

Introduced by: City Manager Nathan Mai-Lombardo

**AN ORDINANCE OF THE CITY OF BERKELEY, MISSOURI, AUTHORIZING THE CITY MANAGER TO EXECUTE AN AGREEMENT WITH SAFEUILT FOR BUILDING DEPARTMENT SERVICES**

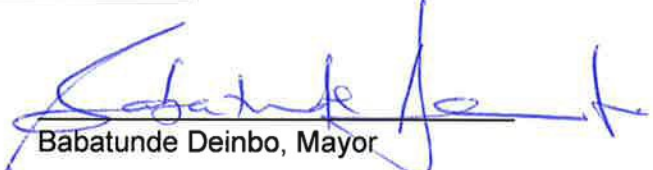
**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BERKELEY, MISSOURI, AS FOLLOWS:**

- Section 1.** The City Manager is hereby authorized to enter into and execute an agreement with Safebuilt for Building Department Services.
- Section 2.** The agreement is attached and hereby incorporated herein and made a part of this ordinance, as if fully set out herein.
- Section 3.** The City Manager is hereby authorized to give notice to the County of St. Louis to terminate the code enforcement services agreement; according to Ordinance #4707.
- Section 4.** This Ordinance shall be in full force and effect from and after its date of passage.

1st Reading this 17<sup>th</sup> day of July 2023

2nd Reading this 17<sup>th</sup> day of July 2023

3rd Reading, PASSED and APPROVED, this 21<sup>st</sup> day of August 2023




Babatunde Deinbo, Mayor

ATTEST:



Deanna L. Jones, City Clerk



Approved as to Form:  
Donnell Smith, City Attorney

Final Roll Call:

Councilwoman Verges	Aye <u>X</u> Nay ___ Absent ___ Abstain ___
Councilwoman Williams	Aye <u>X</u> Nay ___ Absent ___ Abstain ___
Councilman Hoskins	Aye <u>X</u> Nay ___ Absent ___ Abstain ___
Councilwoman Anthony	Aye <u>X</u> Nay ___ Absent ___ Abstain ___
Councilman Hindeleh	Aye <u>X</u> Nay ___ Absent ___ Abstain ___
Councilwoman-at-Large Crawford-Graham	Aye <u>X</u> Nay ___ Absent ___ Abstain ___
Mayor Deinbo	Aye <u>X</u> Nay ___ Absent ___ Abstain ___

**PROFESSIONAL SERVICES AGREEMENT  
BETWEEN CITY OF BERKELEY, MISSOURI  
AND SAFEbuilt, LLC**

This Professional Services Agreement (“Agreement”) is made and entered into by and between City of Berkeley, Missouri, (“Municipality”) and SAFEbuilt, LLC, (“Consultant”). Municipality and Consultant shall be jointly referred to as “Parties”.

**RECITALS**

WHEREAS, Municipality is seeking a consultant to perform the services listed in Exhibit A – List of Services, (“Services”); and

WHEREAS, Consultant is ready, willing, and able to perform Services.

NOW THEREFORE, for good and valuable consideration, the sufficiency of which is hereby acknowledged, Municipality and Consultant agree as follows:

**1. SCOPE OF SERVICES**

Consultant will perform Services in accordance with construction codes, amendments and ordinances adopted by the elected body of Municipality, state laws and regulations that are applicable to the Services provided under this Agreement. The qualified professionals employed by Consultant will maintain current certifications, certificates, licenses as required for Services that they provide to Municipality. Consultant is not obligated to perform services beyond what is contemplated by this Agreement.

Consultant shall provide the Services using Community Core Solutions hardware and software package in accordance with the provisions of Exhibit C.

**2. CHANGES TO SCOPE OF SERVICES**

Any changes to Services between Municipality and Consultant shall be made in writing that shall specifically designate changes in Service levels and compensation for Services. Both Parties shall determine a mutually agreed upon solution to alter services levels and a transitional timeframe that is mutually beneficial to both Parties. No changes shall be binding absent a written Agreement or Amendment executed by both Parties.

**3. FEE STRUCTURE**

In consideration of Consultant providing services, Municipality shall pay Consultant for Services performed in accordance with Exhibit B – Fee Schedule for Services.

**4. INVOICE & PAYMENT STRUCTURE**

Consultant will invoice Municipality, on a monthly basis and provide all necessary supporting documentation. All payments are due to Consultant within 30 days of Consultant’s invoice date. Payments owed to Consultant but not made within sixty (60) days of invoice date shall bear simple interest at the rate of one and one-half percent (1.5%) per month. If payment is not received within ninety (90) days of invoice date, Services will be discontinued until all invoices and interest are paid in full. Municipality may request, and Consultant shall provide, additional information before approving the invoice. When additional information is requested Municipality will identify specific disputed item(s) and give specific reasons for any request. Undisputed portions of any invoice shall be due within 30 days of Consultants invoice date, if additional information is requested, Municipality will submit payment within thirty (30) days of resolution of the dispute.

**5. NOT-TO-EXCEED COMPENSATION**

As compensation for performance of Services under this Agreement, Municipality will pay Consultant for work performed, in accordance with the rates set forth in Exhibit B, a sum not to exceed \$\_\_\_\_\_ annually.

6. TERM

This Agreement shall be effective on the latest date on which this Agreement is fully executed by both Parties. The initial term of this Agreement shall be twelve (12) months. Agreement shall automatically renew for subsequent twelve (12) month terms until such time as either Party notifies the other of their desire to terminate this Agreement.

7. TERMINATION

Either Party may terminate this Agreement, or any part of this Agreement upon ninety (90) days written notice, with or without cause and with no penalty or additional cost beyond the rates stated in this Agreement. In case of such termination, Consultant shall be entitled to receive payment for work completed up to and including the date of termination within thirty (30) days of the termination.

All structures that have been permitted, a fee collected, and not yet expired at the time of termination may be completed through final inspection by Consultant if approved by Municipality. Consultant's obligation is met upon completion of final inspection or permit expiration, provided that the time period to reach such completion and finalization does not exceed ninety (90) days. Alternately, Municipality may exercise the option to negotiate a refund for permits where a fee has been collected but inspections have not been completed. The refund will be prorated according to percent of completed construction as determined by Consultant and mutually agreed upon by all Parties. No refund will be given for completed work.

8. FISCAL NON-APPROPRIATION CLAUSE

Financial obligations of Municipality payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available in accordance with the rules, regulations, and resolutions of Municipality, and other applicable law. Upon the failure to appropriate such funds, this Agreement shall be terminated.

9. MUNICIPALITY OBLIGATIONS

Municipality shall timely provide all data information, plans, specifications and other documentation reasonably required by Consultant to perform Services (Materials). Municipality has the right to grant and hereby grants Consultant a fully paid up, non-exclusive, non-transferable license to use the Materials in accordance with the terms of this Agreement.

10. PERFORMANCE STANDARDS

Consultant shall perform the Services using that degree of care, skill, and professionalism ordinarily exercised under similar circumstances by members of the same profession practicing or performing the substantially same or similar services. Consultant represents to Municipality that Consultant retains employees that possess the skills, knowledge, and abilities to competently, timely, and professionally perform Services in accordance with this Agreement.

11. INDEPENDENT CONTRACTOR

Consultant is an independent contractor, and, except as provided otherwise in this section, neither Consultant, nor any employee or agent thereof, shall be deemed for any reason to be an employee or agent of Municipality. Municipality shall have no liability or responsibility for any direct payment of any salaries, wages, payroll taxes, or any and all other forms or types of compensation or benefits to any personnel performing services for Municipality under this Agreement. Consultant shall be solely responsible for all compensation, benefits, insurance and employment-related rights of any person providing Services hereunder during the course of or arising or accruing as a result of any employment, whether past or present, with Consultant.

