

## DECLARATION OF COVENANTS

THIS DECLARATION OF COVENANTS (the “**Covenant**”) is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 2009 (“**Effective Date**”), by \_\_\_\_\_, a \_\_\_\_\_ (the “**Declarant**”) for the express benefit of the **DISTRICT OF COLUMBIA**, a municipal corporation, acting by and through the District of Columbia Department of Housing and Community Development (hereinafter referred to as “**District**”)

### RECITALS

R-1. Pursuant to the terms of a Property Disposition Agreement (the “**Agreement**”) between District and Declarant, the District has sold and conveyed to Declarant immediately prior to the Effective Date of this Covenant certain real property located in Washington, D.C. and more particularly described in **Exhibit A** attached hereto and incorporated herein (the “**Property**”).

R-2. Under the terms of the Agreement, the District sold and conveyed the Property to the Declarant for a purchase price below fair-market value, in exchange for the Declarant agreeing to develop, construct, own and operate a single-family or multifamily residential housing project as approved by the District as more particularly described in the Agreement (the “**Project**”).

R-3. In order to ensure to the District that the Declarant will construct the Project on the Property in accordance with the Agreement, the Declarant has agreed to subject the Property to certain covenants regarding the construction and use of the Project and the disposition of the Property all as more particularly described herein.

NOW, THEREFORE, the Parties hereto agree that the Property must be held, sold and conveyed, subject to the following covenants, conditions, and restrictions:

### **ARTICLE I DEFINITIONS AND MISCELLANEOUS PROVISIONS**

1.1 For the purposes of this Covenant, the following capitalized terms shall have the meanings ascribed to them below and, unless the context clearly indicates otherwise, shall include the plural as well as the singular:

“**Affordability Covenant**” is the covenant agreement that contains certain affordability requirements for the Project, and is recorded in the Land Records against the Property.

“**Agreement**” is defined in the Recitals.

“**Applicable Laws**” means all applicable District of Columbia and federal laws, codes, regulations, and orders, including, without limitation, Environmental Laws, laws relating to historic preservation, and laws relating to accessibility for persons with disabilities.

**“Approved Plans and Specifications”** means construction plans, drawings, and specifications submitted to and approved by District and based upon which all Permits shall be issued.

**“Business Day”** means Monday through Friday, inclusive, other than holidays recognized by the District government.

**“CBE”** shall mean a certified business enterprise, certified as a “CBE” by the DSLBD under applicable District of Columbia law, as amended.

**“CBE Agreement”** is that agreement, in customary form, between Declarant and the DSLBD governing certain obligations of Declarant under D.C. Law 16-33 for the Project.

**“Certificate of Completion”** means that certificate provided by Declarant to the District upon Completion of Construction, as required under Section 2.4 herein.

**“Certificate of Final Completion”** is defined in Section 2.4.5.

**“Certificate of Occupancy”** means a certificate of occupancy or similar document or permit (whether conditional, unconditional, temporary or permanent) that must be obtained from the appropriate governmental authority as a condition to the lawful occupancy of the Project.

**“Commencement of Construction”** means the date indicated in the Schedule of Performance. For purposes of this Agreement, the term **“Commencement of Construction”** does not mean site exploration, borings to determine foundation conditions, or other pre-construction monitoring or testing to establish background information related to the suitability of the Property for development of the Improvements thereon or the investigations of environmental conditions.

**“Completion of Construction”** means (i) Declarant has substantially completed construction of the Project, exclusive only of Punch List Items, in accordance with the Approved Plans and Specifications and this Covenant; (ii) Declarant’s general contractor is entitled to final payment under the construction contract exclusive only of any retainage held on account of Punch List Items; (iii) Declarant has provided District with a copy of the Certificate of Completion; and (iv) a permanent Certificate of Occupancy has been issued for the Project.

**“Construction Covenants”** shall mean those covenants contained in Articles II and III.

**“Construction Drawings”** shall mean the drawings, plans, and specifications for the Improvements submitted by Declarant to District.

**“Declarant’s Agents”** mean the Declarant’s agents, employees, consultants, contractors, and representatives.

**“Development Plan”** means the Declarant’s detailed plans for developing, constructing, financing, marketing and selling the Project.

“**DOES**” is the District of Columbia Department of Employment Services, and any successor agency.

“**DOL**” is the United States Department of Labor.

“**DSLBD**” is the District of Columbia Department of Small and Local Business Development, and any successor agency.

