

Prepared By and
After recording, return to:

Bruce L. Goldsmith
Dykema Gossett PLLC
4200 Commerce Ct., #300
Lisle, IL 60532

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RECAPTURE AGREEMENT

THIS RECAPTURE AGREEMENT is entered into this ____ day of _____, ____ (the "Effective Date"), between the City of Aurora, Illinois (hereinafter the "City"), and 88 Orchard TMG, LLC, an Illinois limited liability company (hereinafter referred to as the "Developer"). The City and the Developer shall be collectively referred to herein as "Parties" or individually as "Party."

WHEREAS, the Parties entered into a Development Agreement on _____, 2016, which was recorded on ____, 2016 as Document Number _____(the "Development Agreement"). The Development Agreement included the property described in the attached **Exhibit A** ("Subject Property"); and

WHEREAS, the Parties agreed in Article 4 of said Development Agreement to establish a recapture arrangement to reimburse Developer for constructing of the intersection improvements at the intersection of Sullivan Road and Deerpath Road ("Intersection Improvements) which benefits the Subject Property, as well as certain other properties (hereinafter referred to as the "Benefited Properties"); and

WHEREAS, the Parties are entering into this Agreement pursuant to: (i) the authority granted in Division 5 of Article 9 of the Illinois Municipal Code, 65 ILCS 5/9-5-1 and 5/9-5-2, and (ii) the City's general powers; and

WHEREAS, the Parties wish to agree upon the methods, timing and cost reimbursement to the Developer for that portion of the Intersection Improvements which benefits the Benefited Properties; and

WHEREAS, all statutory and ordinance requirements have been satisfied.

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein, the Parties hereto agree as follows:

PREAMBLES

1. That the representations and recitations set forth in the foregoing preambles are material to this Agreement and are hereby incorporated into and made a part of this Agreement as though they were fully set forth in Paragraph 1.

BENEFITED PROPERTIES

2. The Benefited Properties are depicted and legally described in **Exhibit B** attached hereto. Each parcel of real estate contained within the Benefited Properties is referred to herein individually as a “Benefited Parcel.” The City typically allocates the costs of such intersection improvement among the properties abutting the four corners of an intersection, with 25% of the cost attributed to each such owner. The owner of any Benefited Property shall be identified as a “Benefited Owner.”

RECAPTURE ITEMS

3. The Recapture Items include the following public improvements: (i) any acquisition of the real property on which the Developer constructed any widening of the intersection where the Intersection Improvements need to be installed; and (ii) the Intersection Improvements.

The Recapture Schedule, attached hereto as **Exhibit C**, identifies each Recapture Item and the actual cost to construct each Recapture Item, including the maintenance and repair costs required to obtain acceptance thereof by the City (“Actual Cost”). Developer has caused each of the Recapture Items to be constructed in compliance with the provisions of the Development Agreement and to be accepted and conveyed to the City in accordance with said Agreement and applicable ordinances of the City. The Recapture Schedule is comprised of the cost schedule dated_____, 2016, prepared by Jacob and Hefner, Developer’s engineers.

4. In the event that Developer incurs any additional costs in constructing said improvements, the City agrees to adjust the Recapture Schedule to add the additional costs, it being the intention of the Parties to reimburse the Developer for all additional costs incurred together with interest thereon.

RECAPTURE AMOUNTS

5. The Recapture Item(s) which the Corporate Authorities of the City have determined will benefit all Benefited Parcels, and the pro rata share of the Actual Cost or Adjusted Actual Cost, as the case may be, of each such Recapture Item to be allocated to each such Benefited Parcel are set forth in **Exhibit D** attached hereto (“Allocation Schedule”). The aggregate amount of the proportionate share of the Actual Costs or Adjusted Actual Costs, as the case may be, for each of the Recapture Items allocable to a Benefited Parcel is referred to herein as the “Recapture Expense”. Developer shall also be entitled to receive a service fee (“Service Fee”) of 6% of the Recapture Expense, to the extent permitted by law.

PAYMENT

6. At such time as a Benefited Owner, or its agent or representative, applies to the City for the first final plat of any portion of the Benefited Property (“subdivision approval”),

issuance of a building permit or otherwise applies for a permit for ingress or egress to all or any of the Recapture Items, whichever shall first occur, the City shall collect from such Benefited Owner, or its agent or representative, the Recapture Expense, plus accrued interest, and Service Fee owed hereunder by such Benefited Parcel. The City shall not issue to any Benefited Parcel subdivision approval, a building permit or connection permit until such Benefited Parcel has fully paid the Recapture Expense, plus accrued interest and Service Fee, owed by such Benefited Parcel under this Agreement.

