

MEMORANDUM OF UNDERSTANDING AND AGREEMENT
FOR STORMWATER SYSTEM OPERATION AND MAINTENANCE

This Memorandum of Understanding and Agreement For Stormwater System Operation and Maintenance (“Agreement”) dated _____ is entered into by and between the **City of Burlington**, a Vermont Municipal Corporation, acting by and through its Department of Public Works (the “City”), and **BTC Mall Associates LLC**, a Delaware limited liability company (“Owner”) and its successors or assigns. Each is referred to individually as a “Party” and collectively as the “Parties.”

Background

A. The redevelopment (the “Project”) of the real property numbered 49 Church Street, Burlington, Vermont, which is improved with a retail shopping mall known as “Burlington Town Center”, and the real property numbered 75 Cherry Street, Burlington, which is improved with a parking garage (collectively, the “Property”, which Owner acquired by Special Warranty Deed dated December 16, 2013 and recorded in Volume 1239 at Page 621 of the City of Burlington Land Records), included the construction of a stormwater system consisting of catch basins with sumps, manholes, underground piping, a pre-treatment forebay, underground storage and attenuation tanks, and sand filters, all of which discharge stormwater by a controlled outlet and bypass structure to the municipal storm sewer system that discharges to Lake Champlain (the “Stormwater System”).

B. The Project received authorization to discharge stormwater via the Stormwater System in accordance with Vermont General Permit 3-9015 from the Vermont Agency of Natural Resources, Department of Environmental Conservation (the “Agency”) by Permit Number 7760-9015 issued on June 5, 2017 (the “Permit”), which requires the annual inspection and certification of the Stormwater System and the payment of annual fees.

C. Approximately ____ sq. ft. of impervious surface area is drained by the Stormwater System.

D. A portion of the Project consists of the construction of new streets and sidewalks that will be transferred to the City. It is the City’s policy to assume operation and maintenance responsibility for stormwater systems within the right-of-way of accepted city streets. Upon the City’s acceptance of such streets and sidewalks, the City will own ____ sq. ft., or ____%, of the impervious surface area drained by the Stormwater System and Owner will own ____ sq. ft., or ____%, of such impervious surface area.

E. In connection with Owner’s conveyance of the streets and sidewalks to the City, the City has agreed to become a co-permittee of the Permit on the condition that Owner enter into this Agreement in order for the Parties to agree upon their respective obligations with respect to the maintenance, repair and replacement of the Stormwater System and with respect to their obligations as co-permittees of the Permit.

Now, therefore, in consideration of the foregoing and other good and valuable consideration, and meaning and intending to be bound hereby, the City and Owner hereby covenant and agree as follows:

1. The Parties agree that they will be co-permittees under the Permit.
2. Owner shall be solely responsible for the maintenance, repair and replacement of the underground piping, pre-treatment forebay, sumps, underground storage and attenuation tanks, and sand filters that comprise elements of the Stormwater System, including any and all costs related thereto, and Owner shall be solely responsible for the maintenance of all components of the Stormwater System located on property owned by Owner (including the Property), including any and all costs related thereto.

3. The City shall be solely responsible for the maintenance (cleaning), repair and replacement of the catch basins and manholes located within the right-of-way for Pine Street or within other land or easements owned by the City that comprise elements of the Stormwater System, including any and all costs related thereto. The City will not seek to recover from the Owner any costs incurred by the City to maintain such catch basins and manholes other than the standard stormwater fee generally assessed by the City to owners of property with impervious surfaces.

4. Owner shall be responsible for the payment of all fees and costs to the Agency arising out of the Permit, including but not limited to permit application fees, renewal fees, administrative processing fees, fines or penalties assessed by the Agency under the Permit. Notwithstanding the foregoing, in accordance with its pro-rata share of impervious surface area covered by the Permit, Owner shall pay ___% of the annual operating fee required by the Permit, and the City shall pay ___% of the annual operating fee required by the Permit. Owner shall initially pay the annual operating fee to the Agency and the City shall reimburse Owner for the City's share of the annual operating fee within thirty (30) days of its receipt of an invoice therefor together with backup documentation substantiating the invoiced amount.