“**Environmental Laws**” means any present and future federal, or District of Columbia law and any amendments (whether common law, statute, rule, order, regulation or otherwise), permits and other requirements or guidelines of governmental authorities and relating to (a) the protection of health, safety, and the indoor or outdoor environment; (b) the conservation, management, or use of natural resources and wildlife; (c) the protection or use of surface water and groundwater; (d) the management, manufacture, possession, presence, use, generation, transportation, treatment, storage, disposal, release, threatened release, abatement, removal, remediation, or handling of or exposure to Hazardous Materials; or (e) pollution (including any release to air, land, surface water, and groundwater), and includes, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601 et seq.; the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, and subsequently amended, 42 U.S.C. § 6901 et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 et seq.; the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, 33 U.S.C. § 1251 et seq.; the Oil Pollution Act of 1990, 33 U.S.C. § 32701 et seq.; the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. § 136-136y, the Clean Air Act, as amended, 42 U.S.C. § 7401 et seq.; the Toxic Substances Control Act of 1976, as amended, 15 U.S.C. § 2601 et seq.; the Safe Drinking Water Act of 1974, as amended, 42 U.S.C. § 300f et seq.; the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11001 et seq.; the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq.; the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq.; and any similar, implementing or successor law, and any amendment, rule, regulatory order or directive issued thereunder.

“**Event of Default**” is defined in Section 6.1.

“**Final Completion**” means following Completion of Construction (i) the completion of all Punch List Items; (ii) the close-out of all construction contracts for the Project; (iii) the payment of all costs of constructing the Project and receipt by Declarant of fully executed and notarized valid releases of liens from all manufacturers, suppliers, subcontractors, general contractors, and all other Persons furnishing supplies or labor in connection with the Project; and (iv) the receipt by District of a certification by Declarant of the completion of items in clauses (i) through (iii) of this definition.

“**First Source Agreement**” is that agreement, in customary form, between the Declarant and the DOES, entered into in accordance with Section 8.5 of the Agreement, governing certain obligations of Declarant under D.C. Law 14-24, D.C. Law 5-93 and Mayor’s Order 83-265 regarding job creation and employment generated as a result of construction of the Project.

**“Force Majeure”** is an act or event, including, as applicable, an act of God, act of terrorism, fire, earthquake, flood, explosion, war, invasion, insurrection, riot, mob violence, sabotage, inability to procure or a general shortage of labor, equipment, facilities, materials, or supplies in the open market, failure or unavailability of transportation, strike, lockout, actions of labor unions, a taking by eminent domain, requisition, and laws or orders or acts or failures to act of government or of civil, military, or naval authorities enacted or adopted after the Effective Date, so long as such act or event (i) is not within the reasonable control of Declarant, Declarant’s Agents or its Members; (ii) is not due to the fault or negligence of Declarant, Declarant’s Agents or its Members; (iii) is not reasonably foreseeable and avoidable by Declarant, Declarant’s Agents or its Members, and (iv) directly results in a delay in performance by Declarant; but specifically excluding (A) shortage or unavailability of funds or financial condition, (B) changes in market conditions such that construction of the Project as contemplated by this Covenant and the Approved Plans and Specifications is no longer practicable under the circumstances, or (C) the acts or omissions of a general contractor, its subcontractors, any Member, or Declarant’s Agents.

**“Guarantor”** shall mean \_\_\_\_\_ and any substitute guarantor pursuant to Section 2.7.2.

**“Guarantor Submissions”** shall mean the current audited or unaudited financial statements and balance sheets, profit and loss statements, cash flow statements and other financial reports and other financial information of a proposed guarantor as District may reasonably request, together with a summary of such proposed guarantor’s other guaranty obligations and the other contingent obligations of such proposed guarantor (in each case, certified by such proposed guarantor or an officer of such proposed guarantor as being true, correct and complete).

**“HUD”** is the United States Department of Housing and Urban Development.

**“Improvements”** means the structures, landscaping, hardscape, and improvements to be constructed or placed on the Property in accordance with the Approved Plans and Specifications; provided, however, that in no event shall trade fixtures, furniture, operating equipment (in contrast to building equipment), stock in trade, inventory, or other personal property used in connection with the conduct of any business within the Improvements be deemed included in the term “Improvements” as used in this Covenant.

**“Land Records”** means the property records maintained by the District of Columbia Recorder of Deeds.

**“Member”** means any Person with an ownership interest in Declarant.

**“Milestone”** means the date as specified in the Schedule of Performance by which certain actions are required to be undertaken by Declarant.

**“OAG”** is the Office of the Attorney General for the District of Columbia.

“**Party**” when used in the singular, shall mean either District or Declarant; when used in the plural shall mean both District and Declarant.

“**Performance Bond**” means an amount of money equal to the lesser of either: (i) 5% of the Project Budget, or (ii) Two Hundred Fifty Thousand Dollars (\$250,000), in the form of any of the following: a letter of credit from a reputable bank in accordance with a form approved by District, a payment and performance bond from a reputable surety company, or a cash reserve to be held in escrow by a settlement agent for the benefit of District.