Consultant and Municipality agree that Consultant will provide similar service to other clients while under contract with Municipality and Municipality acknowledges that Consultant employees may provide similar services to multiple clients. Consultant shall at its sole discretion assign and reassign qualified employees, as

determined by Consultant, to perform services for Municipality. Municipality may request that a specific employee be assigned to or reassigned from work under this Agreement and Consultant shall consider that request when determining staffing. Consultant shall determine all conditions of employment for its employees, including hours, wages, working conditions, promotion, discipline, hiring and discharge. Consultant exclusively controls the manner, means and methods by which services are provided to Municipality, including attendance at meetings, and Consultant's employees are not subject to the direction and control of Municipality. Except where required by Municipality to use Municipality information technology equipment or when requested to perform the services from office space provided by the Municipality, Consultant employees shall perform the services using Consultant information technology equipment and from such locations as Consultant shall specify. No Consultant employee shall be assigned a Municipal email address as their exclusive email address and any business cards or other IDs shall state that the person is an employee of Consultant or providing Services pursuant to a contractual agreement between Municipality and Consultant.

It is the intention of the Parties that, to the greatest extent permitted by applicable law, Consultant shall be entitled to protection under the doctrines of governmental immunity and governmental contractor immunity, including limitations of liability, to the same extent as Municipality would be in the event that the services provided by Consultant were being provided by Municipality. Nothing in this Agreement shall be deemed a waiver of such protections.

12. ASSIGNMENT AND SUBCONTRACT

Neither party shall assign all or part of its rights or obligations under this Agreement to another entity without the written approval of both Parties; consent shall not be unreasonably withheld. Notwithstanding the preceding, Consultant may assign this Agreement in connection with the sale of all or substantially all of its assets or ownership interest, effective upon notice to Municipality, and may assign this Agreement to its parent, subsidiaries or sister companies (Affiliates) without notice to Municipality. Consultant may subcontract any or all of the services to its Affiliates without notice to Municipality. Consultant may subcontract any or all of the services to other third parties provided that Consultant gives Municipality prior written notice of the persons or entities with which Consultant has subcontracted. Consultant remains responsible for any Affiliate's or subcontractor's performance or failure to perform. Affiliates and subcontractors will be subject to the same performance criteria expected of Consultant. Performance clauses will be included in agreements with all subcontractors to assure quality levels and agreed upon schedules are met.

13. INDEMNIFICATION

To the fullest extent permitted by law, Consultant shall defend, indemnify, and hold harmless Municipality, its elected and appointed officials, employees and volunteers and others working on behalf of Municipality, from and against any and all third-party claims, demands, suits, costs (including reasonable legal costs), expenses, and liabilities ("Claims") alleging personal injury, including bodily injury or death, and/or property damage, but only to the extent that any such Claims are caused by the negligence of Consultant or any officer, employee, representative, or agent of Consultant. Consultant shall have no obligations under this Section to the extent that any Claim arises as a result of Consultants compliance with Municipal law, ordinances, rules, regulations, resolution, executive orders or other instructions received from Municipality.

To the fullest extent permitted by law and without waiver of governmental immunity, Municipality shall defend, indemnify, and hold harmless Consultant, its officers, employees, representatives, and agents, from and against any and all Claims alleging personal injury, including bodily injury or death, and/or property damage, but only to the extent that such Claims are caused by (a) the negligence of, or material breach of any obligation under this Agreement by, Municipality or any officer, employee, representative, or agent of Municipality or (b) Consultant's compliance with Municipal law, ordinances, rules, regulations, resolutions, executive orders or other instructions received from Municipality. If either Party becomes aware of any

incident likely to give rise to a Claim under the above indemnities, it shall notify the other and both Parties shall cooperate fully in investigating the incident.

#### 14. LIMITS OF LIABILITY

EXCEPT ONLY AS MAY BE EXPRESSLY SET FORTH HEREIN, CONSULTANT EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, ERROR-FREE OPERATION, PERFORMANCE, ACCURACY, OR NON-INFRINGEMENT. EXCEPT TO THE EXTENT ARISING FROM MUNICIPALITY'S PAYMENT OBLIGATIONS FOR SERVICES, IN NO EVENT SHALL CONSULTANT OR MUNICIPALITY BE LIABLE TO ONE ANOTHER FOR INDIRECT, INCIDENTAL, CONSEQUENTIAL, RELIANCE, EXEMPLARY, OR SPECIAL DAMAGES INCLUDING WITHOUT LIMITATION, DAMAGES FOR LOST PROFITS, LOST REVENUES, LOST DATA OR OTHER INFORMATION, OR LOST BUSINESS OPPORTUNITY, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, INDEMNITY, NEGLIGENCE, WARRANTY, STRICT LIABILITY, OR TORT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY REMAINING REMEDY. EXCEPT WITH RESPECT TO PAYMENT OBLIGATIONS FOR SERVICES, IN NO EVENT SHALL THE LIABILITY OF MUNICIPALITY OR CONSULTANT UNDER THIS AGREEMENT FROM ANY CAUSE OF ACTION WHATSOEVER (REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER LEGAL THEORY, AND WHETHER ARISING BY NEGLIGENCE, INTENTIONAL CONDUCT, OR OTHERWISE) EXCEED THE GREATER OF THE AMOUNT OF FEES PAID TO CONSULTANT PURSUANT TO THIS AGREEMENT OR THE AVAILABLE LIMITS OF CONSULTANTS INSURANCE (SUCH LIMITS DEFINE MUNICIPAL MAXIMUM LIABILITY TO THE SAME EXTENT AS IF MUNICIPALITY HAD BEEN OBLIGATED TO PURCHASE THE POLICIES).

#### 15. INSURANCE

- A. Consultant shall procure and maintain and shall cause any subcontractor of Consultant to procure and maintain, the minimum insurance coverages listed below throughout the term of this Agreement. Such coverages shall be procured and maintained with forms and insurers acceptable to Municipality. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage.
- B. Worker's compensation insurance to cover obligations imposed by applicable law for any employee engaged in the performance of work under this Agreement, and Employer's Liability insurance with minimum limits of one million dollars (\$1,000,000) bodily injury each accident, one million dollars (\$1,000,000) bodily injury by disease – policy limit, and one million dollars (\$1,000,000) bodily injury by disease – each employee. Worker's compensation coverage in "monopolistic" states is administered by the individual state and coverage is not provided by private insurers. Individual states operate a state administered fund of workers compensation insurance which set coverage limits and rates. Monopolistic states: Ohio, North Dakota, Washington, Wyoming.
- C. Commercial general liability insurance with minimum combined single limits of one million dollars (\$1,000,000) each occurrence and two million dollars (\$2,000,000) general aggregate. The policy shall be applicable to all premises and operations. The policy shall include coverage for bodily injury, broad form property damage, personal injury (including coverage for contractual and employee acts), blanket contractual, independent Consultant's, and products. The policy shall contain a severability of interest provision and shall be endorsed to include Municipality and Municipality's officers, employees, and consultants as additional insureds.
- D. Professional liability insurance with minimum limits of one million dollars (\$1,000,000) each claim and two million dollars (\$2,000,000) general aggregate.
- E. Automobile Liability: If performance of this Agreement requires use of motor vehicles licensed for highway use, Automobile Liability Coverage is required that shall cover all owned, non-owned, and hired automobiles with a limit of not less than \$1,000,000 combined single limit each accident.
- F. Municipality shall be named as an additional insured on Consultant's insurance coverage.
- G. Prior to commencement of Services, Consultant shall submit certificates of insurance acceptable to Municipality.

16. THIRD PARTY RELIANCE

This Agreement is intended for the mutual benefit of Parties hereto and no third-party rights are intended or implied.

17. OWNERSHIP OF DOCUMENTS

Except as expressly provided in this Agreement, Municipality shall retain ownership of all Materials and of all work product and deliverables created by Consultant pursuant to this Agreement. The Materials, work product and deliverables shall be used by Consultant solely as provided in this Agreement and for no other purposes without the express prior written consent of Municipality. As between Municipality and Consultant, all work product and deliverables shall become the exclusive property of Municipality when Consultant has been compensated for the same as set forth herein, and Municipality shall thereafter retain sole and exclusive rights to receive and use such materials in such manner and for such purposes as determined by it. Notwithstanding the preceding, Consultant may use the Materials, work product, deliverables, applications, records, documents and other materials provided to perform the Services or resulting from the Services, for purposes of (i) benchmarking of Municipality's and other client's performance relative to that of other groups of customers served by Consultant; (ii) improvement, development marketing and sales of existing and future Consultant services, tools and products; (iii) monitoring Service performance and making improvements to the Services. For the avoidance of doubt, Municipality Data will be provided to third parties, other than hosting providers, development consultants and other third parties providing services for Consultant, only on an anonymized basis and only as part of a larger body of anonymized data. If this Agreement expires or is terminated for any reason, all records, documents, notes, data and other materials maintained or stored in Consultant's secure proprietary software pertaining to Municipality will be exported into a CSV file and become property of Municipality. Notwithstanding the preceding, Consultant shall own all rights and title to any Consultant provided software and any improvements or derivative works thereof.

