

BY AUTHORITY

ORDINANCE NO. **4248**

COUNCILLOR'S BILL NO. **14**

SERIES OF 2024

INTRODUCED BY COUNCILLORS

DeMott, Nurmela

A BILL

FOR AN ORDINANCE APPROVING A DEVELOPMENT ASSISTANCE AGREEMENT BETWEEN THE CITY OF WESTMINSTER AND 3551 W 71st LLC FOR THE PURPOSE OF CONSTRUCTING A 75-UNIT, MARKET RATE APARTMENT PROJECT WITHIN THE WESTMINSTER STATION AREA

WHEREAS, 3551 W 71st LLC, plans to construct a 75-unit, market rate apartment project (the "Project") within the Westminster Station Area located at 3551 W. 71st Place ("Station Area"); and

WHEREAS, the City desires to support the redevelopment of the Station Area through the addition of market rate housing to support a balanced housing approach within the Station Area's transit-oriented development; and

WHEREAS, the City wishes to provide assistance to aid in the development of the Project because doing so achieves several of the City's Strategic Plan goals and objectives; and

WHEREAS, City Council finds the execution of the Agreement will provide benefit and advance the public interest and welfare of the City and its citizens by promoting the redevelopment of the Station Area.

THE CITY OF WESTMINSTER ORDAINS:

Section 1. The attached Development Assistance Agreement between the City and 3551 W 71st LLC providing terms for City rebates not to exceed \$1,760,635 is hereby approved.

Section 2. The City Manager is hereby authorized to sign, and the City Clerk to attest, the Development Assistance Agreement.

Section 3. That the Development Assistance Agreement shall not be effective until executed by the City of Westminster and 3551 W 71st LLC.

Section 4. This ordinance shall take effect upon its passage on second reading. The title and purpose of this ordinance shall be published prior to its consideration on second reading. The full text of this ordinance shall be published within ten (10) days after enactment on second reading.

INTRODUCED, PASSED ON FIRST READING, AND TITLE AND PURPOSE ORDERED PUBLISHED this 22nd day of April, 2024.

PASSED, ENACTED ON SECOND READING, AND FULL TEXT ORDERED
PUBLISHED this 6th day of May, 2024.

Nancy McNally

Mayor
APPROVED AS TO LEGAL FORM

David Frankel

City Attorney's Office

ATTEST:

Mary G. [Signature]

City Clerk

DEVELOPMENT ASSISTANCE AGREEMENT

THIS DEVELOPMENT ASSISTANCE AGREEMENT (the “**Agreement**”) is made and entered into this ____ day of _____, 2024 (the “**Effective Date**”), between the CITY OF WESTMINSTER, whose address is 4800 West 92nd Avenue, Westminster, CO 80030 (the “**City**”), and 3551 W 71st LLC, whose address is P.O. Box 654, Eastlake, CO 80614 (the “**Developer**”) (collectively, the “Parties”).

WHEREAS, the Developer plans to construct a 75-unit, market rate apartment project (the “**Project**”) within the Westminster Station Area located at 3551 W. 71st Place (“Station Area”); and

WHEREAS, the City desires to support the redevelopment of the Station Area through the addition of market rate housing to support a balanced housing approach within the Station Area; and

WHEREAS, the City wishes to provide assistance to aid in the development of the Project as it achieves several of the City’s Strategic Plan goals and objectives; and

WHEREAS, City Council finds the execution of the Agreement will provide benefit and advance the public interest and welfare of the City and its citizens by promoting the redevelopment of the Station Area.

In consideration of the mutual promises set forth below, and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree to the following:

