

# COUNCIL CHAMBER

City of Berea, Ohio

ORDINANCE No. 2020-21

By Jim Maxwell Sponsored By Mayor Cyril M. Kleem

## AN ORDINANCE

**AUTHORIZING AN ADDITIONAL ONE YEAR EXTENSION OF THE PREVIOUSLY APPROVED MEMORANDUM OF UNDERSTANDING WITH DMark DEVELOPMENT, LLC., AS EXECUTED IN ORDINANCE NO. 2018-21, FOR THE DEVELOPMENT OF MUNICIPALLY OWNED PROPERTY IN THE NORTH END OF BEREA, AND DECLARING AN EMERGENCY.**

**WHEREAS**, in Ordinance No. 2018-21, the Council of the City of Berea authorized the Mayor to enter into a Memorandum of Understanding with DMark Development, LLC for the development of municipally owned property in the north end of Berea; and

**WHEREAS**, the Mayor entered into a Memorandum of Understanding with DMark Development, LLC, to provide said services, effective May 8, 2018 and terminating on May 8, 2019; and

**WHEREAS**, Section 5 of the Memorandum of Understanding provides that upon mutual signed agreement and thirty (30) days' notice, the parties may agree to extend for a period of one hundred eighty (180) days; and

**WHEREAS**, Section 5 of the Memorandum of Understanding provides that there shall be no more than two extension periods; and

**WHEREAS**, the parties have extended the Memorandum of Understanding upon mutual signed agreement and thirty (30) days' notice twice; and

**WHEREAS**, the Memorandum of Understanding will terminate on May 8, 2020; and

**WHEREAS**, the City desires to extend the terms and conditions set forth in the Memorandum of Understanding granting DMark Development, LLC the exclusive right to market the properties for development and eventual sale in a manner consistent with the purposes stated herein for an additional one year term to terminate on May 9, 2021.

**NOW, THEREFORE, BE IT ORDAINED** by the Council of the City of Berea, State of Ohio:

**SECTION 1.** That the Mayor is authorized to extend the terms and conditions set forth in the Memorandum of Understanding granting DMark Development, LLC the exclusive right to market the properties for development and eventual sale, as referenced in the Memorandum of Understanding, attached hereto as Exhibit "A".

**SECTION 2.** That it is found and determined that all formal actions of this Council concerning and relating to the passage of this Ordinance were adopted in an open meeting of this Council, and that all deliberations of this Council and of any of its committees that resulted in such formal action, were in meetings open to the public, in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

**SECTION 3.** That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, property, health, safety and welfare, or providing for the usual daily operation of a municipal department, and for the further reason that the extension must be granted prior to the conclusion of the term of the current Memorandum of Understanding. Therefore, provided this Ordinance receives the affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, from and after the earliest period allowed by law.

# COUNCIL CHAMBER

City of Berea, Ohio

ORDINANCE No. 2020-21

By Maxwell Sponsored By Mayor Kleem

PASSED: May 4, 2020

[Signature]  
President of Council

ATTEST: [Signature]  
Clerk of Council

APPROVED: May 5, 2020  
[Signature]  
Mayor

Approved as to Form:

[Signature]  
Director of Law

## MEMORANDUM OF UNDERSTANDING

## Gateway Development in Berea, Ohio

THIS MEMORANDUM OF UNDERSTANDING ("MOU") is entered into by and between the CITY OF BEREA, OHIO, a municipal corporation and political subdivision duly organized and existing under the laws of the State of Ohio (the "City") and Dmark DEVELOPMENT LLC, an Ohio Limited Liability Company (the Developer") effective as of the last date set forth below their respective signatures hereto (the "Effective Date") and sets forth the primary business terms pursuant to which the Developer proposes to purchase and develop parts or all of the 11.6 acres of City-owned commercial land highlighted on Exhibit A and listed below in Table 1 and the 2.35 acres of City-owned residential land highlighted on Exhibit B and listed below in Table 2.

