



**GARDINER CITY COUNCIL
AGENDA ITEM INFORMATION SHEET**



Meeting Date	12/09/2020	Department	Planning/Economic Dev
Agenda Item	4.e Consider Renewing Amended and Restated Agreement with Developers Collaborative PreDevelopment LLC		
Est. Cost	N/A		

Background Information

Since 2016, Developers Collaborative Predevelopment LLC and the City of Gardiner have had an option agreement on 1 Summer Street (Map 37 Lot 19; including the lot formerly known as 2 Highland Avenue, Map 37, Lot 19A).

Developers Collaborative Predevelopment LLC would like to exercise their interest in said property for one (1) year ending on December 31, 2021.

The City Solicitor has reviewed the document and made suggested changes to reflect updates. The new agreement is attached and a redlined copy is also attached for the Council's review.

Requested Action	'I move to enter into the Amended and Restated Option and PreDevelopment Agreement with Developer's Collaborative Predevelopment LLC for one year and to allow the City Manager to sign the agreement.'
City Manager and/or Finance Review	The Economic Development Director and City Manager recommend the above action.
Council Vote/ Action Taken	
Departmental Follow-Up	

City Clerk Use Only	1 st Reading _____	Advertised _____	EFFECTIVE DATE _____
	2 nd Reading _____	Advertised _____ w/in 15 Days	
	Final to Dept _____	Updated Book _____	Online _____

AMENDED AND RESTATED OPTION AND PREDEVELOPMENT AGREEMENT

THIS AGREEMENT made and entered into as of December ____, 2020, by and between THE CITY OF GARDINER, a Maine body corporate and politic with a place of business and mailing address of City Hall, 6 Church Street, Gardiner, ME 04345 (“Grantor” or “City”) and DEVELOPERS COLLABORATIVE PREDEVELOPMENT LLC, a Maine limited liability company with a place of business in Portland, Maine and mailing address of 100 Commercial St. Suite 414, Portland, Maine 04101 (the “Grantee”)

WITNESSETH:

WHEREAS, Grantor foreclosed on and now holds title to certain land located on Summer Street in the City of Gardiner; and

WHEREAS, in response to a Request for Qualifications and Statement of Interest for Redevelopment of “‘TW Dick’ Site – Summer Street” issued by the City on September 30, 2015 (the “RFQ”) the Grantee submitted a “Qualifications and Statement of Interest for Redevelopment of “‘T.W. Dick’ Site – Summer Street” dated November 6, 2015 (the “RFQ Response”) which resulted in the parties signing a Memorandum of Understanding on December 21, 2015 in which Grantee accepted Grantor’s award of the project outlined in the RFQ pursuant to both the terms and conditions outlined in the City’s RFQ and in the RFQ Response (the “MOU”) (the RFQ, RFQ Response, MOU and this Agreement are hereinafter collectively the “Development Documents”); and

WHEREAS, the parties amended and restated in their entirety that certain Option and Predevelopment Agreement between the parties dated as of January 28, 2016, as amended by four addenda thereto and that certain Option and Development Agreement between the parties dated as of June 15, 2016, as amended by three addenda thereto (collectively the “Original Agreements”); and

WHEREAS, as referenced in the 2019 Extension, the Grantee has closed on and acquired the Housing Project Option as described in Section 1 a. of the 2018 Option; and

WHEREAS, the parties wish to amend and restate in part that certain Amended and Restated Option and Predevelopment Agreement between the parties dated as of July 24, 2018 (the “2018 Option”), as amended by one amendment thereto dated as of September 19, 2019 (the “2019 Extension”);

NOW THEREFORE, in consideration of One Dollar (\$1.00) (the "Option Consideration"), the receipt of which is hereby acknowledged by Grantor, Grantor and Grantee hereby agree as follows:

1. Grant of Option. Grantor hereby grants to Grantee, its successors and assigns, the exclusive and irrevocable option to purchase the following property:

a. Those certain lots or parcels of land located at 1 Summer Street (Map 37, Lot 19; including the lot formerly known as 2 Highland Avenue, Map 37, Lot 19A], as shown on Exhibit A, for the purpose of developing an office building or such other use which shall not have a negative impact on downtown, as shall be approved by the City of Gardiner in its sole discretion (the “Office Project Option;” such project is referred to herein as the “Second Office Project”). The parties agree to discuss in good faith how shared parking at 31 Summer Street is to be apportioned so as to retain the opportunity for future development on the 1 Summer Street parcel, in the event a viable project becomes likely with respect to the Second Office Project.

The property described in subsection a. above is sometimes referred to in this Agreement as the “Property.”

2. Expiration. The option granted in this Agreement shall expire on December 1, 2021, at midnight, Eastern Standard Time unless exercised by that date and time.