5. Owner shall, on behalf of both Parties, manage and coordinate the Parties' compliance with the obligations of the Permit and the laws, rules and regulations pursuant to which the Permit has been issued, and Owner is hereby authorized, and Owner agrees, to do or cause to be done all matters required for Permit compliance on behalf of the Parties except as otherwise set forth in this Agreement. Without limiting the foregoing, Owner shall engage a licensed and qualified engineer to perform the inspections required by the Permit, to file the reports required by the Permit and to file applications to renew the Permit prior to its expiration, and except as set forth in this Agreement shall engage such contractors as may be necessary to perform any maintenance or construction work that may be required for the Stormwater System to be in compliance with the requirements of the Permit and the laws, rules and regulations pursuant to which the Permit has been issued.

6. Each Party shall be responsible for performing any work resulting or arising from its negligence, willful misconduct, failure to abide by the Permit conditions or failure to comply with applicable law, and each Party shall be responsible for paying any fines or penalties which may be assessed against the Parties by the Agency resulting or arising from its negligence, willful misconduct, failure to abide by the Permit conditions or failure to comply with applicable law, provided that the City's liability under this provision is limited to the extent that compliance is the City's obligation or responsibility under this Agreement.

7. The Parties agree that conformance with any future changes to the Permit or amendments to the Permit shall be the responsibility of the Owner. If new or amended Permit requirements require changes, upgrades or alterations to the Stormwater System, Owner shall perform any such changes, upgrades or alterations to the Stormwater System, and the City agrees to work cooperatively with Owner so it can maintain Permit compliance and conform the Stormwater System to future conditions of the Permit or any Permit amendments. Notwithstanding the foregoing, so long as the City shall have agreed in advance to the scope of work, cost and manner of performance associated with any changes, upgrades or alterations to the Stormwater System required by the Permit or future amendments thereto, then each Party shall pay its share of the costs thereof in accordance with its pro-rata share of impervious surface area covered by the Permit, meaning that Owner shall pay ___% of the cost of such required changes, upgrades or alterations, and the City shall pay ___% of the cost of such required changes, upgrades or alterations. Owner shall initially pay the cost of such required changes, upgrades or alterations and the City shall reimburse Owner for the City's share of the cost within thirty (30) days of its receipt of an invoice therefor together with backup documentation substantiating the invoiced amount.

8. With regard to any claims for injury to or death of persons (including employees and agents of the Parties) or damage to property which are caused by or are claimed to have been caused by or arising from the maintenance, reinstallation, replacement, relocation, removal or maintenance of the Stormwater System,

each Party shall indemnify, defend, protect and save the other harmless from all such claims when caused in whole or in part by the negligence or willful misconduct of such Party, its employees, agents or contractors, except to the extent caused by the gross negligence or willful misconduct of the other Party, its employees, agents or contractors

9. This Agreement presumes that each Party will fully perform all of the conditions outlined above. If, after an inspection is completed, it is determined that repairs and/or maintenance are required, or if either Party asserts that the other is in breach of this Agreement for a failure to comply with a stated condition(s), then the first party shall give written notice to the second party of the breach with request for a written correction plan to be submitted within ten (10) business days of the original notice date. The second party shall submit a plan that includes the necessary work to be performed with a deadline for completion that takes unfavorable weather conditions into account. A failure to complete the planned correction(s) as outlined, shall be considered a default of the party's obligations under this Agreement. In the event of a failure by Owner to perform its maintenance responsibilities as noted above, the City may, if it determines that it is necessary, enter onto the Property in order to perform or complete the obligation that is in default. Owner agrees that the City shall have permission to enter onto the Property to perform the obligations, and to assess all costs of such completion to Owner, include reasonable attorney's fees and other costs.

10. This Agreement shall be effective until the expiration of the Permit, and shall be automatically renewed for the term of any successor permit. Any amendments to this Agreement must be in writing, signed by the party to be charged and acknowledged. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns, and shall run with title to the Property.

Signature Page to Follow

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first set forth above.

BTC Mall Associates LLC

By: BDM Associates LLC, Its Manager

Witness

By: _____
Name: Donald Sinex
Title: Manager

Date: _____

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

At Burlington, in said County and State, this ____ day of _____, 2017 personally appeared Donald Sinex, to me known, being the Manager of BDM Associates LLC, being the Manager of BTC Mall Associates LLC, and he acknowledged this instrument, by him signed, to be his free act and deed individually and on behalf of the entities on which he acted.

Before me _____
Notary Public
Commission Expires: 2/10/19

City of Burlington

Witness

By: _____
Name:
Title:

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

At Burlington, in said County and State, this ____ day of _____, 2017 personally appeared _____, to me known, being the _____ of the City of Burlington, and he acknowledged this instrument, by him signed, to be his free act and deed and the free act and deed of the City of Burlington.

Before me _____
Notary Public
Commission Expires: 2/10/19