

District to immediately draw upon the then-existing Performance Letters of Credit, in whole or in part, without further notice to Developer. In the event the issuer of a Performance Letter of Credit is insolvent or is placed into receivership or conservatorship by the Federal Deposit Insurance Corporation, or any successor or similar entity, or if a trustee, receiver or liquidator is appointed for the issuer, then, within five (5) Business Days after the date of such occurrence, Developer shall obtain from a different Acceptable Bank a Replacement Letter of Credit (and Developer's failure to do so shall, notwithstanding anything in this Covenant to the contrary, constitute an Event of Default for which there shall be no notice or cure or grace period being applicable thereto, other than the aforesaid five (5) Business Day period).

(d) Any failure or refusal of the issuer to honor a Performance Letter of Credit shall be at Developer's sole risk and shall not relieve Developer of its obligations hereunder.

(e) Upon issuance of the Final Certificate of Completion, District shall release the Performance Letters of Credit, to the extent the full amount of the same has not been drawn in accordance with the provisions of this Covenant.

2b.8 COMPLETION OF PROJECT.

2b.8.1 Developer's Certificate of Substantial Completion. Promptly after Developer believes it has achieved Substantial Completion of Construction of the Public Improvements, Developer shall notify the District to arrange an inspection for Punch List Items. After the District presents Developer with a list of the Punch List Items, Developer shall furnish District with (a) an Architect's certificate which is consistent with standard practice under the AIA evidencing that the Public Improvements have been completed substantially in accordance with all Approved Plans and Specs and Applicable Law; and (b) a certificate from Developer certifying, among other things, that the Developer has satisfied all of the terms, covenants, agreements, conditions, and provisions of this Covenant relating to obligations of Developer with respect to development and construction of the Public Improvements, except for the Punch List Items (the "**Certificate of Substantial Completion**"). The Certificate of Substantial Completion shall also include the statement that Developer has obtained a Certificate of Occupancy for the Public Improvements. The District will cooperate with the Developer in obtaining the Certificate of Occupancy for the Public Improvements. Upon completion of the Punch List Items or, at District's sole and absolute discretion, upon the Developer providing the District with evidence reasonably satisfactory to the District that it has escrowed 150% of the reasonably anticipated cost to complete such Punch List Items, the District will return the balance of the Deposit to Developer.

2b.8.2 Final Completion.

(a) Developer shall achieve Final Completion on or before the Outside Completion Date indicated therefor in the Schedule of Performance. Within five (5) days after Developer achieves Final Completion, Developer shall deliver to District (i) a certificate, certifying under oath, that: (A) all Punch List Items have been completed, or, in accordance with District's sole and absolute discretion, the Developer has escrowed 150% of the reasonably anticipated cost to complete such Punch List Items, (B) all construction contracts for the Project have been closed-out other than for the Internal Market Rate Improvements, (C) all costs of constructing the Project have been paid other than for the Internal Market Rate Improvements, and (D) Developer 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 other than for the Internal Market Rate Improvements; (ii) a certificate from the general contractor that the Project has been completed pursuant to the construction contract other than for the Internal Market Rate Improvements, and (iii) a complete set of “as-built” drawings (including all field notations and corrections) of the Improvements, in such format as is acceptable to District. Following District’s receipt of the foregoing and its inspection of the Project in accordance with Sections 2b.5 and 2b.6, provided District accepts the Final Completion of the Project, District shall deliver to Developer a certificate, in recordable form (“**Final Certificate of Completion**”), confirming Developer’s Final Completion of the Project.

(b) District’s issuance of a Final Certificate of Completion does not relieve Developer or any other Person from complying with any and all Applicable Law, Permits and requirements of Governmental Authorities. The issuance of a Final Certificate of Completion shall not be deemed an approval, warranty or other certification as to the compliance of the Improvements, or any portion thereof, or the West End Property with any Applicable Law.

