

PURCHASE AND SALE AGREEMENT – HARDEE’S RESTAURANT PROPERTY

THIS PURCHASE AND SALE AGREEMENT (“Agreement”) is made and entered into by and between **4 G PROPERTIES, LLC**, a Colorado limited liability company (referred to herein as “4G” or “Seller”), and The City of Oskaloosa, a municipal authority, or its assigns (referred to herein as “City” or “Buyer”).

RECITALS

A. 4G is the holder of fee simple title to certain real property and described as approximately 0.33 acres located at 208 A Avenue West, in the City of Oskaloosa, Mahaska County, Iowa, which is legally described as ***Lots One and Two of Block Eleven of the Original Plat of the City of Oskaloosa, County of Mahaska, Iowa, Filed on May 25, 1844, Deed Record Book N, Page 1***, together with all improvements thereon, including the Hardee’s restaurant currently occupying the site (the “Hardee’s Property”).

B. City wishes to purchase and 4G desires to sell the Hardee’s Property pursuant to the terms stated herein.

NOW, THEREFORE, in consideration of the foregoing, the mutual covenants, representations, warranties and agreements contained herein, and for other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged by all the parties, it is agreed as follows:

TERMS

1. **Incorporation of Recitals.** The Recitals to this Agreement are hereby incorporated into and made a part of this Agreement.

2. **Effective Date.** The effective date (“Effective Date”) of this Agreement shall be the last date that either Buyer or Seller executes this Agreement.

3. **Purchase Price and Terms of Payment.** The purchase price (“Purchase Price”) for the Hardee’s Property is ONE HUNDRED NINETY-FIVE THOUSAND AND NO/100ths DOLLARS (\$195,000.00). The Purchase Price shall be paid by City as follows:

A. City shall have no obligation to purchase the Hardee’s Property, and 4G shall have no obligation to sell the Hardee’s Property, until the closing contemplated by that Purchase and Sale Agreement, of even date herewith, between 4G and City (the “Vacant Land PSA”), pertaining to the approximately .72 acre parcel of land located to the west of the Hardee’s Property (the “Vacant Land”), which closing (the “Vacant Land Closing”) shall be conducted simultaneously with the closing of the sale of the Hardee’s Property, as described herein (the “Hardee’s Closing”), but not as a §1031 Exchange.

B. At the time of the Vacant Land Closing, the net purchase price paid by 4G to the City for the Vacant Land (including any earnest money deposited by 4G) shall be immediately applied towards the amount the City owes 4G for the Hardee’s Property. To the extent the settlement statements executed at the time of the Hardee’s Closing and the Vacant Land Closing show that either the City or 4G owes the other a net balance, the same shall be paid in certified funds by the obligated party on the date of such closings.

C. The City shall not be obligated to make any earnest money deposit in connection with its purchase of the Hardee's Property, but for purposes of closing the transaction contemplated hereby, DRI Title and Abstract, 13057 West Center Rd., Suite 1, Omaha, NE 68144 (the "Title Company") shall issue the Abstract and shall conduct the closing.

4. **Conveyance and Title.** Subject to the terms and conditions of this Agreement and for the consideration set forth herein, Seller agrees to convey, transfer, assign, sell and deliver to Buyer at Closing, all of the following:

A. Fee simple title to the Hardee's Property, free and clear of any monetary lien or claim, other than the Permitted Exceptions (as defined below), but including a restriction prohibiting for a period of 25 years the use of the Hardee's Property for a fast food restaurant engaged in the sale of hamburgers or any restaurant with a drive-through window.

B. All of Seller's right, title and interest, if any, in and to all easements, privileges, licenses, reservations, permits, approvals, authorizations, rights-of-way, strips and gores, consents and other use rights, interests and privileges owned or used by Seller in connection with the Hardee's Property; and

C. Possession of the Hardee's Property, subject to the "Lease Back", as described in Section 23 hereof.

Seller shall convey the Hardee's Property by a recordable statutory general warranty deed, conveying good and marketable title in fee simple subject only to taxes for the year of Closing and subsequent years, a lien but not yet due and payable, and the Permitted Exceptions, as defined below. Seller hereby agrees to satisfy and discharge any liens on the Hardee's Property prior to or at Closing.

