

**FOURTH AMENDMENT TO PURCHASE AND SALE AGREEMENT
AND FIRST AMENDMENT TO DEVELOPMENT AGREEMENT AND
DEVELOPMENT FINANCING AGREEMENT**

THIS FOURTH AMENDMENT TO PURCHASE AND SALE AGREEMENT AND FIRST AMENDMENT TO DEVELOPMENT AGREEMENT AND DEVELOPMENT FINANCING AGREEMENT (this “**Amendment**”) is entered into by and between the undersigned Parties, effective as of December 5, 2017.

RECITALS

The undersigned Parties entered into a Purchase and Sale Agreement dated December 30, 2016, regarding a Project to be located in the City of West Allis, commonly referred to as “Element 84”, as subsequently amended (the “**Purchase Agreement**”).

The undersigned Parties also entered into a Development Agreement (the “**Development Agreement**”) and a related Development Finance Agreement (the “**Development Financing Agreement**”), both dated December 30, 2016 and related to the same Project.

On November 21, 2017 (File Number R-2017-0319), the City Common Council approved an amendment to the Purchase Agreement and Development Agreement (of which the Development Financing Agreement is a part), authorizing a loan by the City to Element 84, LLC, in the amount of \$2,500,000 to be part of the Project financing (the “**City Loan**”), to be secured by a second mortgage on the Property and personal guarantees as described in this Amendment. The City Loan will replace the “Series II Bonds” in the overall structure of the Project financing. Similarly, the Series I Loan, defined herein, will replace the “Series I Bonds” in the overall structure of the Project financing.

Subject to the terms of this Amendment, Authority, City and Developers now desire to amend the Purchase Agreement, the Development Agreement, and the Development Finance Agreement upon the terms and conditions stated below.

All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Purchase Agreement, the Development Agreement, or the Development Financing Agreement, as applicable.

Subject to the terms of this Amendment, Authority, City and Developers now desire to amend the Purchase Agreement, the Development Agreement and the Development Financing Agreement upon the terms and conditions stated below.

AGREEMENTS

NOW THEREFORE, for and in consideration of Ten Dollars, the agreements of the parties herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. **Purchase Agreement**. The Parties hereby agree to amend the Purchase Agreement as follows:

A. The terms “City Loan Debt Service” and “Developer Pay Go Payments” shall have the meanings defined in the Development Financing Agreement.

B. Section 1 is amended by the addition of the following: The City Loan shall be guaranteed by Element 84 Development Partners LLC and the individual persons who are members of Element 84 Development Partners LLC or its members (the “City Loan Guarantees”). Said guarantors shall be the “City Loan Guarantors” and the City Loan Guarantees shall be in the form attached hereto as **Exhibit A**. Five (5) years following Substantial Completion of the Project, City agrees to re-evaluate the need for the City Loan Guarantees and shall consider, in good faith based on the overall performance of the Project, whether the City Loan Guarantees can either be modified or released. City shall perform such re-evaluation every two (2) years thereafter until such time as the City Loan Guarantees are released.

C. Section 2 is revised to allow for the Public Property to be conveyed either to Corporation or to Element 84 at the election of Developers. Element 84 will be the sole owner of the Property. Notwithstanding anything to the contrary set forth in Sections 11 and 24 of the Purchase Agreement (Conditions to Closing and Closing Documentation, respectively), Developers may request that title to the Public Property be conveyed to Corporation or Element 84 at any time following the execution of this Amendment, and in such case, title shall be conveyed by Authority as soon as reasonably practicable following receipt of such request.

D. Section 11(A)(4) is revised to include the sentence: City Loan Guarantors shall have executed, accepted the terms, and signed the City Loan Guarantees as attached in Exhibit A.

E. Section 12(B)(2) is revised to state that in addition to the Developers and Guarantor, the City Loan Guarantors will deliver financial statements to West Allis’s financial consultant.

F. Section 12.B.(3) and Section 24 are revised to require delivery of the City Loan Guarantees by the City Loan Guarantors in addition to the other closing deliveries. Section 12.B.(3) also includes language stating that the form of the City Loan Guarantees are attached to the document and incorporated within as Exhibit A.

G. Section 13.A.(a) is revised to state that any Project Savings shall be distributed as follows: (a) Sixty percent (60%) to the City to reduce the principal balance of the City Loan, and (b) Forty percent (40%) to the Developers to establish a debt service reserve or Debt Service Management Account.

H. Section 14.A.(4) is revised to state that the City’s financial participation in the Project consists of two components: the City Investment and the City Loan.

