

BUSINESS INCENTIVE AGREEMENT

This Business Incentive Agreement (hereinafter “Agreement”) is entered into this date of _____, 2021, pursuant to the requirements of N.D.C.C. § 54-60.1-03, between the City of Minot, a municipal corporation, whose address is 515 2nd Avenue SW, PO Box 5006, Minot, North Dakota 58702 (hereinafter “Grantor”), and LPND1, LLC, a North Dakota limited liability company, whose address is 1020 20th Ave SW, PO Box 940, Minot, North Dakota 58702 (hereinafter “Recipient”) (individually a “Party” and collectively referred to herein as “Parties”).

RECITALS

- A. Grantor is authorized under N.D.C.C. ch. 54-60.1 to provide, among other things, a “direct cash transfer, loan or contribution of property” to a business “in the form of a cash transfer of money [which] may be “structured as a loan, a forgivable loan, or a preferred share that includes provisions for surrender” provided the expenditure “meets a public purpose.”
- B. A “public purpose” is defined under N.D.C.C. §54-60.1-01 to include activities that “increase[e] the tax base” and/or “directly creat[e] employment opportunities or indirectly creat[e] employment opportunities through increased economic activity.”
- C. Recipient is wholly owned by Minot Area Chamber EDC, a non-profit corporation that strives to facilitate the retention, expansion, start-up, and relocation of primary sector businesses into the Minot Trade Area.
- D. Effective January 20, 2009, Grantor entered into that certain Lease Agreement with North Dakota Port Services, Inc., a North Dakota corporation (hereinafter “NDPS”), as Tenant for the lease of real property owned by Grantor and described in the Lease Agreement, a copy of which is attached hereto as Exhibit A (hereinafter “Lease Agreement”). The purpose of the Lease Agreement was to facilitate the development and operation of a facility for the loading, unloading, and handling of products in connection with the transportation of such products on railroad cars and by other means on land owned by Grantor (hereinafter “intermodal facility”). First Western Bank & Trust (herein “FWBT”) was the originating lender on a construction loan and working capital loan to NDPS for construction of these facilities on the leased land. FWBT’s security for these loans included all of NDPS’s interest in the Lease Agreement, and all of the personal property and business assets of NDPS, including all improvements constructed by NDPS on the leased premises.
- E. In order to induce FWBT to lend money to NDPS to facilitate the development and operation of the intermodal facility, Grantor and FWBT entered into that certain Second Subordination Agreement dated March 3, 2013 (replacing the initial Subordination Agreement dated January 26, 2009), a copy of which is attached hereto as Exhibit B.
- F. As a result of material breaches of the Lease Agreement by NDPS, Grantor terminated the Lease Agreement effective May 31, 2018, subject to FWBT’s security interests therein.

FWBT foreclosed upon its security interests in a civil action entitled First Western Bank & Trust v. North Dakota Port Services, Inc. and City of Minot, Ward County District Court, North Dakota, Civil No. 51-2017-CV-00732. Pursuant to the Second Subordination Agreement, as a result of FWBT being the purchaser of NDPS's interests in the Lease Agreement at a sheriff's sale in the civil action, FWBT became entitled to reinstate the Lease Agreement and to succeed to all of NDPS's rights under the Lease Agreement as though it had never been terminated. NDPS's redemption rights following the sheriff's sale expired December 30, 2018. FWBT and its subsidiary, Westbrand Real Estate Holdings, LLC, (herein "Westbrand") have been in possession of the leased premises since January 1, 2019.

- G. Recipient and Westbrand negotiated for the sale of Westbrand's interest in the Lease Agreement (among other things) to Recipient.
- H. Recipient intends to purchase Westbrand's interest in the Lease Agreement from FWBT and be assigned FWBT's interest in the Lease Agreement.
- I. Pursuant to Section 18 of the Lease Agreement, Recipient intends to exercise an option to purchase Parcel B for \$1,393,770.00 and Parcel C for \$675,030.00, for a total of \$2,068,800.00.
- J. Recipient seeks a cash payment from Grantor of \$1,565,000.00 in the form of a forgivable loan to be used to exercise the option to purchase Parcels B and C (hereinafter "Property"), which Recipient intends to use continuously as a full-time intermodal facility.
- K. Investment in an intermodal facility serves a public purpose because it increases the taxable base by assisting Minot-area farmers and associated processing plants through the added value to their crops or products, improves shipping options for a variety of business sectors, decreases the distance needed for trucking, gets products to their end users quicker, requires less energy, and leads to overall cost savings for consumers. Investment in an intermodal facility also provides additional employment opportunities.

