

COUNCIL DRAFT

LAND DISPOSITION AND DEVELOPMENT AGREEMENT

by and between the
DISTRICT OF COLUMBIA,
TPC 5TH & I PARTNERS LLC, and MLK DC AH DEVELOPER, LLC

for the

DISPOSITION OF
901 FIFTH STREET, NW
(Square 516, Lot 59)

AND DEVELOPMENT OF

A subdivided portion of parcel known as 2100 Martin Luther King, Jr. Avenue, SE
in Washington, D.C.

Dated _____, 201_

TABLE OF CONTENTS [TO BE UPDATED UPON COMPLETION]

Page

Table of Contents

ARTICLE 1 DEFINITIONS, INCORPORATION OF RECITALS, PREVIOUS AGREEMENTS..... 2

 1.1 Definitions..... 2

 1.2 Rules of Construction. 11

 1.3 Other Definitions. 12

 1.4 Recitals..... 12

ARTICLE 2 PURCHASE PRICE; CONDITION OF PROPERTY 12

 2.1 Sale; Purchase Price..... 12

 2.2 Deposit. 12

 2.3 Condition of Property. 13

 2.4 Title..... 15

 2.5 Risk of Loss. 16

 2.6 Condemnation. 16

 2.7 Service Contracts and Leases; Temporary Licensees. 17

ARTICLE 3 REPRESENTATIONS AND WARRANTIES..... 18

 3.1 Representations and Warranties of District. 18

 3.2 Representations and Warranties of Developers. 19

ARTICLE 4 APPROVAL OF CONSTRUCTION DRAWINGS; OTHER SUBMISSIONS; APPROVAL OF IDENTITY OF GUARANTORS..... 20

 4.1 Construction Drawings. 20

 4.2 District Review and Approval of Construction Drawings. 21

 4.3 Changes In Construction Drawings; Government Required Changes..... 22

 4.4 Progress Meetings. 23

 4.5 Guarantors; Completion Guaranty. 23

 4.6 Other Submissions. 24

 4.7 Construction Consultant..... 25

 4.8 Payment and Performance Bonds. 26

ARTICLE 5 CONDITIONS TO CLOSING..... 26

 5.1 Conditions Precedent To Developer’s Obligation To Close..... 26

 5.2 Conditions Precedent To District’s Obligation To Close. 27

ARTICLE 6 CLOSING 30

TABLE OF CONTENTS
(continued)

	Page
6.1 Closing Date.....	30
6.2 Deliveries At Closing.....	31
6.3 Recordation of Closing Documents; Closing Costs.....	33
6.4 Affordable Housing Financing Closing.....	33
ARTICLE 7 DEVELOPMENT OF PROPERTY AND AFFORDABLE HOUSING PROPERTY; CONSTRUCTION OF PROJECT AND AFFORDABLE HOUSING PROJECT; CONSTRUCTION AND USE COVENANT; AFFORDABILITY COVENANT	35
7.1 Obligation To Construct Project.....	35
7.2 Issuance of Permits.....	36
7.3 Site Preparation.....	36
7.4 Obligation to Construct Affordable Housing Project. Subject to consummation of the Closing on the Project:	36
7.5 Opportunity for CBE's.....	38
7.6 Employment of District Residents; First Source Agreement.....	38
7.7 Davis Bacon; Living Wage Act.....	38
7.8 Green Building Act.....	38
7.9 Retail Component.....	38
7.10 Hotel Labor Peace.....	38
ARTICLE 8 DEFAULTS AND REMEDIES.....	39
8.1 Default.....	39
8.2 District Remedies in the Event of a Developer Default.....	39
8.3 Developers' Remedies in the Event of a District Default.....	40
8.4 No Waiver By Delay; Waiver.....	41
ARTICLE 9 FINANCIAL PROVISIONS.....	41
9.1 Project Funding Plan; Project Budget; Affordable Housing Funding Plan; Affordable Housing Project Budget.....	41
9.2 Debt Financing.....	43
ARTICLE 10 ASSIGNMENT AND TRANSFER.....	43
ARTICLE 11 INSURANCE OBLIGATIONS; INDEMNIFICATION.....	44
11.1 Insurance Obligations.....	44
11.2 Indemnification.....	46
ARTICLE 12 NOTICES.....	46
12.1 To District.....	46
12.2 To Developers.....	46

TABLE OF CONTENTS
(continued)

	Page
ARTICLE 13 MISCELLANEOUS	47
13.1 Party in Position of Surety With Respect to Obligations.....	47
13.2 Conflict of Interests; Representatives Not Individually Liable.	47
13.3 Survival; Provisions Not Merged With Deed.	48
13.4 Titles of Articles and Sections.	48
13.5 Law Applicable; Forum for Disputes.	48
13.6 Entire Agreement; Exhibits.....	48
13.7 Counterparts.	49
13.8 Time of Performance.	49
13.9 Successors and Assigns.....	49
13.10 Third Party Beneficiary.....	49
13.11 Waiver of Jury Trial.....	49
13.12 Further Assurances.....	49
13.13 Modifications and Amendments.	49
13.14 Severability.	50
13.15 Anti-Deficiency Limitation; Authority.	50
13.16 Time of the Essence; Standard of Performance.	50
13.17 No Partnership.	50
13.18 Each Party To Bear Its Own Costs.	50
13.19 Discretion.	51
13.20 Force Majeure.	51
13.21 Joint Preparation.	51

LAND DISPOSITION AND DEVELOPMENT AGREEMENT

THIS LAND DISPOSITION AND DEVELOPMENT AGREEMENT (this “**Agreement**”), is made effective for all purposes as of the ____ day of _____, 201_, between (i) **DISTRICT OF COLUMBIA**, a municipal corporation, acting by and through the Office of the Deputy Mayor for Planning and Economic Development as successor to the National Capital Revitalization Corporation pursuant to Mayor’s Order 2008-137 (“**District**”), (ii) **TPC 5TH & I PARTNERS LLC**, a District of Columbia limited liability company (“**Developer**”), and (iii) **MLK DC AH DEVELOPER, LLC**, a Delaware limited liability company (“**Affordable Housing Developer**”) (individually a “**Party**” and collectively, the “**Parties**”)

RECITALS:

R-1. District owns the real property at 901 Fifth Street, NW, Washington, D.C. known for tax and assessment purposes as Lot 59 in Square 516 (the “**Property**”), as further described on **Exhibit A-1** attached hereto and made a part hereof.

R-2. District desires to convey the Property to Developer to be developed in accordance with this Agreement.

R-3. The disposition of the Property to Developer was approved on _____ by the Council of the District of Columbia pursuant to the _____ Approval Resolution of _____, Resolution _____ (“**Resolution**”), subject to certain terms and conditions incorporated herein.

R-4. The Property has a unique and special importance to District. Accordingly, this Agreement makes particular provision to assure the excellence and integrity of the design and construction of the Project (defined below) necessary and appropriate for a first class, urban development serving District residents and the public at large. Further, as a condition of District conveying the Property to Developer, Developer shall grant to District certain design review over the Project (defined below).

R-5. Developer’s affiliate, 2100 Martin Luther King Associates Limited Partnership, a District of Columbia limited partnership (“**MLK Avenue Owner**”) currently owns a parcel of land located at 2100 Martin Luther King, Jr. Avenue, SE, Washington, D.C. which Developer proposes to have subdivided into two parcels, one of which parcels will consist of currently vacant land (the “**Affordable Housing Property**”), which vacant land Developer will cause to be conveyed to Affordable Housing Developer at or prior to Closing.

R-6. Affordable Housing Developer shall develop the Affordable Housing Property, which is further described on **Exhibit A-2** attached hereto and made a part hereof, as a multi-family residential building consisting of ADUs (as hereinafter defined) in conformance with the Affordable Housing Development Plan (as hereinafter defined).

NOW, THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby

COUNCIL DRAFT

acknowledged by the Parties hereto, District, Developer, and Affordable Housing Developer do hereby agree as follows, to wit:

**ARTICLE 1
DEFINITIONS, INCORPORATION OF RECITALS, PREVIOUS AGREEMENTS**

1.1 DEFINITIONS.

For the purposes of this Agreement, the following capitalized terms shall have the meanings ascribed to them below:

“**ADU**” means an affordable dwelling unit, developed in accordance with the Affordability Covenant on the Affordable Housing Property.

“**Affiliate**” means with respect to any Person (“first Person”) (i) any other Person directly or indirectly controlling, controlled by, or under common control with such first Person, (ii) any officer, director, partner, shareholder, manager, member or trustee of such first Person, or (iii) any officer, director, general partner, manager, member or trustee of any Person described in clauses (i) or (ii) of this sentence. As used in this definition, the terms “controlling”, “controlled by”, or “under common control with” shall mean the possession, directly or indirectly, of the power to direct, or cause the direction of, the management and policies of a Person, 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.

“**Affordability Covenant**” is that certain Affordable Housing Covenant in the form attached hereto as **Exhibit B**, to be recorded in the Land Records against the Affordable Housing Property at the Closing pursuant to Applicable Law.

“**Affordable Housing Developer**” is defined in the Recitals.

“**Affordable Housing Developer’s Agents**” mean Affordable Housing Developer’s agents, employees, consultants, contractors, and representatives.

“**Affordable Housing Development Plan**” means the construction of a building on the Affordable Housing Property which will contain approximately 61 ADUs that will be made available for leasing to households at 60% of AMI in accordance with the Affordable Housing Plan, Construction and Use Covenant related to the Affordable Housing Project and the Affordability Covenant, and as more particularly described in **Exhibit H-2**.

“**Affordable Housing Financing Closing**” is defined in Section 6.4.

“**Affordable Housing Financing Closing Date**” means the date on which the Affordable Housing Financing Closing occurs.

“**Affordable Housing Funding Plan**” is defined in Section 9.1.1.

COUNCIL DRAFT

“**Affordable Housing Plan**” is referenced in Section 7.4 and attached hereto as Exhibit C.

“**Affordable Housing Project**” means the affordable housing development that Affordable Housing Developer shall build on the Affordable Housing Property in conformance with the Affordable Housing Development Plan.

“**Affordable Housing Project Budget**” Affordable Housing Developer’s budget for development and construction of the Affordable Housing Project, which shall include a cost itemization prepared by Affordable Housing Developer specifying all “hard” and “soft” costs (direct and indirect) by item, including: (i) the costs of all labor, materials, and services necessary for the construction of the Affordable Housing Project and (ii) all other expenses anticipated by Affordable Housing Developer incident to the Affordable Housing Project (including, without limitation, anticipated interest on all financing, taxes and insurance costs) and the construction thereof, as may be modified from time to time in accordance with this Agreement.

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

“**Agreement**” means this Land Disposition and Development Agreement.

“**AMI**” means the most current area median income for the Washington DC-MD-VA metropolitan statistical area designated by HUD as of the date set forth in the Affordability Covenant.

“**Applicable Law**” 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, and, if applicable, the Davis-Bacon Act.

“**Approvals**” means all applicable jurisdictional governmental approvals that pertain to any subdivision, tax lot designations, and other approvals relating to zoning relief, land use, or historic preservation, but expressly excluding the Permits.

“**Approved Construction Drawings**” is defined in Section 4.2.1.

“**Architect**” means an architect of record, licensed to practice architecture in the District of Columbia, to be selected by Developer and Affordable Housing Developer, respectively, for the Project and the Affordable Housing Project and approved by District.

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

“**CBE Agreement**” are those certain Certified Business Enterprise Utilization and Participation Agreements, between Developers and DSLBD, governing certain obligations of Developers under D.C. Law 16-33 with respect to the projects, attached hereto as Exhibit D.

COUNCIL DRAFT

“**Closing**” is the consummation of the transactions involving the purchase and sale of the Property from District to Developer, as contemplated by this Agreement.

“**Closing Date**” shall mean the date on which Closing occurs and is defined in Section 6.1.1.

“**Commencement of Construction**” means the time at which Developer (or Affordable Housing Developer, as the case may be) has (i) executed a construction contract with its general contractor; (ii) given such general contractor a notice to proceed under said construction contract; (iii) caused such general contractor to mobilize on the Property (or the Affordable Housing Property, as the case may be) equipment necessary for demolition, if any, and (iv) obtained any required Permits for demolition and sheeting and shoring, and commenced demolition, if any, upon the Property (or the Affordable Housing Property, as the case may be) pursuant to the Approved Construction Drawings. 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 conduct due diligence activities or to establish background information related to the suitability of the Property (or the Affordable Housing Property, as the case may be) for development of the Project (or the Affordable Housing Project, as the case may be) thereon or the investigations of environmental conditions, but “Commencement of Construction” shall include any material removal of Hazardous Materials from the Property (or the Affordable Housing Property, as the case may be) by Developer (or Affordable Housing Developer, as the case may be) in anticipation of excavation for construction.

“**Community Participation Programs**” is defined in Section 4.6.2.

“**Completion of Construction**” is defined in the Construction and Use Covenant.

“**Concept Plans**” are the design plans, submitted by Developers and approved by District as of the Effective Date, which serve the purpose of establishing the general direction of the design of the Project and/or the Affordable Housing Project.

“**Construction and Use Covenant**” shall mean collectively those certain Construction and Use Covenants between District and Developers, in the forms attached hereto as Exhibit E-1 and Exhibit E-2, to be recorded in the Land Records against the Property and the Affordable Housing Property, as the case may be, in connection with Closing.

“**Construction Consultant**” is defined in Section 4.7.

“**Construction Drawings**” mean the Concept Plans, the Design Development Plans and the Construction Plans and Specifications, which shall be delivered by Developers to District, and approved by District, to the extent required by, and in accordance with the standards set forth in, Article 4 of this Agreement. As used in this Agreement, the term “Construction Drawings” shall include any changes to such Construction Drawings that are made in accordance with the terms of this Agreement.

“**Construction Plans and Specifications**” mean the detailed architectural drawings and specifications that are prepared for all aspects of the Project and/or the Affordable Housing

COUNCIL DRAFT

Project in accordance with the approved Design Development Plans and that are used to obtain Permits and detailed cost estimates, to solicit and receive construction bids, and to direct the actual construction of the Project and/or the Affordable Housing Project.

“**Council**” means the Council of the District of Columbia.

“**Council Term Sheet**” means the term sheet attached as **Exhibit F** executed as required by D.C. Official Code § 10-801(b-1)(2).

“**DDOE**” means the District of Columbia Department of the Environment.

“**Debt Financing**” shall mean the aggregate financing or financings to be obtained by Developers from one or more Institutional Lenders to fund the costs set forth in the Project Budget and/or the Affordable Housing Project Budget, other than any Equity Investment.

“**Deed**” means the deed conveying the Property to Developer in the form attached hereto as **Exhibit I**.

“**Deposit Letter of Credit**” is defined in Section 2.2.1.

“**Design Development Plans**” are the design plans produced after review and approval of Concept Plans that reflect refinement of the approved Concept Plans, showing all aspects of the Project at the correct size and shape. The Design Development Plans shall include details of materials and design, including size and scale of façade elements, which are presented in detailed illustrations.

“**Developer Default**” is defined in Section 8.1.1.

“**Developers**” means Developer and Affordable Housing Developer, collectively.

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

“**Development and Completion Guaranties**” means the guaranties to be executed by Guarantors, in the form attached hereto as **Exhibit N-1** and **Exhibit N-2**, which shall bind Guarantors to develop and otherwise construct the Project or the Affordable Housing Project, as the case may be, in the manner and within the time frames required by the terms of this Agreement, the Deed and the Construction and Use Covenants, as applicable.

“**Disapproval Notice**” is defined in Section 4.2.3.

“**Disposal Plan**” is defined in Section 2.3.1(b).

“**District Default**” is defined in Section 8.1.3.

“**DOES**” is the District of Columbia Department of Employment Services.

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

COUNCIL DRAFT

“**Effective Date**” is the date first written above, provided that all Parties shall have executed and delivered this Agreement to one another by such date.

“**Environmental Laws**” means any present and future federal, state or local 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 include, 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.

“**Equity Investment**” shall mean all funding that is required for the development and construction of the Project or the Affordable Housing Project, as the case may be, in excess of any and all Debt Financing applicable thereto, including the amount of any deferred development fee due and payable to the applicable Developer, whether or not treated as a loan for tax purposes, provided such Equity Investment does not come from a Prohibited Person.

“**Final Certificate of Completion**” shall have the meaning given in the Construction and Use Covenant.

“**Final Completion**” shall have the meaning given in the Construction and Use Covenant.

“**Final Affordable Housing Budget and Funding Plan**” is defined in Section 9.1.3.

“**Final Project Budget and Funding Plan**” is defined in Section 9.1.3.

“**First Source Agreement**” are those agreements between Developers and DOES, attached hereto as **Exhibit G**, governing certain obligations of Developers regarding job creation and employment generated as a result of the Project.

“**Force Majeure**” is an act or event, including, as applicable, an act of God, fire, earthquake, flood, explosion, war, invasion, insurrection, riot, mob violence, sabotage, terrorism,

COUNCIL DRAFT

labor strikes, unusual delays in deliveries, a taking by eminent domain, requisition, and laws or orders of government or of civil, military, or naval authorities enacted or adopted after the Effective Date, so long as: (i) such acts are not within the reasonable control of Developer, Affordable Housing Developer, Developer's Agents or Affordable Housing Developer's Agents, or their Members; or (ii) such acts or events are not due to the fault or negligence of Developer, Affordable Housing Developer, Developer's Agents or Affordable Housing Developer's Agents, or their Members; (iii) such acts or events are not reasonably avoidable by Developer, Affordable Housing Developer, Developer's Agents or Affordable Housing Developer's Agents, or their Members or District in the event District's claim is based on a Force Majeure event, and (iv) such acts or events directly result in a delay in performance by Developer, Affordable Housing Developer or District, as applicable; but specifically excluding: (A) shortage or unavailability of funds or Developer's, Affordable Housing Developer's or District's financial condition; (B) changes in real estate market conditions; or (C) the acts or omissions of a general contractor, its subcontractors, or any other of Developer's Agents or Affordable Housing Developer's Agents or their Members, except to the extent such acts or omissions are covered by sub-paragraphs (i)-(iii), above.

"Green Building Act" means that certain act of the District of Columbia Council enacted as *Green Building Act of 2006*, D.C. Official Code § 6-1451.01, *et seq.* (2013 Supp.), as may be amended, and the regulations promulgated therewith.

"Guarantor" is the Person(s) acceptable to District in its sole discretion, who will enter into a Development and Completion Guaranty with respect to the Project and the Affordable Housing Project, and any successor(s) to either of the foregoing approved by District pursuant to Section 4.5.

"Guarantors' Submissions" shall mean the then current audited financial statements and audited 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).

"Hazardous Materials" means (a) asbestos and any asbestos containing material; (b) any substance that is then defined or listed in, or otherwise classified pursuant to, any Environmental Law or any other Applicable Law as a "hazardous substance," "hazardous material," "hazardous waste," "infectious waste," "toxic substance," "toxic pollutant" or any other formulation intended to define, list or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity or Toxicity Characteristic Leaching Procedure (TCLP) toxicity; (c) any petroleum and drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources; and (d) any petroleum product, polychlorinated biphenyls, urea formaldehyde, radon gas, radioactive material (including any source, special nuclear or by-product material), medical waste, chlorofluorocarbon, lead or lead-based product and any other substance the presence of which could be hazardous to the environment.

COUNCIL DRAFT

“Hotel Program” means the construction on the Property of a mixed-use structure of approximately 170,000 sq. ft. above grade to be used as a hotel (approximately 200 keys) and condominiums (approximately 60 units), approximately 7,600 sq. ft. of ground floor retail, and approximately 132 underground parking spaces.

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

“Institutional Lender” shall mean a Person that is not an Affiliate of Developer, Affordable Housing Developer or a Prohibited Person and is, at the time it first makes a loan to Developer or Affordable Housing Developer, or acquires an interest in any such loan, (i) a savings bank, savings and loan association, credit union, commercial bank or trust company organized or chartered under the laws of the United States or any state thereof or the District of Columbia or a foreign banking institution (in each case whether acting individually or in a fiduciary or representative (such as an agency) capacity); (ii) an insurance company organized and existing under the laws of the United States of America or any state thereof or the District of Columbia or a foreign insurance company (in each case whether acting individually or in a fiduciary or representative (such as an agency) capacity); (iii) an institutional investor such as a real estate investment trust (or umbrella partnership or other entity of which a real estate investment trust is the majority owner), a real estate mortgage investment conduit or securitization trust or similar investment entity; (iv) an entity that qualifies as a “REMIC” under the IRS Code or other public or private investment entity (in each case whether acting as principal or agent); (v) a brokerage or investment banking organization (in each case whether acting individually or in a fiduciary or representative (such as an agency) capacity) as principal or agent); (vi) an employees’ welfare, benefit, pension or retirement fund; (vii) an institutional leasing company; (viii) an institutional financing company; (ix) any non-District of Columbia governmental agency or entity insured by a governmental agency or any combination of the foregoing entities; (x) a finance company principally engaged in the origination of commercial mortgage loans or any financing related subsidiary of a Fortune 500 company; (xi) any federal, state, or District agency regularly making, purchasing or guaranteeing mortgage loans, or any governmental agency supervising the investment of public funds; (xii) a profit-sharing or commingled trust or fund, the majority of equity investors in which are pension funds having in the aggregate no less than \$1 Billion in assets; (xiii) any entity of any kind actively engaged in commercial real estate financing and having total assets (on the date when its interest in this Project, or any portion thereof, is obtained) of at least \$1 Billion; or (xiv) a charitable organization regularly engaged in making loans secured by real estate.

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

“Managing Member of Developer” means TPC 5th & I Manager LLC, the Managing Member of Developer.

“Managing Member of Affordable Housing Developer” means _____, the Managing Member of Affordable Housing Developer.

“Material Change” means (i) any change in size or design from the Approved Construction Drawings that substantially and adversely affects the general appearance or

COUNCIL DRAFT

structural integrity of exterior walls and elevations and/or building bulk; (ii) any changes in exterior finishing materials that substantially and adversely affects the architectural appearance from those shown and specified in the Approved Construction Drawings; (iii) any substantial reduction to the number of parking spaces by ten percent (10%) or more from the Approved Construction Drawings; (iv) any substantial and adverse change in the general appearance of landscape design or size or quality of exterior pavement, exterior lighting and other exterior site features from the Approved Construction Drawings; (v) any change that reduces the number of ADUs; (vi) any reduction in the level of interior finish from the Approved Construction Drawings as it relates to the ADUs; (vii) any hotel flag or hotel operator change; and (viii) any changes in design and construction of the Project from the Approved Construction Drawings requiring approval by a governmental authority.

“Member” means any Person with a direct ownership interest in either of the Developers.

“Mortgage” means a mortgage, deed of trust, mortgage deed, or such other classes of legal documents as are commonly given to secure advances on fee simple and leasehold estates under the laws of the District of Columbia.

“OAG” means the Office of the Attorney General of the District of Columbia.

“Other Submissions” is defined in Section 4.6.

“Outside Closing Date” is defined in Section 6.1.1.

“Park Renovation” means Developer’s renovation of Milian Park located along Massachusetts Avenue to the immediate south of the Property, and Seaton Park located across Massachusetts Avenue to the west, in accordance with the Project Development Plan and the Approved Construction Drawings.

“Party” when used in the singular, shall mean either District, Developer or Affordable Housing Developer; when used in the plural, shall mean both of District and either Developer or Affordable Housing Developer.

“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 and/or the Affordable Housing Property (including, without limitation, the federal government, WMATA, and any utility company, as the case may be) necessary to commence and complete construction and to operate the Project in accordance with the Project Development Plan, and the Affordable Housing Project in accordance with the Affordable Housing Development Plan, and this Agreement.

“Permitted Exceptions” is defined in Section 2.4.2.

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

“Progress Meetings” is defined in Section 4.4.

COUNCIL DRAFT

“Prohibited Person” shall mean any of the following Persons: (A) any Person (or any Person whose operations are directed or controlled by a Person) who has been convicted of or has pleaded guilty in a criminal proceeding for a felony or who is an on-going target of a grand jury investigation convened pursuant to Applicable Law concerning organized crime; or (B) any Person organized in or controlled from a country, the effects of the activities with respect to which are regulated or controlled pursuant to the following United States laws and the regulations or executive orders promulgated thereunder: (x) the Trading with the Enemy Act of 1917, 50 U.S.C. App. §1, et seq., as amended (which countries are, as of the Effective Date hereof, North Korea and Cuba); (y) the International Emergency Economic Powers Act of 1976, 50 U.S.C. §1701, et seq., as amended; and (z) the Anti-Terrorism and Arms Export Amendments Act of 1989, codified at Section 6(j) of the Export Administration Act of 1979, 50 U.S.C. App. § 2405(j), as amended (which countries are, as of the Effective Date hereof, Iran, Sudan and Syria); or (C) any Person who has engaged in any dealings or transactions (i) in contravention of the applicable money laundering laws or regulations or conventions or (ii) in contravention of Executive Order No. 13224 dated September 24, 2001 issued by the President of the United States (Executive Order Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism), as may be amended or supplemented from time-to-time or any published terrorist or watch list that may exist from time to time; or (D) any Person who appears on or conducts any business or engages in any transaction with any person appearing on the list maintained by the U.S. Treasury Department’s Office of Foreign Assets Control list located at 31 C.F.R., Chapter V, Appendix A or is a person described in Section 1 of the Anti-Terrorism Order; or (E) any Person suspended or debarred by HUD or by the District of Columbia government; or (F) any Affiliate of any of the Persons described in paragraphs (A) through (E) above.

“Project” means the development and construction of the Hotel Program on the Property and the Park Renovation in accordance with the Project Development Plan, this Agreement, the Deed, and the applicable Construction and Use Covenant.

“Project Budget” means Developer’s budget for development and construction of the Project, which shall include a cost itemization prepared by Developer specifying all “hard” and “soft” costs (direct and indirect) by item, including (i) the costs of all labor, materials, and services necessary for the construction of the Project and (ii) all other expenses anticipated by Developer incident to the Project (including, without limitation, anticipated interest on all financing, taxes and insurance costs) and the construction thereof, as may be modified from time to time in accordance with this Agreement.

“Project Development Plan” means Developer’s plan for developing, constructing, financing, using, and operating the Project. As further described on Exhibit H-1, the Project Development Plan shall include: 1) the Hotel Program; 2) the name of the hotel flag and hotel operator; and 3) the Park Renovation.

“Project Funding Plan” has the meaning given it in Section 9.1.1.

“Property” is defined in the Recitals.

“Resolution” is defined in the Recitals.

COUNCIL DRAFT

“**Resubmission Period**” is a period of thirty (30) days commencing on the day after Developer or Affordable Housing Developer receives a Disapproval Notice from District, or such other period of time as District and Developer or Affordable Housing Developer may agree in writing, in their reasonable discretion. In the event either Developer or Affordable Housing Developer or District reasonably believes that the Resubmission Period should be longer or shorter than such thirty (30) day period, such Party shall promptly notify the other in writing of the period of time that such Party reasonably believes should apply and the reasons therefor.

“**Retail Plan**” is defined in Section 4.6.3.

“**Review Period**” is defined in Section 4.2.2.

“**ROE**” is defined in Section 2.3.1(a).

“**Schedule of Performance**” means that schedule of performance, attached hereto as Exhibit J and incorporated herein, and which may be amended by agreement of the applicable Parties, setting forth the timeline for design, development, construction, and completion of the Project and the Affordable Housing Project (including a construction timeline in customary form) together with the dates for submission of documentation required under this Agreement.

“**Second Notice**” means that notice given by Developer or Affordable Housing Developer to District in accordance with Section 4.2.2 and/or Section 4.6.5 herein. Any Second Notice shall (a) be labeled, in bold, 18 point font, as a “SECOND AND FINAL NOTICE”; (b) contain the following statement: “A FAILURE TO RESPOND TO THIS NOTICE WITHIN TEN (10) BUSINESS DAYS SHALL CONSTITUTE APPROVAL OF THE [NAME OF SUBMISSION ORIGINALLY SUBMITTED ON (DATE OF DELIVERY OF SUCH SUBMISSION)]”; and (c) be delivered in the manner prescribed in Section 12.1, in an envelope conspicuously labeled “SECOND AND FINAL NOTICE”.

“**Settlement Agent**” means the title agent selected by Developer or Affordable Housing Developer, as applicable, and reasonably acceptable to District.

“**Settlement Statement**” is the “HUD-1” or a settlement statement in similar form, prepared by the Settlement Agent setting forth the sources and uses of all acquisition funds associated with Closing.

“**Studies**” is defined in Section 2.3.1.

“**Substantial Completion**” shall have the meaning given in the Construction and Use Covenant.

“**Transfer of Membership Interests**” is defined in Section 10.2.

“**UST Act**” is defined in Section 2.3.3.

“**UST Regulations**” is defined in Section 2.3.3.

1.2 RULES OF CONSTRUCTION.

COUNCIL DRAFT

Unless the context clearly indicates to the contrary, for all purposes of this Agreement, (a) words importing the singular number include the plural number and words importing the plural number include the singular number; (b) words of the masculine gender include correlative words of the feminine and neuter genders; (c) words importing persons include any Person; (d) any reference to a particular Section shall be to such Section of this Agreement and (e) any reference to a particular Exhibit shall be to such Exhibit to this Agreement; and to all sub-Exhibits related thereto (e.g., references to Exhibit A shall include Exhibit A-1, Exhibit A-2, etc.).

1.3 OTHER DEFINITIONS.

When used with its initial letter(s) capitalized, any term which is not defined in this Article I shall be given the definition assigned to it elsewhere in this Agreement.

1.4 RECITALS.

The Recitals are hereby incorporated by reference.

ARTICLE 2 PURCHASE PRICE; CONDITION OF PROPERTY

2.1 SALE; PURCHASE PRICE.

2.1.1 Subject to and in accordance with the terms of this Agreement, District shall sell to Developer, and Developer shall purchase from District, all of District's right, title, and interest in and to the Property.

2.1.2 The purchase price of the Property is **TWENTY EIGHT MILLION DOLLARS (\$28,000,000.00)** (the "**Purchase Price**"), payable at Closing.

2.1.3 Developer shall pay the Purchase Price at Closing in immediately available funds through a closing escrow established with the Settlement Agent.

2.2 DEPOSIT.

2.2.1 District hereby acknowledges receipt from Developer of a Letter of Credit in the amount of **One Hundred Thousand Dollars (\$100,000.00)** (the "**Deposit Letter of Credit**"). The Deposit Letter of Credit and any replacement Letter of Credit provided under this Agreement is, or shall be, in the form attached hereto as **Exhibit O**. The Deposit Letter of Credit may be drawn by District in accordance with this Agreement.

2.2.2 The Deposit Letter of Credit is not a payment on account of and shall not be credited against the Purchase Price; rather, the Deposit Letter of Credit shall be held by District to be used as security to ensure Developer's and Affordable Housing Developer's compliance with this Agreement and may be drawn on by District in accordance with the terms of this

COUNCIL DRAFT

Agreement. Notwithstanding any provision herein to the contrary, District shall return the Deposit Letter of Credit to Developer at Closing.

2.2.3 If at any time prior to Closing, the Deposit Letter of Credit will expire within thirty (30) days, Developer shall deliver to District either a replacement Letter of Credit or an endorsement to the Deposit Letter of Credit extending the expiration date of the Deposit Letter of Credit for at least one (1) year, or to a date that is not less than thirty (30) days following the scheduled Closing Date, whichever is earlier. If a replacement Letter of Credit or endorsement is not provided to District as required pursuant to the preceding sentence by five (5) Business Days prior to the expiration date of the existing Deposit Letter of Credit, the same shall be considered a Developer Default and District may draw upon the Deposit Letter of Credit.

2.3 CONDITION OF PROPERTY.

2.3.1 Feasibility Studies; Access to Property.

(a) Developer hereby acknowledges that, prior to the Effective Date, it has had the right to perform Studies on the Property using experts of its own choosing and to access the Property for the purposes of performing Studies. From time to time prior to Closing, provided this Agreement is in full force and effect and no Developer Default has occurred, Developer and Developer's Agents shall continue to have the right to enter the Property for purposes of conducting surveys, soil tests, environmental studies, engineering tests, and such other tests, studies, and investigations (hereinafter "**Studies**") as Developer deems necessary or desirable to conduct due diligence and to evaluate the Property pursuant to the terms of this Agreement and the terms and conditions of that certain Right-of-Entry, by and between Developer and District (the "**ROE**"), attached hereto as **Exhibit K** and incorporated herein, as if such terms, conditions and agreements were expressly set forth herein. The Parties hereby further agree to extend the Expiration Date (as such term is defined in the ROE) of the ROE to the Closing Date. In the event of any conflict between the terms of the ROE or the terms of this Agreement, the terms of this Agreement shall control and be paramount.

(b) In the event Developer or any of Developer's Agents disturbs, removes or discovers any materials or waste from the Property while conducting the Studies, or otherwise during its entry on the Property, which are determined to be Hazardous Materials, Developer shall notify District and DDOE immediately after its discovery of such Hazardous Materials. In the event such Hazardous Materials are discovered by Developer, Developer shall submit a written notice of a proposed plan for disposal (the "**Disposal Plan**") to District and DDOE no later than sixty (60) days prior to Closing. The Disposal Plan shall contain all identifying information as to the type and condition of the Hazardous Materials or waste discovered and a detailed account of the proposed removal and disposal of the Hazardous Materials, including the name and location of the hazardous waste disposal site. DDOE may conduct an independent investigation of the Property, including but not limited to, soil sampling and other environmental testing as may be deemed necessary. Upon completion of DDOE's investigation, District and/or DDOE shall notify Developer of its findings and shall notify Developer by written notice of its approval or disapproval of the proposed Disposal Plan. In the event DDOE disapproves the proposed Disposal Plan, Developer shall resubmit a revised Disposal Plan to District and DDOE. Developer shall seek the advice and counsel of DDOE prior

COUNCIL DRAFT

to any resubmission of a proposed Disposal Plan. Upon review of the revised Disposal Plan, District or DDOE shall notify Developer of its decision. Upon approval of the Disposal Plan, Developer shall remove and dispose of all Hazardous Materials in accordance with the approved Disposal Plan and all Applicable Law; provided, however, Developer shall not be required to begin its removal and disposal of Hazardous Materials not already disturbed or removed until after Closing. Within seven (7) Business Days or otherwise as expeditiously as possible after the disposal of any Hazardous Materials, Developer shall provide District such written evidence and receipts confirming the proper disposal of all Hazardous Materials removed from the Property.

