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# MEMORANDUM

To: City Council -- Parks, Arts and Culture Committee (PACC)

From: David G. White

Date: October 2, 2011

Re: Moran Development Agreements

Attached are scans of the draft development agreements with the two prospective tenants of the Moran Center: Ice Factor and The Lake Champlain Community Sailing Center. Both of these drafts have had confidential portions deleted (redacted) where the premature disclosure of the information might materially harm the City's negotiating position.

The Ice Factor agreement is essentially the same as what we discussed at the most recent PACC meeting on September 21, 2011. The Sailing Center draft includes substantially the same business terms as the outline we discussed at the prior PACC meeting on August 17, 2011, but it has now been expanded from an outline into a full draft agreement.

Both of these drafts are still being reviewed by the two tenants and their respective advisors, thus they remain subject to change. Nonetheless, these two drafts are nearing finality and contain most of the key provisions I expect in the final versions.

Among the key provisions:

- The tenants are responsible for financing their own fit-up, start-up and other business costs. The City will not provide any financing to the tenants.

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- The City is responsible for financing the development of the Moran Center.
- Upon execution of the agreements both tenants must pay their share of project planning costs as specified in the earlier Memorandums of Understanding.
- Once Moran is completed and open, the tenants are obligated to pay their pro-rata share of all costs to operate Moran as well as all operating costs directly attributable to them.
- The City is responsible for paying the costs of operating the parks facilities, access drives, parking lots, community rooms and the public viewing terrace, along with a pro-rata share of the other Moran operating costs.
- The City has several key contingencies that allow it to terminate the agreement if they are triggered. These include if construction bids come in too high or if the City fails to obtain sufficient financing (with affordable terms) to complete the project.

Two of the key provisions that protect the City and provide substantial guarantees of the tenants' commitment and financial capacity to fulfill their obligations are:

- Both tenants are required to provide a substantial "supplemental good faith deposit" before the City begins to prepare for closing on its financing, including New Market Tax Credits and Tax Increment Financing.
- Both tenants are obligated to participate in the New Market Tax Credit Financing such that sufficient funds for their start-up and fit-up costs will be committed to the project at the same time that the City closes on its financing and before the City commences construction on Moran.

Of course, there is much more detail in the drafts, but the foregoing are at least some of the more significant provisions.

I am happy to discuss any of the redacted elements with City Council members so long as those discussions remain confidential until the prospective tenants have completed their reviews and we have reached agreement on the terms (subject, of course, to the City Council approving the agreements) and the City Council is ready to act on the agreements.

**MORAN CENTER AT BURLINGTON'S WATERFRONT PARK**
**DEVELOPMENT AGREEMENT**
**AND**
**OUTLINE of BUSINESS TERMS**
**To Be Incorporated Into a**
**LEASE AGREEMENT**

This Development Agreement ("Agreement") made this____ day of _____, 2011, by and between the City of Burlington, a Vermont municipal corporation ("City" or "Landlord"), and Ice Factor (Burlington), Inc., a Vermont corporation, [comment: need correct corporate entity] ("Ice Factor" or "Tenant");

WITNESSETH

WHEREAS, the voters of Burlington, Vermont have approved an Advisory Ballot authorizing City, as the developer, to redevelop the so-called Moran Plant in a manner consistent with the plan for redevelopment as revised by City's Community and Economic Development Office ("CEDO"); and

WHEREAS, City and Ice Factor, and another prospective tenant, Lake Champlain Community Sailing Center, are all cooperating in order to realize the redevelopment of the Moran Plant and surrounding lands (the "Project"); and

WHEREAS, Ice Factor has been proposed in CEDO's plan, and is committed to being a tenant that will occupy leased space at the Project; and

WHEREAS, it is in the best interest of both City, as developer and landlord, and Ice Factor, as a committed prospective tenant, that a comprehensive agreement be reached which will provide to both entities a framework to develop, construct and occupy the Project; and

WHEREAS, in order for City and Ice Factor to move forward to a fully permitted project, said parties entered into a Memorandum of Understanding and Agreement on October 28, 2008 which memorialized their understanding and agreement as to roles, responsibilities, payments and payment schedules; and

WHEREAS, since the execution of said Memorandum of Understanding and Agreement, work on the Project with regard to design and construction plans as well as the financial structure for the Project have all been developed to a point where the parties are now able to execute this Agreement to undertake the Project.