ARTICLE III CONSTRUCTION FINANCING REQUIREMENTS

Developer shall not engage in any financing or other transaction creating a Mortgage or other lien or encumbrance upon the District Property or Developer Property, or suffer any lien or encumbrance to be made on or attached to the West End Property, whether by express agreement or by operation of law, except that Developer may obtain Debt Financing and encumber the District Property or Developer Property with one or more Project Mortgages. The proceeds of any Project Mortgage shall not be used to fund (a) distributions to Members or Affiliates of Developer; or (b) acquisition, development, construction, operation or any other costs relating to any other real property, including the Retained District Property, personal property or business operation. Subsection (a) shall not prohibit payments for services rendered in accordance with the Approved Budget where the payee is an equity holder of Owner.

ARTICLE IV PERMITTED USES

The District Property may be used for any uses permitted by Law. The New Library may be used only for a library and related uses and other uses which do not materially and adversely affect the value of the District Property. The New Fire Station may be used as a fire station and related uses and for other uses that do not materially and adversely affect the value of the District Property.

ARTICLE V INSURANCE OBLIGATIONS

5.1 Insurance Coverage. The Developer shall procure and maintain, during such times as it owns the West End Property or any portion thereof, the types of insurance specified below. The Developer shall have its insurance broker or insurance company submit a certificate of

insurance to District giving evidence of the required coverage prior to commencing performance under this Covenant. In no event shall any work be performed until the required certificate of insurance signed by an authorized representative of the insurer have been provided to, and accepted by, the District. All insurance shall be written with financially responsible companies authorized to do business in the District of Columbia or in the jurisdiction where the work is to be performed and have an A.M. Best Company rating of A-VIII or higher. The Developer shall require all of its subcontractors to carry the same insurance required herein. The Developer shall ensure that all policies provide that the District shall be given thirty (30) days prior written notice in the event the stated limit in the declarations page of the policy is reduced via endorsement or the policy is cancelled prior to the expiration date shown on the certificate. The Developer or its insurance company shall provide District with ten (10) days prior written notice in the event of non-payment of premium.

5.1.1 Commercial General Liability Insurance. Developer shall provide evidence satisfactory to District with respect to its activities performed that it carries One Million Dollars (\$1,000,000) per occurrence limits and Two Million Dollars (\$2,000,000) aggregate in bodily injury and property damage coverage including, but not limited to: premises-operations, broad form property damage, products and completed operations, personal and advertising injury, contractual liability and independent contractors coverage. The policy coverage shall include the District as an additional insured, shall be primary and non-contributory with any other insurance maintained by the District and shall contain a waiver of subrogation. Developer shall maintain completed operations coverage for five (5) years following Final Completion.

5.1.2 Automobile Liability Insurance. Developer shall provide automobile liability insurance to cover all owned, hired or non-owned motor vehicles used in conjunction with the performance of this Covenant. The policy shall provide One Million Dollars (\$1,000,000) per occurrence combined single limit for bodily injury and property damage.

5.1.3 Workers' Compensation Insurance. Developer shall provide workers' compensation insurance in accordance with all applicable Laws.

5.1.4 Employers' Liability Insurance. Developer shall provide employers' liability insurance as follows: Five Hundred Thousand Dollars (\$500,000) per accident for injury, Five Hundred Thousand Dollars (\$500,000) per employee for disease and Five Hundred Thousand Dollars (\$500,000) per policy disease limit

5.1.5 Builder's Risk Insurance. Developer shall provide a builder's risk policy equal to the replacement cost value of the completed Improvements, including the building supplies and materials related thereto. The policy shall cover property while located at the West End Property, at temporary locations or in transit, deductibles will be the sole responsibility of Developer, and the policy shall name the District as loss payee. The policy shall not exclude equipment breakdown, windstorm, flood, water damage other than flood or damage due to drain/sewer backup. A waiver of subrogation in favor of District shall be included.