“**Permits**” means all demolition, site, building, construction, and other permits, approvals, licenses, and rights required to be obtained from the District of Columbia government or other authority having jurisdiction over the Property (including, without limitation, the federal government, WMATA, and any utility company, as the case may be) necessary to commence and complete construction and occupancy of the Project in accordance with the Approved Plans and Specifications and this Covenant.

“**Person**” means any individual, corporation, limited liability company, trust, partnership, association, or other entity.

“**Project**” means those Improvements on the Property, and the development and construction thereof in accordance with the Approved Plans and Specifications and this Covenant.

“**Project Drawings**” shall mean the drawings, plans and specifications for the Improvements submitted by Declarant to District.

“**Property**” is defined in the Recitals.

“**Punch List Items**” mean the minor items of work to be completed or corrected prior to final payment to Declarant’s general contractor pursuant to its construction contract in order to fully complete the Project in accordance with the Approved Plans and Specifications.

“**Release**” means an instrument, in recordable form, executed by the Parties that releases one or more covenants contained herein.

“**Schedule of Performance**” means that schedule of performance setting forth the timelines for Milestones in the development, construction, and completion of the Project, including a construction timeline in customary form, and dates for submission of documentation required under this Covenant, attached as **Exhibit B** hereto.

“**Use Covenants**” means those covenants contained in Article IV.

1.2 **GOVERNING LAW**. This Covenant shall be governed by and construed in accordance with the laws of the District of Columbia (without reference to conflicts of law principles).

1.3 **CAPTIONS, NUMBERINGS, AND HEADINGS.** Captions, numberings, and headings of Articles, Sections, Schedules, and Exhibits in this Covenant are for convenience of reference only and shall not be considered in the interpretation of this Covenant.

1.4 **NUMBER; GENDER.** Whenever required by the context, the singular shall include the plural, the neuter gender shall include the male gender and female gender, and vice versa.

1.5 **BUSINESS DAY.** In the event that the date for performance of any obligation under this Covenant falls on a day other than a Business Day, then such obligation shall be performed on the next succeeding Business Day.

1.6 **COUNTERPARTS.** This Covenant may be executed in multiple counterparts, each of which shall constitute an original and all of which shall constitute one and the same agreement.

1.7 **SEVERABILITY.** In the event that one or more of the provisions of this Covenant shall be held to be illegal, invalid, or unenforceable, each such provision shall be deemed severable and the remaining provisions of this Covenant shall continue in full force and effect, unless this construction would operate as an undue hardship on District or Declarant or would constitute a substantial deviation from the general intent of the parties as reflected in this Covenant.

1.8 **SCHEDULES AND EXHIBITS.** All Schedules and Exhibits referenced in this Covenant are incorporated by this reference as if fully set forth in this Covenant.

1.9 **INCLUDING.** The word “including,” and variations thereof, shall mean “including without limitation.”

1.10 **NO CONSTRUCTION AGAINST DRAFTER.** This Covenant has been negotiated and prepared by District and Declarant and their respective attorneys and, should any provision of this Covenant require judicial interpretation, the court interpreting or construing such provision shall not apply the rule of construction that a document is to be construed more strictly against one party.

## **ARTICLE II CONSTRUCTION COVENANTS**

### **2.1 OBLIGATION TO CONSTRUCT PROJECT**

2.1.1 Declarant hereby agrees to develop and construct the Project in accordance with the Approved Plans and Specifications, the Schedule of Performance, the Affordability Covenant, and this Covenant. The Project shall be constructed in compliance with all Permits and Applicable Laws and in a first-class and diligent manner in accordance with industry standards. The cost of development and construction of Project thereon shall be borne solely by Declarant.

2.1.2 Declarant agrees that it will not transfer, sell, assign, or otherwise convey fee title in the Property at any time prior to Final Completion without the prior approval of the District, which approval may be granted or withheld in the sole discretion of District.

## 2.2 PRE-CONSTRUCTION ITEMS

2.2.1 ISSUANCE OF PERMITS. Declarant shall have the sole responsibility for obtaining all Permits from the applicable agency within the District of Columbia government or other authority. In no event shall Declarant commence site work or construction of all or any portion of the Project until Declarant has obtained all Permits necessary to commence and maintain the same, without lapse, to complete the portion of the contemplated work. Declarant shall submit to District copies of documents evidencing each and every Permit obtained by Declarant.

2.2.2 SITE PREPARATION. Declarant, at its sole cost and expense, shall be responsible for all preparation of the Property for development and construction in accordance with the Development Plan and Approved Plans and Specifications, including costs associated with excavation, construction of the Project, utility relocation and abandonment, relocation and rearrangement of water and sewer lines and hook-ups, and construction or repair of alley ways on the Property and abutting public property necessary for the Project. All such work, including but not limited to, excavation, backfill, and upgrading of the lighting and drainage, shall be performed under all required Permits and in accordance with all appropriate District of Columbia agency approvals and government standards, and Laws.