3. Notice and Conditions Precedent of Exercise. The option granted in this Agreement may only be exercised by Grantee giving written notice of election to exercise to Grantor by first class mail, postage prepaid, registered or certified, return receipt requested, or by hand delivery, in either case addressed or delivered to Grantor at the address set forth at the beginning of this Agreement, or to such other address as Grantor may designate to Grantee in writing. Said notice shall be deemed to have been duly given if postmarked or delivered by hand prior to the expiration date and time specified herein. Notwithstanding the foregoing, Grantee’s exercise of this option shall be of no force or effect unless at the time of the exercise Grantee shall have received or be in compliance with all of the following conditions precedent: received (i) a “will issue” letter from the City of Gardiner code enforcement office stating that upon payment of the appropriate fee, the City will issue a building permit for the Second Office Project, based on plans and specifications reviewed by the City, (ii) binding written commitments from debt and equity providers in amounts sufficient to finance the acquisition and construction of the Second Office Project, on terms reasonably satisfactory to Grantee (collectively “Project Financing Commitments”), and (iii) material compliance with the Predevelopment Process described in Section 8 below. Grantee shall provide copies of the Project Financing Commitments to Grantor at the time Grantee sends to Grantor its notice of exercise of each option. Grantor may, in its sole discretion, waive or extend the deadline for any of these conditions precedent.

4. Failure to Exercise. In the event that Grantee fails to exercise the option granted in this Agreement within the time specified in Section 2 above in accordance Section 3 above, the Option Consideration shall be retained by Grantor and thereafter neither Grantor nor Grantee shall have any further rights or claims against the other except those specifically provided as surviving closing or termination hereof.

5. Post-Exercise Provisions. In the event that Grantee exercises the option granted in this Agreement as provided herein, the following provisions shall be applicable:

a. Purchase Price. The purchase price for the Property is as follows:

i. For the Office Project Option, the purchase price for the land comprising the Second Office Project is \$115,300.

The purchase price for the option is payable at closing by certified or bank cashier's check or by wire transfer. The Option Consideration shall be credited against the purchase price at the option closing.

b. Title. Grantor shall convey to Grantee at the closing all right, title, and interest Grantor has in the Property as follows:

i. Map 37, Lot 19. The Property is being sold pursuant to the following undischarged tax lien assessed against T.W. Dick Co. Inc. recorded in the Kennebec County Registry of Deeds in Book 11416, Page 68, as to which lien Grantee shall not have any liability. Grantor represents that, to the best of its knowledge, information, and belief, it has properly foreclosed its tax lien on the Property and has given all required statutory notices as required by applicable law. Grantee assumes responsibility and expense for any title search, title examination or title insurance, and Grantor shall cooperate with Grantee in obtaining title insurance coverage. Except as set forth in this paragraph, Grantor makes no representation concerning the title to the Property. At closing, Grantor will convey all right, title and interest it has in the Property by municipal quitclaim deed in accordance with the Short Form Deeds Act, 33 M.R.S.A. §761, *et seq.*, subject to the items described in subsection iii. below.

ii. 2 Highland Avenue. As to the portion of 1 Summer Street formerly known as 2 Highland Avenue, Grantor shall convey good and marketable title in accordance with the Title Standards promulgated by the Maine State Bar Association, free and clear of all liens, claims and encumbrances other than (i) any conditions which a physical inspection of the 2 Highland Avenue property might reveal; and (ii) the items described in subsection iii. below. In the event that Grantor is unable to convey title to the 2 Highland Avenue property as aforesaid, Grantor shall be given a reasonable period of time, not to exceed thirty (30) days, after receipt of notice from Grantee in which to remedy any title defects. Grantee may elect to close notwithstanding such defects as may exist.

iii. Encumbrances. The Property shall also be conveyed subject to the following items: (A) any and all municipal, state, or federal laws, regulations, and ordinances including, without limitation, permits and approvals heretofore issued by any federal, state, or municipal government authority (compliance with, application for the transfer of any such permits, or approvals shall be the sole responsibility of Grantee); (B) any and all encumbrances and easements of record acceptable to Grantee and any governmentally imposed or required zoning, subdivision, environmental, and other land use restrictions; (C) all public easements or other public interests in the Property for roads, sewers or other purposes; and (D) such deed restriction, condition or covenant, agreed upon by the parties cooperating in good faith, appurtenant to the Property regarding the obligations of Grantee in Section 8 hereof, if any, which are to be completed after closing pursuant to said documents. Such covenant shall contain an unambiguous date of termination as described in the last sentence of Section 8 below.

iv. Descriptions. Grantor agrees that the deeds of conveyance will include a new survey description(s) resulting from a boundary survey to be performed by Grantee at its

expense, and the parties shall cooperate in good faith so as to agree upon the survey description of the Property.

c. Closing. The closing under this Agreement shall take place within ten (10) days after the date the option granted herein is exercised (the "Closing Date") at 10:00 AM, local time, at Grantee's counsel's office, or at such other time and place as Grantor and Grantee shall mutually agree upon in writing. At the closing, Grantor shall execute and deliver to Grantee municipal quitclaim deeds and such other affidavits, instruments and documents as Grantee may reasonably request and which are customary in commercial real estate transactions in Maine. In exchange, at the closing, Grantee shall pay to Grantor the balance of the appropriate purchase price as set forth in Section 5.

d. Adjustments, Prorations and Closing Costs. The recording fee for the deed or deeds of conveyance and any expenses related to any mortgages which Grantee may grant to a lender in connection with the purchase of the Property shall be paid for by Grantee. Grantee shall pay its share of the Maine real estate transfer tax in accordance with 36 M.R.S.A. § 4641-A.

e. Possession. Grantor shall deliver possession of the Property to Grantee at the closing, free and clear of all leases, tenancies or occupancies by any person other than Grantee or its assignee described in Section 14 below.

f. Risk of Loss. All risk of loss to the Property prior to the closing shall be on Grantor except if it arises from the act or omission of Grantee.