5.1.6 Professional Liability Insurance (Errors & Omissions). Developer shall provide professional liability insurance (errors and omissions) to cover liability resulting from any error or omission in the performance of professional service. The policy shall provide One Million Dollars (\$1,000,000) per occurrence for each wrongful act and Three Million Dollars (\$3,000,000) annual aggregate.

5.1.7 Umbrella or Excess Liability Insurance. Developer shall provide umbrella or excess liability (which is excess over employers' liability, general liability and automobile liability) insurance in the amount of Twenty Million Dollars (\$20,000,000).

5.1.8 Liability. The foregoing requirements are minimum insurance requirements established by the District of Columbia. HOWEVER, THE REQUIRED MINIMUM INSURANCE REQUIREMENTS PROVIDED ABOVE WILL NOT IN ANY WAY LIMIT DEVELOPER'S LIABILITY UNDER THIS COVENANT.

ARTICLE VI CASUALTY

6.1 PRIOR TO FINAL COMPLETION. In the event of damage or destruction to the Improvements prior to Final Completion, Developer shall be obligated to repair or restore the Improvements in conformity with the Approved Plans and Specs, subject to changes necessary to comply with then-current building code requirements, as approved by District in its reasonable discretion. Notwithstanding anything in this Agreement to the contrary, Developer shall not be entitled to issuance of Final Completion or release from its development obligations hereunder until Developer has completed its restoration obligations.

6.2 AFTER FINAL COMPLETION. In the event of damage or destruction to the Improvements following Final Completion, repair and/or restoration thereof shall be in accordance with the terms of the REA.

ARTICLE VII INDEMNIFICATION

Developer 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 West End Property and directly or indirectly caused by any acts done thereon or any acts or omissions of Developer or Developer's Agents; provided however, that the foregoing indemnity shall not apply to any losses, costs, claims, damages, liabilities, and causes of action due solely to the gross negligence or willful misconduct of District or its officers, employees and agents.

ARTICLE VIII TERM; RELEASE

8.1 TERM OF CONSTRUCTION COVENANTS. Developer's obligations under Articles IIb, III, V, IX and XIII hereof, 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 Developer the Certificate of Final Completion.

8.2 TERM OF USE RESTRICTIONS AND OTHER COVENANTS. All other obligations, liabilities, terms, and conditions set forth herein shall run with the land, binding Developer and its successors and assigns in perpetuity, unless otherwise provided herein.

8.3 RELEASE. At the request of either Party 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.

ARTICLE IX DEFAULT AND REMEDIES

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

(a) It shall be deemed a default by Developer if Developer fails to perform any obligation or requirement under this Covenant or fails to comply with any term or provision of this Covenant and such default remains uncured for thirty (30) days after receipt of written notice of such failure from District. Notwithstanding the foregoing, if a default does not involve the payment of money and cannot reasonably be cured within thirty (30) days, Developer shall have such additional time as is reasonably necessary, not to exceed an additional sixty (60) days, to cure such default; provided, however, Developer must commence the cure within the initial thirty (30) day period and diligently pursue completion of such cure thereafter.

(b) Developer fails to complete any Milestone by the Outside Completion Date indicated in the Schedule of Performance and such default shall continue uncured for thirty (30) days after notice of such default from District;

(d) Developer fails to obtain or maintain in effect any insurance required under this Covenant, or pay any insurance premiums, as and when the same become due and payable, or fails to reinstate, maintain and provide evidence to District of the insurance required to be obtained or maintained, and such failure shall continue for a period of ten (10) days after written notice of such failure from District;

(e) Developer 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 Developer or there shall be appointed any receiver or trustee to take possession of any property of Developer 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;

(f) Developer fails to achieve Intermediate Construction Completion within three (3) years of Closing and such default remains uncured for thirty (30) days after receipt of written notice of such failure from District, subject to Force Majeure. If Closing for Square 37 occurred separately

from Square 50, the foregoing three (3) year period shall run separately for each of Square 50 and Square 37 commencing from the applicable date of Closing for each parcel.

