

## CITY OF WILLMAR

Planning and Development Services  
City Office Building  
333 SW 6<sup>th</sup> Street  
Willmar, MN 56201  
320-235-8311

### COUNCIL ACTION REQUEST

**DATE:** September 15, 2016

**SUBJECT:** Tax Abatement Agreement Between the City of Willmar, Minnesota and RockStep Willmar, LLC

**RECOMMENDATION:** To approve the tax abatement agreement and authorize the necessary signatures.

**BACKGROUND:** With the recent adoption of a tax abatement resolution agreeing to provide a tax abatement for the Kandi Mall improvements and value increases, the next step in the process is to adopt an agreement that details the roles and responsibilities of both parties relative to the abatement. The proposed abatement is for a period not to exceed 10 years (taxes payable 2017 – 2026) in a total amount not to exceed \$375,260. The abatement agreement also serves as the required business subsidy agreement under State law. City Attorney Robert Scott prepared the agreement and it is very similar to past agreements with respect to its contents, which are primarily dictated by statute. The agreement includes a section on events of default and specifies the remedies to the City should the developer default on the project. A possible remedy may be the repayment of all or a portion of the abated taxes based on the developer's ability to meet the development and job creation goals and timelines. The exact timelines have not been determined, but it is anticipated that the goals will need to be met within two years of approval of the agreement.

**FINANCIAL CONSIDERATION:** The City has maximum exposure in the amount of \$375,260 payable over 10 years. These payment obligations are contingent upon the property owner paying all their taxes, and it is required that the property owner not contest valuations or taxes during the life of the abatement.

**LEGAL:** The agreement has been drafted to meet all statutory requirements and to protect the interests of the City of Willmar.

**DEPARTMENT/RESPONSIBLE PARTY:** Bruce D. Peterson, AICP – Director of Planning and Development Services

TAX ABATEMENT AND BUSINESS SUBSIDY AGREEMENT

BY AND BETWEEN

CITY OF WILLMAR, MINNESOTA

AND

ROCKSTEP WILLMAR LLC

**TABLE OF CONTENTS**

		<b>Page</b>
ARTICLE I	DEFINITIONS.....	2
Section 1.1	Definitions .....	2
ARTICLE II	REPRESENTATIONS AND WARRANTIES.....	3
Section 2.1	Representations and Warranties of the City .....	3
Section 2.2	Representations and Warranties of the Developer .....	3
ARTICLE III	UNDERTAKINGS BY DEVELOPER AND CITY .....	4
Section 3.1	Construction of Project and Reimbursement of Cost .....	4
Section 3.2	Limitations on Undertaking of the City .....	5
Section 3.3	Commencement and Completion of Construction.....	5
Section 3.4	Damage and Destruction.....	5
Section 3.5	No Change in Use of Project .....	5
Section 3.6	Prohibition Against Transfer of Project and Assignment of Agreement.....	5
Section 3.7	Real Property Taxes.....	5
Section 3.8	Business Subsidy Act.....	6
Section 3.9	Tax Abatement Program.....	6
ARTICLE IV	EVENTS OF DEFAULT .....	6
Section 4.1	Events of Default Defined .....	6
Section 4.2	Remedies on Default.....	7
Section 4.3	No Remedy Exclusive .....	8
Section 4.4	No Implied Waiver .....	8
Section 4.5	Agreement to Pay Attorneys’ Fees and Expenses .....	8
Section 4.6	Release and Indemnification Covenants.....	8
ARTICLE V	ADDITIONAL PROVISIONS .....	9
Section 5.1	Conflicts of Interest/No Personal Liability .....	9
Section 5.2	Non-Discrimination .....	9
Section 5.3	No Merger .....	9
Section 5.4	Cleanup .....	9
Section 5.5	Responsibilities for Costs .....	9
Section 5.6	Notices and Demands .....	10
Section 5.7	Counterparts.....	10
Section 5.8	Duration .....	10
Section 5.9	Provisions Surviving Rescission or Expiration.....	10
Section 5.10	Records—Availability and Retention .....	10
Section 5.11	Data Practices .....	11
Section 5.12	Rules of Interpretation .....	11

## TAX ABATEMENT AGREEMENT

THIS AGREEMENT, made as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and among the City of Willmar, Minnesota, a Minnesota municipal corporation (the “City”), and RockStep Willmar LLC, a Texas limited liability company (the “Developer”),