5. **Abstract and Title.** Seller, at its expense, shall promptly obtain an abstract of title to the Hardee's Property continued through the Effective Date and deliver it to Buyer for examination. The Abstract shall show merchantable title in Seller in conformity with this Agreement, Iowa law, and Title Standards of the Iowa State Bar Association. The Abstract shall become the property of the Buyer at the time of the Hardee's Closing. Seller shall pay the costs of any additional abstracting and title work to update the Abstract from the date hereof to the date of the Hardee's Closing. Buyer shall notify Seller of any objection to the Abstract, in writing, within twenty (20) days after receipt of the Abstract (the "Abstract Objection Date") and Seller shall have twenty (20) days after the Abstract Objection Date within which to resolve Buyer's objections to Buyer's satisfaction. In the event Seller elects not to cure or fails to cure Buyer's objections within said time period, Buyer may elect to cancel this Agreement in writing within ten (10) days thereafter, or Buyer may waive in writing its objections to title within the ten (10) day period described immediately above and accept the condition of title. Items identified on the Abstract (exclusive of all liens, all of which Seller hereby agrees to satisfy on or before Closing) shall be referred to as "Permitted Exceptions". Any termination of this Contract by Buyer in accordance with this paragraph shall likewise terminate the Vacant Land PSA.

6. **Existing Tenant.** Seller represents that there are no tenant rights to the Hardee's Property or current leases encumbering the Hardee's Property.

7. **Inspection Period.**

A. **Definition.** Buyer, and its designees, shall have one hundred twenty (120) days from the Effective Date (“Inspection Period”) to conduct all such tests, inspections, studies and investigations as may be deemed appropriate by Buyer in its sole and absolute discretion to determine if the Hardee’s Property is suitable for Buyer’s use.

B. **Grant of Access during Inspection Period.** Seller hereby grants to Buyer and its designees the right to enter upon the Hardee’s Property in order to determine whether the Hardee’s Property is suitable for Buyer’s purposes. Any tests conducted in connection with such inspections shall be conducted so as not to damage the Hardee’s Property. Buyer agrees to repair or restore promptly any damage to the Hardee’s Property caused by Buyer, its agents and contractors. All such entries onto the Hardee’s Property shall be at the risk of Buyer, and Seller shall have no liability for any injuries sustained by Buyer or any of Buyer’s agents or contractors. Buyer agrees to indemnify and hold Seller harmless from any and all loss, claim, action, demand or liability which may arise against the Seller or the Hardee’s Property by virtue of any of Buyer’s actions pursuant to this section. Upon completion of Buyer’s investigations and tests, Buyer shall restore the Hardee’s Property to the same condition as it existed before Buyer’s entry upon the Hardee’s Property. Buyer’s obligations and agreements in this section shall survive the termination of this Agreement.

C. **Termination of Agreement within Inspection Period.** In the event Buyer determines in its sole discretion that it is not in Buyer’s best interest to consummate the transaction contemplated by this Agreement, Buyer may cancel this Agreement by delivering notice of such election to Seller at or prior to the expiration of the Inspection Period, in which event the Vacant Land PSA shall likewise be immediately terminated, any earnest money held by Title Company with respect to the Vacant Land PSA shall be returned to 4G, and the parties shall have no further obligation to one another under either this Agreement or the Vacant Land PSA, except for any obligations and agreements which are intended to survive such termination.

8. **Due Diligence Items.** Within ten (10) calendar days of the Effective Date of this Agreement unless otherwise stated herein, Seller shall provide Buyer with the following items:

A. Copies of current Hardee’s Property insurance bills and copy of current policy of title insurance;

B. Copies of any environmental, engineering, structural and environmental reports, if any exist, to the extent within Seller’s possession or control; and

C. Copy of any surveys, plats or drawings of the Hardee’s Property, if any exist, to the extent within Seller’s possession or control; and

D. Any other items reasonably requested by Buyer, provided that receipt and approval of these items shall not delay the date of the Closing.

