



## *City Attorney*

**DATE:** June 25, 2019

**FROM:** Janelle Combs, City Attorney

**ITEM:** Amendment for Public Health building sale

### **REQUEST**

Consider approval of modification of University of Mary purchase agreement amendment to extend due diligence period from 60 to 90 days.

Please place this item on the 6/25/2019 City Commission meeting agenda.

### **BACKGROUND INFORMATION**

The original purchase agreement provided that the University had 60 days for due diligence on the Public Health building. They have decided to order a Phase II environmental assessment which will take them longer to complete. The closing is set for 90 days from execution of the contract so this extension would only allow the due diligence to continue until the same period of time. They have been provided title, and it would appear that there are no other impediments to closing on time.

### **RECOMMENDED CITY COMMISSION ACTION**

Approve first amendment to purchase agreement with University of Mary for the Public Health building to extend the due diligence deadline to 90 days.

### **STAFF CONTACT INFORMATION**

Janelle Combs | City Attorney, 355-1340 or [jcombs@bismarcknd.gov](mailto:jcombs@bismarcknd.gov)

## FIRST AMENDMENT TO PURCHASE AGREEMENT

This First Amendment to Purchase Agreement (this “**Amendment**”) is entered into effective as of June \_\_ 2019, by and between the University of Mary, a North Dakota nonprofit corporation (“**Purchaser**”), and the City of Bismarck, a North Dakota municipal corporation (“**Seller**”).

WHEREAS, Purchaser and Seller are parties to that certain Purchase Agreement, dated May 31, 2019 (the “**Purchase Agreement**”);

WHEREAS, Seller and Buyer wish to extend the Diligence Deadline for all purposes under the Purchase Agreement as set forth herein.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is hereby agreed as follows:

1. Amendment/Extension of Due Diligence Deadline. Seller and Buyer hereby agree that the definition of “Diligence Deadline” (previously defined as “5:00 pm CT on 60th day after the Effective Date of this Purchase Agreement”) under Section 3(d) of the Purchase Agreement is hereby amended, superseded and restated in its entirety to hereafter be defined as follows:

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“Diligence Deadline”: 5:00 pm CT on the 90<sup>th</sup> day after the Effective Date of this Purchase Agreement.

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All references in the Purchase Agreement to Due Diligence Deadline shall be deemed references to the foregoing amended definition. Further, all references to “60 days”, including without limitation “60 days from the Effective Date”, “60-day due diligence period” or otherwise, in Section 3(d) of the Purchase Agreement, shall be deemed references to “90 days” in accordance with the amended definition of Due Diligence Deadline provided for in this Amendment.

2. Amendment/Agreement in Full Force/Defined Terms. Except as expressly amended by this Amendment, the terms and provisions of the Purchase Agreement shall remain in full force and effect. To the extent any of the terms and provisions of the Purchase Agreement are inconsistent with the terms and provisions of this Amendment, the terms and provisions of this Amendment shall govern and control. All defined terms used in this Amendment and not otherwise defined herein shall have the respective meanings ascribed to them in the Purchase Agreement. No modification, waiver, amendment, discharge or change of this Amendment shall be valid unless the same is in writing and signed by the Party against which the enforcement of such modification, waiver, amendment, discharge or change is or may be sought.

3. Counterparts. This Amendment may be executed in any number of counterparts, each of which so executed shall be deemed original; such counterparts shall together constitute but one agreement. Facsimile and/or digitally transmitted signatures shall be sufficient to bind the Parties and shall in all respects be treated in court proceedings or otherwise as the legal equivalent of an original signature.