WITNESSETH:

WHEREAS, the Developer purchased the Kandi Mall property located at 1605 1<sup>st</sup> Street South in the City, comprised of Kandiyohi County Parcel Identification Nos. 95-923-8640, 95-923-8632, and 95-923-8631, as legally described on the attached Exhibit A (collectively, the “Development Property”), in 2015, and plans to renovate, expand and otherwise further develop the Development Property by constructing capital improvements totaling more than \$5.5 million. The renovation, expansion and further development of the Development Property generally consists of renovating the portion of the mall formerly occupied by K-Mart, constructing a new satellite retail structure to support additional retail uses, and constructing parking lot and signage improvements (the “Project”); and

WHEREAS, pursuant to Minnesota Statutes, Sections 469.1812 through 469.1815, the City has established a Tax Abatement Program pursuant to which the City is authorized to grant an abatement of ad valorem property taxes imposed by the City under certain conditions; and

WHEREAS, the Developer has requested that the City provide financial assistance in the form of property tax abatement on the Development Property in the City to abate the City’s share of ad valorem property taxes on the Development Property for a period not to exceed ten (10) years, specifically with respect to the payable 2017 through 2026 property taxes, in a total amount not to exceed \$375,260.00; and

WHEREAS, the City believes that the development and construction of the Project and fulfillment of this Agreement are vital and are in the best interests of the City, will result in the creation of new employment opportunities for its citizens, increase and modernize the commercial building facilities available in the City, and increase the tax base in the City, and are in accordance with the public purpose and provisions of the applicable state and local laws and requirements under which the Project has been undertaken and is being assisted; and

WHEREAS, following notice and a public hearing the City adopted Resolution \_\_\_\_\_, dated September 6, 2016 (the “Abatement Resolution”), agreeing to provide, in accordance with the referenced Abatement Resolution, State law and this Agreement, abatement of City property taxes on the Development Property subject to the terms and conditions contained in the above-referenced Abatement Resolution and this Agreement (the “Tax Abatement” or “Abatement”); and

WHEREAS, the requirements of the Business Subsidy Law, Minnesota Statutes, Section 116J.993 through 116J.995, apply to this Agreement; and

WHEREAS, the City believes that the Project will meet the conditions of the Tax Abatement Act and Tax Abatement Program in that: (a) the City expects the benefits to the City from this Agreement to equal or exceed the costs to the City of this Agreement; and (b) the City finds that granting the Tax Abatement is in the public interest because it will increase or preserve the tax base of the City, help retain and expand commercial and industrial enterprise in the City, and provide employment opportunities in the City; and

WHEREAS, the City has determined that the Project: (a) will promote and carry out the objectives for which development in the City has been undertaken; (b) will be in the vital best interests of the City and the health, safety, morals and welfare of its residents; and (c) is in accord with the public purposes and provisions of the applicable state and local laws, including requirements of the City's Code, under which the Project will be undertaken and is being assisted; and

WHEREAS, the Developer and the City desire to enter into this Agreement in satisfaction of applicable requirements of the City, and to set out the undertakings and obligations of each party from this point forward with respect to the Project.

NOW, THEREFORE, in consideration of the premises and the mutual obligations of the parties hereto, each of them does hereby covenant and agree with the other as follows:

## ARTICLE I

### DEFINITIONS

Section 1.1 Definitions. All capitalized terms used and not otherwise defined herein shall have the following meanings unless a different meaning clearly appears from the context:

Agreement means this Agreement, as the same may be from time to time modified, amended or supplemented;

Benefit Date means every date on which the City makes a payment of Tax Abatements to the Developer according the specific provisions of Section 3.9 payment, consistent with the statutory definition of the term contained in Minnesota Statutes, Section 116J.993, Subdivision 2.