9. **Environmental.** As part of its due diligence during the Inspection Period, Buyer may, at its option and sole cost and expense, obtain a so called "Phase I" environmental inspection of the Hardee's Property. In the event the Hardee's Property is identified by the Phase 1 inspection as suspected of being environmentally contaminated, Buyer shall be permitted to conduct, or have conducted on its behalf, at Buyer's sole cost and expense, those additional environmental tests on the Hardee's Property as indicated or recommended in the Phase 1 environmental inspection of the Hardee's Property, and a copy of the results of such tests shall be promptly delivered by Buyer to Seller. Seller agrees that Buyer may contact other persons or entities that Buyer reasonably believes would have information with respect to any contamination of the Hardee's Property.

As used below the term "Hazardous Material" means hazardous or toxic substance, material or waste (including, without limitation, asbestos) which has been or in the future is determined by any state, federal or local governmental authority to be capable of posing a risk of injury to health, safety or property and/or the use, storage and or disposal of which is regulated by any governmental authority.

Seller represents and warrants that any handling, transportation, storage, treatment or usage of Hazardous Material, if any, by Seller or its employees, on the Hardee's Property during the time of Seller's ownership of the Hardee's Property was and shall be in compliance with all applicable federal, state and local laws, regulations and ordinances. Seller further represents and warrants that it has no knowledge of the presence of any Hazardous Material within, on, in, or under the soil, groundwater, or soil vapor on or under the Hardee's Property.

10. **Closing.** Buyer's obligation to close this transaction ("Closing") is explicitly conditioned on the simultaneous purchase by Seller from Buyer of the Vacant Land in accordance with the terms of the Vacant Land PSA. The Closings contemplated by this Agreement and the Vacant Land PSA shall take place, if at all, on the first business day which is twenty (20) days after the expiration of the Inspection Period (and of the "Inspection/Permitting Period" as defined in the Vacant Land PSA), so long as all other conditions to Closing are fulfilled. Buyer's obligation to close and to purchase the Hardee's Property is expressly conditioned upon all of the representations of Seller contained herein being true and correct as of the date of Closing. The Closing shall be conducted by, and take place in escrow at the office of, the Title Company, so that neither Buyer nor Seller shall be obligated to physically attend the closing.

11. **Adjustments and Prorations.** The following are to be prorated and apportioned as of the date of Closing and shall be adjusted against the Purchase Price:

A. Real estate taxes shall be prorated through the date of Closing. If the taxes for the current year cannot be ascertained, those of the previous year shall be used. If taxes are prorated using the prior year's tax, Buyer and Seller agree that there will be no re-proration of taxes after Closing; and

B. All liens or assessments, special or otherwise, against the Hardee's Property as of the date of the Closing shall be paid in full by Seller other than those, if any, resulting from Buyer's actions.

This Section shall survive Closing.

12. **Expenses of Closing.** The Seller shall pay and be responsible for the following costs: (i) the transfer taxes or documentary stamp taxes on the transfer of the Hardee's Property; (ii) the cost of abstracting to show marketable title in accordance with this Agreement; (iii) the cost of the Survey described in Section 5; (iv) the cost of preparing and recording any corrective instruments required by Section 5; and (v) one half (1/2) of any closing and escrow fees. The Buyer shall pay and be responsible for the following costs: (a) the cost of recording the deed; and (b) one half (1/2) of any closing and escrow fees. Each party shall be responsible for its own attorneys' fees and costs, except as provided otherwise by this Agreement.

13. **Closing Documents.**

A. At Closing, Seller shall execute and/or deliver documents including but not limited to:

1. Statutory general warranty deed, subject only to the Permitted Exceptions approved in accordance with Section 5 herein;
2. Standard mechanics' lien, possession and gap affidavit required by the Title Company;
3. Settlement statement prepared by Title Company related to the Closing, including the adjustments and prorations provided herein;
4. FIRPTA affidavit and Groundwater Hazard Statement;
5. All documents, instruments and the purchase price required of Seller by the Vacant Land PSA; and
6. Such other documents as may be required, necessary or useful in consummating the transaction contemplated by this Agreement at no cost to Seller.

