

TO: City Council

FROM: Laura Newman, City Administrator

DATE: September 3, 2021

RE: Ordinance 21-49 Authorizing Execution of a First Amendment to the Third Amended and Restated 1 N. Washington Redevelopment Agreement

On August 24, 2021, the Developer of the One North Washington Place project provided the Committee of the Whole with an update on the project. The Developer, due to delays in obtaining financing caused by volatility in the market for construction materials caused by the global pandemic, failed to meet certain deadlines in the Third Amended and Restated 1 N. Washington Redevelopment Agreement (the "RDA"), specifically, preparation of the bid documents, submission of the application for building permit and issuance of the notice to proceed. The City's attorney informed Council of the City's three alternatives:

1. Provide notice of termination for delay, which will prompt an opportunity on the part of the Developer to cure the default; or
2. Provide notice of termination without cause, which would cause the City to be liable to pay the Developer's costs since the date of the first amendment to the RDA (January 2, 2018) which the Developer states are approximately \$357,599.44, excluding personnel costs of the Developer's own employees.
3. Amend the RDA to reflect dates provided by Developer for the remaining deliverables in the RDA.
 - a. Prepare Bid Drawings by January 5, 2022
 - b. Apply for the Building Permit by March 6, 2022
 - c. Provide the Notice to Proceed by June 8, 2022 (as long as the City has issued the Building Permit by June 4, 2022)
 - d. Finalize Construction Contracts by July 5, 2022
 - e. Begin Construction by June 8, 2022
 - f. Complete the Public Parking Facility by September 3, 2023
 - g. Complete the Project by April 9, 2025

After a long discussion, the Committee of the Whole, by a vote of 12-2, directed staff to draft an amendment to the RDA that reflected the new dates and included the right for the City to automatically terminate the RDA with no opportunity for the Developer to cure the default if any of the pre-construction deadlines are not met, and in such case there being no liability for the costs of the Developer. The COW also requested the addition to the agreement of a liquidated damages clause of \$1,000 per day if construction completion dates are not met. The Developer stated they were amenable to those terms.

Approval of this amendment means this project can finally launch. With financing in place, the Developer will now move forward with drafting the plans necessary to apply for the building permit and

proceed with construction. The project represents a near \$50 million investment in our downtown which includes a 331-space public parking lot. It will bring hundreds of new residents to our downtown which will attract new businesses and higher uses for our current spaces, as well as creating more than 16,000 square feet of new commercial property. In addition, the project is expected to generate more than \$1,000,000 in new taxes for the benefit of all taxing bodies once the TIF expires.

Staff recommends City Council approval of Ordinance 21-49 Authorizing Execution of the First Amendment to the Third Amended and Restated 1 N. Washington Redevelopment Agreement.

**CITY OF BATAVIA, ILLINOIS
ORDINANCE 21-49**

**AN ORDINANCE AUTHORIZING EXECUTION OF
A FIRST AMENDMENT TO THE THIRD AMENDED AND RESTATED
REDEVELOPMENT AGREEMENT WITH
1 N. WASHINGTON L.L.C., AND RELATING TO A MULTI-STORY,
MIXED-USE BUILDING AT NORTH WASHINGTON AVENUE AND EAST WILSON
STREET**

**ADOPTED BY THE
MAYOR AND CITY COUNCIL
THIS 7th DAY OF SEPTEMBER, 2021**

Published in pamphlet form
by authority of the Mayor
and City Council of the City of Batavia,
Kane & DuPage Counties, Illinois,
This 8th day of September, 2021

Prepared by:
City of Batavia
100 N. Island Ave.
Batavia, IL 60510

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WHEREAS, the City of Batavia is authorized by Illinois Law to create tax increment financing redevelopment areas within its boundaries to aid in the redevelopment of certain areas of the City; and

WHEREAS, 1 North Washington, L.L.C., (“the Developer”) wishes to undertake a wholesale redevelopment of an approximately 2.25-acre site, presently consisting of eight contiguous land parcels and generally located at the northwest corner of N. Washington Avenue and E. Wilson Street, such property is wholly located within TIF District 6 and;

WHEREAS, the City Council has determined that the improvements would not be possible without the assistance of TIF funds to aid in the project, such assistance to be comprised of issuance of bonds to pay for construction of a Public Parking Structure and to reimburse the Developer for certain expenses eligible under the TIF Act; and

