



TO: Mayor and Councilmembers

FROM:

DATE: April 12, 2011

SUBJECT: Consider, discuss and possible approval of a Performance Agreement between Farmersville Economic Development Corporation and III:II/Emerging Market Partners, L.L.C. regarding development incentives related to approximately 10.25 acres of land immediately south of and adjacent to U.S. 380 and immediately west of and adjacent to Lots 1 and 2, Farmersville Market Center Addition, in Farmersville, Collin County, Texas

**ACTION: Discussion and action as deemed by the Council.**

(VI- B)

## PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** by and between **III://EMERGING MARKET PARTNERS, L.L.C.**, a Texas limited liability company (hereinafter referred to as "Developer"), and the **FARMERSVILLE ECONOMIC DEVELOPMENT CORPORATION** ("FEDC"), is made and executed on the following recitals, terms and conditions.

**WHEREAS**, FEDC is an economic development corporation operating pursuant to Chapter 504 of the Texas Local Government Code, as amended (also referred to as the "Act"), and the Texas Non-Profit Corporation Act, article 1396-1.01 *et seq.* of the Texas Revised Civil Statutes, as amended; and

**WHEREAS**, Section 501.103 of the Texas Local Government Code, in pertinent part, defines the term "project" to mean "expenditures that are found by the board of directors to be required or suitable for infrastructure necessary to promote or develop new or expanded business enterprises, limited to: (1) streets and roads, rail spurs, water and sewer utilities, electric utilities, or gas utilities, drainage, site improvements, and related improvements; (2) telecommunications and Internet improvements . . ."; and

**WHEREAS**, Section 501.158 of the Texas Local Government Code prohibits the provision of a direct incentive unless FEDC enters into an Agreement with Developer providing at a minimum a schedule of additional payroll or jobs to be created or retained by FEDC's investment; a schedule of capital investments to be made as consideration for any direct incentives provided by FEDC to Developer; and a provision specifying the terms and conditions upon which repayment must be made should Developer fail to meet the agreed to performance requirements specified in this Agreement; and

**WHEREAS**, Developer has applied to FEDC for a loan or other financial accommodations necessary for the construction of Qualified Expenditures on the Property generally located immediately south of and adjacent to U.S. 380 and immediately west of and adjacent to Lots 1 and 2, Farmersville Market Center Addition, City of Farmersville, Texas; and

**WHEREAS**, Developer understands and agrees that: (a) in granting, renewing, or extending any Loan or other financial incentives, FEDC is relying upon Developer's representations, warranties, and agreements, as set forth and provided for in this Agreement; (b) the granting, renewing, or extending of any Loan by FEDC at all times shall be subject to FEDC's sole judgment and discretion; and (c) all such Loans or other financial incentives shall be and shall remain subject to the terms and conditions as set forth in this Agreement; and

**WHEREAS**, the FEDC's Board of Directors have determined the reimbursement provided to Developer for the Qualified Expenditures on the Property is consistent with and meets the definition of "project" as that term is defined in Section 501.103 of the

Texas Local Government Code; and the definition of "cost" as that term is defined by Section 501.152 of the Texas Local Government Code; and

**WHEREAS**, Developer agrees and understands that Section 501.073(a) of the Texas Local Government Code requires the City Council of the City of Farmersville, Texas, to approve all programs and expenditures of the FEDC, and accordingly this Agreement is not effective until City Council has approved this project at a City Council meeting called and held for that purpose.

**NOW, THEREFORE**, for and in consideration of the agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the FEDC and Developer agree as follows:

### **SECTION 1. FINDINGS INCORPORATED.**

The foregoing recitals are hereby incorporated into the body of this Agreement and shall be considered part of the mutual covenants, consideration and promises that bind the parties.

### **SECTION 2. TERM.**

This Agreement shall be effective as of the Effective Date, and shall continue thereafter until all obligations of Developer to FEDC have been performed in full and the parties terminate this Agreement in writing, or on \_\_\_\_\_, **20**\_\_, unless terminated sooner under the provisions hereof.

### **SECTION 3. DEFINITIONS.**

The following words shall have the following meanings when used in this Agreement.