**IN WITNESS WHEREOF**, this Amendment has been executed as of the date and year first above set forth.

**SELLER**

**CITY OF BISMARCK,**  
a North Dakota municipal corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**BUYER**

**UNIVERSITY OF MARY,**  
a North Dakota nonprofit corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

## PURCHASE AGREEMENT

THIS PURCHASE AGREEMENT (the “**Agreement**”) is entered into as of this \_\_\_ day of May, 2019 (the “**Effective Date**”), between the City of Bismarck, a North Dakota municipal corporation (“**Seller**”), and the University of Mary, a North Dakota nonprofit corporation (the “**Purchaser**”). Seller and Purchaser are the “**Parties**” to this Agreement, and each of them individually may be referred to as a “**Party**”. Purchaser has exercised its option to the purchase the Property under that certain Option to Purchase, dated October 13, 2015, between Seller and Purchaser (the “**Option**”), and this Agreement is the purchase agreement contemplated by the Option.

In consideration of the mutual covenants set forth in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by the Parties, the Parties agree as follows:

1. **Real Property.** Seller agrees to sell, convey, assign, transfer, and deliver to Purchaser, the following real property (collectively, the “**Property**”), in the County of Burleigh, State of North Dakota:

**Tract 500 of Blocks 13 and 15, Original Plat, Bismarck, North Dakota.**

together with all improvements, buildings and fixtures thereon, and together also with all easements, privileges, rights, hereditaments and appurtenances benefiting, connected or appurtenant thereto.

2. **Purchase Price.** Purchaser shall purchase the Property from Seller for US \$2,150,000 (the “**Purchase Price**”).

3. **Conditions Precedent.** In addition to all other conditions and remedies set forth in this Agreement, Purchaser is not obligated to perform or proceed to Closing under this Agreement unless the following conditions precedent are satisfied on or prior to the Closing Date:

(a) On the Closing Date, Seller is able to convey good and marketable title to the Property free and clear of any and all Liens, free and clear of any and all Objections, and free and clear of any and all other encumbrances, except Permitted Encumbrances, in accordance with Section 4;

(b) All representations and warranties of Seller set forth in this Agreement shall be true as of the Closing Date;

(c) Seller shall have performed all of its covenants, duties, and obligations under this Agreement; and

(d) Purchaser, at its cost and option, has obtained a Phase I, Phase II and any other environmental studies of the Property it deems necessary, in all cases reflecting no environmental concerns or hazardous materials at the Property and not recommending any further investigation or study or recommending obtaining any no further action letter from any governmental authority; however, Purchaser has 60 days from the Effective Date to perform any and all inspections and due diligence, except for title (subject to and as provided in Section 4 below), to Purchaser’s satisfaction. If Purchaser gives written notice to Seller that Purchaser is not satisfied with results of its due diligence/inspections within 60 days of the Effective Date, all earnest money shall be returned to Purchaser within two business days and this Purchase Agreement and Option will be null and void. Upon the Purchaser accepting the results of the due diligence/inspections or

expiration of the 60-day due diligence period, said earnest money shall be non-refundable to the Purchaser but applicable as part payment for the purchase of the Property. If Purchaser does not provide written notice of termination to Seller as provided in this paragraph, by 5:00 pm CT on the 60th day after the Effective Date of this Purchase Agreement (the "Diligence Deadline"), then Purchaser's due diligence contingency shall be deemed waived.

If any of these conditions precedent has not been satisfied (or otherwise waived by Purchaser), then this Agreement may be terminated at the option of Purchaser exercised by written notice to Seller delivered at any time prior to the Closing (or, with respect to satisfaction of due diligence/inspections condition set forth in clause (d) above, by not later than the Diligence Deadline), and this Agreement shall be of no further force or effect.

Seller shall, within 10 days following the Effective Date, deliver to Purchaser copies of any Phase I, Phase II or any other environmental studies, inspections, reports or information pertaining to the Property, any hazardous materials or any soil composition or condition in Seller's possession or control. Seller shall provide Purchaser and Purchaser's agents reasonable access to the Property, and reasonable information, necessary to complete any inspections, reports or surveys, including any Phase I, Phase II, or the Survey.