WHEREAS, a certain Agreement entitled "1 North Washington Redevelopment Agreement" was authorized by City Council to be executed by Ordinance 16-57 on September 6, 2016, and amended by Ordinance 18-09 on January 2, 2018 as the First Amended and Restated 1 North Washington Redevelopment Agreement and further amended by Ordinance 19-12 on March 4, 2019 as the Second Amended and Restated 1 North Washington Redevelopment Agreement(the “Agreement”) and further amended by Ordinance 20-51 on August 17, 2020 as the Third Amended and Restated 1 North Washington Redevelopment Agreement; and,

WHEREAS, the Developer has missed deadlines required by the Third Amended and Restated 1 North Washington Redevelopment Agreement; and,

WHEREAS, the Developer is still interested in moving forward with the project, and the City is still interested in moving forward with the project under the condition that it will have rights to termination without opportunity on the part of the Developer to cure and liquidated damages as set forth in the First Amendment to the Third Amended and Restated Redevelopment Agreement attached as Exhibit 1; and,

WHEREAS, it is necessary to amend the existing Agreement in order to reflect these changes and others agreed to by the parties;

CITY OF BATAVIA, ILLINOIS ORDINANCE 21-49

NOW, THEREFORE, BE IT HEREBY ORDAINED by the City Council of the City of Batavia, Kane and DuPage Counties, Illinois, as follows:

SECTION 1: That the Mayor and City Clerk are authorized to execute the document entitled, “First Amendment to the Third Amended and Restated 1 North Washington Redevelopment Agreement”, which is attached hereto as Exhibit 1.

SECTION 2: That this Ordinance shall be in full force and effect from and after its presentation, passage, approval, and publication in pamphlet form as provided by law.

PRESENTED to and **PASSED** by the City Council of the City of Batavia, Illinois, this 7th day of September 2021.

APPROVED, by me as Mayor of said City of Batavia, Illinois, this 7th day of September 2021.

Jeffery D. Schielke, Mayor

Ward	Aldermen	Ayes	Nays	Absent	Abstain	Aldermen	Ayes	Nays	Absent	Abstain
1	Baerren					Solfa				
2	Leman					Wolff				
3	Ajazi					Chanzit				
4	Malay					Knopp				
5	Uher					Beck				
6	Cerone					Russotto				
7	McFadden					Miller				
Mayor Schielke										
VOTE:		0 Ayes	0 Nays	0 Absent		0 Abstentions				
Total holding office: Mayor and 14 aldermen										

ATTEST:

Kate Garrett, City Clerk

**FIRST AMENDMENT TO THIRD AMENDED
AND RESTATED 1 N. WASHINGTON REDEVELOPMENT AGREEMENT**

This First Amendment to the Third Amended and Restated Redevelopment Agreement (the “Amendment”) dated as of September 7, 2021 (the “Amendment Date”) is made and entered into by and between the City of Batavia, an Illinois Municipal Corporation (the “City”) and 1 N. Washington, LLC., an Illinois limited liability company (the “Developer”). Developer and City are sometimes referred to as the “Parties”.

WHEREAS, the Parties entered into a Third Amended and Restated Redevelopment Agreement with an effective date of August 17, 2020 (the “RDA”); and

WHEREAS, the RDA set forth a schedule for the Developer to perform certain tasks and provide certain deliverables to the City; and

WHEREAS, the Developer has not met the time for performance with respect to preparing bid drawings (1.04(c)), and submitting permit applications (1.02(c)); and

WHEREAS, the Parties desire to amend the RDA to establish a new schedule and to provide the City with certain termination rights and liquidated damages as set forth below; and

WHEREAS, it is the understanding and specific intent of the Parties that if the Developer does not comply with the new schedule as set forth in sections 1.02(c) hereof with respect to preparing bid drawings, applying for Project permits and issuing the Notice to Proceed (as those terms are defined in the RDA), and 1.04(c) with respect to finalizing construction contracts, for any reason whatsoever, then the City will have the right to terminate the RDA. Further, if the Developer does not comply with the schedule as set forth in sections 1.05(a) (beginning construction), 1.05(d) (substantial completion of parking deck), and 1.05(e) (completion of Project) as such dates are amended herein for any reason whatsoever except as specifically set

forth in the section below, then the City shall be entitled to liquidated damages in addition to its other remedies.