The following terms and conditions summarize the intent of the City of Berea to sell or ground lease to Dmark Development LLC the parcels listed in Table 1 and Table 2 for the possible development of such land. The primary intent of the City is to sell the parcels specified in Table 1, hereinafter referred to as the "Commercial Development Area" or "CDA", however, the City is also open to entering into a ground lease for said parcels. Conversely, the parcels in Table 2, hereinafter referred to as the "Residential Development Area" or "RDA", are for sale only and the City will not enter into a ground lease for these parcels. The sale or ground lease of the any of CDA or the sale of any of the RDA is conditioned upon approval of Berea City Council and the execution of a formal purchase agreement or ground lease. Said agreement will contain the primary terms and conditions, to be agreed upon by the parties. The parties agree to negotiate in good faith to reach terms and conditions of any agreement that achieve to the spirit and intent of this MOU and allow these parcels to be re-developed.

### Section 1. Commercial Development and Residential Development

The "Commercial Development Area" referred to in this MOU is the Gateway Development, a mixed-use, commercial project that conforms to the City's Uptown District zoning code that includes the following parcels (See Table 1, below):

TABLE 1 - COMMERCIAL DEVELOPMENT PARCELS	
Parcel	Reference Name
362-01-008	Automotive Creations
362-01-012	Laundromat
362-01-019	Berea Casting
362-01-020	Berea Castings
362-02-003	Carwash
362-02-004	Restaurant
362-02-005	Williams Ford Used Car 1
362-02-006	Williams Ford Used Car 2
362-02-009	Williams Ford New Car 1
362-02-010	Mld City Tire
362-02-011	Mebco
362-02-012	Palker Automotive
362-03-002	Williams Ford New Car 2
362-03-013	Williams Ford New Car 3
362-03-014	Williams Ford New Car 4

\* SEE EXHIBIT A - CDA MAP

In addition to the Commercial Development mentioned in Subsection A above, the City and Developer are also interested in a separate Residential Development that will feature a housing component on the following parcels (See Table 2, below):

TABLE 2 – RESIDENTIAL PARCELS	
Parcel	Reference Name
361-22-007	Condren 1
361-22-008	Condren 2
361-22-009	Condren 3
361-22-010	Condren 4
361-22-011	Condren 5
361-22-012	Condren 6
361-22-013	Condren 7
361-22-014	Condren 8
361-22-015	Condren 9
361-22-016	Condren 10
361-22-017	Condren 11
361-22-018	Condren 12
361-23-044	Condren 13
361-23-045	Condren 14

\*\* SEE EXHIBIT B – RDA MAP

If the City acquires contiguous or nearby parcels, Developer shall have the “Right of First Refusal” to acquire said parcels under similar terms and conditions contained herein.

## Section 2. Vision | Development Goals

The Developer and the City seek to collaboratively create a signature project that serves as a gateway to the City. The City's goal is that the development of the CDA shall be completed in a manner which, at a minimum:

- Creates a retail/destination, dining/hospitality, development corridor
- Creates a vibrant, sustainable commercial district that serves the surrounding neighborhood, business community, and key stakeholders;
- Develop a separate new construction residential based component;
- Upgrades and enhances the North End Gateway to the City;
- Provides a visual and symbolic entrance to the City;
- Catalyzes upcoming and additional development;
- Returns underutilized municipally owned parcels to active use; and
- Creates positive economic, employment and fiscal benefits for the neighborhood and the City.

In addition, the Developer and the City have a shared vision of the RDA in that a successful development will:

- Be a separate new construction residential based component;
- Offer new residential housing options;
- Return underutilized municipally owned parcels to active use; and
- Create positive economic and fiscal benefits for the neighborhood and the City.