NOW THEREFORE, IT IS AGREED by and between City and Ice Factor as follows:

I. **Project Description.** The parties understand and agree to proceed in furtherance of City's stated principles for the Project which include:

1) Creating year round use.
2) Creating and extending elements of the Waterfront Park.
3) Minimizing undue traffic and parking issues.
4) Providing opportunity for new public and private partnerships.
5) Utilizing the existing building shell where cost-effective.
6) Retaining historical elements when possible.
7) Generating income for operations and maintenance.
8) Keeping development costs reasonable.
9) Utilizing the highest standards in energy conservation and green building design.

**II. City's Responsibilities.** Except as specifically set forth in this Section II below, City, by itself or through its assigns or designees, will be responsible for:

1) Maintaining control of the property for the Project.
2) Acting as a liaison for and between city departments, the prospective tenants, consultants, contractors and the community.
3) Applying for and maintaining in full force and effect any and all governmental permits and approvals required for the construction of the Project. The Landlord or its assigns or designees will take all reasonable steps to apply for all zoning permits for the Project. Tenant will be responsible for obtaining all construction permits (including building, life safety, plumbing and electrical permits) required for Tenant Fit-Up (as defined below).
4) Negotiating and causing to be executed in the name and on behalf of the Project agreements for architectural, engineering, testing and consulting services for the Project. The terms of such contracts shall be within City's sole discretion. City shall be responsible for managing the design process and having prepared for the Project all plans, designs, specifications, bid documents and similar documents. Upon request by Tenant, City will provide Tenant with copies of all documents relevant to design and construction relative to or impacting upon the Premises. City will consider and seek input from Tenant regarding construction and design, with final determination of design of the items to be constructed by City and construction residing with City, in its sole discretion.

5) Seeking construction bids for Landlord's Work and selecting any and all construction contractors in its sole discretion. The terms of such bid documents and construction contracts shall be within City's sole discretion.

6) Establishing and implementing administrative and financial plans and controls that it deems necessary for the design, construction and operation of the Project, including but not limited to:

   a) Coordination and administration of the architect, the general contractor and other contractors, professionals and consultants employed in connection with the design and development of the Project.

   b) Administration of any construction contracts on behalf of the Project excluding any construction for which Tenant is responsible.

   c) Developing, coordinating and implementing the project financing, including the review and undertaking with any lender, grant or tax credit financing for the development of the Project.

   d) Approval of all requests for payments under any architectural agreement or general contractor's agreement.

   e) Establishing and maintaining bookkeeping and other financial systems and records for operation of the Project that segregate all income and expense for the operation of the Project into separate and discrete bookkeeping accounts from any and all other entities or operations.

7) Managing the construction process, including scheduling and facilitating project meetings during the construction process. City will provide reasonable notice and information to, and receive input from Ice Factor

throughout the process in such manner as is consistent with all other provisions set out herein.

8) Participating cooperatively in Project meetings during the design and construction process.

9) Preparation of the Lease with Ice Factor and any leases for use of space in the Project with any other person.

10) Supervising the management and maintenance of the Project, and performing the services and carrying out the responsibilities with respect to the Project as described herein, and such additional duties as are reasonably within the general scope of such services and responsibilities.

11) Maintaining and monitoring the Project grounds and facility during the design and construction of the Project for compliance with this Agreement.

**III. Tenant's Responsibilities.** Ice Factor agrees to undertake the following responsibilities and obligations:

1) To cooperate with City, and its assigns or designees, and to participate cooperatively in Project meetings during the design and construction process for the Project.

2) To cooperate with City (including its assigns and designees), to ensure that necessary permits are secured for the Project.

3) To obtain all financing necessary and appropriate for Tenant's Work (as defined below) as well as for start-up costs and ongoing costs for operating its business.

4) To provide such documentation, before and after closing, as may be required for the purposes of Tenant's participation in New Market Tax Credits ("NMTC"), Rehabilitation Investment Tax Credits ("RITC") and other Project financing.