6. Default; Remedies; Venue. In the event that Grantee defaults in its obligations under this Agreement, and such default is not cured within thirty (30) days after written notice thereof, the sole remedy of Grantor shall be to terminate this Agreement, and upon termination Grantor may retain the Option Consideration and both parties shall be released from their obligations hereunder (except those specifically provided as surviving closing or termination hereof). In the event that Grantor defaults in its obligations under this Agreement, and such default is not cured within thirty (30) days after written notice thereof, Grantee shall have available all remedies, including, without limitation the right to seek specific performance and the right to recovery of damages. Any legal action or proceeding involving this Agreement or the Development Documents must be brought in a court of competent jurisdiction in Kennebec County, Maine, without regard to conflicts of law principles.

7. Inspection; Access to Information. At all reasonable times upon reasonable prior notice, Grantee and any prospective lender or investor of Grantee's shall have a license to enter the Property and adjacent property of Grantor's and to perform, at Grantee's expense, any and all inspections, tests, surveys or other due diligence inquiries with respect to the Property as Grantee deems necessary or appropriate. Grantee agrees to return the Property or adjacent property of Grantor's as nearly as possible to its original condition after all of such tests and inspections. Grantor shall cooperate with Grantee in such inspections. Grantee shall defend, indemnify and hold Grantor fully and completely harmless from and against any and all claims, demands, suits and actions of any person arising out of Grantee's exercise of its rights in this Section, including all claims by or on behalf of Grantee and Grantee's and Grantor's agents and contractors, or their

respective estates. The rights and obligations set forth in this Section shall survive closing or the termination or expiration of the rights herein.

8. Development. Pursuant to Grantee having accepted Grantor's award of the project outlined in the RFQ pursuant to both the terms and conditions outlined in the RFQ and in the RFQ Response, Grantee agrees the following terms and conditions apply:

a. Grantee shall provide a certificate of insurance indicating: 1) workers' compensation that complies with state statutes, if required; 2) general liability in an amount not less than \$1,000,000 for injuries including accidental death to any person and subject to the same limit to each person in an amount not less than \$5,000,000 where more than one person is involved in any one accident; 3) property damage insurance in an amount not less than \$500,000, and 4) all policies shall name the City as an additional insured.

b. Grantee shall be responsible for obtaining any and all necessary licenses, permits, and authorizations to perform work in the United States, State of Maine, and the City, at no cost to the City.

c. Grantee shall provide a performance bond in an amount equal to the Grantee's budgeted construction cost, without cost to the City, such bond to name City as an additional obligee in a multiple obligee rider that includes Grantee's lender.

d. In case of default of the Grantee in its obligation to complete construction, which default is not cured within any applicable grace period, the City may enter into a contract or other agreement for services from other sources and hold Grantee responsible for any excess cost and other damages caused thereby, or may trigger the coverage provisions of the bond, at the sole discretion of the City.

e. Grantee shall maintain such records as are required by the City in order to allow the City to fulfill its reporting requirements to the State of Maine or other agencies. Grantee shall allow the City or other agencies authorized by the City, access to its records at reasonable hours, including all books, records, documents, and accounting procedures and practices relevant to the subject matter of the contract documents, for purposes of audit, for a minimum of six years. This agreement does not commit the City to pay any costs incurred by the Grantee in making and preparing necessary investigations, studies or designs, or for any procuring or contracting for services to be furnished.

f. Grantee certifies that no elected or appointed official, agent or employee of the City who has a pecuniary interest in the RFQ, has participated in the preparation of the RFQ or in any related negotiations; that the RFQ Response was made in good faith without fraud; that the Grantee was competing solely on its own behalf without connection or obligation to any undisclosed person or firm and that the Grantee (including all subcontractors) is able to perform all the services specified in the RFQ without any conflict of interest. A breach of this provision shall be deemed an anticipatory default under the terms of any contract or other agreement issued or entered into in accordance with the RFQ.

g. Grantee shall design the Second Office Project in accordance with the vision set forth in the City's Cobbossee Corridor Master Plan, Comprehensive Plan, and Downtown Master Plan. Grantee shall obtain public input on the design via a method(s) agreed upon by Grantee and City. Grantee shall complete the project no later than fifteen (15) months after the date of exercise of the respective options for each project, unless the parties agree to an extension.

h. Brownfields Cleanup. Grantor shall transfer title to the Property to Grantee after a Commissioner's Certificate of Completion under the Maine Voluntary Response Action Program (the "COC") has been issued. The COC and accompanying Declaration of Environmental Covenant (the "DEC"), both of which shall be recorded at the Kennebec County Registry of Deeds, shall contain restrictions reasonably satisfactory to Grantee. If the COC and/or DEC do not contain restrictions reasonably satisfactory to Grantee, Grantee's sole recourse is to terminate this Agreement; Grantee's dissatisfaction is not and will not be construed as a default of Grantor's obligations under this Agreement. Grantee acknowledges that Grantor has no control over the contents of the COC and/or DEC which are Maine Department of Environmental Protection documents.

9. Brokerage. The parties represent to one another that neither has dealt with or had contact with any broker in connection with the transaction described in this Agreement. In the event that a broker claims a commission, the party having contact with that broker shall be responsible for satisfying that commission and indemnifying the other party. The rights and obligations set forth in this Section shall survive closing or the termination or expiration of the rights herein.