9.2 REMEDIES.

9.2.1 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 Letters of Credit, or, if applicable, the Bonds, in an amount to be determined by District, in its sole discretion necessary to cure such Event of Default, up to the full amount of the Performance Letters of Credit;

(b) District may cure Developer's Event of Default, at Developer's sole cost and expense. Developer shall pay to District an amount equal to its actual out-of-pocket costs for such cure within ten (10) days after demand therefor. Any such sums not paid by Developer within ten (10) days after demand shall bear interest at the Default Rate, until paid;

(c) District may pursue specific performance of Developer's obligations hereunder;

(d) District may pursue any and all other remedies available at law and in equity, including without limitation, injunctive relief;

(e) District may require the Guarantor(s), in accordance with the terms of the Development and Completion Guaranty, to perform Developer's obligations; and

(f) In the case of an Event of Default under Section 9.1(f) District shall have a right of reversion to the District applicable to District Property in each of Square 37 and/or Square 50 if Intermediate Construction Completion has not occurred in Square 37 and Square 50, respectively. The Right of Reversion shall be automatic, upon the District's election of that remedy after applicable notice and cure periods, and the District shall not be obliged to seek judicial action. The District is granted power of attorney, coupled with an interest, by Developer solely for the purpose of executing a Deed or other documents necessary in implementing the Right of Reversion in the event that Developer does not timely execute such Deed or other documents. Notwithstanding the foregoing, if, not later than thirty (30) days after District delivers notice to Developer under Section 9.1(g), Project Lender elects to cure such Event of Default and delivers written notice of such election to District, District shall not exercise its Right of Reversion so long as the Project Lender is diligently pursuing such cure. In such event, District shall have the right to communicate directly with the Project Lender and District shall not unreasonably withhold, condition or delay its approval to any proposed amendments to this Section 9.2.1(f), so long as any such amendments do not materially and adversely affect District's rights and/or obligations under this Covenant.

9.2.2 If the Event of Default arises from Developer's failure to pay to District any amount due to District under this Covenant when due, such amount shall bear interest at the Default Rate until paid in full.

9.2.3 If District pursues any of its remedies under this Section 9.2 that require the filing of a court action and District prevails in a court of competent jurisdiction, District shall be entitled to reimbursement of its reasonable attorneys' fees and costs, to the extent awarded by such court. In the event District is represented by OAG, attorneys' fees shall be calculated based on the then-applicable hourly rates established in the most current Laffey matrix prepared by the Civil Division of the United States Attorney's Office for the District of Columbia and the number of hours OAG employees prepared for and participated in any such litigation. If the Developer prevails in such action, the Developer will be entitled to reimbursement of its reasonable attorneys' fees and costs to the extent awarded by such court.

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

This Covenant is and shall be binding upon the West End Property and shall run with the land for the period of time stated herein. The rights and obligations of District, Developer, 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 Developer hereunder shall not convey with the transfer of title or any lesser interest in the West End 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:
Office of the Deputy Mayor for Planning and Economic
1350 Pennsylvania Avenue, Suite 317
Washington, D.C. 20004
Attention: Deputy Mayor of Planning and Economic Development

With a copy to:
Office of the Attorney General for the District of Columbia
1100 15th Street, N.W., Suite 800
Washington, D.C. 20005

Attention: Deputy Attorney General, 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 Developer at the following addresses:

DEVELOPER:
Eastbanc, Inc.
3307 M St. NW, Suite 400
Washington, DC 20007
Attention: Anthony Lanier, President

With a copy to:

Holland & Knight LLP
2099 Pennsylvania Ave. NW
Washington, DC 20006
Attention: Dennis M. Horn, Esq.

12.2 Notices served upon Developer 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; or (iii) if given by certified mail, return receipt requested, postage prepaid, 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. Either Party may change the address to which notices are sent and add additional parties who are to receive notice by delivery and written notice to the other Party in accordance with this Section.