1. **REBATES.** The City agrees to rebate to the Developer certain fees paid by the Developer to the City, as set forth below. Notwithstanding anything herein to the contrary, the Parties agree that, with the exception of the Stipulated Use Tax (defined below), the fees paid and rebated in accordance herewith are estimates and may vary depending on construction costs and approved revisions to the Project. In the event the amount of any fee below (not including Stipulated Use Tax) changes, and the Developer is assessed and pays an amount different than the amount estimated herein, the City will rebate the actual amount paid, so long as the total amount rebated to the Developer hereunder does not exceed the combined total rebate amount set forth in section 2 below.
 - a. **Public Land Dedication Fee.** The City shall rebate to the Developer one hundred percent (100%) of the Public Land Dedication fee-in-lieu in the estimated amount of \$1,100,000 paid to the City (the “**PLD Rebate Amount**”).
 - b. **Building Permit and Review Fees.** The City shall rebate to the Developer one hundred percent (100%) of the building permit and review fees paid as required under W.M.C. Section 11-9-3(E)(2) and E(4) for the construction of the Project (the “**Building Permit and Review Fees Rebate**”). The Fees Rebate shall apply to all such building permit and review fees paid to the City during the Rebate Period (defined below) in connection with the Project whether paid directly by the Developer or by contractors or other third parties conducting work on the Project on behalf of the Developer. The “**Rebate Period**” shall be the time period commencing on the Effective Date and ending (1) one year from Effective Date. Notwithstanding the foregoing, water and sewer tap fees shall not be included in the Fees Rebate. Based on the Developer’s current construction estimates, the Fees Rebate will be approximately \$163,310 (the “**Building Permit and Review Fees Rebate Amount**”).

- c. Stipulated Use Tax Rebate - Construction. The City shall rebate to the Developer one hundred percent (100%) of the estimated use tax due on construction materials (excluding the City's 0.25% Open Space Tax and 0.6% Public Safety Tax) paid as a result of the construction of the Project as required under W.M.C. Sections 4-2-9 and 4-2-3 (the "**Construction Use Tax**"). The City, the Developer and the Developer's general contractor have agreed to a specific Construction Use Tax amount of \$481,250 (the "**Stipulated Use Tax**" or "**SUT**"), resulting in a Construction Use Tax rebate of \$375,000 (the "**SUT Rebate Amount**"), further described in the Agreement Stipulating to Building Use Tax Payment and Waiver of Reconciliation Requirement, attached hereto as **Exhibit A** (the "**Stipulated Use Tax Agreement**"). Neither the Stipulated Use Tax nor the SUT Rebate Amount will be subject to review by the City or appeal by the Developer, or its general contractor or any subcontractor. The Developer agrees to hold the City harmless for any claims by its general contractor or any subcontractor for refund of any use taxes paid by the general contractor or subcontractor.
 - d. Park Development and Public Art Fees. The City shall rebate to the Developer one hundred percent (100%) of the park development and public art fees in the estimated amounts of \$118,725 and \$3,600 respectively (the "**Park Development/Public Art Fees Rebate Amounts**").
2. PAYMENT OF REBATES. The combined total of the PLD Rebate Amount, Fees Rebate Amount, SUT Rebate Amount, and Park Development/Public Art Fees Rebate Amounts **shall not exceed \$1,760,635**.
 - a. Once both of the following have been accomplished, the City shall pay the SUT Rebate Amount within thirty (30) days after the end of the then-current calendar quarter:
 - i. the City has received the fully executed Stipulated Use Tax Agreement from the Developer; and
 - ii. the Stipulated Use Tax payment has been made to the City.
 - b. The PLD Rebate, Building Permit and Review Fees Rebate, SUT Rebate, and Park Development/Public Art Fees Rebate payments shall be made no later than thirty (30) days following the end of the calendar quarter in which payment is received by the City, subject to and in accordance with subsection f of this Section 2.
 - c. Notwithstanding subsections a and b of this section 2, no Rebate payment shall be made until the Developer has submitted a completed, current W-9, a completed EDA request for information form as prescribed by the City and a waiver of confidentiality/release of records.
 - d. With the exception of the initial payment of Rebates, the City shall make all payments of Rebates electronically to the Developer's designated financial institution or other account of the Developer. The initial Rebates payment will be issued by check and a pre-note confirmation sent to the Developer's designated financial institution or other account of the Developer.
 - e. All payments made by the City pursuant to this Agreement shall be made to the Developer in the Developer's name as set forth in the first paragraph of this Agreement or, in the event the City has approved assignment in accordance with section X(d), to such assignee, and to no other individual or entity.