10. Governmental Powers Unaffected. Nothing in this Agreement shall be deemed to waive, impair, modify or preclude enforcement of any otherwise applicable permit requirements, municipal ordinances or other measures enacted or adopted by the City of Gardiner in its governmental capacity. This Agreement, the other Development Documents and any consent given by the City as a party to the Development Documents shall not constitute approval of any license or permit that may be required under the City of Gardiner's municipal ordinances or Maine law for redevelopment or operation of the Property.

11. Immunities Preserved. Nothing in this Agreement or the other Development Documents shall be deemed to waive or impair any immunities from suit or judgment, including statutory limitations on damages, now enjoyed by the City of Gardiner or its employees or councilors, under provisions of the Maine Tort Claims Act 14 MRSA §§ 8101 *et seq.*; the Maine charitable immunities act, 14 MRSA § 158-A, or other provisions of law.

12. Recording of Option. Grantor and Grantee agree that this Option shall not be recorded. If requested, Grantor agrees to execute and acknowledge before a notary public, in recordable form under Maine law, a Memorandum of Option, and to deliver the same to Grantee for recording at the Kennebec County Registry of Deeds.

13. Notices. Except as provided in Section 3 above, all notices, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given on the date of service if served personally on the party to whom notice is to be given, or on the first

business day after mailing if mailed to the party to whom notice is to be given by first class mail, postage prepaid, registered or certified, return receipt requested, addressed to the recipient at the addresses set forth at the beginning of this Agreement. Either party may change its address for purposes of this Section by giving the other party notice of the new address in the manner described herein.

14. Assignment. Grantee may assign the option granted in this this Agreement as provided in this Section.

a. With respect to the Office Project Option, Grantee may assign the option to an affiliate of Grantee's. An 'affiliate' shall mean any parent, subsidiary or sister company or other legal entity that controls, is controlled by, or is under common control with the sole member of Grantee. For purposes of this clause, 'control' means direct or indirect ownership of fifty percent (50%) or more of the voting rights of, or managerial control of, the subject entity.

15. Miscellaneous. Time is of the essence hereof. This Amended and Restated Option and Development Agreement constitutes the entire agreement between Grantor and Grantee and amends and restates in their entirety the Original Agreements. Until the execution of this Agreement, the Original Agreements have at all times been in full force and effect. There are no agreements or understandings between the parties except as set forth herein, and all prior agreements and understandings are superseded by this Agreement. This Agreement shall not be altered or amended except by a written amendment signed by Grantor and Grantee. This Agreement may be simultaneously executed in any number of counterparts, each of which when duly executed and delivered shall be an original; but such counterparts shall constitute but one and the same agreement. This Agreement will inure to the benefit of and bind the respective successors and assigns of Grantor and Grantee. As used in this Agreement, the singular number shall include the plural, the plural the singular, and the use of one gender shall be deemed applicable to all genders. Captions and headings in this Agreement are inserted for reference only, and shall not be deemed to alter, limit or expand any provision hereof. This Agreement shall be governed by and construed in accordance with the laws of Maine. If any provision of this Agreement is determined to be invalid or unenforceable, it shall not affect the validity or enforcement of the remaining provisions hereof. The terms of this Agreement are for the sole and exclusive protection and use of Grantor and Grantee or its assignee as described above. No party shall be a third-party beneficiary hereunder, and no provision hereof shall operate or inure to the use and benefit of such third party. Nothing in this Agreement shall be deemed to create a partnership, joint venture or other similar legal relationship between Grantee and Grantor.

IN WITNESS WHEREOF, Grantor and Grantee have executed this Agreement as of the date first above written.

WITNESS:

CITY OF GARDINER, Grantor

By: _____

Name:

Title:

DEVELOPERS COLLABORATIVE
PREDEVELOPMENT LLC, Grantee

By: _____
Kevin R. Bunker, its Manager

AMENDED AND RESTATED OPTION AND PREDEVELOPMENT AGREEMENT

THIS AGREEMENT made and entered into as of ~~July~~, ~~2018~~December, ~~2018~~, 2020, by and between THE CITY OF GARDINER, a Maine body corporate and politic with a place of business and mailing address of City Hall, 6 Church Street, Gardiner, ME 04345 ("Grantor" or "City") and DEVELOPERS COLLABORATIVE PREDEVELOPMENT LLC, a Maine limited liability company with a place of business in Portland, Maine and mailing address of 100 Commercial St. Suite 414, Portland, Maine 04101 (the "Grantee")

WITNESSETH:

WHEREAS, Grantor foreclosed on and now holds title to certain land located on Summer Street in the City of Gardiner, ~~and Grantor also acquired other real property on Highland Avenue in the City of Gardiner; and; and~~

WHEREAS, in response to a Request for Qualifications and Statement of Interest for Redevelopment of ~~"T.W. Dick' Site – Summer Street"~~ issued by the City on September 30, 2015 (the "RFQ") the Grantee submitted a "Qualifications and Statement of Interest for Redevelopment of ~~"T.W. Dick' Site – Summer Street"~~ dated November 6, 2015 (the "RFQ Response") which resulted in the parties signing a Memorandum of Understanding on December 21, 2015 in which Grantee accepted Grantor's award of the project outlined in the RFQ pursuant to both the terms and conditions outlined in the City's RFQ and in the RFQ Response (the "MOU") (the RFQ, RFQ Response, MOU and this Agreement are hereinafter collectively the "Development Documents"); and