Business Day means any day except a Saturday, Sunday or a legal holiday or a day on which banking institutions in the City are authorized by law or executive order to close;

City means the City of Willmar, Minnesota;

Code means the City's Code of Ordinances;

Developer means RockStep Willmar LLC, its parent corporation, RockStep Capital LLC, and their successors and assigns;

Development Property means the real property described on Exhibit A, attached hereto;

Event of Default means any of the events described in Section 4.1;

Project means the Developer's construction of capital improvements on the Development Property totaling more than \$5.5 million, including the renovation and improvement of the portion of the mall formerly occupied by K-Mart, the construction of a new satellite retail structure to support additional retail uses, and the construction of parking lot and signage improvements;

Project Improvements means each and all of the improvements to be constructed on the Development Property as part of the Project, pursuant to the Project Plans and this Agreement. The timing of Developer's construction of the Project is described in more detail in remaining portions of this Agreement. All Project Improvements shall be completed to City specifications as provided in the Project Plans, this Agreement, and the Code.

Project Plans means all submissions required by the City Ordinances, or this Agreement with respect to the Project and all plans, drawings, plats and related documents for the construction of the Project, approved by the City and Developer, irrespective of whether the Developer's and/or the City's final approval of any such documents occurs before or after the execution and delivery of this Agreement.

State means the State of Minnesota;

Tax Abatement Act means Minnesota Statutes, Sections 469.1812 through 469.1815;

Tax Abatement Program means the action by the City pursuant to Minnesota Statutes, Section 469.1812 through 469.1815, as amended, and undertaken in support of the Project;

Tax Abatements means the City's reimbursement to the Developer of the City's share of ad valorem property taxes imposed on the Development Property and paid by the Developer for a period not to exceed ten (10) years, specifically with respect to the payable 2017 through 2026 property taxes, in a total amount not to exceed \$375,260.00, pursuant to the specific provisions of Section 3.9.

## ARTICLE II

### REPRESENTATIONS AND WARRANTIES

Section 2.1 Representations and Warranties of the City. The City makes the following representations and warranties:

(1) The City is a municipal corporation organized under the laws of the State and has the power to enter into this Agreement and carry out its obligations hereunder.

(2) The Tax Abatement Program was created, adopted and approved in accordance with the terms of the Tax Abatement Act.

(3) To finance the costs of the Project to be undertaken by the Developer, the City proposes, subject to the further provisions of this Agreement, to reimburse the Developer for Project costs as further provided in this Agreement.

(4) The City has made the findings required by the Tax Abatement Act for the Tax Abatement Program.

(5) This Agreement has been duly approved by the City Council of the City and the execution and delivery of this Agreement has been authorized by such City Council.

Section 2.2 Representations and Warranties of the Developer. The Developer makes the following representations and warranties:

(1) The Developer is a limited liability company duly organized, in good standing, and validly existing under the laws of the State of Texas and is registered and in good standing with the Office of the Secretary of State of Minnesota, with full authority to transact business in this State, has the power to enter into the Agreement and to perform its obligations hereunder, and is not in violation of its charter, articles of incorporation, operating agreement or any local, state or federal laws.

(2) The Developer's parent corporation is RockStep Capital LLC, a Texas limited liability company, with its principal place of business located at 1445 North Loop West, Suite 625, Houston, Texas, 77008.

(3) The Developer will cause the Project to be constructed in accordance with the terms of the Agreement, the Project Plans, and all local, state, and federal laws and regulations (including, but not limited to, environmental, zoning, energy conservation, building code and public health laws and regulations, City Policy and Code).

(4) The Developer will obtain or cause to be obtained, in a timely manner, all required permits, licenses and approvals, and will meet, in a timely manner, all requirements of all applicable local, state, and federal laws and regulations which must be obtained or met before the Project may be lawfully constructed. Without in any way limiting the foregoing, the Developer will request and seek to obtain from the City, if necessary, such approvals, variances, conditional use permits, zoning changes and other required City approvals as may be applicable.

(5) The Project will, as of the date it is completed and subject to the issuance of City approvals as herein contemplated, contain only uses permitted under the Code.

(6) The construction of the Project would not be undertaken by the Developer, and in the opinion of the Developer would not be economically feasible within the reasonably foreseeable future, without the assistance and benefit to the Developer provided for in this Agreement.

(7) Neither the execution and delivery of this Agreement, the consummation of the transactions contemplated hereby, nor the fulfillment of or compliance with the terms and conditions of this Agreement is prevented, limited by or conflicts with or results in a breach of, the terms, conditions or provision of any contractual restriction, evidence of indebtedness, agreement or instrument of whatever nature to which the Developer is now a party or by which it is bound, or constitutes a default under any of the foregoing.

