

REAL ESTATE EXCHANGE AGREEMENT (A2021-53)

This Real Estate Exchange Agreement (“Agreement”), made and entered into this ____ day of September, 2021, by and between P&B Casey Farms, LLC, hereinafter referred to as “LLC,” and the City of Mitchell, South Dakota, hereinafter referred to as “the City.”

WITNESSETH:

WHEREAS, due to a proposed transfer of real property legally described as:

The East ½ of the Southeast ¼ of Section 32, Township 104 North, Range 60 West of the 5th P.M., except Irregular Tract 1, all in Davison County, South Dakota.

such property currently owned by LLC, the City became aware of a potential title error where the property borders Irregular Tract 1; and

WHEREAS, a plat was recorded with the Davison County Register of Deeds on December 29th, 1993, recorded in Book of Plats 14 on Page 118. Said plat depicts the creation of Lots 1, 2, and 3 along the former boundary between the above described real property and Irregular Tract 1. There are no records of this plat being formally approved, nor are there any records of any land transfers relative to the lots. Nevertheless, the intention appears to have been to have straightened the property line relative to the actual location of North Harmon Drive. To that end, it appears that Lot 1 and 3 would have been transferred to the City and Lot 2 would have been transferred by the City to the adjacent owner; and

WHEREAS North Harmon Drive has actually been located and in continuous use over the above described Lots 1 and 3 for more than 20 years and the adjacent landowner has used the above described Lot 2 for at least the same period; and

WHEREAS the parties acknowledge that the City has a statutory right in Lots 1 and 3 and there can be no claim of adverse possession against a municipality in regards to Lot 2. Nevertheless, the parties mutually desire to resolve this potential title issue by effectuating the transfer that was apparently intended without need for court action.

NOW, THEREFORE, in consideration of the mutual representations, warranties, and covenants set forth herein, and of other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties do agree as follows:

1. Conveyance.

On the terms and subject to the conditions set forth in this Agreement, LLC shall sell, convey, transfer, warrant, and assign to City, and City shall purchase, acquire, and assume from LLC, the above described Lots 1 and 3, together with all improvements thereon and all appurtenances attached thereto.

On the terms and subject to the conditions set forth in this Agreement, City shall sell, convey, transfer, warrant, and assign to LLC, and LLC shall purchase, acquire, and assume from LLC, the above described Lot 2, together with all improvements thereon and all appurtenances attached thereto.

2. Purchase Price. The land received by City from LLC shall serve as the sole consideration for City's transfer of City's land to LLC. The land received by LLC from City shall serve as the sole consideration for LLC's transfer of LLC's land to City.

3. Closing. The "Closing" or "Closing Date" shall be held as soon as possible following the satisfaction of all conditions contained in Section 5 below. At Closing, each party shall transfer their respective Lots to the other party by good and sufficient Warranty Deed.

4. Special Terms of Transfer. The parties agree that the following additional terms shall apply to the transfer and will survive the closing:

a. None.

5. Conditions Precedent to Closing.

a. Survey. If either party elects, it may cause a survey of the lots to be prepared for the purpose of locating and identifying the boundaries and locations of improvements of the Property (the "Survey") and any encroachments into or out of the property boundaries. The cost of said Survey shall be borne solely by the requesting party.

b. Review of Title Commitment, Title Documents & Survey. Each party shall examine title to the lots and determine that no issues which may serve to cloud title are known to them, determined in each party's sole discretion to be exercised in good faith.

6. Due Diligence. Each party's obligation to exchange the lots is specifically subject to a satisfactory inspection, test, and review of the lots, including but not limited to, any feasibility studies, environmental assessments (including but not limited to a Phase I and/or Phase II or other environmental tests, studies or reports), zoning review, examinations, appraisals, boring, or other surveys or tests, and any other test, review or inspection deemed necessary by a party. The costs and expenses incurred in the due diligence review performed by a party shall be the requesting party's obligation. Such party shall complete the due diligence review prior to September 30, 2021 and agrees to promptly commence its due diligence review. Each party shall have reasonable access to the lots to conduct its inspections, tests, and due diligence review. To the extent the due diligence review is not acceptable to a party, then such party shall have the option to terminate this Agreement. In such event, the parties hereto shall have no further rights, duties or obligations under this Agreement.

7. Representations and Warranties. The parties represent and warrant the following to each other, each of which representation and warranty shall be true and effective as of the date of Closing:

a. Ownership. Except for any interest which may already be vested with City, LLC has good and marketable fee simple title to Lot 2. At Closing, LLC shall sell, transfer, convey and assign to City fee simple ownership in Lot 2 free and clear of any and all liens, mortgages, encumbrances, security interests, pledges and

restrictions or other interest or obligations of whatever kind and nature, except as permitted pursuant to this Agreement.