5) To comply with all terms and conditions applicable to Tenant or its Premises contained in (a) any governmental permit or approval required or obtained for the construction and operation of the Project, (b) any surety bonds or other similar guaranties (e.g., completion guaranties) obtained in connection with the Project, (c) any other applicable Project documents, or (d) any applicable law, order or regulation. Tenant will be responsible for any obligations under any zoning, land use or other permits applicable to the Premises.

6) To coordinate and administer the design and construction of Tenant Fit-Up and other work required by Tenant. Tenant is responsible, subject to City's review and approval, for conducting and managing the design and construction requirements of Tenant Fit-Up, including developing necessary bid documents and construction plans as well as securing any additional permits relative to the fit-up.

7) To keep City fully informed of the progress of the design and construction of Premises on a regular basis or as may be requested by City.

8) As requested to do so by City, Tenant shall prepare and distribute to City (a) a critical path schedule and periodic updates thereto to reflect material changes, (b) other design or construction cost estimates as required by

City, and (c) financial accounting reports, including monthly progress reports on the quality, progress and cost of construction.

9) Prior to any construction or fit-up within Premises, to provide evidence of builder's risk and liability insurance in amounts requested by City. Tenant shall assist City in obtaining, maintaining, and complying with insurance coverage for the Project and shall not use or operate any business on the Premises in a manner that would cause cancellation of insurance or prevent City from obtaining insurance on commercially reasonable terms.

10) Tenant shall comply and assist City to comply with all legal requirements of all governmental authorities having jurisdiction over the Project.

11) Subsequent to opening for business at the Project, to continuously operate its business on the Premises during the term of the Lease not less than eight hours per day, five days per week, national and state holidays excluded, and excluding force majeure or "acts of God".

12) To promptly commence and complete Tenant Fit-Up after City gives Tenant notice of substantial completion of Landlord's Work on the area of Tenant Fit-Up.

13) To indemnify, and save City harmless from, all amounts paid by City for all loss, cost, damage, liability, and expense, including reasonable attorneys' fees and court costs, incurred in enforcing any obligation of Tenant or curing any default by Tenant or for any claims arising under or through the Tenant with respect to the Tenant Fit-Up, Tenant's Work, or its use or possession of the Premises.

14) Upon execution of this Development Agreement, Ice Factor will pay City a non-refundable $53,000 payment for its share of pre-development costs as specified in the Memorandum of Understanding dated October 28, 2008.

## IV. Intent to Proceed.

1) City is responsible for preparing a plan for project financing sufficient for development of Project, exclusive of financing for Tenant's Work and Tenant's capital expenses, start-up and operating costs which shall be the sole responsibility of Tenant. City may use such financing sources, structures and methods as City may deem appropriate in City's sole discretion.

2) City contemplates use of NMTC to generate equity investment in the Project. Tenant shall participate in the NMTC financing as specified below. Such participation shall consist of Tenant providing funds to a so-called NMTC Investment Fund (the "Investment Fund") to be established for the Project.

3) Between thirty and ninety days prior to the first closing on City's Project Financing, City will issue to Tenant a written Notice of Intent to Proceed ("NIP"). City shall not issue a NIP until and unless it has sufficient financing arranged to complete its portion of the Project substantially as planned. Tenant shall have ten days in which to either agree to the terms of the NIP, or indicate that it is not prepared to proceed and provide the specific reasons requiring any delay or rescheduling of the NMTC closing.

The NIP shall include (a) a plan and schedule for Tenant's use of its share of the Investment Fund, (b) provisions requiring Tenant to cover for contingencies including construction costs overruns and change orders, and (c) provisions for Tenant to forfeit its interest in the Investment Fund and the Project if Tenant fails to complete Tenant's work.