(8) The Developer will cooperate fully with the City with respect to any litigation commenced with respect to the Project, but only to the extent that the City and the Developer are not adverse parties to the litigation.

(9) The Developer will cooperate fully with the City in resolution of any traffic, drainage, utility, parking, trash removal or public safety problems which may arise in connection with the construction and operation of the Project.

ARTICLE III

UNDERTAKINGS BY DEVELOPER AND CITY

Section 3.1 Construction of Project and Reimbursement of Cost.

(1) The costs of the construction of the Project shall be paid by the Developer. The Developer will construct the Project in a good and workmanlike manner in accordance with the Project Plans and at all times prior to the termination of this Agreement will operate and maintain, preserve and keep the Project or cause the Project to be maintained, preserved and kept with the appurtenances and every part and parcel thereof, in good repair and condition.

(2) The City shall partially reimburse the Developer for the costs of the Project pursuant to the Abatement Program as provided in Section 3.9, and shall have no other financial obligation to the Developer with respect to the Project.

Section 3.2 Limitations on Undertaking of the City. Notwithstanding the provisions of Section 3.1, the City shall have no obligation to reimburse the Developer for the costs of the Project, if the City, at the time or times such payment is to be made, is entitled under Section 4.2 to exercise any of the remedies set forth therein as a result of an Event of Default which has not cured.

Section 3.3 Commencement and Completion of Construction.

The Developer shall complete the Project by [REDACTED]. All work with respect to the Project to be constructed or provided by the Developer shall be in conformity with the Project Plans as submitted by the Developer and approved by the City.

Nothing in this Agreement shall be deemed to impair or limit any of the City's rights or responsibilities under its zoning laws or construction permit processes.

Section 3.4 Damage and Destruction. In the event of damage or destruction of the Project the Developer shall repair or rebuild the Project.

Section 3.5 No Change in Use of Project. The City's obligations pursuant to this Agreement shall be subject to the continued operation of the Project by the Developer.

Section 3.6 Prohibition Against Transfer of Project and Development Property and Assignment of Agreement. The Developer represents and agrees that prior to the termination date of this Agreement the Developer shall not transfer the Project or the Development Property or any part thereof or any interest therein, without the prior written approval of the City. The City shall be entitled to require as conditions to any such approval that;

(1) Any proposed transferee shall have the qualifications and financial responsibility, in the reasonable judgment of the City, necessary and adequate to fulfill the obligations undertaken in this Agreement by the Developer.

(2) Any proposed transferee, by instrument in writing satisfactory to the City shall, for itself and its successors and assigns, and expressly for the benefit of the City, have expressly assumed all of the obligations of the Developer under this Agreement and agreed to be subject to all the conditions and restrictions to which the Developer is subject.

(3) There shall be submitted to the City for review and prior written approval all instruments and other legal documents involved in effecting the transfer of any interest in this Agreement or the Project.

Section 3.7 Real Property Taxes. The Developer acknowledges that it is obligated under law to pay all real property taxes and special assessments payable with respect to all parts of the Development Property acquired and owned by it which are payable pursuant to this Agreement, State law and any other statutory or contractual duty that shall accrue subsequent to the date of its acquisition of title to the Development Property (or part thereof) and until title to the property is vested in another person. The Developer agrees that for tax assessments so long as this Agreement remains in effect:

(1) It will not seek administrative review or judicial review of the applicability of any tax statute relating to the ad valorem property taxation of real property contained on the Development Property determined by any tax official to be applicable to the Project or the Developer or raise the inapplicability of any such tax statute as a defense in any proceedings with respect to the Development Property, including delinquent tax proceedings; provided, however, "tax statute" does not include any local ordinance or resolution levying a tax;

(2) It will not seek administrative review or judicial review of the constitutionality of any tax statute relating to the taxation of real property contained on the Development Property determined by any tax official to be applicable to the Project or the Developer or raise the unconstitutionality of any such tax statute as a defense in any proceeding, including delinquent tax proceeding with respect to the Development Property; provided, however, "tax statute" does not include any local ordinance or resolution levying a tax;

(3) It will not seek any tax deferral or abatement not expressly provided for in this Agreement, either presently or prospectively authorized under Minnesota Statutes, Section 469.181, or any other State or federal law, of the ad valorem property taxation of the Development Property so long as this Agreement remains in effect.