### Section 3. Purchase Agreement

Both the City and the Developer acknowledge that the preferred course of action is the sale of the parcels contained in the CDA and RDA. In order to complete such a sale a purchase agreement is necessary. Such a purchase agreement will have all necessary terms and conditions, including, but not limited to price, time of closing and related items. The parties agree to negotiate in good faith to reach terms and conditions of the purchase agreement that achieve to the spirit and intent of this MOU and allow re-development of said parcels.

#### A. Commercial Development Parcels

In consideration of the cost of acquisition, demolition, testing and other related expenses incurred by the City in positioning the commercial parcels contained in Table 1 for commercial re-development, the City and Developer agree to negotiate a final purchase price that is within the price ranges contained in Table 3.

In determining the final purchase price, the City and the Developer shall consider the following: type of development proposed; amount of tax revenue generated as estimated by the City; number of jobs created; amount of any real estate tax abatement requested by the Developer or other end user; amount of required permit fees as estimated by the City; the overall economic impact on the community and any other relevant factors.

The City shall be made whole for its costs in positioning the CDA for commercial re-development either by final purchase price or a combination of the final purchase price and future tax revenue streams generated by the Commercial Development. If the development of the CDA is to be via a ground lease, the terms and conditions of said lease shall be mutually acceptable through good faith negotiations.

The acquisition price range for the CDA is as follows:

TABLE 3 - PRICE RANGE PER ACRE		
Parcel	Reference Name	Price Range Per Acre
362-01-008	Automotive Creations	\$125,000 - \$225,000
362-01-012	Laundromat	\$125,000 - \$225,000
362-01-019	Berea Casting	\$125,000 - \$225,000
362-01-020	Berea Castings	\$125,000 - \$225,000
362-02-004	Restaurant	\$125,000 - \$225,000
362-02-003	Carwash	\$125,000 - \$225,000
362-02-009	Williams Ford New Car 1	\$125,000 - \$225,000
362-02-011	Mebco	\$125,000 - \$225,000
362-02-012	Palker Automotive	\$125,000 - \$225,000
362-03-002	Williams Ford New Car 2	\$125,000 - \$225,000
362-03-013	Williams Ford New Car 3	\$125,000 - \$225,000
362-03-014	Williams Ford New Car 4	\$125,000 - \$225,000
362-02-005	Williams Ford Used Car 1	\$125,000 - \$225,000
362-02-006	Williams Ford Used Car 2	\$125,000 - \$225,000
362-02-010	Mid City Tire	\$125,000 - \$225,000

## **B. Residential Parcels**

In consideration of the costs incurred by the City in preparing the 14 residential parcels contained in the RDA, the Developer agrees to make a single purchase all of these parcels as one block of land for the total amount of \$80,000.

### **Section 4. Due Diligence**

The City, at its own expense, has conducted Phase I and Phase II testing on multiple parcels in the CDA, See Exhibit C. At its expense, the Developer shall have a period of time commencing on the Effective Date and continuing for one hundred twenty days (120) to conduct inspections of the CDA and RDA. The Developer and its agents, representatives and contractors shall be granted full access to the CDA and RDA for purposes of conducting physical and environmental inspections, tests and surveys, including without limitation Phase I and Phase II environmental surveys, soil borings, geotechnical testing, surveys and title searches (collectively, the "Inspections") of the Project Site as the Developer deems necessary, in the Developer's sole discretion, to determine the feasibility, costs and physical and other impediments to development of the CDA and RDA. The Developer shall provide the City with copies of any and all reports generated as a result of said testing.

Pursuant to Ohio Public Records Laws, the City shall furnish or make available to the Developer upon the Effective Date, all available information with respect to the history and physical and environmental condition of the CDA and RDA which is in the City's possession or control, including without limitation any environmental or geotechnical studies or tests, surveys, plats and title reports.