B. At Closing, Buyer shall execute and/or deliver documents including but not limited to:

1. The Purchase Price shall be paid in accordance with the provisions of Section 3.B hereof;
2. Settlement statement prepared by Title Company related to the Closing, including the adjustments and prorations provided for herein;
3. All documents and instruments required of Buyer by the Vacant Land PSA; and
4. Such other documents as may be required, necessary or useful in consummating the transaction contemplated by this Agreement.

14. **Brokerage Commission.** Buyer and Seller warrant and represent to each other that no broker is involved in the Hardee's Property transaction and that the only broker involved

in the Vacant Land transaction is Dustin Whitehead of Lockard Realty Company, acting as 4G's broker, and to be paid by 4G as provided in the Vacant Land PSA.

15. **Establishment of Escrow.** Buyer and Seller both hereby acknowledge and agree that Title Company shall hold and deliver all sums which may be deposited with Title Company pursuant to this Agreement in connection with the Closing in accordance with the terms and conditions of this Agreement and that Title Company shall be relieved of all liability and held harmless by both Seller and Buyer in the event Title Company makes any disbursement of such monies in accordance with the terms and provisions of this Agreement. Title Company shall be relieved from any responsibility or liability and held harmless by both Buyer and Seller in connection with the discharge of any of Title Company's duties hereunder provided that Title Company exercises ordinary and reasonable care in the discharge of such duties. In the event of any dispute between the Buyer and Seller as to the disbursement of such sums, Title Company shall have the right to deliver any sums deposited with it into the registry of a court of competent jurisdiction and, upon such delivery, Title Company shall be discharged from any and all further obligations and liabilities hereunder.

15. **Seller Representations, Warranties and Covenants.**

A. Seller represents and warrants to Buyer that it has the full power and authority to make, deliver, enter into and perform pursuant to this Agreement. Seller further warrants and represents that this Agreement is valid, binding and enforceable against Seller in accordance with its terms.

B. Seller further warrants and represents to Buyer that Seller is the fee simple owner of the Hardee's Property.

C. Seller further warrants and represents to Buyer that neither its execution of this Agreement nor the consummation of the transaction contemplated by this Agreement will result in a breach of, or violation of, any agreement or covenant to which Seller is signatory or is otherwise bound.

D. Seller further warrants and represents to Buyer that the Hardee's Property is not encumbered by leases and that there are no parties with any rights to possession of the Hardee's Property, other than Seller.

16. **Warranties and Representations of Buyer.** Buyer hereby warrants and represents to Seller that it, and any assignee of Buyer hereunder, is in existence and in good standing and that it has full power and legal authority to enter into this Agreement for the purchase of the Hardee's Property. Buyer further warrants and represents that neither its execution of this Agreement nor the consummation of the transaction contemplated by this Agreement will result in a breach of, or violation of, any agreement or covenant to which Buyer is signatory or is otherwise bound.

17. **Buyer's Default.** In the event of a default by Buyer under this Agreement, or if Buyer's warranties and representations contained herein are not correct, Seller shall have the right to seek specific performance as its remedy and to recover damages incurred by Seller as a result of such default.

18. **Seller's Default.** In the event of a default by Seller under this Agreement or if Seller's warranties and representations contained herein are not correct, Buyer shall have the

right to seek specific performance as its remedy and to recover damages incurred by Buyer as a result of such default.

19. **Litigation and Attorneys' Fees.** If it shall be necessary for either party to this Agreement to bring suit to construe, interpret or enforce any provisions hereof or for damages on account of any breach of this Agreement, the prevailing party on any issue in any such litigation and any appeals therefrom shall be entitled to recover from the other party, in addition to any damages or other relief granted as a result of such litigation, all costs and expenses of such litigation and a reasonable attorneys' fee as fixed by the court.