#### **4. Title Examination.**

(a) Title Examination and Objections. Seller shall, within 10 days following the Effective Date, deliver to Purchaser updated Abstract(s) of Title covering the Property including all appropriate searches (the "**Abstract**", whether one or more). Within a reasonable period of time following Purchaser's receipt of the Abstract, Purchaser shall, at its expense, order from The North Dakota Guaranty & Title Co., or another title company selected by Purchaser (as applicable, the "**Title Company**"), a title insurance commitment covering the Property, showing all matters affecting title to the Property and binding the Title Company to issue at Closing a standard form of ALTA Owner's Policy of Title Insurance, in the full amount of the Purchase Price, with gap coverage (the "**Title Commitment**"), together with legible copies of all instruments (the "**Exception Instruments**") referenced in the Title Commitment. Purchaser may, at Purchaser's expense and option, order an ALTA/ACSM Survey of the Property ("**Survey**") to be prepared by a licensed North Dakota surveyor. The Title Commitment, and Exception Instruments, and if applicable, the Survey, are referred to, collectively, as the "**Title Evidence**".

Purchaser shall examine the Title Evidence, and any other information relevant to and affecting title, and object in writing to any matters disclosed thereby (the "**Objections**"), and shall deliver such Objections to Seller by not later than the later of (a) 20 business days following the date on which the Purchaser has received the last of all Title Evidence (including the Survey if ordered by the Purchaser within 10 business days following its receipt of the Title Commitment) or (b) 30 business days following the date of Purchaser's receipt of the Abstract (as applicable, the "**Objection Period**"). Objections may include items that, in Purchaser's reasonable judgment, materially interfere with Purchaser's proposed uses of, or improvements to, the Property. Any matters (except for Liens) shown or raised in the Title Evidence to which Purchaser does not provide Objection(s) within the Objection Period will be deemed waived and become Permitted Encumbrances.

(b) Cure of Objections by Seller. Seller shall, at its expense, diligently undertake to resolve all Objections, and if necessary, the Closing Date shall, at the option of Purchaser, be extended by up to 120 days to allow Seller to do so. If all Objections are not corrected by the Closing Date, as extended by the preceding sentence, this Agreement may be terminated at the option of Purchaser by written notice of such termination to Seller delivered at any time prior to Closing. If all objected to matters are corrected

within said time, or Purchaser elects in writing to close notwithstanding any uncorrected matters, the parties shall promptly close this transaction.

(c) Free and Clear of all Liens. Notwithstanding anything in this Agreement to the contrary, it is a condition precedent to Purchaser's obligation to consummate the transaction contemplated by this Agreement, and an obligation of Seller under this Agreement, that on the Closing Date, Seller must convey title to the Property free and clear of any and all Liens, and Liens must be satisfied, released, and resolved by Seller, at Seller's sole cost and expense. "**Liens**" shall mean any current, future, or conditional monetary obligation affecting, encumbering, or secured by the Property or any part of the Property, including any mortgage, deed of trust, contract for deed, Lien (including, without limitation, any judgment Lien, tax Lien, mechanic's Lien, construction Lien or the like), lease or occupancy agreement or occupancy right (other than the Leases), collateral assignment of leases, financing statement or the like.

**5. Closing.** The transaction contemplated by this Agreement shall close (the "**Closing**") within 90 days following the Effective Date except as extended in accordance with the provisions of Section 4 above (the date on which Closing actually occurs is referred to herein as the "**Closing Date**").

- (a) On the Closing Date, Seller shall prepare, obtain, execute, and/or deliver to Purchaser, the following:
  - (i) A Warranty Deed in proper recordable form and sufficient to vest in Purchaser good and marketable title to the Property, free and clear of all liens, charges and encumbrances, except the following (collectively, the "**Permitted Encumbrances**"): installments of real estate taxes and special assessments not yet due and payable; zoning, land use, building and similar ordinances; and any other matters not objected to by Purchaser under Section 4 (except Liens, which shall not under any circumstances be deemed Permitted Encumbrances).
  - (ii) A customary Seller' Affidavit completed in a manner allowing the Title Company to remove the standard printed title policy exceptions.
  - (iii) The Lease Assignment and the Estoppel Certificates.
  - (iv) Releases, satisfactions, or payoff statements for all Liens, in a form acceptable to the Title Company.
  - (v) All other documents affecting title to and possession of the Property, and reasonably necessary to transfer or assign the same to Purchaser, free and clear of all Liens, charges, and encumbrances, except the Permitted Encumbrances.
  - (vi) Any other documents reasonably required by the Title Company.
- (b) On the Closing Date, Purchaser shall deliver the Purchase Price as set forth in Section 2, less the \$100.00 already paid by Purchaser to Seller pursuant to the Option.
- (c) The Closing and delivery of all such documents shall take place at the offices of the Title Company.
- (d) Seller shall deliver final possession of the Property to Purchaser on the Closing Date.