7. At the time described in Section 6, the City shall assess against and collect from the Benefited Owner of a Benefited Property, or any portion thereof (other than the Subdivision), his successors and assigns, the Service Fee and Recapture Expense, plus accrued interest in the amount of five percent (5%) per annum, which interest shall not begin to accrue until the City has accepted the improvements representing the Recapture Items. However, the accrued interest shall only continue to accrue for a period of seven (7) years from the Effective Date. The Benefited Owner thereof shall pay, and the City shall collect from such Benefited Owner, or its agent or representative, the Recapture Expense, plus accrued interest and a Service Fee owed hereunder by such Benefited Property.

PAYMENT OF RECAPTURE EXPENSE

8. Each Recapture Expense, plus accrued interest and service fee, collected by the City pursuant to this Agreement shall be paid to Developer, or such other person or entity as Developer may direct by written notice to the City, within thirty (30) days following collection thereof by the City for that portion of the Recapture Items then completed. The City may assess and retain an amount not to exceed two percent (2%) in excess of the total amount collected for

each Benefited Property as the City's sole and exclusive fee for entering into and administering this Agreement ("Administration Fee").

JOINT RELEASE

9. If Developer, jointly with any Benefited Owner, sends a notice ("Joint Notice") to the City that they have installed the infrastructure and made provisions for payment thereof outside of the terms of this Recapture Agreement, then Developer shall release the City from any further obligations hereunder for each Recapture Item and Recapture Expense identified in the Joint Notice.

CITY'S OBLIGATION: INDEMNIFICATION OF CITY

10. A. It is understood and agreed that the City's obligation to reimburse Developer shall be limited to funds collected from the Benefited Owners as provided herein, and payments made hereunder shall be made solely out of said funds. This Agreement shall not be construed as creating any obligation upon the City to make payments from its general corporate funds or revenue.

B. The City and its officers, employees and agents shall make reasonable efforts to make the aforesaid collections of the Recapture Expense, plus accrued interest and Service Fee, for each Benefited Property but shall not be obligated to bring any suit to enforce the collection of same nor shall the City or any of its officials be liable in any manner for the failure to make such collections.

C. Developer agrees to hold the City, its officers, employees and agents, harmless from the unintentional failure to collect said funds from Benefited Owners. In any event, however, Developer may sue any Benefited Owner owing any Recapture Expense, plus accrued interest and Service Fee, hereunder for collection thereof, and in the event Developer initiates a

collection lawsuit, the City agrees to cooperate in Developer's collection attempts hereunder by allowing full and free access to the City's books and records pertaining to the development of the Benefited Property and the collection of any Recapture Expense therefore. In addition, if the City fails to collect said funds from Benefited Owners, and the Developer provides the City with notice of such failure, then the City agrees that it shall not issue any building permits or other permits for the development of the relevant Benefited Properties or approve any additional plat of subdivision for said parcels until all Recaptured Expenses, plus accrued interest and Service Fee, for said Benefited Properties have been paid.

CITY'S COLLECTION OF OTHER FEES AND CHARGES

11. Nothing contained in this Agreement shall limit or in any way affect the rights of the City to collect other fees and charges pursuant to the City's ordinances, resolutions, motions and policies. The Recapture Expense provided for herein for each Benefited Property is in addition to such other City fees and charges.

TERM OF AGREEMENT

12. The term of this Agreement shall remain in full force and effect until the first to occur of: (i) such time as the Developer has been fully reimbursed for that portion of the reimbursement attributable to the Benefited Properties as herein provided; or (ii) twenty (20) years from the date of this Agreement.

NOTICES

13. Any notice to be given or served hereunder or under any document or instrument executed pursuant hereto shall be in writing and shall be (i) delivered personally, with a receipt requested therefore; or (ii) sent by telecopy facsimile; or (iii) sent by a recognized overnight courier service; or (iv) delivered by United States registered or certified mail, return receipt

requested, postage prepaid. All notices shall be addressed to the Parties at their respective addresses set forth below, and the same shall be effective (a) upon receipt or refusal if delivered personally or by telecopy facsimile; (b) one (1) business day after depositing with such an overnight courier service or (c) two (2) business days after deposit in the mails, if mailed. A Party may change its address for receipt of notices by service of a notice of such change in accordance herewith. All notices by telecopy facsimile shall be subsequently confirmed by U.S. certified or registered mail.