2.2.3 DEVELOPER'S SUBMISSIONS FOR THE PROJECT. Declarant shall submit to District for District's review and approval, the following drawings, plans and specifications (collectively, the "**Project Drawings**") for the Project within the timeframes specified below:

- (a) One Hundred percent (100%) complete Schematic Plans, within fifteen days (15) days after the Effective Date of the Property Disposition Agreement ("PDA"); and
- (b) One Hundred percent (100%) complete Construction Plans and Specifications within one hundred and twenty (120) days after the Effective Date of the PDA, with fifty percent (50%) of the Construction Plans and Specifications to be completed and submitted to District within sixty (60) days after the Effective Date of the PDA, and the remaining fifty percent (50%) of the Construction Plans and Specifications to be completed and submitted to District within sixty (60) days after the Effective Date of the PDA.

All Project Drawings shall be prepared and completed in accordance with this Agreement. Uses Plan. As used in this Agreement, the term "**Project Drawings**" shall include any changes to such Project Drawings.

## 2.4 **CONSTRUCTION RESTRICTIONS AND OBLIGATIONS**

2.4.1 Declarant agrees that it shall achieve Commencement of Construction on or before the date indicated in the Schedule of Performance and diligently prosecute the development and construction of the Project in accordance with the Approved Plans and Specifications and the Schedule of Performance.

2.4.2 Declarant shall not construct any portion of the Project on, over, or within the boundary lines of any easement for public utilities, unless such construction is provided for in the Approved Plans and Specifications in connection with the issuance of a Permit.

2.4.3 Declarant shall complete all Milestones in accordance with the Schedule of Performance, and shall achieve Final Completion on or before the date that is indicated in the Schedule of Performance.

2.4.4 Promptly after Declarant achieves Completion of Construction, Declarant shall furnish District with a Certificate of Completion, in which Declarant states that the Project has been completed, subject only to Punch List Items, in accordance with all Approved Plans and Specifications and all Applicable Laws. In the Certificate of Completion, the Declarant also shall determine, among other things, that all of the Construction Covenants herein, which relate to obligations of Declarant to develop and construct the Project, including the times for Commencement of Construction and Completion of Construction, have been fully satisfied.

2.4.5 Promptly after Declarant achieves Final Completion, Declarant shall notify District and certify, that all Punch List Items have been completed, all construction contracts for the Project have been closed-out, all costs of constructing the Project have been paid, and Declarant has received fully executed and notarized valid releases of liens from all manufacturers, suppliers, subcontractors, general contractors, and all other Persons furnishing supplies or labor in connection with the Project. Following District's inspection of the Project in accordance with Sections 3.1 and 3.2, provided District accepts Final Completion of the Project, District shall deliver to Declarant a certificate ("**Certificate of Final Completion**") confirming Declarant's Final Completion of the Project.

## 2.5 **LABOR/EMPLOYMENT COVENANTS.**

2.5.1 If Declarant receives federal or District of Columbia financial assistance, and if the construction of the Project is a union project with respect to the Property, Declarant shall:

- (a) send to each labor union or representative of workers with which it has a collective bargaining agreement, or other contract or understanding, a notice, to be provided by the DOL, advising the said labor union or worker's representative of Declarant's commitments under Section 202 of the Executive Order 11246 of September 24, 1965, as amended, and shall post copies of the notice in conspicuous places available to employees and applicants for employment;



- (b) comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules and regulations and relevant orders of the DOL, including the goals and timetables for minority and female participation and the Standard Federal Equal Employment Opportunity Construction Contract Specifications to the extent applicable;
- (c) furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended, and by the rules, regulations, and orders of the DOL and HUD, and will permit access to its books, records, and accounts pertaining to its employment practices by DOL and HUD for purposes of investigation to ascertain compliance with such rules, regulations and orders; and
- (d) require the inclusion of the provisions of paragraphs (a) through (c) of this subsection in every contract, subcontract, or purchase order, unless exempted by rules, regulations, or orders of DOL issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, as amended, so that such provisions will be binding upon each contractor, subcontractor and vendor.

2.5.2 Declarant will take such action with respect to any contract, subcontract, or purchase order as District, DOES, or DOL may direct as a means of enforcing such provisions, including sanctions for noncompliance. In the event of Declarant's non-compliance with this Section or with any applicable rule, regulation, or order, the District, DOES, or DOL may take such enforcement against Declarant, including, but not limited to, an action for injunctive relief and/or monetary damages, as may be provided by Law.