WHEREAS, the parties ~~wish to amend~~amended and ~~restate~~restated in their entirety that certain Option and Predevelopment Agreement between the parties dated as of January 28, 2016, as amended by four addenda thereto and that certain Option and Development Agreement between the parties dated as of June 15, 2016, as amended by three addenda thereto (collectively the "Original Agreements"); and

WHEREAS, as referenced in the 2019 Extension noted below, the Grantee has closed on and acquired the Housing Project Option as described in Section 1 a. of the 2018 Option; and

Formatted: Indent: First line: 0.5"

WHEREAS, the parties wish to amend and restate in part that certain Amended and Restated Option and Predevelopment Agreement between the parties dated as of July 24, 2018 (the "2018 Option"), as amended by one amendment thereto dated as of September 19, 2019 (the "2019 Extension");

NOW THEREFORE, in consideration of One Dollar (\$1.00) (the "Option Consideration"), the receipt of which is hereby acknowledged by Grantor, Grantor and Grantee hereby agree as follows:

1. Grant of OptionsOption. Grantor hereby grants to Grantee, its successors and assigns, the exclusive and irrevocable optionsoption to purchase the following property:

Formatted: Tab stops: Not at -1" + -0.5" + 0" + 0.5" + 1" + 1.5" + 2" + 2.5" + 3" + 3.5" + 4" + 4.5" + 5" + 5.5" + 6" + 6.5" + 7" + 7.5" + 8" + 8.5" + 9" + 9.5" + 10" + 10.5" + 11" + 11.5" + 12" + 12.5" + 13" + 13.5" + 14" + 14.5" + 15" + 15.5" + 16" + 16.5" + 17" + 17.5" + 18" + 18.5"

a. That certain lot or parcel of land located at 59 Summer Street in the City of Gardiner (City of Gardiner Tax Map 37, Lot 14) and 58-60 Summer Street (Map 37, Lot 6A [formerly known as that portion of 24 Summer Street (Map 37, westerly portion of Lot 6) not previously conveyed to DC Summer Medical LLC], as shown on the drawing attached hereto as Exhibit A (labelled as "Multifamily Project"), for the purpose of developing an affordable rental housing project that is affordable to individuals or families whose incomes do not exceed sixty percent (60%) of the published local area median income or such other use which shall not have a negative impact on downtown, as shall be approved by the City of Gardiner in its sole discretion (the "Housing Project Option;" such project is referred to herein as the "Housing Project"); and

b. a. Those certain lots or parcels of land located at 1 Summer Street (Map 37, Lot 19; including the lot formerly known as 2 Highland Avenue, Map 37, Lot 19A], as shown on Exhibit A, for the purpose of developing an office building or such other use which shall not have a negative impact on downtown, as shall be approved by the City of Gardiner in its sole discretion (the "Office Project Option;" such project is referred to herein as the "Second Office Project"). The parties agree to discuss in good faith how shared parking at 31 Summer Street is to be apportioned so as to retain the opportunity for future development on the 1 Summer Street parcel, in the event a viable project becomes likely with respect to the Second Office Project.

~~The Housing Project Option and the Office Project Option may be exercised independently of one another, subject to the terms of this Agreement. Neither option is conditioned upon the exercise of the other.~~ The property described in ~~subsections~~ subsection a. and b. above is sometimes referred to collectively in this Agreement as the "Property."

2. Expiration. The ~~options~~ option granted in this Agreement shall expire on ~~October~~ December 1, ~~2019~~ 2021, at midnight, Eastern Standard Time unless exercised by that date and time.

3. Notice and Conditions Precedent of Exercise. ~~Each of the options~~ The option granted in this Agreement may only be exercised by Grantee giving written notice of election to exercise to Grantor by first class mail, postage prepaid, registered or certified, return receipt requested, or by hand delivery, in either case addressed or delivered to Grantor at the address set forth at the beginning of this Agreement, or to such other address as Grantor may designate to Grantee in writing. Said ~~notices~~ notice shall be deemed to have been duly given if postmarked or delivered by hand prior to the expiration date and time specified herein. Notwithstanding the foregoing, Grantee's exercise of ~~these options~~ this option shall be of no force or effect unless at the time of ~~each~~ the exercise Grantee shall have received or be in compliance with all of the following conditions precedent: received (i) a "will issue" letter from the City of Gardiner code enforcement office stating that upon payment of the appropriate fee, the City will issue a building permit for the Housing Project and/or the Second Office Project, as applicable, based on plans and specifications reviewed by the City, (ii) binding written commitments from debt and equity providers in amounts sufficient to finance the acquisition and construction of the Housing Project and/or the Second Office Project, as applicable, on terms reasonably satisfactory to Grantee (collectively "Project Financing Commitments"), and (iii) material compliance with the

Predevelopment Process described in Section 8 below. Grantee shall provide copies of the Project Financing Commitments to Grantor at the time Grantee sends to Grantor its notice of exercise of each option. Grantor may, in its sole discretion, waive or extend the deadline for any of these conditions precedent.