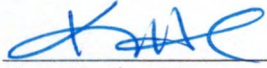
- f. Total quarterly rebate amounts must reach at least \$1,000 before the City will make payment. Thus, if the total amount of a quarterly rebate is less than \$1,000, payment of such rebate amount will be deferred to the following quarter. If the total amount of such following quarter's rebate is still less than \$1,000, payment of such rebate amounts will be deferred to the next following quarter. This process will continue until the total amount to be rebated is at least \$1,000, at which point the accumulated amount of such rebates will be paid within thirty (30) days following the end of that calendar quarter.
3. SUSPENSION OF REBATE PAYMENTS; TERMINATION OF AGREEMENT. In the event the Developer fails to comply in any material respect with provisions of City regulations or code applicable to the development, use, occupancy or operation of the Project, the City may, after providing the Developer with not less than thirty (30) days advance written notice, suspend payment of the Rebates until the Developer complies with such City regulations or code provisions. This Agreement shall terminate and become void and of no force or effect at the election of the City should the Developer remain in non-compliance after having received such written notice and failed to cure, or diligently pursue a cure, within thirty (30) days of the written notice, unless such breach cannot be cured or remedied within thirty (30) days, in which case the period for remedy or cure shall be extended for a reasonable time (not to exceed an additional (30) days), provided the Developer has made and continues to make a diligent effort to effect such remedy or cure.
4. GENERAL PROVISIONS.
 - a. Entire Agreement. This Agreement shall constitute the entire agreement between the City and the Developer and supersedes any prior agreements between the Parties and their agents or representatives related to the same subject matter, all of which are merged into and revoked by this Agreement with respect to its subject matter.
 - b. Subordination. Notwithstanding anything herein to the contrary, the City's obligations pursuant to this Agreement are subordinate to the City's obligations for the repayment of any current or future bonded indebtedness and are contingent upon the existence of a surplus in sales and use tax revenues in excess of the sales and use tax revenues necessary to meet such existing or future bonded indebtedness. The City shall meet its obligations under this Agreement only after the City has satisfied all other obligations with respect to the use of sales tax revenues for bond repayment purposes. For the purposes of this Agreement, the terms "bonded indebtedness," "bonds," and similar terms describing the possible forms of indebtedness include all forms of indebtedness that may be incurred by the City, including but not limited to, general obligation bonds, revenue bonds, revenue anticipation notes, tax increment notes, tax increment bonds, certificates of participation and all other forms of contractual indebtedness of whatever nature that is in any way secured or collateralized by sales and use tax revenues of the City. The City reasonably believes, as of the date hereof, that sufficient sales and use tax reserves will exist to satisfy the City's obligations hereunder. In the event the City is unable to timely provide a Rebate as provided hereunder by operation of this subsection b, or subsection below, the Developer may terminate this Agreement, at which point this Agreement will become null and void in all respects, and neither Party shall be liable hereunder to the other Party.
 - c. Annual Appropriation. Nothing in this Agreement shall be deemed or construed as creating a multiple fiscal year obligation on the part of the City within the meaning of Colorado Constitution Article X, Section 20, and the City's obligations hereunder are expressly conditional upon annual appropriation by the City Council.

- d. Assignment. Absent the prior written consent of the City, which shall not be unreasonably withheld, the Developer shall not assign this Agreement or any interest hereunder, including any sales, transfers, assignments or disposals to: (i) any successor in interest to the Developer's business operations in connection with any merger, acquisition or similar transaction; or (ii) any purchaser of all or substantially all of the Developer's assets, except that such consent shall not be required for sales, transfers, assignments or disposals to any parent, subsidiary or affiliate, or any person, firm or corporation, that shall Control, or be under common Control with, the Developer. Any sale, transfer, assignment or disposal of this Agreement will bind the successor in interest to the terms of this Agreement. As used in this subsection d, "Control" shall mean actual working control in whatever manner exercised. "Control" includes, but may not necessarily require, majority stock ownership.
- e. Governing Law; Venue; Cost Shifting. This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado, the Westminster City Charter and the Westminster Municipal Code. In the event of a dispute concerning any provision of this Agreement, the Parties agree that prior to commencing any litigation, they shall first engage in mediation in good faith for the purpose of resolving such dispute. The venue for any lawsuit concerning this Agreement shall be in the District Court for Adams County, Colorado, and the prevailing Party in any such lawsuit shall be entitled to its reasonable court costs and attorney fees.

[Remainder of page intentionally blank – signatures follow]

DEVELOPER:

3551 W. 71st LLC, a Colorado
limited liability company



Kara Hucke, Manager

CITY OF WESTMINSTER

Mark A. Freitag, City Manager

ATTEST:

City Clerk

APPROVED AS TO LEGAL FORM:

City Attorney

Adopted by Ordinance No.