I. Section 14.C. is revised as follows: (i) the phrase “calendar year 2017” in the first paragraph shall be replaced with “calendar year 2021 (for tax year 2020)”; (ii) the phrase “15 years” in subsection (1).(a) is changed to “19 years”; (iii) the phrase “in any given calendar year” in subsection (1).(b) is changed to “in any given calendar year beginning with 2021 and thereafter”; (iv) the phrase “in any given calendar year” in subsection (1).(c) is changed to “in any given calendar year beginning with 2021 and thereafter”; (ii) the term “Series II Bond” in

subsection (1).(c) is replaced with the term “City Loan”; (iii) any excess Tax Increments generated by the Project under subsection (1).(c) shall be used to offset any Shortfall Payments that may become due in future years, any payments that may become due in future years pursuant to the City Loan Guarantees, repayment of the City Loan, and to payment of the Developer Pay Go Payments prior to the closure or expiration of the Tax Increment District; (iv) subsection (1).(d) is deleted and replaced in its entirety with the following: “Prior to closure or expiration of the Tax Increment District, the City shall provide Developers with an accounting of any Shortfall Payments made by Developers, any payments made by City Loan Guarantors pursuant to the City Loan Guarantees, and any Developer Pay Go Payments that accrued but remain unpaid, and with an accounting of any excess Tax Increments from the Project that remain in reserve pursuant to subsection (c), above. If any such excess Tax Increments remain in reserve at that time from the Project, then such funds shall be distributed FIRST to pay down any remaining balance on the City Loan, SECOND to City Loan Guarantors to repay any prior payments made pursuant to the City Loan Guarantees, without interest, that have not been repaid previously, THIRD to Developers to repay any prior Shortfall Payment(s) made by Developers, without interest, that have not been repaid previously, and FOURTH to Element 84 to pay any accrued but unpaid Developer Pay Go Payments, without interest, that have not been paid previously. All obligations for repayment of Shortfall Payments, payments made by City Loan Guarantors, and Developer Pay Go Payments shall terminate with the expiration or closure of the Tax Increment District; provided, however, City’s obligation to distribute Tax Increments reserved pursuant to subsection (c), above, shall survive termination of the District.

J. The term “Developer Financed Contribution” in Section 15.D.(2) is replaced with the term “City Loan”.

K. Section 15.E. is deleted and replaced in its entirety with the following: “If a Sale or 1031 exchange occurs before closure of the District, and the full repayment of the various financial obligations secured by the Guaranty or the City Loan Guarantees, or if any amounts are still due to West Allis or to the Developers, Guarantors, or City Loan Guarantors, West Allis agrees to (1) continue to make the scheduled payments of the City Investment and City Loan (to the extent not already fully disbursed), to disburse payments to the purchaser of the controlling interest in the Project (to the extent not all ready fully disbursed) and to disburse any amounts payable to the Developers, Guarantors, the City Loan Guarantors, or their assignees, and (2) to continue administering and operating the District in accordance with this Agreement.

L. Section 24.B.(6) includes the requirement that the City Loan Guarantees as attached in Exhibit A be delivered at closing.

M. Exhibits to the Purchase Agreement shall be updated as necessary prior to closing, in forms approved by the City, to reflect final Project and financing details.

N. Closing on the HUD 221(d)4 Loan shall occur on or before March 15, 2018.

O. Closing on the Public Property shall occur on or before March 15, 2018.

- P. In the event one or more of the deadlines specified in subsections N and O above are not met, the Purchase Agreement may be terminated by any Party upon written notice to the other Parties.

2. **Development Agreement.** The Parties hereby agree to amend the Development Agreement as follows:

A. Section 1.A. is revised to allow for the Public Property to be conveyed either to Corporation or to Element 84 at the election of Developers. Element 84 will be the sole owner of the Property.

B. Section 2. G. is revised to insert “and City Loan” after “City Investment.”

C. Exhibits to the Development Agreement shall be updated as necessary prior to closing, in forms approved by the City, to reflect final Project and financing details.

3. **Development Financing Agreement.** The Parties hereby agree to amend the Development Financing Agreement as follows:

A. Recitals: (I) the seventh recital paragraph is revised to state: “WHEREAS, West Allis has determined that the Project, the City Investment and the City Loan (both defined below) related to the Project serve a public purpose by eliminating blighted conditions and encouraging residential development within the City, enhancing the City’s tax base, promoting employment opportunities, inducing appropriate development of the Property, and encouraging redevelopment of nearby parcels.”; (II) the ninth recital paragraph is revised to state: “WHEREAS, the tax incremental financing provided for the Project consists of two components: (i) a financial contribution from City to Corporation or Element 84 in the amount of \$2,500,000 which City will finance through a loan from the State of Wisconsin’s State Trust Fund Program (the “City Investment”); and (ii) a loan from City to Element 84 in the amount of \$2,500,000 (the “City Loan”), both of which will be repaid from available tax increments pursuant to the terms of this Agreement; (III) The last recital paragraph and Exhibit III referenced therein are deleted in their entirety.