- (a) **Act.** The word "Act" means Chapters 501 to 505 of the Texas Local Government Code, as amended.
- (b) **Agreement.** The word "Agreement" means this Performance Agreement, together with all exhibits and schedules attached to this Performance Agreement from time to time, if any.
- (c) **Developer.** The word "Developer" means III:I/Emerging Market Partners, L.L.C., Inc., a Texas limited liability company, its successors and assigns, whose address for the purposes of this Agreement is 921 Circle in the Woods, Fairview, Texas 75069.
- (d) **Event of Default.** The words "Event of Default" mean and include any of the Events of Default set forth below in the section entitled "Events of Default."

- (e) **Employment Positions.** The words “Employment Position” or “Employment Positions” mean and include a job requiring a minimum of One Thousand Forty (1,040) hours of work averaged over a twelve (12) month period.
- (f) **FEDC.** The word “FEDC” means the **FARMERSVILLE ECONOMIC DEVELOPMENT CORPORATION**, a Texas non-profit corporation, its successors and assigns, whose corporate address for the purposes of this Agreement is 205 South Main Street, Farmersville, Texas 75442.
- (g) **Loan.** The word “Loan” or “Loans” means and includes any and all loans and financial accommodations from FEDC to Developer, whether now or hereafter existing, and however evidenced, including without limitation those loans and financial accommodations described in this Agreement and described on any exhibit or schedule attached to this Agreement.
- (h) **Property.** The word “Property” means the approximately 10.25 acre tract of land immediately south of and adjacent to U.S. 380 and immediately west of and adjacent to Lots 1 and 2, Farmersville Market Center Addition, in Farmersville, Collin County, Texas, as generally described and or depicted in **Exhibit A** of this Agreement, which is attached hereto and incorporated herein for all purposes.
- (i) **Qualified Expenditures.** The words “Qualified Expenditures” mean those expenditures consisting of costs to furnish the materials and install a gravity flow sanitary sewer collection system in accordance with City of Farmersville specifications and codes to service the Property without the use of any lift stations, and those expenses which otherwise meet the definition of “project” as that term is defined by Section 501.103 of the Act, and the definition of “cost” as that term is defined by Section 501.152 of the Act.
- (j) **Related Documents.** The words “Related Documents” mean and include without limitation all promissory notes, loan agreements, and all other instruments and documents, whether now or hereafter existing, executed in connection with Developer’s indebtedness to FEDC.
- (k) **Term.** The word “Term” means the term of this Agreement as specified in Section 2 of this Agreement.

#### **SECTION 4. AFFIRMATIVE COVENANTS.**

Developer covenants and agrees with FEDC that, while this Agreement is in effect, it shall comply with the following terms and conditions:

- (a) **Reimbursement for Qualified Expenditures.** Upon inspection and final acceptance by the City of Farmersville, Texas, (“City”) of a gravity flow sanitary

sewer collection system constructed in accordance with the City's specifications and codes to service the Property without the use of any lift stations, Developer shall be entitled to reimbursement from the FEDC for Qualified Expenditures made to the Property in the amount not to exceed **Twenty-Five Thousand and No/100 Dollars (\$25,000.00)**. Developer shall obtain all required permits and submit to the City Manager of the City as-built construction documents or other documentation acceptable to the City prior to any reimbursement, and shall provide proof to City of payment of all reasonable expenses and clearance of liens on the Property by any contractor.

- (b) **Capital Investment.** Developer covenants and agrees by \_\_\_\_\_, 20\_\_\_\_, to develop the Property for retail uses consistent with a first class shopping center development that generates annual sales in excess of Three Million and No/100 Dollars (\$3,000,000.00).
- (c) **Job Creation and Retention.** Developer covenants and agrees by \_\_\_\_\_, 20\_\_\_\_, and through \_\_\_\_\_, 20\_\_\_\_, that the development will generate and retain a minimum of fifty (50) Employment Positions working on the Property.
- (d) **Performance.** Developer agrees to perform and comply with all terms, conditions, and provisions set forth in this Agreement and in all other instruments and agreements between Developer and FEDC.