2.6 **COMMUNITY BENEFIT PLANS.** During the term of this Covenant, Declarant agrees to: (i) comply with all applicable labor and employment standards, Laws, and orders in the construction of the Project; (ii) comply with and maintain the CBE Agreement; and (iii) comply with and maintain the First Source Agreement.

2.7 **DISTRICT SECURTY FOR PERFORMANCE.**

2.7.1 On or before the Effective Date, Developer has delivered the Development and Completion Guaranty to District to secure Developer's performance of the provisions of this Covenant through District's issuance of the Final Certificate of Completion. In the event Developer fails to perform any of its obligation contained in these Covenants, the District may require the Guarantors, in accordance with the terms of the Development and Completion Guaranty, to perform Developer's obligations.

2.7.2 In the event District determines, in its sole discretion, that a material adverse change in the financial condition of the Guarantor(s) has occurred that impacts, or could threaten to impact, the Guarantor's ability to perform under the Development and Completion Guaranty, Developer shall, within five (5) Business Days after written notice from District, identify a proposed substitute guarantor and request District's approval of the same, which request shall include delivery of the Guarantor Submissions for such proposed guarantor. If (i) Developer fails to propose a substitute guarantor and deliver Guarantor Submissions for such proposed

substitute guarantor and deliver Guarantor Submissions for such proposed substitute guarantor within the foregoing five (5) Business Day period or (ii) District determines, in its sole discretion, that the proposed substitute guarantor does not have sufficient net worth and liquidity to satisfy the obligations under the Development and Completion Guaranty, then an Event of Default shall be deemed to have occurred and District shall be entitled to the remedies contained in Section 6.2

### **ARTICLE III**

#### **MONITORING AND INSPECTING THE CONSTRUCTION OF THE PROJECT**

3.1 **INSPECTION AND MONITORING RIGHTS.** In addition to and notwithstanding any monitoring and inspecting requirements of Declarant's construction lender and any applicable District of Columbia building and health code requirements, District shall have the following rights:

3.1.1. **INSPECTION OF SITE.** District shall have the right to enter the Property from time to time and at no cost or expense to District (but at the risk of District), for the purpose of performing routine inspections in connection with the development and construction of the Project. Declarant understands that District or its representatives will enter the Property from time to time for the sole purpose of undertaking the inspection of the Project to determine conformance to the Approved Plans and Specifications and this Covenant, as applicable, and Declarant shall have the right to accompany those persons during such inspections. Declarant waives any claim that it may have against District, its officers, directors, employees, agents, consultants, or representatives, arising out of District representatives' entry upon the Property unless resulting from the gross negligence or willful misconduct of said District representatives. Any inspection of the Project or access of the Property by District hereunder shall not be deemed an approval, warranty, or other certification as to the compliance of the Project or Property with any building codes, regulations, standards, or other Applicable Laws.

3.1.2. **PROGRESS REPORTS.** From and after the Effective Date and until issuance of the Certificate of Final Completion, and in addition to the notice provisions contained in Section 3.2, Declarant, upon request by District, shall make written reports to District as to the progress of the construction of the Project, in such form and detail as may reasonably be requested by District, and shall include a reasonable number of construction photographs taken since the last report submitted by Declarant. Such progress reports shall be delivered to District by the Declarant within ten (10) Business Days after request by District, but not more frequently than on a monthly basis.

3.1.3. **AUDIT RIGHTS.** Upon reasonable prior notice at any time prior to issuance of the Certificate of Final Completion, District shall have the right (at the cost of District unless Declarant is found to be in violation of any obligation imposed hereunder, in which event such expense shall be borne by Declarant) to inspect the books, records, and corporate documents of Declarant for the purpose of ensuring compliance with this Covenant and to have an independent audit of the construction documents and records. Declarant shall cooperate with District in providing District reasonable access to its books and records during normal business hours at Declarant's offices for these purposes. Declarant shall maintain its books and records in

accordance with generally accepted accounting principles, consistently applied. Declarant and District may, but shall not be obligated to, jointly agree to use a common accounting firm for the purpose of conducting any such audits; provided, however, that in such event, the accounting firm shall have a valid contract with District in compliance with the Procurement Practices Act of 1985, D.C. Official Code §§ 2-301.01, et seq., as amended, and shall execute a separate engagement letter with District for calculation of the return.

3.2 **MILESTONE NOTICES.** Upon completion of each Milestone in the Schedule of Performance, Declarant shall notify District, and District shall have ten (10) Business Days to inspect the Property and certify Declarant's completion of such Milestone. In the event District fails to certify completion of such Milestone within thirty (30) days after receipt of Declarant's notice, the District shall waive its opportunity to certify or contest completion of the applicable Milestone.