WHEREAS, it is the further intent of the Parties that to the extent this Amendment and the RDA are in conflict that terms and conditions of this Amendment shall control.

NOW, THEREFORE, for good and valuable consideration the receipt and sufficiency are hereby acknowledged by the Parties be it agreed as follows:

Section 1. Amendment. The RDA is amended by deleting the existing sections referenced below and substituting the following provisions:

(1) 1.02(c)

c) **Drawings and Bidding.** The Developer has completed current budgets (the “Current Budgets”), based upon the approved Preliminary Plans and has determined that the Current Budgets are acceptable. The Developer shall, by no later than January 5, 2022, prepare necessary bid drawings for the construction of the Project and shall provide such bid drawings to the City with confirmation from the Project Architect that the bid drawings are complete. No later than March 6, 2022, the Developer shall apply to the City for a building permit for the Project. In the event that the City does not issue its building permit until after June 4, 2022, then in that event, the Developer’s time to complete subsequent required tasks shall be extended day for day for each day past June 4, 2022 that it takes the City to issue the building permit. Not later than June 8, 2022 (unless extended by reason of City delay) Developer shall notify the City in writing whether the bids are acceptable and of its intent to proceed or not to proceed with the Project documented by a Notice to Proceed (the “Notice to Proceed”). Plans and bid specifications are subject to City approval with respect to the Public Improvements.

(2) 1.04(b)

(b) Secure Construction Financing for the Improvements. Developer has secured a binding loan commitment from a lender at interest rates and terms acceptable to Developer. If for any reason Developer does not actually receive construction financing, the City shall be under no obligation to convey the Redevelopment Property.

(3) 1.04(c)

(c) Finalize Construction Contracts. Not later than July 5, 2022, unless extended as set forth in 1.02(c), Developer shall finalize and issue its initial contracts for construction of the Project or obtain from the Project general contractor guaranteed pricing of general project construction components and provide copies of same to the City Community Development Department. Construction contracts for the construction of the Public Parking Facility will include provisions assigning any and all warranties to City when title passes back to the City following construction of the facility.

(4) 1.05(a)

(a) Begin Construction of the Project. Developer shall commence construction of the Project not later than June 8, 2022 (unless extended as a result of unforeseen environmental conditions causing a schedule delay as set forth in 1.04(c)) in accordance with, and subject to: (i) this Agreement, (ii) the applicable local, state and other laws and regulations ("Applicable Laws"), (iii) the Final Plans and specifications; and (iv) the Environmental Indemnity Agreement;

(5) 1.05(d)

(d) Completion of the Public Parking Facility. Developer shall diligently proceed to complete the improvements and shall substantially complete the Public Parking Facility not later than September 3, 2023, unless extended as set forth in 1.04(c), or as a result of unforeseen environmental conditions causing a schedule delay, or because of a reason of Force Majeure as set forth in Section 5.02. Substantial completion of the Public Parking Facility for purposes of this Section means that the construction is completed, but for punch list items and the one-year maintenance obligations and a request for a certificate of occupancy has been submitted.

(6) 1.05(e)

(e) Completion of the Project. The Developer shall diligently proceed to complete all of the improvements and shall substantially complete the Project, including all remaining Public Improvements, by April 9, 2025, unless extended as set forth in 1.04(c), or as a result of unforeseen environmental conditions causing a schedule delay, or because of a reason of Force Majeure as set forth in Section 5.02. Substantial completion of the Project means the constructions is completed, but for punch list items, and

a request for a certificate of occupancy permit has been submitted for the residential portion of the Project (“Project Completion”).

(7) 1.09

1.09 Plat of Condominium and Declaration of Covenants. Not later than June 8, 2025, unless extended as set forth in 1.04(c), unless extended as a result of unforeseen environmental conditions causing a schedule delay or because of a reason of Force Majeure as set forth in Section 5.02, Developer shall submit to the City a Plat of Condominium and Declaration of Covenants covering the Redevelopment Site, to separate out from the balance of the Site, the Public Parking Facility and its appurtenances, consistent with this Agreement, which approval shall not be withheld, providing that it is in substantial compliance with the terms of this Agreement, and Developer shall record the Plat of Condominium and Declaration of Covenants within ten (10) days from written approval of the City.