NOW, THEREFORE, in consideration of the mutual promises, conditions, covenants and terms set forth herein and for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

AGREEMENT

Section 1. **Incorporation by Reference.** The above Recitals and exhibits hereto are incorporated herein by reference.

Section 2. **Term.** This Agreement becomes effective when signed by both Parties and terminates ~~ten-five~~ (105) years after the date the funds are disbursed by Grantor to Recipient, or on the date Recipient completes repayment of the Business Incentive, whichever is later.

Section 3. Project Information.

3.1 **Business Incentive.** Grantor shall pay Recipient \$1,565,000.00 U.S. Dollars in the form of a forgivable loan, without interest, the terms of which are contained in the promissory note attached hereto as Exhibit C (hereinafter “Business Incentive”). The Business Incentive will be disbursed to Recipient, subject to the conditions of this Agreement, and provided that Recipient has met and fully satisfied the following requirements: (i) This Agreement, the promissory note attached as Exhibit C, and the mortgage attached as Exhibit D, have been duly-executed by an authorized representative of Recipient; and (ii) Recipient has satisfied the Conditions Precedent set forth in Section 3.2 of this Agreement. For purposes of this Agreement, the date the funds are disbursed by Grantor to Recipient shall be referred to as the Benefit Date.

The Business Incentive shall be repaid to Grantor, in ~~ten-five (540)~~ installments, without interest, as follows but subject, however, to the provisions of Section 3.6 (hereinafter “Business Incentive Repayment”):

December-March 31, 2022	\$156,500 <u>313,000</u>
December-March 31, 2023	\$156,500 <u>313,000</u>
December-March 31, 2024	\$156,500 <u>313,000</u>
December-March 31, 2025	\$156,500 <u>313,000</u>
December-March 31, 2026	\$156,500 <u>313,000</u>
December 31, 2027	\$156,500
December 31, 2028	\$156,500
December 31, 2029	\$156,500
December 31, 2030	\$156,500
December 31, 2031	\$156,500

3.2 **Conditions Precedent to Payment of Business Incentive.** The Parties expressly acknowledge and agree that the following listed conditions shall be considered conditions precedent and that all of these conditions must be satisfied in full before Grantor’s duty to perform hereunder arises.

3.2.1 **Assignment of Lease Agreement.** Recipient shall be assigned Westbrand’s interest in the Lease Agreement, with written approval from the City Council.

3.2.2 **Full Compliance with Lease Agreement.** Once assigned FWBT’s interest in the Lease Agreement, Recipient shall be in full compliance with all of the terms and conditions of the Lease Agreement.

3.2.3 **Execution of Option to Purchase.** Recipient shall exercise its Option to Purchase the Property pursuant to the terms and conditions of the Lease Agreement. Recipient acknowledges and understands that if it exercises its Option to Purchase the Property under the Lease Agreement the

Property will be conveyed to Recipient by a Warranty Deed in substantially the form of Exhibit E.

- 3.2.4 **No Default.** Recipient shall not be in default under this Agreement or adjudicated in default by a court of competent jurisdiction on any other agreement, obligation, representation, or promise with any other entity doing business in the State of North Dakota.
- 3.2.5 **In Good Standing.** Recipient shall be, and remain throughout the term of this Agreement, in good standing under the laws of the State of North Dakota and in compliance with its Articles of Incorporation, Bylaws, and any other governing documents.
- 3.2.6 **Duly Authorized.** Recipient shall be duly-authorized to enter into this Agreement and to perform its obligations hereunder.
- 3.2.7 **Solvent.** Recipient shall be, and remain throughout the term of this Agreement, a solvent corporation capable of fulfilling its obligations hereunder, and shall not be the subject of any “Insolvency Event.” For purposes of this Agreement, the term Insolvency Event means (a) Recipient’s (i) failure to generally pay its debts as such debts become due; (ii) admission in writing that it is unable to pay its debts generally; or (iii) general assignment for the benefit of creditors; (b) a proceeding instituted by or against Recipient (i) seeking to adjudicate it bankrupt or insolvent; (ii) seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency, or reorganization or relief of debtors; or (iii) seeking entry of an order for relief or the appointment of a receiver, trustee, or other similar official for it or for any substantial part of its property (and in the case of any such proceeding instituted against Recipient, such proceeding shall remain undismissed for a period of sixty (60) days or any of the actions sought in such proceeding shall occur); or (c) Recipient takes any action to authorize any of the aforementioned actions.
- 3.2.8 **No Conflicting Obligations.** Neither the execution and delivery of this Agreement, nor Recipient’s performance of its obligations hereunder, shall breach any known obligation, right or interest of a third party, regulatory agency, Board of Directors or other governing body with authority over Recipient.
- 3.2.9 **No Action to Impair Performance.** No known event, circumstance or violation of any federal, state or local law has occurred, and no litigation is currently pending or threatened, that may adversely affect Recipient’s ability to perform its obligations under this Agreement. During the Term of this Agreement, Recipient shall take no action which could deprive it of