#### **ARTICLE IV USE COVENANTS**

4.1 **Residential Use Only.** The Property shall be used for residential purposes only.

4.2 **Warranty.** Following issuance of the Certificate of Final Completion, Declarant warrants that:

- a. All appliances shall be under warranty for a minimum of one (1) year from the date of transfer of the Property from Declarant to a purchaser; and
- b. All structural (including roofing), electrical, mechanical, heating and air conditioning systems shall be under warranty for a minimum of ten (10) years from the date of transfer of the Property from Declarant to a purchaser.

Notwithstanding the foregoing, nothing herein shall be construed to limit any other statutory consumer warranties the Declarant shall be required to give any purchaser in connection with the sale of the Property and any attendant personal property, and to the extent there is a conflict between such warranties and this Article IV, the Declarant shall provide the more generous warranty.

#### **ARTICLE V TERM; RELEASE**

5.1 **TERM OF CONSTRUCTION COVENANTS.** The Construction Covenants, and any obligations hereunder that relate solely to the development and construction of the Project, shall run with the land and otherwise remain in effect until District delivers to Declarant the Certificate of Final Completion.

5.2 **TERM OF USE RESTRICTIONS AND OTHER COVENANTS.** All other obligations, liabilities, terms, and conditions set forth herein shall run with the land, binding Declarant and its successors and assigns, until all obligations required to be performed under these Covenants are fulfilled.

### 5.3 **RELEASE.**

5.3.1 At the request of either Party to this Covenant and provided that there is no dispute as to the expiration of the term, the Parties shall execute a Release. In such event, the requesting Party shall, at its sole cost and expense, prepare such Release and present it to the non-requesting Party. The non-requesting Party shall then have five (5) Business Days from receipt of the proposed Release to review the same and notify the requesting Party of any material deficiencies or errors in the Release. Upon the correction of any material deficiency or error in the Release, the non-requesting Party shall promptly deliver an original executed Release to the requesting Party who shall be responsible for causing the Release to be recorded in the Land Records. Any Release not so recorded shall not be deemed valid pursuant to this Article.

5.3.2 Upon District's delivery to Declarant of the Certificate of Final Completion, District shall release the Performance Bond, to the extent the full amount of the same has not been drawn in accordance with Section 6.2.1(a) herein.

## **ARTICLE VI DEFAULT AND REMEDIES**

6.1. **EVENTS OF DEFAULT.** Each of the following shall constitute an “**Event of Default**” on the part of Declarant:

- (a) Declarant defaults in the performance of any obligation, term, or provision under this Covenant, and such default shall continue uncured for thirty (30) days after written notice of such default from District, provided that such thirty (30) day period may be extended for an additional period of time, at the sole discretion of District, to the extent required to complete such cure;
- (b) Declarant fails to complete any Milestone by the date indicated in the Schedule of Performance; or
- (c) Declarant commits any affirmative act of insolvency or shall file any petition or action under any bankruptcy or insolvency law, or any other law or laws for relief of, or relating to debtors; or if there shall be filed any insolvency petition under any bankruptcy or insolvency statute against Declarant or there shall be appointed any receiver or trustee to take possession of any property of Declarant and such petition or appointment is not set aside or withdrawn or does not cease within sixty (60) days from the date of such filing of appointment.

### 6.2 **REMEDIES.**

6.2.1 If any Event of Default occurs hereunder, District may elect to pursue any of the following remedies, all of which are cumulative:

- (a) District may draw on the Performance Bond, in an amount to be determined by District, in its sole discretion, up to the full amount of the Performance Bond, upon an Event of Default that arises under Section 6.1;
- (b) District may cure Declarant's Event of Default, at Declarant's sole cost and expense. Declarant shall pay to District an amount equal to its actual out-of-pocket costs for such cure within ten (10) Business Days after demand therefor. Any such sums not paid by Declarant within ten (10) Business Days after demand shall bear interest at the rate of fifteen percent (15%) per annum or the highest rate permitted by Law, if less, until paid;
- (c) District may pursue specific performance of Declarant's obligations hereunder;
- (d) District may re-enter the Property in accordance with the covenants contained in Declarant's deed(s) to the Property; and
- (e) District may pursue any and all other remedies available at law and in equity, including without limitation, injunctive relief.

6.2.2 If District pursues any of its remedies under this Section that require the filing of a court action and District prevails in a court of competent jurisdiction, District shall be entitled to reimbursement of all costs including its attorneys' fees. If OAG is counsel for the District, the reasonable attorney fees shall be calculated based on the then applicable hourly rates established in the most current adjusted Laffey matrix prepared by the Civil Division of the United States Attorney's Office for the District of Columbia and the number of hours employees of OAG prepared for or participated in any such action.