B. The 10th Recital paragraph is deleted and replaced in its entirety with the following: The City Investment will be financed by 19-year debt service on a loan from the State of Wisconsin Trust Fund Loan Program (defined herein as the “Series I Loan”).

C. Section 3 is deleted and replaced in its entirety with the following: **3. CITY INVESTMENT AND CITY LOAN.** City will make available the City Investment to Corporation or Element 84 (as directed by Developers) and the proceeds of the City Loan to Element 84 for construction of the Project. Said funds will be made available for an account designated by Developers and approved by Developers’ lender and disbursed according to procedures mutually acceptable to the Parties, which shall include an escrow and disbursement agreement under which Developers’ title insurance company shall act as the disbursement agent. Notwithstanding the foregoing or anything to the contrary set forth in Sections 11 and 24 of the Purchase Agreement (Conditions to Closing and Closing Documentation, respectively), or any conditions to disbursement of the City Investment set forth in the Development Financing Agreement or the Purchase Agreement, Developers may request that the full amount of the City Investment be disbursed to Corporation or Element 84 at any time following the execution of this

Amendment, and in such case, the City shall, as soon as reasonably practicable following receipt of such request, disburse such funds to First American Title Insurance Company, to be held in escrow for Developers' benefit pursuant to the title company's customary construction disbursement requirements. Payments on the City Loan shall be scheduled to commence in calendar year 2021, payable in 2021 and annually thereafter, but in no event prior to HUD's annual determination of "Surplus Cash" pursuant to the terms of the City Loan Note.

D. Section 4 is revised for the last sentence to state: The Developers agree to cooperate with the consultant and provide such information as they may request to satisfy this section.

E. Section 5.A. is deleted and replaced in its entirety with the following: City will make available the City Investment funds pursuant to Section 3, in accordance with a schedule and procedures mutually acceptable to the parties, which may, at the request of Developers or the Developers' lender, include an escrow and disbursement agreement under which Developers' title insurance company shall act as the disbursement agent. The City will not issue general obligation bonds for the City Investment. Instead, the City will source the funds needed to make the City Investment with a loan through the State of Wisconsin Trust Fund Loan Program (the "Series I Loan"). Said loan shall be 19-year debt service, at a fixed interest rate of 4% per annum. Immediately after closing on the Series I Loan, City shall generate and deliver to the Developers a schedule setting forth the actual debt service payments on the Series I Loan (the "Series I Debt Service Payments").

F. Section 5.B. is deleted and replaced in its entirety with the following: In each year, beginning in 2021 (for tax year 2020) and ending in 2037 (for tax year 2036) (or sooner, if all of the outstanding principal and interest on the Series I Loan has been paid in full by City in accordance with the Series I Loan documents, the City Loan has been paid in full by Element 84 or Guarantors in the case of a shortfall, and if all payments have been made to Developers or City Loan Guarantors as required herein),¹ City shall apply the tax increment generated by the Property (the "Tax Increments") as follows: FIRST, to pay (i) administrative costs of City which are described on Exhibit II-Project Costs ("Administrative Costs")², (ii) repayment of any City advances for initial interest payments on the Series I Debt Service or City Loan³, and (iii) an annual loan servicing fee to the City equal to 0.5% of the outstanding balance on the City Loan (the "City Loan Servicing Fee"). The Administrative Costs, reimbursement of City advances, and City Loan Servicing Fee shall be paid to City annually, prior to any disbursement of Tax Increments. After such amounts are paid, Tax Increments shall then be applied SECOND, to make Series I Debt Service Payments. THIRD, to pay principal and interest due on the City Loan ("City Loan Debt Service Payments"). FOURTH, to pay to Element 84 an annual amount according the schedule of payments attached hereto as **Exhibit C** ("Developer Pay Go Payments"). FIFTH, all Tax Increments in excess of the amount required annually to pay the Administrative Costs, repayment of City advances, City Loan Servicing Fee, Series I Debt Service Payments, the City Loan Debt Service payments, and the Developer Pay

¹ The calendar years in which Tax Increments are to be generated remains subject to change depending on actual Project commencement date and the corresponding final City financial model.