Exhibit A

AGREEMENT STIPULATING TO BUILDING USE TAX PAYMENT AND WAIVER OF RECONCILIATION REQUIREMENT

THIS AGREEMENT STIPULATING TO BUILDING USE TAX PAYMENT AND WAIVER OF RECONCILIATION REQUIREMENT (the "Agreement"), is made and entered into this ___ day of _____, 2024 (the "Effective Date"), between the **CITY OF WESTMINSTER**, Colorado (the "City") and _____ (the "Contractor"), hereinafter referred to collectively as the "Parties" and individually as a "Party." is as follows:

WHEREAS, Contractor has been contracted by Diverse Blue QOF, LLC, to perform construction activities defined as _____ (the "Project") per the attached Development Assistance Agreement, attached hereto as Exhibit A (the "DAA").

WHEREAS, the Parties enter into this Agreement for the purpose of effectuating the agreements set forth in the EDA between the City and the Developer related to the use tax due upon construction materials used in the Project.

NOW, THEREFORE, in consideration of the mutual understandings and agreements herein set forth, the City and the Contractor agree as follows:

1. The Contractor shall pay to the City the Stipulated Use Tax ("SUT") described in Section 1(c) of the DAA.

2. The Contractor shall not be required to reconcile any permit, or file any return, relating to use tax for the Project as required pursuant to Title IV of the Westminster Municipal Code.

3. The Contractor hereby waives any right to refund of use tax from the City if it is determined that the actual amount of use tax due for the Project is less than the Stipulated Use Tax.

4. The City shall neither refund nor set off any amount of sales tax paid upon the purchase of materials by any owner, developer, contractor, or other person relating to the Project.

5. The City hereby waives any right to collect any actual or estimated use tax upon materials for the Project that may be determined to be due in excess of the Stipulated Use Tax.

6. So long as the Contractor is not in material breach of this Agreement, as determined by the City in its sole discretion, the City agrees not to audit the Contractor for the use tax due upon materials related to the Project.

7. General Provisions.

a. **Entire Agreement.** This Agreement, which includes the DAA, represents the entire agreement between the Parties. No other agreements or representations exist other than as noted in this Agreement.

b. **Amendments.** No provision of this Agreement shall be waived or modified except in writing signed by Parties.

c. **Applicable Laws and Venue.** This Agreement shall be governed by the laws of the State of Colorado and the Charter and Ordinances of the City of Westminster and shall be deemed entered into in both Adams County and Jefferson County, State of Colorado, as the City is located in both counties.

The location for adjudication and/or settlement, whether by alternative dispute resolution or litigation, of any and all claims, controversies and disputes arising out of or related to this Agreement or any breach hereof shall be proper only in the Colorado Counties of either Adams or Jefferson, at the City's option.

d. Enforcement of Agreement. In the event it becomes necessary for either Party to bring legal action against the other to enforce any provision of this Agreement, in addition to any other relief that may be granted, the prevailing Party in such action shall be entitled to an award of its reasonable court costs and attorney fees.

e. Annual Appropriation. Nothing in this Agreement shall be deemed or construed as creating a multiple fiscal year obligation on the part of the City within the meaning of Colorado Constitution Article X, Section 20, and the City's obligations hereunder are expressly conditional upon annual appropriation by the City Council.

f. Authorization. The person or persons signing and executing this Agreement on behalf of each Party, do hereby warrant and guarantee that they have been fully authorized to execute this Agreement and to validly and legally bind such Party to all the terms, performances and provisions herein set forth.

g. Digital Signatures and Copies. The Parties hereby acknowledge that this Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The Parties agree that signature pages may be executed via ink signature or electronic mark and the executed signature pages may be delivered using pdf or similar file type transmitted via electronic mail, cloud-based server, e-signature technology or other similar electronic means. Further, the Parties acknowledge and agree that the original of this Agreement, including the signature page, may be scanned and stored in a computer database or similar device, and that any printout or other output readable by sight, the reproduction of which is shown to accurately reproduce the original of this Agreement, may be used for any purpose as if it were the original, including proof of the content of the original writing.

[Remainder of page intentionally blank – signatures follow]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized officers on the date first appearing above.

XXXXXXXXXXXXXXXXXXXXX (Contractor)

CITY OF WESTMINSTER (City)

By: 
Signature

By: _____
Signature

KARA HOCKE
Printed Name

Printed Name

MEMBER
Title

Title

ATTEST:

ATTEST:

Approved as to legal form and content:

By: _____
City Attorney's Office