(8) 5.07(d)(x)

(x) Failure to Complete the Project. Immediately, without notice, Developer shall be in default for failure to complete the Project Improvements by April 9, 2025, unless extended by 1.04(c), or as a result of unforeseen environmental conditions causing a schedule delay (the “Final Completion Date”), or because of a reason of Force Majeure as set forth in Section 5.02, in which case liquidated damages shall become due. The City in its sole discretion shall be permitted to extend this date by action of the City Council.

(9) 3.04

(a) Termination by Developer or For Failure to Meet Deadlines Prior to Acquisition. The Developer shall have the right to terminate the Agreement without penalty as set forth in (a)(i). The City shall have the right to terminate the Agreement as provided in (a)(ii).

(ii) The City may terminate the RDA by written notice in the event that the Developer does not comply with the deadlines for performance set forth in sections 1.02(c) and 1.04(c). The termination notice may be given at the close of business at the City Hall in the event that the Developer has not complied with these, the requirements. If the final date for compliance falls on a weekend or City Holiday, the deadline shall be extended to the next day the City is open for business with no penalty to Developer. This termination shall be without an opportunity to cure. The Developer waives any recourse or damages whatsoever against the City in the event of this

termination. The notice must be given within thirty (30) days of the applicable due date. Notwithstanding anything to the contrary contained herein, the City may terminate this Agreement at any time prior to the conveyance of the Subject Property by paying to the Developer its costs incurred subsequent to the First Amended and Restated Redevelopment Agreement.

(10) Liquidated Damages

LIQUIDATED DAMAGES

The Developer is solely responsible for completing the Work by the scheduled Completion Date for each Phase of the Work after conveyance of the Property. This responsibility includes all work of the Developer and that of its Subcontractors and suppliers. The Developer acknowledges that the City will suffer significant financial loss, and there will be disruption to the City if the Project is not complete on or before the Completion Date. The Developer further acknowledges that the measure of such loss and the disruption to the City would not be susceptible to precise calculation. To protect the City against said loss and disruption to the City and not as a penalty, the City and the Developer hereby agree that the Developer and the Developer's Surety, if any, shall be liable for and shall pay to the City, Liquidated Damages in the sum of one thousand (\$1,000.00) dollars for each calendar day of delay.

Payments of Liquidated Damages are in addition to other remedies available to the City or direct damages that may be incurred by the City and not a penalty. All such Liquidated Damages may be set-off against any monies that may be due the Developer. The City's approval or making of progress payments or final payment, with or without knowledge that the Work was untimely, shall not constitute or be deemed a waiver of the City's rights or claims, or of the City's ability to receive Liquidated Damages under the Contract or common law.

Section 2.

In the event the RDA terminates pursuant to 3.04(a)(ii), the Developer and the City shall cooperate to record a memorandum of termination of the RDA.

Section 3.

Section 4. Miscellaneous. This First Amendment to the RDA shall be binding upon and inure to the benefit of the successors and permitted assigns of City and Developer. The terms

and provisions of the RDA not specifically modified by this Agreement shall remain in full force and effect and shall not be construed to have been modified, waived, discharged or otherwise altered by this Agreement. The terms and provisions of the RDA are incorporated herein by reference as if fully stated herein. This Agreement may be executed in several counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument. This Agreement may be executed via e-mail or facsimile transmission and all PDF (or similar electronic format) or facsimile signatures shall be deemed originals for all purposes.

Section 5. Recording. This Agreement shall be recorded in the Office of the Kane County Recorder of deeds.

IN WITNESS WHEREOF, the Parties have executed this Agreement by their duly authorized officials as of the date of the Agreement herein set forth.

I N. WASHINGTON, L.L.C.,
AN ILLINOIS LIMITED LIABILITY CORPORATION

CITY OF BATAVIA,
AN ILLINOIS MUNICIPAL CORPORATION

BY: _____
ITS: _____
NAME: _____

BY: _____
NAME: _____
TITLE: _____

BY: _____
NAME: _____
TITLE: _____