² The Administrative Costs shall be in the amounts modeled in version 17 of the financial analysis prepared by City's financial consultant dated 1/24/2018.

³ The repayment of such City advances shall occur over a period of not less than ten (10) years at an interest rate of not more than 2.50%.

Go Payments shall be deposited into a special reserve account for the District and applied as follows pursuant to Section 14 of the Purchase and Sale Agreement:

- (1) First, to the Series I Debt Service Payments;
- (2) Second, to City Loan Debt Service payments;
- (3) Third, to reimburse the City Loan Guarantors for any payments made by City Loan Guarantors pursuant to the City Loan Guarantees in any given year during the life of the Tax Incremental District;
- (4) Fourth, to reimburse the Developers for any Shortfall Payments made by Developers in any given year during the life of the Tax Incremental District;
- (5) Fifth, to the payment of any Developer Pay Go Payments that have accrued but remain unpaid, and
- (6) Sixth, to the payment of other District project costs.

G. Section 6 is deleted in its entirety and replaced with the following: **6. CITY LOAN.** A. The City Loan shall have a fixed annual interest rate of 4.0%, and Developers shall pay a loan origination fee in the amount of \$ 12,500 at Closing. Immediately after closing on the City Loan, City shall generate and deliver to the Developers a schedule setting forth the City Loan Debt Service Payments. The City Loan shall be documented by a note, subordinate mortgage, and subordination agreement, substantially in the forms attached hereto as **Exhibit B.** The City Loan shall be further secured by the City Loan Guarantees. Five (5) years following Substantial Completion of the Project, City agrees to re-evaluate the need for the City Loan Guarantees and shall consider, in good faith based on the overall performance of the Project, whether the City Loan Guarantees can either be modified (stepped-down) or released. City shall perform such re-evaluation every two (2) years thereafter until such time as the City Loan Guarantees are released. B. In lieu of Developers paying the principal and interest on the City Loan in 2018 and 2019, the City will advance funds totaling \$281,013 for the payment of the interest and principal in those years. The Developers shall re-pay the advanced funds through tax increments as set forth on the schedule of City Loan Debt Service Payments.⁴

H. Section 7 is revised to replace the term “Series II Bond” with “City Loan.”

I. Section 13 is deleted in its entirety.

J. Exhibits to the Development Financing Agreement shall be updated as necessary prior to closing, in forms approved by the City, to reflect final Project and financing details.

⁴ The repayment of such City advances shall occur over a period of not less than ten (10) years at an interest rate of not more than 2.50%.

4. Miscellaneous. This Amendment may be executed in several counterparts, and by the parties hereto in separate counterparts, and each counterpart, when so executed and delivered (which delivery may be by facsimile or via electronic mail), shall constitute an original, and all such separate counterparts shall constitute but one and the same instrument. This Amendment embodies the entire agreement and understanding between the parties with respect to the subject matter hereof and supersedes all prior agreements, consents and understandings relating to such subject matter. To the extent inconsistent with any provisions of the Purchase Agreement, the terms and provisions of this Amendment shall control.

AGREED TO BY AND BETWEEN Developers, Authority, and City on the date first set forth above.

**COMMUNITY DEVELOPMENT AUTHORITY
OF THE CITY OF WEST ALLIS**

By: John F. Stibal
John F. Stibal, Executive Director

Dated: 2-13-18

**CITY OF WEST ALLIS
MILWAUKEE COUNTY, WISCONSIN**

By: Dan Devine
Dan Devine, Mayor

Dated: 2/13/18

By: Monica Schultz
Monica Schultz, City Clerk

Dated: 2/6/18

ELEMENT 84, LLC


By: Element 84 Development Partners LLC, its
Manager

By: Ogden Midwest Funding LLC, its Manager

By: 
Jonathan S. Ross, Manager

Dated: 4-13-18

WEST ALLIS 84 PROPERTIES, INC.

By: 
Jonathan S. Ross, President

Dated: 4-13-18

Approved as to form this 28th day
of ~~January~~, 2018.
March


Jenn Merten, Deputy City Attorney

Exhibit A – Form of City Loan Guarantees

[Attached]

Exhibit B – Form of City Loan Note, Mortgage and Subordination Agreement

[Attached]

Exhibit C

Schedule of Developer Pay Go Payments

<u>Year</u>	<u>Amount</u>
2021	\$65,000
2022	\$65,000
2023	\$65,000
2024	\$55,000
2025	\$55,000
2026	\$45,000
2027	\$45,000
2028	\$40,000
2029	\$30,000
2030	\$25,000
2031	\$20,000
2032	\$15,000
2033	\$11,135
2034	\$10,000