6. **Taxes and Assessments.** Real estate taxes and special assessment installments for the year 2018 (payable 2019), and all prior years, shall be paid by Seller in full on or prior to Closing. Real estate taxes and installments of special assessments for 2019 shall be prorated between Seller and Purchaser, as of the Closing Date, based on the prior year's information if the tax statements for 2019 are not yet available.

7. **Allocation of Costs.** Except as otherwise provided in this Agreement, Purchaser shall pay for its title examination. Seller shall pay to obtain all releases and/or satisfactions of all Liens, and any actions necessary to cure the Objections. Purchaser shall pay the premium for any Owner's Policy of Title Insurance for the Property to be issued to Purchaser at Closing. The parties shall share equally any closing fee charged by the Closing Agent. All other items not specifically allocated between the Parties under this Agreement shall be paid for by the party ordering the same.

All rents under the Leases paid in advance to Seller for any periods following the Closing Date shall be prorated on a per diem basis between Seller and Purchaser to the Closing Date, with Seller being entitled to all rents received for all periods prior to the Closing Date, and Purchaser being entitled to all rents applicable to the Closing Date and periods thereafter. Seller shall assign and transfer to Purchaser all security deposits (if any) of tenants held by Seller under the Leases, in accordance with applicable law, via a credit against the balance of the Purchase Price due at Closing. All utilities, and other operational expenses for the Property, shall be prorated to the Closing Date.

8. **Leases.** Exhibit A attached to this Agreement sets forth and identifies all leases, occupancy agreements or the like (whether written or oral) in effect and pertaining to the Property (each a "**Lease**" and collectively, the "**Leases**"). At Closing, the Leases shall be assigned to and assumed by Purchaser pursuant the Assignment and Assumption of Leases (the "**Lease Assignment**"), in the form reasonably acceptable to Seller and Purchaser. At Closing, Seller shall deliver to Purchaser estoppel certificates from each tenant under the Leases (the "**Estoppel Certificates**"), which shall be in customary form reasonably acceptable to Purchaser, provided, none of the Estoppel Certificates may contain any tenant statements or disclosures that Purchaser deems unacceptable (in Purchaser's commercially reasonable judgment discretion) or that contravene or conflict with any representation, warranty or covenant of Seller hereunder. Additionally, at Closing, Seller shall sign a tenant notification letter prepared by Purchaser to be sent to the tenants under the Leases, informing such tenants as to the change in ownership and providing instructions as to future delivery of payments of rent and notices under the Leases.

9. **Operation of Property Prior to Closing.** From and after the Effective Date, and at all times this Agreement remains effective, Seller shall: (a) insure, operate, maintain and repair all portions of the Property in a commercially reasonable manner, and as required under the Leases, keeping the Property in substantially the same condition as existing on the Effective Date; (b) pay, when due and prior to any delinquency, all installments of real estate taxes and special assessments; (c) within 10 business days after the receipt of same, provide Purchaser with copies of any and all notices whatsoever it receives or sends concerning the Property; and (d) not amend or modify any Lease and not enter into any additional lease or other agreement granting a person or entity the right to use or occupy the Property, or any portion of the Property, or otherwise pertaining to the Property in any manner, without in any such case, the prior written consent of Purchaser, which may be withheld in Purchaser's sole and absolute discretion.