4) Upon Tenant's acceptance of the NIP, Tenant shall make a supplemental good faith deposit to City in the amount of _____ (the "Supplemental Good Faith Deposit"). The Supplemental Good Faith Deposit may be in the form of cash or a Letter of Credit from a reputable financial entity acceptable to City in its sole discretion. If the Supplemental Good Faith Deposit is made in cash it shall be placed in an escrow account. If City fails to close in a timely manner on its financing sufficient to complete the Project, the supplemental deposit will be returned by the escrow agent to Tenant. If Tenant participates in the NMTC closing at a dollar value not less than $_____, the amount, if any, of the Supplemental Good Faith Deposit in escrow shall be included in the amount of money provided by Tenant at the NMTC closing, which amount, including the amount in escrow if any, shall be deposited into the Investment Fund. If Tenant does not participate in such closing in at least the amount of $_____, Tenant shall forfeit the Supplemental Good Faith Deposit to City and this Agreement shall terminate.

5) City shall cause construction to commence promptly following the NMTC closing.

6) Tenant may draw from the Investment Fund to pay for Tenant's Work, capital expenses, and other start-up and operating costs pursuant to a plan and schedule included in the NIP.

**V.** **Lease.** The parties agree to negotiate in good faith a lease agreement incorporating the following terms and conditions:

1) Premises:

a) Interior space totaling approximately 16,969 sq ft as follows:

i. Approx. 2,293 sq ft located generally in the middle portion of the first floor.

ii. Approx. 573 sq ft located in the so-called skate pavilion.

iii. Approx. 10,712 sq ft consisting of the entire rentable area of the second floor.

iv. Approx. 3,391 sq ft consisting of the entire rentable area of the third floor.

b) Exterior space consisting of:

i. An outdoor roof deck generally located at the north-west corner on the second floor, extending from the Moran building over the skate pavilion.

ii. An outdoor roof deck located generally at the south-east corner of the third floor.

iii. Use of the area above the single story portion of the building located generally on the north side of the building for an outdoor aerial ropes course.

iv. Seasonal wintertime use of the City's splash park as an ice skating rink commencing on <date> each year and ending on <date> each year. (This term may be addressed in a separate operating contract).

2) Guarantor: To Be Determined. Depending on the financial strength of the Tenant entity, an external guarantor of Tenant's obligations or other security therefor may be required.

3) Use: Ice Factor may use the premises for recreational use as a family adventure and exercise center, with activities such as rock climbing, ice climbing, exercise facilities, a soft play area, lazer tag, an aerial ropes course, one or more restaurants (only allowed as secondary uses), retail shop (only allowed as secondary use) and similar activities. No use shall be allowed that would be prohibited for properties financed by NMTC including, for example, massage parlors, hot tub facilities, tanning salons, and sales of alcohol for off-site consumption.

4) Initial Term: Thirty years.

5) Renewal Term: Up to Thirty (30) years – terms to be negotiated at time of renewal. Further renewal is subject to agreement between Landlord and Tenant and further subject to any applicable laws and regulations then in effect.

6) Occupancy: Ice Factor will take occupancy upon notification by City of substantial completion of landlord's work. "Substantial Completion" means that Landlord's Work relative to Premises is completed, ready for Tenant to commence Tenant Fit-Up, notwithstanding any minor so-called "punch list" items remaining to be completed by Landlord that do not materially interfere with Tenant's ability to commence Tenant Fit-Up. Notwithstanding the foregoing, Tenant may request entry to commence Tenant's Fit-Up prior to Substantial Completion of Landlord's Work. If in Landlord's sole judgment such early commencement of Tenant's Fit-Up may be done without material interference with completion of Landlord's Work, Landlord may allow such early entry. <redacted>

7) Rent Commencement: Tenant shall pay rent commencing on the day it opens for business in Premises, or ninety days after occupancy of Premises, whichever is earlier (the "Rent Commencement Date").

8) Initial Rent: Tenant's initial rent shall be $_____ per month, provided Tenant provides at least $_____million into the NMTC financing structure and spends not less than $_____(which is included in the $_____ million) on Qualified Rehabilitation Expenses. If Tenant fails to satisfy such conditions, Tenant's rent will be determined as follows: Tenant's initial monthly rent shall equal the amount of equal monthly payments that would be charged at a fixed rate of 7.75% for a mortgage in the amount of the Net Rent Basis amortized over twenty years. Tenant's Net Rent Basis shall be $_____ less the amount of net (after all associated

transaction costs are paid) tax credit equity generated by the value of Tenant's participation in NMTC and RITC.