the use of its assets or materially impair its ability to perform its obligations hereunder.

- 3.3 **Use of Business Incentive.** Recipient agrees to use the Business Incentive solely to purchase the Property, pursuant to the option to purchase under the Lease Agreement, which said Property shall be used for the continuous full-time operation of an intermodal facility during the term of this Agreement, to be known as the Logistics Park of North Dakota (hereinafter “LPND”), and for no other purpose.
- 3.4 **Public Purpose of Business Incentive.** The public purpose of the Business Incentive includes assisting community development and increasing the local tax base by adding value to crops produced by Minot-area farmers and products made by local processing plants. Access to a local intermodal facility improves shipping options for many business sectors – resulting in lower costs and an increase in these individuals’ and companies’ bottom line. The additional shipping options also present a cost savings for consumers, because transporting goods via intermodal shipping is more cost-effective than using over-the-road trucks and products reach their end users quickly. Attached and incorporated into this Agreement as Exhibit F is the Economic Impacts from the Operation Phase of the Minot Intermodal Facility documentation which further supports the economic benefits described in this Section. Additional employment opportunities - both directly created by the Business Incentive Agreement, and indirectly created through increased economic activity - are also expected as a result of the Business Incentive.
- 3.5 **Goals for Business Incentive.** In exchange for the Business Incentive, Recipient agrees to fulfill the following goals (hereinafter “Business Incentive Goals”):

3.5.1 **Job Creation.** Recipient shall employ full-time employees or full-time equivalents (FTEs), collectively referred to as “employees”, at LPND in Minot, North Dakota, as follows:

- Year 1: 8 full-time employees or FTEs
- Year 2: 9 full-time employees or FTEs
- Year 3: 10 full-time employees or FTEs
- Year 4: 11 full-time employees or FTEs
- Year 5: 12 full-time employees or FTEs
- ~~Year 6: 13 full-time employees or FTEs~~
- ~~Year 7: 14 full-time employees or FTEs~~
- ~~Year 8: 15 full-time employees or FTEs~~
- ~~Year 9: 15 full-time employees or FTEs~~
- ~~Year 10: 15 full-time employees or FTEs~~

A “full time employee” shall be defined as an employee or combination of employees that accumulate 2080 paid hours in the calendar year with an average rate of at least \$25.00 per hour without overtime and whose

position shall offer health insurance and two weeks of paid vacation annually. A “full time equivalent” shall be defined as an employee or combination of employees that accumulate 2080 paid hours in the calendar year with an average rate of at least \$25.00 per hour. Employees in service for less than the entire calendar year shall be prorated based on the number of hours worked divided by 2080 or the number of months employed divided by 12.

- 3.5.2 **Continued Operation of Intermodal Facility.** Recipient shall maintain continuous full-time operation of an intermodal facility on the Property, to be known as LPND, and provide the public equal and uniform use of LPND’s services for a period of at least ~~ten-five (105)~~ years after the Benefit Date of this Agreement. For purposes of this Agreement, “continuous full-time operation” of LPND shall mean the loading for transport by rail a minimum of one thousand three hundred (1300) twenty-foot equivalent unit intermodal containers out of the LPND per quarter.

Recipient intends to have a long-term lease in effect with the operator(s) of LPND, which will provide the day-to-day management and operation of LPND. The lease will include the goals contained in this Agreement and provide that at the end of ten (10) years the operator(s) will have the ability to exercise an option to purchase the assets of LPND.