## **ARTICLE VII INSURANCE OBLIGATIONS**

7.1 During the periods identified below, Declarant shall carry and maintain in full force and effect the following insurance policies:

- (a) Property Insurance - After achieving Completion of Construction, Declarant shall maintain property insurance insuring the Project under a Special Form (Causes of Loss) policy for 100% insurable replacement value with no co-insurance.
- (b) Builder's Risk Insurance – At all times after the Effective Date of this Covenant until delivery of the Certification of Final Completion, Declarant shall maintain builder's risk insurance for the amount of the completed value of the Project (or lesser amount acceptable to District) under a Special Form (Causes of Loss) policy with no co-insurance penalty, including flood risks if the Property is

located in a flood zone, insuring the interests of Declarant, District and any contractors and subcontractors.

- (c) Automobile Liability and Commercial General Liability Insurance - At all times after the Effective Date of this Covenant until delivery of the Certificate of Final Completion, Declarant shall maintain and cause its general contractor to maintain automobile liability insurance and commercial general liability insurance policies written so that each have a combined single limit of liability for bodily injury and property damage of not less than three million dollars (\$3,000,000.00) per occurrence, of which at least one million dollars (\$1,000,000.00) must be maintained as primary coverage, and of which the balance may be maintained as umbrella coverage; provided, however, that the foregoing statement as to the amount of insurance Declarant is required to carry shall not be construed as any limitation on Declarant's liability under this Covenant. The foregoing limits may be increased by District from time to time, in its sole discretion.
- (d) Workers' Compensation Insurance - At all times after the Effective Date of this Covenant until such time as all obligations of Declarant hereunder have been satisfied or have expired, Declarant shall maintain and cause its general contractor and any subcontractors to maintain workers' compensation insurance in such amounts as are required by applicable Laws.
- (e) Professional Liability Insurance – At all times after the Effective Date, the Declarant shall cause the architect, and every engineer or other professional who will perform services in connection with the Project to maintain professional liability insurance with limits of not less than one million dollars (\$1,000,000.00) for each occurrence, including coverage for injury or damage arising out of acts or omissions with respect to all design and engineering professional services provided by the architect of record, structural, electrical, and mechanical engineers with a deductible acceptable to District.

7.2 All property and builder's risk insurance shall name District as an additional insured. Any deductibles with respect to the foregoing insurance policies shall be commercially reasonable. All such policies shall include a waiver of subrogation endorsement. All insurance policies required pursuant to this section shall be written as primary policies, not contributing with or in excess of any coverage that District may carry. Such insurance shall be obtained through a recognized insurance company licensed to do business in the District of Columbia and rated by A.M. BEST as an A-X or above. The policies shall contain an agreement by the insurer notifying District in writing, by certified U.S. Mail, return receipt requested, not less than thirty (30) days before any material change, reduction in coverage, cancellation, including cancellation for nonpayment of premium, or other termination thereof or change therein.

## ARTICLE VIII CASUALTY

8.1 **PRIOR TO ISSUANCE OF THE CERTIFICATE OF FINAL COMPLETION.** In the event of damage or destruction to the Project following the Effective Date, but prior to the

issuance of the Certificate of Final Completion, Declarant shall be obligated to repair or restore the Project in conformity with the Approved Plans and Specifications, subject to changes necessary to comply with then-current building code requirements, as approved by District in its sole discretion. Notwithstanding anything in this Covenant to the contrary, District will not accept, nor shall Declarant present to District, any Certificate of Final Completion nor shall District release Declarant from its development obligations hereunder until Declarant has completed its restoration obligations.

8.2 **AFTER ISSUANCE OF THE CERTIFICATE OF COMPLETION.** In the event of damage or destruction to the Project following the issuance of the Certificate of Final Completion, Declarant shall promptly cause the Property to be restored to its condition existing prior to the casualty, subject to changes necessary to comply with then-current building code or insurance requirements, as approved by District (such approval not to be unreasonably withheld, conditioned, or delayed).

## **ARTICLE IX INDEMNIFICATION**

Declarant shall indemnify, defend, and hold District, its officers, employees and agents harmless from and against any and all losses, costs, claims, damages, liabilities, and causes of action (including attorneys' fees and court costs) arising out of death of or injury to any person or damage to any property occurring on or adjacent to the Property and directly or indirectly caused by any acts done thereon or any acts or omissions of Declarant or Declarant's Agents; provided however, that the foregoing indemnity shall not apply to any losses, costs, claims, damages, liabilities, and causes of action due to the gross negligence or willful misconduct of District or its officers, employees and agents.