9) Rent Adjustments: On the fifth anniversary of the term and every five years thereafter, Tenant's rent shall be adjusted to the higher of:

   a) The rental rate during the previous five year period; or

   b) The rental rate paid during the previous five years increased by the same percentage as the increase in the Consumer Price Index Northeast Urban (CPI-U) over the quinquennium between the three months prior to the commencement of the previous five year period and three months prior to the end of the previous five year period.

10) NMTC Asset Management Fee. Ice Factor will pay a pro rata share of any and all NMTC Asset Management Fees assessed by the NMTC Allocatee(s) involved with the NMTC financing. Ice Factor's pro rata share of such fees shall bear the same proportionate relationship to the total of such fees as Ice Factor's investment into the NMTC financing structure bears to the total NMTC financing. The parties currently estimate that for an investment of $_____ million Tenant's share will be approximately ____% of the total of such fees. For each of the seven year NMTC holding period, the parties estimate Ice Factor's annual Asset Management Fee to be approximately $_____. This fee will cease after the expiration of applicable holding periods required for NMTC.

11) Repairs and Maintenance.

a) Common Area Maintenance. Tenant acknowledges and agrees that during the period of time when the Project is owned by the new corporate entity to be established to own the Project for NMTC purposes, that entity may contract with City for City to handle all management and maintenance of the Project. In such event, City shall be deemed to be the Landlord for the purposes of this section. Landlord shall be responsible for providing, either directly through its own employees or through third party contractors, all common area maintenance, including upkeep, repairs and replacements (if necessary) of the roof, and underlying structure supporting the roof of the Building (to include maintaining a weather-tight watertight condition at all times); all exterior walls and other structural walls, columns and beams; all utility lines and conduits serving the Premises (from the point of connection at or within the Premises to the public utility mains or supply points); the heating, ventilation and air conditioning system(s) ("HVAC") except those solely serving Tenant; elevators, sprinklers and other systems and equipment serving more than one tenant; the exterior of the building, including, without limitation, the walls, common exterior doors and windows (but not those solely serving Tenant); underground/under-slab systems (including sprinkler and sewer); and exterior lighting, and exterior grounds; janitorial and cleaning services, rubbish removal, snow removal, landscape maintenance, painting, and other services

customarily provided by landlords in multi-tenant commercial properties.

b) City's Maintenance. City will have full responsibility, at its sole expense, for maintaining the public park facilities located outside of the area outlined in red on Exhibit ___, including the relocated recreation path, splash park, skate park and other lawn and park areas on the property except to the extent these grounds are used by tenants, such as the Ice Factor's use of the splash park for skating or the Sailing Center's use of the path between their storage area and launch area. City will pay all costs of maintaining extended Lake Street, with its on-street parking, as well as the enlarged parking lot south of the Project. City will also be responsible at its sole expense for all operations and maintenance of the two community rooms (located on the fourth and sixth floors) and the public viewing terrace (located on the fourth floor) of the main Project building.

c) Tenant's Maintenance. Tenant shall at all times during Tenant's occupancy of the Premises, maintain the Premises in good order, condition and repair, do all interior decorating, do all necessary painting, and make all repairs other than those specifically listed as Landlord's responsibility. Further, Tenant will maintain, repair and replace glass and windows, the air conditioning, heating, plumbing, electrical and hot water systems, which are located within the Premises or which solely service the Premises whether located within or without

said Premises. Tenant will keep in force a maintenance contract covering routine servicing and repairs of all HVAC equipment for which it is responsible and will file a copy of said contract with Landlord annually. At the expiration or the termination of the Lease, Tenant will turn back the Premises in a state of good repair, ordinary wear, tear and exhaustion excepted.