10. **Representations and Warranties.** Seller represents and warrants to Purchaser, as of the Effective Date and Closing Date, that:

(a) at Closing: (i) except for Permitted Encumbrances, Seller will own the Property, to the best of Seller's knowledge, free and clear of all Liens, charges, encumbrances, and there will be no liabilities

or obligations (direct or contingent) and no contracts or commitments relating to the Property that extend beyond the Closing Date; (ii) there will be no unpaid amounts for labor or materials provided to the Property; and (iii) there shall be no Liens on the Property other than those for which sufficient sums of Seller's closing proceeds are applied at Closing to completely satisfy the same or release the Property from the same.

(b) Seller has the full right, power, and authority to sell, convey, and transfer the Property to Purchaser and to execute, deliver, and carry out the provisions of this Agreement and all other documents and instruments to be executed and delivered by Seller under this Agreement.

(c) Other than the Leases identified on Exhibit A attached hereto, Seller is not a party to any lease or other agreement that would allow any other person, entity, or party to possess any portion of the Property beyond the Closing Date. Seller has not entered into any purchase agreements, contracts for deed, rights of first refusal, options, or the like through which someone other than Purchaser has a right to acquire all or any part of the Property or that might prevent consummation of the transactions contemplated this Agreement.

(d) There is no action, litigation, investigation, condemnation, or proceeding of any kind pending, or to Seller's knowledge, threatened, against the Property or Seller with respect to the Property, and Seller has no notice of any claimed violations relating to the Property from any local, state, or federal governing authority. Further, there are no violations of law, ordinances, or other legal requirements with respect to the Property or that will result from Closing, to Seller's knowledge.

(e) Exhibit A is a true, correct and complete listing of all Leases. Seller has provided Purchaser with true, correct and complete copies of all Leases, and all amendments or extensions thereto, and any personal guarantees thereof. The Leases are in full force and effect, enforceable in accordance with their respective terms, and none of the Leases permits the occupancy or use of the Property or any portion thereof by any tenant or occupant for any period beyond December 31, 2020. Neither Seller nor any tenant under any of the Leases, is in breach, violation or default under any Lease, and no event has occurred that, with notice or lapse of time or both, would constitute such a breach, violation or default under any such Lease.

Seller shall not commit intentional or negligent actions nor intentionally or negligently fail to take any actions that materially and adversely render any of the above representations or warranties no longer accurate or true, and Seller shall be liable to Purchaser for all such actions or inactions.

**11. Risk of Loss/Damage, Destruction and Eminent Domain.** Prior to Closing, the risk of loss or damage to the Property shall remain with Seller. If, prior to Closing, the Property or any part thereof is damaged or destroyed by fire, flood, elements or any other cause, or any part thereof is taken or threatened to be taken by eminent domain, and in any such case Purchaser determines (in Purchaser's reasonable judgment) that such event has a material adverse affect on the Property, then Purchaser may terminate this Agreement. If Purchaser elects to proceed and consummate this Agreement despite said event(s), Seller shall assign to Purchaser all of Seller's right, title and interest in and to all insurance proceeds and/or condemnation proceeds. In the event of any casualty or condemnation, Seller shall contemporaneously provide copies of all written information and communication sent and received by Seller, and Seller shall afford Purchaser the opportunity to participate in all communications and meetings regarding same.

**12. Assignment.** Neither Party may assign its rights and obligations under this Agreement without the written consent of the other Party.

**13. Survival.** All covenants, agreements, representations, warranties, and any indemnification provisions of this Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns, and shall survive and continue in full force and effect and be binding after the Closing Date and delivery of the Warranty Deed. A Party breaching any representation, warranty, covenant, or obligation in this Agreement shall indemnify, defend, and hold the other Party harmless with respect to any suit, loss, cost, expense, damage, liability, or the like (including attorney's fees) arising out of or relating to any such breach.

**14. Timing.** Time is of the essence as to all dates and time periods set forth in this Agreement. With respect to computation of time periods provided in this Agreement, the day of the act or event after which the designated period of time begins to run is not to be included, and the last day of the period so computed is to be included, and any time period provided in this Agreement which shall end on a day other than a business day shall automatically extend to, and end on, the next business day thereafter. "Business days" do not include a Saturday, Sunday, or legal holiday on which banking institutions in the State of North Dakota are authorized to remain closed, or a day on which the New York Stock Exchange is closed.