Section 3.8 Business Subsidies Act.

(1) In order to satisfy the provisions of Minnesota Statutes, Sections 116J.993 to 116J.995 (the "Business Subsidies Act"), the Developer acknowledges and agrees that the amount of the "Business Subsidy" granted to the Developer under this Agreement is needed because the Project is not sufficiently feasible for the Developer to undertake without the Business Subsidy. The public purpose of the Business Subsidy is to create new employment opportunities for the City's citizens, increase and modernize the commercial building facilities available in the City, and increase the tax base in the City. The Developer agrees that it will meet the following goals (the "Goals"):

- (a) To create a minimum of 60 full-time equivalent jobs on the Development Property by \_\_\_\_\_.
- (b) For each full-time equivalent job added pursuant to subparagraph (a) above, to pay a wage that with benefits, exceeds the minimum hourly wage required for qualification for job creation or retention goals in the City's Business Subsidy Policy, as the same may be amended.
- (c) To spend a minimum of \$5.5 million on capital projects on and improvements to the Development Property by \_\_\_\_\_.

(2) If the Goals are not met, the Developer agrees to repay all or a part of the Business Subsidy to the City, plus interest (“Interest”) set at the implicit price deflator defined in Minnesota Statutes, Section 275.70, subdivision 2, accruing from and after the Benefit Date, as that term is defined in Minnesota Statute Section 116J.993, compounded semiannually. If the Goals are met in part, the Developer will repay a portion of the Business Subsidy (plus Interest) determined by multiplying the Business Subsidy by a fraction in proportion to the level of the Developer’s partial satisfaction of the Goals.

(3) The Developer agrees to (i) report its progress on achieving the Goals to the City until the later of the date the Goals are met or two years from the latest Benefit Date, or, if the Goals are not met, until the date the Business Subsidy is repaid, (ii) include in the report the information required in Subdivision 7 of the Jobs Act (Minnesota Statutes, Section 116J.994) on forms developed by the Minnesota Department of Employment and Economic Development, and (iii) send completed reports to the City. The Developer agrees to file these reports no later than March 1 of each year commencing March 1, 2017, and within 30 days after each deadline for meeting the Goals. The Taxing Jurisdictions agree that if they do not receive the reports, they will mail the Developer a warning within one week of the required filing date. If within 14 days of the post marked date of the warning the reports are not made, the Developer agrees to pay to the City a penalty of \$100 for each subsequent day until the report is filed up to a maximum of \$1,000.

(4) The Developer agrees to continue operations of the Project on the Development Property for at least five (5) years after the latest Benefit Date.

### Section 3.9 Tax Abatement Program.

(1) The Tax Abatement paid to the Developer shall be in accordance with and subject to the terms and conditions contained in the Abatement Resolution and the Tax Abatement Act.

(2) The Tax Abatement shall be for a duration of not to exceed ten years and shall apply to the increased portion of the City’s share of ad valorem property taxes imposed on the Development Property derived from the value of the Project and paid by the Developer, in a total amount not to exceed \$375,260.00, beginning with taxes payable in 2017 and continuing through taxes payable in 2026, as follows:

- (a) For the years 2017 through 2024, 100 percent of the increased portion of the City’s share of ad valorem property taxes on the Development Property resulting from the Project; and
- (b) For the years 2025 and 2026, 80 percent of the increased portion of the City’s share of ad valorem property taxes on the Development Property resulting from the Project.

The increased portion of the City’s share of ad valorem property taxes on the Property which will be subject to abatement under this paragraph shall be any property taxes collected in any given year in excess of the 2016 base tax capacity for the Development Property of \$185,806.

(3) On or before January 1 and July 1 each year commencing July 1, 2017 and including January 1, 2027, the Developer shall invoice the City in the amount of the City’s

portion of ad valorem property taxes on the Development Property paid by Developer in the previous six month period to which the Developer is entitled to reimbursement under this Section. On or before February 1 and August 1 each year commencing August 1, 2017 to and including February 1, 2027 the City shall pay the Developer the amount of the Tax Abatements received by the City in the previous six month period.