12) Operating Costs. Ice Factor will pay a pro rata share of operating costs of Project within the area outlined in red on Exhibit __. Operating costs shall include, but are not limited to, all expenses incurred by Landlord for common area maintenance, insurance of the property, common area utilities, replacement reserves, management fees and security. City's two community rooms (located on the fourth and sixth floors) and the public viewing terrace located on the fourth floor of the main Project building shall not be considered common areas. Ice Factor's pro rata share will be based on interior rentable area within the main Project building. The current estimate of Ice Factor's share of annual operating costs for the Project (common area maintenance, etc.) for the first year is approximately $_____. Operating costs due under this Section shall not include the costs for any exterior yard areas or any separate building constructed by Tenant. Ice Factor will pay at its sole expense, all costs associated with use of the splash park as a seasonal ice skating facility. Such costs include, but are not necessarily limited to costs to set up, operate, maintain, take down and repair any and all damage caused by the ice skating facilities and associated appurtenances. Ice Factor will pay, at

its sole cost all expenses associated with operating and maintaining the service elevator and stairwell which solely serve Ice Factor's space on the second and third floors.

13) Tenant will pay its share of operating costs monthly based on one-twelfth of the estimate of costs by City in its sole discretion for each year. At the end of the year actual costs will be reconciled to the estimate. Tenant will pay immediately any shortfall or in the event of having overpaid, Tenant will receive a credit against the revised estimated costs for the next year.

Landlord will competitively bid all services to be provided by third party contractors. Landlord will use the low bidder unless in Landlord's reasonable judgment there are extenuating factors not to do so. Such factors may include, but are not limited to past experience with the bidder(s), the quality of the work to be provided or manner or timing proposed of the work, reputation of the bidder(s) and similar factors.

In the event Landlord uses its own staff to provide some or all maintenance services, it shall not charge the Project any costs in excess of commercially competitive rates. In the event Tenant in its reasonable judgment believes Landlord is violating this provision, Tenant shall have the right to require Landlord to seek third party bids or cost estimates for the contested service(s) to verify whether City is charging commercially competitive rates. Tenant shall not use this right in a manner that is arbitrary or capricious or has the

effect of harassing Landlord. The details of how this right may be exercised and its limits shall be negotiated as part of the Lease agreement between the parties.

14) Property Taxes. Tenant shall pay real estate and personal property taxes associated with its Premises beginning at Occupancy.

15) Legal Fees: Landlord and Tenant will be responsible for their respective legal and professional fees in preparation of the lease documentation.

16) Other Tenant Costs. Tenant shall be responsible at its sole expense for all costs of Tenant's Work (as defined below), as well as for all costs for installing fixtures, equipment and other startup and operating costs for its business. Tenant will keep the Premises and the Project free of liens, excluding any construction related liens secured by its owned improvements.

17) Assignment and Subletting. Ice Factor may assign or sublet the Premises or any portion thereof subject to City's prior approval which will not be unreasonably withheld. Any proposed assignment or subletting must a) be consistent with the public trust doctrine, b) be an allowed use under City zoning as may be in effect at the time, c) be family oriented, d) create no conflict with other tenants, e) the proposed assignee or sub-tenant shall have adequate financial capacity and strength, f) will cause no nuisance, g) will cause no conflict regarding compliance with financing covenants, including but not limited to financing covenants related to Landlord's bond or other indebtedness, lease financing, NMTC's and RITC's and use of tax increment financing, and h) receive any and all required governmental permits and

approvals, including, but not limited to zoning, building and water and waster water disposal. Any assignment or subletting of the lease or portions thereof shall not relieve Tenant of its responsibilities and obligations under the terms of the lease.

18) Alterations. Structural alterations by Tenant shall require landlord's written consent which it may or may not give in its sole discretion. Non-structural alterations within the premises will require Landlord's written consent which will not be unreasonably withheld or delayed.

19) Intellectual Property. All designs, models, drawings copyright works and intellectual property created, produced or contributed by Tenant will at all times remain the property of Tenant.