4. Failure to Exercise. In the event that Grantee fails to exercise ~~either of the options~~ option granted in this Agreement within the time specified in Section 2 above in accordance Section 3 above, the Option Consideration shall be retained by Grantor and thereafter neither Grantor nor Grantee shall have any further rights or claims against the other except those specifically provided as surviving closing or termination hereof.

5. Post-Exercise Provisions. In the event that Grantee exercises ~~either or both of the options~~ option granted in this Agreement as provided herein, the following provisions shall be applicable:

a. Purchase Price. The purchase price for the Property is as follows:

i. For the Housing Project Option, the purchase price for the land comprising the Housing Project is \$49,900.

~~ii.~~ For the Office Project Option, the purchase price for the land comprising the Second Office Project is \$115,300.

The purchase price for ~~each~~ the option is payable at closing by certified or bank cashier's check or by wire transfer. The Option Consideration shall be credited against the purchase price at the first option closing.

b. Title. Grantor shall convey to Grantee at the closing all right, title, and interest Grantor has in the Property as follows:

i. Map 37, Lots 6B, 14 and Lot 19. ~~These portions of the~~ The Property ~~are~~ is being sold pursuant to the following un-discharged tax ~~liens~~ lien assessed against T.W. Dick Co. Inc. recorded in the Kennebec County Registry of Deeds in Book 11416, ~~Pages 66, 64 and Page 68, respectively,~~ as to which ~~liens~~ lien Grantee shall not have any liability. Grantor represents that, to the best of its knowledge, information, and belief, it has properly foreclosed its tax ~~liens~~ lien on ~~these portions of~~ the Property and has given all required statutory notices as required by applicable law. Grantee assumes responsibility and expense for any title search, title examination or title insurance, and Grantor shall cooperate with Grantee in obtaining title insurance coverage. Except as set forth in this paragraph, Grantor makes no representation concerning the title to the Property. At closing, Grantor will convey all right, title and interest it has in ~~these portions of~~ the Property by municipal quitclaim deed in accordance with the Short Form Deeds Act, 33 M.R.S.A. §761, *et seq.*, subject to the items described in subsection iii. below.

ii. 2 Highland Avenue. As to the portion of 1 Summer Street formerly known as 2 Highland Avenue, Grantor shall convey good and marketable title in accordance with the Title Standards promulgated by the Maine State Bar Association, free and clear of all liens, claims and

encumbrances other than (i) any conditions which a physical inspection of the 2 Highland Avenue property might reveal; and (ii) the items described in subsection iii. below. In the event that Grantor is unable to convey title to the 2 Highland Avenue property as aforesaid, Grantor shall be given a reasonable period of time, not to exceed thirty (30) days, after receipt of notice from Grantee in which to remedy any title defects. Grantee may elect to close notwithstanding such defects as may exist.

iii. Encumbrances. The Property shall also be conveyed subject to the following items: (A) any and all municipal, state, or federal laws, regulations, and ordinances including, without limitation, permits and approvals heretofore issued by any federal, state, or municipal government authority (compliance with, application for the transfer of any such permits, or approvals shall be the sole responsibility of Grantee); (B) any and all encumbrances and easements of record acceptable to Grantee and any governmentally imposed or required zoning, subdivision, environmental, and other land use restrictions; (C) all public easements or other public interests in the Property for roads, sewers or other purposes; and (D) such deed restriction, condition or covenant, agreed upon by the parties cooperating in good faith, appurtenant to the Property regarding the obligations of Grantee in Section 8 hereof, if any, which are to be completed after closing pursuant to said documents. Such covenant shall contain an unambiguous date of termination as described in the last sentence of Section 8 below.

iv. Descriptions. Grantor agrees that the deeds of conveyance will include a new survey description(s) resulting from a boundary survey to be performed by Grantee at its expense, and the parties shall cooperate in good faith so as to agree upon the survey description of the Property.

c. Closing. The ~~elosings~~ closing under this Agreement shall take place within ten (10) days after the date ~~either of the options~~ option granted herein is exercised (the "Closing Date") at 10:00 AM, local time, at Grantee's counsel's office, or at such other time and place as Grantor and Grantee shall mutually agree upon in writing. At ~~each~~ the closing, Grantor shall execute and deliver to Grantee municipal quitclaim deeds and such other affidavits, instruments and documents as Grantee may reasonably request and which are customary in commercial real estate transactions in Maine. In exchange, at the closing, Grantee shall pay to Grantor the balance of the appropriate purchase price as set forth in Section 5.

d. Adjustments, Prorations and Closing Costs. The recording fee for the deed or deeds of conveyance and any expenses related to any mortgages which Grantee may grant to a lender in connection with the purchase of the Property shall be paid for by Grantee. Grantee shall pay its share of the Maine real estate transfer tax in accordance with 36 M.R.S.A. § 4641-A.

e. Possession. Grantor shall deliver possession of the Property to Grantee at the closing, free and clear of all leases, tenancies or occupancies by any person other than Grantee or its assignee described in Section 14 below.

f. Risk of Loss. All risk of loss to the Property prior to the closing shall be on Grantor except if it arises from the act or omission of Grantee.