- 3.5.3 **Determination of Goal Fulfillment.** Fulfillment of the above-described Business Incentive Goals will be verified by the City or its representative at the Grantor’s expense. For purposes of verifying Recipient’s job creation goal, Grantor shall have access to all Recipient documentation filed with the State of North Dakota for employment taxes as well as personnel records and payroll records. For purposes of verifying Recipient’s continuous full-time operation of an intermodal facility on the Property, Grantor shall have access to all Recipient business records that verify Recipient has met the minimum requirements for maintaining continuous full-time operation of the intermodal facility on the Property. In the event that the Grantor does not agree with Recipient’s assertion of its fulfillment of the Business Incentive Goals, Grantor shall notify Recipient in writing.

- 3.6 **Financial Obligation of Recipient if Business Incentive Goals are Not Met.** Recipient shall repay the Business Incentive to Grantor as required by Section 3.1, provided, however, if all of the Business Incentive Goals described in Section 3.5 are met by Recipient, the payment for that year shall be forgiven by Grantor, as if the payment due in that year had been paid by Recipient on the due date of that installation. If, however, the Business Incentive Goals are not met at any time a Business Incentive balance is outstanding, the Business Incentive shall be repaid in accordance with Section 3.1. If the Recipient fails to maintain continuous, full-time operation of the facility pursuant to Section 3.5.2, the payment for that year

must be paid in full. If the Recipient maintains continuous, full-time operation in accordance with Section 3.5.2, but fails to meet the requirements of Section 3.5.1, the repayment obligation shall be prorated to reflect any partial fulfillment as follows:

Grantor shall subtract the actual number of employees from the required number of employees and divide that number by the number of employees required for that year. Then, Grantor shall multiply that number by ~~\$156,500~~313,000. That sum shall be the prorated amount due by Recipient to Grantor. For example, if the facility employs 10 employees in 2026. The loan repayment would be calculated as $((12-10)/12) \times \text{\$156,500}$ 313,000 = \text{\\$26,083.33}~~52,166.67~~. \\$26,083.33~~52,166.67~~ would be the prorated amount due by Recipient to Grantor.

Recipient shall not be required to repay any portion of the Business Incentive Repayment attributable to unmet goals that result from an act of God or terrorism.

3.6.1. **Alternative to Business Incentive Repayment.** As an alternative to Recipient's Business Incentive Repayment obligations described in Sections 3.1 and 3.6, Recipient may execute and deliver to the Grantor a warranty deed transferring the Recipient's entire right, title, and interest in and to the Property to the Grantor.

3.7 **Name and Address of Parent Company.** Recipient represents and warrants that its parent company is Minot Area Chamber EDC, a non-profit corporation.

3.8 **Financial Assistance by all Grantors for Project.** Recipient represents and warrants that it has not received additional financial assistance from state or political subdivision grantors for the purchase of the Property.

3.9 **Reporting.** Recipient shall comply with the requirements of this Section during the Term of this Agreement.

3.9.1. **Annual Report.** Recipient shall file a recipient report with the Grantor, as described in N.D.C.C. § 54-60.1-05 on the anniversary of the Benefit Date of each year until the Business Incentive Goals specified in this Agreement have been met, or until Recipient completes the Business Incentive repayment to Grantor, whichever is later.

3.9.2. **Failure to Timely Report.** Grantor shall mail Recipient a warning letter if no report is received eight days after the anniversary of the Benefit Date. Recipients shall file the recipient report within 14 days of the postmarked date of the warning letter. If a report is not received from Recipient within 14 days of such date, Recipient agrees to pay Grantor one hundred dollars (\$100) for each subsequent day until the report is filed. The maximum penalty under this section may not exceed one thousand dollars. Failure to

submit a timely report is considered a material breach this Business Incentive Agreement that allows the Grantor, in its sole discretion, to declare this Agreement in default and entitle Grantor to equitable relief, including, but not limited to, recovering all of Grantor's funds expended on this Agreement and any attorney, court, and consultant costs and fees necessary to enforce its rights under this Agreement.

- 3.10. **Additional Consequences of Default.** Pursuant to N.D.C.C. § 54-60.1-04, if Recipient breaches the terms of this Agreement, Recipient shall not be entitled to receive a business incentive from any grantor for a period of five (5) years from the date of the default or until Recipient completes the incentive repayment to Grantor, whichever occurs first. This qualification attaches to Recipient and to each owner or shareholder of twenty percent or more of Recipient.