20) <redacted>

**VI. Landlord's Work:**

1) Main Project (Moran) Building. Each tenant space within the main Project building will be provided as an empty shell without finishes. This will include a structurally sound building with all basic utilities, exterior finishes, rough plumbing and rough HVAC to each space, unfinished concrete floors, minimum lighting and minimum electric to meet shell building temporary code requirements, and similar. Space as provided to each tenant includes the following:

   a) Raw concrete floors unfinished and may require finished floor material prepping.

b) Exterior walls that are insulated to VT Energy Standards but without interior fixed finish.

c) Interior core "Demising" walls (between tenant spaces, not within tenant spaces) with unfinished gypsum sheathing wall board.

d) Insulated glass windows for the exterior shell meeting VT Energy Standards per design elevations.

e) Basic entry doors and limited exterior doors to meet code requirements for egress.

f) No finished ceilings within lease space. Structural members and MEP systems are open to above.

g) Building core mechanical systems sized to accommodate typical office tenant fit-up requirements.

h) Electrical infrastructure sized to accommodate typical office tenant fit-up requirements.

i) Automatic sprinkler system provided throughout with a standard layout. No complex fire suppression systems are included.

j) Air conditioning through lake water cooling will be provided.

2) Site. Landlord shall construct and install all site work per the construction plans for the Project and Waterfront North.

**VII. Tenant's Work:**

1) Main Project. Subject to Landlord's review and approval, Tenant is responsible at its sole cost for designing, installing and constructing fit-up

("Tenant Fit-Up") of its leased space within the main Project building to its needs, including, but not necessarily limited to:

a) Full lighting, electrical, communications and IT to support Tenant's program requirements.

b) HVAC distribution within Tenant's premises.

c) Fit-up of the leased space including interior partitions and fixed finishes (floors, walls, ceilings).

d) Plumbing systems within Tenant's premises, including bathrooms and sinks.

e) Any and all specialized fit-up, fixtures and equipment required for Tenant's use.

f) Any tenant program spaces requiring additional items that are not "Office Standard" fit-up shall be brought to the Landlord's attention.

2) Tenant's work shall be completed promptly, in accordance with all applicable building codes and permits, of high quality materials (consistent with those installed by Landlord) and in compliance with all applicable codes and installed in a good and workmanlike manner.

3) Tenant shall require all contractors and subcontractors to carry worker's compensation insurance and other such insurances as required by Landlord in its sole discretion.

**VIII. Mediation.** The parties shall endeavor to resolve any disputes related to this Agreement by direct discussions or agreed upon mediation. Any mediation

shall occur with a mutually agreed upon independent mediator to be paid for in equal shares by City and any or all parties involved in the mediation.

**IX. Contingencies:**

1) Contingencies of Landlord. Landlord shall have no obligations to Tenant under this Agreement if any of the following conditions exist:

   a) The Landlord is unable to complete the sale of bonds or other form of indebtedness or tax credit financing on such terms and conditions as it shall deem necessary or desirable in its sole discretion.

   b) If City is unable to utilize incremental tax revenues from its waterfront tax increment financing district or such incremental revenues, after projected payment of debt service on all the outstanding bonds or other financial obligations, is projected to be insufficient to pay principal and interest on Landlord's debt for the Project when due.

   c) Project Construction Bids – Landlord fails to receive an acceptable construction bid for Landlord's work on the Project site from a qualified and acceptable contractor in an amount acceptable to Landlord in its discretion.

   d) Waterfront North Construction Bids – Landlord fails to receive an acceptable construction bid for the so-called Waterfront North project from a qualified and acceptable contractor in an amount acceptable to Landlord in its discretion.

e) Permits – Landlord fails to receive all required environmental, land use and other governmental permits in a form acceptable to Landlord in its sole discretion without appeal.

f) City Council Approval – Landlord fails to receive approval from City Council for all Development Agreements and Lease Agreements.

g) There has been, or there occurs before the payment by Tenant of the Supplemental Good Faith Deposit, a material adverse change in the financial condition of Tenant (and, if applicable, any guarantor) which change(s) make it substantially more likely, in the exclusive judgment of Landlord, that Tenant will be unable to fulfill its covenants and obligations under this Agreement, the Lease, and the other project documents.