(4) In order to be entitled to the Tax Abatement provided for in this Agreement, the Developer shall not be in default within the City of any of its payment obligations respecting any taxes, assessments, utility charges or other governmental impositions. Notwithstanding the other provisions of this Article, the City shall not have any obligation to the Developer with respect to the Abatement of taxes hereunder if the City, at the time or times such obligation is required, is entitled to exercise any of the remedies set forth in this Agreement as a result of an Event of Default, which has not been cured.

## ARTICLE IV

### EVENTS OF DEFAULT

Section 4.1 Events of Default Defined. The following shall be “Events of Default” under this Agreement and the term “Event of Default” shall mean whenever it is used in this Agreement any one or more of the following events:

(1) Failure by the Developer to timely pay when due the payments required to be paid or secured under any provision of this Agreement or which are otherwise required, including the payment of any ad valorem real property taxes, special assessments, utility charges or other governmental impositions with respect to the Development Property, the Project or any portion thereof.

(2) Failure by the Developer to cause the construction of the Project to be completed pursuant to the terms, conditions and limitations of this Agreement.

(3) Failure by the Developer to observe or perform any other covenant, condition, obligation or agreement on its part to be observed or performed under the Agreement.

(4) If Developer admits in writing of its inability to pay its debts generally as they become due, or shall file or be involuntarily named as a debtor in a petition in bankruptcy, or shall make an assignment for the benefit of creditors, or shall consent to the appointment of a receiver of itself or of the whole or any substantial part of the Development Property.

(5) If the Developer, on a petition in bankruptcy filed against it, be adjudicated bankrupt, or a court of competent jurisdiction shall enter an order or decree appointing, without the consent of the Developer, a receiver of the Developer or of the whole or substantially all of its property, or approve a petition filed against the Developer seeking reorganization or rearrangement of the Developer under the federal bankruptcy laws, and such adjudication, order or decree shall not be vacated or set aside or stayed within sixty (60) days from the date of entry thereof.

(6) If the Developer is in default under any mortgage and has not entered into a workout agreement with the Mortgagee within sixty (60) days after such default.

Section 4.2 Remedies on Default. Whenever any Event of Default referred to in Section 4.1 occurs and is continuing, the City, as specified below, in addition to any other remedies or rights given the City under this Agreement, after the giving of thirty (30) days' written notice to the Developer citing with specificity the item or items of default and notifying the Developer that it has thirty (30) days within which to cure said Event of Default, may take any one or more of the following actions:

(1) The City may suspend its performance under this Agreement, including the payment of any Tax Abatement, until it receives assurances from the Developer, deemed adequate by the City, that the Developer will cure its default and continue its performance under this Agreement.

(2) The City may cancel and rescind the Agreement.

(3) The City may take any action, including legal or administrative action, in law or equity, which may appear necessary or desirable to collect any payments due under this Agreement, or to enforce performance and observance of any obligation, agreement, or covenant of the Developer under this Agreement; provided that any exercise by the City of its rights or remedies hereunder shall always be subject to and limited by, and shall not defeat, render invalid or limit in any way the lien of any mortgage authorized by this Agreement; and provided further that should any Mortgagee succeed by foreclosure of the mortgage or deed in lieu thereof in respect to the Developer's interest in the Development Property, the Mortgagee shall, notwithstanding the foregoing, be obligated to perform the obligations of the Developer to complete construction of the Project described and in the manner required hereunder, but only to the extent that the same have not theretofore been performed by the Developer.

(4) The City may withhold any certificate or permit required hereunder.

The notice of an Event of Default required in this Section shall be effective on the date mailed or hand delivered to the Developer.

Section 4.3 No Remedy Exclusive. No remedy herein conferred upon or reserved to the City is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or now or hereafter existing at law or in equity or by statute. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. Except as expressly set forth herein, it shall not be necessary to give notice to exercise a remedy, other than such notice as may be required in this Article.

Section 4.4 No Implied Waiver. In the event any obligation contained in this Agreement should be breached by either party hereto and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other concurrent, previous or subsequent breach hereunder.

Section 4.5 Agreement to Pay Attorneys' Fees and Expenses. Whenever any Event of Default occurs and the City shall employ attorneys or incur other expenses for the collection of payments due or to become due or for the enforcement or performance or observance of any obligation or agreement on the part of the Developer herein contained, the Developer agrees that

it shall, on demand therefore, pay to the City the reasonable fees of such attorneys and such other expenses so incurred by the City.