If to the City:

City of Aurora
44 E. Downer Place
Aurora, Il 60507
Attn: Mayor

with a copy to:

City of Aurora
5. E. Downer Place
Aurora, Il 60507
Attn: Corporation Counsel

To the Developer:

Orchard 88 TMG, LLC
c/o the Missner Group
1700 W. Higgins Road
Des Plaines, Illinois
Attn: Barry Missner

with a copy to:

Dykema Gossett PLLC
4200 Commerce Court, Suite 300
Lisle, Illinois 60532
Attn: Bruce Goldsmith

SUCCESSORS IN INTEREST

14. This Agreement shall inure to the benefit of, and be binding upon, the successors in title of Developer, its successors, grantees, and assigns, and upon successor corporate authorities of the City and successor municipalities. Notwithstanding anything contained herein to the contrary, Developer may assign its rights and delegate its duties and obligations hereunder to the extent Developer assigns, transfers and conveys all its right, title and interest in and to the Property to a bona fide third party purchaser. No sale of the property, in whole or in part, shall affect, in and of itself, Developer's right to recapture the sums advanced by it.

ENFORCEMENT OF AGREEMENT

15. It is agreed that the Parties, at law or in equity, by suit, action, mandamus or other proceeding, may enforce or compel the performance of this Agreement. No action taken by either Party hereto pursuant to the provisions of this Paragraph or pursuant to the provisions of any other Paragraph of this Agreement shall be deemed to constitute an election of remedies and all remedies set forth in this Agreement shall be cumulative and non-exclusive of any other remedy either set forth herein or available to either party at law or in equity.

In the event of a material breach of this Agreement, the Parties agree that they shall give prompt written notice of such alleged breach and the party receiving such notice shall have thirty (30) days after receipt of such notice to correct such alleged breach, prior to the seeking of any remedy provided herein (plus any cure period).

If either Party to this Agreement shall fail to perform any of its obligations hereunder, and other Party shall have given written notice of the default of the defaulting Party, and the defaulting Party shall have failed to cure the default within thirty (30) days after the receipt of the default notice (provided, however, that said thirty (30) day period shall be extended if the

defaulting Party has initiated the cure of said default and is diligently proceeding to cure the same), then in addition to any and all other remedies that may be available, the Party affected by the default shall have the right (but not the obligation) to take such action as in its reasonable discretion shall be necessary to cure the default.

The failure of either Party to insist upon the strict and prompt performance of the terms, covenants, agreements and conditions herein contained, or any of them, upon the other Party imposed, shall not constitute or be construed as a waiver or relinquishment of such Party's right thereafter to enforce any such terms, covenants, agreements or conditions, but the same shall continue in full force and effect.

14. If any provision, clause, word or designation of this Agreement is held to be invalid by any court of competent jurisdiction, such provision, clause, word or designation shall be deemed to be excised from this Agreement and the invalidity thereof shall not affect any other provision, clause, word or designation contained herein. Notwithstanding the foregoing, if a court of competent jurisdiction determines by final order that the amount of the fees or interest payable hereunder exceeds the amount that may be recaptured by Developer under currently existing or subsequently enacted law, then such amount shall be automatically reduced to such amount as the court then determines would conform to such requirements of law so that the provision establishing the fees and interest payable may be given force and effect. No Party to this Agreement shall contest the validity or enforceability, or assert the invalidity or unenforceability, of any provision of this Agreement.

15. This Recapture Agreement shall be recorded with the recorder of deeds, against the Benefited Properties, after its execution by the Parties.

IN WITNESS WHEREOF, the Parties have hereunto set their hands on the day and year first written above.

Orchard 88 TMG, LLC

BY: _____

ITS: _____

City of Aurora:

SIGNED by the Mayor and City Clerk of the City of Aurora, Illinois, on this ____ day of _____, 2016.

Mayor

ATTEST:

City Clerk

EXHIBIT "A"

Legal Description of Subject Property

EXHIBIT “B”

Legal Description of the Benefited Properties

EXHIBIT “C”

Cost Schedule

(Attached Hereto)

EXHIBIT “D”

Allocation Schedule

(Attached Hereto)