20. **Risk of Loss and Condemnation.** Until Closing, Seller has the risk of loss or damage to the Hardee's Property. If any loss or damage occurs prior to Closing, Buyer may, at its option, either (i) cancel this Agreement or (ii) accept the Hardee's Property with no reduction in the Purchase Price provided that Seller assigns to Buyer any insurance proceeds payable by reason of such loss or damage. Buyer shall not commence any condemnation proceeding against the Hardee's Property while this Agreement is in effect.

21. **As Is/No Representations and Warranties by Seller.** Buyer acknowledges that this Agreement provides Buyer with an adequate opportunity to inspect, examine and evaluate the Hardee's Property. In purchasing the Hardee's Property, Buyer is relying solely on the results of its inspections, examinations and evaluations and not on any representation or warranty made by Seller. Buyer shall acquire the Hardee's Property in an "AS IS" and "WHERE IS" condition, with all faults, whether known or unknown. Buyer acknowledges that any information of any type which Buyer has received or may receive from Seller or Seller's agents, including without limitation any materials required to be provided by Seller herein, is furnished on the express condition that Buyer shall make an independent verification of the accuracy of such information, all such information being furnished without any representation or warranty whatsoever. Buyer acknowledges having the opportunity to inspect the Hardee's Property and to conduct such investigations and studies on and off the Hardee's Property as it deems necessary. Buyer hereby waives any and all objections to, complaints about, or claims regarding any environmental law, the physical characteristics and existing conditions, including, without limitation, subsurface soil and water conditions and the presence of Hazardous Materials on, under, or adjacent to the Hardee's Property (unless such Hazardous Materials were placed on the Hardee's Property by Seller or its agents), and the risk that adverse conditions, including, without limitation, the presence of Hazardous Materials or other contaminants, may not have been revealed by its investigation.

22. **Lease Back and Demolition.** Upon the occurrence of the Closing as described herein, the following shall occur:

A. 4G shall lease the Hardee's Property back from City (the "Lease") for a period of not less than two (2), nor greater than twelve (12), calendar months following Closing, during construction by 4G of a replacement Hardee's restaurant on the Vacant Land. The precise term of such Lease to be at 4G's option, with lease termination occurring simultaneously upon the opening of the new restaurant. 4G shall continue to insure the improvements located on the Hardee's Property, and all risk of casualty and other insurable risks with respect to the Hardee's Property shall remain with 4G. Rent shall be abated for the first four (4) months following Closing (measured from the date of Closing to the same date the following month), and shall thereafter be paid by 4G to City in the amount of \$4,200.00 per month, on the first day of each month, prorated for any partial month. 4G shall not be required to pay real estate taxes on the Hardee's

Property during the term of the Lease, however, if 4G holds over beyond twelve calendar months of occupancy, then 4G shall thereafter also pay monthly, to the City, an amount equal to the real estate taxes accruing against the Hardee's Property during any such holdover period. 4G shall give City not less than thirty (30) days prior written notice of the exact Lease termination date, and any holdover by 4G beyond the twelve calendar months described above shall be at 150% of the base rent paid immediately preceding such holdover. City acknowledges that it intends to demolish the existing restaurant located on the Hardee's Property, and if any casualty shall occur on the Hardee's Property during the term of the Lease, 4G shall not be required to repair or restore the improvements located on the Hardee's Property, but shall deliver the proceeds of any casualty insurance to City. At all times prior to Closing, and also during the term of the Lease, 4G shall be permitted to remove all equipment, fixtures, signs, branding items, and any other improvements from the Hardee's Property, whether affixed to the Hardee's Property or not, as 4G shall desire, without being required to repair or restore any damage occasioned by such removal. If City requires, 4G shall enter into a separate Lease Agreement with the City, on a form drafted by City and acceptable to 4G, such Lease Agreement to be negotiated during the Inspection Period and incorporating the terms hereof, or, at City's option, the provisions of this Section 23 shall substitute for such a separate Lease Agreement, and this section shall survive the Hardee's Closing.