Upon reasonable prior written notice, Municipality and its duly authorized representatives shall have access to any books, documents, papers and records of Consultant that are related to this Agreement for the purposes of audit or examination, other than Consultant's financial records, and may make excerpts and transcriptions of the same at the cost and expense of Municipality.

18. CONSULTANT ACCESS TO RECORDS

Parties acknowledge that Consultant requires access to Records in order for Consultant to perform its obligations under this Agreement. Accordingly, Municipality will either provide to Consultant on a daily basis such data from the Records as Consultant may reasonably request (in an agreed electronic format) or grant Consultant access to its Records and Record management systems so that Consultant may download such data. Data provided to or downloaded by Consultant pursuant to this Section shall be used by Consultant solely in accordance with the terms of this Agreement.

19. CONFIDENTIALITY

Consultant shall not disclose, directly or indirectly, any confidential information or trade secrets of Municipality without the prior written consent of Municipality or pursuant to a lawful court order directing such disclosure.

20. CONSULTANT PERSONNEL

Consultant shall employ a sufficient number of experienced and knowledgeable employees to perform Services in a timely, polite, courteous and prompt manner. Consultant shall determine appropriate staffing levels and shall promptly inform Municipality of any reasonably anticipated or known employment-related actions which may affect the performance of Services. Additional staffing resources shall be made available to Municipality when assigned employee(s) is unavailable.

21. DISCRIMINATION & ADA COMPLIANCE

Consultant will not discriminate against any employee or applicant for employment because of race, color, religion, age, sex, disability, national origin or any other category protected by applicable federal or state law. Such action shall include but not be limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. Consultant agrees to post in conspicuous places, available to employees and applicants for employment, notice to be provided by an agency of the federal government, setting forth the provisions of Equal Opportunity laws. Consultant shall comply with the appropriate provisions of the Americans with Disabilities Act (the "ADA"), as enacted and as from time to time amended, and any other applicable federal regulations. A signed certificate confirming compliance with the ADA may be requested by Municipality at any time during the term of this Agreement.

22. E-VERIFY/VERIFICATION OF EMPLOYMENT STATUS

Pursuant to FS 448.095, Consultant certifies that it is registered with and uses the U.S. Department of Homeland Security's E-Verify system to verify the employment eligibility of all new employees hired by Consultant during the term of the Agreement. Consultant shall not knowingly employ or contract with an illegal alien to perform work under this Agreement and will verify immigration status to confirm employment eligibility. If Consultant enters into a contract with a subcontractor to perform work or provide services pursuant to the Agreement, Consultant shall likewise require the subcontractor to comply with the requirements of FS 448.095, and the subcontractor shall provide to Consultant an affidavit stating that the subcontractor does not employ, contract with or subcontract with an unauthorized alien. Consultant will maintain a copy of such affidavit for the duration of its contract with owner. Consultant is prohibited from using the E-Verify program procedures to undertake pre-employment screening of job applicants while this Agreement is being performed.

23. SOLICITATION/HIRING OF CONSULTANT'S EMPLOYEES

During the term of this Agreement and for one year thereafter, Municipality shall not solicit, recruit or hire, or attempt to solicit, recruit or hire, any employee or former employee of Consultant who provided services to Municipality pursuant to this Agreement ("Service Providers"), or who interacted with Municipality in connection with the provision of such services (including but not limited to supervisors or managers of Service Providers, customer relations personnel, accounting personnel, and other support personnel of Consultant). Parties agree that this provision is reasonable and necessary in order to preserve and protect Consultant's trade secrets and other confidential information, its investment in the training of its employees, the stability of its workforce, and its ability to provide competitive building department programs in this market. If any provision of this section is found by a court or arbitrator to be overly broad, unreasonable in scope or otherwise unenforceable, Parties agree that such court or arbitrator shall modify such provision to the minimum extent necessary to render this section enforceable. In the event that Municipality hires any such employee during the specified period, Municipality shall pay to Consultant a placement fee equal to 25% of the employee's annual salary including bonus.

24. NOTICES

Any notice under this Agreement shall be in writing and shall be deemed sufficient when presented in person, or sent, pre-paid, first class United States Mail, or delivered by electronic mail to the following addresses:

<b>If to Municipality:</b> Nathan Mai-Lombardo, City Manager City of Berkeley 8425 Airport Road Berkeley, MO 63134 Email: <a href="mailto:nathan@berkeleymo.us">nathan@berkeleymo.us</a>	<b>If to Consultant:</b> Joe DeRosa, CRO SAFEbuilt, LLC 444 N. Cleveland, Suite 444 Loveland, CO 80537 Email: <a href="mailto:jderosa@safebuilt.com">jderosa@safebuilt.com</a>
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25. FORCE MAJEURE

Any delay or nonperformance of any provision of this Agreement by either Party (with the exception of payment obligations) which is caused by events beyond the reasonable control of such party, shall not constitute a breach of this Agreement, and the time for performance of such provision, if any, shall be deemed to be extended for a period equal to the duration of the conditions preventing such performance.

26. DISPUTE RESOLUTION

In the event a dispute arises out of or relates to this Agreement, or the breach thereof, and if said dispute cannot be settled through negotiation, Parties agree first to try in good faith to settle the dispute by mediation, before resorting to arbitration, litigation, or some other dispute resolution procedure. The cost thereof shall be borne equally by each Party.

27. ATTORNEY'S FEES

In the event of dispute resolution or litigation to enforce any of the terms herein, each Party shall pay all its own costs and attorney's fees.

28. AUTHORITY TO EXECUTE

The person or persons executing this Agreement represent and warrant that they are fully authorized to sign and so execute this Agreement and to bind their respective entities to the performance of its obligations hereunder.

29. CONFLICT OF INTEREST

Consultant shall refrain from providing services to other persons, firms, or entities that would create a conflict of interest for Consultant with regard to providing the Services pursuant to this Agreement. Consultant shall not offer or provide anything of benefit to any Municipal official or employee that would place the official or employee in a position of violating the public trust as provided under Municipality's charter and code of ordinances, state or federal statute, case law or ethical principles.

30. GOVERNING LAW AND VENUE

The negotiation and interpretation of this Agreement shall be construed under and governed by the laws of the State of Missouri, without regards to its choice of laws provisions. Exclusive venue for any action under this Agreement, other than an action solely for equitable relief, shall be in the state and federal courts serving Municipality and each party waives any and all jurisdictional and other objections to such exclusive venue.

31. COUNTERPARTS

This Agreement and any amendments or task orders may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. For purposes of executing this Agreement, scanned signatures shall be as valid as the original.

32. ELECTRONIC REPRESENTATIONS AND RECORDS

Parties hereby agree to regard electronic representations of original signatures as legally sufficient for executing this Agreement and scanned signatures emailed by PDF or otherwise shall be as valid as the original. Parties agree not to deny the legal effect or enforceability of the Agreement solely because it is in electronic form or because an electronic record was used in its formation. Parties agree not to object to the admissibility of the Agreement in the form of an electronic record, or a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature, on the ground that it is an electronic record or electronic signature or that it is not in its original form or is not an original.

33. WAIVER

Failure to enforce any provision of this Agreement shall not be deemed a waiver of that provision. Waiver of any right or power arising out of this Agreement shall not be deemed waiver of any other right or power.



34. ENTIRE AGREEMENT

This Agreement, along with attached exhibits, constitutes the complete, entire and final agreement of the Parties hereto with respect to the subject matter hereof, and shall supersede any and all previous agreements, communications, representations, whether oral or written, with respect to the subject matter hereof. Invalidation of any of the provisions of this Agreement or any paragraph sentence, clause, phrase, or word herein or the application thereof in any given circumstance shall not affect the validity of any other provision of this Agreement.

IN WITNESS HEREOF, the undersigned have caused this Agreement to be executed in their respective names on the dates hereinafter enumerated.