**15. No Brokers.** Seller and Purchaser each represent to one another that they have not contracted with or engaged any real estate agent or broker in connection with the Property or transaction contemplated in this Agreement.

**16. Entire Agreement.** This Agreement constitutes the entire agreement between the Parties and may not be amended or modified by any previous negotiations or agreements between the Parties. No subsequent amendment or modification of this Agreement shall be effective unless in writing and signed by the Party against which it is sought to be enforced. If any term, covenant or condition of this Agreement shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, and/or the application of such term, covenant or condition to person or circumstances other than those in respect to which it is held invalid or unenforceable, shall not be affected thereby and each term, covenant or condition of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

**17. Choice of Law.** This Agreement shall be construed in accordance with the laws of the State of North Dakota.

**18. Review by Counsel.** The Parties agree that they have had this Agreement reviewed by counsel of their own choosing, or otherwise have had the full opportunity to have this Agreement reviewed by such counsel. For purposes of interpreting the meaning of any of the terms of this Agreement, this Agreement shall be deemed to have been jointly drafted by both Parties.

**19. Attorney's Fees.** Each Party agrees to pay to the prevailing Party its reasonable attorney's fees incurred in any suit or action instituted by either Party to enforce the provisions of this Agreement.

**20. Notices.** Any notice or election required or permitted to be given or served by any party hereto upon any other shall be deemed given or served in accordance with the provisions of this Agreement if said notice or election is (a) delivered personally, (b) mailed by United States certified mail, return receipt requested with postage prepaid, or (c) delivered by nationally recognized courier, utilizing the "overnight" option and with delivery charges prepaid, and in any case properly addressed to the applicable party's address provided on the signature page of this Agreement. Notices shall be deemed given at the time of delivery if by personal delivery, or as of the date deposited in the mails or with such courier, as applicable. Any party may change its address for service of notice by providing the other party notice in the manner

specified above. Legal counsel to any party to this Agreement shall have the right to give a notice on the respective party's behalf.

**21. Further Cooperation.** Following Closing, each party hereto shall take such further actions as may be reasonably requested by the other party to carry out the provisions of this Agreement and give effect to the transactions contemplated by this Agreement and the documents to be delivered hereunder.

**22. Seller Leaseback.** At Closing, Seller (as tenant) and Buyer (as landlord) shall each execute and deliver the Lease Agreement attached hereto as Exhibit B.

**[SIGNATURE PAGE FOLLOWS]**

IN WITNESS WHEREOF, the parties hereto have caused this Purchase Agreement to be executed effective as of the Effective Date first set forth above.

**SELLER:  
CITY OF BISMARCK**

By: \_\_\_\_\_

Its: \_\_\_\_\_

Seller's Address for Notices:

City of Bismarck, City Administrator  
Attn: Keith Hunke  
221 N. Fifth St., Fourth Floor  
Bismarck, ND 58506

**PURCHASER:  
UNIVERSITY OF MARY**

By: \_\_\_\_\_

Its: \_\_\_\_\_

Purchaser's Address for Notices:

University of Mary  
Attn: Greg Vetter  
7500 University Drive  
Bismarck, ND 58504

This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one instrument. This Agreement may be signed by facsimile, PDF, or other electronic means, and such signatures shall be as binding on the party providing the same as original signatures.

**EXHIBIT A**

(the “**Leases**”)

1. Lease Agreement, dated September 28, 2004, between the City of Bismarck, as landlord, and Bismarck State College, as tenant, as amended March 12, 2019, by the City Commission;
2. Lease Agreement, dated December 14, 2017, between the City of Bismarck, as landlord, and Schaff Tax & Financial Services, Inc., as tenant; and
3. Lease, dated April 28, 2015 between the City of Bismarck, as landlord, and the State of North Dakota, North Dakota Department of Health, as tenant.

**EXHIBIT B**

Seller Leaseback—Lease Agreement

Attached.