Section 4.6 Release and Indemnification Covenants.

(1) The Developer expressly releases from and covenants and agrees to indemnify and hold the City and its officers, agents, servants, employees and all members of the City Council, planning commission and other board or commission harmless from and against all claims, costs and liability of every kind and nature, for injury or damage received or sustained by any person or entity in connection with, or an account of the Project, the Development Property, or the performance of work at the development site and elsewhere pursuant to this Agreement, and further releases such officers employees, agents and members from any personal liability in connection with handling funds pursuant to the terms of this Agreement. The indemnification provided hereunder shall not apply to intentional acts or gross misconduct of the individual or entity so indemnified.

(2) Except for any willful misrepresentation or any willful or wanton misconduct of the following named parties, the Developer agrees to protect and defend the City and its officers, agents, servants and employees and all members of the City Council, planning commission and other board or commission, now or forever, and further agrees to hold the aforesaid harmless from any claim, demand, action or other proceeding whatsoever by any person or entity whatsoever arising or purportedly arising from a breach of the obligations of the Developer under this Agreement, or the transactions contemplated hereby or the acquisition, construction, installation, ownership, maintenance and operation of the Project.

(3) The City and its officers, agents, employees and all members of the City Council, planning commission and other board or commission shall not be liable for any damages or injury to the persons or property of the Developer or its officers, agents, servants or employees or any other person who may be about the Project due to any act of negligence of any person.

(4) All covenants, stipulations, promises, agreements and obligations of the City contained herein shall be deemed to be the covenants, stipulations, promises, agreements and obligations of the City and not of any officer, agent, servant, employee or any members of the City Council, planning commission and other board or commission of the City in the individual capacity thereof.

(5) The Developer is not an agent of the City and this Agreement shall not be construed as creating a joint venture, partnership or other joint arrangement between the Developer and the City relating to the Project.

ARTICLE V

ADDITIONAL PROVISIONS

Section 5.1 Conflicts of Interest/No Personal Liability. No member of the governing body or other official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to the Agreement which affects his or her personal interests or the interests of any corporation, partnership or association in which he or she is directly or indirectly interested. No member, official or employee of the City shall be personally liable to the Developer in the event

of any default or breach by the City or for any amount that may become due to the Developer for any obligations under the terms of this Agreement.

Section 5.2. Non-Discrimination. Developer shall not violate any law applicable to it with respect to civil rights and non-discrimination including, without limitation, Minnesota Statutes, Section 181.59.

Section 5.3. No Merger. None of the provisions of this Agreement are intended to be or shall be merged by reason of any deed transferring any interest in any part of the Development Property and any such deed shall not be deemed to affect or impair the provisions of this Agreement.

Section 5.4. Cleanup. The Developer shall promptly clear or cause to be cleared from the Development Property and any public streets or property, any soil, earth or debris or unnecessary personal property or equipment resulting from construction work by the Developer or its agents or assigns. If Developer fails to do so within two (2) business days of receipt of telephone or personally delivered personal notice from the City, the City shall be entitled to undertake such corrective action as it deems necessary and to charge the Developer for the cost of such corrective action. This remedy is in addition to any other remedy available to the City hereunder. Developer's failure to pay such charges when billed by the City shall be an additional Event of Default under this Agreement.

Section 5.5. Responsibility for Costs. Developer shall be responsible for the following costs incurred with respect to this Agreement, which costs shall be paid as set forth below:

(1) The Developer shall reimburse the City for reasonable, administrative and out-of-pocket costs, expenses and disbursements incurred in the enforcement of this Agreement, including engineering and attorney's fees.

(2) The Developer shall pay in full all bills submitted to it by the City within thirty (30) days after receipt. If the bills are not paid on time, the City may without further notice to Developer exercise any one or more of the remedies provided to the City by Article 5 hereunder.

Section 5.6 Notices and Demands. Except as otherwise expressly provided in this Agreement, a notice, demand or other communication under this Agreement by any party to any other shall be sufficiently given or delivered if it is dispatched by registered or certified mail, postage prepaid, return receipt requested, or delivered personally, and

(1) in the case of the Developer is addressed to or delivered personally to:

\_\_\_\_\_, President  
RockStep Willmar LLC  
1445 N Loop West #625  
Houston, TX 77008

(2) in the case of the City is addressed to or delivered personally to:

City Administrator  
City of Willmar  
333 SW 6<sup>th</sup> St.  
Willmar, MN 56201

or at such other address with respect to any such party as that party may, from time to time, designate in writing and forward to the other, as provided in this Section.