(c) Developer shall not have the right to object to any condition that may be discovered, offset any amounts from the Purchase Price, or terminate this Agreement as a result of any Studies conducted after the Effective Date.

(d) In the event of a termination of this Agreement, neither Developer nor any of Developer's Agents shall have any continuing liability or obligations regarding the Disposal Plan or the removal or remediation of any Hazardous Materials on the Property not caused by Developer or Developer's Agents.

(e) Developer covenants and agrees that Developer shall keep confidential all information obtained by Developer as to the condition of the Property; provided, however, that (i) Developer may disclose such information to its Members, officers, directors, attorneys, consultants, Settlement Agent, and potential lenders and potential investors so long as Developer directs such parties to maintain such information as confidential; and (ii) Developer may disclose such information as it may be legally compelled so to do. The foregoing obligation of confidentiality shall not be applicable to any information which is a matter of public record or, by its nature, necessarily available to the general public. This provision shall survive termination of this Agreement.

(f) Any access to the Property by Developer pursuant to this Section shall additionally be subject to all of Developer's insurance obligations contained in Article 11.

2.3.2 Soil Characteristics. District hereby states that, to the best of its knowledge, the soil on the Property has been described by the Soil Conservation Service of the United States Department of Agriculture in the Soil Survey of the District of Columbia and as shown on the Soil Maps as Urban Land. Developer acknowledges that, for further soil information, Developer may contact a soil testing laboratory, the D.C. Department of Environmental Services or the Soil Conservation Service. The foregoing is set forth pursuant to requirements contained in D.C. Official Code § 42-608(b) and does not constitute a representation or warranty by District.

2.3.3 Underground Storage Tanks. In accordance with the requirements of Section 3(g) of the D.C. Underground Storage Tank Management Act of 1990, as amended by the District of Columbia Underground Storage Tank Management Act of 1990 Amendment Act of 1992 (D.C. Official Code § 8-113.01, *et seq.*) (collectively, the "UST Act") and the applicable D.C. Underground Storage Tank Regulations, 20 DCMR Chapter 56 (the "UST Regulations") District hereby represents and warrants that it is unaware of any "underground storage tanks" (as defined in the UST Act) located on the Property or previously removed from the Property during District's ownership. Information pertaining to underground storage tanks and underground

COUNCIL DRAFT

storage tank removals of which the D.C. Government has received notification is on file with the District Department of the Environment, Underground Storage Tank Branch, 1200 First St., NE, 5th Floor, Washington, DC 20002, telephone (202) 535-2600. District's knowledge for purposes of this Section shall mean and be limited to the actual knowledge of the Deputy Mayor for Planning and Economic Development. The foregoing is set forth pursuant to requirements contained in the UST Act and UST Regulations.

2.3.4 AS-IS. DISTRICT SHALL CONVEY THE PROPERTY TO DEVELOPER IN "AS IS", "WHERE IS" CONDITION WITH ALL FAULTS AND DISTRICT MAKES NO REPRESENTATIONS OR WARRANTIES, EITHER EXPRESS OR IMPLIED, AS TO THE CONDITION OF THE PROPERTY OR ANY IMPROVEMENTS THEREON, AS TO THE SUITABILITY OR FITNESS OF THE PROPERTY OR ANY IMPROVEMENTS THEREON, AS TO ANY LAW, OR ANY OTHER MATTER AFFECTING THE USE, VALUE, OCCUPANCY, OR ENJOYMENT OF THE PROPERTY, OR, EXCEPT AS SPECIFICALLY SET FORTH IN SECTION 2.3.2, SECTION 2.3.3, SECTION 3.1.1 AND THE DEED (THE "REPRESENTATIONS AND WARRANTIES"), AS TO ANY OTHER MATTER WHATSOEVER. DISTRICT SHALL HAVE NO RESPONSIBILITY TO PREPARE THE PROPERTY IN ANY WAY FOR DEVELOPMENT AT ANY TIME. DEVELOPER ACKNOWLEDGES THAT NEITHER DISTRICT NOR ANY EMPLOYEE, REPRESENTATIVE, OR AGENT OF DISTRICT HAS MADE ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO THE PROPERTY OR ANY IMPROVEMENTS THEREON EXCEPT AS SPECIFICALLY SET FORTH IN THE REPRESENTATIONS AND WARRANTIES. THE PROVISIONS HEREOF SHALL SURVIVE CLOSING OR THE EARLIER TERMINATION OF THIS AGREEMENT.

2.4 TITLE.

2.4.1 Developer hereby acknowledges that title to the Property has been investigated by Developer and is deemed acceptable, subject only to the Permitted Exceptions.

2.4.2 At Closing, District shall convey the Property "AS IS" and subject to the Permitted Exceptions. The "**Permitted Exceptions**" shall be the following collectively: (i) all title and survey matters, encumbrances or exceptions of record as of the Effective Date; (ii) encroachments, overlaps, boundary disputes, or other matters which would be disclosed by an accurate survey or an inspection of the Property as of the Effective Date; (iii) any documents described in this Agreement that are to be recorded in the Land Records pursuant to the terms of this Agreement; (iv) defects or exceptions to title to the extent such defects or exceptions are created by Developer or Developer's Agents or created as a result of or in connection with the use of or activities on the Property or any portion thereof by Developer or Developer's Agents; (v) all building, zoning, and other Applicable Law affecting the Property as of the Effective Date; (vi) real property taxes and water and sewer charges or other governmental or utility assessments which are not due and payable as of Closing, subject to the obligation to pro-rate such charges and taxes on the Property as set forth in this Agreement; and (vii) licenses for temporary use of the Property, which licenses shall be terminable on thirty (30) days advance notice by District or Developer to the licensees from and after the Closing Date.

COUNCIL DRAFT

2.4.3 From and after the Effective Date through Closing, District agrees not to take any action that would cause a material adverse change to the status of title to the Property existing as of the Effective Date or that would otherwise adversely impact Developer's ability to develop the Project as described in the Project Development Plan, except as expressly required by Applicable Law or as permitted by this Agreement.

2.4.4 Developer may, at or prior to Closing, notify District in writing of any adverse changes to the status of title to the Property or survey matters that occurred after the Effective Date as a direct result of action by (or the failure to act of) District. With respect to any objections to title or survey set forth in such notice, District shall have the right, but not the obligation, to cure such objections. Within ten (10) Business Days after receipt of Developer's notice of objections, District shall notify Developer in writing whether District elects to attempt to cure such objections. If District fails to timely give Developer such notice of election, then District shall be deemed to have elected not to attempt to cure such matters. If District elects to attempt to cure, District shall immediately, diligently and continuously attempt to cure such objections prior to the date of Closing to remove, satisfy or cure the same and for this purpose District shall be entitled to a reasonable adjournment of Closing if additional time is required, but in no event shall the adjournment exceed sixty (60) days after the date scheduled for Closing (and in no event later than the Outside Closing Date). If District elects not to cure any objections specified in Developer's notice, or if District is unable to effect a cure prior to Closing, or to make satisfactory arrangements with the Settlement Agent to escrow sufficient funds from the Purchase Price to effect a cure of such objections (or to cure such objections prior to any date to which Closing has been adjourned), Developer shall have the following options: (i) to accept the conveyance of the Property including any matter objected to by Developer which District is unwilling or unable to cure, in which event Developer shall be obligated to develop the Property in accordance with this Agreement, or (ii) to terminate this Agreement by sending written notice thereof to District, and upon delivery of such notice of termination, this Agreement shall terminate and the Deposit Letter of Credit shall be returned to Developer, and thereafter no Party hereto shall have any further rights, obligations or liabilities hereunder except to the extent that any right, obligation or liability set forth herein expressly survives termination of this Agreement. If District notifies (or is deemed to have notified) Developer that District does not intend to attempt to cure any objection, or if, having commenced to attempt to cure any objection, District later notifies Developer that District will be unable to effect a cure thereof, Developer shall, within ten (10) Business Days after such notice has been given, notify District in writing whether Developer shall elect to accept conveyance under clause (i) or to terminate this Agreement under clause (ii). In the event Developer does not notify District within such ten (10) Business Day period, then Developer shall be deemed to have elected to accept the conveyance under clause (i).

2.5 RISK OF LOSS.

All risk of loss prior to Closing with respect to any and all existing improvements (if any) on the Property shall be borne by District; provided in the event of a casualty, neither District nor Developer shall be required to rebuild any improvements.

2.6 CONDEMNATION.

COUNCIL DRAFT

2.6.1 Notice. If, prior to Closing, any condemnation or eminent domain proceedings shall be commenced by any other competent public authority against the Property, District shall promptly give Developer written notice thereof.

2.6.2 Total Taking. In the event of a taking of the entire Property prior to Closing, the Deposit Letter of Credit shall be returned to Developer by District, this Agreement shall terminate, the Parties shall be released from any and all obligations hereunder except those that expressly survive termination. District shall have the right to any and all condemnation proceeds payable by the condemning public authority, except for the condemnation proceeds paid to Developer by the condemning public authority for its pre-development costs incurred up until the condemnation of the Property. District shall reasonably cooperate with Developer in seeking such condemnation proceeds from the condemning public authority and such obligation shall survive the termination of this Agreement.

2.6.3 Partial Taking. In the event of a partial taking prior to Closing, District and Developer shall jointly determine in good faith whether the development of the Project remains physically and economically feasible. If the Parties reasonably determine that the Project is no longer feasible, whether physically or economically, as a result of such condemnation, this Agreement shall terminate, District shall release the Deposit Letter of Credit to Developer and District shall have the right to any and all condemnation proceeds payable by the condemning public authority. Subject to foregoing, the Parties shall be released from any further liability or obligation hereunder. If the Parties jointly determine that the Project remains economically and physically feasible, the Parties shall be deemed to have elected to proceed to Closing, the condemnation proceeds shall either be paid to Developer at Closing or, if paid to District, such amount shall be credited against the Purchase Price payable at Closing; provided, however, that if no compensation has been actually paid on or before Closing, Developer shall accept the Property without any adjustment to the Purchase Price and subject to the proceedings, in which event District shall assign to Developer at Closing all interest of District in and to the condemnation proceeds that may otherwise be payable to District, and Developer shall receive a credit at Closing in the amount of any condemnation proceeds actually paid to District prior to the Closing Date. In either event, District shall have no liability or obligation to make any payment to Developer with respect to any such condemnation. In the event the Parties elect to proceed to Closing, District agrees that Developer shall have the right to participate in all negotiations with the condemning authority, and District shall not settle or compromise any claim to the condemnation proceeds without Developer's consent. In the event that within forty-five (45) days after the date of receipt by Developer of notice of such condemnation the Parties have not jointly determined, in accordance with the foregoing provisions, to elect to terminate or proceed to Closing hereunder, such failure shall be deemed the Parties' election to terminate this Agreement.

2.7 SERVICE CONTRACTS AND LEASES; TEMPORARY LICENSEES.

Except for that certain _____, dated _____, by and between District and Franklin Parking (the "**Parking Agreement**"), District has not, and will not hereafter, procure or enter into any (i) service, management, maintenance, or development contracts, or (ii) leases, licenses,

easements, or other occupancy agreements affecting the Property that will survive Closing. Notwithstanding the above, the District may enter into licenses to third parties for temporary use of the Property, upon such terms as may be agreed by District in the exercise of its reasonable discretion, which licenses shall be terminable by District upon thirty (30) days advance notice to such licensees. Such licenses shall not contain any provisions that will survive the Closing without the approval of Developer. District will not hereafter enter into any such contracts or agreements that will bind the Property or Developer after Closing as successor-in-interest with respect to the Property, without the prior written consent of Developer and at Closing District shall deliver the Property vacant and free and clear of the Parking Agreement and any other such licenses or other agreements.

**ARTICLE 3
REPRESENTATIONS AND WARRANTIES**

3.1 REPRESENTATIONS AND WARRANTIES OF DISTRICT.

3.1.1 District hereby represents and warrants to Developers as follows:

(a) District owns the Property in fee simple, and the execution, delivery and performance of this Agreement by District and the consummation of the transactions contemplated hereby have been duly and validly authorized by the District, subject to expiration of the authority granted in the Resolution, unless extended.

(b) No agent, broker, or other Person acting pursuant to express or implied authority of District is entitled to any commission or finder's fee in connection with the transactions contemplated by this Agreement or will be entitled to make any claim against Developer for a commission or finder's fee. District has not dealt with any agent or broker in connection with its sale of the Property.

(c) There is no litigation, arbitration, administrative proceeding, condemnation or other similar proceeding pending, or to the current actual knowledge of District, threatened against District, which relates to the Property. There is no other litigation, arbitration, administrative proceeding, condemnation or other similar proceeding pending or to District's current actual knowledge, threatened against District which, if decided adversely to District, would impair District's ability to perform its obligations under this Agreement.

(d) Except as set forth on **Exhibit __**, there are no leases, license agreements, service contracts or other similar agreements encumbering or otherwise affecting the Property, and District has not entered into any agreement pursuant to which it is obligated to convey the Property to any Person other than Developer.

(e) The execution, delivery, and performance of this Agreement by District and the consummation of the transactions contemplated hereby do not violate any of the terms, conditions or provisions of any judgment, order, injunction, decree, regulation, or ruling of any court or other governmental authority, or Applicable Law, to which District is subject, or any agreement or contract to which District is a party or to which it is subject.

COUNCIL DRAFT

3.1.2 Survival. The representations and warranties contained in Section 3.1.1 shall survive Closing for a period of six (6) months. District shall have no liability or obligation hereunder for any representation or warranty that becomes untrue because of reasons beyond District's control, but District shall promptly notify Developers upon learning of same.

3.2 REPRESENTATIONS AND WARRANTIES OF DEVELOPERS.

3.2.1 Developer hereby covenants, represents, and warrants to District as follows:

(a) Developer is a District of Columbia limited liability company, duly formed and validly existing and in good standing, and has full power and authority under, the laws of the District of Columbia to conduct the business in which it is now engaged. Neither the Managing Member nor any Person owning directly or indirectly any interest in Developer or the Managing Member is a Prohibited Person. A full and complete set of all organizational documents of Developer and the Managing Member of Developer have heretofore been delivered to District in connection with Closing.

(b) The execution, delivery, and performance of this Agreement and the consummation of the transactions contemplated hereby have been duly and validly authorized by Developer and the Managing Member of Developer. Upon the due execution and delivery of the Agreement by Developer, this Agreement constitutes the valid and binding obligation of Developer, enforceable in accordance with its terms.

(c) The execution, delivery, and performance of this Agreement and the consummation of the transactions contemplated hereby do not violate any of the terms, conditions, or provisions of: (i) Developer's organizational documents, (ii) any judgment, order, injunction, decree, regulation, or ruling of any court or other governmental authority, or Applicable Law to which Developer is subject, or (iii) any agreement or contract to which Developer is a party or to which it is subject.

(d) No agent, broker, or other Person acting pursuant to express or implied authority of Developer is entitled to any commission or finder's fee in connection with the transactions contemplated by this Agreement or will be entitled to make any claim against District for a commission or finder's fee. Developer has not dealt with any agent or broker in connection with its purchase of the Property.

(e) There is no litigation, arbitration, administrative proceeding, or other similar proceeding pending, or, to Developer's knowledge, threatened against Developer that, if decided adversely to Developer, (i) would impair Developer's ability to enter into and perform its obligations under this Agreement or (ii) would materially adversely affect the financial condition or operations of Developer.

(f) Developer's acquisition of the Property and its other undertakings pursuant to this Agreement are for the purpose of constructing and operating the Project in accordance with the Project Development Plan and Construction Drawings and not for speculation in land holding.

COUNCIL DRAFT

(g) Neither Developer nor any of its Members are the subject debtor under any federal, state, or local bankruptcy or insolvency proceeding, or any other proceeding for dissolution, liquidation or winding up of its assets.

3.2.2 Representations and Warranties of Affordable Housing Developer. Affordable Housing Developer hereby makes representations and warranties to District identical to Sections 3.2.1(a) through (g) above, but with reference to Affordable Housing Developer, the Affordable Housing Property and the Affordable Housing Project.

3.2.3 Survival. The representations and warranties contained in Sections 3.2.1 and 3.2.2 shall survive Closing for a period of six (6) months. Neither Developer nor Affordable Housing Developer shall have any liability or obligation hereunder for any representation or warranty that becomes untrue because of reasons beyond Developer's or Affordable Housing Developer's control.

ARTICLE 4
APPROVAL OF CONSTRUCTION
DRAWINGS; OTHER SUBMISSIONS; APPROVAL OF IDENTITY OF GUARANTORS

4.1 CONSTRUCTION DRAWINGS.

4.1.1 Developer's and Affordable Housing Developer's Submissions for the Project and the Affordable Housing Project. Developers shall submit to District for District's review and approval, the following drawings, plans and specifications (collectively, the "**Construction Drawings**") for the Project (or the Affordable Housing Project, as the case may be) within the timeframes set forth on the Schedule of Performance. All Construction Drawings shall be prepared and completed in accordance with this Agreement and the Development Plan for either the Project or the Affordable Housing Project, as the case may be.

4.1.2 Approval by District. Notwithstanding anything to the contrary herein, prior to the issuance of any Permit by a District agency, Developers shall cause the Construction Drawings applicable to such Permit to become Approved Construction Drawings. All of the Construction Drawings shall conform to and be consistent with Applicable Law, including the applicable zoning requirements, and shall comply with the following:

(a) The Construction Drawings shall be prepared or supervised by and signed by the Architect or engineer as appropriate.

(b) A structural, geotechnical, and civil engineer, as applicable, who is licensed by the District of Columbia, shall review and certify all final foundation and grading designs.

(c) Upon submission of all Construction Drawings to District, the Architect shall certify (with standard professional language reasonably acceptable to District) that the Project (or the Affordable Housing Project, as the case may be) has been designed in accordance with Applicable Law relating to accessibility for persons with disabilities.

COUNCIL DRAFT

4.1.3 Non-Material Changes. District and Developers recognize that, during the course of the construction of the Project and the Affordable Housing Project, changes may be necessary to the Construction Plans and Specifications for each of these projects because of unanticipated situations that are encountered or arise during construction. Accordingly, notwithstanding any provisions of this Agreement requiring District's approval of any changes or modifications to the Construction Plans and Specifications, from and after the Commencement of Construction, changes or modifications to the Construction Plans and Specifications shall not require District's approval unless such change constitutes a Material Change (in which event such Material Change shall be subject to the approval of District in accordance with the procedures set forth in Section 4.2 of this Agreement).

4.2 DISTRICT REVIEW AND APPROVAL OF CONSTRUCTION DRAWINGS.

4.2.1 Generally. District shall have the right to review and approve or disapprove all or any part of each of the Construction Drawings, which approval shall not be unreasonably withheld, conditioned or delayed provided such Construction Drawings are reasonably consistent with the information exchanged in Progress Meetings and are in accordance with the requirements of the terms herein and Applicable Law. Any Construction Drawings approved (or any approved portions thereof) pursuant to this Section 4.2 shall be "**Approved Construction Drawings**."

4.2.2. Time Period for District Review and Approval. District shall complete its review of each submission of Construction Drawings and provide a written response thereto, within ten (10) Business Days after its receipt of the same; provided, however, the Parties may agree to allow District such longer period of time as they may mutually agree is required (the ten (10) Business Day review period, plus any extension agreed to by the Parties, may be referred to herein as the "**Review Period**"). If District fails to respond with its written response to a submission of any Construction Drawings within the Review Period, Developer (or Affordable Housing Developer) shall notify District, in writing, of District's failure to respond by delivering to District a Second Notice. Failure of District to respond to the time period set forth in the Second Notice shall constitute, and shall be deemed to be, District approval of the applicable Construction Drawings.

4.2.3 Disapproval Notices. Any notice of disapproval ("**Disapproval Notice**") delivered to Developer (or Affordable Housing Developer) by District shall state the basis for such disapproval in reasonably sufficient detail so as to enable Developer (or Affordable Housing Developer) to respond to District. If District issues a Disapproval Notice, Developer (or Affordable Housing Developer) shall have a period of time equal to the Resubmission Period to revise the Construction Drawing to address the obligations or comments of District and shall resubmit the amended Construction Drawing for approval by District prior to the expiration of such Resubmission Period. District shall use good faith efforts to complete its review of such amended Construction Drawing within the Review Period applicable to such resubmitted Construction Drawing, which Review Period shall commence the day following District's receipt thereof of such resubmitted Construction Drawings from Developer (or Affordable Housing Developer). If District fails to notify Developer (or Affordable Housing Developer) in writing of its approval or disapproval of such amended Construction Drawing within the Review Period,

COUNCIL DRAFT

Developer (or Affordable Housing Developer) may provide a written Second Notice to District with respect to such amended Construction Drawing, and the provisions of Section 4.2.2 shall apply with respect to such Second Notice. The provisions of this Section 4.2 relating to approval, disapproval and resubmission of any submission of Construction Drawings shall continue to apply until such Construction Drawings (and each component thereof) have been finally approved by District. In no event will District's failure to respond to any submission of Construction Drawings be deemed an approval except as otherwise expressly set forth in this Section 4.2. Any Construction Drawings may not be later disapproved by District unless any disapproval and revision is mutually agreed upon by the Parties. District's review of any Construction Drawings that is responsive to a Disapproval Notice shall be limited to the matters disapproved by District as set forth in the Disapproval Notice, but shall not be so limited with regard to any new matters shown on such Construction Drawings that were not included or indicated on any prior Construction Drawings.

4.2.4 Submission Deadline Extensions. Subject to Force Majeure, Developer shall complete the Project, and Affordable Housing Developer shall complete the Affordable Housing Project, in accordance with the Schedule of Performance. The Schedule of Performance may be modified from time to time upon the approval of the Parties. If Developer (or Affordable Housing Developer) is proceeding diligently and in good faith and desires to extend a specified deadline for any submission of particular Construction Drawings or Other Submissions provided for in the Schedule of Performance, Developer (or Affordable Housing Developer) may request such extension in writing, and, for good cause shown, District may, in its sole and absolute discretion, grant such extension by written notice.

4.2.5 No Representation; No Liability. District's review and approval of the Construction Drawings is not and shall not be construed as a representation or other assurance that they comply with any building codes, regulations, or standards, including, without limitation, building engineering and structural design or any other Applicable Law. District shall incur no liability in connection with its review of any Construction Drawings and is reviewing such Construction Drawings solely for the purpose of ensuring that the Construction Drawings are consistent with the Development Plan for either the Project or the Affordable Housing Project, as the applicable Development Plan is modified from time to time in accordance with the terms of this Agreement.

4.3 CHANGES IN CONSTRUCTION DRAWINGS; GOVERNMENT REQUIRED CHANGES.

4.3.1 No Material Changes. No Material Changes to the Approved Construction Drawings shall be made without District's prior written approval, except those changes required by a governmental authority pursuant to Section 4.3.2. If Developer (or Affordable Housing Developer) desires to make any Material Changes to the Approved Construction Drawings, Developer (or Affordable Housing Developer) shall submit in writing the proposed changes to District for approval, and the procedures set forth in Section 4.2 shall apply to District's review and approval (or disapproval) of any such proposed Material Changes in the same manner as if the submission of such proposed Material Change was the submission of the original Construction Drawings for District's review.

COUNCIL DRAFT

4.3.2 Government Required Changes. Notwithstanding any other provision of this Agreement to the contrary, District acknowledges and agrees that District shall not withhold its approval (if otherwise required by the terms of this Agreement) of any elements of a Construction Drawing or proposed changes to an Approved Construction Drawing which are required by any governmental authority; provided however, that (i) District shall have been afforded a reasonable opportunity to discuss such element of, or change in, the submission with the governmental authority requiring such element or change and with the Architect, (ii) the Architect shall have reasonably cooperated with District and such governmental authority in seeking such reasonable modifications of the required element or change as District shall deem reasonably necessary, and (iii) such element or change is consistent with Applicable Law. Developers and District each agree to use diligent, good faith efforts to resolve District's approval of such elements or changes, and District's request for reasonable modifications to such required elements or changes, as soon as reasonably possible and in no event later than ten (10) Business Days after the submission of the applicable Construction Drawing or Approved Construction Drawing. Developers shall promptly notify District in writing of any changes required by a governmental authority whether before or during construction.

4.4 PROGRESS MEETINGS.

During the preparation of the Construction Drawings, District's staff and Developers shall hold periodic progress meetings ("**Progress Meetings**"), during which meetings Developers and designated representatives of District and other District staff shall coordinate the development and construction of the Project and the Affordable Housing Project, including preparation and submission of the Construction Drawings as well as the review of such Construction Drawings by District.

4.5 GUARANTORS; COMPLETION GUARANTY.

4.5.1 Approval of Guarantors. The Development and Completion Guaranties required pursuant to this Agreement shall be from one or more Persons approved by District in District's sole discretion, which approval shall include District's determination as to whether such Person has sufficient net worth and liquidity to satisfy its obligations under the applicable Development and Completion Guaranty, taking into account all relevant factors, including, without limitation, such Person's obligations under other guaranties and the other contingent obligations of such Person (each, a "**Guarantor**"); provided, however, Guarantor shall not be a Prohibited Person; provided further, that any Guarantor acceptable to the applicable Institutional Lender shall be deemed acceptable to District.

4.5.2 Updated Submissions. No later than fifteen (15) days prior to Closing on the Project, or the Affordable Housing Financing Closing as the case may be, the applicable Guarantor shall submit to District updated Guarantor Submissions. In the event District determines, in its sole discretion, that a material adverse change in the financial condition of the applicable Guarantor has occurred that impacts, or could threaten to impact, such Guarantor's ability to perform under the applicable Development and Completion Guaranty, Developer or Affordable Housing Developer, as the case may be, shall, within fifteen (15) Business Days after

COUNCIL DRAFT

receipt of 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 substitute Guarantor.

4.5.3 Development and Completion Guaranty. The Development and Completion Guaranties shall comply in all material respects with the terms of the form of Development and Completion Guaranties attached hereto as Exhibit N-1 and Exhibit N-2.

4.5.4 Material Adverse Change in Financial Condition of Guarantor. In the event that there is material adverse change (as determined by District in the exercise of its sole and absolute discretion) in the Guarantor's financial condition from the financial condition of the Guarantor at the time of District approval of the Guarantor, Developer and/or Affordable Housing Developer, as appropriate, shall deliver a replacement guaranty from a replacement guarantor approved by District with terms and conditions consistent with this Article and within a commercially reasonable period, but in no event less than thirty (30) days.

4.6 OTHER SUBMISSIONS.

Developer or Affordable Housing Developer, as the case may be, shall submit the following to District for review and approval in District's sole but reasonable discretion ("**Other Submissions**"):

4.6.1 Development Plan. Prior to Closing or Affordable Housing Financing Closing, as the case may be, Developer or Affordable Housing Developer, as the case may be, shall submit to any proposed changes in the Project Development Plan or the Affordable Housing Development Plan, as applicable.

4.6.2 Community Participation Programs. No later than ninety (90) days after the Effective Date, Developers shall provide District a description of Developer's and Affordable Housing Developer's programs, as applicable, for public involvement, education and outreach with respect to their respective projects (including input from the community that is impacted by the applicable project as it is designed, developed, constructed and operated) (the "**Community Participation Programs**"), including a plan for implementing the Community Participation Programs and shall include, without limitation, the organization(s) with whom Developer and Affordable Housing Developer propose to discuss their respective project, a schedule for public meetings and the type of information that Developer or Affordable Housing Developer proposes to submit to the public. The Community Participation Programs shall include a mechanism to document all public meetings, including a narrative description of the events of each meeting, the concerns raised by members of the public, and Developer's responses to such concerns. Developer and Affordable Housing Developer shall submit such documentation of each meeting to District and shall otherwise include a summary of Developer's and Affordable Housing Developer's activities with respect to, and in furtherance of, the Community Participation Programs at each Progress Meeting. District hereby agrees that the Community Participation Programs may be maintained on Developer's and Affordable Housing Developer's website and delivered to District electronically.

COUNCIL DRAFT

4.6.3 Retail Plan. Prior to Closing, Developer shall provide District with a retail strategy and marketing plan for the development of the retail components of the Project (the “Retail Plan”).

4.6.4 District’s Approval of Professionals; Contracts.

(a) Any Person that Developer or Affordable Housing Developer proposes for any of the following shall be subject to District’s approval (unless otherwise pre-approved by District under this Agreement), which approval shall not be unreasonably withheld, conditioned or delayed: (i) the Architect; (ii) the general construction contractor; and (iii) any replacement of either of the foregoing. District’s review of any proposed Person under this Section 4.6.4(a) shall be limited to whether the Person (i) reasonably has the experience and technical qualifications to provide the services required, and (ii) is not a Prohibited Person.

(b) No Person that is a Prohibited Person or is debarred by HUD shall be engaged as contractor or a subcontractor or otherwise provide materials or services with respect to the Project or the Affordable Housing Project.

(c) Upon District’s request, Developers shall provide to District the contracts with any Person required to be approved by District pursuant to the foregoing provisions of this Section 4.6.4.

4.6.5 Time Period for District Review and Approval of Other Submissions. District shall complete its review and approval of each Other Submission by Developers and provide a written response thereto, within ten (10) Business Days after its receipt of the same. If District fails to respond with its written response to a submission of any Other Submission within such period, Developer or Affordable Housing Developer, as applicable, shall notify District, in writing, of District’s failure to respond by delivering to District a Second Notice. Failure of the District to respond to the time period set forth in the Second Notice shall constitute, and shall be deemed to be, District approval of the applicable Other Submission.

4.6.6 Changes to Other Submissions. No material adverse change or Material Change to any Other Submission shall be made without District’s prior written approval. If Developers desire to make any material adverse changes or Material Changes to any Other Submission, Developer or Affordable Housing Developer, as the case may be, shall submit the proposed changes to District for approval, which approval shall be granted or withheld in District’s sole but reasonable discretion. District agrees that it shall respond to any such request within a reasonable period of time, not to exceed ten (10) Business Days. If District fails to respond with its written response to a submission of any Other Submission within such period, Developer or Affordable Housing Developer, as applicable, shall notify District, in writing, of District’s failure to respond by delivering to District a Second Notice. Failure of District to respond within ten (10) Business Days of District’s receipt of the Second Notice shall constitute, and shall be deemed to be, District approval of the applicable Other Submission.

4.7 CONSTRUCTION CONSULTANT.

COUNCIL DRAFT

On or before the Commencement of Construction for either the Project or the Affordable Housing Project, Developer or Affordable Housing Developer, as applicable, shall appoint a construction consultant (“**Construction Consultant**”), approved by District (such approval to be deemed given if no response is provided by District within ten (10) Business Days after a request for approval is submitted to District), on such terms as District may approve (such approval to be deemed given if no response is provided by District within ten (10) Business Days after the request for approval is submitted to District): (a) to report to District on a monthly basis whether the construction of the Project or the Affordable Housing Project is in adherence to the Schedule of Performance, (b) to review and approve whether the construction of the Project or the Affordable Housing Project is consistent with the requirements of the applicable Construction and Use Covenant, and (c) to review and report to District on District’s issuance of the Certificate of Final Completion (as defined in the Construction and Use Covenant). Construction Consultant shall receive timely reports from the applicable Architect, and shall promptly report any issues or problems to District and Developer or Affordable Housing Developer, as applicable. Construction Consultant shall provide such certifications as are required by the applicable Construction and Use Covenant. Construction Consultant’s time, expenses, reports, and certification shall be at the sole cost and expense of Developer or Affordable Housing Developer, as applicable; provided that in no event shall such costs and expenses exceed the amount contained in the Project Budget or Final Project Budget for the Project or the Affordable Housing Project, as applicable. Any construction consultant engaged by the primary lender for supervision of construction of the applicable project shall be considered the “Construction Consultant” hereunder, provided that such construction consultant agrees in writing with District to undertake the duties of the Construction Consultant set forth in this Section 4.7.

4.8 PAYMENT AND PERFORMANCE BONDS.

Developer and Affordable Housing Developer shall require its general contractor for the Project or Affordable Housing Project, as applicable, to obtain a payment and performance bond in form and substance acceptable to District, naming District as a named beneficiary. Developer and Affordable Housing Developer shall deliver to District an original of each such payment and performance bond prior to the Commencement of Construction for the applicable project.

ARTICLE 5 CONDITIONS TO CLOSING

5.1 CONDITIONS PRECEDENT TO DEVELOPER’S OBLIGATION TO CLOSE.

5.1.1 The obligations of Developer to consummate the Closing on the Closing Date shall be subject to the following conditions precedent:

(a) the representations and warranties made by District in Section 3.1.1 of this Agreement shall be true and correct in all material respects on and as if made on the Closing Date;

(b) District shall have performed all of its material obligations and observed and complied with all material covenants and conditions required at or prior to Closing under this Agreement;

COUNCIL DRAFT

(c) this Agreement shall not have been previously terminated pursuant to any provision hereof;

(d) District shall have delivered (or caused to be delivered) the original, executed documents required to be delivered pursuant to Section 6.2.1 herein;

(e) as of the Closing Date, there shall be no rezoning or other statute, law, judicial, or administrative decision, ordinance, or regulation (including amendments and modifications of any of the foregoing) by any governmental authorities or any public or private utility having jurisdiction over the Property that would materially adversely affect the acquisition, development, sale, or use of the Property such that the Project is no longer physically or economically feasible. This provision shall not apply to any normal and customary reassessment of the Property for ad valorem real estate tax purposes; and

(f) title to the Property shall be subject only to the Permitted Exceptions.

5.1.2 Failure of Condition. If all of the conditions to Closing set forth above in Section 5.1.1 have not been satisfied by the Closing Date, provided the same is not the result of Developer's failure to perform in any material respect any of its obligations hereunder, Developer shall have the option, in its sole discretion, to (i) waive such condition(s) and proceed to Closing hereunder; (ii) terminate this Agreement by written notice to District, whereby District will release the Deposit Letter of Credit to Developer and the Parties shall be released from any further liability or obligation hereunder except those that expressly survive termination of this Agreement; provided, however, if the failure to satisfy the condition precedent is due to a District Default, Developer may exercise its remedies in Section 8.3; or (iii) delay Closing for up thirty (30) days (or such longer time as may be agreed to by the Parties) to permit District to satisfy the conditions to Closing set forth in Section 5.1.1. In the event Developer proceeds under clause (ii), Closing shall occur within thirty (30) days after the conditions precedent set forth in Section 5.1.1 have been satisfied, but in no event later than the Outside Closing Date. District shall use good faith efforts and diligently pursue satisfaction of the conditions to Closing set forth in Section 5.1.1. The foregoing notwithstanding, but subject to Section 6.1.2 and Section 8.3, as applicable, Closing shall not occur after the Outside Closing Date. If Closing has not occurred by the Outside Closing Date because all of the conditions to Closing set forth above in Section 5.1.1 have not been satisfied, provided the same is not the result of Developer's failure to perform in any material respect any obligation of Developer hereunder, Developer may again proceed under clause (i) or (ii) above in this Section 5.1.2, in its sole discretion.

5.2 CONDITIONS PRECEDENT TO DISTRICT'S OBLIGATION TO CLOSE.

5.2.1 The obligation of District to consummate the Closing on the Closing Date shall be subject to the following conditions precedent:

(a) Developer and Affordable Housing Developer shall have performed all of their material obligations hereunder and observed and complied with all material covenants and conditions required at or prior to Closing under this Agreement;

COUNCIL DRAFT

(b) the representations and warranties made by Developer and Affordable Housing Developer in Section 3.2 of this Agreement shall be true and correct in all material respects on and as if made on the Closing Date, and shall be updated as appropriate at Closing to reflect any changes in facts covered by such representations and warranties, and all documents heretofore delivered by Developer and Affordable Housing Developer to District in support of such representations and warranties, including, without limitation, updated and current organizational documents, shall be delivered by Developer and Affordable Housing Developer to District prior to Closing; provided that any documents in support of such representations and warranties submitted by Affordable Housing Developer to District in connection with the Affordable Housing Financing Closing need not be resubmitted to District if such documents remain true and correct in all material respects as of the Closing Date;

(c) this Agreement shall not have been previously terminated pursuant to any other provision hereof;

(d) District's authority, pursuant to the Resolution, to proceed with the disposition, as contemplated in this Agreement, shall have not previously expired;

(e) the Development Plans and all Construction Drawings for the Project and the Affordable Housing Project shall have been approved as Approved Construction Drawings in their entirety pursuant to Article 4;

(f) all Other Submissions for the Project and the Affordable Housing Project shall have been approved in their entirety pursuant to Article 4;

(g) Developer shall have certified to District in writing that it is ready, willing, and able in accordance with the terms and conditions of this Agreement to purchase the Property and proceed with the development and construction of the Project in accordance with the applicable Approved Construction Drawings and the applicable Construction and Use Covenant, and Affordable Housing Developer shall have certified to District in writing on the Closing Date or on the Affordable Housing Financing Closing Date, if earlier than the Closing Date, that it is ready, willing and able in accordance with the terms and conditions of this Agreement to proceed with the development and construction of the Affordable Housing Project in accordance with the applicable Approved Construction Drawings and the applicable Construction and Use Covenant;

(h) Developer and Affordable Housing Developer shall not be in default under the terms of their respective First Source Agreements with DOES;

(i) Developer and Affordable Housing Developer shall not be in default under the terms of their respective CBE Agreements with DSLBD;

(j) Developer and Affordable Housing Developer shall have furnished to District certificates of insurance or duplicate originals of insurance policies required of Developer and Affordable Housing Developer hereunder;

(k) Developer and Affordable Housing Developer shall have provided District with resolutions adopted by each of Developer and Affordable Housing Developer

COUNCIL DRAFT

authorizing the performance by Developer and Affordable Housing Developer of their respective obligations under this Agreement, including the purchase of the Property by Developer;

(l) Developer and Affordable Housing Developer shall have applied for and obtained all Approvals necessary to accomplish the Project and Affordable Housing Project;

(m) Developer shall have obtained all Permits for demolition (if any), excavation, and sheeting and shoring for the Project, and the building Permits for construction of the Project, and Affordable Housing Developer shall have obtained all Permits for the construction of the Affordable Housing Project, except for those Permits which are normally obtained during the course of construction of each project, such as elevator permits and landscaping permits;

(n) Developer shall have delivered (or caused to be delivered) the original, executed documents required to be delivered pursuant to Section 6.2.2 herein;

(o) Developer and Affordable Housing Developer shall have secured District's approval and shall have secured all Debt Financing and Equity Investment necessary to fully perform all development and construction obligations contained in the Construction and Use Covenant with respect to each project, and District shall have approved all of the foregoing;

(p) there shall be no changes to the Final Project Funding Plan or the Final Project Budget, except to the extent such changes have been previously approved by District;

(q) Developer and Affordable Housing Developer shall each have executed a construction contract with its general contractor for its respective project;

(r) there shall have occurred no material adverse change in the financial condition of any Guarantor, determined in accordance with the provisions of Section 4.5 or, if a material adverse change has occurred, District has approved a substitute guarantor pursuant to Section 4.5; and

(s) the Affordable Housing Financing Closing shall have occurred, or shall occur simultaneously with the Closing; provided, however, if the Affordable Housing Financing Closing occurred prior to Closing, Affordable Housing Developer shall not be required to re-deliver to District at Closing any documents delivered to District in connection with the Affordable Housing Financing Closing, if such documents remain true and correct in all material respects as of the Closing Date.

5.2.2 Failure of Condition. Subject to Section 6.1.2, if all of the conditions to Closing set forth above in Section 5.2.1 have not been satisfied by the Closing Date, provided the same is not the result of District's failure to perform any obligation of District hereunder, District shall have the option, in its sole discretion, by written notice to Developers, to (i) waive such condition(s) and proceed to Closing hereunder, (ii) other than with respect to the conditions set forth in Section 5.2.1 that have not been met due to Force Majeure, terminate this Agreement and

COUNCIL DRAFT

retain the Deposit Letter of Credit, whereupon the Parties shall be released from any further liability or obligation hereunder except those that expressly survive termination of this Agreement or (iii) delay Closing for up to thirty (30) days (or such longer period as may be agreed to by the Parties), to permit Developers to satisfy the conditions to Closing set forth in Section 5.2.1. In the event District proceeds under clause (iii), Closing shall occur within thirty (30) days after the conditions precedent set forth in Section 5.2.1 have been satisfied but in no event later than the Outside Closing Date. Developers shall use good faith efforts and diligently pursue satisfaction of the conditions to Closing set forth in Section 5.2.1. The foregoing notwithstanding, but subject to Section 6.1.2, Closing shall not occur after the Outside Closing Date. If Closing has not occurred by the Outside Closing Date because all of the conditions to Closing set forth above in Section 5.2.1 have not been satisfied, provided the same is not the result of District's failure to perform any obligation of District hereunder, District may again proceed under clause (i) – (ii) above in this Section 5.2.2, in its sole discretion.

ARTICLE 6 CLOSING

6.1 CLOSING DATE.

6.1.1 Closing Date and Outside Closing Date. Closing shall occur no later than the Closing Date shown on the Schedule of Performance, subject only to Force Majeure, or as otherwise expressly provided herein (the “**Closing Date**”). If any condition to Closing is not met due to Force Majeure, and there is no continuing uncured District Default or Developer Default, as applicable, under this Agreement, the Closing Date shall be extended for the period of the Force Majeure, but in no event shall the Closing Date be held after [THE DATE THAT IS TWO (2) YEARS AFTER DATE OF COUNCIL RESOLUTION] (the “**Outside Closing Date**”). Closing shall occur at 10:00 a.m. at the offices of District or another location in the District of Columbia acceptable to the Parties.

6.1.2 Extension of Outside Closing Date.

(a) If Developer and District reasonably agree that the milestones set forth on the Schedule of Performance cannot be met prior to the Outside Closing Date, District shall consider submitting a resolution requesting an extension under D.C. Official Code § 10-801 for Council consideration (“**Extension Resolution**”). If Council passes the Extension Resolution, the Outside Closing Date may be extended for a period determined by District, in its sole and absolute discretion.

(b) Developers acknowledge and agree that (i) any Extension Resolution will be granted or denied in the sole and absolute discretion of Council, (ii) Developers shall have no recourse against District if Council fails to approve the Extension Resolution, and (iii) District shall have no future obligation to seek additional extensions under D.C. Official Code § 10-801 if Council fails to approve the Extension Resolution submitted in accordance with this Section 6.1. If Council fails to pass the Extension Resolution, this Agreement shall terminate, in which case District shall deliver the Deposit Letter of Credit to Developer and the Parties shall be released from any further liability or obligation hereunder, except those provisions that expressly survive termination of this Agreement. The Parties

COUNCIL DRAFT

acknowledge and agree that, unless a District Default occurs, all monies spent by Developer and Affordable Housing Developer prior to Closing are “at-risk” and District shall have no liability for Developer’s failure or inability to meet the milestones and conditions required to proceed to Closing by the Outside Closing Date.

6.2 DELIVERIES AT CLOSING.

6.2.1 District’s Deliveries. On or before the Closing Date, subject to the terms and conditions of this Agreement, District shall execute, notarize, and deliver, as applicable, to Settlement Agent:

- (a) the Deed in recordable form to be recorded in the Land Records against the Property;
- (b) the Construction and Use Covenant for the Project in recordable form to be recorded in the Land Records against the Property;
- (c) a certificate, duly executed by District, stating that all of District’s representations and warranties set forth herein are true and correct as of and as if made on the Closing Date; and
- (d) any and all other deliveries required from District on the Closing Date under this Agreement and such other documents and instruments as are customary and as may be reasonably requested by Developer or Settlement Agent, and reasonably acceptable to District, to effectuate the transactions contemplated by this Agreement.

6.2.2 Developer’s Deliveries. On or before the Closing Date, subject to the terms and conditions of this Agreement, Developer shall execute, notarize, and deliver, or cause to be executed, notarized and delivered, as applicable, to Settlement Agent:

- (a) the Deed in recordable form for recordation in the Land Records against the Property;
- (b) the Purchase Price and any other funds required by the Settlement Statement to be delivered by Developer;
- (c) any documents required to close on all of the Debt Financing for Developer’s construction of the Project;
- (d) the fully executed Development and Completion Guaranty;
- (e) the Construction and Use Covenant in recordable form to be recorded in the Land Records against the Property;
- (f) [Intentionally Deleted];
- (g) a certificate, duly executed by Developer, stating that all of Developer’s representations and warranties set forth herein are true and correct as of and as if made on the Closing Date;

COUNCIL DRAFT

- (h) copies of all (i) Permits and (ii) Approvals for the Project;
- (i) a copy of each of the fully executed First Source Agreement and CBE Agreement for the Project;
- (j) evidence of satisfactory liability, casualty and builder's risk insurance policies in the amounts, and with such insurance companies, as required in Article 11 of this Agreement;
- (k) any financial statements or updated financial statements of Developer that may be reasonably requested by District;
- (l) the following documents evidencing the due organization and authority of Developer and its Managing Member to enter into, join and consummate this Agreement and the transactions contemplated herein:
 - (i) organizational documents and a current certificate of good standing issued by the District of Columbia with respect to Developer;
 - (ii) authorizing resolutions, in form and content reasonably satisfactory to District, demonstrating the authority of the entity and of the Person executing each document on behalf of Developer and its Managing Member in connection with this Agreement and development of the Project;
 - (iii) if requested by District, an opinion of counsel that Developer and its Managing Member are validly organized, existing and in good standing in the District of Columbia, that Developer and its Managing Member have the full authority and legal right to carry out the terms of this Agreement and the documents to be recorded in the Land Records, that Developer and its Managing Member have taken all actions to authorize the execution, delivery, and performance of said documents and any other document relating thereto in accordance with their respective terms, that none of the aforesaid actions, undertakings, or agreements violate any restriction, term, condition, or provision of the organizational documents of Developer or its Managing Member or any contract or agreement to which they are a party or by which they are bound; provided, however, that if a separate opinion is provided by Developer's counsel to an Institutional Lender for the Project covering such matters, that Developer may satisfy the requirements of this clause (v) by delivering a counsel letter to District stating that District shall be entitled to rely on the legal opinion provided to the Institutional Lender;
- (k) a copy of the agreement between Developer and the Construction Consultant; and
- (l) any and all other deliveries required from Developer on the Closing Date under this Agreement and such other documents and instruments as are customary and as may be reasonably requested by District or Settlement Agent, and reasonably acceptable to Developer, to effectuate the transactions contemplated by this Agreement.

COUNCIL DRAFT

On the Closing Date, Settlement Agent shall record and distribute documents and funds in accordance with closing instructions provided by the Parties so long as they are consistent with this Agreement.

6.3 RECORDATION OF CLOSING DOCUMENTS; CLOSING COSTS.

6.3.1 Recordation of Closing Documents. At Closing, Settlement Agent shall file for recordation among the Land Records the Deed and the Construction and Use Covenant for the Project. Such documents shall be recorded prior to any security instruments to be recorded in connection with the Debt Financing.

6.3.2 Closing Costs. At Closing, Developer shall be responsible for and pay all costs pertaining to the transfer and financing of the Property, including, without limitation: (i) title search costs, (ii) title insurance premiums and endorsement charges, (iii) survey costs, (iv) all recordation and transfer taxes, if any, and (v) all Settlement Agent's fees and costs.

6.4 AFFORDABLE HOUSING FINANCING CLOSING.

6.4.1 Timing. Affordable Housing Developer shall close on the Debt Financing and Equity Investment necessary for it to construct the Affordable Housing Project in accordance with the Affordable Housing Development Plan prior to or simultaneously with Closing under the terms of this Agreement (the "**Affordable Housing Financing Closing**"). Affordable Housing Developer shall deliver to District written notice of its intent to proceed to the Affordable Housing Financing Closing no less than *[sixty (60)]* days prior to the date on which the Affordable Housing Financing Closing is scheduled to occur. Prior to the Affordable Housing Financing Closing:

(a) the Affordable Housing Development Plan and all Construction Drawings for the Affordable Housing Project shall have been approved as Approved Construction Drawings in their entirety pursuant to Article 4;

(b) any Other Submissions applicable to the Affordable Housing Project shall have been approved in their entirety pursuant to Article 4; and

(c) Affordable Housing Developer shall have delivered to District an Affordable Housing Plan in the form attached hereto as Exhibit C.

6.4.2 District Deliveries at Affordable Housing Financing Closing. On or before the Affordable Housing Closing Date, District shall execute, notarize and deliver, as applicable, to the settlement agent designated by Affordable Housing Developer:

(a) the Construction and Use Covenant for the Affordable Housing Project in recordable form to be recorded in the Land Records against the Affordable Housing Property; and

(b) the Affordability Covenant in recordable form to be recorded in the Land Records against the Affordable Housing Property.

COUNCIL DRAFT

6.4.3 Affordable Housing Developer Deliveries at Affordable Housing Financing Closing. On or before the Affordable Housing Financing Closing Date, Affordable Housing Developer shall execute, notarize and deliver, as applicable, to its settlement agent:

- (a) the fully executed Development and Completion Guaranty;
- (b) the Construction and Use Covenant in recordable form to be recorded in the Land Records against the Affordable Housing Property;
- (c) the Affordability Covenant in recordable form to be recorded in the Land Records against the Affordable Housing Property;
- (d) a copy of the agreement between Affordable Housing Developer and the Construction Consultant;
- (e) a certificate, duly executed by Affordable Housing Developer, stating that all of Affordable Housing Developer's representations and warranties set forth herein are true and correct as of and as if made on the date of the Affordable Housing Financing Closing;
- (f) copies of all (i) Permits and (ii) Approvals for the Affordable Housing Project;
- (g) a copy of each of the fully executed First Source Agreement and CBE Agreement for the Affordable Housing Project;
- (h) evidence of satisfactory liability, casualty and builder's risk insurance policies in the amounts, and with such insurance companies, as required in Article 11 of this Agreement;
- (i) any financial statements or updated financial statements of Affordable Housing Developer that may be requested by District;
- (j) the following documents evidencing the due organization and authority of Affordable Housing Developer and its Managing Member to enter into, join and consummate this Agreement and the transactions contemplated herein:
 - (i) organizational documents and a current certificate of good standing issued by the District of Columbia with respect to Affordable Housing Developer;
 - (ii) authorizing resolutions, in form and content reasonably satisfactory to District, demonstrating the authority of the entity and of the Person executing each document on behalf of Affordable Housing Developer and its Managing Member in connection with this Agreement and development of the Affordable Housing Project;
 - (iii) if requested by District, an opinion of counsel that Affordable Housing Developer and its Managing Member are validly organized, existing and in good standing in the District of Columbia, that Affordable Housing Developer and its Managing

COUNCIL DRAFT

Member have the full authority and legal right to carry out the terms of this Agreement and the documents to be recorded in the Land Records, that Affordable Housing Developer and its Managing Member have taken all actions to authorize the execution, delivery, and performance of said documents and any other document relating thereto in accordance with their respective terms, that none of the aforesaid actions, undertakings, or agreements violate any restriction, term, condition, or provision of the organizational documents of Affordable Housing Developer or its Managing Member or any contract or agreement to which they are a party or by which they are bound; provided, however, that if a separate opinion is provided by Affordable Housing Developer's counsel to an Institutional Lender for the Affordable Housing Project covering such matters, that Affordable Housing Developer may satisfy the requirements of this clause (v) by delivering a counsel letter to the District stating that the District shall be entitled to rely on the legal opinion provided to such Institutional Lender; and

(i) any and all other deliveries required from Affordable Housing Developer on the Affordable Housing Financing Closing Date under this Agreement and such other documents and instruments as are customary and as may be reasonably requested by District or settlement agent for the Affordable Housing Financing Closing, and reasonably acceptable to Affordable Housing Developer, to effectuate the transactions contemplated by this Agreement.

On the date of the Affordable Housing Financing Closing, the settlement agent shall record and distribute documents and funds in accordance with closing instructions provided by the Parties so long as they are consistent with this Agreement.

6.4.4 Delivery/Recordation of Certain Documents at Affordable Housing Financing Closing. The Parties acknowledge and agree that, in the event the Affordable Housing Financing Closing occurs prior to Closing on the Project, and Closing on the Project does not occur prior to the Outside Closing Date and this Agreement expires by its terms, Affordable Housing Developer will be released from all obligations under the Affordability Covenant, the Construction and Use Covenant, and the Development and Completion Guaranty and District shall execute such releases and other documents as Affordable Housing Developer may reasonably request to evidence the termination of such obligations.

ARTICLE 7

**DEVELOPMENT OF PROPERTY AND AFFORDABLE HOUSING PROPERTY;
CONSTRUCTION OF PROJECT AND AFFORDABLE HOUSING PROJECT;
CONSTRUCTION AND USE COVENANT; AFFORDABILITY COVENANT**

7.1 OBLIGATION TO CONSTRUCT PROJECT.

Developer hereby agrees to develop, construct, use, maintain, and operate the Project in accordance with the requirements contained in the Construction and Use Covenant and the Schedule of Performance, subject only to Force Majeure; provided, however, Developer's obligations pursuant to the Schedule of Performance shall be extended on a day-to-day basis each time District fails to respond in a timely manner to a submission of Construction Drawings or Other Submissions from Developer, and Developer may seek extension of the milestone dates from District, which may be granted or withheld by District in its sole but reasonable discretion.

COUNCIL DRAFT

Developer's failure to perform its obligations in accordance with the Schedule of Performance, subject to Force Majeure, after notice and opportunity to cure pursuant to Section 8.1, shall constitute a Developer Default which shall entitle District to terminate this Agreement and draw on the Deposit Letter of Credit in its full amount. The Project shall be constructed in accordance with the Approved Construction Drawings and in compliance with all Permits and Applicable Law. The cost of developing the Project shall be borne solely by Developer. As further assurance of the above and of the covenants contained in the Construction and Use Covenant for the Project, Developer shall cause the Development and Completion Guaranty to be executed by applicable Guarantor on or before Closing. Developer shall be responsible for all costs and expenses related to its due diligence, predevelopment and soft costs for the Project. Developer shall be responsible for all costs and expenses related to its due diligence, predevelopment and soft costs for the Project. Upon receipt of a written request from District, Developer shall provide District with copies of executed predevelopment agreements and contracts with third parties as evidence of commencement of predevelopment activities.

7.2 ISSUANCE OF PERMITS.

Developer shall have the sole responsibility for obtaining all Permits and shall make application therefor directly to the applicable agency within the District of Columbia government or other authority. District shall, upon request by Developer, promptly execute applications (as landowner) for such Permits as are required by the District of Columbia government or other authority, at no cost, expense, obligation, or liability to District. In no event shall Developer commence site work or construction of all or any portion of the Project until Developer shall have obtained all Permits for the work in question. Developer shall submit its application for Permits required for demolition (if any), excavation and sheeting and shoring for the Project within a period of time that Developer believes in good faith is reasonably sufficient to allow issuance of such Permits prior to the Closing Date. From and after the date of Developer's submission of an application for a Permit, Developer shall diligently prosecute such application until receipt. In addition, from and after submission of any such application until issuance of the Permit, Developer shall report Permit status in writing on a periodic basis to District, not more frequently than once every thirty (30) days.

7.3 SITE PREPARATION.

Developer, at its sole cost and expense, shall be responsible for all preparation of the Property for development and construction in accordance with the Project Development Plan and Approved Construction Drawings, 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, government standards and Applicable Law.

7.4 OBLIGATION TO CONSTRUCT AFFORDABLE HOUSING PROJECT.

COUNCIL DRAFT

(a) Except as provided in Section 6.4.4, Affordable Housing Developer agrees that it will develop, construct, use, maintain, and operate the Affordable Housing Project in accordance with the Affordable Housing Development Plan and the requirements contained in the applicable Construction and Use Covenant, the Affordability Covenant and the Schedule of Performance, subject only to Force Majeure; provided, however, Affordable Housing Developer's obligations pursuant to the Schedule of Performance shall be extended on a day-to-day basis each time District fails to respond in a timely manner to a submission of Construction Drawings or Other Submissions from Affordable Housing Developer, and Affordable Housing Developer may seek extension of the milestone dates from District, which may be granted or withheld by District in its sole but reasonable discretion; and provided, further, that Affordable Housing Developer's failure to perform its obligations in accordance with the Schedule of Performance, subject to Force Majeure, after notice and opportunity to cure pursuant to Section 8.1, may constitute a Developer Default which shall entitle District to terminate this Agreement and draw on the Deposit Letter of Credit in its full amount.

(b) Affordable Housing Developer agrees that it will deliver, prior to the Affordable Housing Financing Closing, an Affordable Housing Plan in the form attached hereto as Exhibit C governing the requirements for ADUs, including specific affordability levels, tenure type, unit mix, bedroom size breakdowns and formula for the rents of the ADUs, which Affordable Housing Plan shall be subject to the prior approval of District. At the Affordable Housing Financing Closing, Developer shall execute the Affordability Covenant reflecting the above provisions. Subject to the provisions of the Affordability Covenant, the ADUs shall be of the size and AMI levels set forth on the Affordable Housing Plan.

(c) The Affordable Housing Project shall be constructed in accordance with the Approved Construction Drawings and in compliance with all Permits and Applicable Law. The cost of developing the Affordable Housing Project shall be borne solely by Affordable Housing Developer. As further assurance of the above and of the covenants contained in the applicable Construction and Use Covenant, Affordable Housing Developer shall cause the applicable Development and Completion Guaranty to be executed by applicable Guarantor on or before Affordable Housing Financing Closing. Affordable Housing Developer shall be responsible for all costs and expenses related to its due diligence, predevelopment and soft costs for the Affordable Housing Project. Affordable Housing Developer shall provide District with copies of executed predevelopment agreements and contracts with third parties as evidence of commencement of predevelopment activities.

(d) In connection with its development and construction of the Affordable Housing Project, Affordable Housing Developer shall comply with the requirements set forth in Section 7.2 and Section 7.3 above relating to Permits and site preparation for the Affordable Housing Project.

(e) The obligations of Affordable Housing Developer to construct the Affordable Housing Project in accordance with this Section 7.4 shall terminate in the event that the Closing on the Project does not occur by the Outside Closing Date, and Affordable Housing Developer shall have no further obligations under this Agreement to construct the Affordable Housing Project.

COUNCIL DRAFT

7.5 OPPORTUNITY FOR CBE'S.

In cooperation with District, Developers shall comply with the terms and conditions set forth in their respective CBE Agreements.

7.6 EMPLOYMENT OF DISTRICT RESIDENTS; FIRST SOURCE AGREEMENT.

Pursuant to Mayor's Order 83-265, DC Law 5-93, as amended, and DC Law 14-24, Developers recognize that one of the primary goals of the District of Columbia government is the creation of job opportunities for District of Columbia residents. Accordingly, Developer and Affordable Housing Developer agree to enter into First Source Agreements with DOES, prior to Closing, with respect to the Project and the Affordable Housing Project, respectively, which First Source Agreements require, among other things, that Developer and Affordable Housing Developer: (i) use diligent efforts to hire and use diligent efforts to require its architects, engineers, consultants, contractors, and subcontractors to hire at least fifty one percent (51%) District of Columbia residents for all new jobs created by the Project and the Affordable Housing Project, as appropriate, all in accordance with such First Source Employment Agreements, and (ii) use diligent efforts to ensure that at least fifty one percent (51%) of apprentices and trainees employed are residents of the District of Columbia and are registered in apprenticeship programs approved by the D.C. Apprenticeship Council.

7.7 DAVIS BACON; LIVING WAGE ACT.

If applicable, Developers shall comply with the provisions of the Davis-Bacon Act, 40 U.S.C. § 276(a), and the regulations promulgated therewith. In addition, as required under D.C. Official Code § 2-220.06, Developers shall cause their respective general contractors to comply with all requirements under the "*Living Wage Act of 2006*", D.C. Official Code § 2-220.01 *et seq.* The general contractors shall notify all subcontractors of the requirements under the Living Wage Act and shall post the notice required by the Living Wage Act requirements in a conspicuous site at its place of business.

7.8 GREEN BUILDING ACT.

Developer shall construct the Project, and Affordable Housing Developer shall construct the Affordable Housing Project, in accordance with the Green Building Act. Developer shall use commercially reasonable efforts to design the Project to achieve an equivalent of LEED Silver standard or higher.

7.9 RETAIL COMPONENT.

Developer shall consult with District with regard to the nature, size and identity of the retail uses in the Project. Subject to applicable zoning Approvals, the retail component of the Project shall contain approximately 7600 square feet of rentable space.

7.10 HOTEL LABOR PEACE.

COUNCIL DRAFT

Developer shall comply with the Hotel Development Projects Labor Peace Agreement Act of 2002, D.C. Official Code §§ 32-851 *et seq.*

**ARTICLE 8
DEFAULTS AND REMEDIES**

8.1 DEFAULT.

8.1.1 Pre-Closing Default by Developer or Affordable Housing Developer. Prior to achievement of Closing, Developer and Affordable Housing Developer shall be in default under this Agreement if either fails to perform or comply with any term, condition, obligation, provision or requirement under this Agreement, including, without limitation, the Schedule of Performance, and such default remains uncured for thirty (30) days after receipt of written notice of such failure from District (except no notice shall be necessary nor shall any cure period apply to Developer's obligation to close on its acquisition of the Property, time being of the essence) (any such continuing uncured default, a "**Developer Default**"). Notwithstanding the foregoing, if a default does not involve the payment of money and cannot reasonably be cured within thirty (30) days, Developer or Affordable Housing 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 and Affordable Housing Developer must commence the cure within the initial thirty (30) day period and diligently pursue completion of such cure thereafter. Notwithstanding the foregoing, in no event shall the cure periods provided herein with respect to a pre-Closing default delay the Closing beyond the Outside Closing Date (as may be extended in accordance with this Agreement).

8.1.2 Default by Developer or Affordable Housing Developer After Closing. After achievement of Closing on the Project, a default by either of the Developers shall not be deemed to be a default by the other.

8.1.3 Default by District. District shall be in default under this Agreement if District fails to perform any obligation or requirement under this Agreement or fails to comply with any term or provision of this Agreement and such default remains uncured for thirty (30) days after receipt of written notice of such failure from Developer or Affordable Housing Developer (any such continuing uncured default, a "**District Default**"). Notwithstanding the foregoing, if a default cannot reasonably be cured within thirty (30) days, District shall have such additional time as is reasonably necessary, not to exceed an additional sixty (60) days, to cure such default; provided, however, District must commence the cure within the initial thirty (30) day period and diligently pursue completion of such cure thereafter. Notwithstanding the foregoing, in the event of a pre-Closing default, the cure periods provided herein shall not delay Closing beyond the Outside Closing Date (as may be extended in accordance with this Agreement).

8.2 DISTRICT REMEDIES IN THE EVENT OF A DEVELOPER DEFAULT.

8.2.1 Remedies Prior to Closing. In the event of a Developer Default, pertaining to either the Project or the Affordable Housing Project, under this Agreement prior to Closing, District may elect to:

COUNCIL DRAFT

(a) terminate this Agreement and, as liquidated damages, draw on the Deposit Letter of Credit, whereupon the Parties shall be released from any further liability or obligation hereunder, except those that expressly survive termination of this Agreement. Upon such termination, all plans and specifications with regard to the development and construction of the Project and all Other Submissions with respect to the Project, including, without limitation, the Construction Drawings produced to date and any Permits obtained, shall be automatically assigned to District subject to any reasonable and customary restrictions contained in any applicable vendor agreements; or

(b) cure any default, the costs of which shall be paid by Developers and, if not paid, District shall be entitled to draw on the Deposit Letter of Credit for partial reimbursement of District's reasonable out-of-pocket costs incurred to cure the default.

8.2.2 Remedies After Closing. In the event of a Developer Default under this Agreement after Closing with respect to the Project, District shall be entitled to all the remedies set forth in the Deed, the Construction and Use Covenant with respect to the Project and the Development and Completion Guaranty with respect to the Project. In the event of Developer Default under this Agreement after Closing with respect to the Affordable Housing Project, District shall be entitled to all the remedies set forth in the Construction and Use Covenant with respect to the Affordable Housing Project, the Affordability Covenant, and the Development and Completion Guaranty with respect to the Affordable Housing Project.

8.2.3 General. The remedies of District provided in this Section 8.2 shall be the sole and exclusive remedies of District in the event of a Developer Default. Notwithstanding anything to the contrary contained in this Agreement, in no event shall Developers be liable for any consequential, punitive, or special damages.

8.3 DEVELOPERS' REMEDIES IN THE EVENT OF A DISTRICT DEFAULT.

8.3.1 Remedies Prior to Closing. In the event of a District Default prior to Closing, Developer and/or Affordable Housing Developer may elect to (a) extend the Closing Date for a reasonable period of time to allow District to cure the District Default, not to exceed the Outside Closing Date, (b) pursue specific performance or other equitable relief, or (c) terminate this Agreement, whereupon District will deliver the Deposit Letter of Credit to Developer and/or Affordable Housing Developer and Developer and/or Affordable Housing Developer may seek money damages from a court of competent jurisdiction and in accordance with Section 13.15 and District of Columbia law. Any such monetary damages sought by Developer and/or Affordable Housing Developer shall be limited to reasonable actual out-of-pocket costs and expenses that are incurred by Developer and/or Affordable Housing Developer in connection with (i) Developer's Studies, title and survey preparation and examination, and any work performed under Section 2.3.1 hereof; (ii) the design, planning, permitting and financing of the Project and Affordable Housing Project; and (iii) the negotiation and preparation of this Agreement and any documents to be delivered at Closing and/or the Affordable Housing Financing Closing under this Agreement or in connection with the Debt Financing or Equity Investment, including, without limitation, reasonable attorney's and accountant's fees and related expenses, architectural and engineering fees and the fees of other professionals involved in the preparation of the Construction Drawings, consulting fees, costs relating to Permits and Permit expeditors,

COUNCIL DRAFT

financing fees and points, and insurance. Upon District's payment of such damages to Developers pursuant to this Section 8.3.1 the Parties shall be released from any further liability or obligation hereunder except for those that expressing survive termination of this Agreement.

8.3.2 Remedies After Closing. In the event of a District Default under this Agreement after Closing, Developer and Affordable Housing Developer shall be entitled to all the remedies set forth in the Deed, the applicable Construction and Use Covenant and the Affordability Covenant (if applicable) in accordance with applicable District of Columbia law.

8.3.3 General. The remedies of Developer and Affordable Housing Developer provided in this Section 8.3 shall be the sole and exclusive remedies of Developer and Affordable Housing Developer in the event of a District Default. Notwithstanding anything to the contrary contained in this Agreement, in no event shall District be liable for any consequential, punitive, or special damages.

8.4 NO WAIVER BY DELAY; WAIVER.

Notwithstanding anything to the contrary contained herein, any delay by any Party in instituting or prosecuting any actions or proceedings with respect to a default by the other hereunder or otherwise asserting its rights or pursuing its remedies under this Article, shall not operate as a waiver of such rights or to deprive such Party of or limit such rights in any way (it being the intent of this provision that no Party shall be constrained by waiver, laches, or otherwise in the exercise of such remedies). Any waiver by any Party hereto must be made in writing. Any waiver in fact made with respect to any specific default under this Section shall not be considered or treated as a waiver with respect to any other defaults or with respect to the particular default except to the extent specifically waived in writing.

ARTICLE 9
FINANCIAL PROVISIONS

9.1 PROJECT FUNDING PLAN; PROJECT BUDGET; AFFORDABLE HOUSING FUNDING PLAN; AFFORDABLE HOUSING PROJECT BUDGET.

9.1.1 Project Funding Plan; Affordable Housing Funding Plan. As of the Effective Date, Developer has provided District its initial Project Funding Plan describing the sources and uses of funds for the Project and the methods for obtaining such funds (including lending sources), which plan is attached hereto as **Exhibit L-1** (such plan, as may be modified from time to time in accordance with this Agreement being the "**Project Funding Plan**") and also as of the Effective Date, Affordable Housing Developer has provided District with its initial Affordable Housing Funding Plan describing the sources and uses of funds for the Affordable Housing Project and the methods for obtaining such funds (including lending sources), which plan is attached hereto as **Exhibit L-2** (such plan, as may be modified from time to time in accordance with this Agreement being the "**Affordable Housing Funding Plan**"). The Affordable Housing Funding Plan shall include details of the funding, if any, from the District of Columbia Department of Housing and Community Development for the Affordable Housing Project.

COUNCIL DRAFT

9.1.2 Project Budget; Affordable Housing Budget. As of the Effective Date, Developer has provided District its initial Project Budget describing the expenditure of direct and indirect costs for the Project, as further described in the definition of Project Budget, which Project Budget is attached hereto as **Exhibit M-1** (such budget, as may be modified from time to time in accordance with this Agreement being the “**Project Budget**”), and also as of the Effective Date, Affordable Housing Developer has provided District its initial Affordable Housing Project Budget describing the expenditure of direct and indirect costs for the Affordable Housing Project, as further described in the definition of Affordable Housing Project Budget, which Affordable Housing Project Budget is attached hereto as **Exhibit M-2** (such budget, as may be modified from time to time in accordance with this Agreement being the “**Affordable Housing Project Budget**”).

9.1.3 Final Project Budget and Funding Plan; Final Affordable Housing Project Budget and Funding Plan. Within sixty (60) days after Developer submits the Approved Construction Drawings to DCRA for each of the Project and the Affordable Housing Project, as applicable, Developer (or Affordable Housing Developer) shall provide to District a revised Project Budget (or Affordable Housing Project Budget, as appropriate) and Project Funding Plan (or Affordable Housing Project Funding Plan, as appropriate) and such supporting documentation as District may reasonably request. Developer (or Affordable Housing Developer) shall further modify the Project Budget (or Affordable Housing Project Budget) and Project Funding Plan (or Affordable Housing Funding Plan) (i) upon receipt of the Commitment Letters for the Equity Investment and Debt Financing and (ii) within sixty (60) days but no later than thirty (30) days prior to Closing. Upon District’s approval of the modified Project Budget (or Affordable Housing Project Budget) and Project Funding Plan (or Affordable Housing Funding Plan) submitted pursuant to clause (ii), such modified Project Budget (or Affordable Housing Project Budget) and Project Funding Plan (or Affordable Housing Funding Plan) shall be the “**Final Project Budget and Funding Plan**” for such project, except that the Affordable Housing Project Budget and Affordable Housing Funding Plan shall not require District approval, but shall be updated and delivered to District in accordance with this Section 9.1.3.

9.1.4 Modifications. After Closing, Developer (or Affordable Housing Developer, as the case may be) shall be permitted to modify the Final Project Budget and Funding Plan for the Project (or the Affordable Housing Project) with District’s approval, as may be reasonably necessary to construct the Project (or the Affordable Housing Project) in accordance with the applicable Approved Construction Drawings, provided that the applicable Development and Completion Guaranty remains in full force and effect and Developer (or Affordable Housing Developer) notifies District of such modifications in accordance with the applicable Construction and Use Covenant. Notwithstanding anything else in this subsection, the Final Project Budget and Funding Plan for the Project or the Affordable Housing Project may be modified without District’s approval if such modifications are as a result of non-Material Changes to the Approved Construction Drawings, use of contingency funds, or transfers among “hard” and “soft” cost budget items, exclusive of fees payable to Developer (or Affordable Housing Developer); provided, however, that in the event either Final Project Budget and Funding Plan is modified without District’s approval, Developer (or Affordable Housing Developer) shall notify District of such modification within five (5) Business Days of such modification.

9.2 DEBT FINANCING.

9.2.1 No Encumbrances. Beginning at Closing, Developer shall not obtain any Debt Financing or engage in any other transaction that shall create a Mortgage or other encumbrance or lien upon the Property or Developer's interest in the Property, whether by express agreement or operation of law, or suffer any encumbrance or lien to be made on or attached to the Property without the prior written approval of District, in its sole but reasonable discretion. Affordable Housing Developer may obtain Debt Financing or engage in any other transaction that shall create a Mortgage or other encumbrance or lien upon the Affordable Housing Property, provided such encumbrance is subordinate to the applicable Construction and Use Covenant and the Affordability Covenant.

9.2.2 Bona Fide Indebtedness. The Debt Financing obtained in connection with Closing, the Affordable Housing Financing Closing and construction of the Project and Affordable Housing Project shall (i) secure a bona fide indebtedness to an Institutional Lender, the proceeds of which shall be applied only to the costs identified in the applicable Final Project Budget and Funding Plan; notwithstanding the foregoing, the proceeds of such Debt Financing or Mortgage shall not be used to fund the development, construction, operation or any other costs relating to any real property, personal property or business operation other than the Project (or the Affordable Housing Project); and (ii) the amount thereof, together with all other funds available to Developer, shall be sufficient to complete construction of the Project (or the Affordable Housing Project, as applicable).

9.2.3 Submissions. At least thirty (30) days prior to Closing, Developer shall submit to District, for the purpose of obtaining District's approval of any such Debt Financing or Mortgage, and at least (30) days prior to the Affordable Housing Financing Closing, Affordable Housing Developer shall submit to District for informational purposes, such documents as District may reasonably request, including, but not limited, copies of:

(a) the commitment or agreement between Developer (or Affordable Housing Developer) and the holder of such Debt Financing or Mortgage, certified by Developer (or Affordable Housing Developer) to be a true and correct copy thereof;

(b) a statement detailing the disbursement of the proceeds of the proposed Debt Financing, certified by Developer (or Affordable Housing Developer) to be true and accurate; and

(c) a copy of the proposed Mortgage and a description of the portion of the Property (or Affordable Housing Property) that such documents will encumber.

**ARTICLE 10
ASSIGNMENT AND TRANSFER**

10.1 Assignment by Developers. Prior to Closing, Developer and Affordable Housing Developer represent, warrant, covenant, and agree, for themselves and their respective successors and assigns, that Developer and Affordable Housing Developer (or any successor in

COUNCIL DRAFT

interest thereof) shall not assign its rights under this Agreement, or delegate its obligations under this Agreement, except to Developer's or Affordable Housing Developer's Affiliates or Members, without District's prior written approval, which may be granted or denied in District's sole discretion. After Closing, Developer (or Affordable Housing Developer) may transfer or assign the Property (or the Affordable Housing Property) (or portions thereof) in accordance with the applicable Construction and Use Covenant and the Deed (in the case of the Property), but in any event assignment shall not be permitted prior to Final Completion.

10.2 Transfer of Membership Interests. Prior to Closing, neither Developer nor any Member of Developer (or Affordable Housing Developer or any Member of Affordable Housing Developer) (including any successors in interest of Developer or Affordable Housing Developer or their respective Members) shall cause or suffer to be made any assignment, sale, conveyance or other transfer, or make any contract or agreement to do any of the same, whether directly or indirectly, of the membership interests of Developer or Affordable Housing Developer except to their respective Affiliates or Members or in connection with an Equity Investment in Developer (or Affordable Housing Developer, as the case may be); provided, however, no membership interest shall be held by a Prohibited Person ("**Transfer of Membership Interests**"). In no event shall the foregoing restrictions be deemed to prohibit or otherwise restrict transfers in ownership interest to any Member or an Affiliate of any Member, including, without limitation, transfers for estate planning purposes. After Closing, Developer or Affordable Housing Developer may conduct a Transfer of Membership Interests in accordance with the applicable Construction and Use Covenant and the Deed (in the event of Developer), but in any event a Transfer of Membership Interests shall not be permitted prior to Final Completion.

10.3 No Unreasonable Restraint. Developer and Affordable Housing Developer hereby acknowledge and agree that the restrictions on transfers set forth in this Article do not constitute an unreasonable restraint on Developer's or Affordable Housing Developer's right to transfer or otherwise alienate the Property or the Affordable Housing Property, as applicable, or their respective rights under this Agreement. Developer and Affordable Housing Developer hereby waive 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.

10.4 Assignment by District. District represents, warrants, covenants and agrees that it shall not assign its rights or delegate its obligations under this Agreement except to another District agency or to an entity controlled by District.

ARTICLE 11 INSURANCE OBLIGATIONS; INDEMNIFICATION

11.1 INSURANCE OBLIGATIONS.

11.1.1 Insurance Coverage. During the periods identified below, and in addition to any insurance policies required under the terms of the Construction and Use Covenant, Developer and Affordable Housing Developer shall carry and maintain in full force and effect the following insurance policies:

COUNCIL DRAFT

(a) Automobile Liability and Commercial General Liability Insurance - At all times after Closing until achievement of Final Completion with respect to the Project and the Affordable Housing Project, Developer and Affordable Housing Developer shall maintain and/or cause its 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 Developer and Affordable Housing Developer is required to carry shall not be construed as any limitation on Developer's or Affordable Housing Developer's liability under this Agreement. The foregoing limits may be increased by District from time to time, in its reasonable discretion.

(b) Workers' Compensation Insurance - At all times after Closing until achievement of Final Completion with respect to the Project and the Affordable Housing Project, Developer and Affordable Housing Developer shall maintain and cause its general contractor and any subcontractors to maintain workers' compensation insurance in such amounts as required by Applicable Law.

(c) Professional Liability Insurance - During development of the Project and Affordable Housing Project, Developer and Affordable Housing Developer shall cause their respective Architect and every engineer or other professional who will perform services in connection with the Project or the Affordable Housing 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.

(d) Contractor's Pollution Legal Liability Insurance - At all times after Closing until achievement of Final Completion with respect to the Project and the Affordable Housing Project, Developer shall not remove, store, transport, or dispose of Hazardous Materials if the cost of such removal, storage, transport or disposal is reasonably expected to exceed \$1,000,000, without first obtaining (or causing its contractor to obtain) a Contractor's Pollution Legal Liability Insurance Policy covering Developer's liability during such activities, if such policy is available at a commercially reasonable cost. The policy shall include such coverage for bodily injury, personal injury, loss of, damage to, or loss of use of property, directly or indirectly arising out of the discharge, dispersal, release or escape of Hazardous Materials.

11.1.2 General Policy Requirements. Developer and Affordable Housing Developer shall name District as an additional insured under all policies of liability insurance identified above. 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 11.1 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. Prior to any entry onto the Property at

COUNCIL DRAFT

any time pursuant to this Agreement, Developer shall furnish to District certificates of insurance (or copies of the policies if requested by District) together with satisfactory evidence of payment of premiums for such policies. 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.

11.2 INDEMNIFICATION.

Developer and Affordable Housing Developer, jointly and severally, shall indemnify, defend, and hold harmless District from and against any and all losses, costs, claims, damages, liabilities, and causes of action (including reasonable attorneys' fees and court costs) arising out of death of or injury to any person or damage to any property that is directly or indirectly caused by any acts done on their respective properties or any acts or omissions of Developer and Developer's Agents or Affordable Housing Developer and Affordable Housing Developer's Agents; provided, however, that the foregoing indemnity shall not apply to any losses, costs, claims, damages, liabilities, and causes of action (including reasonable attorneys' fees and court costs) due to the gross negligence or willful misconduct of District. The obligations of Developer and Affordable Housing Developer under this Section shall survive Closing or the earlier termination of this Agreement.

**ARTICLE 12
NOTICES**

12.1 TO DISTRICT.

Any notices given under this Agreement 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 District at the following addresses:

District of Columbia
Office of the Deputy Mayor for Planning and Economic Development
1350 Pennsylvania Avenue, NW, Suite 317
Washington, DC 20004
Attn: Project Manager- 5th&I

With a copy to:

Office of the Attorney General for the District of Columbia
441 4th Street, NW, Suite 1010S
Washington, DC 20001
Attn: Deputy Attorney General, Commercial Division

12.2 TO DEVELOPERS.

COUNCIL DRAFT

Any notices given under this Agreement 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 and Affordable Housing Developer at the following addresses:

TPC 5TH & I PARTNERS, LLC
c/o The Peebles Corporation
2020 Ponce De Leon Blvd., Suite 907
Coral Gables, FL 333134
Attn: Lowell Plotkin, General Counsel

With a copy to:

Debra D. Yogodzinski, Esq.
Rogers Yogodzinski LLP
1129 20th Street, NW, Suite 300
Washington, DC 20036

Notices served upon Developer, Affordable Housing 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 pre-paid, on the date of actual delivery or refusal thereof. If notice is tendered under the terms of this Agreement 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 Agreement. The Parties agree that counsel to any of them may provide notice to the other Parties under this Agreement.

ARTICLE 13 MISCELLANEOUS

13.1 PARTY IN POSITION OF SURETY WITH RESPECT TO OBLIGATIONS.

Developers, for themselves and their respective successors and assigns and for all other persons who are or who shall become, whether by express or implied assumption or otherwise, liable upon or subject to any obligation or burden under this Agreement, hereby waive, to the fullest extent permitted by law and equity, any and all claims or defenses otherwise available on the grounds of their being or having become a person in the position of surety, whether real, personal, or otherwise or whether by agreement or operation of law, including, without limitation any and all claims and defenses based upon extension of time, indulgence or modification of this Agreement.

13.2 CONFLICT OF INTERESTS; REPRESENTATIVES NOT INDIVIDUALLY LIABLE.

COUNCIL DRAFT

No official or employee of District shall participate in any decision relating to this Agreement which affects his personal interests or the interests of any District of Columbia agency, partnership, or association in which he is, directly or indirectly, interested. No official or employee of District shall be personally liable to Developers or any successor-in-interest in the event of any default or breach by District or for any amount which may become due to Developers or such successor-in-interest or on any obligations hereunder. Further, no member, employee, officer, director, or shareholder of Developers shall be personally liable to District in the event of any default or breach by Developer or Affordable Housing Developer or for any amount which may become due to District or on account of any obligations hereunder.

13.3 SURVIVAL; PROVISIONS NOT MERGED WITH DEED.

Unless expressly stated otherwise herein, the provisions of this Agreement are intended to and shall merge with the Deed.

13.4 TITLES OF ARTICLES AND SECTIONS.

Titles and captions of the several parts, articles, and sections of this Agreement are inserted for convenient reference only and shall be disregarded in construing or interpreting Agreement provisions.

13.5 LAW APPLICABLE; FORUM FOR DISPUTES.

This Agreement shall be governed by, interpreted under, construed, and enforced in accordance with the laws of the District of Columbia, without reference to the conflicts of laws provisions thereof. District and Developers irrevocably submit to the jurisdiction of (a) the courts of the District of Columbia and (b) the United States District Court for the District of Columbia for the purposes of any suit, action, or other proceeding arising out of this Agreement or any transaction contemplated hereby. District and Developers irrevocably and unconditionally waive any objection to the laying of venue of any action, suit, or proceeding arising out of this Agreement or the transactions contemplated hereby in the courts described in (a) and (b), above, and hereby further waive and agree not to plead or claim in any such court that any such action, suit, or proceeding brought in any such court has been brought in an inconvenient forum.

13.6 ENTIRE AGREEMENT; EXHIBITS.

13.6.1 This Agreement (including the Exhibits annexed hereto and made part hereof including, without limitation, the Council Term Sheet), together with any document delivered pursuant to this Agreement collectively contain all the agreements and understandings between District and Developers relative to the transactions contemplated herein and thereby and there are no agreements or understandings, oral or written, expressed or implied, between them with respect thereto other than as herein set forth or expressly referenced herein and made a part hereof. Upon execution of this Agreement, all previous agreements shall be deemed null and void.

COUNCIL DRAFT

13.6.2 All Exhibits are incorporated herein by reference, whether or not so stated. In the event of any conflict between the Exhibits and this Agreement that occurs prior to Closing, this Agreement shall control. In the event of any conflict between the Exhibit and this Agreement that occurs after Closing, the Exhibits shall control.

13.7 COUNTERPARTS.

This Agreement may be executed in any number of counterparts, each of which shall be an original but all of which shall together constitute one and the same instrument. Delivery of executed counterparts of this Agreement by facsimile or e-mail .pdf shall be sufficient for all purposes and shall be binding on any Person who so executes.

13.8 TIME OF PERFORMANCE.

All dates for performance (including cure) shall expire at 6:00 p.m. (Eastern time) on the performance or cure date. A performance date which falls on a Saturday, Sunday, or District holiday is automatically extended to the next Business Day.

13.9 SUCCESSORS AND ASSIGNS.

This Agreement shall be binding upon and shall inure to the benefit of, the successors and assigns of District, Developer and Affordable Housing Developer, and where the term "Developer", "Affordable Housing Developer" or "District" is used in this Agreement, it shall mean and include their respective successors and assigns.

13.10 THIRD PARTY BENEFICIARY.

No Person shall be a third party beneficiary of this Agreement.

13.11 WAIVER OF JURY TRIAL.

TO THE EXTENT PERMITTED BY LAW, ALL PARTIES HERETO WAIVE THE RIGHT TO TRIAL BY JURY IN CONNECTION WITH ANY LITIGATION ARISING IN RESPECT OF THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

13.12 FURTHER ASSURANCES.

Each Party agrees to execute and deliver to the other Parties such additional documents and instruments as the other Parties reasonably may request in order to fully carry out the purposes and intent of this Agreement.

13.13 MODIFICATIONS AND AMENDMENTS.

None of the terms or provisions of this Agreement may be changed, waived, modified, or removed except by an instrument in writing executed by the Party or Parties against which

COUNCIL DRAFT

enforcement of the change, waiver, modification, or removal is asserted. None of the terms or provisions of this Agreement shall be deemed to have been abrogated or waived by reason of any failure or refusal to enforce the same. In addition, if any Party seeks to amend or change any material terms set forth in the Council Term Sheet, the Parties must seek and receive Council approval as required under D.C. Official Code § 10-801(b-1)(6).

13.14 SEVERABILITY.

If any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future Applicable Law, such provisions shall be fully severable, this Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable provision had never comprised a part of this Agreement, and the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance from this Agreement. Furthermore, there shall be added automatically as a part of this Agreement a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable.

13.15 ANTI-DEFICIENCY LIMITATION; AUTHORITY.

13.15.1 Though no financial obligations on the part of District are anticipated, Developers acknowledge that District is not authorized to make any obligation in advance or in the absence of lawfully available appropriations and that 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 § 47-105; (iii) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01 – 355.08, as the foregoing statutes may be amended from time to time; and (iv) Section 446 of the District of Columbia Home Rule Act.

13.15.2 Developers acknowledge and agree that any unauthorized act by District is void. It is Developers' obligation to accurately ascertain the extent of District's authority.

13.16 TIME OF THE ESSENCE; STANDARD OF PERFORMANCE.

Time is of the essence with respect to all matters set forth in this Agreement. For all deadlines set forth in this Agreement, the standard of performance of the Party required to meet such deadlines shall be strict adherence and not reasonable adherence.

13.17 NO PARTNERSHIP.

Nothing contained herein shall be deemed or construed by the Parties hereto or any third party as creating the relationship of principal and agent or of partnership or of joint venture between Developer and/or Affordable Housing Developer, on the one hand, and District, on the other hand.

13.18 EACH PARTY TO BEAR ITS OWN COSTS.

COUNCIL DRAFT

Each Party shall bear its own costs and expenses incurred in connection with the negotiation of this Agreement and the performance of such Party's duties and obligations hereunder.

13.19 DISCRETION.

Unless explicitly provided to the contrary in this Agreement, where any Party has the right to approve or consent to any matter herein, such approval or consent shall not be unreasonably withheld, conditioned, or delayed nor any charge made therefor.

13.20 FORCE MAJEURE.

Neither District nor Developers, as the case may be, nor any successor-in-interest, shall be considered in default under this Agreement with respect to their respective obligations with respect to the Property or the Affordable Housing Property in the event of forced delay in the performance of such obligations due to Force Majeure, and the periods allowed for the performance by the Party(ies) of such obligation(s) shall be extended on a day-for-day basis for so long as one or more Force Majeure events continues to materially and adversely affect the performance by such Party of such obligations. The Party seeking the benefit of this Section 13.20 shall notify the other Parties in writing within ten (10) days after it becomes aware of the beginning of any such Force Majeure event of the cause or causes thereof, with supporting documentation, and request an extension for the period of the forced delay; (b) in the case of a delay in obtaining Permits, Developers must have filed complete applications for such Permits by the dates set forth in the Schedule of Performance and hired an expeditor reasonably acceptable to District to monitor and expedite the Permit process; (c) in the case of any other delay in obtaining approval from, or changes ordered by, any District governmental entity, Developers must have notified the Office of the Deputy Mayor for Planning and Economic Development when the issue arose, and (d) the Party seeking the delay must take commercially reasonable actions to minimize the delay. If any Party requests any extension on the date of completion of any obligation hereunder due to Force Majeure, it shall be the responsibility of such Party to reasonably demonstrate that the delay was caused specifically by a delay of a critical path item of such obligation.

13.21 JOINT PREPARATION.

Each of the Parties acknowledges that it has thoroughly read and reviewed this Agreement, including all Exhibits and attachments thereto, and has sought and received whatever competent advice and counsel as was necessary for it to form a full and complete understanding of all rights and obligations herein. The language of this Agreement has been agreed to by the Parties to express their mutual intent and no rule of strict construction shall be applied against any Party hereto.

[Signature Pages Follow]

COUNCIL DRAFT

IN WITNESS WHEREOF, District and Developers have each caused this Agreement to be signed, acknowledged and delivered in its name by its duly authorized representative as of the day and year first above written.

DISTRICT:

DISTRICT OF COLUMBIA, by and through the Office of the Deputy Mayor for Planning and Economic Development

Witness:

By: _____

Name: M. Jeffrey Miller

Title: Interim Deputy Mayor for Planning and Economic Development

Approved as to legal sufficiency:

D.C. Office of the Attorney General

By: _____

Assistant Attorney General

Date: _____

DEVELOPER:

TPC 5TH & I PARTNERS LLC, a District of Columbia limited liability company

BY: TPC 5th & I Manager LLC, a District of Columbia limited liability company

By: _____
R. Donahue Peebles, Jr.

Title: _____

Witness:

AFFORDABLE HOUSING DEVELOPER:

MLK DC AH Developer, LLC, a Delaware limited liability company

By: _____
R. Donahue Peebles, Jr.
Authorized Signatory

Witness:

COUNCIL DRAFT

EXHIBITS

Exhibits:

- Exhibit A-1 Legal Description of the Property
- Exhibit A-2 Legal Description of the Affordable Housing Property
- Exhibit B Form of Affordability Covenant
- Exhibit C Affordable Housing Plan [*to be attached when complete*]
- Exhibit D CBE Agreement(s)
- Exhibit E-1 Form of Construction and Use Covenant for the Property
- Exhibit E-2 Form of Construction and Use Covenant for the Affordable Housing Property
- Exhibit F Council Term Sheet
- Exhibit G First Source Agreement(s)
- Exhibit H-1 Project Development Plan
- Exhibit H-2 Affordable Housing Development Plan
- Exhibit I Deed
- Exhibit J Schedule of Performance
- Exhibit K Right of Entry Agreement [*to be attached when complete*]
- Exhibit L-1 Project Funding Plan
- Exhibit L-2 Affordable Housing Funding Plan
- Exhibit M-1 Project Budget
- Exhibit M-2 Affordable Housing Project Budget
- Exhibit N-1 Form of Development and Completion Guaranty for the Project
- Exhibit N-2 Form of Development and Completion Guaranty for the Affordable Housing Project
- Exhibit O Form of Deposit Letter of Credit

COUNCIL DRAFT

Exhibit A-1
Legal Description of the Property

All that certain lot, piece or parcel of land, together with all improvements thereon, situate, lying and being in the District of Columbia, and being all of Lot 59, Square 0516.

Exhibit A-2
Legal Description of the Affordable Housing Property

That certain lot, piece or parcel of land, together with all improvements thereon, situate, lying in the District of Columbia, and being a part of Lot 1023, Square 5782 and more particularly described as follows:

Commencing at a point at the northwest corner of Square 5782, being the intersection of the south line of V Street, S.E. and the east line of Martin Luther King Jr. Avenue, S.E.; thence S76°57'E 110.10 feet with the south line of V Street, S.E. to the Point of Beginning; thence continuing with the south line of V Street, S.E. S76°57'E 125.90 feet to a point; thence the following courses and distances: thence departing said south line of V Street, S.E. S13°03'W 130.0 feet to a point; thence N76°57'W 105.0 feet to a point; thence S13°03'W 16.81 feet to a point; thence N71°39'10"W 14.38 feet to a point; thence S20°22'32"W 48.03 feet to a point; thence S16°25'52"W 24.01 feet to a point; thence N71°39'10"W 17.35 feet to a point; thence N17°53'E 216.26 feet to the Point of Beginning and containing 18,841 square feet by record.

COUNCIL DRAFT

Exhibit B
Form of Affordability Covenant

Exhibit B

AFFORDABLE HOUSING COVENANT

THIS AFFORDABLE HOUSING COVENANT (this “**Covenant**”) is made as of the ___ day of _____, 20_ (“**Effective Date**”), by MLK DC AH DEVELOPER, LLC, a Delaware limited liability company and its successors and assigns (the “**Developer**”) having an address of _____, for the benefit of the DISTRICT OF COLUMBIA, a municipal corporation, acting by and through the Office of the Deputy Mayor for Planning and Economic Development (the “**District**”).

RECITALS

R-1. Developer is the fee simple owner of certain real property located in the District of Columbia as further described in **Exhibit A** (the “**Property**”).

R-2. District has determined to further its public policy of increasing the affordable housing stock in the District of Columbia and, in particular, on the Property.

R-3. District, TPC 5th & I Partners, LLC, a District of Columbia limited liability company (“TPC”) and Developer entered into that certain Land Disposition and Development Agreement, dated _____, 20__, as the same may be amended (the “**Development Agreement**”) whereby, *inter alia*, Developer agreed to construct on the Property a multifamily housing building containing no less than 61 Affordable Units (the “**Project**”), in conformance with the requirements set forth in this Covenant and the Construction and Use Covenant, dated as of this date between Developer and District (the “**Construction and Use Covenant**”), recorded as an encumbrance on the Property in the Land Records of the District of Columbia immediately prior to the recordation of this Covenant, and after the construction of the Project Developer shall manage and lease the Affordable Units to be constructed in the Project in accordance with this Covenant.

R-5. District and Developer desire to set forth herein the terms, restrictions, and conditions upon which Developer will construct, maintain, sell and/or lease the Affordable Units in the Project.

NOW THEREFORE, in consideration of the foregoing and other good and valuable consideration, the District and Developer hereby declare, covenant and agree as follows:

**ARTICLE I
DEFINITIONS**

For the purposes of this Covenant, the capitalized terms used herein 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 Period: is defined in Article X.

Affordability Requirement: is the requirement that one hundred percent (100%) of the Residential Units to be contained in the Project are to be Affordable Units and reserved for Households with an Annual Household Income at or below sixty percent (60%) AMI.

Affordable Unit Marketing Plan: means Developer’s plan for marketing the rental or initial sale of the Affordable Units, as approved by the Agency pursuant to Section 2.3.

Affordable Unit: means each Residential Unit that will be used to satisfy the Affordability Requirement, all of which shall be identified in the Affordable Unit Index.

Affordable Unit Index: is an index of the Affordable Units contained in the Project, that identifies: (i) unit number (or similar identifier), floor, and location for each Affordable Unit and whether each Affordable Unit is a Rental Affordable Unit or For Sale Affordable Unit; (ii) the Designated Affordability Level of each Affordable Unit; (iii) the approximate square footage and number of bedrooms of each Affordable Unit and a schematic drawing showing the layout of the unit; (iv) a listing or schedule of the standard and upgrade options of finishes, fixtures, equipment, and appliances for all Residential Units; (v) a listing or schedule of the amenities, services, upgrades, parking, and other facilities that will be offered as an option at an additional upfront or recurring cost or fee to the Residential Units; and (vi) residential floor plans showing the location of each Residential Unit.

Affordable Unit Owner: means a Qualified Purchaser who own(s) a For Sale Affordable Unit.

Affordable Unit Tenant: means a Qualified Tenant who lease(s) a Rental Affordable Unit.

Agency: means, as of the Effective Date, the D.C. Department of Housing and Community Development, pursuant to Mayor’s Order 2009-112 (effective June 18, 2009), or such other agency of the District of Columbia government that may subsequently be delegated the authority of the Mayor to monitor, enforce or otherwise administer the affordable housing requirements of the District of Columbia government.

AMI: means the most current “area median income” (also known as “median family income” or “MFI”) for a household of four persons in the “Washington Metropolitan Statistical Area” as periodically published by HUD, and adjusted for Household size without regard to any adjustments made by HUD for the purposes of the programs it administers.

Annual Household Income: means the aggregate annual income of a Household as determined by using the standards set forth in 24 CFR § 5.609, as may be amended, or as otherwise set forth by the Agency.

Annual Report: has the meaning given in Section 4.10.

Business Day: means Monday through Friday, inclusive, other than holidays recognized by the District of Columbia government.

Certificate of Purchaser Eligibility: means a certification executed by a Household prior to its purchase of an Affordable Unit, in a form approved by the Agency, that shall be given to the Agency, Owner, and the Certifying Authority representing and warranting the following: (a) the Household is a Qualified Purchaser and has disclosed all of its Annual Household Income to the Certifying Authority and has provided reasonably satisfactory documentation evidencing such Annual Household Income, (b) the Household's Annual Household Income is at or below the Maximum Annual Household Income for the applicable Affordable Unit, (c) the Household has been informed of its rights and obligations under this Covenant, (d) the Household intends to occupy the Affordable Unit as its principal residence, (e) that the Household size is within the Occupancy Standard for the Affordable Unit, and (f) any other reasonable and customary representations requested by the Agency.

Certificate of Tenant Eligibility: means a certification by a Household at its initial occupancy of an Affordable Unit, in a form approved by the Agency, that shall be given to the Agency, Developer, and the Certifying Authority representing and warranting the following: (a) the Household is a Qualified Tenant and has disclosed all of its Annual Household Income to the Certifying Authority, (b) the Household's Annual Household Income is at or below the Maximum Annual Household Income for the applicable Affordable Unit, (c) the Household has been informed of its rights and obligations under this Covenant, (d) the Household intends to occupy the Affordable Unit as its principal residence, (e) that the Household size is within the Occupancy Standard for the Affordable Unit, and (f) any other reasonable and customary representations requested by the Agency.

Certification of Income: means a certification made by a Certifying Authority that verifies the Annual Household Income of a Qualified Tenant or Qualified Purchaser, as applicable, meets the Designated Affordability Level for an applicable Affordable Unit and meets the requirements of Section 4.5 or Section 5.2.1, as applicable, in such form as the Agency approves.

Certification of Inspection: means a certification by Developer that it has performed or caused to be performed an inspection of a Rental Affordable Unit and that, to the best of Developer's knowledge, such Rental Affordable Unit is in compliance with all applicable statutory and regulatory requirements, in such form as the Agency approves.

Certification of Residency: means a certification made by an Affordable Tenant or Affordable Unit Owner that states that the Affordable Tenant or Affordable Unit Owner occupies the Affordable Unit as its principal residence, in such form as the Agency approves.

Certifying Authority: means an entity or entities approved by the Agency pursuant to Section 2.4.

Designated Affordability Level: means the percentage of AMI assigned to each Affordable Unit, at or below which a Qualified Purchaser's or Qualified Tenant's, as applicable, Annual Household Income must fall.

Developer: is identified in the preamble of this Covenant.

For Sale Affordable Unit: means an Affordable Unit that shall be sold to a Qualified Purchaser.

Foreclosure Notice: is defined in Section 8.4.

Household(s): means all persons who will occupy the Affordable Unit, including all persons over eighteen (18) years of age whose names will appear on the lease, the purchaser's or tenant's as applicable, spouse or domestic partner and children under eighteen (18) years of age. A Household may be a single family, one (1) person living alone, two (2) or more families living together, or any other group of related or unrelated persons who share living arrangements as allowable by this Covenant.

Household Size Adjustment Factor (HAF): means the factor related to the number of individuals in a Household for the purpose of establishing the Maximum Annual Household Income of an Affordable Unit, as set forth in the following table:

Household Size	Household Adjustment Factor
1	0.7
2	0.8
3	0.9
4	1
5	1.1
6	1.2

Housing Cost: means (a) the total monthly payments for rent and Utilities for Rental Affordable Units, less any rental subsidies paid on behalf of that Household, and (b) the total monthly mortgage payments, property tax, hazard insurance, if applicable, and condominium or homeowner fees for For Sale Affordable Units.

HUD: means the United States Department of Housing and Urban Development.

Land Records: means the real property records for the District of Columbia located in the Recorder of Deeds.

Market-Rate Unit: is each Residential Unit that is not an Affordable Unit.

Maximum Allowable Rent: as defined in Section 4.4.2.

Maximum Annual Household Income or MAXI: is the maximum Annual Household Income of a Household occupying an Affordable Unit as calculated pursuant to (a) Section 4.5.1 for Rental Affordable Units and (b) Section 5.2.1 for For Sale Affordable Units.

Maximum Resale Price: is the maximum resale price of a For-Sale Affordable Unit as determined pursuant to the procedures contained in **Schedule 3** attached hereto.

Maximum Sales Price: as defined in Section 5.1.1.

Minimum Annual Household Income or **MINI**: is the minimum Annual Household Income of a Household occupying an Affordable Unit as calculated pursuant to (a) Section 4.5.2 for Rental Affordable Units and (b) Section 5. 2.1 for For Sale Affordable Units.

Mortgage: means a mortgage, deed of trust, mortgage deed, or such other classes of instruments as are commonly given to secure a debt under the laws of the District of Columbia.

Mortgagee: means the holder of a Mortgage.

OAG: means the Office of the Attorney General for the District of Columbia.

Occupancy Standard: means the minimum number of individuals in a Household permitted to occupy any given Affordable Unit, as identified in the following chart:

Affordable Unit Size (Number of Bedrooms)	Minimum Number of Individuals in Affordable Unit
Studio/Efficiency	1
1	1
2	2
3	3
4	4
5	5
6	6

Occupancy Standard Factor: means the factor related to the assumed number of occupants for the purpose of establishing the Maximum Allowable Rent or Maximum Sales Price, as applicable, of an Affordable Unit as set forth in the following table:

Size of Affordable Unit	Occupancy Pricing Standard	Occupancy Standard Factor
Efficiency/Studio	1	.7
1 Bedroom	2	.8
2 Bedroom	3	.9
3 Bedroom	5	1.1

Over-Income Tenant: as defined in Section 4.6.5.

Owner: means, in the context of Rental Affordable Units, Developer, its successors and assigns, and in the context of For Sale Affordable Units, Developer, its successors and assigns, for so long as Developer owns the applicable For Sale Affordable Unit, and then thereafter, the Affordable Unit Owner that owns such For Sale Affordable Unit.

Person: means any individual, corporation, limited liability company, trust, partnership, association, or other legal entity.

Project: means the structures, landscaping, hardscape and/or site improvements to be constructed or placed on the Property pursuant to the Development Agreement.

Property: is defined in the Recitals.

Qualified Purchaser: means a Household that (i) has an Annual Household Income, as certified by the Certifying Authority, less than or equal to the Maximum Annual Household Income for the applicable Affordable Unit, (ii) shall occupy the Affordable Unit as its principal residence during its ownership of such Affordable Unit, (iii) shall not permit exclusive occupancy of the Affordable Unit by any other Person, (iv) shall use, occupy, hold and sell the Affordable Unit as an Affordable Unit subject to the Affordability Requirement (including the requirement to sell the Affordable Unit to a Qualified Purchaser) and this Covenant, and (v) shall occupy the Affordable Unit within the Occupancy Standard.

Qualified Tenant: means a Household that (i) has an Annual Household Income, as certified by the Certifying Authority, less than or equal to the Maximum Annual Household Income for the applicable Affordable Unit at the time of leasing and subsequent lease renewals, (ii) shall occupy the Affordable Unit as its principal residence during its lease of such Affordable Unit, (iii) shall not permit exclusive occupancy of the Affordable Unit by any other Person, (iv) shall use and occupy the Affordable Unit as an Affordable Unit subject to the Affordability Requirement and this Covenant and (v) shall occupy the Affordable Unit within the Occupancy Standard.

Rental Affordable Unit: means an Affordable Unit that shall be leased to a Qualified Tenant.

Rental Affordable Unit Lease Rider: is that certain lease rider, which is attached to this Covenant as **Exhibit B** and incorporated herein, as the same may be amended from time to time with the written approval of the Agency.

Rental Formula: is defined in Section 4.4.2.

Residential Unit: means an individual residential unit constructed as part of the Project.

Sale: is defined in Section 5.1.

Transferee: is defined in Section 5.8.

Utilities: means water, sewer, electricity, and natural gas.

ARTICLE II AFFORDABILITY REQUIREMENT

2.1 **Requirement of Affordability.** Developer shall construct, reserve, and either maintain and lease as Rental Affordable Units, or sell as For Sale Affordable Units that number of Affordable Units that are required by the Affordability Requirement.

2.2 Affordable Unit Standards and Location.

2.2.1 *Affordable Unit Index.* As of the date of this Covenant, District has approved the Affordable Unit Index, which is attached hereto as Exhibit C. Developer shall not amend or modify the Affordable Unit Index, except to the extent permitted under Section 4.6.6, without the Agency's prior written approval, which shall not be unreasonably withheld, conditioned or delayed. Any such approved amendment or modification shall be recorded in the Land Records as an amendment to this Covenant.

2.3 Marketing Affordable Units.

2.3.1 *Marketing Plan.* Developer shall create an Affordable Unit Marketing Plan that sets forth its plan for marketing the Affordable Units to Households who may be Qualified Tenants or Qualified Purchasers, as applicable. The Affordable Unit Marketing Plan shall be subject to the Agency's prior written approval, which approval shall not be unreasonably withheld, conditioned or delayed, and shall be submitted to and approved by the Agency prior to marketing any Affordable Units for sale or rent. Developer may contract with the Certifying Authority to implement the Affordable Unit Marketing Plan.

2.3.2 *Housing Locator.* When an Affordable Unit becomes available for rent or for sale, Owner shall register the Affordable Unit on the Housing Locator website established under the Affordable Housing Clearinghouse Directory Act of 2008, D.C. Law 17-215, effective August 15, 2008, and indicate the availability of such Affordable Unit and the application process for the Affordable Unit.

2.4 **Certifying Authority.** Each Owner shall select a Certifying Authority, which shall be subject to the Agency's prior written approval, not to be unreasonably withheld, conditioned or delayed. Owner may contact the Agency with questions and information about the selection of a Certifying Authority. The Certifying Authority shall review documentation and verify a Household's Annual Household Income and Household's size in order to determine whether that Household is a Qualified Tenant or Qualified Purchaser, as applicable. If a Household is determined to be a Qualified Tenant or Qualified Purchaser, as applicable, the Certifying Authority shall issue a Certification of Income for the subject Household.

**ARTICLE III
USE**

3.1 **Use.** Except as provided herein, all Affordable Unit Owners and Affordable Unit Tenants shall have the same and equal use and enjoyment of all of the amenities of the Property and services provided at the Property as the owners or tenants of the comparable Market-Rate Units. No restrictions, requirements or rules shall be imposed on Affordable Unit Owners or Affordable Unit Tenants that are not imposed equally on the owners or tenants of the comparable Market-Rate Units. If amenities, services, upgrades, or ownership or rental of parking and other facilities are offered as an option at an additional upfront and or recurring cost or fee to the comparable Market-Rate Units, such amenities, services, upgrades, or ownership or rental of parking and other facilities shall be offered to the Affordable Unit Owners and Affordable Unit Tenants of comparable Affordable Units at the same upfront and or recurring cost or fee charged to the Market-Rate Units. If there is no cost or fee charged to the owners or tenants of the comparable Market-Rate Units for such amenities, services, upgrades, or ownership or rental of parking and other facilities, there shall not be a cost or fee charged to Affordable Unit Owners or Affordable Unit Tenants of comparable Affordable Units.

3.2 **Demolition/Alteration.** Owner shall maintain, upkeep, repair and replace interior components (including fixtures, appliances flooring and cabinetry) of the Affordable Units with interior components of equal or better quality than those interior components being replaced. Owner shall not demolish or otherwise structurally alter an Affordable Unit or remove fixtures or appliances installed in an Affordable Unit other than for maintenance and repair without the prior written approval of the Agency, which approval shall be in the sole discretion of the Agency.

**ARTICLE IV
RENTAL OF AFFORDABLE UNITS**

4.1 **Lease of Rental Affordable Units.** In the event the Project contains Rental Affordable Units, Developer shall reserve, maintain and lease the Rental Affordable Units to Qualified Tenants (a) in accordance with this Covenant, and (b) at a rental rate at or below the Maximum Allowable Rent.

4.2 **Rental Affordable Unit Lease Requirements.**

4.2.1 *Form of Lease.* To lease a Rental Affordable Unit to a Qualified Tenant, Developer shall use a lease agreement to which is attached and incorporated a Rental Affordable Unit Lease Rider. The Rental Affordable Unit Lease Rider shall be executed by Developer and each Qualified Tenant prior to the Qualified Tenant's occupancy of the Rental Affordable Unit. Any occupant of the Rental Affordable Unit who is eighteen (18) years or older shall be a party to the lease agreement and shall execute the Rental Affordable Unit Lease Rider.

4.2.2 *Effectiveness of Lease.* The lease of a Rental Affordable Unit shall only be effective if a Rental Affordable Unit Lease Rider, a Certification of Income and a Certificate of Tenant Eligibility are attached as exhibits to the lease agreement. Failure to attach the foregoing shall render the lease null and void *ab initio*.

4.2.3 *Developer to Maintain Copies.* Developer shall maintain or cause to be maintained copies of all initial and renewal leases executed with Qualified Tenants for a period of no less than five (5) years from the expiration or termination of such lease.

4.3 **Rental Affordable Unit Admissions Process.**

4.3.1 *Referrals.* Developer may obtain referrals of prospective tenants of Rental Affordable Units from federal and District of Columbia agencies, provided such referrals comply with the requirements of this Covenant. In all events, before a prospective tenant leases a Rental Affordable Unit, their Annual Household Income shall be verified by a Certifying Authority.

4.3.2 *Consideration of Applicants.* For the initial occupancy of the Rental Affordable Units, Developer shall select Qualified Tenants through a lottery system or other system as otherwise approved by the Agency as shall be further provided in the Affordable Unit Marketing Plan. Following the initial occupancy of the Affordable Units, Developer shall consider each applicant in the order in which received by Developer, whether received pursuant to the Affordable Unit Marketing Plan or referred pursuant to Section 4.3.1.

4.3.3 *Rejection of Applicants.* In connection with the leasing of a Rental Affordable Unit, Developer may reject any applicant if, after diligent review of such applicant's application, Developer determines in good faith that such applicant does not meet Developer's criteria to lease or occupy a Rental Affordable Unit, provided such criteria do not violate applicable District of Columbia and federal laws and is the same criteria used by Developer to lease or occupy the Market-Rate Units. In the event any rejected applicant raises an objection or challenges Developer's rejection of such applicant, Developer shall be solely responsible for ensuring that its rejection of such applicant is not in violation of federal law and/or the D.C. Human Rights Act, D.C. Official Code § 2-1400 *et seq.* Developer shall provide the Agency with all documents evidencing Developer's review and rejection of an applicant, upon the request of the Agency.

4.3.4 *Determination of Eligibility.* Each tenant seeking to occupy a Rental Affordable Unit shall have its Annual Household Income verified by and obtain a Certification of Income from the Certifying Authority prior to leasing such unit.

4.4 **Initial Rental Affordable Unit Lease Terms.**

4.4.1 *Term.* The term of any Rental Affordable Unit lease agreement shall be for a period of one (1) year.

4.4.2 *Establishment of Maximum Rent.* The maximum allowable monthly rent ("**Maximum Allowable Rent**" or "**MAR**") for each Rental Affordable Unit shall be determined through the use of one of the two following formulas: (a) $MAR = (AMI * DAL * OSF * 30\%) / 12 - MU$ (if the Household pays any Utility costs directly to the Utility providers) or (b) $MAR = (AMI * DAL * OSF * 30\%) / 12$ (if all Utility costs are included in the rent payment to Owner) ("**Rental Formula**"), where:

(1) AMI = see definitions

(2) DAL = Designated Affordability Level (%)

(3) OSF = Occupancy Standard Factor

(4) 30% = Thirty percent (30%)

(5) 12 = Number of months in the lease period

(6) MU = Monthly Utilities paid by the Affordable Unit Tenant. The utility schedule published by the District of Columbia Housing Authority shall be utilized to estimate the MU.

4.5 Income Determinations. The Annual Household Income for a prospective tenant of a Rental Affordable Unit shall be determined as of the date of the lease and any lease renewals for such Rental Affordable Unit. A Household's income eligibility to rent a Rental Affordable Unit is determined by calculating both the Maximum Annual Household Income for a Household occupying the Rental Affordable Unit and the Minimum Annual Household Income for a Household occupying the Rental Affordable Unit. The Certifying Authority shall verify that the Household's Annual Household Income is between the MAXI and MINI.

4.5.1 Maximum Annual Household Income. The Maximum Annual Household Income is determined through the use of the formula: $MAXI = (AMI * DAL * HAF)$. Examples of the calculation of Maximum Annual Household Income are included in the attached Schedule 1.

4.5.2 Minimum Annual Household Income. The Minimum Annual Household Income is determined by multiplying the monthly Housing Cost by twelve (12) and dividing this number by thirty-eight percent (38%). Examples of the calculation of the Minimum Annual Household Income are included in the attached Schedule 1.

4.6 Subsequent Lease Years.

4.6.1 Use of Rental Formula. Developer shall use the Rental Formula to determine the Maximum Allowable Rent in lease years after the first lease year.

4.6.2 Renewal by Affordable Unit Tenant. For each Affordable Unit Tenant who intends to renew its residential lease, no earlier than ninety (90) days and no later than thirty (30) days before each anniversary of the first day of a residential lease, Developer shall obtain the following: (i) a Certification of Residency from each such Affordable Unit Tenant; and (ii) a Certification of Income completed by the Certifying Authority. Developer shall not permit a renewal of an Affordable Unit Tenant's lease unless the Affordable Unit Tenant has provided Developer with these documents as required herein and the tenant is determined to be a Qualified Tenant. If the Affordable Unit Tenant fails to provide such documents, Developer shall treat such tenant as an Over-Income Tenant.

4.6.3 Annual Recertification of Tenants. Upon receipt of an Affordable Unit Tenant's renewal documents at annual recertification, Certifying Authority shall determine the Affordable Unit Tenant's income eligibility pursuant to Section 4.5 for the subject Rental Affordable Unit and notify Affordable Unit Tenant of the same within fifteen (15) days prior to the expiration of

the then-current lease term. Any Affordable Unit Tenant whose Annual Household Income remains at or below the Maximum Annual Household Income for the subject Rental Affordable Unit will be eligible to remain in the Rental Affordable Unit and to renew his/her lease at the then-current lease rate for the particular Rental Affordable Unit.

4.6.4 *Annual Recertification of Under Income Tenants.* Upon annual recertification, any Affordable Unit Tenant whose Annual Household Income remains at or below the Maximum Annual Household Income for the subject Rental Affordable Unit, but whose Annual Household Income is less than the Minimum Annual Household Income for the subject Rental Affordable Unit, may elect either to (i) remain in the Rental Affordable Unit paying rent, as established by the Owner, up to the then-current Maximum Allowable Rent for the subject Rental Affordable Unit or (ii) vacate the Rental Affordable Unit at the end of the tenant's lease term.

4.6.5 *Annual Recertification of Over-Income Tenants.* Upon annual recertification, if an Affordable Unit Tenant's Annual Household Income is determined to exceed the Maximum Annual Household Income for the subject Rental Affordable Unit (such tenant, an "**Over-Income Tenant**"), then the Over-Income Tenant may elect to remain in the Rental Affordable Unit and pay the rent applicable to a higher Designated Affordability Level, if a higher Designated Affordability Level exists for the Property, for which the Over-Income Tenant's Annual Household Income qualifies, whereupon Developer shall change the Designated Affordability Level of the Rental Affordable Unit to the higher Designated Affordability Level pursuant to Section 4.6.6, or Developer, at direction of the Agency, shall be required to give the Over-Income Tenant notice to quit the Property upon the expiration of its lease.

4.6.6 *Changes to Unit Location.* Developer may only change the designation of a Rental Affordable Unit to a new Designated Affordability Level, if one exists on the Property, or to a Market-Rate Unit, if any exist on the Property, as necessary to allow an Over-Income Tenant to remain in the unit. Following any change in designation of a Rental Affordable Unit to a higher Designated Affordability Level or to a Market-Rate Unit, as applicable, Developer shall designate the next available Rental Affordable Unit at that same higher Designated Affordability Level or Market-Rate Unit of similar size and location in the Property to the lower Designated Affordability Level from which the original Rental Affordable Unit had been changed in order to bring the Property in conformity with the Affordability Requirement.

4.6.7 *Rent from Subsidies.* Nothing herein shall be construed to prevent Developer from collecting rental subsidy or rental-related payments from any federal or District of Columbia agency paid to Developer and/or the Affordable Unit Tenant, or on behalf of an Affordable Unit Tenant, to the extent receipt of such payment is otherwise in compliance with the requirements of this Covenant. Such rental subsidy or rental-related payment shall be included in the calculation to determine if a tenant is a Qualified Tenant.

4.7 **No Subleasing of Rental Affordable Units.** An Affordable Unit Tenant may not sublease any portion of its Rental Affordable Unit or assign its lease to any other Household and Developer shall not knowingly allow such Rental Affordable Unit to be subleased, except with the Agency's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed.

4.8 Representations of Affordable Unit Tenant. By execution of a lease for a Rental Affordable Unit, each Affordable Unit Tenant shall be deemed to represent and warrant to the Agency and Developer, each of whom may rely thereon, that the Affordable Unit Tenant meets, and will continue to meet, all eligibility requirements contained in this Covenant for the rental of a Rental Affordable Unit.

4.9 Representations of Developer. By execution of a lease for a Rental Affordable Unit, Developer shall be deemed to represent and warrant to the Agency, which may rely on the following, that: (i) the Household is determined to be a Qualified Tenant by the Certifying Authority, and (ii) Developer is not collecting more than the Maximum Allowable Rent.

4.10 Annual Reporting Requirements. Beginning with the first occupancy of any Affordable Unit, Developer shall provide an annual report ("**Annual Report**") to the Agency regarding the Rental Affordable Units, which shall be submitted on each anniversary date of the Effective Date of this Covenant. The Annual Report shall include the following:

(a) the number and identification of the Rental Affordable Units, by bedroom count, that are occupied;

(b) the number and identification of the Rental Affordable Units, by bedroom count, that are vacant;

(c) for each Rental Affordable Unit that is vacant or that was vacant for a portion of the reporting period, the manner in which the Rental Affordable Unit became vacant (e.g. eviction or voluntary departure) and the progress in re-leasing that unit;

(d) for each occupied Rental Affordable Unit, the names and ages of all persons in the Household, the Household size, date of initial occupancy, and total Annual Household Income as of the date of the most recent Certification of Income;

(e) a sworn statement that, to the best of Developer's information and knowledge, the Household occupying each Rental Affordable Unit meets the eligibility criteria of this Covenant;

(f) a copy of each new or revised Certification of Income for each Household renting a Rental Affordable Unit;

(g) a copy of each new or revised Certification of Residency for each Household renting a Rental Affordable Unit;

(h) a copy of each inspection report and Certification of Inspection for each Rental Affordable Unit; and

(i) a copy of all forms, policies, procedures, and other documents reasonably requested by the Agency related to the Rental Affordable Units.

The Annual Reports shall be retained by Developer for a minimum of five (5) years after submission and shall be available, upon reasonable notice, for inspection by the Agency or its designee. Notwithstanding anything contained herein to the contrary, in the event that Developer provides a report to an agency within the District government with content substantially similar to the content of the Annual Reports described in this section, subject to the Agency's prior written approval, then the reporting requirements under this section shall be satisfied upon Developer's delivery of such report to the Agency. The Agency may request Developer to provide additional information in support of its Annual Report.

4.11 **Confidentiality.** Except as may be required by applicable law, including, without limitation to, the *District of Columbia Freedom of Information Act of 1976*, D.C. Code § 2-531 *et seq.* (2001), Developer, Certifying Authority and the Agency shall not disclose to third parties the personal information of the Households, including the identity of the Households, submitted as a part of the Annual Report.

4.12 **Inspection Rights.** The Agency or its designee shall have the right to inspect the Rental Affordable Units, upon reasonable advance notice to Developer. If Developer receives such notice, Developer shall, in turn, give reasonable advance notice of the inspection to the tenant(s) occupying the specific Rental Affordable Unit(s). The Agency or its designee shall have the right to inspect a random sampling of the Rental Affordable Units to confirm that the units are in compliance with applicable statutory and regulatory housing requirements and as otherwise permitted under this Covenant. The Agency or its designee shall have the right to conduct audits of a random sampling of the Rental Affordable Units and associated files and documentation to confirm compliance with the requirements of this Covenant.

ARTICLE V SALE OF AFFORDABLE UNITS

5.1 **Sale of For Sale Affordable Units.** In the event the Project contains For Sale Affordable Units, the Owner shall comply with the provisions of this Article V for the sale of such individual Affordable Units. Owner shall not convey all or any part of its fee interest ("**Sale**"), whether or not for consideration, in a For Sale Affordable Unit to any Person other than a Qualified Purchaser. Developer and each Affordable Unit Owner of such For Sale Affordable Unit shall only sell to a buyer who has obtained a Certification of Income and who is a Qualified Purchaser. The provisions of this Article V shall not apply to any sale by Developer of the entire Project to a new Owner.

5.1.1 *Maximum Sales Price.* The sale price of each For Sale Affordable Unit upon an initial Sale shall not exceed an amount (the "**Maximum Sales Price**") that is affordable to a Household with an Annual Household Income at the Designated Affordability Level, adjusted by the Occupancy Standard Factor, spending not more than thirty percent (30%) of their Annual Household Income on Housing Cost. The Housing Cost includes mortgage payments, property taxes, condominium and homeowner fees, and hazard insurance, if applicable, and shall be calculated in accordance with Schedule 2 attached hereto and incorporated herein. Developer shall submit to the Agency the proposed sales price for each For Sale Affordable Unit for approval prior to the marketing and sale of such For Sale Affordable Unit.

5.1.2 *Maximum Resale Price.* The Maximum Resale Price for each Sale subsequent to the initial Sale shall be calculated in accordance with Schedule 3 attached hereto and incorporated herein. The Agency shall approve the Maximum Resale Prices for each For Sale Affordable Unit prior to the marketing and resale of such For Sale Affordable Unit.

5.1.3 *Housing Purchase Assistance Program and other subsidized funding.* The Maximum Sales Price and Maximum Resale Price of a For Sale Affordable Unit shall be determined as described in Sections 5.1.1 and 5.1.2, regardless of the prospective buyer's use of Housing Purchase Assistance Program and/or other subsidized funding for the purchase of the For Sale Affordable Unit.

5.2 **Procedures for Sales.** The following procedures shall apply to (i) Developer with respect to the initial Sale of a For Sale Affordable Unit, and (ii) an Affordable Unit Owner of a For Sale Affordable Unit desiring to sell his or her For Sale Affordable Unit.

5.2.1 *Income Eligibility.* For any Qualified Purchaser, the Annual Household Income shall be determined as of the date of the sales contract for such For Sale Affordable Unit. To the extent settlement for a For Sale Affordable Unit will not occur within 90 days after the sales contract, the Annual Household Income of the prospective Qualified Purchaser shall be determined again within 90 days prior to settlement. A Household's eligibility to purchase a For Sale Affordable Unit is determined by calculating both the Maximum Annual Household Income for a Household seeking to occupy the For Sale Affordable Unit and the Minimum Annual Household Income for a Household seeking to occupy the For Sale Affordable Unit and verifying that the prospective Household's Annual Household Income is between the MAXI and MINI. The Maximum Annual Household Income is determined through the use of the formula: $MAXI = (AMI * DAL * HAF)$. Examples of the calculation of Maximum Annual Household Income are included in the attached Schedule 1. The Minimum Annual Household Income is determined by multiplying the total Housing Cost by twelve (12) and dividing this number by forty-one percent (41%). Examples of the calculation of Minimum Annual Household Income are included in the attached Schedule 1. The Housing Cost is determined by calculating the monthly mortgage payments using the actual terms of the Household's approved mortgage, and adding all applicable property taxes, homeownership or condominium fees, and hazard insurance. Each Qualified Purchaser shall have its Annual Household Income verified by and obtain a Certification of Income from the Certifying Authority prior to entering into the contract.

5.2.2 *Sale.* A Sale of a For Sale Affordable Unit shall only be effective if a Certificate of Purchaser Eligibility submitted by a Household to Owner and dated within ninety (90) days of the closing of such Sale is recorded prior to or contemporaneous with the deed conveying the Affordable Unit and (b) a Certification of Income is completed by a Certifying Authority within ninety (90) days before closing of such Sale. Owner, Mortgagee(s), District and any title insurer shall each be a third party beneficiary of each such Certificate of Purchaser Eligibility.

5.2.3 *Resale.* Prior to selling or otherwise transferring a fee interest in a For Sale Affordable Unit, the Affordable Unit Owner intending to re-sell such unit shall (i) contact the Agency to obtain the Maximum Resale Price and (ii) shall refer the prospective purchaser to the Agency to determine their eligibility to purchase the For Sale Affordable Unit.

5.3 Closing Procedures and Form of Deed.

5.3.1 *Owner to Provide Copy of Covenant.* Owner shall provide the Qualified Purchaser with a copy of this Covenant prior to or at the closing on the Sale of the For Sale Affordable Unit.

5.3.2 *Form of Deed.* All deeds used to convey a For Sale Affordable Unit must have a fully executed Certificate of Purchaser Eligibility attached, and shall include the following statement in twelve (12) point or larger type, in all capital letters, on the front page of the deed:

THIS DEED IS DELIVERED AND ACCEPTED SUBJECT TO THE PROVISIONS AND CONDITIONS SET FORTH IN THAT CERTAIN AFFORDABLE HOUSING COVENANT, DATED AS OF _____, 20__ RECORDED AMONG THE LAND RECORDS OF THE DISTRICT OF COLUMBIA AS INSTRUMENT NUMBER _____, ON _____ 20__, WHICH AMONG OTHER THINGS IMPOSES RESTRICTIONS ON THE SALE AND CONVEYANCE OF THE SUBJECT PROPERTY.

5.3.3 *Deed for For Sale Affordable Unit.* A deed for a For Sale Affordable Unit shall not be combined with any other property, including parking spaces or storage facilities, unless the price of such property is included in the Maximum Sales Price (for initial Sales) or Maximum Resale Price (for subsequent Sales).

5.3.4 *Post-Closing Obligations.* The purchaser of a For Sale Affordable Unit shall submit to the Agency within thirty (30) days after the closing a copy of the final executed HUD settlement statement, a copy of the deed recorded in the Land Records, the Certificate of Purchaser Eligibility, and the Certification of Income.

5.4 Rejection of Applicants. In connection with the Sale of a For Sale Affordable Unit, Owner may reject any applicant seeking to acquire a For Sale Affordable Unit who has obtained a Certification of Income or other evidence of eligibility adopted by the Agency, if, based on such applicant's application, background and/or creditworthiness (including, without limitation, the applicant's inability to provide credible evidence that such applicant will qualify for sufficient financing to purchase the For Sale Affordable Unit), such Owner determines in good faith that such applicant does not meet the criteria to purchase or occupy a For Sale Affordable Unit, provided that such criteria do not violate applicable District of Columbia and federal laws and are the same criteria as Market-Rate Units, except as required by this Covenant. In the event any rejected applicant raises an objection or challenges Owner's rejection of such applicant, Owner shall be solely responsible for ensuring that its rejection of any applicant is not in violation of federal law and/or the D.C. Human Rights Act, D.C. Official Code § 2-1400, *et seq.* Owner shall provide the Agency with all documents evidencing Owner's review and rejection of an applicant, upon the request of the Agency.

5.5 Representations of Owner. By execution of a deed for a For Sale Affordable Unit, Developer (for initial Sales) and the Affordable Unit Owner (for subsequent Sales) shall be deemed to represent and warrant to, and agree with, the Agency and, if applicable, the title company, each of whom may rely on the following: that (i) the Household is determined to be a

Qualified Purchaser by the Certifying Authority at the Designated Affordability Level, and (ii) the sale price satisfies the terms of this Covenant.

5.6 Annual Certification of Residency. During the Affordability Period, the Affordable Unit Owner shall submit to the Agency annually on the anniversary of the closing date for a For Sale Affordable Unit, a Certification of Residency. The Certification of Residency shall be submitted on or with such form as may be prescribed by Agency.

5.7 Leasing For Sale Affordable Units. An Affordable Unit Owner shall not lease, or permit a sublease of, a For Sale Affordable Unit except with the Agency's prior written consent, such consent not to be unreasonably withheld, conditioned or delayed in the event such subtenant is a Qualified Tenant. If the Agency approves the lease of a For Sale Affordable Unit, then that Unit shall be leased in compliance with District (e.g. rental unit registration) and federal laws, and any applicable corporate governing documents (e.g. condominium, cooperative or home owners' association bylaws or rules).

5.8 Transfers. Except as provided in Article VIII, in the event an Affordable Unit Owner voluntarily or involuntarily transfers all or part of the For Sale Affordable Unit pursuant to operation of law, court order, divorce, death to a transferee, heir, devisee or other personal representative of such owner of a For Sale Affordable Unit (each a "**Transferee**"), such Transferee, shall be automatically be bound by all of the terms, obligations and provisions of this Covenant; and shall either: (i) occupy the For Sale Affordable Unit if he or she is a Qualified Purchaser, or (ii) if the Transferee does not wish to or is unable to occupy the For Sale Affordable Unit, he or she shall promptly sell it in accordance with this Covenant.

5.9 Prohibition on Occupancy. In no event shall a Transferee who is not a Qualified Purchaser reside in a For Sale Affordable Unit for longer than ninety (90) days.

5.10 Progress Reports. Until all initial Sales of For Sale Affordable Units are completed, Developer shall provide Agency with annual progress reports, or more frequently upon request, on the status of its sale or rental of Affordable Units.

ARTICLE VI DEFAULT; ENFORCEMENT AND REMEDIES

6.1 Default; Remedies. In the event Owner, Affordable Unit Tenant, a Person or a Household defaults under any term of this Covenant and does not cure such default within thirty (30) days following written notice of such default from the Agency, the District shall have the right to seek specific performance, injunctive relief and/or other equitable remedies, including compelling the re-sale or leasing of an Affordable Unit and the disgorgement of rents and sale proceeds in excess of the rental rates and sale prices permitted hereunder, against the party in default under this Covenant.

6.2 No Waiver. Any delay by the Agency in instituting or prosecuting any actions or proceedings with respect to a default hereunder, in asserting its rights or pursuing its remedies hereunder shall not operate as a waiver of such rights.

6.3 **Right to Attorney's Fees.** If the District shall prevail in any such legal action to enforce this Covenant, then Owner, Affordable Unit Tenant, Person or Household against whom the District prevails, shall pay District all of its costs and expenses, including reasonable attorney fees, incurred in connection with District efforts to enforce this Covenant. If OAG is counsel for the District in such legal action, 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
COVENANTS BINDING ON SUCCESSORS AND ASSIGNS**

This Covenant is and shall be binding upon the Property and each Affordable Unit and shall run with the land as of the Effective Date through the Affordability Period. The rights and obligations of District, Developer, Affordable Unit Owner, and their respective successors, heirs, and assigns shall be binding upon and inure to the benefit of the foregoing parties and their respective successors, heirs, and assigns; provided however that all rights of District pertaining to the monitoring and/or enforcement of the obligations of Developer or Affordable Unit Owner hereunder shall be retained by District, or such designee of the District as the District may so determine. No Sale, transfer or foreclosure shall affect the validity of this Covenant, except as provided in Article VIII.

**ARTICLE VIII
MORTGAGES**

8.1 **Subordination of Mortgages.** All Mortgages placed against the Property, or any portion thereof, shall be subject and subordinate to this Covenant, except as provided in Section 8.3.3.

8.2 **Amount of Mortgage.** In no event shall the aggregate amount of all Mortgages placed against a For Sale Affordable Unit exceed an amount equal to one hundred five percent (105%) of the Maximum Resale Price for such unit. Prior to obtaining any Mortgage or refinancing thereof, the Affordable Unit Owner shall request from the Agency the then-current Maximum Resale Price for its For Sale Affordable Unit.

8.3 **Default of Mortgage and Foreclosure.**

8.3.1 *Notice of Default.* The Mortgagee shall provide the Agency written notice of any notice of default and notice of intent to foreclose under the Mortgage on the For Sale Affordable Unit. Notwithstanding the foregoing, in no event shall failure to provide such notices preclude the Mortgagee's right to proceed with its remedies for default under the Mortgage.

8.3.2 *Right of Purchase by the District.* The Agency shall have the right to purchase a For Sale Affordable Unit in the event a notice of default or notice of intent to foreclose for a Mortgage in first position was recorded in the Land Records. The purchase price shall be an amount that is the greater of (a) the amount of the debt secured by all Mortgages recorded against the subject For Sale Affordable Unit, including commercially reasonable costs and expenses, if any, incurred by Mortgagee as a result of a default and due and payable by the Affordable Unit Owner under the terms of the Mortgage or (b) the Maximum Resale Price. The

Agency shall have thirty (30) days from the date a notice of default or a notice of foreclosure sale was recorded in the Land Records to exercise its option and to purchase the For Sale Affordable Unit. The Agency's right to purchase shall automatically expire upon the transfer of the For Sale Affordable Unit by foreclosure or deed in lieu thereof. The Agency may designate another District of Columbia agency or third party to take title to the For Sale Affordable Unit.

8.3.3 Termination Upon Foreclosure and Assignment. In the event title to a For Sale Affordable Unit is transferred following foreclosure by, or deed in lieu of foreclosure to a Mortgagee in first position, or a Mortgage in first position is assigned to the Secretary of HUD, the terms of this Covenant applicable to such unit shall automatically terminate subject to Sections 8.3.4 and 8.4.

8.3.4 Apportionment of Proceeds. In the event title to a For Sale Affordable Unit is transferred according to the provisions of Section 8.3.3, the proceeds from such foreclosure or transfer shall be apportioned and paid as follows: first, to the Mortgagee, in the amount of debt secured under the Mortgage, including commercially reasonable costs and expenses, if any, incurred by Mortgagee and due and payable by the Affordable Unit Owner under the terms of the Mortgage; second, to any junior Mortgagees, in the amount of the debt secured under such Mortgages; third, to the For Sale Affordable Unit Owner, up to the amount of the Maximum Resale Price as of the date of such sale or transfer; and fourth, to the District.

8.3.5 Effect of Foreclosure on this Covenant. Except as provided in Section 8.3.3, in the event of foreclosure or deed in lieu thereof, this Covenant shall not be released or terminated and the Mortgagee or any Person who takes title to an Affordable Unit through a foreclosure sale shall become a Transferee in accordance with Section 5.8.

8.4 Assignment of Mortgage to the Secretary of HUD. In the event a Mortgage recorded in the first position against a For Sale Affordable Unit is assigned to the Secretary of HUD, the following shall occur upon the date of assignment: (a) the District's right to purchase, whether or not such right has been triggered, shall automatically expire and (b) the terms of this Covenant applicable to such unit shall automatically terminate pursuant to Section 8.3.3, except that upon sale of such unit by the For Sale Affordable Owner or foreclosure or deed in lieu thereof, the proceeds of such sale shall be apportioned as provided in Section 8.3.4.

ARTICLE IX AMENDMENT OF COVENANT

Except as otherwise provided herein, neither this Covenant, nor any part hereof, can be amended, modified or released other than as provided herein by an instrument in writing executed by a duly authorized official of the Agency on behalf of the District, and by a duly authorized representative of Owner of such Affordable Unit affected by such amendment. Any amendment to this Covenant that alters the terms and conditions set forth herein shall be recorded among the Land Records before it shall be deemed effective.

**ARTICLE X
AFFORDABILITY PERIOD**

All Affordable Units in the Project shall be sold or leased in accordance with the terms of this Covenant for the “Affordability Period.” If the Project contains For Sale Affordable Units, the “Affordability Period” for each For Sale Affordable Unit shall begin on the date of the Sale to the initial Affordable Unit Owner and continue for a period of ninety-five (95) years. The Affordability Period for each For Sale Affordable Unit is renewed upon each subsequent sale of the For Sale Affordable Unit. If the Project contains Rental Affordable Units, the “Affordability Period” for all of the Rental Affordable Units shall begin on the date of the lease of the first Rental Affordable Unit and continue for a period of forty (40) years, which date shall be memorialized in an acknowledgment executed by the District and Developer and recorded in the Land Records. Notwithstanding the foregoing, this Covenant may be released and extinguished upon the approval of the Agency, in its sole and absolute discretion.

**ARTICLE XI
NOTICES**

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 applicable Person at the addresses specified in this Article, or to such other persons or locations as may be designated by the District or the Developer from time to time. All notices to be sent to the District shall be sent to the following address:

DISTRICT:

Director
Department of Housing and Community Development
1800 Martin Luther King Jr. Avenue, SE
Washington, DC 20020
Re: Housing Regulation Administration, Affordable Dwelling Unit Monitoring

All notices to be sent to Developer shall be sent to the address given in the preamble. All notices to be sent to the Affordable Unit Owner shall be sent to the address on record with the District of Columbia Office of Tax and Revenue. All notices to be sent to any Affordable Unit Tenant shall be sent to the unit number referenced in its lease. It shall be the responsibility of the applicable Person and any successor to the applicable Person to provide the District with a current address. The failure of the applicable Person to provide a current address shall be a default under this Covenant.

Notices shall be deemed delivered as follows: (i) if hand delivered, then on the date of delivery or refusal thereof; (ii) if by overnight courier service, then on the next business day after deposit with the overnight courier service; and (iii) if by certified mail (return receipt requested, postage pre-paid), then on the date of actual delivery or refusal thereof.

**ARTICLE XII
MISCELLANEOUS**

12.1 **Applicable Law; Forum for Disputes.** This Covenant shall be governed by, interpreted under, and construed and enforced in accordance with the laws of the District of Columbia, without reference to the conflicts of laws provisions thereof. Owner, Affordable Unit Tenants and the District irrevocably submit to the jurisdiction of the courts of the District of Columbia (including the Superior Court of the District of Columbia) for the purposes of any suit, action or other proceeding arising out of this Covenant or any transaction contemplated hereby. Owner, Affordable Unit Tenants and the District irrevocably and unconditionally waive any objection to the laying of venue of any action, suit or proceeding arising out of this Covenant or the transactions contemplated hereby in the courts of the District of Columbia (including the Superior Court of the District of Columbia), and hereby further waive and agree not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum.

12.2 **Counterparts.** This Covenant may be executed in any number of counterparts, each of which shall be an original but all of which shall together constitute one and the same instrument.

12.3 **Time of Performance.** All dates for performance (including cure) shall expire at 5:00 p.m. (Eastern Time) on the performance or cure date. A performance date which falls on a Saturday, Sunday or District holiday is automatically extended to the next Business Day.

12.4 **Waiver of Jury Trial.** TO THE EXTENT PERMITTED BY LAW, ALL PARTIES HERETO WAIVE THE RIGHT TO TRIAL BY JURY IN CONNECTION WITH ANY LITIGATION ARISING IN RESPECT OF THIS COVENANT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

12.5 **Further Assurances.** Each party agrees to execute and deliver to the other party such additional documents and instruments as the other party reasonably may request in order to fully carry out the purposes and intent of this Covenant; provided that such additional documents and instruments do not materially increase the obligations or burdens upon the second party.

12.6 **Severability.** If any provision of this Covenant is held to be unenforceable or illegal for any reason, said provision shall be severed from all other provisions. Said other provisions shall remain in effect without reference to the unenforceable or illegal provision.

12.7 **Limitation on Liability.** Provided that Owner has exercised reasonable due diligence in the performance of its obligations and duties herein, no Owner shall be liable in the event a Household submits falsified documentation, commits fraud, or breaches any representation or warranty contained in this Covenant. Notwithstanding the foregoing, Owner shall be liable if Owner has knowledge, or should have knowledge, that a Household submitted falsified documentation, committed fraud, or breached any representation or warranty contained in this Covenant; provided, however, in no event shall any partner, officer, director, member employee, agent, representative, affiliate or subsidiary of Owner have any liability under this Section 12.7 absent intentional misrepresentation or fraud.

12.8 Agency Limitation on Liability. Any review or approval by the District or the Agency shall not be deemed to be an approval, warranty, or other certification by the District or the Agency as to compliance of such submissions, the Project, any Affordable Unit or Property with any building codes, regulations, standards, laws, or any other requirements contained in this Covenant or any other covenant granted in favor of the District that is filed among the Land Records; or otherwise contractually required. The District shall incur no liability in connection with the Agency's review of any submissions required under this Covenant as its review is solely for the purpose of protecting the District's interest under this Covenant.

12.9 No Third Party Beneficiary. Except as expressly set forth in this Covenant, there are no intended third party beneficiaries of this Covenant, and no Person other than District shall have standing to bring an action for breach of or to enforce the provisions of this Covenant.

12.10 Representations of Developer. As of the date hereof, Developer hereby represents and warrants to District as follows:

(a) This Covenant has been duly executed and delivered by Developer, and constitutes the legal, valid and binding obligation of Developer, enforceable against Developer, and its successors and assigns, in accordance with its terms, subject only to applicable bankruptcy, insolvency, and similar laws affecting rights of creditors generally, and subject as to enforceability, to general principles of equity (regardless of whether enforcement is sought in a proceeding in equity or at law);

(b) Neither the entering into of this Covenant nor performance hereunder will constitute or result in a violation or breach by Developer of any agreement or order which is binding on Developer; and

(c) Developer (i) is duly organized, validly existing and in good standing under the laws of its state of jurisdiction and is qualified to do business and is in good standing under the laws of the District of Columbia; (ii) is authorized to perform under this Covenant; and (iii) has all necessary power to execute and deliver this Covenant.

12.11 Federal Affordability Restrictions. In the event the Property is encumbered by other affordability restrictions ("Federal Affordability Restrictions") as a result of federal funding or the issuance of Low-Income Housing Tax Credits for the Project, it is expressly understood and agreed that in the event the requirements in this Covenant would cause a default of or finding of non-compliance ("Conflict") with the Federal Affordability Restrictions during the compliance period for the Federal Affordability Restrictions, then the requirements of the Federal Affordability Restrictions shall control to the extent of the Conflict. In all other instances, the requirements of this Covenant shall control.

[Signatures on Following Pages]

IN TESTIMONY WHEREOF, Developer has caused these presents to be signed, acknowledged and delivered in its name by _____, its duly authorized _____, witnessed by _____, its _____

WITNESS:

DEVELOPER:

By: _____

MLK DC AH DEVELOPER, LLC, a Delaware limited liability company

By: _____

Name: R. Donahue Peebles, Jr.

Authorized Signatory

CITY OF WASHINGTON

ss.

DISTRICT OF COLUMBIA

I, _____, a Notary Public in and for the District of Columbia, DO HEREBY CERTIFY THAT _____ who is personally known to be (or proved by oaths of credible witnesses to be) the person named as _____ for _____ in the foregoing and annexed Affordable Housing Covenant, bearing the date of the _____ personally appeared before me in said District of Columbia, and as _____, acting on behalf of _____, as aforesaid, acknowledged the same to be his/her free act and deed.

Given under my hand and seal this ____ day of _____.

Notary Public

My Commission Expires: _____

APPROVED AND ACCEPTED THIS _____ DAY OF _____, 20__:

WITNESS:

DISTRICT OF COLUMBIA, acting by and through the Office of the Deputy Mayor for Planning and Economic Development

By: _____

By: _____

Name: _____
Title: Deputy Mayor for Planning and Economic Development

Approved for Legal Sufficiency
D.C. Office of the Attorney General

By: _____

Date: _____

EXHIBIT A
Legal Description of Property

(Subdivided portion of Lot commonly known as 2100 MLK Avenue, SE in Washington, D.C.)

See Attached

EXHIBIT B

Rental Affordable Unit Lease Rider

This Affordable Unit Lease Rider ("Rider") is attached to and incorporated into the lease dated ("Lease") between ("Resident" or "You") and , as Management Agent ("Manager") for ("Owner") for Apartment ("Premises"). All capitalized terms not defined in this Rider shall have the meaning provided in the Affordable Housing Covenant (as defined below).

In consideration of the mutual covenants set forth in the Lease and below, you agree that your use and possession of the Premises is subject to the terms and conditions set forth in the Lease and the following terms and conditions, which are in addition to and supplement the Lease:

AFFORDABLE UNIT: Resident acknowledges that the Premises is subject to that certain Affordable Housing Covenant between Owner or its predecessor in interest and the District of Columbia dated _____, 20____, as may be subsequently amended, (the "Affordable Housing Covenant"). The Premises is currently designated as an Affordable Unit, which requires the Resident's household income to be less than or equal to [____] of the area median income (AMI).

DEFINED TERMS: Those terms not specifically defined herein shall be assigned the definition provided in the Affordable Housing Covenant.

ELIGIBILITY: In order for you, as Resident, to be eligible to rent an Affordable Unit, you must be and remain an "Affordable Unit Tenant" as defined in the Affordable Housing Covenant.

INCOME CERTIFICATION / INCOME RECERTIFICATION: No more than ninety (90) days and no less than forty-five (45) days before each anniversary of the first day of the lease, the Manager shall request that the Resident provide the Certifying Authority with the following:

- (i) an executed Certification of Residency that states that Resident occupies the Premises as his/her/their principal residence,
- (ii) all information pertaining to the Resident's household composition and income for all household members,
- (iii) a release authorizing third party sources to provide relevant information regarding the Resident's eligibility for the Affordable Unit, as well as how to contact such sources, and
- (iv) any other reasonable and customary representations, information or documents requested by the Certifying Authority.

Resident shall submit the foregoing listed documentation to the Certifying Authority within fifteen (15) days of Manager's request. Within ten (10) days of Certifying Authority's receipt of the foregoing documentation and based on the results of the annual income recertification review, Certifying Authority will determine whether the Resident remains income eligible for the Premises and notify the Resident of his or her household's AMI percentage, and (a) if the Resident is no longer income eligible for the Premises, the income category for which the Resident is income eligible to lease a unit in the apartment community, or (b) if the Resident is income eligible for the Premises, provide a Certification of Income completed by the Certifying Authority, verifying that the income of the Resident meets income eligibility for the Premises.

Upon annual recertification, if the Resident remains income eligible for the Premises, the Resident will be eligible to remain in the Premises and to renew his/her lease at the then-current lease rate for the Premises. If the Resident's Annual Household Income is determined to exceed the Maximum Annual Household Income applicable to the Premises, then the Resident may remain in the Premises and pay the rent applicable to an Affordable Unit at a higher affordability level for which the Resident's Annual Household Income qualifies. If the Resident's Annual Household Income is determined to exceed the Maximum Annual Income for the Affordable Unit with the highest AMI level in the Property, then the Owner may allow the Resident to remain in the Premises and to pay the applicable market-rate rent for the Premises.

Manager will notify Resident of all options (i.e., an Affordable Unit at a different AMI category or a market rate unit) for which Resident is income eligible prior to the expiration of the Resident's lease term. Prior to the expiration of the Resident's lease term, the Resident shall notify Manager in writing of the Resident's election to either (i) remain in the Premises and pay the rental rate applicable to the Resident's then current AMI category if the Resident's Annual Household Income is at or below the established AMI categories of []AMI or [] AMI, (ii) remain in the Premises paying the market rate rent for that unit if the Resident's then current income is above the highest AMI level, or (iii) vacate the Premises at the end of the Resident's Lease term. Resident's failure to notify Manager of Resident's election prior to the expiration of the lease term will be deemed by Manager as Resident's election to vacate the Premises.

In the event that Resident fails to pay the applicable rental rate or vacate the Premises upon expiration of the lease term, Manager shall pursue an action for eviction of Resident. Resident's agreement to pay the applicable rental rate or vacate was a condition precedent to Manager's initial acceptance of Resident's eligibility and Manager has relied on Resident's agreement. Resident acknowledges and agrees that the criteria to be income eligible to occupy the Premises is and serves as a District policy and objective, and that failure to vacate the Premises or pay the applicable rental rate is both a default under the Lease and in violation of the Affordable Housing Covenant.

PROHIBITION ON SUBLETS AND ASSIGNMENTS: Resident may not sublease any portion of the Premises or assign its lease to any other person, except with the prior written consent of the D.C. Department of Housing and Community Development, which consent shall not be unreasonably withheld, conditioned or delayed in the event such subtenant is a Qualified Tenant.

LEASE EFFECTIVE: The Lease of the Premises shall only be effective if this executed Rider, a Certification of Income, a Certificate of Tenant Eligibility (for initial lease term), and a Certificate of Residency (for lease renewals) are attached as exhibits to the lease agreement.

Resident Signature

Date

Resident Signature

Date

Resident Signature

Date

EXHIBIT C

Affordable Unit Index

SCHEDULE 1

Examples of Calculating Maximum Annual Household Income and Minimum Annual Household Income [Assuming 2014 AMI of \$107,000 for a family of four]

[To be revised appropriately to reflect 60% AMI Affordable Unit]

Maximum Annual Household Income for Rental Affordable Units and For Sale Affordable Units:

Q1: Does a two (2) person Household with a \$55,000 annual income qualify under the Maximum Annual Household Income for an 80% AMI Affordable Unit?

A1: Yes. The Household makes less than the Maximum Annual Household Income for the 80% AMI Affordable Unit (\$68,480).

$$\$107,000 \text{ (the 2014 AMI)} * 0.8 * 80\% = \$68,480$$

Minimum Annual Household Income for Rental Affordable Units:

Q2: If the monthly Housing Cost for an 80% AMI Rental Affordable Unit is \$1,643, would a 2 person Household with a \$55,000 annual income have enough income to afford the cost of the Rental Affordable Unit?

A2: Yes. The Household's Annual Household Income is \$55,000, which is more than \$51,884.

$$\$1,643 * 12 / 38\% = \$51,884.$$

Q3: Using the example above, if the monthly Housing Cost for a Rental Affordable Unit is \$1,849, would the 2 person Household have enough income to afford the cost of the Rental Affordable Unit?

A3: No. The household's income is \$55,000, which is less than \$58,390.

$$\$1,849 * 12 / 38\% = \$58,390.$$

Minimum Annual Household Income for For Sale Affordable Units:

Q4: If the monthly Housing Cost for an 80% AMI For Sale Affordable Unit is \$1,500, would a 2 person Household with a \$55,000 annual income have enough income to afford the cost of the For Sale Affordable Unit?

A4: Yes. The Household's income is \$55,000, which is more than \$43,902.

$$\$1,500 * 12 / 41\% = \$43,902.$$

Q5: Using the example above, if the monthly Housing Cost for a For Sale Affordable Unit is \$2,200, would the 2 person household have enough income to afford the cost of the For Sale Affordable Unit?

A5: **No.** The Household's income is \$55,000, which is less than \$58,537.

$$\$2,200 * 12 / 41\% = \$58,537$$

SCHEDULE 2

Maximum Sales Price

The following assumptions shall be used in calculating the Maximum Sales Price of a For Sale Affordable Unit.

- i. *Condominium Fees, if applicable:* Use the actual monthly condominium fees, or if unknown, estimate monthly condominium fees at \$0.60 per square foot. If the actual size of the Affordable Unit is unknown, use the square footage estimated in the chart below based on unit type.

Multi-Family Development

Studio	1-Bedroom	2-Bedroom	3-Bedroom
500	625	900	1,050

- ii. *Homeowner Fees, if applicable:* Use the actual monthly homeowner fees, or if unknown, estimate monthly homeowner fees at \$0.10 per square foot. If the actual size of the Affordable Unit is unknown, use the square footage estimated in the chart below based on home type.

Single-Family Development

2-Bedroom	3-Bedroom	4-Bedroom
1,100	1,300	1,500

- iii. *Monthly Hazard Insurance, if single family home:* Estimated to be \$125.00 per month. If a more recent survey or source is available, the Agency shall instruct Developer to use a different estimate.
- iv. *Monthly Real Property Taxes:* Base monthly real property taxes on the estimated price of the Affordable Unit assuming the current homestead deduction (\$70,200 in 2014) at current real estate tax rates (\$0.85 per \$100 in 2014).
- v. *Mortgage Rate:* Mortgage rates are determined by the most recent monthly average of a 30 year fixed rate mortgage at www.freddiemac.com plus a one percent (1%) cushion. For this example, assume an average rate of 4.40%. After adding the 1% cushion, the rate for calculation of the Maximum Sale Price would be 5.40%.
- vi. *Down payment:* Assume a down payment of 5% on the purchase of the Affordable Unit.

SCHEDULE 3

Provisions Governing Calculation of Maximum Resale Price

1. The Maximum Resale Price (“MRP”) for a subsequent sale of a For Sale Affordable Unit shall be determined through use of the formula $MRP = P \times (F) + V$ (“Formula”), where:

- (a) P = the price Owner paid for the Affordable Unit;
- (b) V = the sum of the value of the Eligible Capital Improvements and Eligible Replacement and Repair Costs, as determined by the Agency pursuant to this section; and
- (c) F = the average of the Ten Year Compound Annual Growth Rates of the Area Median Income (“AMI”) from the first year of ownership of the For Sale Affordable Unit to the year of the sale of the For Sale Affordable Unit by the Affordable Unit Owner. This average may be expressed:
 - (1) As the result of the formula $F = (1 + [((AMI \text{ Year } m / AMI \text{ Year } m-10)^{(1/10)} - 1) + \dots + ((AMI \text{ Year } k / AMI \text{ Year } k-10)^{(1/10)} - 1) / n])^n$, where m = the year after the Affordable Unit was purchased by Owner, k = the year in which the Affordable Unit is sold by Owner, and n = the number of years the Affordable Unit is owned by Owner; or
 - (2) As published by the Agency.

2. For the purposes of determining the value of “V” in the Formula, the following improvements made to a For Sale Affordable Unit after the date of purchase may be included at the percentage of cost indicated, to the extent they are permanent in nature and add to the market value of the property:

- (a) Eligible Capital Improvements, which will be valued at 100% of reasonable cost, as determined by the Agency; and
- (b) Eligible Replacement and Repair Costs, which shall be valued at 50% of reasonable cost, as determined by the Agency.

3. Ineligible costs shall not be included in the determining the value of “V” in the Formula.

4. The value of improvements may be determined by the Agency based upon documentation provided by the Affordable Unit Owner or, if not provided, upon a standard value established by the Agency.

5. The Agency may disallow an Eligible Capital Improvement or Eligible Replacement and Repair Cost if the Agency finds that the improvement diminished or did not increase the fair

market value of the For Sale Affordable Unit or if the improvements make the Affordable Unit unaffordable to all Qualified Purchasers at the Designated Affordability Level .

6. The Agency may reduce the value of a capital improvement if there is evidence of abnormal physical deterioration of, or abnormal wear and tear to, the capital improvement.

7. Owner shall permit a representative of the Agency to inspect the For Sale Affordable Unit upon request to verify the existence and value of any capital improvements that are claimed by Owner.

8. No allowance shall be made in the Maximum Resale Price for the payment of real estate brokerage fees associated with the sale of the For Sale Affordable Unit.

9. The value of personal property transferred to a purchaser in connection with the resale of a For Sale Affordable Unit shall not be considered part of the sales price of the For Sale Affordable Unit for the purposes of determining whether the sales price of the For Sale Affordable Unit exceeds the MRP.

10. Any capitalized terms used in this Schedule that are not defined herein shall have the meanings set forth in the Covenant. As used in this Schedule, the following capitalized terms shall have the meanings indicated below:

Eligible Capital Improvement: major structural system upgrades, special assessments, new additions, and improvements related to increasing the health, safety, or energy efficiency of an Affordable Unit. Such improvements generally include: (i) major electrical wiring system upgrades; (ii) major plumbing system upgrades; (iii) room additions; (iv) installation of additional closets and walls; (v) alarm systems; (vi) smoke detectors; (vii) removal of toxic substances, such as asbestos, lead, mold, or mildew; (viii) insulation or upgrades to double-paned windows or glass fireplace screens; and (ix) upgrade to Energy Star built-in appliances, such as furnaces, water heaters, stoves, ranges, dishwashers, and microwave hoods. Improvements that meet these criteria will be given 100% credit by the Agency.

Eligible Replacement and Repair Cost: in-kind replacement of existing amenities and repairs and general maintenance that keep an Affordable Unit in good working condition. Such improvements generally include: (i) electrical maintenance and repair, such as switches and outlets; (ii) plumbing maintenance and repair, such as faucets, supply lines, and sinks; (iii) replacement or repair of flooring, countertops, cabinets, bathroom tile, or bathroom vanities; (viii) non-Energy Star replacement of built-in appliances, including furnaces, water heaters, stoves, ranges, dishwashers, and microwave hoods; (ix) replacement of window sashes; (x) fireplace maintenance or in-kind replacement; (xi) heating system maintenance and repairs; and (xii) lighting system. Costs that meet these criteria will be given 50% credit for repairs as determined by the Agency.

Ineligible Costs: means costs of cosmetic enhancements, installations with limited useful life spans and non-permanent fixtures not eligible for capital improvement credit as determined by the Agency. These improvements generally include: (i) cosmetic enhancements such as fireplace tile and mantel, decorative wall coverings or hangings, window treatments (blinds, shutters,

curtains, etc.), installed mirrors, shelving, refinishing of existing surfaces; (ii) non-permanent fixtures, such as track lighting, door knobs, handles and locks, portable appliances (refrigerator, microwave, stove/ oven, etc.); and (iii) installations with limited useful life spans, such as carpet, painting of existing surfaces, window glass and light bulbs.

COUNCIL DRAFT

Exhibit C
Affordable Housing Plan

COUNCIL DRAFT

Exhibit D
CBE Agreement(s)

COUNCIL DRAFT

Exhibit E-1
Form of Construction and Use Covenant for the Property

EXHIBIT E-1

CONSTRUCTION AND USE COVENANT

THIS CONSTRUCTION AND USE COVENANT (this “**Covenant**”) is made as of the _____ day of _____, 20__ (the “**Effective Date**”), between (i) the DISTRICT OF COLUMBIA, a municipal corporation, acting by and through the Office of the Deputy Mayor for Planning and Economic Development (“**District**”) and (ii) TPC 5TH & I PARTNERS LLC, a District of Columbia limited liability company (“**Developer**”).

RECITALS

R-1. District is the fee simple title owner of the real property located in Washington, D.C., known for tax and assessment purposes as Square 0516, Lot 0059 (the “**Property**”), more commonly known as 901 Fifth Street, NW, which Property is more fully described in Exhibit A attached hereto.

R-2. District and Developer entered into a Land Disposition and Development Agreement, dated as of _____, 20__ (the “**Agreement**”), pursuant to which District agreed to convey the Property to Developer, subject to certain terms and conditions.

R-3. The Property has a unique and special importance to District. Accordingly, this Covenant makes particular provision to assure the excellence and integrity of the design as well as the construction and use of the Project, as necessary and appropriate to serve District of Columbia residents.

R-4. As required by the Agreement, Developer, for the benefit of District, agrees to construct the Project on the Property in accordance with the Approved Construction Drawings.

NOW, THEREFORE, the Parties hereto agree that the Property shall be subject to the following covenants, conditions, and restrictions:

**ARTICLE I
DEFINITIONS**

1.1 DEFINITIONS. 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:

“**Acceptable Bank**” means a commercial bank with an office located in the Washington, D.C. metropolitan area that has a credit rating with respect to certificates of deposit, short-term deposits or commercial paper of at least Aa3 (or equivalent) by Moody’s Investor Service, Inc., or at least AA- (or equivalent) by Standard & Poor’s Corporation.

“Affiliate” means with respect to any Person (“first Person”) (i) any other Person directly or indirectly Controlling, Controlled by, or under common Control with such first Person, (ii) any officer, director, partner, shareholder, manager, member or trustee of such first Person, or (iii) any officer, director, general partner, manager, member or trustee of any Person described in clauses (i) or (ii) of this sentence.

“Agreement” is defined in the Recitals.

“ANC” means an Advisory Neighborhood Commission.

“Applicable Law” means all applicable District of Columbia and federal laws, codes, regulations, and orders, including, without limitation, Environmental Laws, laws, if applicable, relating to historic preservation and laws relating to accessibility for persons with disabilities, and, if applicable, the Davis-Bacon Act, 40 U.S.C. § 276(a).

“Approved Construction Drawings” shall mean all Construction Drawings (as defined in the Agreement), including the Construction Plans and Specifications, approved by District pursuant to the Agreement, and any permitted changes thereto under this Covenant.

“Architect” means the architect of record, licensed to practice architecture in the District of Columbia, which Developer has selected and District has approved for the Project.

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

“CBEs” means a Person that has been issued a certificate of registration by DSLBD pursuant to D.C. Official Code §§ 2-218.01, *et seq.*

“CBE Agreement” is that agreement between Developer and DSLBD executed prior to the Effective Date, governing certain obligations of Developer under D.C. Official Code §§ 2-218.01, *et seq.* regarding participation by and contracting and employment of CBEs in the Project.

“Certificate of Occupancy” means a certificate of occupancy or similar document or permit that must be obtained from the appropriate Governmental Authority as a condition to the lawful occupancy of the Project, or any component or portion thereof, including all Residential Units.

“Commencement of Construction” means the time at which Developer has (i) executed a construction contract with its Contractor; (ii) given such Contractor a notice to proceed under said construction contract; (iii) caused such Contractor to mobilize on the Property equipment necessary for demolition, if any; and (iv) obtained any required Permits for demolition and sheeting and shoring and commenced demolition, if any, upon the Property pursuant to the Approved Construction Drawings. For purposes of this Covenant, the term **“Commencement of Construction”** does not mean site exploration, borings to determine foundation conditions, or other pre-construction monitoring or testing to conduct due diligence activities or to establish background information related to the suitability of the Property for development of the

Improvements thereon or the investigations of environmental conditions, but “**Commencement of Construction**” shall include any material removal of Hazardous Materials from the Property by Developer in anticipation of excavation for construction.

“**Community Participation Program**” means the plan, attached hereto as Exhibit C, by which Developer shall apprise the immediate ANC and other community organizations of the status of the Project, which shall comply with Section 2.9.

“**Compliance Form**” is defined in Section 2.10.2.

“**Concept Plans**” are the design plans, submitted by Developer and approved by District prior to the Effective Date, which serve the purpose of establishing the major direction of the design of the Project.

“**Construction Consultant**” is the construction consultant retained by Developer for the Project and approved by District pursuant to the Agreement.

“**Construction Plans and Specifications**” mean the detailed architectural drawings and specifications that are prepared for all aspects of the Project submitted by Developer and approved by District prior to the Effective Date which are used to obtain Permits, to prepare detailed cost estimates, to solicit and receive construction bids, and to direct the actual construction of the Project.

“**Contaminant Release**” means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discharge of barrels, containers and other receptacles containing any Hazardous Materials) of any Hazardous Materials.

“**Contractor**” means _____, which Developer has selected and District has approved for the Project.

“**Control**” means the possession, directly or indirectly, of the power to direct, or cause the direction of, the management and policies of a Person, 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, as applicable, the directors, managers, managing partners or Persons exercising similar authority with respect to the subject Person. A lender’s right to foreclose or to accept a deed in lieu of foreclosure under a loan secured by the 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 Operating Agreement for Developer shall not constitute a change of “Control.” The terms “**Control**,” “**Controlling**,” “**Controlled by**” or “**under common Control with**” shall have meanings correlative thereto.

“**Council**” means the Council of the District of Columbia.

“**Covenant**” is defined in the Preamble.

“**DDOE**” means the District of Columbia Department of the Environment.

“**Deed**” means that certain Special Warranty Deed, dated this date, by District as grantor to Developer as grantee.

“**Default Rate**” means the annual rate of interest that is the lesser of (i) twelve percent (12%) or (ii) the maximum rate allowed by Applicable Law.

“**Design Development Plans**” are the design plans that reflect refinement of the approved Schematic Plans, showing all aspects of the Project at the correct size and shape submitted by Developer and approved by District prior to the Effective Date.

“**Development and Completion Guaranty**” is that guaranty, of even date herewith, by the Guarantor, which binds Guarantor to develop and otherwise construct the Project in the manner and within the time frames required by the terms of the Agreement and this Covenant.

“**Developer**” means TPC 5th & I Partners LLC, and its permitted successors and assigns.

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

“**Developer’s Certificate of Completion**” means that certificate provided by Developer to District upon Substantial Completion, as required under Section 2.12.1 herein.

“**Disapproval Notice**” is defined in Section 2.2.3.

“**Disposal Plan**” is defined in Section 5.1.3.

“**DOES**” is the District of Columbia Department of Employment Services.

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

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

“**Effective Date**” is the date first written above.

“**Environmental Claims**” is defined in Section 5.1.1.

“**Environmental Laws**” means any present and future federal, state or local 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 9.1.

“**Final Certificate of Completion**” means the certificate issued by District to Developer confirming Developer’s Final Completion of the Project.

“**Final Completion**” means following Substantial Completion: (a) the completion of all Punch List Items or the establishment of an escrow account for the completion of such items; (b) the close-out of all construction contracts for the Project; and (c) the payment of all costs of constructing the Project and receipt by Developer of fully executed and notarized valid releases or waivers of liens from all manufacturers, suppliers, subcontractors, general contractors, and all other Persons furnishing supplies or labor in connection with the Project.

“**Final Project Budget and Funding Plan**” means the Project Budget and Funding Plan based on the Approved Construction Drawings that was submitted by Developer and approved by District prior to the Effective Date pursuant to the Agreement.

“**First Source Agreement**” is that agreement between Developer and DOES executed prior to the Effective Date, governing certain obligations of Developer 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 the Project.

“**Force Majeure**” is an act or event, including, as applicable, an act of God, fire, earthquake, flood, explosion, war, invasion, insurrection, riot, mob violence, sabotage, terrorism, labor strikes, unusual delays in deliveries, a taking by eminent domain, requisition, and laws or orders of government or of civil, military, or naval authorities enacted or adopted or implemented after the Effective Date; provided, however, that with respect to any of the above acts or events despite reasonable business efforts in obtaining approval from, or changes ordered by, any governmental authority, that with respect to any of such acts or events: (i) such acts are not within the reasonable control of Developer, Developer’s Agents or their Members; or (ii) such acts or events are not due to the fault or negligence of Developer, Developer’s Agents, or their Members; (iii) such acts or events are not reasonably avoidable by Developer, Developer’s Agents, or their Members or District in the event District’s claim is based on a Force Majeure event, and (iv) such acts or events result in a delay in performance by Developer or District, as applicable; but specifically excluding: (A) shortage or unavailability of funds or Developer’s or District’s financial condition; (B) changes in real estate market conditions; or (C) the acts or

omissions of a general contractor, its subcontractors, or any other of Developer's Agents or its Members, except to the extent such acts or omissions are covered by sub-paragraphs (i)-(iii), above.

"Governmental Approvals" are the approvals from the applicable Governmental Authorities obtained by Developer that are necessary or required for construction and occupancy of the Improvements, excavation permits, building permits, public space permits and such other permits, licenses or approvals as may be required by the applicable Governmental Authorities for the construction and occupancy of the Improvements.

"Governmental Authority" means the United States of America, the District of Columbia, and any agency, department, commission, board, bureau, instrumentality or political subdivision of the foregoing, now existing or hereafter created, having jurisdiction over Developer, the Project or the Property or any portion thereof, or any street, road, avenue or sidewalk comprising a part of, or in front of, the Project, or any vault in or under the Project, or airspace over the Project, including, without limitation, WMATA and utility companies

"Guarantor" shall be a Person selected by Developer and approved by District pursuant to the Agreement.

"Guarantor Submissions" shall mean the current audited financial statements and audited 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).

"Hazardous Materials" means (a) asbestos and any asbestos containing material; (b) any substance that is then defined or listed in, or otherwise classified pursuant to, any Environmental Law or any other Applicable Law as a "hazardous substance," "hazardous material," "hazardous waste," "infectious waste," "toxic substance," "toxic pollutant" or any other formulation intended to define, list or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity or Toxicity Characteristic Leaching Procedure (TCLP) toxicity; (c) any petroleum and drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources; and (d) any petroleum product, polychlorinated biphenyls, urea formaldehyde, radon gas, radioactive material (including any source, special nuclear or by-product material), medical waste, chlorofluorocarbon, lead or lead-based product and any other substance the presence of which could be detrimental to the Property or hazardous to health or the environment.

"Hotel Program" means the construction on the Property of a mixed-use structure of approximately 170,000 sq. ft. above grade to be used as a hotel (approximately 200 keys) and condominiums (approximately 60 units), approximately 7,600 sq. ft. of ground floor retail, and approximately 132 underground parking spaces.

"HUD" is the United States Department of Housing and Urban Development.

“Improvements” means the landscaping, hardscape, and improvements to be constructed or placed on the Property in accordance with the Development Plan, the Approved Construction Drawings, and the Park Renovation; 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.

“Indemnified Parties” is defined in Section 5.1.1.

“Institutional Lender” shall mean a Person that is not an Affiliate of Developer or a Prohibited Person and is, at the time it first makes a loan to Developer, or acquires an interest in any such loan, (i) a savings bank, savings and loan association, credit union, commercial bank or trust company organized or chartered under the laws of the United States or any state thereof or the District of Columbia or a foreign banking institution (in each case whether acting individually or in a fiduciary or representative (such as an agency) capacity); (ii) an insurance company organized and existing under the laws of the United States of America or any state thereof or the District of Columbia or a foreign insurance company (in each case whether acting individually or in a fiduciary or representative (such as an agency) capacity); (iii) an institutional investor such as a real estate investment trust (or umbrella partnership or other entity of which a real estate investment trust is the majority owner), a real estate mortgage investment conduit or securitization trust or similar investment entity; (iv) an entity that qualifies as a “REMIC” under the IRS Code or other public or private investment entity (in each case whether acting as principal or agent); (v) a brokerage or investment banking organization (in each case whether acting individually or in a fiduciary or representative (such as an agency) capacity) as principal or agent); (vi) an employees’ welfare, benefit, pension or retirement fund; (vii) an institutional leasing company; (viii) an institutional financing company; (ix) any non-District of Columbia governmental agency or entity insured by a governmental agency or any combination of the foregoing entities; (x) a finance company principally engaged in the origination of commercial mortgage loans or any financing related subsidiary of a Fortune 500 company; (xi) any federal, state, or District agency regularly making, purchasing or guaranteeing mortgage loans, or any governmental agency supervising the investment of public funds; (xii) a profit-sharing or commingled trust or fund, the majority of equity investors in which are pension funds having in the aggregate no less than \$1 Billion in assets; (xiii) any entity of any kind actively engaged in commercial real estate financing and having total assets (on the date when its interest in this Project, or any portion thereof, is obtained) of at least \$1 Billion; or (xiv) a charitable organization regularly engaged in making loans secured by real estate.

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

“Lease” means any lease of a portion of the Retail Portion in the ordinary course of business, and any subsequent amendments, modifications and extensions thereto, subject to the approval of District, such approval not to be unreasonably withheld, conditioned or delayed, with regard to all matters involving permitted uses under any such Lease.

“Material Change” means (i) any change in size or design from the Approved Construction Drawings that substantially and adversely affects the general appearance or

structural integrity of exterior walls and elevations and/or building bulk; (ii) any changes in exterior finishing materials that substantially and adversely affects the architectural appearance from those shown and specified in the Approved Construction Drawings; (iii) any substantial reduction to the number of parking spaces by ten percent (10%) or more from the Approved Construction Drawings; (iv) any substantial and adverse change in the general appearance of landscape design or size or quality of exterior pavement, exterior lighting and other exterior site features from the Approved Construction Drawings; (v) any hotel flag or hotel operator change; and (vi) any changes in design and construction of the Project from the Approved Construction Drawings requiring approval by a Governmental Authority.

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

“Mortgage” means a mortgage, deed of trust, mortgage deed, or such other classes of legal documents as are commonly given to secure advances on fee simple estates under the laws of the District of Columbia.

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

“Operating Agreement” means that certain Operating Agreement by and between the Members of Developer dated _____, 20__.

“Park Renovation” means Developer’s renovation of Milian Park located along Massachusetts Avenue to the immediate south of the Property, and Seaton Park located across Massachusetts Avenue to the west, in accordance with the Project Development Plan and the Approved Construction Drawings.

“Party” or **“Parties”** when used in the singular, means either District or Developer; when used in the plural, means both District and Developer.

“Permits” means all demolition, site, building, construction, and other permits, approvals, licenses, and rights required to be obtained from Governmental Authorities necessary to commence and complete construction and occupancy of the Project in accordance with the Approved Construction Drawings and this Covenant.

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

“Prohibited Person” shall mean any of the following Persons: (A) any Person (or any Person whose operations are directed or controlled by a Person) who has been convicted of or has pleaded guilty in a criminal proceeding for a felony or who is an on-going target of a grand jury investigation convened pursuant to Applicable Law concerning organized crime; or (B) any Person organized in or controlled from a country, the effects of the activities with respect to which are regulated or controlled pursuant to the following United States laws and the regulations or executive orders promulgated thereunder: (i) the Trading with the Enemy Act of 1917, 50 U.S.C. App. §1, et seq., as amended (which countries are, as of the Effective Date hereof, North Korea and Cuba); (ii) the International Emergency Economic Powers Act of 1976, 50 U.S.C. §1701, et seq., as amended; and (iii) the Anti-Terrorism and Arms Export Amendments Act of 1989, codified at Section 6(j) of the Export Administration Act of 1979, 50 U.S.C. App. § 2405(j), as amended (which countries are, as of the Effective Date hereof, Iran,

Sudan and Syria); or (C) any Person who has engaged in any dealings or transactions (i) in contravention of the applicable money laundering laws or regulations or conventions or (ii) in contravention of Executive Order No. 13224 dated September 24, 2001 issued by the President of the United States (Executive Order Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism), as may be amended or supplemented from time-to-time or any published terrorist or watch list that may exist from time to time; or (D) any Person who appears on or conducts any business or engages in any transaction with any person appearing on the list maintained by the U.S. Treasury Department's Office of Foreign Assets Control list located at 31 C.F.R., Chapter V, Appendix A or is a person described in Section 1 of the Anti-Terrorism Order; or (E) any Person suspended or debarred by HUD or by the District of Columbia government; or (F) any Affiliate of any of the Persons described in paragraphs (A) through (E) above.

"Project" means the development and construction of the Hotel Program on the Property, together with the Park Renovation, all in accordance with the Agreement and this Covenant.

"Project Lender" means an Institutional Lender that holds a loan secured by a Project Mortgage.

"Project Mortgage" means a Mortgage that is recorded against the Property and secures a loan held by a Project Lender that provides Developer financing to acquire, develop, construct and/or operate the Project.

"Property" is defined in the Recitals.

"Punch List Items" mean the minor items of work to be completed or corrected in order to fully complete the Project in accordance with the Approved Construction Drawings.

"Related Agreements" means the Agreement, this Covenant and the Development and Completion Guaranty.

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

"Residential Units" means the for-sale branded residential units being developed as part of the Project.

"Restricted Period" shall mean with respect to the Project, or any portion thereof, that period of time beginning on the Effective Date and ending on the date of Final Completion of the Project.

"Resubmission Period" is a period of thirty (30) days commencing on the day after Developer receives Disapproval Notice from District, or such other period of time as District and Developer may agree in writing, in their reasonable discretion. In the event either Developer or District reasonably believes that the Resubmission Period should be longer or shorter than such thirty (30) day period, such Party shall promptly notify the other in writing of the period of time that such Party reasonably believes should apply and the reasons therefor.

“**Retail Plan**” means the retail marketing plan and retail strategy that was submitted by Developer and approved by District prior to the Effective Date pursuant to the Agreement, and any modifications thereto approved pursuant to Section 5.7.

“**Retail Portion**” means that portion of the Project that is to be used for retail purposes.

“**Schedule of Performance**” means the schedule of performance, attached hereto as Exhibit B, as well as any approved modifications thereto, setting forth the timelines for milestones in the design, development, construction, and completion of the Project.

“**Schematic Plans**” means the design plans that present a developed design based on the approved Concept Plans that were submitted to and approved by District prior to the Effective Date pursuant to the Agreement.

“**Second Notice**” means that notice given by Developer to District in accordance with Section 2.2. Any Second Notice shall (a) be labeled, in bold, 18 point font, as a “SECOND AND FINAL NOTICE”; (b) contain the following statement: “A FAILURE TO RESPOND TO THIS NOTICE WITHIN TEN (10) DAYS SHALL CONSTITUTE APPROVAL OF THE [NAME OF SUBMISSION ORIGINALLY SUBMITTED ON (DATE OF DELIVERY OF SUCH SUBMISSION)]”; (c) be delivered in the manner prescribed in Section 11.1, in an envelope conspicuously labeled “SECOND AND FINAL NOTICE”

“**Substantial Completion**” shall occur when: (a) the applicable Governmental Authorities shall have issued a final (and not shell) Certificate of Occupancy and other necessary approvals for the use and occupancy of the Project, and (b) the Architect shall have executed an AIA Form G704 evidencing substantial completion (subject only to Punch List Items that do not interfere with the use and occupancy of the Project for its intended purposes) and stating that, in its professional opinion based on its inspections, the Project was constructed in compliance in all material respects with (1) the Approved Construction Drawings, (2) all applicable governmental requirements, and (3) all covenants, conditions, restrictions, easements, or other matters of record with respect to the title to the Project in effect as of the date thereof.

“**Transfer**” means any sale, assignment, conveyance, lease, sublease, trust, power, encumbrance or other transfer (whether voluntary, involuntary or by operation of law) of the Property, or of any portion of any of the foregoing, or of any interest in any of the foregoing, or any contract or agreement to do any of the same; provided, however, “**Transfer**” shall not be deemed to include Developer’s execution of (a) a management agreement and/or a franchise agreement with respect to the operation of the Improvements; (b) a contract for sale of one or more condominium units that are a part of the Improvements in the ordinary course of business, which sale or series of related sales do not result in a bulk sale of the units; or (c) a lease of the Retail Portion of the Improvements in the ordinary course of business; and provided further, that any transfer by Developer or a Member of Developer to an Affiliate or another Member of Developer or in connection with an Equity Investment (as defined in the Agreement) in Developer shall not be deemed a “**Transfer**” for purposes of this Covenant. As used in this Covenant, a Transfer shall be deemed to have occurred if in a single transaction or a series of transactions (including without limitation, increased capitalization, merger with another entity, combination with another entity, or other amendments, issuance of additional or new stock,

partnership interests or membership interests, reclassification thereof or otherwise), whether related or unrelated, there is a direct or indirect change in Control of Developer from that existing as of the Effective Date.

“**Transferee**” means the purchaser, assignee, transferee or lessee as a result of a Transfer.

“**Zoning Commission**” shall mean the Zoning Commission of the District of Columbia.

ARTICLE II CONSTRUCTION COVENANTS

2.1 APPROVED CONSTRUCTION DRAWINGS. Prior to the Effective Date, Developer has submitted to District, and District has approved, all of the Construction Drawings, rendering them Approved Construction Drawings pursuant to the Agreement. District’s review and approval of the Approved Construction Drawings is not, and shall not be construed as, a representation or other assurance that they comply with any building codes, regulations, or standards, including, without limitation, building engineering and structural design or any other Applicable Law. District shall incur no liability as a result of its review of any Approved Construction Drawings which Developer acknowledges was undertaken by District solely for the purpose of protecting its own interests.

2.2 CHANGES TO APPROVED CONSTRUCTION DRAWINGS.

2.2.1 Material Changes. No Material Changes to the Approved Construction Drawings shall be made without District’s prior written approval, except those changes required by a Governmental Authority pursuant to Section 2.2.4. If Developer desires to make any Material Changes to the Approved Construction Drawings, Developer shall submit in writing the proposed changes to District for approval, and the procedures set forth in this Section 2.2 shall apply to District’s review and approval (or disapproval) of any such proposed Material Changes.

2.2.2 Time Period for District Review and Approval. District shall complete its review of any Material Change and provide a written response thereto, within ten (10) Business Days after its receipt of the same; provided, however, the Parties may agree to allow District such longer period of time as they may mutually agree is required as a result of the complexity of the Material Change that has been submitted (a “**Complexity Extension**”) (the ten (10) Business Day review period, plus any Complexity Extension agreed to by the Parties, may be referred to as the “**Review Period**”). If District fails to respond with its written response to a submission of any Material Change within the Review Period, Developer may notify District, in writing, of District’s failure to respond by delivering to District a Second Notice. Failure of District to respond to the time period set forth in the Second Notice shall constitute District approval of the applicable Material Change.

2.2.3 Disapproval Notice. Any notice of disapproval (“**Disapproval Notice**”) delivered to Developer by District shall state the basis for such disapproval in reasonably sufficient detail so as to enable Developer to respond to District. If District issues a Disapproval Notice,

Developer shall have a period of time equal to the Resubmission Period to revise the Material Change to address the comments of District and may resubmit the revised Material Change for approval by District prior to the expiration of such Resubmission Period. District shall use good faith efforts to complete its review of such revised Material Change within the Review Period applicable to such revised Material Change, which Review Period shall commence the day following District's receipt of such revised Material Change from Developer. If District fails to notify Developer in writing of its approval or disapproval of such revised Material Change within the Review Period, Developer may provide a written Second Notice to District with respect to such revised Material Change, and the provisions of Section 2.2.2 shall apply with respect to such Second Notice. The provisions of this Section 2.2 relating to approval, disapproval and resubmission of any submission of Material Changes shall continue to apply until such Material Changes (and each component thereof) and any Material Changes thereto have been finally approved or disapproved by District. In no event will District's failure to respond to any submission of Material Changes be deemed an approval except as otherwise expressly set forth in this Section 2.2. Any Material Changes may not be later disapproved by District unless any disapproval and revision is mutually agreed upon by the Parties. District's review of any Material Changes that is responsive to a Disapproval Notice shall be limited to the matters disapproved by District as set forth in the Disapproval Notice, but shall not be so limited with regard to any new matters shown on such submission that were not included or indicated on any prior submission.

2.2.4 Government Required Changes. Notwithstanding any other provision of this Covenant to the contrary, District acknowledges and agrees that District shall not withhold its approval (if otherwise required by the terms of this Covenant) of any elements of a proposed change to an Approved Construction Drawing which are required by any Governmental Authority; provided, however, that (i) District shall have been afforded a reasonable opportunity to discuss such element of, or change in, the submission with the Governmental Authority requiring such element or change and with the Architect, (ii) the Architect shall have reasonably cooperated with District and such Governmental Authority in seeking such modifications of the required element or change as District shall deem reasonably necessary, and (iii) such element or change is consistent with Applicable Law. Developer and District each agree to use diligent, good faith efforts to resolve District's approval of such elements or changes, and District's request for reasonable modifications to such required elements or changes, as soon as reasonably possible and in no event later than ten (10) days after the submission of the Material Change, or such additional period of time granted as a Complexity Extension. Developer shall promptly notify District in writing of any changes required by a Governmental Authority whether before or during construction.

2.3 PERMITS. Prior to the Effective Date, Developer has obtained all Permits for demolition, sheeting and shoring for the Project in accordance with the Approved Construction Drawings. Developer has submitted to District copies of documents evidencing such Permits obtained by Developer.

2.4 SITE PREPARATION. Developer, at its sole cost and expense, shall be responsible for all preparation of the Property for development and construction in accordance with the Approved Construction Drawings, 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 in accordance with all Permits, requirements of applicable Governmental Authorities, and Applicable Law.

2.5 PRE-CONSTRUCTION USE AND CONDITION. After the Effective Date and prior to Commencement of Construction, Developer may use the Property or any portion thereof for any use approved in advance by District, which approval shall not be unreasonably withheld, conditioned or delayed so long as such uses are permitted by Applicable Law. Developer shall maintain the Property during such pre-construction period in good repair and condition, free of rubbish and debris, and sightly in appearance. If, at any time prior to Commencement of Construction, Developer fails to maintain the Property in such good repair and condition, free of rubbish and debris, and sightly in appearance, District shall give Developer written notice of its failure to so maintain the Property, and shall have the right to enter the Property and perform all maintenance and clean-up of the Property deemed necessary by District, all at Developer's sole cost and expense, in the event Developer does not do so within thirty (30) days of its receipt of such notice from District. In such event, District shall be reimbursed for such maintenance and clean-up costs within five (5) Business Days after demand. Any sums not paid by Developer within five (5) Business Days after demand shall bear interest at the Default Rate until paid.

2.6 FINAL PROJECT BUDGET AND FUNDING PLAN. Prior to the Effective Date, Developer has submitted to District and District has approved the Final Project Budget and Funding Plan. Developer shall be permitted to modify the Final Project Budget and Funding Plan with District's approval, as may be reasonably necessary to construct the Improvements in accordance with the Approved Construction Drawings, provided that the Development and Completion Guaranty shall remain in full force and effect. Notwithstanding anything else in this Covenant to the contrary, Developer may modify the Final Project Budget and Funding Plan without District's approval if such modifications are as a result of non-Material Changes to the Approved Construction Drawings.

2.7 DEVELOPER'S SUBMISSION OF PROJECT TO ONE OR MORE CONDOMINIUM OR OTHER PROPERTY DIVISION REGIMES. Developer shall have the right to subject all or any portion of the Project to a condominium or other property division regime (including, with out limitation, a vertical subdivision), provided that District shall have the right to approve all documentation relating thereto, such approval not to be unreasonably conditioned, withheld or delayed.

2.8 CONSTRUCTION OBLIGATIONS

2.8.1 Obligation to Construct. Developer hereby agrees to develop and construct the Project in accordance with the Approved Construction Drawings, the Schedule of Performance and this Covenant. Developer 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 Construction Drawings and the Schedule of Performance.

2.8.2 Compliance with Laws. The Project shall be constructed in compliance with all Permits and Applicable Law, including the Green Building Act of 2006, D.C. Law 16-234, as may be amended, and in a first-class and diligent manner in accordance with industry standards.

2.8.3 Easements for Public Utilities. Developer 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 Construction Drawings in connection with the issuance of a Permit.

2.8.4 Costs. The cost of development and construction of the Project thereon shall be borne solely by Developer.

2.8.5 Signs. At all times during construction of the Project, Developer, at its sole expense, shall have in place at the Property at least one sign identifying District in a manner reasonably satisfactory to District, and identifying the Project as a development undertaken in cooperation with District. Developer shall so identify the Project on all other signs placed on the Property. The design of all signs on the Property shall be subject to District's approval, which approval shall not be unreasonably conditioned, withheld or delayed. In order to gain District's approval of any sign design, Developer shall submit plans of such signs to District in sufficient completeness and detail to enable District to evaluate the size, location, design and aesthetic qualities of such signs. Developer shall comply with all Applicable Law regarding the installation of signage at the Property.

2.9 COMMUNITY PARTICIPATION PROGRAM. Prior to the Effective Date, Developer submitted, and District approved, Developer's Community Participation Program. Pursuant to the Community Participation Program, Developer is required to: (a) document all ANC and other community organization meetings to provide a narrative description of the events of each meeting, including the concerns raised by the ANC and other community organizations and Developer's responses to those concerns; (b) provide documentation of the ANC and other community organization meetings to District within thirty (30) days after the end of each calendar month; and (c) include a summary of each ANC and other community organization meeting held during the preceding month with the documentation of each meeting. The documentation and summaries may be made available to the public by District. Developer shall comply with the Community Participation Program and the requirements of this Section 2.9 until issuance of the Final Certificate of Completion.

2.10 INSPECTION AND MONITORING RIGHTS. In addition to and notwithstanding any monitoring and inspecting requirements of the Project Lender(s) and any applicable District of Columbia building and health code requirements, District shall have the following rights:

2.10.1 Inspection of Site. District shall have the right to enter the Property from time to time and at no cost or expense to District, for the purpose of performing routine inspections in connection with the development and construction of the Project. Developer 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 Construction Drawings and this Covenant, as applicable, and Developer shall have the right to accompany those persons during such inspections. Developer 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 Law.

2.10.2 Project Compliance Monitoring System. Pursuant to the Compliance Unit Establishment Act of 2008, D.C. Law 17-176, effective June 13, 2008, Council established a compliance unit within the Office of the District of Columbia Auditor, which was charged with conducting audits and reporting on compliance of certain real estate projects. In furtherance of this compliance review, beginning the first month immediately following the Effective Date and continuing each month thereafter until issuance of the Final Certificate of Completion, no later than five (5) Business Days prior to the end of each calendar month, Developer shall submit to District a detail of the status of the Project in the form attached hereto as **Exhibit D** (the "**Compliance Form**"), as such form may be amended from time-to-time by District (provided such amendment is of general application). Upon District's receipt of Developer's monthly Compliance Form, District will generate a written report, which Developer shall execute within twenty-four (24) hours following Developer's receipt of the report from District, but in no event later than the last day of the subject month.

2.10.3 Progress Reports.

(a) In addition to the submission of the Compliance Form in accordance with Section 2.10.2, beginning on the 15th day of the month following the Effective Date and no later than the 15th day of each calendar month thereafter until issuance of the Final Certificate of Completion, Developer shall submit written reports to District as to the progress of the Project, which shall address the following matters: (1) a design and construction report, including a reasonable number of construction photographs taken since the last report submitted by Developer; (2) a budget and cost update report; (3) an unaudited financial schedule; (4) a report on the sale of the Residential Units in the Project; (5) a report on the leasing of the retail space in the Project; (6) a current construction schedule for the Project; and (7) a schedule regarding the tenant improvements of the Retail Portion of the Project, which shall include the actual cost and square footage of the tenant improvements completed as of the date of such report

(b) Developer shall also contemporaneously submit to District any progress reports it submits to the Project Lender(s).

2.10.4 Progress Meetings. District and Developer shall hold such periodic progress meetings as District deems reasonably appropriate, from time to time and at any time, to consider the progress of Developer's construction of the Project.

2.10.5 Construction Consultant. On or before the Commencement of Construction and continuing through District's issuance of the Final Certificate of Completion, Developer shall appoint a construction consultant ("**Construction Consultant**"), approved by District (such approval not to be unreasonably withheld, delayed or conditioned and to be deemed given if no response is given by District within ten (10) Business Days after a request for approval), on such

terms as District may approve (provided such terms shall be reasonable in the context of the scope of the Project), to: (a) report to District on a monthly basis whether the construction of the Project is in adherence to the Schedule of Performance, (b) review and approve whether the construction of the Project is consistent with the requirements of this Covenant, and (c) review and report to District on District's issuance of the Final Certificate of Completion. The Construction Consultant shall receive timely reports from the Architect and Developer, as necessary, and shall promptly report any issues or problems to District and Developer. The Construction Consultant's time, expenses, reports, and certification shall be at Developer's sole cost and expense, provided that in no event shall such costs and expenses exceed the amount contained in the Final Approved Project Budget. Any construction consultant engaged by the primary lender for supervision of construction of the Project shall be considered the Construction Consultant hereunder, provided that such construction consultant agrees in writing with District to undertake the duties of the Construction Consultant set forth in this Section 2.10.5.

2.10.6 Books and Records; Audit Rights.

(a) Developer shall keep proper books of records and accounts which include full, true, and correct entries of all dealings and transactions in relation to the Project. Developer shall maintain its books and records in accordance with generally accepted accounting principles, consistently applied and in compliance with Applicable Law.

(b) Upon reasonable prior notice at any time after the Effective Date, District shall have the right (at the cost of District, unless an Event of Default has occurred and is continuing, in which event such expense shall be borne by Developer) to inspect the books and records of Developer for the purpose of ensuring compliance with this Covenant and to have an independent audit of the Project documents and records. Developer shall cooperate with District in providing District reasonable access to its books and records during normal business hours at Developer's offices for these purposes. Developer 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 D.C. Procurement Practices Act, and shall execute a separate engagement letter with District to undertake the audit. In the event that the audit reveals any material default under the terms of this Covenant, whether or not such material default is cured, Developer shall be responsible for payment of all costs and expenses incurred by the common accountant in connection with the audit or, at District's election, Developer shall reimburse District in the amount of the costs and expenses incurred by District and paid to the common accountant.

2.11 MILESTONE NOTICES. Upon completion of each milestone in the Schedule of Performance, Developer shall notify District, and District shall have thirty (30) days to inspect the Property and certify Developer's completion of such milestone.

2.12 COMPLETION OF PROJECT.

2.12.1 Developer's Certificate of Completion. Promptly after Developer achieves Substantial Completion of the Project, Developer shall furnish District with a Developer's Certificate of Completion, in which Developer states under oath that: (a) Developer has achieved

Substantial Completion of the Project; (b) the Project has been completed, subject only to Punch List Items, in accordance with the Approved Construction Drawings, Permits and all Applicable Law; (c) all of the construction covenants contained herein have been fully satisfied; and (d) Developer has obtained a Certificate of Occupancy for the Project.

2.12.2 Final Completion.

(a) Developer shall achieve Final Completion on or before the date indicated 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 all Punch List Items have been completed or that an escrow account has been established to complete such items, all construction contracts for the Project have been closed-out, all costs of constructing the Project have been paid, and 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; and (ii) a certificate from the Contractor that the Project has been completed pursuant to the construction contract and in accordance with the Approved Construction Drawings. Developer shall deliver to District a complete set of “as-built” drawings (including all field notations and corrections) of the Improvements, in such format as is acceptable to District within ninety (90) days of Developer’s achievement of Final Completion.

(b) District shall have thirty (30) days after receiving the materials in Section 2.12.2(a) to inspect the Project and approve of the Final Completion in writing (once approved, District shall issue the Final Certificate of Completion), or provide Developer with a written objection, setting forth in detail the grounds for such objection. If District fails to either approve of the Final Completion or object to Developer’s submissions in Section 2.12.2(a) within the thirty (30) day period, District shall be deemed to have approved of the Final Completion and District shall be deemed to have issued the Final Certificate of Completion. If District objects to Developer’s submissions in Section 2.12.2(a) within the aforesaid thirty (30) day period, Developer and District shall work diligently and in good faith to resolve any disputed issues within thirty (30) days following the date of District’s written objection notice. If, despite such efforts, District and Developer are unable to resolve all disputed issues within said thirty (30) day period, the Construction Consultant shall resolve the disputed issues. The Construction Consultant shall issue its determination in a written report which shall be binding upon District and Developer.

2.12.3 No Representation. 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 with the Improvements, or any portion thereof, or the Property with any Applicable Law.

**ARTICLE III
INSURANCE OBLIGATIONS**

3.1 INSURANCE COVERAGE PRIOR TO COMPLETION OF THE PROJECT. At all times after the Effective Date until issuance of the Final Certificate of Completion, Developer shall carry and maintain in full force and effect, or if approved by District may cause its Contractor, Architect, subcontractors and/or other consultants, as applicable, to carry and maintain in full force and effect, the following insurance policies:

(a) **Builder's Risk Insurance** – Developer shall maintain builder's risk insurance for the amount of the completed value of the Project (or lesser amount acceptable to District) under the 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 Developer, District and any contractors and subcontractors. All builder's risk insurance shall name District as a named insured.

(b) **Automobile Liability and Commercial General Liability Insurance** - At all times after the Effective Date of this Agreement until such time as all obligations of Developer hereunder have been satisfied or have expired, Developer shall maintain and/or cause its 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 Developer is required to carry shall not be construed as any limitation on Developer's liability under this Agreement. The foregoing limits may be increased by District from time to time, in its reasonable discretion.

(c) **Workers' Compensation Insurance** - At all times after the Effective Date of this Agreement until such time as all obligations of Developer hereunder have been satisfied or have expired, Developer shall maintain and cause its general contractor and any subcontractors to maintain workers' compensation insurance in such amounts as required by Applicable Law.

(d) **Professional Liability Insurance** - During development of the Project, Developer shall cause 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.

(e) **Contractor's Pollution Legal Liability Insurance** - At all times after the Effective Date of this Agreement until such time as all obligations of Developer hereunder have been satisfied or have expired, Developer shall not remove, store, transport, or dispose of demolition debris, hazardous waste or contaminated soil, without first obtaining (or causing its contractor to obtain) a Contractor's Pollution Legal Liability Insurance Policy covering Developer's liability during such activities. The policy shall include such coverage for bodily injury, personal injury, loss of, damage to, or loss of use of property, directly or indirectly arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis,

toxic chemicals, liquid or gas, waste materials, or other irritants, contaminants, or pollutants into or upon the land, the atmosphere, or any water course or body of water, whether it be gradual or sudden and accidental.

3.2 GENERAL POLICY REQUIREMENTS. 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.

3.3 PAYMENT OF PREMIUMS; RENEWAL. All premiums and charges for all insurance policies required under this Article III shall be paid by Developer or Developer's Contractor, Architect, subcontractors and/or other consultants, as applicable. At least fifteen (15) days prior to the expiration of each insurance policy required hereunder, Developer shall pay, or cause to be paid, the premiums for the renewal of such insurance and prior to said period shall deliver to District the original or a certified copy of such policy or a certificate or binder on and duplicate receipt (or other written documentation) evidencing the payment thereof. In the event Developer (or Developer's Contractor, Architect, subcontractors and/or other consultants, as applicable) fails to pay any such amounts when due or fails to carry any such policies pursuant to this Article III, in addition to its remedies contained in Section 9.2, District may, but shall not be obligated to, after first having given Developer notice of District's intention to do so, procure and/or pay therefor, and the amount paid by District shall be repaid to District by Developer within ten (10) Business Days after District's demand therefor or shall bear interest at the Default Rate until paid.

ARTICLE IV COVENANTS REGARDING USE OF THE PROPERTY

4.1 USE OF PROPERTY. The Property shall be used in accordance with Applicable Law and Governmental Approvals, for commercial, residential, and retail purposes, subject to the provisions of this Covenant, to the extent applicable.

4.2 RETAIL SPACE.

4.2.1 Retail Plan. The Retail Portion shall be leased by Developer to retail tenants in conformance with the Retail Plan approved by District pursuant to the Agreement.

4.2.2 Prohibited Retail Uses. Developer agrees that it shall not lease any space within the Retail Portion for the following uses: laundromat, check-cashing establishment, adult entertainment, adult video or adult bookstore.

4.2.3 Documentation. At any time prior to Final Completion, upon District's demand, Developer shall deliver to District, within ten (10) Business Days following such demand, a schedule of all leases with respect to the Retail Portion of the Project.

**ARTICLE V
OTHER COVENANTS**

5.1 ENVIRONMENTAL CLAIMS AND INDEMNIFICATION

5.1.1 Compliance with Environmental Laws; Indemnity. Developer hereby covenants that, at its sole cost and expense (as between District and Developer, provided that the foregoing shall not prohibit Developer from the pursuit of any third party responsible for non-compliance with Environmental Laws), it shall comply with all provisions of Environmental Laws applicable to the Property and all uses, improvements, and appurtenances of and to the Property, and shall perform all investigations, removal, remedial actions, cleanup and abatement, corrective action, or other remediation that may be required pursuant to any Environmental Law, and District and its officers, agents, and employees (collectively, the "**Indemnified Parties**") shall have no responsibility or liability with respect thereto. Developer shall indemnify, defend, and hold District harmless from and against any and all losses, costs, claims, damages, liabilities, and causes of action of any nature whatsoever (including, without limitation, the reasonable fees and disbursements of counsel and engineering consultants) incurred by or asserted against any Indemnified Parties in connection with, arising out of, in response to, or in any manner relating to (i) Developer's violation of any Environmental Law, (ii) any Contaminant Release or threatened Contaminant Release of a Hazardous Material after the Effective Date, or (iii) any condition of pollution, contamination, or Hazardous Material-related nuisance on, under, or from the Property subsequent to the Effective Date ("**Environmental Claims**"); provided, however, that Developer shall not be required to indemnify District or any of the other Indemnified Parties if and to the extent that any Environmental Claims arise in connection with the violation of any Environmental Law in relation to the Property by District or any of District's agents, officers, directors, contractors or employees. If an alleged Environmental Claim arises and Developer disputes that such event or action constitutes an Environmental Claim, the parties shall mutually agree on a third party consultant to prepare a written report regarding whether an Environmental Claim has occurred. The findings of such report shall be determinative of the issue. Such third party consultant's services shall be conducted at Developer's sole cost and expense.

5.1.2 Release. Developer, for itself, its former and future officers, directors, agents, and employees, and each of their respective heirs, personal representatives, successors, and assigns, hereby forever releases and discharges the Indemnified Parties and all of their present, former, and future parent, subsidiary, and related entities and all of its and their respective present, former, and future officers, directors, agents, and employees, and each of its and their heirs, personal representatives, successors and assigns, of and from any and all rights, claims, liabilities, causes of action, obligations, and all other debts and demands whatsoever, at law or in equity, whether known or unknown, foreseen or unforeseen, accrued or unaccrued, in connection with any Environmental Claims, except if and to the extent any such rights, claims, liabilities, causes of action, obligations, debts, demands or Environmental Claims arise in connection with the violation of any Environmental Law in relation to the Property by District. If an alleged Environmental Claim arises and Developer disputes that such event or action constitutes an

Environmental Claim, the parties shall mutually agree on a third party consultant to prepare a written report regarding whether an Environmental Claim has occurred. The findings of such report shall be determinative of the issue. Such third party consultant's services shall be conducted at Developer's sole cost and expense.

5.1.3 Disposal Plan. From and after the Effective Date, in the event Developer or any Developer's Agent disturbs, removes or discovers any materials or waste from the Property, which are determined to be Hazardous Materials, in addition to any notices that may be required by Applicable Law, Developer shall notify District within five (5) Business Days after its discovery of such Hazardous Materials. Thereafter, Developer shall promptly develop a plan for disposal of the Hazardous Materials (the "**Disposal Plan**"). The Disposal Plan shall contain all identifying information as to the type and condition of the Hazardous Materials discovered and a detailed account of the manner in which the Hazardous Materials are to be removed and disposed of. Developer shall remove and dispose of all Hazardous Materials in accordance with all Applicable Law. Within seven (7) Business Days after the disposal of any Hazardous Materials or waste, Developer shall provide District such written evidence and receipts confirming the proper disposal of all Hazardous Materials or waste removed from the Property. In the event of a termination of this Covenant, neither Developer nor any of Developer's Agents shall have any continuing liability or obligations regarding the Disposal Plan or the removal or remediation of any Hazardous Materials on the Property not caused by Developer or Developer's Agents; provided, however, notwithstanding such termination, Developer shall complete any disposal actions it had begun prior to such termination (District agrees that the mere monitoring and/or discovery of Hazardous Materials shall not, in and of itself, be deemed to constitute the commencement of disposal actions) and shall take such other actions so as to rectify any conditions impeding the safety and security of the Property that were created or arose after the Effective Date and were not caused by District or any of District's agents, officers, directors, contractors or employee, and this obligation shall survive termination of this Covenant until such completion.

5.2 LABOR/EMPLOYMENT COVENANTS.

5.2.1 If Developer receives federal or District of Columbia financial assistance, and if the construction of the Project is a union project with respect to the Property, Developer 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 Developer'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.

5.2.2 Developer 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 Developer's non-compliance with this Section or with any applicable rule, regulation, or order, District, DOES, or DOL may take such enforcement against Developer, including, but not limited to, an action for injunctive relief and/or monetary damages, as may be provided by Applicable Law.

5.3 NONDISCRIMINATION EMPLOYMENT COVENANTS

5.3.1 Covenant not to Discriminate in Use. Developer shall not discriminate upon the basis of race, color, religion, sex, national origin, ethnicity, sexual orientation, or any other factor which would constitute a violation of the D.C. Human Rights Act or any other Applicable Law, regulation, or court order, in the use or occupancy of the Project.

5.3.2 Covenant not to Discriminate in Employment. Developer shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, or any other factor which would constitute a violation of the D.C. Human Rights Act or other Applicable Law, regulation, or court order. Developer agrees to comply with all applicable labor and employment standards, Applicable Law, and orders in the operation of the Project.

5.3.3 Affirmative Action. Developer will take reasonable steps to ensure that employees are treated equally during employment, without regard to their race, color, religion, sex, or national origin, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, or physical handicap. Such affirmative action shall include, but not be limited to, the following: (i) employment, upgrading, or transfer; (ii) recruitment or recruitment advertising; (iii) demotion, layoff, or termination; (iv) rates of pay or other forms of compensation; and (v) selection for training and apprenticeship. Developer agrees to post in conspicuous places available to employees and applicants for employment notices to be provided by the DOES or District setting forth the provisions of this non discrimination clause.

5.3.4 Solicitations for Employment. Developer will, in all solicitations or advertisements for employees placed by or on behalf of Developer, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin or any other factor that would constitute a violation of the D.C. Human Rights

Act or other Applicable Law.

5.3.5 Enforcement. If Developer fails to comply with the nondiscrimination covenants of this Section 5.3 or with any applicable rule, regulation, or order, District, DOES, or DOL may take such enforcement against Developer, including, but not limited to, an action for injunctive relief and/or monetary damages, as may be provided by Applicable Law.

5.4 OPPORTUNITY FOR TRAINING AND EMPLOYMENT. District requires that priority for training and employment opportunities be given to residents of the District of Columbia in accordance with Applicable Law. In accordance therewith, Developer shall comply with all applicable requirements of Mayor's Order 83-265, D.C. Law 5-93, as amended, D.C. Law 14-24, and all applicable labor and employment standards, laws, regulations and orders in the construction and operation of the Residential Development and the Commercial Development. In addition to any other requirements of Applicable Law, Developer covenants that it shall comply with the First Source Agreement.

5.5 OPPORTUNITY FOR CERTIFIED BUSINESS ENTERPRISES. Developer covenants that it is in compliance and shall continue to comply with the CBE Agreement, the requirements of the CBE Act, including the equity and development participation requirements set forth in section 2349a of the CBE Act (D.C. Official Code § 2-218.49a), and all other Applicable Law regarding economic inclusion and the utilization of CBEs.

5.6 DISTRICT SECURITY FOR PERFORMANCE

5.6.1 Development and Completion Guaranty.

(a) 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 obligations contained in these Covenants, District may require the Guarantor, in accordance with the terms of the Development and Completion Guaranty, to perform Developer's obligations.

(b) In the event District reasonably determines that a material adverse change in the financial condition of the Guarantor(s) has occurred that materially impacts, or could threaten to materially impact, the Guarantor's ability to perform under the Development and Completion Guaranty, Developer shall, within thirty (30) days after 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 substitute guarantor. Such replacement Guarantor(s) shall execute and deliver to District a Development and Completion Guaranty in the same form as originally delivered to District.

**ARTICLE VI
ASSIGNMENT AND TRANSFER; OPERATING AGREEMENT**

6.1 ASSIGNMENT AND TRANSFER. Up until the time that Final Completion of the Project occurs, Developer represents, warrants, covenants, and agrees, for itself and its successors and assigns, that Developer (or any successor in interest thereof) shall not assign its rights under this Covenant, or delegate its obligations under this Covenant, or otherwise effect a Transfer or suffer a Transfer to occur, without District's prior written approval, which may be granted or denied in District's sole discretion; provided, however, the foregoing restriction on Developer's assignment of its rights and delegation of its obligations under this Covenant shall not be deemed to prohibit Developer from engaging the Contractor, Architect and such other subcontractors and consultants as may be necessary for Developer to fulfill its obligations under the Agreement and this Covenant. After Final Completion of the Project, Developer may assign the Property (or portions thereof) or otherwise Transfer the Property without District's prior written approval.

6.2 AMENDMENT OF OPERATING AGREEMENT. Prior to Final Completion of the Project, Developer shall not materially amend the Operating Agreement or otherwise materially modify the relationship between the Members (including, but not limited to, the Members' respective financial interests in Developer) without the prior written approval of District. District's approval of a proposed amendment to the Operating Agreement shall be within District's sole discretion. Notwithstanding the foregoing, the Operating Agreement may be amended without District's approval, if the purpose of the amendment is to document or otherwise confirm any arrangement not included within the definition of "**Transfer**" in this Covenant.

**ARTICLE VII
INDEMNIFICATION**

Developer shall indemnify, defend, and hold the Indemnified Parties 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 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 any of the Indemnified Parties.

**ARTICLE VIII
TERM; RELEASE**

8.1 TERM OF CONSTRUCTION RELATED COVENANTS. The provisions of Article II, Article III and Section 5.6 of this Covenant shall remain in effect until the date on which District issues the Final Certificate of Completion.

8.2. TERM OF CERTAIN OTHER COVENANTS.

8.2.1 Term of Indemnification and Employment Covenants. The provisions of Section 5.1, Section 5.2, Section 5.3, and Article VII of this Covenant shall run with the land and otherwise remain in effect until this Covenant terminates pursuant to Section 8.4 of this Covenant. The provisions of Section 5.4 and Section 5.5 of this Covenant shall be governed by the First Source Agreement and the CBE Agreement, respectively.

8.2.2 Term of Use Covenant. The term of the use covenant set forth in Section 4.1 shall continue for the term of this Covenant.

8.2.3 Term of Assignment and Transfer and Operating Agreement Covenants. The provisions Article VI of this Covenant shall run with the land and otherwise remain in effect until expiration of the Restricted Period.

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 ten (10) 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.

8.4 TERMINATION OF COVENANT. Notwithstanding anything to the contrary contained in this Covenant or the Agreement (i) in no event shall this Covenant be effective beyond the date that is fifteen (15) years from the date of expiration of the Restricted Period, and (ii) if a party no longer owns an interest in the Property, such party shall have no further obligation under this Covenant, provided that all obligations and liabilities of such party are assumed by the party's assignee or transferee. If District exercises its right of re-entry contained in the Deed, this Covenant shall terminate as to the Property re-entered by District as of the date title to the Property vests in District; provided, however that the obligations of Section 5.1 and Article VII that were incurred by Developer prior to the termination shall survive such termination. Upon re-entry by District and termination of this Covenant, all plans and specifications with regard to the development and construction of the Project, including, without limitation, the Approved Construction Drawings and any Permits obtained, shall be automatically assigned to District, at the sole cost and expense of Developer, free and clear of all liens and claims for payment.

**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) Developer fails to pay or cause to be paid any amount required to be paid by it under this Covenant, and such default shall continue for thirty (30) days after notice of such default from District;
- (b) Developer defaults in the performance of any obligation, term, or provision under this Covenant (other than the payment of any amount required to be paid by Developer pursuant to this Covenant and such Events of Default expressly set forth in this Section 9.1), and such default shall continue uncured for thirty (30) days (or such other cure period specifically identified in this Covenant) after notice of such default from District, provided that such thirty (30) day (or such other cure period specifically identified in this Covenant) period shall be extended for an additional period of time reasonably necessary to effect such cure, but in no event more than an additional one hundred twenty (120) days, provided that Developer commences the cure within such original thirty (30) day period and thereafter diligently pursues and completes such cure;
- (c) 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 continues for ten (10) Business Days after written notice from District;
- (d) An event of default occurs under any Related Agreement beyond any applicable notice and cure period; and
- (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.

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 exercise its remedies or options under the Development and Completion Guaranty;

- (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) Business Days after demand therefor. Any such sums not paid by Developer within ten (10) Business Days after demand shall bear interest at the Default Rate, until paid;
- (b) District may pursue specific performance of Developer's obligations hereunder;
- (c) District may pursue any and all other remedies available at law and in equity, including without limitation, injunctive relief; and
- (d) if applicable, District may exercise its right of re-entry contained in the Deed.

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. Under no circumstances shall Developer be liable for any consequential, punitive or special damages.

9.2.3 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 its attorneys' fees and costs. 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.

ARTICLE X CASUALTY

In the event of damage or destruction to the Project following the Effective Date, but prior to District's issuance of the Final Certificate of Completion, Developer shall be obligated to promptly repair or restore the Project in conformity with the Approved Construction Drawings, 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 shall not issue the Final Certificate of Completion nor shall District release Developer from its development obligations hereunder until Developer has completed its restoration obligations. The foregoing restoration obligations are subject to (i) the availability of insurance proceeds to perform the repair or restoration, provided Developer has maintained the insurance required by this Covenant, and (ii) a Project Lender's rights under a Project Mortgage.

ARTICLE XI MISCELLANEOUS PROVISIONS

11.1 NOTICES. 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 overnight commercial courier service to the Parties at the following addresses:

DISTRICT:

Office of the Deputy Mayor for Planning and Economic Development
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
441 4th Street, N.W., 10th Floor South
Washington, D.C. 20001
Attn: Deputy Attorney General, Commercial Division

DEVELOPER:

TPC 5th & I Partners LLC
c/o The Peebles Corporation
2020 Ponce De Leon Blvd., Suite 907
Coral Gables, FL 33134
Attn: Lowell Plotkin, General Counsel

With a copy to:

Debra D. Yogodzinski, Esq.
Rogers Yogodzinski LLP
1129 20th Street, NW, Suite 300
Washington, DC 20036

Notices served upon Developer or District in the manner aforesaid shall be deemed to have been received for all purposes hereunder 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 refused.

11.2 COVENANT 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, 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 Property, but shall be retained by District, or such other designee of District as District may so determine.

11.3 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.

11.4 GOVERNING LAW; FORUM FOR DISPUTES. This Covenant shall be governed by and construed in accordance with the laws of the District of Columbia (without reference to conflicts of laws principles). District and Developer irrevocably submit to the jurisdiction of (a) the courts of the District of Columbia and (b) the United States District Court for the District of Columbia for the purposes of any suit, action, or other proceeding arising out of this Covenant or any transaction contemplated hereby. District and Developer irrevocably and unconditionally waive any objection to the laying of venue of any action, suit, or proceeding arising out of this Covenant or the transactions contemplated hereby in (a) the courts of the District of Columbia and (b) the United States District Court for the District of Columbia, and hereby further waive and agree not to plead or claim in any such court that any such action, suit, or proceeding brought in any such court has been brought in an inconvenient forum.

11.5 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.

11.6 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.

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

11.8 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.

11.9 SEVERABILITY. If any provision of this Covenant is held to be illegal, invalid, or unenforceable under present or future Applicable Law, such provisions shall be fully severable, this Covenant shall be construed and enforced as if such illegal, invalid, or unenforceable provision had never comprised a part of this Covenant, and the remaining provisions of this Covenant shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance from this Covenant. Furthermore, there shall be added automatically as a part of this Covenant a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable.

11.10 SCHEDULES AND EXHIBITS; RECITALS; ENTIRE AGREEMENT. All Schedules and Exhibits referenced in this Covenant are incorporated by this reference as if fully set forth in

this Covenant. In the event of any conflict between the Exhibits or the Schedules and this Covenant, this Covenant shall control. The Recitals of this Covenant are hereby incorporated herein by this reference and made a substantive part of the agreements herein between the Parties. This Covenant constitutes the entire agreement and understanding between the Parties hereto and supersedes all prior agreements and understandings between the Parties hereto and supersedes all prior agreements and understandings related to the subject matter hereof.

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

11.12 NO CONSTRUCTION AGAINST DRAFTER. This Covenant has been negotiated and prepared by District and Developer 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.

11.13 FORCE MAJEURE DELAYS. Developer 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) Developer shall have first notified, within twenty (20) days after it becomes aware of the beginning of any such Force Majeure event, District in writing of the cause or causes thereof, with supporting documentation, and requested an extension for the period of the forced delay; and (b) Developer must take commercially reasonable actions to minimize the delay. If Developer requests any extension on the date of completion of any obligation hereunder due to Force Majeure, it shall be the responsibility of Developer to reasonably demonstrate that the delay was caused specifically by a Force Majeure event.

11.14 SINGULAR AND PLURAL USAGE; GENDER. Whenever the sense of this Covenant so requires, the use herein of the singular number shall be deemed to include the plural; the masculine gender shall be deemed to include the feminine or neuter gender; and the neuter gender shall be deemed to include the masculine or feminine gender.

11.15 RECORDATION. It is the intent of the Parties to record this Covenant in the Land Records.

11.16 DISTRICT RIGHT TO ENFORCE. It is intended and agreed that District and its successors and assigns shall be deemed beneficiaries of the agreements and covenants provided in this Covenant, both for and in their own right and also for the purposes of protecting the interests of the community and the other parties, public or private, in whose favor or for whose benefit such agreements and covenants have been provided. Such agreements and covenants shall run in favor of District for the entire period during which such agreements and covenants shall be in force and effect, without regard to whether District has, at any time, been, remains, or is an owner of any land or interest therein to or in favor of which such agreement and covenants relate.

11.17 WAIVER OF TRIAL BY JURY. TO THE EXTENT PERMITTED BY LAW, ALL PARTIES HERETO WAIVE THE RIGHT TO TRIAL BY JURY IN CONNECTION WITH ANY LITIGATION ARISING IN RESPECT OF THIS COVENANT OR THE TRANSACTIONS AND MATTERS CONTEMPLATED HEREBY.

11.18 FURTHER ASSURANCES. Each party agrees to execute and deliver to the other party such additional documents and instruments as the other party reasonably may request in order to fully carry out the purposes and intent of this Covenant, including, without limitation, any releases contemplated by and in accordance with the terms of this Covenant.

11.19 NO UNREASONABLE RESTRAINT. Developer hereby acknowledges and agrees that the restrictions set forth in this Covenant do not constitute an unreasonable restraint on Developer's right to transfer or otherwise alienate the 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.

11.20 DISCRETION. Unless explicitly provided to the contrary in this Covenant in each instance, where either party has the right to approve or consent to any matter herein, such approval or consent shall not be unreasonably withheld, conditioned, or delayed.

11.21 CONFLICT OF INTERESTS; REPRESENTATIVES NOT INDIVIDUALLY LIABLE. No official or employee of District shall participate in any decision relating to this Covenant which affects his personal interests or the interests of any District of Columbia agency, partnership, or association in which he is, directly or indirectly, interested. No official or employee of District shall be personally liable to Developer or any successor-in-interest in the event of any default or breach by District or for any amount which may become due to Developer or such successor-in-interest or on any obligations hereunder. Further, no employee, officer, director, or shareholder of Developer shall be personally liable to District in the event of any default or breach by Developer or for any amount which may become due to District or on account of any obligations hereunder.

11.22 NO WAIVER BY DELAY; WAIVER. Notwithstanding anything to the contrary contained herein, any delay by any Party in instituting or prosecuting any actions or proceedings with respect to a default by the other hereunder or otherwise asserting its rights or pursuing its remedies under this Covenant, shall not operate as a waiver of such rights or to deprive such Party of or limit such rights in any way (it being the intent of this provision that neither Party shall be constrained by waiver, laches, or otherwise in the exercise of such remedies). Any waiver by either Party hereto must be made in writing. Any waiver in fact made with respect to any specific default under this Covenant shall not be considered or treated as a waiver with respect to any other defaults or with respect to the particular default except to the extent specifically waived in writing.

[Signatures on following pages]

IN WITNESS WHEREOF, District has, on this ____ day of _____, 20__, caused this Construction and Use Covenant to be executed, acknowledged and delivered by _____, Deputy Mayor for Planning and Economic Development, for the purposes therein contained.

DISTRICT:

DISTRICT OF COLUMBIA,
acting by and through the Deputy Mayor for
Planning and Economic Development

By: _____
Name:
Title: Deputy Mayor for Planning and Economic
Development

Approved for Legal Sufficiency:

Office of the Attorney General

By: _____
Assistant Attorney General
Date: _____

DISTRICT OF COLUMBIA) ss:

The foregoing instrument was acknowledged before me on this ____ day of _____, 20__ by _____, the Deputy Mayor for Planning and Economic Development, whose name is subscribed to the within instrument, being authorized to do so on behalf of the District of Columbia, acting by and through the District of Columbia Office of the Deputy Mayor for Planning and Economic Development, has executed the foregoing and annexed document as his/her free act and deed.

Notary Public

[Notarial Seal]

My commission expires: _____

DEVELOPER:

TPC 5th & I PARTNERS LLC, a District of
Columbia limited liability company

By: TPC 5TH & I Manager LLC, a District of
Columbia limited liability company, its
Managing Member

By: _____
Name: R. Donahue Peebles, Jr.
Title:

DISTRICT OF COLUMBIA) ss:

The foregoing instrument was acknowledged before me on this ____ day of _____, 20 __, by _____, the Managing Member of TPC 5th & I Manager LLC a District of Columbia limited liability company, the Managing Member of TPC 5th & I Partners LLC, a District of Columbia limited liability company, Developer herein, whose name is subscribed to the within instrument, being authorized to do so on behalf of said Developer, has executed the foregoing and annexed document as his free act and deed, for the purposes therein contained.

Notary Public

[Notarial Seal]

My commission expires: _____

EXHIBITS:

EXHIBIT A	Legal Description of Property
EXHIBIT B	Schedule of Performance
EXHIBIT C	Community Participation Program
EXHIBIT D	Compliance Form

COUNCIL DRAFT

Exhibit E-2
Form of Construction and Use Covenant for the Affordable Housing Property

EXHIBIT E-2

CONSTRUCTION AND USE COVENANT

THIS CONSTRUCTION AND USE COVENANT (this “**Covenant**”) is made as of the _____ day of _____, 20__ (the “**Effective Date**”), between (i) the DISTRICT OF COLUMBIA, a municipal corporation, acting by and through the Office of the Deputy Mayor for Planning and Economic Development (“**District**”) and (ii) MLK DC AH DEVELOPER, LLC, a Delaware limited liability company (“**Developer**”).

RECITALS

R-1. Developer is the fee simple title owner of the real property located in Washington, D.C., known for tax and assessment purposes as Square____, Lot____ (the “**Property**”), more commonly known as 2100 Martin Luther King , Jr. Avenue, SE, Washington. DC, which Property is more fully described in Exhibit A attached hereto.

R-2. District, Developer and Developer’s affiliate, TPC 5th & I Partners, LLC, a District of Columbia limited liability company (“**TPC**”) entered into a Land Disposition and Development Agreement, dated as of _____, 20__ (the “**Agreement**”), pursuant to which Developer has agreed to construct a multifamily building on the Property devoted to affordable housing.

R-3. The Property shall consist of approximately sixty-one [61] affordable housing residential units developed in accordance with the Affordable Housing Development Plan and other provisions set forth in the Agreement, and in conformance with the Affordable Housing Covenant (the “**Affordable Housing Covenant**”) executed by Developer and recorded in the Land Records of the District of Columbia as an encumbrance on the Property immediately after the recordation of this Covenant.

R-4. As required by the Agreement, Developer, for the benefit of District, agrees to construct the Project on the Property in accordance with the Approved Construction Drawings.

NOW, THEREFORE, the Parties hereto agree that the Property shall be subject to the following covenants, conditions, and restrictions:

ARTICLE I
DEFINITIONS

1.1 DEFINITIONS. 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:

“**Acceptable Bank**” means a commercial bank with an office located in the Washington, D.C. metropolitan area that has a credit rating with respect to certificates of deposit, short-term deposits or commercial paper of at least Aa3 (or equivalent) by Moody’s Investor Service, Inc., or at least AA- (or equivalent) by Standard & Poor’s Corporation.

“**ADUs**” means the affordable dwelling units, developed in accordance with the Affordable Housing Covenant and/or any applicable Inclusionary Zoning (IZ) Covenant required to be recorded in the Land Records against the Property (each being an “**ADU**.”)

“**Affiliate**” means with respect to any Person (“first Person”) (i) any other Person directly or indirectly Controlling, Controlled by, or under common Control with such first Person, (ii) any officer, director, partner, shareholder, manager, member or trustee of such first Person, or (iii) any officer, director, general partner, manager, member or trustee of any Person described in clauses (i) or (ii) of this sentence.

“**Affordable Housing Covenant**” is defined in the Recitals.

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

“**AMI**” means the most current area median income for the Washington DC/MD/VA metropolitan statistical area as of the date of determination, as designated by HUD.

“**ANC**” means an Advisory Neighborhood Commission.

“**Applicable Law**” means all applicable District of Columbia and federal laws, codes, regulations, and orders, including, without limitation, Environmental Laws, laws, if applicable, relating to historic preservation and laws relating to accessibility for persons with disabilities, and, if applicable, the Davis-Bacon Act, 40 U.S.C. § 276(a).

“**Approved Construction Drawings**” shall mean all Construction Drawings (as defined in the Agreement), including the Construction Plans and Specifications, approved by District pursuant to the Agreement, and any permitted changes thereto under this Covenant.

“**Architect**” means the architect of record, licensed to practice architecture in the District of Columbia, which Developer has selected and District has approved for the Project.

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

“**CBEs**” means a Person that has been issued a certificate of registration by DSLBD pursuant to D.C. Official Code §§ 2-218.01, *et seq.*

“**CBE Agreement**” is that agreement between Developer and DSLBD executed prior to the Effective Date, governing certain obligations of Developer under D.C. Official Code §§ 2-218.01, *et seq.* regarding participation by and contracting and employment of CBEs in the Project.

“Certificate of Occupancy” means a certificate of occupancy or similar document or permit that must be obtained from the appropriate Governmental Authority as a condition to the lawful occupancy of the Project, or any component or portion thereof, including all ADU’s.

“Commencement of Construction” means the time at which Developer has (i) executed a construction contract with its Contractor; (ii) given such Contractor a notice to proceed under said construction contract; (iii) caused such Contractor to mobilize on the Property equipment necessary for demolition, if any; and (iv) obtained any required Permits for demolition and sheeting and shoring and commenced demolition, if any, upon the Property pursuant to the Approved Construction Drawings. For purposes of this Covenant, the term **“Commencement of Construction”** does not mean site exploration, borings to determine foundation conditions, or other pre-construction monitoring or testing to conduct due diligence activities or to establish background information related to the suitability of the Property for development of the Improvements thereon or the investigations of environmental conditions, but **“Commencement of Construction”** shall include any material removal of Hazardous Materials from the Property by Developer in anticipation of excavation for construction.

“Community Participation Program” means the plan, attached hereto as Exhibit C, by which Developer shall apprise the immediate ANC and other community organizations of the status of the Project, which shall comply with Section 2.9.

“Compliance Form” is defined in Section 2.10.2.

“Concept Plans” are the design plans, submitted by Developer and approved by District prior to the Effective Date, which serve the purpose of establishing the major direction of the design of the Project.

“Construction Consultant” is the construction consultant retained by Developer for the Project and approved by District pursuant to the Agreement.

“Construction Plans and Specifications” mean the detailed architectural drawings and specifications that are prepared for all aspects of the Project submitted by Developer and approved by District prior to the Effective Date which are used to obtain Permits, to prepare detailed cost estimates, to solicit and receive construction bids, and to direct the actual construction of the Project.

“Contaminant Release” means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discharge of barrels, containers and other receptacles containing any Hazardous Materials) of any Hazardous Materials.

“Contractor” means _____, which Developer has selected and District has approved for the Project.

“Control” means the possession, directly or indirectly, of the power to direct, or cause the direction of, the management and policies of a Person, 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, as applicable, the directors, managers, managing partners or Persons exercising similar authority with respect to the subject Person. A lender's right to foreclose or to accept a deed in lieu of foreclosure under a loan secured by the 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 Operating Agreement for Developer shall not constitute a change of "Control." The terms "**Control**," "**Controlling**," "**Controlled by**" or "**under common Control with**" shall have meanings correlative thereto.

"**Council**" means the Council of the District of Columbia.

"**Covenant**" is defined in the Preamble.

"**DDOE**" means the District of Columbia Department of the Environment.

"**Default Rate**" means the annual rate of interest that is the lesser of (i) twelve percent (12%) or (ii) the maximum rate allowed by Applicable Law.

"**Design Development Plans**" are the design plans that reflect refinement of the approved Schematic Plans, showing all aspects of the Project at the correct size and shape submitted by Developer and approved by District prior to the Effective Date.

"**Development and Completion Guaranty**" is that guaranty, of even date herewith, by the Guarantor, which binds Guarantor to develop and otherwise construct the Project in the manner and within the time frames required by the terms of the Agreement and this Covenant.

"**Developer**" means MLK DC AH Developer, LLC, and its permitted successors and assigns.

"**Developer's Agents**" mean Developer's agents, employees, consultants, contractors, and representatives.

"**Developer's Certificate of Completion**" means that certificate provided by Developer to District upon Substantial Completion, as required under Section 2.12.1 herein.

"**Disapproval Notice**" is defined in Section 2.2.3.

"**Disposal Plan**" is defined in Section 5.1.3.

"**DOES**" is the District of Columbia Department of Employment Services.

"**DOL**" is the United States Department of Labor.

"**DSLBD**" is the District of Columbia Department of Small and Local Business Development.

"**Effective Date**" is the date first written above.

“**Environmental Claims**” is defined in Section 5.1.1.

“**Environmental Laws**” means any present and future federal, state or local 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 9.1.

“**Final Certificate of Completion**” means the certificate issued by District to Developer confirming Developer’s Final Completion of the Project.

“**Final Completion**” means following Substantial Completion: (a) the completion of all Punch List Items or the establishment of an escrow account for the completion of such items; (b) the close-out of all construction contracts for the Project; and (c) the payment of all costs of constructing the Project and receipt by Developer of fully executed and notarized valid releases or waivers of liens from all manufacturers, suppliers, subcontractors, general contractors, and all other Persons furnishing supplies or labor in connection with the Project.

“**Final Project Budget and Funding Plan**” means the Project Budget and Funding Plan based on the Approved Construction Drawings that was submitted by Developer and approved by District prior to the Effective Date pursuant to the Agreement.

“**First Source Agreement**” is that agreement between Developer and DOES executed prior to the Effective Date, governing certain obligations of Developer 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 the Project.

“Force Majeure” is an act or event, including, as applicable, an act of God, fire, earthquake, flood, explosion, war, invasion, insurrection, riot, mob violence, sabotage, terrorism, labor strikes, unusual delays in deliveries, a taking by eminent domain, requisition, and laws or orders of government or of civil, military, or naval authorities enacted or adopted or implemented after the Effective Date; provided, however, that with respect to any of the above acts or events despite reasonable business efforts in obtaining approval from, or changes ordered by, any governmental authority, that with respect to any of such acts or events: (i) such acts are not within the reasonable control of Developer, Developer’s Agents or their Members; or (ii) such acts or events are not due to the fault or negligence of Developer, Developer’s Agents, or their Members; (iii) such acts or events are not reasonably avoidable by Developer, Developer’s Agents, or their Members or District in the event District’s claim is based on a Force Majeure event, and (iv) such acts or events result in a delay in performance by Developer or District, as applicable; but specifically excluding: (A) shortage or unavailability of funds or Developer’s or District’s financial condition; (B) changes in real estate market conditions; or (C) the acts or omissions of a general contractor, its subcontractors, or any other of Developer’s Agents or its Members, except to the extent such acts or omissions are covered by sub-paragraphs (i)-(iii), above.

“Governmental Approvals” are the approvals from the applicable Governmental Authorities obtained by Developer that are necessary or required for construction and occupancy of the Improvements, excavation permits, building permits, public space permits and such other permits, licenses or approvals as may be required by the applicable Governmental Authorities for the construction and occupancy of the Improvements.

“Governmental Authority” means the United States of America, the District of Columbia, and any agency, department, commission, board, bureau, instrumentality or political subdivision of the foregoing, now existing or hereafter created, having jurisdiction over Developer, the Project or the Property or any portion thereof, or any street, road, avenue or sidewalk comprising a part of, or in front of, the Project, or any vault in or under the Project, or airspace over the Project, including, without limitation, WMATA and utility companies

“Guarantor” shall be a Person selected by Developer and approved by District pursuant to the Agreement.

“Guarantor Submissions” shall mean the current audited financial statements and audited 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).

“Hazardous Materials” means (a) asbestos and any asbestos containing material; (b) any substance that is then defined or listed in, or otherwise classified pursuant to, any Environmental Law or any other Applicable Law as a “hazardous substance,” “hazardous material,” “hazardous waste,” “infectious waste,” “toxic substance,” “toxic pollutant” or any other formulation intended to define, list or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity or Toxicity Characteristic Leaching Procedure (TCLP) toxicity; (c) any petroleum and

drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources; and (d) any petroleum product, polychlorinated biphenyls, urea formaldehyde, radon gas, radioactive material (including any source, special nuclear or by-product material), medical waste, chlorofluorocarbon, lead or lead-based product and any other substance the presence of which could be detrimental to the Property or hazardous to health or the environment.

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

“**Improvements**” means the landscaping, hardscape, and improvements to be constructed or placed on the Property in accordance with the Development Plan and the Approved Construction Drawings; 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.

“**Indemnified Parties**” is defined in Section 5.1.1.

“**Institutional Lender**” shall mean a Person that is not an Affiliate of Developer or a Prohibited Person and is, at the time it first makes a loan to Developer, or acquires an interest in any such loan, (i) a savings bank, savings and loan association, credit union, commercial bank or trust company organized or chartered under the laws of the United States or any state thereof or the District of Columbia or a foreign banking institution (in each case whether acting individually or in a fiduciary or representative (such as an agency) capacity); (ii) an insurance company organized and existing under the laws of the United States of America or any state thereof or the District of Columbia or a foreign insurance company (in each case whether acting individually or in a fiduciary or representative (such as an agency) capacity); (iii) an institutional investor such as a real estate investment trust (or umbrella partnership or other entity of which a real estate investment trust is the majority owner), a real estate mortgage investment conduit or securitization trust or similar investment entity; (iv) an entity that qualifies as a “REMIC” under the IRS Code or other public or private investment entity (in each case whether acting as principal or agent); (v) a brokerage or investment banking organization (in each case whether acting individually or in a fiduciary or representative (such as an agency) capacity) as principal or agent); (vi) an employees’ welfare, benefit, pension or retirement fund; (vii) an institutional leasing company; (viii) an institutional financing company; (ix) any non-District of Columbia governmental agency or entity insured by a governmental agency or any combination of the foregoing entities; (x) a finance company principally engaged in the origination of commercial mortgage loans or any financing related subsidiary of a Fortune 500 company; (xi) any federal, state, or District agency regularly making, purchasing or guaranteeing mortgage loans, or any governmental agency supervising the investment of public funds; (xii) a profit-sharing or commingled trust or fund, the majority of equity investors in which are pension funds having in the aggregate no less than \$1 Billion in assets; (xiii) any entity of any kind actively engaged in commercial real estate financing and having total assets (on the date when its interest in this Project, or any portion thereof, is obtained) of at least \$1 Billion; or (xiv) a charitable organization regularly engaged in making loans secured by real estate.

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