B. Upon the Lease termination date, Hardee's shall pay to the City the sum of Twenty Thousand and No/100ths dollars (\$20,000) towards the costs of demolition of the improvements on the Hardee's Property. Upon payment of such sum, 4G shall have no further obligation with respect to the City's planned redevelopment of the Hardee's Property, including, without limitation, any obligation for demolition, disconnection or movement of utilities, grading and/or paving on the Hardee's Property.

23. **Notice.** All notices required or allowed by this Agreement shall be considered delivered when: (a) delivered in person, (b) the following business day after delivering the same to a nationally recognized overnight courier service (such as Federal Express or UPS), postage prepaid, (c) the following business day after facsimile transmission, so long as a transmission receipt is generated and promptly mailed to the party to be notified, or (d) three business days after depositing the same in U.S. Mail, postage prepaid, addressed to the party or person to whom notice is to be given, at the following addresses:

To Buyer: City of Oskaloosa
c/o Michael Schrock
Oskaloosa City Manager
220 South Market Street
Oskaloosa, IA 52577
Telephone: 641-673-9431
Fax: _____
Email: michael.schrock@oskaloosaiowa.org

With a copy to: David Dixon, Esq.
Oskaloosa City Attorney
118 North Market
Oskaloosa, IA 52577
Telephone: 641-673-9481
Telephone: 671-673-9481

Fax: 671-673-9484
Email: ddixon@heslingalaw.com

To Seller: 4 G Properties, LLC
10703 Barkley St
Overland Park, KS 66211
Attention: Frank Westermajer
Telephone: 913 648-2148 x12
Fax: 913-648-6425
Email: frank@westarfoods.com

With a copy to: Emily Jane Bennett, Esq.
7730 Belleview Avenue, Suite A-240
Greenwood Village, CO 80111
Telephone: 720-484-3933
Fax: 303-740-7300
Email: ejbennett@lafflaw.com

Notice shall be deemed to have been given a) upon receipt by recipient if personally delivered, b) the following business day if delivered by nationally recognized overnight courier such as FedEx or UPS, c) three business days after postmark by the U.S. Postal Service, postage prepaid and delivery confirmation requested, or d) facsimile with evidence of transmission.

24. **Miscellaneous.** This Agreement constitutes the entire agreement of the parties with respect to the Hardee's Property described herein. This Agreement may not be amended or modified except by a writing signed by all of the parties. All understandings and agreements heretofore between the parties with respect to the Hardee's Property are merged in this Agreement which alone fully and completely expresses their understanding. In the event any term or provision of this Agreement is determined by appropriate judicial authority to be illegal or otherwise invalid, such provision shall be given its nearest legal meaning or be construed or deleted as such authority determines, and the remainder of this Agreement shall remain in full force and effect. This Agreement shall be governed by the laws of the State of Iowa. Buyer shall have the right to assign this Agreement to a related entity. Time is of the essence with respect to all matters contained herein. Whenever any time period is to be computed hereunder, the day from which the period begins to run is not to be included, and any period ending on a Saturday, Sunday or legal holiday will be extended to the next business day. This Agreement may be executed in counterparts by the parties hereto and each shall be considered an original, but all such counterparts shall be construed together as representing one agreement between the parties hereto.

25. **Not a 1031 Exchange.** Seller and Buyer agree that this transaction, taken together with the transaction evidenced by the Vacant Land PSA, shall not be treated as an exchange pursuant to Section 1031 of the Internal Revenue Code, but rather shall be separate purchase and sale transactions. Buyer acknowledges that its basis in the Hardee's Property is \$295,000.00.

26. **Contingent upon Approval.** This agreement is contingent upon the approval of the Oskaloosa City Council, and in the event approval is not obtained this agreement shall become null and void.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates specified below.

SELLER:

4 G PROPERTIES, LLC, a Colorado limited liability company, or its assigns

By: _____
Name: Frank Westermajer
Title: President

Date Executed: _____

BUYER:

CITY OF OSKALOOSA, IOWA, a municipal authority

By: _____
Name: _____
Title: _____

Date Executed: _____