## **SECTION 5. EVENTS OF DEFAULT.**

Each of the following shall constitute an Event of Default under this Agreement:

- (a) **Provision of Documentation for Qualified Expenditures.** Failure of Developer to submit to the City Manager of the City construction documents or other documentation as provided in Section 4(a) of this Agreement, which is acceptable to the FEDC, by \_\_\_\_\_, 201\_\_\_\_\_, is an Event of Default.
- (b) **Reimbursement for Qualified Expenditures.** Failure of FEDC to reimburse Developer for Qualified Expenditures made to the Property in the amount not to exceed **Twenty-Five Thousand and No/100 Dollars (\$25,000.00)** within thirty (30) days after: the sanitary sewer improvements have been final accepted by the City.
- (c) **Capital Investment.** Failure of Developer to develop the Property for retail uses consistent with a first class shopping center development that generates annual sales in excess of Three Million and No/100 Dollars (\$3,000,000.00) consistent with Section 4(b) of this Agreement is an Event of Default.

- (d) **Job Creation and Retention.** Failure of the development to generate and maintain a minimum of fifty (50) new Employment Positions working at the Property consistent with Section 4(c) of this Agreement is an Event of Default.
- (e) **False Statements.** Any warranty, representation, or statement made or furnished to FEDC by or on behalf of Developer under this Agreement or the Related Documents that is false or misleading in any material respect, either now or at the time made or furnished is an Event of Default.
- (f) **Insolvency.** Developer's insolvency, appointment of receiver for any part of Developer's property, any assignment for the benefit of creditors of Developer, any type of creditor workout for Developer, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Developer is an Event of Default.
- (g) **Other Defaults.** Failure of Developer to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents, or failure of Developer to comply with or to perform any other term, obligation, covenant or condition contained in any other agreement between FEDC and Developer.

## **SECTION 6. EFFECT OF AN EVENT OF DEFAULT.**

In the event of default under Section 5 of this Agreement, the non-defaulting party shall give written notice to the other party of any default, and the defaulting party shall have thirty (30) days to cure said default. Should said default remain uncured as of the last day of the applicable cure period, and the non-defaulting party is not otherwise in default, the non-defaulting party shall have the right to immediately terminate this Agreement. In the event, Developer defaults and is unable or unwilling to cure said default within the prescribed time period, the amounts provided by FEDC to Developer pursuant to Section 4(a) of this Agreement shall become immediately due and payable by Developer to FEDC.

## **SECTION 7. INDEMNIFICATION.**

**Developer shall indemnify, save, and hold harmless FEDC, its directors, officers, agents, attorneys, and employees (collectively, the "Indemnitees") from and against: (i) any and all claims, demands, actions or causes of action that are asserted against any Indemnatee if the claim, demand, action or cause of action directly or indirectly relates to tortious interference with contract or business interference, or wrongful or negligent use of FEDC's loan advances by Developer or its agents and employees; (ii) any administrative or investigative proceeding by any governmental authority directly or indirectly related, to a claim, demand, action or cause of action in which FEDC is a disinterested party; (iii) any claim, demand, action or cause of action which directly or indirectly contests or**

challenges the legal authority of FEDC or Developer to enter into this Agreement; and (iv) any and all liabilities, losses, costs, or expenses (including reasonable attorneys' fees and disbursements) that any Indemnitee suffers or incurs as a result of any of the foregoing; provided, however, that Developer shall have no obligation under this Section to FEDC with respect to any of the foregoing arising out of the gross negligence or willful misconduct of FEDC or the breach by FEDC of this Agreement. If any claim, demand, action or cause of action is asserted against any Indemnitee, such Indemnitee shall promptly notify Developer, but the failure to so promptly notify Developer shall not affect Developer's obligations under this Section unless such failure materially prejudices Developer's right to participate in the contest of such claim, demand, action or cause of action, as hereinafter provided. If requested by Developer in writing, as so long as no Default or Event of Default shall have occurred and be continuing, such Indemnitee shall in good faith contest the validity, applicability and amount of such claim, demand, action or cause of action and shall permit Developer to participate in such contest. Any Indemnitee that proposes to settle or compromise any claim, demand, action, cause of action or proceeding for which Developer may be liable for payment of indemnity hereunder shall give Developer written notice of the terms of such proposed settlement or compromise reasonably in advance of settling or compromising such claim or proceeding and shall obtain Developer's concurrence thereto.