6. Default; Remedies; Venue. In the event that Grantee defaults in its obligations under this Agreement, and such default is not cured within thirty (30) days after written notice thereof, the sole remedy of Grantor shall be to terminate this Agreement, and upon termination Grantor may retain the Option Consideration and both parties shall be released from their obligations hereunder (except those specifically provided as surviving closing or termination hereof). In the event that Grantor defaults in its obligations under this Agreement, and such default is not cured within thirty (30) days after written notice thereof, Grantee shall have available all remedies, including, without limitation the right to seek specific performance and the right to recovery of damages. Any legal action or proceeding involving this Agreement or the Development Documents must be brought in a court of competent jurisdiction in Kennebec County, Maine, without regard to conflicts of law principles.

7. Inspection; Access to Information. At all reasonable times upon reasonable prior notice, Grantee and any prospective lender or investor of Grantee's shall have a license to enter the Property and adjacent property of Grantor's and to perform, at Grantee's expense, any and all inspections, tests, surveys or other due diligence inquiries with respect to the Property as Grantee deems necessary or appropriate. Grantee agrees to return the Property or adjacent property of Grantor's as nearly as possible to its original condition after all of such tests and inspections. Grantor shall cooperate with Grantee in such inspections. Grantee shall defend, indemnify and hold Grantor fully and completely harmless from and against any and all claims, demands, suits and actions of any person arising out of Grantee's exercise of its rights in this Section, including all claims by or on behalf of Grantee and Grantee's and Grantor's agents and contractors, or their respective estates. The rights and obligations set forth in this Section shall survive closing or the termination or expiration of the rights herein.

8. Development. Pursuant to Grantee having accepted Grantor's award of the project outlined in the RFQ pursuant to both the terms and conditions outlined in the RFQ and in the RFQ Response, Grantee agrees the following terms and conditions apply:

a. Grantee shall provide a certificate of insurance indicating: 1) workers' compensation that complies with state statutes, if required; 2) general liability in an amount not less than \$1,000,000 for injuries including accidental death to any person and subject to the same limit to each person in an amount not less than \$5,000,000 where more than one person is involved in any one accident; 3) property damage insurance in an amount not less than \$500,000, and 4) all policies shall name the City as an additional insured.

b. Grantee shall be responsible for obtaining any and all necessary licenses, permits, and authorizations to perform work in the United States, State of Maine, and the City, at no cost to the City.

c. Grantee shall provide a performance bond in an amount equal to the Grantee's budgeted construction cost, without cost to the City, such bond to name City as an additional obligee in a multiple obligee rider that includes Grantee's lender.

d. In case of default of the Grantee in its obligation to complete construction, which default is not cured within any applicable grace period, the City may enter into a contract or

other agreement for services from other sources and hold Grantee responsible for any excess cost and other damages caused thereby, or may trigger the coverage provisions of the bond, at the sole discretion of the City.

e. Grantee shall maintain such records as are required by the City in order to allow the City to fulfill its reporting requirements to the State of Maine or other agencies. Grantee shall allow the City or other agencies authorized by the City, access to its records at reasonable hours, including all books, records, documents, and accounting procedures and practices relevant to the subject matter of the contract documents, for purposes of audit, for a minimum of six years. This agreement does not commit the City to pay any costs incurred by the Grantee in making and preparing necessary investigations, studies or designs, or for any procuring or contracting for services to be furnished.

f. Grantee certifies that no elected or appointed official, agent or employee of the City who has a pecuniary interest in the RFQ, has participated in the preparation of the RFQ or in any related negotiations; that the RFQ Response was made in good faith without fraud; that the Grantee was competing solely on its own behalf without connection or obligation to any undisclosed person or firm and that the Grantee (including all subcontractors) is able to perform all the services specified in the RFQ without any conflict of interest. A breach of this provision shall be deemed an anticipatory default under the terms of any contract or other agreement issued or entered into in accordance with the RFQ.

g. Grantee shall design ~~each of the Housing Project and~~ the Second Office Project in accordance with the vision set forth in the City's Cobbossee Corridor Master Plan, Comprehensive Plan, and Downtown Master Plan. Grantee shall obtain public input on the design via a method(s) agreed upon by Grantee and City. Grantee shall complete ~~each~~the project no later than fifteen (15) months after the date of exercise of the respective options for each project, unless the parties agree to an extension.

h. ~~Trail easement. Grantee shall work in good faith to offer and grant a trail easement over the Property to the City of Gardiner, such easement not to unreasonably interfere with the siting, configuration and location of the buildings and other improvements comprising the Projects and to contain mutually satisfactory terms and conditions.~~

i. ~~Brownfields Cleanup.~~ Grantor shall transfer title to the Property to Grantee after a Commissioner's Certificate of Completion under the Maine Voluntary Response Action Program (the "COC") has been issued. The COC and accompanying Declaration of Environmental Covenant (the "DEC"), both of which shall be recorded at the Kennebec County Registry of Deeds, shall contain restrictions reasonably satisfactory to Grantee. If the COC and/or DEC do not contain restrictions reasonably satisfactory to Grantee, ~~Grantee's~~Grantee's sole recourse is to terminate this Agreement; ~~Grantor's~~Grantor's dissatisfaction is not and will not be construed as a default of ~~Grantor's~~Grantor's obligations under this Agreement. Grantee acknowledges that Grantor has no control over the contents of the COC and/or DEC which are Maine Department of Environmental Protection documents.