Section 5.7 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall constitute one and the same instrument.

Section 5.8 Duration. This Agreement shall remain in effect through February 1, 2031, unless earlier terminated or rescinded in accordance with its terms.

Section 5.9 Provisions Surviving Rescission or Expiration. Sections 4.5 and 4.6 shall survive any rescission, termination or expiration of this Agreement with respect to or arising out of any event, occurrence or circumstance existing prior to the date thereof.

Section 5.10 Records—Availability and Retention. Pursuant to Minn. Stat. § 16C.05, subd. 5, the Developer agrees that the City, the State Auditor, or any of their duly authorized representatives at any time during normal business hours and as often as they may reasonably deem necessary, shall have access to and the right to examine, audit, excerpt, and transcribe any books, documents, papers, records, etc., which are pertinent to the accounting practices and procedures of the Developer and involve transactions relating to this Agreement. The Developer agrees to maintain these records for a period of six years from the date of termination of this Agreement.

Section 5.11 Data Practices. The parties acknowledge that this Agreement is subject to the requirements of Minnesota's Government Data Practices Act, Minnesota Statutes, Section 13.01 *et seq.*

Section 5.12. Rules of Interpretation.

- (1) Governing Law. This Agreement shall be interpreted in accordance with and governed by the laws of the State of Minnesota,
- (2) Includes Entire Agreement. The words "herein" and "hereof" and words of similar import, without reference to any particular section or subdivision refer to this Agreement as a whole rather than any particular section or subdivision hereof.
- (3) Original Sections. References herein to any particular article, section or paragraph hereof are to the section or subdivision of this Agreement as originally executed.
- (4) Headings. Any headings, captions, or titles of the several parts, articles, sections, and paragraphs of this Agreement are inserted for convenience and reference only and shall be disregarded in construing or interpreting any of its provision.
- (5) Conflict Between Agreements. In the event of any conflict between the terms, conditions and provisions of this Agreement and the terms, conditions and provisions of any other instrument, the terms, conditions and provisions of this Agreement shall control and take precedence.
- (6) Entire Agreement. This Agreement including any Schedules and Exhibits hereto contain the entire agreement of the parties relating to the subject matter herein, and no other prior or contemporary agreements, oral or written, shall be binding upon the parties hereto.

(7) Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns as provided and as conditioned in this Agreement.

[THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the City has caused this Agreement to be duly executed in its name and on its behalf, and the Developer has caused this Agreement to be duly executed in its name and on its behalf, on or as of the date first above written.

ROCKSTEP WILLMAR LLC

By \_\_\_\_\_  
Its \_\_\_\_\_

By \_\_\_\_\_  
Its \_\_\_\_\_

CITY OF WILLMAR, MINNESOTA

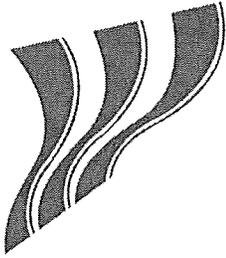
By \_\_\_\_\_  
Its Mayor

By \_\_\_\_\_  
Its Administrator

Exhibit A  
Legal Description of Development Property

*[insert legal description*

]



## CITY OF WILLMAR

Planning and Development Services  
City Office Building  
333 SW 6<sup>th</sup> Street  
Willmar, MN 56201  
320-235-8311

### COUNCIL ACTION REQUEST

**DATE:** September 15, 2016

**SUBJECT:** John's Supper Club Building

**RECOMMENDATION:** N/A

**BACKGROUND:** The former John's Supper Club building has been under reconstruction for a number of years. The Council previously granted the property owner an open-ended building permit to complete improvements. Most of the work on the building is completed. Final inspections have been made for the building construction and plumbing systems. The property is ready for occupancy and occupancy is subject to the owner at this point.

**FINANCIAL CONSIDERATION:** None.

**LEGAL:** None.

**DEPARTMENT/RESPONSIBLE PARTY:** Bruce D. Peterson, AICP – Director of Planning and Development Services