#### **SECTION 8. MISCELLANEOUS PROVISIONS.**

The following miscellaneous provisions are a part of this Agreement:

- (a) **Amendments.** This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.
- (b) **Applicable Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Collin County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of Collin County, Texas.
- (c) **Assignment.** This Agreement may not be assigned without the express written consent of the other party.
- (d) **Binding Obligation.** This Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. Developer warrants and represents that the individual or individuals executing this Agreement on behalf of Developer has full authority to execute this Agreement and bind Developer to

the same. FEDC warrants and represents that the individual executing this Agreement on its behalf has full authority to execute this Agreement and bind it to the same.

- (e) **Caption Headings.** Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of the Agreement.
- (f) **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same document.
- (g) **Effective Date.** The effective date (the "Effective Date") of this Agreement shall be the date of the later to execute this Agreement by Developer and FEDC.
- (h) **Notices.** Any notice or other communication required or permitted by this Agreement (hereinafter referred to as the "Notice") is effective when in writing and (i) personally delivered either by facsimile (with electronic information and a mailed copy to follow) or by hand or (ii) three (3) days after notice is deposited with the U.S. Postal Service, postage prepaid, certified with return receipt requested, and addressed as follows:

if to Developer: III:I/Emerging Market Partners, L.L.C.  
C/O Scott Steenson  
921 Circle in the Woods  
Fairview, Texas 75069

with a copy to: Jarrett Reed  
Kane Russell Coleman & Logan  
3700 Thanksgiving Tower  
1601 Elm Street  
Dallas, Texas 75201

if to FEDC: Farmersville Economic Development Corporation  
205 South Main Street  
Farmersville, Texas 75442

- (i) **Severability.** If a court of competent jurisdiction finds any provision of this Agreement to be invalid or unenforceable as to any person or circumstance, such finding shall not render that provision invalid or unenforceable as to any other persons or circumstances. If feasible, any such offending provision shall be deemed to be modified to be within the limits of enforceability or validity; however, if the offending provision cannot be so modified, it shall be stricken and all other provisions of this Agreement in all other respects shall remain valid and enforceable.

- (j) **Time is of the Essence.** Time is of the essence in the performance of this Agreement.
- (k) **Undocumented Workers.** Developer certifies that the Developer does not and will not knowingly employ an undocumented worker in accordance with Chapter 2264 of the Texas Government Code, as amended. If during the Term of this Agreement, Developer is convicted of a violation under 8 U.S.C. § 1324B(f), Developer shall repay the amount of the public subsidy provided under this Agreement plus interest, at the rate of eight percent (8%), not later than the 120<sup>th</sup> day after the date the FEDC notifies Developer of the violation.

**DEVELOPER ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS PERFORMANCE AGREEMENT, AND DEVELOPER AGREES TO ITS TERMS. THIS PERFORMANCE AGREEMENT IS DATED TO BE EFFECTIVE AS OF \_\_\_\_\_, 20\_\_\_\_.**

**DEVELOPER:**

**III:I/EMERGING MARKET PARTNERS,  
L.L.C.,** a Texas limited liability company,

By: \_\_\_\_\_  
Scott R. Steenson  
Manager

Date Signed: \_\_\_\_\_

**FEDC:**

**FARMERSVILLE ECONOMIC  
DEVELOPMENT CORPORATION,**  
a Texas non-profit corporation

By: \_\_\_\_\_  
Joseph E. Helmberger, P.E.  
Chairman

Date Signed: \_\_\_\_\_

**ATTEST:**

\_\_\_\_\_  
Stefanie Hurst, Secretary/Treasurer

**DEVELOPER ACKNOWLEDGMENT**

**STATE OR TEXAS           §**

**COUNTY OF COLLIN       §**

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 2011. By Scott R. Steenson, being the Manager of III:1/Emerging Market Partners, L.L.C., a Texas limited liability company, on behalf of said company.

\_\_\_\_\_  
Notary Public, State of Texas

My Commission expires: \_\_\_\_\_

**FEDC ACKNOWLEDGMENT**

**STATE OR TEXAS           §**

**COUNTY OF COLLIN       §**

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 2011, by Joseph E. Helmberger, P.E., Chairman of the Farmersville Economic Development Corporation, a Texas non-profit corporation, on behalf of said corporation.

\_\_\_\_\_  
Notary Public, State of Texas

My Commission expires: \_\_\_\_\_

***Exhibit A***

[Description and or Depiction of Property]

**Exhibit B**

[Qualified Expenditures]