In the event that the Developer is dissatisfied with the results of the inspections, the Developer shall provide the City with a written explanation of the alleged defects and the City shall have thirty (30) days to propose an action plan to cure said defects. If the City's plan is not acceptable to the Developer, either party may terminate this MOU. Further, should the Developer elect to terminate this MOU for defects found during testing or the cure period, the Developer shall restore the CDA to its pre-investigation condition and the City shall not be obligated to adhere to the Protection Period found in Section 9 of this MOU. If additional parcels are added due to subsequent purchase by the City, the time frame is extended to match that 120 day due diligence period.

### **Section 5. Exclusive Marketing Period**

In consideration of the expenses that the Developer has incurred and will incur in connection with the development of the CDA and/or RDA, the Developer shall have an Exclusive Marketing Period lasting three hundred sixty-five days (365), commencing on the Effective Date of this MOU, to market, advertise and negotiate the development of the CDA and RDA. During this Exclusive Marketing Period, the City shall: not advertise, market or offer any of the parcels subject to this MOU for sale to any other party; not solicit or accept bids from any other party; and subject to Ohio Public Records laws, not furnish information related to the CDA or RDA to any other party interested in purchase or development. Attached is a letter (Exhibit D) from City which indicates developer's exclusive rights on the CDA and

RDA Parcels during and after the MOU. The City may reject any proposed end user(s) presented by the Developer. However, should the City reject an end user(s), the Developer may terminate this MOU.

Upon mutual signed agreement and 30 days' notice, the parties may agree to extend this MOU for a period of one hundred eighty (180) days. There shall be no more than two extension periods. If the developer is diligently working for City Approvals during the last 60 days of the initial term, the initial request for extension will not be unreasonably withheld by the City.

## **Section 6. Communications**

The Developer shall provide periodic updates to the City regarding the status of the Developer's efforts. It is anticipated that these updates will take place on an 'as needed' basis. Should an Interested party contact the City, whether directly or through a representative, the City shall send a joint email to the Prospect and the Developer notifying all parties of the interest in the development.

## **Section 7. City Cooperation**

The City intends to work collaboratively with the Developer to refine the Project and to assist the Developer as much as possible. The City will cooperate with the Developer with respect to reasonable requests that the Developer makes, from time to time, of other governmental or quasi-governmental entities providing resources or funding to the Project (i.e., Federal, State, County, Port Authority).

Depending on final design of the project, the vacation of existing streets, re-platting or reconfiguration of the CDA or RDA and execution of reciprocal easement agreements (if any) or similar instruments with respect to the site(s) may be reasonably necessary to facilitate ingress, egress and access to the development for public utilities and other public improvements. To the extent that any of the foregoing actions are necessary, the Developer shall submit a timely application along with all required supporting materials to Berea City Council and/or the Berea Municipal Planning Commission, depending on which body has jurisdiction. The process of public review of said applications shall follow the method and timeframe specified by the Berea Charter, Codified Ordinances of the City of Berea, Berea Zoning Code as well as any non-codified established protocol.

## **Section 8. Economic Feasibility**

The City and the Developer acknowledge that (i) the economic feasibility of the Project requires additional market analysis that will be completed through the Developer's marketing of the CDA and RDA and during the Due Diligence Period and Exclusive Marketing Period as described in Section 4 and 5 hereof, and (ii) the scope of the Project as currently contemplated may need to be adjusted pursuant to discussions between the Developer and the City to the extent one or more components of the Project as currently contemplated are determined by the Developer as a result of such market analysis to not be economically feasible for the Project Site. Should the Developer determine that one or more of the components of the Commercial Development are not economically feasible; the Developer may terminate this MOU.