City has good and marketable fee simple title to Lots 1 and 3. At Closing, City shall sell, transfer, convey and assign to LLC fee simple ownership in Lots 1 and 3 free and clear of any and all liens, mortgages, encumbrances, security interests, pledges and restrictions or other interest or obligations of whatever kind and nature, except as permitted pursuant to this Agreement.

- b. Ability to Contract. Each party has the full right, power and authority to enter into this Agreement to sell and convey the respective lots to the other party and this Agreement shall be a valid and binding obligation of both parties, subject to the terms and conditions contained herein.
 - c. Proceedings. To the best of each party's knowledge, there is no action, litigation, investigation, condemnation proceeding, judgment, executions, bankruptcies, zoning changes or any other proceeding of any kind outstanding, pending, or threatened, against either party or any portion of the lots.
 - d. Liens. No work has been performed or is in the process of being performed by either party or at the direction of either party, and no materials have been furnished to any of the lots or any portion thereof, which might give rise to mechanic's, materialman's or other liens against the lots.
 - e. Familiarity with the Property. Subject to the completion of their due diligence investigations, each party is familiar with the physical condition of the lots, has inspected the same, and is taking the same in its "AS IS" condition without any warranty or guaranty by the other party.
8. Obligations at Closing. At Closing, the following shall occur:
- a. LLC shall deliver to City, or its assigns, the following executed documents:
 - (i) A good and sufficient Warranty Deed(s) for Lot 2;
 - (ii) Certificate(s) of Real Estate Value;
 - (iii) Such other documents as deemed necessary by City or its counsel to transfer the Property to City or as may be required pursuant to this Agreement.
 - b. City shall deliver to LLC:
 - (i) A good and sufficient Warranty Deed(s) for Lots 1 and 3;
 - (ii) Certificate(s) of Real Estate Value;
 - (iii) Such other documents as deemed necessary by City or its counsel to transfer the Property to City or as may be required pursuant to this Agreement.

9. Miscellaneous.
 - a. Possession. City shall be entitled to sole, exclusive and immediate possession and the right to occupy the Property upon the Closing, except as may be provided herein.
 - b. Governing Law. This Agreement is subject to and shall be governed by and construed and enforced in accordance with the laws of the State of South Dakota without regard to conflict of laws principles.
 - c. Survival of Representations and Warranties. The representations and warranties contained herein shall survive Closing and are and shall be deemed to be continuing representations and warranties.
 - d. Counterparts/Facsimile/Electronic Signature. This Agreement may be executed by electronic signature, facsimile and in any number of counterparts as deemed appropriate by the parties, all of which taken together shall constitute one and the same instrument. Reproductions of original signature via pdf/scanned signatures shall be deemed an original for purposes of execution of this instrument.
 - e. Time is of the Essence. It is expressly understood and agreed by the parties that time is of the essence in this Agreement.
 - f. Benefit. This Agreement shall inure to the benefit of and be binding upon the parties hereto and also upon their respective heirs, representatives, successors and assigns.
 - g. Severability. Should any provision in this Agreement be deemed unenforceable as to a particular circumstance or set of facts, the unenforceability shall be limited to such circumstance or set of facts and all remaining provisions of this Agreement shall remain fully binding and enforceable as between LLC and City.
 - h. Further Assurances. Each party, upon the request of the other, agrees to perform any further acts, and to execute and deliver any other documents, which are reasonably necessary to carry out the provisions of this Agreement.
 - i. Entire Agreement; Waiver. This Agreement contains the entire agreement of the parties. It may not be changed orally but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification, extension, or discharge is sought. A waiver of any term or provision shall not be construed as waiver of any other term or provisions or as waiver of subsequent performance of the same provision of this Agreement.
 - j. Drafting Presumption. City and LLC agree that they participated in the drafting of this Agreement and, in the event that any dispute arises in the interpretation or construction of this Agreement, no presumption shall arise that either one party or the other drafted this Agreement.

(seal)

CITY:

CITY OF MITCHELL, SOUTH DAKOTA

Robert B. Everson, Jr., Mayor

Attest:

Michelle Bathke, Finance Officer

(seal)

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF DAVISON)

On this _____ day of September, 2021, before me, the undersigned officer, personally appeared Robert B. Everson, Jr. and Michelle Bathke, who acknowledged themselves to be the Mayor and Finance Officer, respectively, of the City of Mitchell, a South Dakota municipal corporation, and that in their official capacities, being authorized to do so, executed the foregoing instrument for the purposes stated therein.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public – South Dakota
My Commission Expires:_____

(seal)