Formatted: Indent: First line: 0"

~~j. Tax Increment Financing. Grantee will pursue obtaining a TIF for 30 years of operations of the completed Housing Project. Grantee intends initially to propose a TIF of 50% which Grantee projects may allow for a successful application for low income housing tax credits ("LIHTC") for the Housing Project. If Grantee's LIHTC application with a 50% TIF, anticipated to be filed in fall 2018, is not successful, Grantee's next succeeding LIHTC application shall reflect an automatically increased TIF of 80%. Notwithstanding the foregoing, Grantee acknowledges and understands that nothing contained in this Agreement shall obligate the City of Gardiner to grant Grantee's application for a TIF.~~

9. Brokerage. The parties represent to one another that neither has dealt with or had contact with any broker in connection with the transaction described in this Agreement. In the event that a broker claims a commission, the party having contact with that broker shall be responsible for satisfying that commission and indemnifying the other party. The rights and obligations set forth in this Section shall survive closing or the termination or expiration of the rights herein.

10. Governmental Powers Unaffected. Nothing in this Agreement shall be deemed to waive, impair, modify or preclude enforcement of any otherwise applicable permit requirements, municipal ordinances or other measures enacted or adopted by the City of Gardiner in its governmental capacity. This Agreement, the other Development Documents and any consent given by the City as a party to the Development Documents shall not constitute approval of any license or permit that may be required under the City of Gardiner's municipal ordinances or Maine law for redevelopment or operation of the Property.

11. Immunities Preserved. Nothing in this Agreement or the other Development Documents shall be deemed to waive or impair any immunities from suit or judgment, including statutory limitations on damages, now enjoyed by the City of Gardiner or its employees or councilors, under provisions of the Maine Tort Claims Act 14 MRSA §§ 8101 *et seq.*; the Maine charitable immunities act, 14 MRSA § 158-A, or other provisions of law.

12. Recording of Option. Grantor and Grantee agree that this Option shall not be recorded. If requested, Grantor agrees to execute and acknowledge before a notary public, in recordable form under Maine law, a Memorandum of Option, and to deliver the same to Grantee for recording at the Kennebec County Registry of Deeds.

13. Notices. Except as provided in Section 3 above, all notices, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given on the date of service if served personally on the party to whom notice is to be given, or on the first business day after mailing if mailed to the party to whom notice is to be given by first class mail, postage prepaid, registered or certified, return receipt requested, addressed to the recipient at the addresses set forth at the beginning of this Agreement. Either party may change its address for purposes of this Section by giving the other party notice of the new address in the manner described herein.

14. Assignment. Grantee may assign ~~either~~the option granted in this this Agreement as provided in this Section.

~~_____ a. _____ With respect to the Housing Project Option, Grantee may assign this option and its rights under this Agreement to a limited partnership affiliated with, or otherwise specially created by, the Grantee in order to receive LIHTC to finance the Project, without the prior consent of the Grantor. Any other assignment shall require the prior written consent of the Grantor, which consent shall not be unreasonably withheld, delayed or conditioned.~~

~~_____ b. _____ a. _____~~ With respect to the Office Project Option, Grantee may assign the option to an affiliate of Grantee's. An 'affiliate' shall mean any parent, subsidiary or sister company or other legal entity that controls, is controlled by, or is under common control with the sole member of Grantee. For purposes of this clause, 'control' means direct or indirect ownership of fifty percent (50%) or more of the voting rights of, or managerial control of, the subject entity.

15. Miscellaneous. Time is of the essence hereof. This Amended and Restated Option and Development Agreement constitutes the entire agreement between Grantor and Grantee and amends and restates in their entirety the Original Agreements. Until the execution of this Agreement, the Original Agreements have at all times been in full force and effect. There are no agreements or understandings between the parties except as set forth herein, and all prior agreements and understandings are superseded by this Agreement. This Agreement shall not be altered or amended except by a written amendment signed by Grantor and Grantee. This Agreement may be simultaneously executed in any number of counterparts, each of which when duly executed and delivered shall be an original; but such counterparts shall constitute but one and the same agreement. This Agreement will inure to the benefit of and bind the respective successors and assigns of Grantor and Grantee. As used in this Agreement, the singular number shall include the plural, the plural the singular, and the use of one gender shall be deemed applicable to all genders. Captions and headings in this Agreement are inserted for reference only, and shall not be deemed to alter, limit or expand any provision hereof. This Agreement shall be governed by and construed in accordance with the laws of Maine. If any provision of this Agreement is determined to be invalid or unenforceable, it shall not affect the validity or enforcement of the remaining provisions hereof. The terms of this Agreement are for the sole and exclusive protection and use of Grantor and Grantee or its assignee as described above. No party shall be a third-party beneficiary hereunder, and no provision hereof shall operate or inure to the use and benefit of such third party. Nothing in this Agreement shall be deemed to create a partnership, joint venture or other similar legal relationship between Grantee and Grantor.

IN WITNESS WHEREOF, Grantor and Grantee have executed this Agreement as of the date first above written.

WITNESS:

CITY OF GARDINER, Grantor

By: _____

Name:

Title:

DEVELOPERS COLLABORATIVE
PREDEVELOPMENT LLC, Grantee

By: _____
Kevin R. Bunker, its Manager

[O:\MAS\20081-DC-Predevelopment-LLC\Gardner\Option Agreement - Amended and Restated June 2018 - FINAL.docx](#)