\_\_\_\_\_  
Gary Amato, CAO  
SAFEbuilt, LLC



\_\_\_\_\_  
Nathan Mai-Lombardo, City Manager  
City of Berkeley, Missouri

\_\_\_\_\_  
Date



\_\_\_\_\_  
Date

\_\_\_\_\_  
Name and Title  
City of Berkeley, Missouri

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## EXHIBIT A – LIST OF SERVICES

### 1. LIST OF SERVICES

#### Building Official Services

- ✓ Be a resource for Consultant team members, Municipal staff, and applicants
- ✓ Help guide citizens through the complexities of the codes in order to obtain compliance
- ✓ Monitor changes to the codes including state or local requirements and determine how they may impact projects in the area and make recommendations regarding local amendments
- ✓ Provide Building Code interpretations for final approval
- ✓ Oversee our quality assurance program and will make sure that we are meeting our agreed upon performance measurements and your expectations
- ✓ Oversee certificate of occupancy issuance to prevent issuance without compliance of all departments
- ✓ Attend staff and council meetings as requested
- ✓ Responsible for reporting for Municipality – frequency and content to be mutually agreed upon
- ✓ Issue stop-work notices for non-conforming activities related to provided services – as needed

#### Building, Electrical, Plumbing, Mechanical Inspection Services

- ✓ Consultant utilizes an educational, informative approach to improve the customer's experience
- ✓ Perform code compliance inspections to determine that construction complies with approved plans
- ✓ Meet or exceed agreed upon performance metrics regarding inspections
- ✓ Provide onsite inspection consultations to citizens and contractors while performing inspections
- ✓ Return calls and emails from permit holders in reference to code and inspection concerns
- ✓ Identify and document any areas of non-compliance
- ✓ Leave a copy or provide an electronic version of the inspection results and discuss inspection results with site personnel

#### Plan Review Services

- ✓ Provide plan review services electronically or in the traditional paper format
- ✓ Review plans for compliance with adopted building codes, local building amendments or building ordinances
- ✓ Be available for pre-submittal meetings by appointment
- ✓ Coordinate plan review tracking, reporting, and interaction with applicable departments
- ✓ Provide feedback to keep plan review process on schedule
- ✓ Communicate plan review findings and recommendations in writing
- ✓ Return a set of finalized plans and all supporting documentation
- ✓ Provide review of plan revisions and remain available to applicant after the review is complete

#### Remote Permit Technician Services

- ✓ Provide qualified individuals to perform the functions of this position
- ✓ Facilitate the permitting process from initial permit intake to final issuance of permit
- ✓ Review submittal documents and request missing information to ensure packets are complete
- ✓ Answer questions concerning the building process and requirements over the phone
- ✓ Form and maintain positive relationships with Municipal staff and maintain a professional image
- ✓ Determine permit fees, if requested
- ✓ Work with Municipal Clerk to facilitate Freedom of Information Act (FOIA) requests, if requested
- ✓ Provide inspection scheduling and tracking to ensure code compliance
- ✓ Act as an office resource to inspectors in the field
- ✓ Provide input, tracking and reporting to help increase efficiencies

Reporting Services

- ✓ Consultant will work with Municipality to develop a mutually agreeable reporting schedule and format

2. COMMUNITY CORE SOLUTIONS TERMS AND CONDITIONS

- ✓ Provide Community Core in accordance with the terms and conditions of Exhibit C.

3. TIME OF PERFORMANCE

- ✓ Consultant will perform Services during normal business hours excluding Municipal holidays
- ✓ Building Official will be available as mutually agreed upon
- ✓ Remote Permit Technician will be available as mutually agreed upon
- ✓ Inspectors will be dispatched daily or as-requested
- ✓ Consultant representative(s) will be available by phone and email
- ✓ Consultant representative(s) will meet with the public by appointment

Deliverables			
<b>INSPECTION SERVICES</b>	Inspections requested before 4:00 p.m. completed the following business day		
<b>PRE-SUBMITTAL MEETINGS</b>	Provide pre-submittal meetings to applicants by appointment		
<b>PLAN REVIEW TURNAROUND TIMES</b>	Provide comments within the following timeframes: Day 1 = first full business day after receipt of plans and all supporting documents		
	<u>Project Type:</u>	<u>First Comments</u>	<u>Second Comments</u>
	✓ Single-family within	10 business days	10 business days or less
	✓ Multi-family within	10 business days	10 business days or less
	✓ Small commercial within (under \$2M in valuation)	10 business days	10 business days or less
✓ Large commercial within	20 business days	10 business days or less	

## EXHIBIT B – FEE SCHEDULE FOR SERVICES

### 1. FEE SCHEDULE

- ✓ Municipality and Consultant will review the Municipal Fee Schedule and valuation tables annually to discuss making adjustments to reflect increases in the costs incurred by Consultant to provide Services.
- ✓ Beginning January 01, 2024 and annually thereafter, any hourly and flat rates listed shall be increased based upon the annual increase in the Department of Labor, Bureau of Labor Statistics or successor thereof, Consumer Price Index (United States City Average, All Items (CPI-U), Not Seasonally adjusted, All Urban Consumers, referred to herein as the “CPI”) for the Municipality or, if not reported for the Municipality the CPI for cities of a similar size within the applicable region from the previous calendar year, such increase, however, not to exceed 4% per annum. The increase will become effective upon publication of the applicable CPI data. If the index decreases, the rates listed shall remain unchanged.
- ✓ Consultant fees for Services provided pursuant to this Agreement will be as follows:

<b>Service Fee Schedule:</b>	
Inspection Services <ul style="list-style-type: none"> <li>• Permits issued after service start date</li> <li>• All Trades – Residential and Commercial</li> </ul>	82% of Municipal Permit Fee as established by ordinance or resolution
Inspection Services <ul style="list-style-type: none"> <li>• Permits issued prior to service start date</li> <li>• All Trades – Residential and Commercial</li> </ul>	\$75.00 per inspection
Plan Review Services <ul style="list-style-type: none"> <li>• Residential and Commercial</li> </ul>	82% of Municipal Plan Check Fee as established by ordinance or resolution
Structural Engineering Plan Review	\$156.00 per hour – one (1) hour minimum
Building Official Services	Included in percentage of fees above
Remote Permit Technician Service	Included in percentage of fees above
After Hours/Emergency Inspection Services	\$125.00 per hour – two (2) hour minimum
Community Core Software	No Cost to Municipality
Hourly inspection time tracked will start when Consultant checks in at Municipality or first inspection site. Time tracked will end when the inspector completes the last scheduled inspection or leaves Municipal office. Time tracked will include travel time between inspection sites and all administrative work related to inspection support.	

Meritage Systems CommunityCore: Description of Services

CITY OF BERKELEY, MO

This order form is subject to the [terms of service](#) and [privacy policy](#).

Meritage reserves the right to amend the terms of service and privacy policy at any time and without prior notice.

Applications and Services		One-Time Set-Up Fee	Annual Support and Licensing Fee	Number of Users
<b>CommunityCore</b> Including InspectorConnect iOS mobile app for building and code inspections	<input checked="" type="checkbox"/>	\$0.00	\$0.00	3
<b>Legacy Data Import: Permitting</b> Transfer of historical permit data from legacy system, assumes availability of readable data file or CSV	<input type="checkbox"/>	\$	\$	
<b>GIS Integration: Permitting</b>	<input type="checkbox"/>	\$	\$	
<b>Contractor &amp; Business Licensing</b>	<input checked="" type="checkbox"/>	\$	Included	
<b>CommunityConnect Online Permitting</b> Anywhere, anytime access for contractors to apply for permits, pay fees, check status, request inspections and upload plans	<input checked="" type="checkbox"/>	\$0.00 Includes Setup of CommunityCore Preferred Merchant Account for Credit Card Processing	\$0.00	3
<b>Online Payments</b> Non-Preferred Merchant Account: additional fee if Meritage Systems is not a preferred provider	<input checked="" type="checkbox"/>	\$	NA	
<b>System Training</b>	<input checked="" type="checkbox"/>		NA	
<b>Total:</b>		\$0.00	\$0.00	3