## **ARTICLE X COVENANTS BINDING ON SUCCESSORS AND ASSIGNS**

This Covenant is and shall be binding upon the Property and shall run with the land for the period of time stated herein. The rights and obligations of District, Declarant, and their respective successors and assigns shall be binding upon and inure to the benefit of the foregoing parties and their respective successors and assigns; provided, however, that all rights of District pertaining to the monitoring or enforcement of the obligations of Declarant hereunder shall not convey with the transfer of title or any lesser interest in the Property, but shall be retained by District, or such other designee of District as District may so determine.

## **ARTICLE XI AMENDMENT OF COVENANT**

This Covenant shall not be amended, modified, or released other than by an instrument in writing executed by a duly authorized official of District on behalf of District and approved by OAG for legal sufficiency. Any amendment to this Covenant that materially alters the terms of this Covenant shall be recorded among the Land Records before it shall be deemed effective.

**ARTICLE XII**  
**NOTICES**

12.1 Any notices given under this Covenant shall be in writing and delivered by certified mail, return receipt requested, postage pre-paid, by hand or by reputable private overnight commercial courier service to the parties at the following addresses:

**DISTRICT:**

D.C. Department of Housing and Community Development  
Property Acquisition and Disposition Division  
1800 Martin Luther King Avenue, SE  
Washington, D.C. 20020  
Attn: Director of D.C. Department of Housing and Community Development

With a copy to:

The Office of the Attorney General for the District of Columbia  
1100 15<sup>th</sup> Street, N.W., Suite 800  
Washington, D.C. 20005  
Attn: Section Chief, Real Estate Transactions Section, Commercial Division

Any notices given under this Covenant shall be in writing and delivered by certified mail (return receipt requested, postage pre-paid), by hand, or by reputable private overnight commercial courier service, to Declarant at the following addresses:

**DECLARANT:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

12.2 Notices served upon Declarant or District in the manner aforesaid shall be deemed to have been received for all purposes hereunder at the time such notice shall have been: (i) if hand delivered to a party against receipted copy, when the copy of the notice is receipted; (ii) if given by overnight courier service, on the next Business Day after the notice is deposited with the overnight courier service; (iii) if given by certified mail, return receipt requested, postage pre-paid, on the date of actual delivery or refusal thereof. If notice is tendered under the terms of this Covenant and is refused by the intended recipient of the notice, the notice shall nonetheless be considered to have been received and shall be effective as of the date provided in this Covenant.



**ARTICLE XIII**  
**FORCE MAJEURE**

Declarant shall not be considered in default to perform its obligations under this Covenant, in the event of forced delay in the performance of such obligations due to Force Majeure. It is the purpose and intent of this provision that in the event of the occurrence of any such Force Majeure event, the time or times for performance of the obligations of Developer shall be extended for the period of the Force Majeure; provided, however that: (a) Declarant shall have first notified, within ten (10) days after it becomes aware of the beginning of any such Force Majeure event, District thereof in writing of the cause or causes thereof, with supporting documentation, and requested an extension for the period of the forced delay; (b) in the case of a delay in obtaining Permits, Declarant must have filed complete applications for such Permits and hired an expediter reasonably acceptable to District to monitor and expedite the Permit process; and (c) Declarant must take commercially reasonable actions to minimize the delay. If Declarant requests any extension on the date of completion of any obligation hereunder due to Force Majeure, it shall be the responsibility of Declarant to reasonably demonstrate that the delay was caused specifically by a delay of a critical path item of such obligation.

**[Remainder of Page Intentionally Blank. Signatures Appear on Following Page.]**

**IN WITNESS WHEREOF**, the Declarant has caused this Covenant to be executed, acknowledged and delivered, for the purposes therein contained.

**DECLARANT:**

\_\_\_\_\_, a District of Columbia

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

Name:

Title:

**DISTRICT OF COLUMBIA** ) ss:

The foregoing instrument was acknowledged before me on this \_\_\_\_ day of \_\_\_\_\_, 2009, by \_\_\_\_\_, the \_\_\_\_\_ of \_\_\_\_\_, Declarant herein, whose name is subscribed to the within instrument, being authorized to do so on behalf of said Declarant, has executed the foregoing and annexed document as his/her free act and deed, for the purposes therein contained.

\_\_\_\_\_  
Notary Public

[Notarial Seal]

My commission expires: \_\_\_\_\_

**APPROVED BY THE DISTRICT  
THIS \_\_\_ DAY OF \_\_\_\_\_, 2009:**

DISTRICT OF COLUMBIA,  
acting by and through the District of Columbia Department of  
Housing and Community Development

By: \_\_\_\_\_  
Name: Leila Finucane Edmonds  
Title: Director

Approved for legal sufficiency

By: \_\_\_\_\_  
Name:  
Title: Assistant Attorney General for the Office  
of the Attorney General for the District of Columbia

**EXHIBIT A**  
**Legal Description**

**EXHIBIT B**

**Schedule of Performance**