ARTICLE XIII TRANSFER

13.1 Transfer. Developer represents, warrants, covenants, and agrees, for itself and its successors and assigns, that Developer (or any successor in interest thereof) shall not perform a Transfer or assign its rights under this Covenant, or delegate its obligations under this Covenant to any Person, other than an Affiliate of the Developer or to the Project Lender, without the District's prior written approval, which may be granted or denied in the District's sole discretion. Notwithstanding the foregoing, the Developer will have the right to create more than one entity to acquire, finance and develop different parts of the Improvements provided that (i) the Developer or the Persons who control the Developer will be the general partner or managing member of each such entity with operational control over each such entity; and (ii) both the entity that takes title to Square 37 and the Guarantor for the development of the Market-Rate Units will guaranty completion of the Public Improvements. Provided that the foregoing conditions are met, any separate entity that owns and develops only the Affordable Units (i) will not be required to guaranty completion of the balance of the Public Improvements and may finance the Affordable Units separately from the balance of the

Improvements; and (ii) will not be required to comply with any provisions of this Covenant that only apply to the portion of the Project that do not constitute Affordable Units . Any change of control of the Person defined as “Developer” under this Covenant, from time to time, shall be subject to District’s prior written consent, such consent not to be unreasonably withheld, conditioned or delayed. As used in this Section 13.1, the term “change of control” shall mean a change in possession, directly or indirectly, of the power to direct, or cause the direction of, the management and policies of such Person as of the date the “change of control” is determined, whether through ownership of voting securities, membership interests or partnership interests, by contract or otherwise, or the power to elect at least fifty percent (50%) of the directors, managers, partners or Persons exercising similar authority with respect to the subject Person. No Person who is adverse to the District in any lawsuit or court proceeding at the time such Person becomes (or would become but for this provision) a member or equity owner of Developer shall become a member or equity owner of the Person defined as "Developer" unless the Person is approved by the District in its sole discretion. A lender’s right to foreclose or to accept a deed in lieu of foreclosure under a loan secured by the District Property or any part thereof following a default under the documents evidencing or securing such loan or, an equity investor’s right to obtain management control in the event Developer or its Affiliate defaults in its obligations under the limited liability operating agreement for the Developer shall not constitute a “change of control”. Except as may be set forth in the herein as to the Affordable Units, the foregoing restrictions will terminate upon Final Completion.

13.2 No Unreasonable Restraint. Developer hereby acknowledges and agrees that the restrictions on Transfers set forth in this Article do not constitute an unreasonable restraint on Developer’s right to Transfer or otherwise alienate the District Property or the Developer Property. Developer hereby waives any and all claims, challenges, and objections that may exist with respect to the enforceability of such restrictions, including any claim that such restrictions constitute an unreasonable restraint on alienation.

13.3 Space Lease; Residential Sale. Notwithstanding anything to the contrary contained in this Article 13, the prior written consent of District shall not be required before Developer enters into a Space Lease or conducts a Residential Sale. Within ten (10) Business Days of execution of any Space Lease or deed for a Residential Sale, Developer shall provide to District copies of the Space Lease or Residential Sale deed. At any time upon District’s demand, Developer shall deliver to District, within ten (10) Business Days following such demand, a schedule of all Space Leases giving the names of all tenants, a description of the space that has been leased pursuant to each Space Lease, expiration dates, rentals and other fees, and such other information as District reasonably may request.

ARTICLE XIV ANTI-DEFICIENCY LIMITATION; AUTHORITY

14.1 Anti-Deficiency. Though no financial obligations on the part of the District are anticipated, Developer acknowledges that District is not authorized to make any obligation in advance or in the absence of lawfully available appropriations and that the District’s authority to make such obligations is and shall remain subject to the provisions of (i) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349, 1350, 1351; (ii) D.C. Official Code Section 47-105; (iii) the