**CommunityCore Permit Management Features:**

**PAYMENT SHALL BE PURSUANT TO SECTION 5**

- Permitting and Inspection Management
- Address Import Setup
- Inspections (including mobile access & when available, InspectorConnect app for iOS tablets)
- Contractor and Business Registration
- Plan Review Tracking and simple Planning/Zoning permits and workflow
- Reporting and Data Import/Export
- Complete configuration of permit type, terminology, fee structures, documents and user roles and permissions
- Permit Documents: Standard set of Permits, CO, TCO configured with your jurisdiction logo and information
- Customs Documents: Available for an additional charge
- Reports: Library of standard reports
- Custom Reports: Available for an additional charge
- Online Training for startup and post startup, ongoing and customer support
- Personalized support, including configuration updates
- Automatic updates of new features

These Service Terms of Use ("Agreement") constitute a contract between Meritage Systems, Inc., with offices at 444 N. Cleveland Ave., Suite 444, Loveland, CO 80537 ("Meritage"), and you ("Customer"). This Agreement includes and incorporates the Order Form with which Customer purchased the Services and any subsequent Order Forms (submitted in written or electronic form), our Privacy Policy and our Copyright Policy. By accessing or using the Services, you agree to be bound by this Agreement. If you are entering into this Agreement on behalf of a company, organization or other entity, you represent that you have such authority to bind such entity and are agreeing to this Agreement on behalf of such entity. If you do not have such authority to enter into this Agreement or do not agree with these terms and conditions, you may not use the Services. Meritage reserves the right to revise this Agreement from time to time, at our sole discretion. By accessing or using the Services after such revisions, you agree to be bound by the revised Agreement.

**1. Definitions. For purposes of this Agreement the following terms have the following meanings:**

- a. "Account" means an account allowing access to the Services created in Customer's name.
- b. "Fees" means the fees for the Services.
- c. "Confidential Information" means (a) all nonpublic information disclosed or made available under this Agreement that relates to the provision or receipt of the Services or either party's financial condition, operations or business, and which is clearly identified as confidential at the time of disclosure, (b) the Technology, (c) the Documentation, (d) the Customer Information that is not publicly available, and (e) the User IDs.
- d. "Customer Information" means all data, information or other content entered by or collected from Customer or any User that is entered into the Services by Customer or any User while accessing the Services. Customer Information includes any third-party information collected by Customer or any User and entered into the Services.
- e. "Documentation" means the online help files and instruction manuals (whether in print or electronic form) that relate to the use of the Services that have been provided or made available by Meritage to Customer.
- f. "Go-Live Date" means the date on which the Services, hosted on a Production Server, become active.
- g. "Intellectual Property Rights" means any and all intellectual property rights throughout the world, including, without limitation, any and all copyrights, trademarks, service marks, trade secrets, patents, patent applications, moral rights, contract rights and any and all other legal rights protecting intangible proprietary information.
- h. "Order Form" means the form executed by the parties that describes the Services and any setup fees associated with the Services.
- i. "On-boarding" means the Set-Up and the Training, as specified in the Order Form.
- j. "Production Server" means the server on which the Services will be hosted.
- k. "Start of Service Date" is the date of commencement of operation of the services by Customer or 120 days following the Effective Date, whichever is first.
- l. "Services" means the publicly-available, online building department services provided by Meritage through its CommunityCore application, which can be accessed through the web site located at [www.app.communitycore.com](http://www.app.communitycore.com) and such other sites as may be designated by Meritage (each, the "Site" or collectively, the "Sites").
- m. "Set-Up" means defining workflows and permit types, entering fee schedules and setting up Users. The purpose of Set-Up is to configure the Production Server on which the Services for Customer will be hosted.
- n. "Set-Up Fees" means the fees for Set-Up specified in the Order Form.
- o. "Subscription Fees" means the annual subscription fee specified in the Order Form.
- p. "Technology" means the software, hardware and other technology used by or on behalf of Meritage to provide the Services, and all data, information and other content included on or accessible through the Services, except for any Customer Information.
- q. "Training" means the services intended to familiarize Users on the use of the Services, as described in Section 4, and to verify configuration of the Production Server.
- r. "User ID" means each unique User identification name and password used for access to and use of the Services through the Account.
- s. "User" means anyone accessing the Services through Customer's Account.

**2. Customer's Access To And Use Of The Services.**

- a. Customer's Right to Access the Services. Subject to the terms of this Agreement Meritage grants to Customer a limited, non-exclusive, non-transferrable license to access and use the Sites and Services as specified in the Order Form during the term of this Agreement, solely for Customer's own internal business purposes. Except as set forth in this Agreement, Customer is not receiving any right or license to use, or any ownership interest with respect to, the Sites, Services or any Technology or Intellectual Property related to the Sites or Services. Customer acknowledges that the Services are hosted by third-party hosting providers contracted by Meritage. Meritage reserves the right to change hosting provider from time to time and without notice to Customer.

- b. Certain Restrictions on Customer's Access. Customer will not, and will not permit any Users or any other party to: a) download or otherwise obtain a copy of the Technology in any form; (b) reverse engineer or otherwise derive the source code of the Service, Sites or Technology or otherwise modify, reverse compile, disassemble, or translate the Service, Sites or Technology or create any derivative works thereof; or (c) use the Service on behalf of any third party or for any purpose other than as described in this Agreement; (d) sell, lease, license, sublicense, distribute or otherwise transfer in whole or in part the Service or use it as a service bureau; (e) post, send, process or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortuous material, including material violating of third party rights; (f) post, send, process or store material containing software viruses, worms, Trojan horses or other harmful or malicious computer code, files, scripts, agents or programs; (g) interfere with or disrupt the integrity or performance of the Service or attempt to gain unauthorized access to the Service or related systems or networks; (h) remove, alter or obscure any titles, product logo or brand name, trademarks, copyright notices, proprietary notices or other indications of the IP Rights and/or Licensor's rights and ownership thereof, whether such notice or indications are affixed on, contained in or otherwise connected to the software or on any copies made in accordance with this Agreement; (i) remove, alter or obscure any titles, product logo or brand name, trademarks, copyright notices, proprietary notices or other indications of the intellectual property rights and/or Licensor's rights and ownership thereof, whether such notice or indications are affixed on, contained in or otherwise connected to the Service, or Documentation, or on any copies made in accordance with this Agreement; (j) use, or authorize or permit the use of, the Service except as expressly permitted herein; (k) use the Service to perform any activity which is or may be, directly or indirectly, unlawful, harmful, threatening, abusive, harassing, tortuous, or defamatory, nor to perform any activity which breaches the rights of any third party.
- c. Customer's Use of the Services. (1.a) Accounts/User IDs. Customer will be provided with one or more User IDs to access the Services through the Account. Your Order Form specifies the number of user IDs and Read-Only IDs provided by Meritage to Customer under this agreement ("Subscription Cap"). Each User ID shall be linked to a single User and Customer agrees to limit usage of a User ID to the individual to which the User ID is assigned. Customer may request to increase the number of Users and the parties shall establish the terms under which such additional Users will be added. Customer shall use, and shall ensure that Users use, commercially reasonable efforts to ensure the security and confidentiality of all User IDs. In the event that the confidentiality of a User ID is or may be compromised, Customer shall promptly advise Meritage of the potential or actual compromise. Customer shall be responsible for the use of a User ID by unauthorized users. (1.b) Customer Information. Customer represents and warrants that it has all necessary intellectual and proprietary rights and licenses in and to any Customer Information to permit (i) it and its Users to enter Customer Information into the Services and (ii) to permit Meritage to perform the Services. Customer hereby grants to Meritage a fully paid-up, non-exclusive license to use, reproduce and create derivative works of the Customer Information as reasonably required to perform the Services. (1.c) Necessary Equipment. The Services are provided through the internet and Users must have an internet connection in order to access the Services. Meritage does not provide internet connectivity. Customer will be solely responsible, at Customer's own expense, for acquiring, installing and maintaining all telecommunication services, hardware, software and other equipment as may be necessary for Customer and Customer's Users to connect to, access, and use the Services. Currently, the services may be accessed through the Chrome browser or the iOS mobile app provided they have been maintained to versions supported during the three-year period prior to the date on which access is sought. (1.d) Customer will not use and will not authorize any User to use any open source software in connection with the Services in any manner that requires, pursuant to the license applicable to such open source software, that any Meritage Confidential Information or the Services be (A) disclosed or distributed in source code form, (B) made available free of charge to recipients, or (C) modifiable without restriction by recipients. (1.e) By using the Services, Customer agrees to be bound by the terms of **Meritage's Copyright Policy**, which terms may be revised by Meritage at its sole discretion. By using the Services after the effective date of any such revision, Customer expressly agrees to be bound by the terms of the revised Copyright Policy.
- d. Meritage will use reasonable commercial efforts to ensure that the Services perform substantially in accordance with the description of the services found at [www.app.communitycore.com](http://www.app.communitycore.com). The Services are subject to modification from time to time at Meritage's sole discretion, provided the modifications do not materially diminish the functionality of the Services provided by Meritage.
- e. Meritage will use reasonable commercial efforts to make the Services available to Customer and its Users. Notwithstanding the foregoing, Meritage reserves the right to suspend Customer's (or any of its Users') access to the Services: (i) for scheduled or emergency maintenance, (ii) in the event Customer is in breach of this Agreement, including failure to pay any amounts due to Meritage, and fails to correct that breach within the applicable cure period; (iii) in the event that Customer breaches Section 2.2 or Section 7.2 of this Agreement or (iv) as it deems reasonably necessary to respond to any actual or potential security concerns.

- f. Customer acknowledges that the Services will require the Users and third parties for whom the Services are being performed by Customer to share with Meritage certain information for the purposes of providing the Services. This information may include personal information (such as email address, and/or phone number) regarding the Users or such third parties which Meritage will use for the purposes of providing the Services. Customer is fully responsible for obtaining the consent of each User and any third party to the use of his/her information by Meritage for purposes of providing the Services. Such use will be subject to and governed by the terms of Meritage's Privacy Policy, the current version of Meritage's privacy policy is available [here](#). Meritage reserves the right to revise the Privacy Policy at its sole discretion. By using the Services after the effective date of any such revision, Customer expressly agrees to be bound by the terms of the revised Privacy Policy.
- g. Customer will be fully responsible for Users' compliance with this Agreement. Any breach of this Agreement by a User shall be deemed to be a breach by Customer. Customer will promptly advise Meritage in the event that any User or third party revokes such consent or ceases to be a User. Customer is solely responsible for determining whether the Services are sufficient for Customer's purposes.

### **3. Set-Up.**

- a. Set-Up Services. Subject to the terms of this Agreement Meritage will provide Customer with the Set-Up services as described in the Order Form. Except to the extent provided in the Order Form, no such services will be provided. Customer Responsibilities and Certain Restrictions on Set-Up. Customer is responsible for providing information in a timely manner and in an appropriate format to allow Meritage to provide the Set-Up and for ensuring the Customer resource(s) assigned to provide support to Meritage in performing the Set-Up, along with all Users, have adequate computer skills to perform their tasks. Set up support required beyond the specified Set-Up shall be arranged upon the agreement of the parties and will incur an additional fee. Acceptance. The purpose of Set-Up is to configure the Services for availability on the Go-Live Date. During the Training, Customer will have the opportunity to evaluate the Set-Up and note any configuration errors. Upon discovery of an error, Customer will notify Meritage of the necessary configuration changes and Meritage will modify Set-Up to make the requested changes. Upon completion of Training and prior to the Go-Live Date, Customer shall review and accept the Services by executing a form of acceptance provided by Meritage. Customer acknowledges and accepts that configuration of the Services is limited to the extent accommodated by the current capabilities and limitations of the Services.

### **4. Training.**

- a. Training Services. Subject to the terms of this Agreement, Meritage will provide Customer with the Training services as described in the Order Form. Except to the extent provided in the Order Form, no such services will be provided.
- b. Delivery. All Training will be provided by Meritage using WebEx or an equivalent service agreed by the parties. Meritage will create a Training site for Customer and its Users to use for Training. In addition to WebEx training, the Training website will provide access to online documentation and training videos that may be accessed by Customer and its Users. Customer and its Users may access the Training web site on an unlimited basis through the Go-Live Date. Customer acknowledges that the Training website may not be available at all times and that Meritage shall have no liability as a result of the unavailability of the Training website.
- c. Customer Responsibilities and Certain Restrictions. Customer is responsible for providing information in a timely manner and in an appropriate format to allow Meritage to provide the Training and for ensuring the Customer resource(s) assigned to provide support to Meritage in performing the Training, along with all Users, have adequate computer skills to perform their tasks.
- d. Verification of Set-Up. Customer acknowledges that a primary purpose of the Training website is to verify functionality of the Services prior to the Go-Live Date. Customer will have the opportunity to evaluate the Set-Up and note any configuration errors. Upon discovery of an error, Customer will notify Meritage of the necessary configuration changes and Meritage will modify Set-Up to make the requested changes to the Training website.

### **5. Fees And Payment.**

- a. . Fees. On the Effective Date, Customer will pay Meritage the Set-Up Fee as specified in the Order Form for Set-Up. In addition, on the Start of Service Date and ending upon the termination of this Agreement, Customer will pay to Meritage the Subscription Fees as specified in Order Form, plus all applicable sales, use and other purchase related taxes (Customer shall be responsible for timely providing Meritage with a valid certificate of exemption from the requirement of paying sales, use or other purchase related taxes). Unpaid Fees are subject to a finance charge of one percent (1.0%) per month, or the maximum permitted by law, whichever is lower, plus all expenses of collection, including reasonable attorneys' fees. In the case of any withholding requirements, Customer will pay any required withholding itself and will



not reduce the amount paid to Meritage on account thereof. In the event that Customer elects to increase the number of Users, the parties shall meet to discuss the impact on Set-Up and Subscription Fees. The Subscription Fees may be increased on an annual basis, as determined by Meritage, provided that any pricing increase will not exceed seven percent (7%) of the Subscription Fees per User for the immediately prior Term, unless the pricing was designated in the applicable Order Form as promotional or one-time. Meritage will provide 30 days advance notice of any increase in the Subscription Fees. By using the Services after the increase in the Subscription Fees becomes effective, Customer agrees to be bound by such new Subscription Fees. FEES AND FEE RATES ARE TO BE CONSIDERED CONFIDENTIAL BY BOTH PARTIES AND NOT TO BE SHARED WITH ANY THIRD PARTY WITHOUT WRITTEN PERMISSION OR AS REQUIRED BY LAW.

- b. Payment. All Set-Up Fees, Subscription Fees and other fees due under this Agreement (collectively, "Fees") are payable in U.S. dollars, unless otherwise specified in writing. Except for the Set-Up Fee, which shall be paid prior to the performance of Set-Up, Customer shall pay all Fees and any other amounts set forth on each such invoice issued by Meritage under this Agreement within 30 days of the date of invoice. Fees are payable in advance and are non-refundable. In the event that Customer disputes the amount of any Fees, it shall so notify Meritage within the 30-day payment period. The failure to provide such notice shall be deemed agreement that the Fees are undisputed.

## 6. Confidentiality.

- a. Obligations. Each party acknowledges that by reason of the relationship created between the parties by this Agreement, it may have access to certain non-public information of substantial value concerning the other party's business, operations, strategic plans, customers, suppliers, technology, competition and employees. Accordingly, each party as the recipient of Confidential Information (the "Receiving Party") from the other party (the "Disclosing Party") will not use any Confidential Information of the Disclosing Party for any purpose other than the providing and receipt of Services under this Agreement. The parties agree the use of the Confidential Information will be in accordance with all terms and conditions of this Agreement. The Receiving Party will not disclose the Confidential Information of the Disclosing Party to any third party except as expressly provided herein and will protect the Disclosing Party's Confidential Information from unauthorized use, access or disclosure in the same manner as the Receiving Party protects its own confidential or proprietary information of a similar nature and with no less than reasonable care. Either party may disclose the Confidential Information of the other party to the Receiving Party's employees, subcontractors and advisors who require access to such information for the performance of their obligations, all provided that the employees, subcontractors and/or agents have entered into confidentiality agreements with the Receiving Party that are at least as protective of the Disclosing Party's Confidential Information as are the terms of this Agreement. The Receiving Party shall be responsible for any disclosure or use of the Disclosing Party's Confidential Information by or through any employee, subcontractor or agent of the Receiving Party. For the avoidance of doubt, Customer acknowledges that Meritage utilizes the services of certain third parties in connection with the provision of the Services (such as data hosting) and such third parties will have access to Customer's Confidential Information, subject to compliance with this Section 6. In addition, the Receiving Party will be allowed to disclose Confidential Information of the Disclosing Party to the extent that such disclosure is: (i) approved in writing by the Disclosing Party; (ii) necessary for the Receiving Party to enforce its rights under this Agreement in connection with a legal proceeding; or (iii) required by law or by the order of a court of similar judicial or administrative body, provided that, to the extent permitted by law, the Receiving Party notifies the Disclosing Party of such required disclosure in writing and cooperates with the Disclosing Party, at the Disclosing Party's reasonable request and expense, in any lawful action to contest or limit the scope of such required disclosure.
- b. Termination of Obligations. The Receiving Party's obligations under this Section 6 with respect to maintaining the confidentiality of any Confidential Information of the Disclosing Party will terminate if and when the Receiving Party can document that such information: (a) was already lawfully known to the Receiving Party at the time of disclosure by the Disclosing Party and is not subject to restrictions on disclosure and/or use; (b) is disclosed to the Receiving Party by a third party who had the right to make such disclosure without any confidentiality restrictions; (c) is, or through no fault of the Receiving Party has become, generally available to the public; or (d) is independently developed by the Receiving Party without access to, or use of, the Disclosing Party's Confidential Information. The restrictions on use of the Disclosing Party's Confidential Information shall remain in effect for five years subsequent to the earlier of the termination of this Agreement or the date on which the obligation to maintain the Confidentiality of the Disclosing Party's Confidential Information terminates.
- c. Return of Confidential Information. The Receiving Party will return to the Disclosing Party or destroy all Confidential Information of the Disclosing Party in the Receiving Party's possession or control and permanently erase all electronic copies of such Confidential Information promptly upon the written request of the Disclosing Party or the termination of this Agreement, whichever comes first. At the Disclosing Party's request, the Receiving Party will certify in writing

that it has fully complied with its obligations under this Section 6.3. For the purposes of this Section 6, Data, as defined in Section 7 below, shall not be considered Customer's Confidential Information.

- d. Remedies. Each party acknowledges that any breach of any of its obligations with respect to the other party's Confidential Information may cause or threaten irreparable harm to such party. Accordingly, each party agrees that in such event, the aggrieved party shall be entitled to seek equitable relief in any court of competent jurisdiction without the necessity of posting bond and in addition to such other remedies as may be available to the aggrieved party under law or in equity.
- e. Both Parties will have the right to disclose the existence but not the terms and conditions of this Agreement, provided that the terms and conditions may be disclosed if such disclosure is approved in writing by both Parties prior to such disclosure, or is included in a filing required to be made by a Party with a governmental authority (provided such party will use reasonable efforts to obtain confidential treatment or a protective order) or is made on a confidential basis to potential investors or acquirers in Meritage or any entity directly or indirectly controlling the majority voting interest in Meritage.

## **7. Ownership.**

- a. Customer's Ownership. Customer retains all right, title and interest in and to the Customer Information Customer or its Users provide to Meritage, other than such information that is subject to disclosure under applicable freedom of information laws and regulations. During the termination notice period specified in Section 9, Meritage will provide Customer Information in the form of Meritage native format files containing permit data to Customer within 10 business days of receipt of a written request for that Customer Information, all at no additional charge.
- b. Meritage's Ownership. Meritage retains all right, title and interest in and to, and all Intellectual Property Rights embodied in or related to the Sites, Services, Technology, and any other information or technology used or made available in connection with the Sites or Services, including without limitation any and all improvements, updates, and modifications thereto, whether or not made in conjunction with this Agreement. Meritage's name, logo, and the product and service names associated with the Services are trademarks of Meritage or third parties, and no right or license is granted to Customer to use them separate from Customer's right to access the Services. In the event that Customer or any End User makes any suggestions for the addition of features to, or the improvement of the Services ("Feedback"), Meritage shall, to the maximum extent permitted by law, own all such Feedback, including any Intellectual Property Rights therein, and shall have the right to use such Feedback for any purpose without payment or accounting to Customer or any End User. Customer and/or End User agree to execute any and all materials reasonably required by Customer to perfect Customer's ownership in such Feedback and Intellectual Property Rights, all at Meritage's expense.

## **8. Data.**

- a. Meritage will have the right to collect non-personally identifiable data and anonymized information resulting from Customer Information and Customer's use of the Services ("Customer Data") for purposes of (i) benchmarking of Customer's and others performance relative to that of other groups of customers served by Meritage (for the avoidance of doubt, Customer Data will be provided to third parties only as part of a larger body of anonymized data); (ii) sales and marketing of existing and future Meritage services; (iii) monitoring Service performance and making improvements to the Services and Sites.
- b. Backup and Recovery. Meritage shall provide, either directly or through its hosting partner, the following recovery services: 7.2.1 Hosting infrastructure recovery processes 7.2.2 Application recovery processes 7.2.3 Data backup with rotation and retention. Backups are done daily, the prior month of daily data is retained, each month is retained for a year, and each year retained until termination of the agreement.

## **9. Term and Termination.**

- a. This Agreement will begin on the Effective Date and will continue in perpetuity until terminated in accordance with the terms of this Agreement or the applicable Order Form. Upon the expiration of the initial term, if any, specified in the Order Form, Customer may terminate this Agreement upon not less than 90 days advanced written notice to Meritage. Except with respect to a failure to timely make any payments required under this Agreement, either party may terminate this Agreement if the other party breaches this Agreement and does not cure such breach within 60 days after being provided with written notice thereof, provided that in the case of Customer such time period will be extended beyond 60 days if Customer is exercising reasonable efforts to cure such breach during such 60-day period. With respect to the failure to timely make any payments, Meritage shall have the right to suspend access to the Services and Sites or, at its option, to terminate this Agreement, in the event that Customer fails to make any required payment

within five (5) business days after receipt of notice that the payment is past due. Upon any termination of this Agreement: (a) all rights and licenses granted to Customer in this Agreement will immediately terminate and Customer shall immediately cease to use the Services and Sites; (b) Meritage will cease performing all Services; (c) all access by Customer and any Users to the Sites and the Services (including all Customer Information) will be suspended; (d) Meritage will discontinue all use of the Customer Information; and (e) all Fees and other amounts incurred under this Agreement prior to such termination or expiration will become immediately due and payable by Customer. Upon the request of Customer following any termination or expiration, Meritage will transfer all Customer Information collected by Meritage either directly to Customer or to Customer's identified third-party partner. Customer shall compensate Meritage for the transfer on a time and materials basis at Meritage's then-current rates and will reimburse all reasonable expenses and costs associated with the transfer. Such expenses and costs shall include, without limitation, travel, consultant costs, hardware expenses, and software costs associated with efforts involved in preparing Customer Information for transfer as well as any costs incurred as part of the physical transfer of Customer Information. Meritage will not be required to issue any refunds for any unearned Fees paid in advance. The provisions of Sections 2.2, 2.3 (section 2.3(b) and as necessary to complete the return of Customer Information), 2.6, 2.7, 5, 6, 7, 8, 9, 10, 11 and 12 of this Agreement will survive termination of the Agreement for any reason.