### **Section 9. Protection Period**

Should the City or Developer terminate this MOU for any of the reasons stated herein or following the expiration of this MOU, the Developer, within thirty (30) days, shall submit to the City a written list of the names of those persons or entities: (a) to whom the Property has been submitted, either by the Developer or in cooperation with brokers, agents, etc.; (b) with whom the Developer has negotiated regarding the lease or sale of the Property; or (c) who have contacted the City with respect to the lease or sale of the Property (collectively, "Prospect List"). Any person or entity who during the term of the MOU submits to the City a written offer or letter of intent to lease or purchase the Property, or a portion thereof, shall be deemed a Prospect even if not included on the Developer's Prospect List. The City shall be precluded from selling or leasing any portion of the Project Site to a Client listed on the Prospect List for a period of three hundred sixty-five (365) days (the "Protection Period"). The aforementioned restriction shall extend to any individual or entity with whom the City shall later lease or sell all or a portion of the Project Site during the Protection Period.

### **Section 10. Marketing**

Press releases related to the development shall be approved by both parties. Additional marketing materials shall be submitted to the City for review and comment prior to distribution. Subject to the City's approval, the Developer, at its sole cost, shall be allowed to place marketing signs on the parcels governed by this MOU. The marketing signs should comply with the City Zoning Code.

### **Section 11. Indemnification**

Developer agrees to defend, indemnify and hold harmless the City from and against any actions, suits, claims, losses, costs, demands, judgments, liabilities and damages asserted against the City to the extent such actions, suits, claims, losses, costs, demands, judgments, liabilities or damages are a result of or arise from the acts of Developer or its agents, employees, contractors, licensees, invitees or anyone else acting at Developer's request in connection with the Project.

### **Section 12. Governing Law**

This MOU shall be governed by and construed in accordance with the laws of the State of Ohio.

1. Notices: Dmark Development, LLC.  
C/O David Cerny  
100 North Main Street, Suite 125  
Chagrin Falls, OH 44022

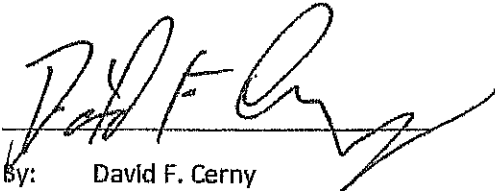



Dmark Development, LLC.  
C/O Mark Jablonski  
PO Box 22512  
Cleveland, OH 44122

City of Berea  
Attention: Mayor Cyril Kleem  
11 Berea Commons  
Berea, OH 44017

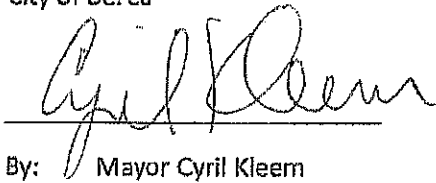
SIGNATURES

Dmark Development LLC

  
By: David F. Cerny

  
By: Mark Jablonski

City of Berea

  
By: Mayor Cyril Kleem







Phase I and Phase II Testing of Properties				
Property	Parcel	Phase I	Phase II	Notes
739 Front	362-020009; 362-03-002; 362-03-013; 362-03-014	Y	Y	
746 Front	362-02-005	N	N	Parking Lot
756 Front	362-02-006	N	N	Parking Lot
757 Front	362-02-011	N	N	
767 Front	362-02-012	Y	Y	Have No Further Action Letter
768 Front	362-02-010	Y	Y	
785 Front	362-02-003	Y	Y	
804 Front	362-02-004	N	N	
822 Front	362-01-012	N	N	
838 Front	362-01-008	Y	Y	Have VAP Phase I as well
818 Thacker	362-01-020	Y	Y	

**EXHIBIT C – TESTING INFORMATION**

Exhibit D

\_\_\_\_\_, 2018

To Whom It May Concern:

Re: 11.6 acres of City-owned property (or tailor to the specific parcel)

Dear \_\_\_\_\_:

The City of Berea is the owner of the above-referenced property. The City has entered into a memorandum of understanding with Dmark Development LLC to acquire and develop the property. Please direct your inquiries to either David Cerny @ 216.589.1010 or Mark Jablonski @ 216.539.3555.

Thank you for your interest in the City of Berea.

Regards,

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

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

City of Berea