List of Recipient Owners or Shareholders of Twenty (20) Percent or More

Owner/ Shareholder	Mailing Address	City	State	Zip
Minot Area Chamber EDC	1020 20th Ave. SW	Minot	ND	58702

Section 5. Miscellaneous.

- 5.1 **January 20, 2009 Lease Agreement.** Recipient's obligations with respect to this Agreement are not intended to replace or diminish Recipient's obligations under the Lease Agreement otherwise, but are instead intended to be in addition to Recipient's other obligations under the Lease Agreement.
- 5.2 **Headings.** Any headings or subheadings preceding the texts of the several parts hereof shall be solely for the convenience of reference and shall not constitute a part of this Agreement, nor shall it affect its meaning, construction or effect.
- 5.3 **Modification of Agreement.** This Agreement shall only be modified or extended by the Grantor in writing, and pursuant to N.D.C.C. § 54-60.1-04.
- 5.4 **Assignment.** Recipient may not assign, in whole or in part, any of its rights or delegate any of its obligations under this Agreement.
- 5.5 **Relation of Parties.** This Agreement does not constitute either party as the legal representative of the other for any purpose whatsoever. Neither party has authority to assume or create any obligation whatsoever, express or implied, on behalf or in the name of the other party, nor to bind the other party in any manner whatsoever.

5.6 **Compliance with Public Records Laws.** Recipient understands that, Grantor must disclose to the public upon request any records it receives from Recipient. Recipient further understands that any records obtained or generated by Recipient under this Agreement may, under certain circumstances, be open to the public upon request under the North Dakota public records law. At no additional cost to the Grantor, Recipient agrees to contact Grantor promptly upon receiving a request for information under the public records law and to comply with Grantor's instructions on how to respond to the request.

5.7 **Notice.** Any notice, demand, or request required or permitted to be given or made under this Agreement must be made in writing unless specifically stated otherwise in this Agreement. Notice will be deemed given when delivered in person, sent via certified mail/return receipt requested, or sent by email to the Parties, as follows:

If to Grantor:

City of Minot
Attn: Finance Director
515 2nd Avenue SW
Minot, ND 58701
finance@minotnd.org

If to Recipient:

LPND1, LLC
Attn: President
PO Box 940
Minot, ND 58702
minot@minotchamberedc.com

5.8 **Severability.** If any provision of this Agreement shall, for any reason and to any extent, be found invalid or unenforceable, the invalid or unenforceable provision shall be deemed severed from the remainder of the Agreement, and the remaining paragraphs shall remain in full force and effect to the fullest extent of the law.

5.9 **Waiver.** No course of dealing between the parties or any failure or delay by Grantor in exercising any rights or remedies available to it shall operate as a waiver of any of Grantor's rights or remedies and no single or partial exercise of any rights or remedies shall operate as a waiver or preclude the exercise of any other rights or remedies.

5.10 **Recipient's Assurances.** By signing this Agreement, Recipient agrees to the terms noted herein, verifies that it has not failed to meet the terms of any business incentive agreement in the last five years.

5.11 **Final Agreement.** This Agreement supersedes any and all prior understandings of the Parties, oral or written, in connection with the subject matter hereof and is intended by both Parties to be a complete and exclusive statement of their commitments and responsibilities with respect to the subject matter hereof.

- 5.12 **Authorized to Execute.** Each person signing this Agreement represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this Agreement. Each party represents and warrants to the other that the execution and delivery of the Agreement and the performance of such party's obligation hereunder have been duly authorized and that the Agreement is a valid and legal agreement binding on such party and enforceable in accordance with its terms.
- 5.13 **Governing Law and Jurisdiction.** This Agreement shall be governed by and construed in accordance with the laws of the State of North Dakota. The parties agree that any lawsuit filed to enforce, terminate, or interpret this Agreement will be filed in a District Court located in Ward County, North Dakota.
- 5.14 **Binding Effect.** This Agreement shall be binding upon the parties hereto and upon their respective successors and assigns.

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Dated: _____, 2021.

CITY OF MINOT

By:

Shaun Sipma
Its: Mayor

David Lakefield
Its: Finance Director

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF WARD)

The foregoing instrument was acknowledged before me on _____, 2021 by Mayor Shaun Sipma on behalf of the City of Minot.

Notary Public

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Dated: _____, 2021. LPND1, LLC

By:

Its:

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF WARD)

The foregoing instrument was acknowledged before me on _____, 2021 by
_____ on behalf of LPND1, LLC.

Notary Public

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