#### **10. Warranties and Disclaimers.**

- a. Warranties. Each party represents and warrants to the other party that: (a) such party has all requisite corporate or other applicable power and authority to execute, deliver and perform its obligations under this Agreement; and (b) the execution, delivery and performance of this Agreement by such party has been duly authorized; and will not conflict with, result in a breach of, or constitute a default under any other agreement to which such party is a party or by which such party is bound;
- b. Disclaimers. EXCEPT AS STATED UNDER THIS AGREEMENT, MERITAGE PROVIDES THE SERVICES "AS IS" AND "AS AVAILABLE" AND TO THE MAXIMUM EXTENT PERMITTED BY LAW, SPECIFICALLY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, REGARDING THE SERVICES, INCLUDING WITHOUT LIMITATION IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, COURSE OF DEALING, TITLE AND NON-INFRINGEMENT. CUSTOMER ACKNOWLEDGES THAT CUSTOMER HAS RELIED ON NO SUCH WARRANTIES IN ENTERING INTO THIS AGREEMENT. MERITAGE DOES NOT WARRANT THAT THE SERVICES WILL BE FREE FROM LOSS OR LIABILITY INCLUDING THAT ARISING OUT OF ANY THIRD-PARTY TECHNOLOGY, THIRD PARTY ACTION, SUCH AS UNAUTHORIZED ACCESS BY ANY THIRD PARTY, OR ANY ACT OR OMISSION OF CUSTOMER. MERITAGE EXPRESSLY DISCLAIMS ANY WARRANTY OR LIABILITY WITH RESPECT TO COMPLIANCE WITH LAWS, RULES OR REGULATIONS APPLICABLE TO CUSTOMER, WHICH SHALL BE THE SOLE RESPONSIBILITY OF CUSTOMER. MERITAGE DOES NOT WARRANT THE ACCURACY, RELIABILITY OR COMPLETENESS OF customer materials or ANY ADVICE, REPORT, DATA OR DELIVERABLES OBTAINED BY CUSTOMER FROM THE CUSTOMER MATERIALS SUBMITTED TO THE SERVICES, SUCH ADVICE, REPORTS, DATA OR DELIVERABLES ARE PROVIDED "AS IS" AND MERITAGE SHALL NOT BE LIABLE FOR ANY INACCURACY THEREOF. MERITAGE SHALL NOT BE RESPONSIBLE OR LIABLE FOR: (A) ANY DAMAGES IF, AND TO THE EXTENT, CAUSED BY CUSTOMER'S FAILURE TO PERFORM ITS OBLIGATIONS, AS SET FORTH IN THIS AGREEMENT OR AN ORDER FORM; (B) ANY CORRUPTION, DAMAGE, LOSS OR MIS-TRANSMISSION OF CUSTOMER MATERIALS, UNLESS SUCH TRANSMISSION IS THE RESPONSIBILITY OF MERITAGE; OR (C) THE SECURITY OF CUSTOMER MATERIALS DURING TRANSMISSION FROM CUSTOMER'S FACILITIES TO THE CLOUD PLATFORM. Customer acknowledges that the Services may be subject to limitations, delays, and other problems inherent in the use of the Internet and electronic communications. Meritage is not responsible for any delays, failures, or other damage resulting from such problems.
- c. Customer represents and warrants that it: (A) owns or has the right to use all Customer Information and to submit and store such Customer Information on the Site and the infrastructure supporting the Site and Services; and (B) has all necessary licenses and permissions for usage of any third-party software or other information or material supplied or provided by Customer to Meritage in an Order Form or otherwise used in connection with the Services. Customer hereby grants to Meritage the right to use all Customer Information, including any third-party software solely for the purposes of this Agreement, including any Order Form, and the performance of Meritage's obligations hereunder and any Order Form.

#### **11. Certain Liabilities, Limitation of Liability.**

- a. Customer will, at Customer's own expense, indemnify, defend, hold harmless against, and pay all costs, damages and expenses (including reasonable attorneys' fees) awarded against or incurred by Meritage based on, any claims, allegations or lawsuits that may be made or filed against Meritage by any person to the extent arising from or relating to any breach by Customer of any representation and warranty under this Agreement; or (b) alleging that use by

Meritage in accordance with this Agreement of Customer Information, Customer Data or Customer Confidential Information infringes or misappropriates the Intellectual Property Rights of, or has caused harm or damage to, a third party.

- b. Limitation of Liability. EXCEPT TO THE EXTENT ARISING FROM A BREACH OF CONFIDENTIALITY OR OF SECTIONS 2.2 OR 7, OR AS ARISING UNDER OBLIGATIONS OF INDEMNIFICATION, IN NO EVENT WILL EITHER PARTY, INCLUDING ITS VENDORS, HOSTING SERVICE PROVIDERS, OR ITS LICENSORS, BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES (INCLUDING WITHOUT LIMITATION PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, LOSS OF USE, DATA, OR PROFITS, OR BUSINESS INTERRUPTION) HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY, WHETHER IN CONTRACT, STRICT LIABILITY OR TORT (INCLUDING ACTIVE AND PASSIVE NEGLIGENCE OR OTHERWISE), ARISING IN ANY WAY IN CONNECTION WITH OR OUT OF THE USE OF THE SITES OR SERVICES, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. EXCEPT TO THE EXTENT ARISING FROM A BREACH OF CONFIDENTIALITY OR OF SECTIONS 2.2 OR 7, OR AS ARISING UNDER OBLIGATIONS OF INDEMNIFICATION OR CUSTOMER'S OBLIGATION TO MAKE PAYMENTS, EACH PARTY'S TOTAL CUMULATIVE LIABILITY IN CONNECTION WITH THIS AGREEMENT, THE SITES OR THE SERVICES, WHETHER IN CONTRACT OR TORT OR OTHERWISE, WILL NOT EXCEED THE FEES PAID TO MERITAGE HEREUNDER AS OF THE DATE OF THE ACT OR OMISSION GIVING RISE TO THE LIABILITY. EACH PARTY ACKNOWLEDGES THAT THE FEES REFLECT THE ALLOCATION OF RISK SET FORTH IN THIS AGREEMENT AND THAT NEITHER PARTY WOULD ENTER INTO THIS AGREEMENT WITHOUT THESE LIMITATIONS ON ITS LIABILITY. IN JURISDICTIONS WHERE LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES IS NOT PERMITTED, EACH PARTY'S LIABILITY IS LIMITED TO THE MAXIMUM EXTENT PERMITTED BY LAW.

## 12. General Provisions.

- a. Notwithstanding anything else, Customer may not provide to any person an export or re-export or allow the export or re-export of the Services or any software or anything related thereto or any direct product thereof, in violation of any restrictions, laws or regulations of the United States Department of Commerce, the United States Department of Treasury Office of Foreign Assets Control, or any other United States or foreign agency or authority.
- b. This Agreement will be binding upon the parties to this Agreement and their permitted successors and assigns. Neither party may assign, delegate or transfer this Agreement or any of its rights or obligations (in whole or in part) under this Agreement (whether by operation of law or otherwise) to any third party without the other party's prior written consent. Notwithstanding the foregoing, either party may assign this agreement to any successor in interest to such party's stock, assets or business, whether by way of sale, merger, reorganization or other form of transaction, provided that such party provides the other party with notice of such assignment and that the successor in interest agreed in advance to assume all right, obligations, liabilities, and responsibilities of the assigning party under this Agreement. Any assignment or transfer in violation of the foregoing shall be null and void.
- c. Nothing in this Agreement confers or is intended to confer, expressly or by implication, any rights or remedies upon any person or entity not a party to this Agreement.
- d. This Agreement shall be governed by and construed in accordance with the laws of Colorado without regard to conflicts of law principles. Customer agrees that it will only bring any action or proceeding arising from or relating to this Agreement in a federal court in the District of Colorado or in state court in Larimer County, Colorado, and Customer irrevocably submits to the personal jurisdiction and venue of any such court in any such action or proceeding or in any action or proceeding brought in such courts by Meritage.
- e. The parties hereto are independent parties, not agents, employees or employers of the other or joint ventures, and neither acquires hereunder any right or ability to bind or enter into any obligation on behalf of the other.
- f. Any notice to the other party required or allowed under this Agreement must be delivered in writing by express courier, personal delivery, or by certified mail, postage pre-paid to the address for the party listed in the first paragraph of this Agreement.
- g. If any provision of this Agreement is held by a court of competent jurisdiction to be unenforceable, such provision will be changed and interpreted to accomplish the objectives of such provision to the greatest extent possible under applicable law and the remaining provisions of this Agreement will continue in full force and effect.
- h. Meritage may use Customer's name as a reference and publicize Customer as a customer of Meritage.
- i. Unless otherwise amended as provided herein, this Agreement will exclusively govern Customer's access to and use of the Services and the Sites and is the complete and exclusive understanding and agreement between the parties, and supersedes any oral or written proposal, agreement or other communication between the parties, regarding Customer's access to and use of the Services and the Sites. This Agreement may be amended or modified only by a writing signed by both parties.
- j. All waivers under this Agreement must be in writing. Any waiver or failure to enforce any provision of this Agreement on one occasion will not be deemed a waiver of any other provision or of such provision on any other occasion.