2) Contingencies of Tenant. Tenant's obligations hereunder are contingent on:

a) City issuing to Tenant by _____ a NIP.

b) _____

c) _____

**X.** **Termination.** In the event any contingencies are not satisfied, this Agreement shall terminate.

**XI.** **Force Majeure.** Neither City nor the Tenant shall be deemed in violation of this Agreement if it is prevented from performing any obligations hereunder by reason of strikes, boycotts, labor disputes, acts of God, acts of the public enemy, acts of superior governmental authority, severe weather conditions,

riots, rebellion, sabotage, or any other circumstances for which it is not responsible or which is not under its control, and the party experiencing force majeure gives written notice to the other party identifying the nature of such force majeure, and when it began. The party experiencing force majeure shall take immediate action to attempt to remove such causes of force majeure as may occur from time to time and its operations under this Agreement shall be resumed immediately after such cause has been removed, provided that neither party shall be required to settle any labor dispute except upon terms that party deems acceptable. The suspension of any obligations under this section shall not cause the term of this Agreement to be extended and shall not affect any rights accrued under this Agreement prior to the occurrence of the force majeure. The party giving notice of the force majeure shall also give notice of its cessation.

**XII. Assignment.** This Agreement shall not be assigned by either party without the advance written approval of the other at the sole discretion of the other party. Ice Factor acknowledges that as part of its plan for financing the Project, City intends to transfer ownership and management of the Project to a new corporate entity to be established. Ice Factor hereby agrees to said transfer of ownership and to assignment of this Agreement and City's responsibilities hereunder to said new corporate entity.

**XIII. Binding Effect.** This Agreement shall be binding on and benefit the parties and permitted successors and assigns.

**XIV. Regulatory Review.** This Agreement shall not be read in any manner as altering, affecting or guaranteeing any particular outcome with respect to required regulatory review before City's regulatory agencies such as the Design Advisory Board or Development Review Board.

**XV. Amendments.** This Agreement may not be varied in its terms by any oral agreement, representation or otherwise, except by an instrument in writing of subsequent date hereto executed by both parties by their respective officers or other persons duly authorized.

**XVI. Severability.** In the event any term, covenant or condition herein contained is held to be invalid by any court of competent jurisdiction, such invalidity shall not affect any other term, covenant or condition herein contained, provided that such invalidity does not materially prejudice either party in their respective rights and obligations contained in the valid terms, covenant or conditions hereof.

**XVII. Entire Agreement.** This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes any prior agreements or representations, oral or written, on the same subject.

**XVIII. Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the State of Vermont. The language in all parts of this Agreement shall in all cases be construed simply according to its fair meaning and not strictly construed against either party, as it is agreed that both parties participated in the drafting hereof.

**XIX. Subsequent Agreements.** The parties commit to making a good faith effort to move forward the redevelopment of the Project consistent with the responsibilities described in this Memorandum.

**XX. Notice.** Any notice or other communication from any party to the other pursuant to this Agreement shall be deemed sufficiently given or communicated if sent by first class mail, postage pre-paid and addressed to:

For City: Bob Kiss, Mayor
City of Burlington
City Hall
149 Church Street, Rm.
Burlington, VT 05401

CC: City Attorney

For Ice Factor:

IN WITNESS WHEREOF, this Agreement is executed by the duly authorized officers or representatives of City of Burlington and Ice Factor (Burlington), Inc. as of the day and date first above written.

THE CITY OF BURLINGTON

By: _____
Bob Kiss, Mayor
Duly Authorized Agent

STATE OF VERMONT
COUNTY of CHITTENDEN, SS.

At Burlington, in said County, on the ___ day of _____, 20011 personally appeared, Bob Kiss, Mayor of the City of Burlington and acknowledges this instrument by him, sealed and subscribed to be his free act and deed, and the free act and deed of the City of Burlington.

Before me,

_____
Notary Public:

My commission expires:

ICE FACTOR (BURLINGTON) INC.

By: _____
Duly Authorized Agent

STATE OF VERMONT
COUNTY OF CHITTENDEN, SS.

At Burlington, in said County, on the ___ day of _____, 2011, personally appeared, _____, Duly Authorized Agent of Ice Factor (Burlington), Inc., and acknowledges this instrument by him/her, sealed and subscribed to be his/her free act and deed, and the free act and deed of Ice Factor (Burlington), Inc..

Before me,

_____
Notary Public:
My commission expires: