

**LAND DISPOSITION AND DEVELOPMENT AGREEMENT**

by and between the

DISTRICT OF COLUMBIA

and

COMMUNITY THREE GRIMKE LLC

for the

DISPOSITION AND DEVELOPMENT OF  
CERTAIN PARCELS OF LAND LOCATED AT

1923 VERMONT AVENUE, N.W., AND 912 U STREET, N.W.  
(Square 361, Lot 827 and Lot 833)

Dated \_\_\_\_\_, 2017

## LAND DISPOSITION AND DEVELOPMENT AGREEMENT

THIS LAND DISPOSITION AND DEVELOPMENT AGREEMENT (this “**Agreement**”), is made effective for all purposes as of the \_\_\_\_\_ day of \_\_\_\_\_, 2017, between (i) **DISTRICT OF COLUMBIA**, a municipal corporation, acting by and through the Office of the Deputy Mayor for Planning and Economic Development, (the “**District**”), and (ii) **COMMUNITY THREE GRIMKE LLC**, a District of Columbia limited liability company, its successors and assigns (the “**Developer**”) (individually a “**Party**” and collectively, the “**Parties**”).

### RECITALS:

R-1 District owns the real property located at 1923 Vermont Avenue, N.W., and 912 U Street, N.W., in the District of Columbia and known for taxation and assessment purposes as, Lot 827 in Square 361 (the “**School Parcel**”) and Lot 833 in Square 361 (the “**Vacant Parcel**”) respectively (collectively, the “**Property**”), as further described in **Exhibit A**.

R-2 District desires to convey (i) a leasehold interest in the portion of the School Parcel on which the existing improvements known as the Grimke School and the yards adjacent thereto are located (the “**Grimke School Building**”), as indicated on the plat attached hereto as **Exhibit B** (the “**Ground Lease Parcel**”), to Developer pursuant to the terms of a ground lease, and (ii) a fee simple interest in the Vacant Parcel and the balance of the School Parcel shown on **Exhibit B** (the “**9 ½ Street Fee Parcel**”) pursuant to a deed (collectively, the “**Fee Parcels**”). Developer is to develop the Property 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 Resolution\_\_\_\_\_, the “Grimke School, N.W., Disposition Approval Resolution of 2017” (the “**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’s agreement to convey fee simple title to and lease, as applicable, the Property to Developer as set forth in this Agreement, Developer shall grant to District the design review rights over the Project (defined below) set forth in this Agreement.

R-5 Developer and District further desire and intend that Developer renovate and/or construct the Project on the Property without any District of Columbia financing or assistance, operate the affordable housing component of the Project, and maintain the SBE (defined below) involvement in the Project without any financing or assistance from the District of Columbia; provided that this shall not preclude any grants or financing funded to occupants of the Project, including without limitation arts funding, or loan programs benefitting residential buyers.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties hereto, District and Developer do hereby agree as follows, to wit:

## **ARTICLE I DEFINITIONS; INCORPORATION OF RECITALS**

1.1 Definitions and Recitals. For the purposes of this Agreement, the terms and definitions contained in the Recitals are incorporated herein, and the following capitalized terms shall have the meanings ascribed to them below:

**“9 ½ Street Fee Parcel”** is defined in the Recitals.

**“ADU”** means an affordable residential unit developed on the Fee Simple Parcels in accordance with the Affordable Housing Covenant and the terms of this Agreement.

**“African American Civil War Memorial Museum”** or **“AACWMM”** means the museum operated by the African American Civil War Memorial Freedom Foundation, a District of Columbia not for profit corporation.

**“AACWMM Lease”** means the sublease between Developer and AACWMM for a minimum of 10,000 square feet of space in the renovated Grimke School Building, which space shall be delivered to AACWMM by Developer in a condition substantially similar to that of a Warm Lit Shell or as more particularly defined in the AACWMM Lease.

**“AACWMM Space”** is defined in Section 2.7.

**“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 that certain Affordable Housing Covenant between District and Developer substantially in the form attached hereto as **Exhibit C**, to be conformed and made consistent with this Agreement, and to be recorded in the Land Records against the Fee Parcels at Closing pursuant to Applicable Law and this Agreement.

**“Affordable Housing Plan”** is attached hereto as **Exhibit D**.

**“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 of the Affordable Housing 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 including, without limitation, the approval by the District of Columbia Zoning Commission of any PUD Application or zoning variance sought by Developer on the Property, but expressly excluding the Permits.

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

**“Architect”** means Torti Gallas Urban, Inc., its successors and assigns, or another architect of record, licensed to practice architecture in the District of Columbia, which has been selected by Developer for the Project and approved by District, which approval shall not be unreasonably withheld, conditioned or delayed.

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

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

**“Closing”** is the consummation of the transactions involving the purchase/lease 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.

**“Commencement of Construction”** means the time at which Developer 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 equipment necessary to commence (A) the renovation of the Grimke School Building (to include construction of no less than 10,000 square feet of space for the use of the AACWMM on the Ground Lease Parcel), and (B) construction of improvements on the Vacant Parcel; (iv) obtained the Permits required in order to commence the actions set forth in (A) and (B); and (v) commenced construction of the improvements on the Vacant Parcel and the renovation of the Grimke School Building 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 for development of the Project 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 construction. Further, District acknowledges that achievement of Commencement of Construction on the Project shall not require the execution of a construction contract, delivery of a notice to proceed and mobilization and construction on the 9 ½ Street Fee Parcel.

**“Commercial Uses”** shall mean any and all Office and Retail uses, as defined in the Zoning Regulations, as may be more specifically set forth in the Construction and Use Covenant.

**“Community Benefits Plan”** is defined in Section 7.10.

**“Community Participation Programs”** is defined in Section 4.6.4.

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

**“Concept Plans”** are the design plans, submitted by Developer and approved by District as of the Effective Date herein, which serve the purpose of establishing the major direction of the design of the Project, which are attached as Exhibit G.

**“Construction and Use Covenant”** means, individually and collectively, the Construction and Use Covenants between District and Developer, substantially in the form attached hereto as Exhibit H, to be conformed and made consistent with this Agreement, and to be recorded in the Land Records at Closing against each of the parcels that constitute the Property.

**“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 Developer to District, and approved by District, to the extent required by, and in accordance with the standards set forth in Article IV 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 in accordance with the approved Design Development Plans and that are used to obtain Permits, detailed cost estimates, to solicit and receive construction bids, and to direct the actual construction of 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. 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.

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

**“Cultural Uses”** means cultural and arts uses and cultural and arts-related uses, including, without limitation, Art Centers, Art Exhibition Areas, Art Galleries, Art Incubators and Artist Studios, Community Service Uses, Gallery Displays and Retail, Group Instruction Centers or Studios, Media Studios, Public Recreation and Community Centers and Museums, each as the foregoing is defined in the Zoning Regulations, including all ancillary storage, circulation, loading, mechanical, parking and any other area allocated for the exclusive use by the patrons or occupants of the space designated for Cultural Uses, as may be more specifically set forth in the Construction and Use Covenant.

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

**“Deed”** means the special warranty deeds conveying the Fee Parcels to Developer, substantially in the form attached hereto as **Exhibit J**, and to be conformed and made consistent with this Agreement’s provisions.

**“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, including its approximate size and layout. 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”** is defined in the Preamble.

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

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

**“Development and Completion Guaranty”** means a guaranty to be executed by Guarantor and that complies in all material respects with the terms of **Section 4.5.1**, substantially in the form attached hereto as **Exhibit K**, to be conformed and made consistent with this Agreement’s provisions, and which shall bind Guarantor to develop and otherwise construct the Project within the time frames and in the manner required by the terms of this Agreement, the Deed, the Ground Lease, and the Construction and Use Covenant.

**“Development Plan”** means Developer’s plan to: (i) redevelop the Ground Lease Parcel and the Grimke School Building for the following uses: (A) approximately 15,000 square feet of Cultural Uses, of which at least 10,000 square feet shall be occupied by AACWMM in accordance with the Exclusive Use Covenant Required by the Museum Act of 2013 (defined below); and (B) the balance of the Grimke School Building square footage for Commercial Uses; (ii) redevelop the Fee Parcels for residential use, including ground floor retail on the Vacant Parcel; and (iii) such associated parking as may be required by Applicable Law or otherwise as permitted by the PUD Process (defined below).

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

**“Disposal Plan”** is defined in Section 2.2.1(b).

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

**“District/AACWMM Lease”** is defined in Section 2.6.

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

**“DOEE”** means the District of Columbia Department of Energy and Environment.

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

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

**“Effective Date”** is the date first written above, which shall be completed by the last Party to execute this Agreement.

**“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), including, 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”** shall mean the funds required for the development and construction of the Project in excess of any and all Debt Financing, including the amount of any deferred development fee due and payable to Developer, whether or not treated as a loan for tax purposes, provided such Equity does not come from a Prohibited Person.

**“Exclusive Use Covenant Required by the Museum Act of 2013”** is defined in Section 2.7.

**“Fee Parcels”** is defined in the Recitals.

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

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

**“First Source Agreement”** is that agreement between Developer and DOES, attached hereto as **Exhibit L**, governing certain obligations of Developer 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, inability to procure or a general shortage of labor, equipment, facilities, materials, or supplies in the open market, failure or unavailability of transportation, strike, lockout, actions of labor unions, a taking by eminent domain, requisition, and laws or orders of government or of civil, military, or naval authorities enacted or adopted after the Effective Date, so long as such act or event: (i) is not within the reasonable control of Developer, Developer’s Agents, or its Members; (ii) is not due to the fault or negligence of Developer, Developer’s Agents, or its Members; (iii) is not reasonably avoidable by Developer, Developer’s Agents, or its Members or District in the event District’s claim is based on a Force Majeure event; and (iv) directly results in a delay in performance by Developer or District, as applicable; but specifically excluding: (A) shortage or unavailability of funds or Developer’s financial condition; (B) changes in real estate market conditions such that development of the Project is no longer practicable under the circumstances; or (C) the acts or omissions of a general contractor, its subcontractors, or any of Developer’s Agents or 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.*, as may be amended, and the regulations promulgated therewith.

**“Grimke School Building”** is defined in the Recitals.

**“Ground Lease”** is defined in Section 2.1.2 herein.

**“Ground Lease Parcel”** is defined in the Recitals.

**“Ground Rent”** is defined in Section 2.1.2 herein.

**“Guarantor”** shall be such Person and any successor(s) thereto as may be from time to time be approved by District pursuant to Section 4.5.

**“Guarantor Submissions”** shall mean the current financial statements and balance sheets, profit and loss statements, cash flow statements and other financial reports and



other financial information of a proposed guarantor as District may reasonably request, together with a summary of such proposed guarantor's other guaranty obligations and the other contingent obligations of such proposed guarantor (in each case, certified by such proposed guarantor or an officer of such proposed guarantor as being true, correct and complete).

**"Gymnasium"** means that part of the Property currently occupied and/or used by the AACWMM outside of the Grimke School Building.

**"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 landscaping, hardscape, and improvements to be constructed or placed on the Property in accordance with the Development Plan and 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 Agreement.

**"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; (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.

**“Letter of Credit”** means an irrevocable, unconditional, automatically renewed, stand-by letter of credit from a bank reasonably acceptable to District and substantially in the form attached hereto as **Exhibit M**, and to be conformed and made consistent with this Agreement.

**“Managing Member”** means Community Three Development LLC, a District of Columbia limited liability company.

**“Material Casualty”** is defined in Section 2.4.

**“Material Casualty Adjustment”** is defined in Section 2.4.

**“Material Change”** means (i) any change in size or design, from the Approved Construction Drawings approved by District pursuant to Section 4.2 herein, substantially affecting the general appearance or structural integrity of exterior walls and elevations, building bulk, or a diminution or increase of square footage in the Project in excess of five percent (5%) from the Approved Construction Drawings approved by District pursuant to Section 4.2 herein; (ii) any changes in exterior finishing materials substantially affecting architectural appearance from those shown and specified in the Approved Construction Drawings approved by District pursuant to Section 4.2 herein; (iii) any change in number of parking spaces by ten percent (10%) or more from the Approved Construction Drawings approved by District pursuant to Section 4.2 herein; (iv) any substantial change in landscape planning and design or changes in size or quality of exterior pavement, exterior lighting and other exterior site features from the Approved Construction Drawings approved by District pursuant to Section 4.2 herein; (v) any change that reduces the number of ADUs; or (vi) any change that reduces the total residential square footage of the Project by more than ten percent (10%); (vii) any material reduction in the level of interior finishes below market rate standards from the Approved Construction Drawings approved by District pursuant to Section 4.2 herein, as it relates to the ADUs; (viii) any changes in design and construction of the Project from the Approved Construction Drawings approved by District, pursuant to Section 4.2 herein, requiring approval by a governmental authority; and (ix) any change requiring an amendment to the PUD, if applicable.

**“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 and leasehold estates under the laws of the District of Columbia.

**“Other Submissions”** is defined in Section 4.6.

**“Outside Closing Date”** is defined in Section 6.1.

**“Parking Agreement”** is defined in Section 2.6.

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

**“Payment Bond”** means a bond that meets the requirements of Section 4.8, which shall be delivered to District pursuant to the terms of this Agreement.

**“Performance Bond”** means a bond that meets the requirements of Section 4.8, which shall be delivered to District pursuant to the terms of this Agreement.

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

**“Permitted Exceptions”** is defined in Section 2.3.2.

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

**“Progress Meetings”** is defined in Section 4.4.

**“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 those Improvements on the Property, and the development and construction thereof in accordance with the Approvals, the Development Plan, this Agreement, the Approved Construction Drawings, and the 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 Deposit"** has the meaning given it in Section 2.1.2(a).

**"Project Funding Plan"** has the meaning given it in Section 9.1.1.

**"Property"** is defined in the Recitals.

**"PUD"** has the meaning given to it in Section 7.2.

**"PUD Application"** has the meaning given to it in Section 7.2.

**"PUD Process"** shall mean the process of obtaining a PUD or other zoning approval which is applicable to the Development Plan.

**"Purchase Price"** has the meaning given in Section 2.1.1(a).

**"Residential Units"** means the residential dwelling units to be constructed in accordance with the Development Plan and this Agreement, including the ADUs.

**"Resolution"** is defined in the Recitals.

**"Resubmission Period"** is a period of thirty (30) days commencing on the day after Developer receives a 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.

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

“**ROE**” is defined in Section 2.2.1(a).

“**SBE Agreement**” is that certain Small Business Enterprise Agreement to be entered into, prior to Closing, by Developer and DSLBD, governing certain obligations of Developer under D.C. Law 20-0108 with respect to the Project, and for which an SBE Acknowledgement Form executed by Developer is attached hereto as **Exhibit E**.

“**Schedule of Performance**” means that schedule of performance, attached hereto as **Exhibit N** and incorporated herein, and which may be amended by agreement of the Parties, setting forth the timeline for design, development, construction, and completion of the Project (including a construction timeline in customary form) together with the dates for submission of documentation required under this Agreement. The Schedule of Performance shall be updated in connection with Closing pursuant to the terms of this Agreement and shall be attached to the Construction and Use Covenant.

“**School Parcel**” is defined in the Recitals.

“**Second Notice**” means that notice given by 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 FIVE (5) 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 Stewart Title Guaranty Company (Attn: Chris Luckett), the title agent selected by Developer and mutually acceptable to Developer and District.

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

“**Studies**” is defined in Section 2.2.1.

“**Subdivision**” is defined in Section 4.6.3.

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

“**UST Act**” is defined in Section 2.2.3.

“**UST Regulations**” is defined in Section 2.2.3.

“**Vacant Parcel**” is defined in the Recitals.

“**Warm Lit Shell**” is defined on Exhibit U.

“**Zoning Commission**” means the District of Columbia Zoning Commission.

“**Zoning Regulations**” means the Zoning Regulations of the District of Columbia as enacted by the Zoning Commission on September 6, 2016 and as may be amended from time to time.

1.2 Rules of Construction. 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 II**

### **CONVEYANCE OF PROPERTY; PROJECT DEPOSIT; CONDITION OF PROPERTY**

2.1 Sale of a Portion of the Property; Purchase Price; Ground lease; Project Deposit.

2.1.1 Sale of a Portion of the Property.

(a) The Fee Parcels. 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 Fee Parcels, including both the Vacant Parcel and the 9 ½ Street Fee Parcel, as shown on Exhibit B attached hereto.

(b) Purchase Price. The purchase price is One Dollar (\$1.00) for each of the Fee Parcels (the “**Purchase Price**”).

2.1.2 Ground Lease. Subject to and in accordance with the terms of this Agreement, District shall lease to Developer the Ground Lease Parcel, as shown on Exhibit B, pursuant to an unsubordinated, “triple net” ground lease (the “**Ground Lease**”) substantially in the form attached hereto as Exhibit O, and which shall be memorialized in the Land Records of the District of Columbia through the recordation of a Memorandum of Ground Lease at Closing, substantially in the form attached hereto as Exhibit P, to be conformed and made consistent with this Agreement’s provisions. The Ground Lease shall have the term of NINETY-NINE (99) YEARS, which term shall commence as of the date of Closing. The ground rent payable by

Developer to District with respect to the Ground Lease shall be One Dollar (\$1.00) annually (the “**Ground Rent**”), in consideration of Developer’s agreement to (i) renovate the Grimke School Building in accordance with the Development Plan, (ii) deliver to AACWMM the AACWMM Space in Warm Lit Shell condition for occupancy by the AACWMM in accordance with the Exclusive Covenant Required by the Museum Act of 2013, and (iii) maintain the portion of the Grimke School Building devoted to Cultural Uses other than the AACWMM Space for a minimum of ten (10) years from the date such space is first occupied by such Cultural Uses, and Developer shall, in good faith and using reasonable commercial efforts, extend the period for a minimum of five (5) additional years.

### 2.1.3 Project Deposit.

(a) Upon execution of this Agreement, Developer has delivered to the District a deposit Letter of Credit in the amount of **One Hundred Thousand Dollars (\$100,000.00)** (the “**Project Deposit**”). From and after Closing, the Project Deposit shall be deemed to be the closing deposit (the “**Closing Deposit**”) which District shall draw upon in accordance with the terms of the Construction and Use Covenant.

(b) The Project Deposit may be drawn by District in accordance with this Agreement. The Project Deposit is not a payment on account of and shall not be credited against the Purchase Price; rather, the Project Deposit shall be held by District to be used as security to ensure Developer’s compliance with this Agreement and may be drawn on by District in accordance with the terms of this Agreement. The Project Deposit and any replacement Letters of Credit provided under this Agreement is, or shall be, in the form attached hereto as **Exhibit M**. Notwithstanding any provision herein to the contrary, District shall return the Project Deposit to Developer at Closing. If at any time prior to Closing, a 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 Letter of Credit extending the expiration date of the 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 Letter of Credit, the same shall be considered a Developer Default and District may draw upon the Project Deposit.

## 2.2 Condition of Property.

### 2.2.1 Feasibility Studies; Access to Property.

(a) Developer hereby acknowledges that, prior to the Effective Date, it has had the right to perform Studies (as hereinafter defined) 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 uncured 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 Agreement, by and between Developer and District (the “**ROE**”), attached hereto as **Exhibit Q** and incorporated herein, as if such terms, conditions and agreements were expressly set forth herein. 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 that Developer or Developer’s Agents disturbs, discovers or removes any materials or waste from the Property while conducting the Studies, or otherwise during entry on the Property, which are determined to be Hazardous Materials as defined herein, Developer shall notify District and DOEE immediately after its discovery of such Hazardous Materials and Developer shall submit a written notice of a proposed plan for disposal (the “**Disposal Plan**”) to District and DOEE no later than ninety (90) days prior to Closing. 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 proposed removal and disposal of the Hazardous Materials, including the name and location of the hazardous waste disposal site. DOEE 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 DOEE’s investigation, District and/or DOEE 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 DOEE disapproves the proposed Disposal Plan, Developer shall resubmit a revised Disposal Plan to District and DOEE. Developer shall seek the advice and counsel of DOEE prior to any resubmission of a proposed Disposal Plan. Upon review of the revised Disposal Plan, District or DOEE shall notify Developer of its decision. Upon approval of the Disposal Plan and if Closing occurs, Developer shall remove and dispose of all Hazardous Materials in accordance with the approved Disposal Plan and all Applicable Law; provided, however, in no event shall Developer be required to begin its removal and disposal of Hazardous Materials until after Closing. Within seven (7) Business Days after the disposal of any Hazardous Materials or otherwise as expeditiously as possible not to exceed fourteen (14) Business Days (or in an otherwise timely manner in accordance with the terms of the approved Disposal Plan and all Applicable Law), 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) Notwithstanding anything to the contrary contained herein, in the event of a termination of this Agreement prior to Closing, neither Developer nor any of Developer’s Agents shall have any continuing liability or obligations regarding the Disposal Plan or the discovery, 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 proprietary 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 or



required by the terms of this Agreement to do so. 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, as applicable to the Ground Lease Parcel, shall survive Closing or the earlier termination of this Agreement. This provision, as applicable to the Fee Parcels, shall terminate at Closing. The parties acknowledge and agree that “proprietary” information shall mean information which relates to the economic terms of this transaction between the District and Developer; but shall not pertain to typical due diligence matters relating to the Property or the terms of any contract, lease or other agreement entered into by Developer with parties other than the District with respect to the Property.

(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 XI.

2.2.2 Lead Paint and Asbestos. Developer acknowledges that the Property is to be conveyed “As is” and is aware of previous tests performed by third parties indicating the existence of lead paint and asbestos within the Grimke School Building which Developer shall remediate, if any exist, at its sole cost and expense after Closing in connection with its construction of the Project.

2.2.3 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 [Soil – Urban Land and Urban Land- Chillum complex, 0 to 8 percent slopes]. 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.

2.2.4 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 has executed and delivered to Developer an Underground Storage Tank Real Estate Transfer Disclosure Form in the form attached to this Agreement as **Exhibit R**. Information pertaining to underground storage tanks and underground 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.

2.2.5 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 SET FORTH IN SECTION 2.2.4, SECTION 2.3.2, SECTION 2.3.3, SECTION 3.1, THE GROUND LEASE, 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.

### 2.3 Title.

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

2.3.2 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; and (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.

2.3.3 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 in accordance with the Development Plan as a result of a change to the status of title to the Property after the Effective Date, except as expressly required by Applicable Law or as permitted by this Agreement.

2.3.4. Developer may, at or prior to Closing, notify District in writing of any 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 commence and diligently pursue a cure to Developer’s objections to title prior to the date of Closing 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 (but in no event later than the Outside Closing Date). If District is unable to effect a cure prior to Closing, Developer shall have the following options: (i) 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) terminate this Agreement by sending written notice thereof to District, and upon delivery of such notice of termination, this Agreement shall terminate, the Project Deposit shall be returned to Developer and thereafter neither 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, or (iii) to permit the District, if the District so elects to undertake a post-closing cure in its sole and absolute discretion, to effect the cure post-Closing. 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 prior to Closing, 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) or accept a commitment from the District under clause (iii). In the event Developer does not notify District within such five (5) Business Day period, then Developer shall be deemed to have elected to accept the conveyance under clause (i).

2.4 Risk of Loss. Prior to Closing, all risk of loss with respect to any and all existing improvements on the Property shall be borne by District; provided the foregoing is not intended and shall not be construed to impose any liability on District for personal injury or property damage incurred by Developer or any third party prior to Closing beyond its liability under Applicable Law as owner of the Property. In the event any existing improvements on the Property are damaged or destroyed prior to Closing and the cost to repair such damage or destruction exceeds twenty percent (20%) of the value of the “improvements” (as assessed by the District of Columbia’s Office of Tax and Revenue) as of Effective Date (a “**Material Casualty**”), the required minimum area of Cultural Uses within the Development Plan shall be modified to include only the AACWMM Space and no Cultural Uses other than the AACWMM Space shall be required under the terms of this Agreement (a “**Material Casualty Adjustment**”). If, after a Material Casualty Adjustment, both Parties agree that development of the Project, or any portion thereof, remains physically and economically infeasible, District and Developer shall jointly further negotiate in good faith to adjust the Final Budget, Development Plan, Schedule of Performance and Concept Plans in such manner as to allow the Parties to move forward with the Project. In the event the Parties are unable to reach agreement on all necessary adjustments within sixty (60) days of the damage or destruction of the Property, then the Parties shall be deemed to have elected to terminate this Agreement, and the Parties shall be released from any and all obligations hereunder except those that expressly survive termination.

## 2.5 Condemnation.

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

2.5.2 Total Taking. In the event of a taking of the entire Property prior to Closing, the Project Deposit shall be returned to Developer by District, this Agreement shall terminate, and the Parties shall be released from any and all rights, obligations and liabilities hereunder (unless such rights, obligations, and liabilities expressly survive termination pursuant to this Agreement).

2.5.3 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, the Deposit shall be released to Developer and the Parties shall be released from any further liability or obligation hereunder, except as expressly provided otherwise herein, and District shall have the right to any and all condemnation proceeds. 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, and the condemnation proceeds shall be paid to Developer at Closing; provided, however, that if some or all compensation has not been actually paid to the Court registry by the condemning authority on or before Closing, Developer shall accept the Property 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. In either event, District (as the seller hereunder) shall have no liability or obligation to make any payment to Developer with respect to any such condemnation, except as expressly provided herein and subject to the following provisions: (i) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349-1351 1511-1519 (the "Federal ADA"); and (ii) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 1-204.46, 1-206.03(e), 47-105, and §§ 47-355.01 - 355.08 (the "D.C. ADA" and (i) and (ii) collectively, as amended from time to time, the "Anti-Deficiency Acts"). 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, the Deposit shall be released to Developer and the Parties shall be released from any further liability or obligation hereunder, except as expressly provided otherwise herein, and District shall have the right to any and all condemnation proceeds.

2.6 Service Contracts and Leases; Temporary Licensees; Maintenance of Property. Except for that certain License to Occupy by and between the District of Columbia, through the Department of General Services, and U Street Parking, Inc., dated August 26, 2013 (the "**Parking Agreement**") and that certain Lease by and between the District and AACWMM dated as of May 4, 2016 (the "**District/AACWMM Lease**"), 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, District may enter into licenses with third parties for temporary use of the Property, upon such terms as may be agreed to 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 prior written approval of Developer. District shall not hereafter enter into any contracts, licenses 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 agreements, except that the District/AACWMM Lease shall have been assigned to Developer. Prior to Closing, District shall continue to maintain the Property in substantially the same manner as it has maintained the Property prior to the Effective Date.

2.7 Exclusive Use of a Portion of the School Parcel by AACWMM. Developer acknowledges the cultural and historical support for Recital R-4 herein and its importance to the District, as further evidenced by the enactment of District of Columbia law, the “African American Civil War Memorial Freedom Foundation, Inc., Museum Development Act of 2013” (the “**Museum Act**”) requiring the recordation in the Land Records of a covenant (the “**Exclusive Use Covenant Required by the Museum Act of 2013**”). The Exclusive Use Covenant Required by the Museum Act of 2013 shall provide for the exclusive use, renovation, and expansion of a space of not less than 10,000 square feet of space in the Grimke School Building for the establishment and operation of the AACWMM (the “**AACWMM Space**”) and shall be in a form agreed to by Developer and District prior to Closing. The Exclusive Use Covenant Required by the Museum Act of 2013 shall be recorded at the time of Closing in accordance with Article VI of this Agreement. Prior to Closing, Developer shall negotiate in good faith with AACWMM the terms of a lease pursuant to which Developer shall deliver the AACWMM Space in Warm Lit Shell condition and AACWMM shall vacate the Gymnasium in accordance with the schedule therefor to be set forth in the AACWMM Lease; provided, however, in the event Developer and AACWMM are unable to agree upon a mutually agreeable AACWMM Lease no later than ninety (90) days prior to Closing on terms no more onerous to AACWMM than those set forth on Exhibit V (the “**Minimum Terms of AACWMM Lease**”), Developer shall be deemed to have met the requirements of this Section 2.7 by delivering the AACWMM Space to the AACWMM in Warm Lit Shell condition and AACWMM shall vacate the Gymnasium no later than twelve (12) months from Developer’s delivery of the AACWMM Space to the AACWMM.

### **ARTICLE III**

#### **REPRESENTATIONS AND WARRANTIES**

##### 3.1 Representations and Warranties of District.

###### 3.1.1 District hereby represents and warrants to Developer 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 District, subject to expiration of the authority granted in the Resolution. Upon the due execution and delivery of the Agreement by District, and subject to the expiration of the authority to convey the Property granted in the Resolution, this Agreement constitutes the valid and binding obligation of District, enforceable in accordance with its terms. Other than the Permitted Exceptions, District has not conveyed any right to purchase the Property, or any other right to or interest in the Property to

any Person other than Developer, nor does any Person other than District have any right, title or interest in or to the Property.

(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 the conveyance 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) 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.

(e) There are no leases, contracts, license agreements or other contractual agreements of any nature currently in effect with respect to the Property other than the District/AACWMM Lease and the Parking Agreement disclosed in Section 2.6 and District has not entered into any agreement pursuant to which it is obligated to convey the Property to any Person other than Developer.

3.1.2 Survival. The representations and warranties contained in Section 3.1.1 shall survive Closing for a period of eighteen (18) 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 Developer upon learning of same.

### 3.2 Representations and Warranties of Developer.

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 Managing Member nor any Person owning directly or indirectly any interest in Developer or Managing Member is a Prohibited Person. A full and complete set of all organizational documents of Developer and Managing Member of Developer, have heretofore been delivered to District on the Effective Date, or shall be delivered to District within 180 days of the Effective Date.

(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 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 or Managing Member 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 actual 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 Development Plan and Construction Drawings and not for speculation in land holding.

(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 Survival. The representations and warranties contained in Section 3.2.1 shall survive Closing for a period of eighteen (18) months. Developer shall have no liability or obligation hereunder for any representation or warranty that becomes untrue because of reasons beyond Developer's control.

## **ARTICLE IV**

### **APPROVAL OF CONSTRUCTION DRAWINGS; OTHER SUBMISSIONS; APPROVAL OF IDENTITY OF GUARANTOR**

#### **4.1 Construction Drawings.**

4.1.1 Developer's Submissions for the Project. Developer shall submit to District for District's review and approval, the Construction Drawings for the Project 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.

4.1.2 Approval by District. Notwithstanding anything to the contrary herein, prior to the issuance of any Permit by a District agency, Developer 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 applicable zoning requirements (which may include any pending or approved PUD for the Project) 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 Developer's submission of all Construction Drawings to District, the Architect shall certify (with standard professional language reasonably acceptable to District) that the Project has been designed in accordance with all Applicable Law relating to accessibility for persons with disabilities.

4.1.3 Non-Material Changes. District and Developer recognize that, during the course of the construction of the Project, changes may be necessary to the Construction Plans and Specifications 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, however, District shall have no right to disapprove any Construction Drawings so long as such Construction Drawings do not include a Material Change from the prior Construction Drawings submitted to District by Developer, which have been determined to be Approved Construction Drawings (as hereinafter defined), and are consistent with the Concept Plans and do not change the Development Plan. 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 twenty (20) Business Days after its receipt of the same (the twenty (20) Business Day review period 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 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 Second Notice within five (5) Business Days after its receipt of same 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 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 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. If District fails to notify Developer in writing of its approval or disapproval of such amended Construction Drawing within the Review Period, 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 in accordance with the Schedule of Performance. If 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 may request such extension in writing, and, for good cause shown, District may, in its sole reasonable 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 protecting its own interests.

#### 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 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 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.

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. 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) Business Days after the submission of the applicable Construction Drawing or Approved Construction Drawing. Developer 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 Developer shall hold periodic progress meetings ("**Progress Meetings**"), during which meetings Developer and designated representatives of District and other District staff shall coordinate the development and construction of the Project, including preparation and submission of the Construction Drawings as well as the review of such Construction Drawings by District.

#### 4.5 Guarantor.

4.5.1 Approval of Guarantor. The Person designated by Developer as Guarantor, or any substitute therefor, shall execute the Development and Completion Guaranty required pursuant to this Agreement. Developer shall, in all events, identify the Guarantor no later than ninety (90) days before Closing, and District shall have the right to approve such Guarantor, in District's reasonable 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 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. For purposes of this entire Section 4.5, District's determination that Guarantor has "sufficient net worth and liquidity" shall not require a standard

of net worth and liquidity greater than that found sufficient by the primary Institutional Lender to complete the Project.

4.5.2 Updated Submissions. No later than fifteen (15) days prior to Closing, each Guarantor shall submit to District updated Guarantor Submissions. In the event District determines, in its reasonable discretion, that a material adverse change in the financial condition of the Guarantor has occurred that impacts, or could threaten to impact, the Guarantor's ability to perform under the Development and Completion Guaranty, Developer shall, within five (5) Business Days after notice from District, identify a proposed substitute Guarantor and request District's approval of the same in accordance with the terms of Section 4.5.1 above, 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 Guaranty shall comply in all material respects with the terms of the form of Development and Completion Guaranty attached hereto as **Exhibit K**.

4.5.4 Guaranty Required by Primary Institutional Lender. District, in the exercise of its sole and absolute discretion, may acknowledge that the obligation of Guarantor to provide the Development and Completion Guaranty hereunder may be satisfied by the delivery by Guarantor of a guaranty of development and completion to the primary Institutional Lender, with District named as a beneficiary thereunder, which guaranty of development and completion must be acceptable to District in its reasonable discretion. The rights of District and such primary Institutional Lender to enforce such guaranty of development and completion (or guaranties, if separate guaranties of development and completion are offered by Guarantor to each of District and such primary Institutional Lender) may be governed by an intercreditor agreement between District and such primary Institutional Lender, which intercreditor agreement must be acceptable to District in its sole and absolute discretion.

4.5.5 Material Adverse Change in Financial Condition of Guarantor. In the event that there is material adverse change (as reasonably determined by District) in the Guarantor's financial condition from the financial condition of the Guarantor at the time of District approval the Guarantor Developer shall deliver a replacement guaranty from a substitute guarantor approved by District with terms and conditions consistent with this Article and within a commercially reasonable period.

4.6 Other Submissions. Prior to Closing, Developer shall submit the following to District for review and approval in District's sole but reasonable discretion ("**Other Submissions**"):

4.6.1 Development Plan. Developer shall provide District with any proposed changes in the Development Plan, which changes shall be subject to District approval in District's sole and absolute discretion unless they are required by the Construction and Use Covenant, governmental authorities (a) in connection with any PUD Application or other request for relief from the Zoning Commission, or (b) otherwise in connection with any Approvals, in which event District's approval shall not be required.

#### 4.6.2 District's Approval of Professionals; Contracts.

(a) Any Person that 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 4.6.2(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.

(c) Upon District's request, Developer shall provide to District the contracts with any Person required to be approved by District pursuant to the foregoing provisions of this Section 4.6.2.

4.6.3 Subdivision. Prior to Closing, Developer shall have caused the subdivision of the School Parcel (the "**Subdivision**") so that District is in a position to convey fee simple title to the 9 ½ Street Fee Parcel to Developer at Closing. In connection therewith, Developer shall determine the location of the boundary lines between the Ground Lease Parcel and the 9 ½ Street Fee Parcel that are required to allow the 9 ½ Street Fee Parcel to be developed in accordance with the terms of the PUD, which location shall be subject to the approval of the District prior to the submission of the application for Subdivision, which approval shall not be unreasonably withheld, conditioned or delayed.

4.6.4 Community Participation Program. No later than ninety (90) days after the Effective Date, Developer shall provide District a description of Developer's program for public involvement, education and outreach with respect to the Project (including input from the community that is impacted by the Project as it is designed, developed, constructed and operated) (the "**Community Participation Program**"), including a plan for implementing the Community Participation Program and shall include, without limitation, the organization(s) with whom Developer proposes to discuss the Project, a schedule for public meetings and the type of information that Developer proposes to submit to the public. The Community Participation Program 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 shall submit such documentation of each meeting to District and shall otherwise include a summary of Developer's activities with respect to, and in furtherance of, the Community Participation Program at each Progress Meeting. District hereby agrees that the Community Participation Program may be maintained on Developer's website and delivered to District electronically.

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 Developer and provide a written response thereto, within seven (7) 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 shall notify District, in writing, of District's failure to respond by delivering to District a Second Notice. Failure of District to respond in five (5) Business Days after its receipt of a 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 Changes to any Other Submission shall be made without District's prior written approval. If Developer desires to make any Material Changes to any Other Submission, Developer 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 fifteen (15) Business Days.

4.7 Construction Consultant. On or before Commencement of Construction, Developer 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), on such terms as District may approve: (a) to report to District on a monthly basis whether the construction of the Project is in adherence to the Schedule of Performance, (b) to review and approve whether the construction of the Project is consistent with the requirements of the Construction and Use Covenant and (c) to review and report to District on District's issuance of the Certificate of Final Completion. 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. Construction Consultant shall provide such certifications as are provided in the Construction and Use Covenant. 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 Project Budget or Final 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 is reasonably acceptable to District, and provided further that such construction consultant agrees in writing with District to undertake the duties of Construction Consultant set forth in this Section 4.7.

4.8 Payment and Performance Bond Requirements. Developer shall require its general contractor for the Project to obtain payment and performance bonds in form and substance acceptable to District, naming District as a named beneficiary. The "**Payment Bond**" shall be for an amount no less than one hundred percent (100%) of all costs of labor and materials indicated in the Final Project Budget. The "**Performance Bond**" shall be for an amount no less than one hundred percent (100%) of all costs of labor and materials indicated in the Final Project Budget and shall ensure completion of the Project in accordance with the Approved Plans and Specifications. The Payment Bond and Performance Bond shall be delivered to District at or prior to Closing and shall be maintained until Final Completion.

## **ARTICLE V**

### **CONDITIONS TO CLOSING**

#### **5.1     Conditions Precedent To Developer's Obligation To Close.**

5.1.1   The obligations of Developer to consummate 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 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;

(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;

(g)     title to the Property shall be subject only to the Permitted Exceptions;

(h)     the Subdivision shall have been completed; and

(i)     the Property shall be vacant and free of all occupants and licensees; any personal property remaining thereon shall be deemed conveyed to Developer in connection with the conveyance of the Property at Closing; and there shall be no person or entity in possession of any portion of the Property, except AACWMM pursuant to the terms of the District/AACWMM Lease.

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) other than with respect to the conditions set forth in Section 5.1.1 that have not been met due to Force Majeure, terminate this Agreement by delivering written notice of such termination to District, whereby the Project Deposit shall be returned 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 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 (iii), 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. In the event such conditions precedent have not been satisfied by the end of the thirty (30) day period, provided the same is not the result of Developer's failure to perform any obligation of Developer hereunder, Developer may again proceed under clause (i), (ii) or (iii) above, in its sole discretion. The foregoing notwithstanding, Closing shall not occur after the Outside Closing Date. If Closing has not occurred by such date, this Agreement shall immediately terminate and be of no further force and effect, except for those provisions that expressly survive termination of this Agreement. Notwithstanding anything set forth above to the contrary, if any such failed condition is a District Default hereunder, then Developer may exercise its remedies in Section 8.3.

## 5.2 Conditions Precedent To District's Obligation To Close.

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

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

(b) the representations and warranties made by 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 to District in support of such representations and warranties, including, without limitation, updated and current organizational documents, shall be delivered by Developer to District prior to Closing;

(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 Plan and all Construction Drawings for the Project shall have been approved as Approved Construction Drawings in their entirety pursuant to Article IV;

(f) all Other Submissions shall have been approved in their entirety pursuant to Article IV;

(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 acquire the Property and proceed with the development and construction of the Project in accordance with the Approved Construction Drawings and the Construction and Use Covenant;

(h) Developer shall not be in default under the terms of the First Source Agreement with DOES;

(i) Developer shall not be in default under the terms of the SBE Agreement with DSLBD;

(j) Developer shall have obtained all Approvals necessary to accomplish the Project (including, if applicable, the approval of the PUD Application by the Zoning Commission);

(k) Developer shall have furnished to District certificates of insurance or duplicate originals of insurance policies required of Developer hereunder.

(l) Developer shall have provided District with a resolution adopted by Developer authorizing its acquisition of the Property and the performance by Developer of its obligations under this Agreement;

(m) Developer shall have obtained all Permits required to demolish the Gymnasium and to commence renovation of the Grimke School Building and construction on the Vacant Parcel, but shall not be required to have applied for such Permits which are normally obtained during the course of construction of the Project, nor any Permits that will be required to commence construction on the 9 ½ Street Fee Parcel;

(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 shall have secured all Debt Financing and Equity necessary to construct the Improvements on the Vacant Parcel and renovate the Grimke School Building in accordance with the Development Plan and to fully perform all development and construction obligations contained in the Construction and Use Covenant with respect to the Vacant Parcel and the Grimke School Building;

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

(q) Developer shall have executed a construction contract with its general contractor for the Vacant Parcel and the Grimke School Building;

(r) there shall have occurred no material adverse change in the financial condition of any Guarantor, determined in accordance with the provisions of Section 4.8.3 or, if a material adverse change has occurred, District has approved a substitute guarantor pursuant to Section 4.8.3; and



- (s) the Subdivision shall have been completed.

**5.2.2 Failure of Condition.** 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 Developer, 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 by delivering written notice of such termination to Developer on or prior to the Closing Date, in which event the Project Deposit shall be retained by District and 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 Developer 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. In the event such conditions precedent have not been satisfied by the end of the thirty (30) day period, 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) or (iii) above, in its sole discretion. The foregoing notwithstanding, Closing shall not occur after the Outside Closing Date. If Closing has not occurred by such date, this Agreement shall immediately terminate and be of no further force and effect, except for those provisions that expressly survive termination of this Agreement. Notwithstanding anything set forth above to the contrary, if any such failed condition is a Developer Default hereunder, then District may exercise its remedies in Section 8.2.

## **ARTICLE VI CLOSING**

### **6.1 Closing Date and Outside Closing Date.**

(a) Developer and District shall consummate Closing upon satisfaction of all conditions to Closing, but no later than the Closing Date shown on the Schedule of Performance, subject only to Force Majeure, or as otherwise expressly provided herein ("**Closing Date**"). If District or Developer has not met any condition to Closing due to Force Majeure, and there is no continuing uncured District Default or Developer Default under this Agreement, the Closing Date shall be extended for the period of the Force Majeure, but in no event shall the Closing occur after the date that is **TWO (2) YEARS AFTER DATE OF COUNCIL RESOLUTION** as is shown on the Schedule of Performance (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.

(b) 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, whether as a result of an appeal of the Zoning Commission's decision with respect to the PUD Application or otherwise, District may submit 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 shall be extended in accordance therewith.

(c) Developer acknowledges and agrees that (i) any Extension Resolution will be granted or denied in the sole and absolute discretion of Council; (ii) Developer 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 extension 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 Project Deposit to Developer and the Parties shall be released from any further liability or obligation hereunder, except those provisions that expressly survive termination of the Agreement.

## 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 with respect to the Fee Parcels in recordable form to be recorded in the Land Records;

(b) the Ground Lease with respect to the Ground Lease Parcel and a Memorandum of Ground Lease in recordable form to be recorded in the Land Records against the Ground Lease Parcel;

(b) the Construction and Use Covenant in recordable form to be recorded in the Land Records against the Property;

(c) the Affordable Housing Covenant in recordable form to be recorded in the Land Records against the Fee Parcels;

(d) 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 that the District/AACWMM Lease has been assigned to Developer; and

(e) 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 Exclusive Use Covenant Required by the Museum Act of 2013;

(b) the Ground Lease with respect to the Ground Lease Parcel and the Memorandum of Ground Lease in recordable form for recordation in the Land Records against the Ground Lease Parcel;

(b) the Construction and Use Covenant in recordable form to be recorded in the Land Records against the Property;

(c) the Affordable Housing Covenant in recordable form to be recorded in the Land Records against the Fee Parcels;

(d) the fully executed Development and Completion Guaranty;

(e) any funds required by the Settlement Statement to be delivered at Closing;

(f) evidence reasonably satisfactory to District that Developer has the necessary Equity to complete the construction of the Improvements on the Vacant Parcel and the renovation of the Grimke School Building in accordance with the Development Plan;

(g) all documents required to close on the Debt Financing needed to provide funding for Developer's construction of the Improvements on the Vacant Parcel and the renovation of the Grimke School Building in accordance with the Final Project Budget and Funding Plan;

(h) 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;

(i) copies of all Permits and evidence reasonably satisfactory to District that Developer has obtained all Approvals required to commence construction of the Improvements on the Vacant Parcel and the renovation of the Grimke School Building in accordance with the Development Plan;

(j) a copy of each of the fully executed First Source Agreement and SBE Agreement;

(k) evidence of satisfactory liability, casualty and builder's risk insurance policies in the amounts, and with such insurance companies, as required in Article XI of this Agreement;

(l) any financial statements or updated financial statements of Developer that may be requested by District;

(m) the following documents evidencing the due organization and authority of Developer and 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 for Developer issued by the District of Columbia;

(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 Managing Member in connection with this Agreement and development of the Project; and

(iii) if requested by District, an opinion of Developer's counsel that Developer and Managing Member is validly organized, existing and in good standing in the District of Columbia, that Developer and Managing Member has 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 Managing Member has 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 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 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;

(n) a copy of the agreement between Developer and Construction Consultant, if any; and

(o) 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.

6.2.3 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 At Closing, Settlement Agent shall file for recordation among the Land Records the Deed, the Memorandum of Ground Lease, the Construction and Use Covenant, and the Affordable Housing Covenant. Such documents shall be recorded prior to any security instruments to be recorded in connection with the Debt Financing.

6.3.2 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, and (v) all of Settlement Agent's fees and costs.

6.3.3 All real estate and personal property taxes and all utilities and other operating expenses, if any, applicable to the Property being acquired by Developer shall be prorated between District and Developer as of the Closing Date (i.e., District shall be responsible for all such amounts payable with respect to the period up to, but not including the Closing Date, and Developer shall be responsible for all such amounts payable with respect to the period from and after the Closing Date) based on estimates of the amounts that will be due and payable on the

next payment date, unless final readings or invoices therefor as of the Closing Date shall have been obtained, in which event such final readings shall be utilized as the basis for adjustment. All items to be apportioned and adjusted pursuant to this Section 6.3.3 shall be prorated as of midnight of the day immediately preceding the Closing Date, based on the actual number of days of the month which shall have elapsed as of the Closing Date and the actual number of days in the month and a three hundred sixty-five (365) day year.

## **ARTICLE VII**

### **DEVELOPMENT OF PROPERTY AND CONSTRUCTION OF PROJECT; PUD APPLICATION; CONSTRUCTION AND USE COVENANT; AFFORDABLE HOUSING 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 attached hereto as Exhibit N, as such Schedule of Performance may be modified from time to time in accordance with the terms of this Agreement, subject only to Force Majeure. Developer's failure to perform its obligations in accordance with the Schedule of Performance shall constitute a Developer Default, which shall entitle District to terminate this Agreement and draw on the Project Deposit in its full amount without notice or opportunity to cure. 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, Developer shall cause the Development and Completion Guaranty to be executed by 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.

7.2 Application for Planned Unit Development. Developer shall obtain all necessary Approvals to construct the Project, and shall prepare and file an application to the Historic Preservation Review Board, if required, and an application to the Zoning Commission (the "**PUD Application**") for approval of the Project as a planned unit development, or for a map amendment or such other zoning relief as Developer may require (the "**PUD**") on behalf of District as the owner of the Property, which PUD Application may be submitted by Developer either before or after the Effective Date, in Developer's sole discretion. Any PUD Application may be in the name of District, as applicant, and shall be subject to prior approval by District. In this regard, Developer shall submit a copy of any proposed PUD Application to District for its review and approval prior to submission of the PUD Application to the Zoning Commission. District shall have twenty (20) Business Days to review and comment on the PUD Application; provided, however, District's approval of the PUD Application shall not be unreasonably withheld, conditioned or delayed. District acknowledges that the PUD Application may seek relief from the requirements of Inclusionary Zoning from the appropriate District agency. District shall cooperate, at no cost to District, with Developer in connection with all such zoning requests or applications submitted by Developer to appropriate District agencies, shall join such requests or applications (as landowner) as reasonably requested by Developer.

7.3 Issuance Of Permits. Developer shall have the sole responsibility for obtaining all Permits and shall make application therefor directly to the applicable agency within 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 to commence construction on the Vacant Parcel and renovation of the Grimke School Building, 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, prior to Closing, upon the request of the District from and after submission of any such application until issuance of the Permit, Developer shall report Permit status in writing (email shall be deemed a "writing" for purposes of this Section 7.3, on a periodic basis to District, not more frequently than once every thirty (30) days, and, after Closing, in accordance with the terms the Construction and Use Covenant.

7.4 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 Development Plan and Approved Construction Drawings, including costs associated with excavation, if any, 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.

7.5 Affordable Housing Requirement. Developer will comply with all affordable housing requirements of D.C. Official Code 10-801 *et seq.*, as amended, and Applicable Law, and will also comply with the requirements of District's Inclusionary Zoning program, if and to the extent applicable to the Project. As of the Effective Date, Developer has delivered an Affordable Housing Plan in the form attached hereto as **Exhibit D** 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, which shall not be unreasonably withheld, conditioned or delayed. Floor plans depicting the ADUs for the Property shall also be presented to District for review and approval prior to Closing. At Closing, Developer shall execute the Affordable Housing Covenant, which shall reflect the Affordable Housing Plan and the Development Plan. District agrees that Developer may retain ownership of the ADUs and lease the ADUs to qualified tenants, whether or not Developer sells the balance of the Residential Units as individually-owned condominium units.

7.6 Opportunity for SBEs. In cooperation with District, Developer shall comply with the terms and conditions set forth in the SBE Acknowledgement form as required by DSLBD, including the equity and development participation requirements of D.C. Code §2.218.01 *et seq.*, and the SBE Agreement.

7.7 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, Developer recognizes 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 agrees to enter into the First Source Agreement prior to Closing, with DOES that shall, among other things, require Developer to: (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, all in accordance with such First Source Employment Agreement 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.

7.8 Davis Bacon; Living Wage Act. If applicable, Developer 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, Developer shall cause its general contractor to comply with all requirements under the “*Living Wage Act of 2006*”, D.C. Official Code §§ 2-220.01 *et seq.* The general contractor 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.

7.9 Green Building. Developer shall construct the Project in accordance with the *Green Building Act of 2006*, D.C. Official Code §§ 6-1451.01, *et seq.*, as amended from time to time to the extent applicable to the different components of the Project. Additionally, Developer shall use commercially reasonable efforts to achieve LEED Gold certification or equivalent for the Project, as such standards are applicable to the different components of the Project.

7.10 Community Benefits Plan. Developer shall provide a “**Community Benefits Plan**” as part of the PUD Process if applicable (the “**Community Benefits Plan**”), or, to the extent a Community Benefits Plan is not part of the PUD Process, to the District for its reasonable review and approval prior to Closing.

## |ARTICLE VIII DEFAULTS AND REMEDIES

### 8.1 Default.

8.1.1 Default by Developer. Developer shall be in default under this Agreement if Developer 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 District (any such default that remains uncured after all notice and cure periods have expired, 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 shall have such additional time as is reasonably necessary, not to exceed an additional sixty (60) days, to cure such default; provided, however, Developer must commence the cure within the initial thirty (30) day period and diligently pursue completion of such cure thereafter. Notwithstanding the foregoing, in the event of a pre-Closing default, the cure periods provided herein shall not delay the Closing beyond the Outside Closing Date.

8.1.2 It shall be deemed a default by Developer if Developer fails to meet the milestones on or before the dates set forth for such milestones in the Schedule of Performance, after notice of such default by District and a thirty (30) day opportunity to cure the default, subject to Force Majeure. Developer may seek extension of the milestone dates from District, which may be granted or withheld by District in its sole but reasonable discretion.

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 (any such default that remains uncured after all notice and cure periods have expired, 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.

## 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 under this Agreement prior to Closing, District may elect to:

(a) terminate this Agreement and, as liquidated damages, draw on the Project Deposit in the full amount, 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, 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;

(b) cure any default, the reasonable out-of-pocket costs of which shall be paid by Developer, and if not paid by Developer, District shall be entitled to draw on the Project Deposit for partial reimbursement of District’s reasonable out-of-pocket costs incurred to cure the default; or

(c) pursue injunctive or other equitable relief.

8.2.2 Remedies After Closing. In the event of Developer Default under this Agreement after Closing, District shall be entitled to all the remedies set forth in the Deed, Ground Lease, Construction and Use Covenant, Affordable Housing Covenant, and Development and Completion Guaranty, including, without limitation, the right of District to re-enter and take possession of the Property under the Deed.

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 Developer be liable for any consequential, punitive, or special damages.

### 8.3 Developer 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 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, or (b) pursue specific performance or other equitable relief.

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

8.3.3 General. The remedies of Developer provided in this Section 8.3 shall be the sole and exclusive remedies of 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 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 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 IX**

### **FINANCIAL PROVISIONS**

#### 9.1 Project Funding Plan; Project Budget.

9.1.1 Project 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 and affordable housing financing, as applicable), which plan is attached hereto as **Exhibit S** (such plan, as may be modified from time to time in accordance with this Agreement being the “**Project Funding Plan**”).

9.1.2 Project 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 T** (such budget, as may be modified from time to time in accordance with this Agreement being the “**Project Budget**”).

9.1.3 Final Project Budget and Funding Plan. Within sixty (60) days after Developer submits the Approved Construction Documents for the Project, Developer shall provide District with a revised Project Budget and Project Funding Plan and such supporting documentation as District may reasonably request. Developer shall further modify the Project Budget and Project 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 and Project Funding Plan submitted pursuant to clause (ii), such modified Project Budget and Project Funding Plan shall be the "**Final Project Budget and Funding Plan**".

9.1.4 Modifications. After Closing, 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 remains in full force and effect and Developer notifies District of such modifications in accordance with the Construction and Use Covenant. Notwithstanding anything else in this subsection, the Final Project Budget and Funding Plan 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; provided, however, that in the event the Final Project Budget and Funding Plan is modified without District's approval, 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, 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 and absolute discretion.

9.2.2 Bona Fide Indebtedness. The Debt Financing obtained in connection with Closing and construction of the 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 Final Project Budget; 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; and (ii) the amount thereof, together with all other funds available to Developer, shall be sufficient to complete construction of the Project.

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, such documents as District may reasonably request, including, but not limited to, copies of:

(a) The commitment or agreement between Developer and the holder of such Debt Financing or Mortgage, certified by 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 to be true and accurate; and

(c) A copy of the proposed Mortgage, deed of trust or such other instrument to be used to secure the Debt Financing and a description of the portion of the Property for which such documents will encumber.

## **ARTICLE X**

### **ASSIGNMENT AND TRANSFER**

10.1 Assignment. Prior to Closing, 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 Agreement, or delegate its obligations under this Agreement, except to an entity that is Controlled by Managing Member, without District's prior written approval, which may be granted or denied in District's sole discretion. After Closing, Developer may assign the Property (or portions thereof) in accordance with the Construction and Use Covenant, the Ground Lease, and the Deed, but in any event assignment shall not be permitted prior to the District's issuance of a Certificate of Final Completion.

10.2 Transfer of Membership Interests. Prior to Closing, neither Developer nor any Member of Developer (including any successors in interest of Developer or its 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, except (a) to an entity that is Controlled by Managing Member, (b) in connection with Developer's raising of Equity, or (c) in the event of the death, disability or adjudication of mental incapacity or incompetence of any Member who is an individual without District's prior written approval, which may be granted or denied in District's sole discretion; 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 of ownership interests to any Member or Affiliate of a Member, including, without limitation, transfer for estate planning purposes. After Closing, Developer may conduct a Transfer of Membership Interests in accordance with the Construction and Use Covenant, the Ground Lease, and the Deed, but in any event, a Transfer of Membership Interests shall not be permitted prior to District's issuance of a Certificate of Final Completion.

10.3 No Unreasonable Restraint. Developer hereby acknowledges and agrees that the restrictions on transfers set forth in this Article do not constitute an unreasonable restraint on Developer's right to transfer or otherwise alienate the Property or its rights under this Agreement. 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.

## **ARTICLE XI**

### **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 shall carry and maintain in full force and effect the following insurance policies:

(a) **Automobile Liability and Commercial General Liability Insurance** - At all times after Closing until Final Completion of the Project is achieved, 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, so long as any such increase is commercially reasonable and otherwise in accordance with market conditions at such time.

(b) **Workers' Compensation Insurance** - At all times after Closing until Final Completion of the Project, 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, 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, and structural, electrical and mechanical engineers, with a deductible acceptable to District.

(d) **Contractor's Pollution Legal Liability Insurance** - At all times after the Effective Date of this Agreement until achievement of Final Completion of the Project, 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 pollution, contamination, or Hazardous Materials.

11.1.2 General Policy Requirements. Developer shall name District as an additional insured under all policies of liability insurance identified above except Workers' Compensation Insurance. 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-VIII or above. Prior to any entry onto the Property at 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 to provide written notice to District, by overnight carrier or U.S. Certified 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 shall indemnify, defend, and hold harmless District and District's agents and employees 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 or omissions of Developer, its Members, agents, employees, or contractors that arise after the Effective Date; 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 negligence or willful misconduct of District as determined by a court of competent jurisdiction, or that arose prior to the Effective Date. The obligations of Developer under this Section shall survive Closing or the earlier termination of this Agreement.

## **ARTICLE XII**

### **NOTICES**

12.1 To District. Any notices given under this Agreement shall be in writing and delivered by U.S. 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—Grimke School

With a copy to:

Office of the General Counsel for DMPED  
1350 Pennsylvania Avenue, NW, Suite 317  
Washington, DC 20004  
Attn: General Counsel for DMPED—Grimke School

12.2 To Developer. Any notices given under this Agreement shall be in writing and delivered by U.S. Certified Mail (return receipt requested, postage pre-paid), by hand, or by reputable private overnight commercial courier service, to Developer at the following addresses:

Community Three Grimke LLC  
c/o Community Three Development LLC  
1326 H Street NE, Second Floor  
Washington, DC 20002  
Attention: Grant Epstein, President

With copies to:

Rogers Yogodzinski LLP  
1129 20<sup>th</sup> Street NW, Suite 300  
Washington, DC 20036  
Attention: Debra D. Yogodzinski

and

Lindner & Associates, P.C.  
5028 Wisconsin Avenue, NW, Suite 404  
Washington, DC 20016  
Attention: Irene M. Lindner

Notices served upon Developer or District in the manner aforesaid shall be deemed to have been received for all purposes hereunder at the time such notice shall have been: (i) if hand delivered to a Party against receipted copy, when the copy of the notice is receipted; (ii) if given by overnight courier service, on the third (3) 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 XIII**

#### **MISCELLANEOUS**

13.1 Party in Position of Surety With Respect to Obligations. Developer, for itself and its 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 the Agreement, hereby waives, to the fullest extent permitted by law and equity, any and all claims or defenses otherwise available on the grounds of its 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. 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 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 member, partner, employee, officer, director, or shareholder of Developer or Managing Member 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.

13.3 Survival; Merger With Conveyance Documents. Unless expressly stated otherwise herein, the provisions of this Agreement are intended to and shall merge with the documents pursuant to which District conveys the Property to Developer.

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 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 Agreement 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 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; Recitals; Exhibits.

13.6.1 This Agreement (including the Exhibits annexed hereto and made part hereof including, without limitation, the Council Term Sheet), and any document delivered pursuant to this Agreement collectively contain all the agreements and understandings between District and Developer 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.

13.6.2 The Recitals of this Agreement are incorporated herein by this reference and are made a substantive part of the agreements between the Parties.

13.6.3 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. Execution and delivery 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, District holiday, or day in which the Government of the District of Columbia is officially closed for business 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 and Developer, and where the term “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 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 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 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 that is legal, valid, and enforceable.



13.15 Anti-Deficiency Limitation; Authority.

13.15.1 Though no financial obligations on the part of District are anticipated, Developer acknowledges that District is not authorized to make any obligation in advance or in the absence of lawfully available appropriations and that 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 Developer acknowledges and agrees that any unauthorized act by District is void. It is Developer's 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 District.

13.18 Each Party To Bear Its Own Costs. 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 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 nor any charge made therefor.

13.20 Force Majeure. Neither Party nor any successor-in-interest, shall be considered in default of their obligations under this Agreement, in the event of forced delay in the performance of such obligations is due to Force Majeure, and the periods allowed for the performance by the applicable 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 Party in writing within ten (10) Business Days after it becomes aware of the beginning of any such Force Majeure event, of the cause or causes thereof, with supporting documentation, and requested an extension for the period of the forced delay. If either 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 such Force Majeure event.

13.21 Joint Preparation. District and Developer each acknowledge 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]*

**IN WITNESS WHEREOF**, District and Developer 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

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

Brian T. Kenner  
Deputy Mayor for Planning and Economic  
Development

Date: \_\_\_\_\_

**DEVELOPER:**

Community Three Grimke LLC,  
a District of Columbia limited liability company

By: Community Three Development LLC, a  
District of Columbia limited liability  
company, its Managing Member

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

Grant Epstein  
President

Date: \_\_\_\_\_

Reviewed By:

\_\_\_\_\_

Name:

Title: Associate General Counsel

Office of the Deputy Mayor for Planning and  
Economic Development

Date: \_\_\_\_\_

## **EXHIBITS**

Exhibit A	Legal Description of Property
Exhibit B	Plat of Ground Lease Parcel and 9 ½ Street Fee Parcel
Exhibit C	Form of Affordable Housing Covenant
Exhibit D	Affordable Housing Plan
Exhibit E	SBE Agreement
Exhibit F	Intentionally Omitted
Exhibit G	Concept Plans
Exhibit H	Form of Construction and Use Covenant
Exhibit I	Council Term Sheet
Exhibit J	Form of Deed
Exhibit K	Form of Development and Completion Guaranty
Exhibit L	First Source Agreement
Exhibit M	Form of Letter of Credit
Exhibit N	Schedule of Performance
Exhibit O	Form of Ground Lease
Exhibit P	Form of Memorandum of Ground Lease
Exhibit Q	Right of Entry
Exhibit R	Underground Storage Tank Transfer Disclosure Form
Exhibit S	Project Funding Plan
Exhibit T	Project Budget
Exhibit U	Warm Lit Shell Definition
Exhibit V	Minimum Terms of AACWMM Lease

**EXHIBIT A**

Legal Description of Property

**EXHIBIT B**

Plat of Ground Lease Parcel and 9 ½ Street Fee Parcel

**EXHIBIT C**

Affordable Housing Covenant

**EXHIBIT D**

Affordable Housing Plan

**EXHIBIT E**

SBE Agreement



**EXHIBIT F**

Intentionally Omitted

**EXHIBIT G**

Concept Plans

**EXHIBIT H**

Form of Construction and Use Covenant

**EXHIBIT I**

Council Term Sheet

**EXHIBIT J**

Form of Deed

**EXHIBIT K**

Form of Development and Completion Guaranty

**EXHIBIT L**

First Source Agreement

**EXHIBIT M**

Form of Letter of Credit



**EXHIBIT N**

Schedule of Performance

**EXHIBIT O**

Form of Ground Lease

**EXHIBIT P**

Form of Memorandum of Ground Lease

**EXHIBIT Q**

Right of Entry



**EXHIBIT R**

Underground Storage Tank Real Estate Transfer Disclosure Form

**EXHIBIT S**

Project Funding Plan

**EXHIBIT T**

Project Budget



## **EXHIBIT U**

Definition of Warm Lit Shell

**EXHIBIT V**

Minimum Terms of AACWMM Lease