

19th Street

Massachusetts Avenue

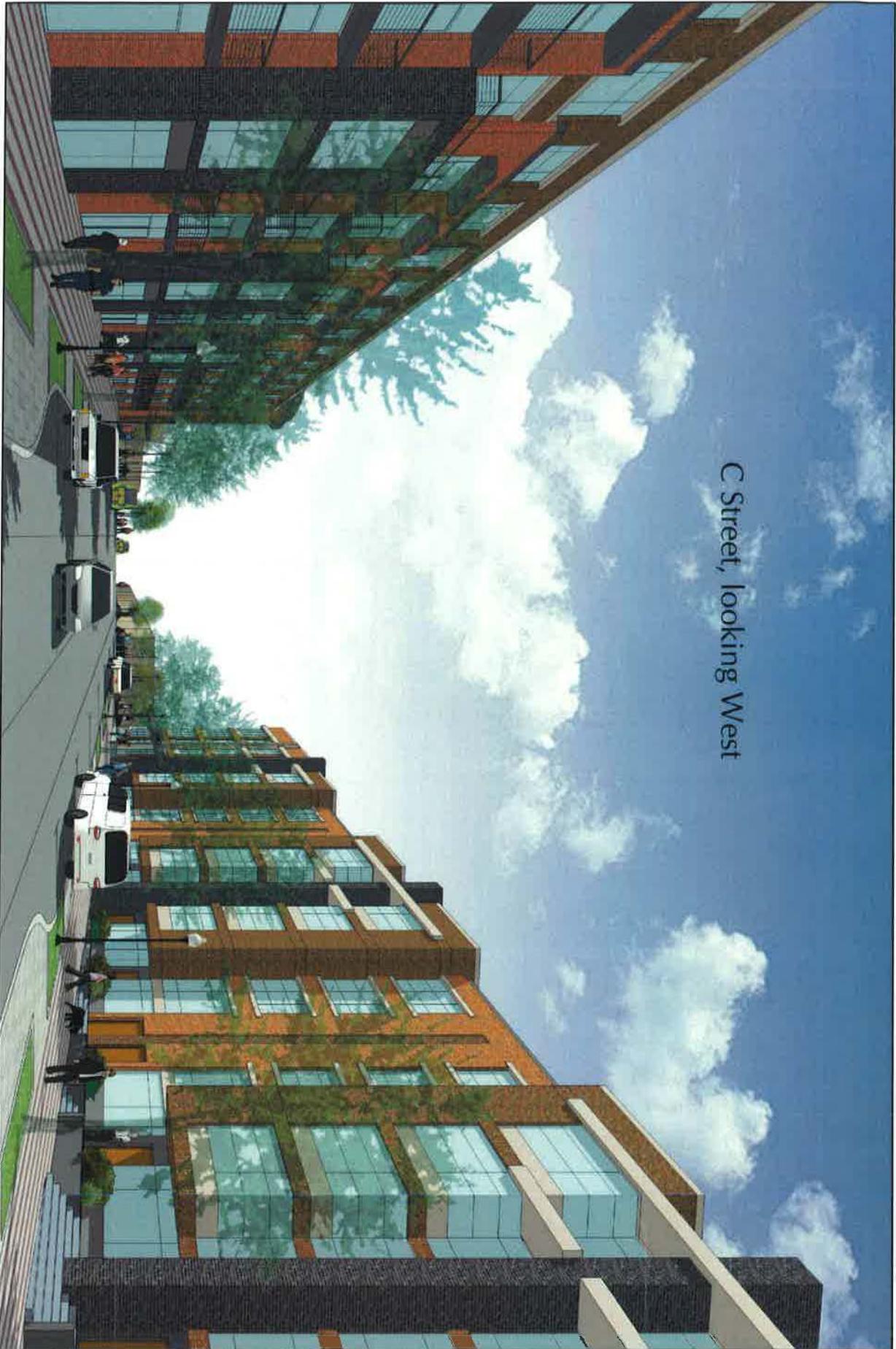
Eric Colbert & Associates
Architects
717 26 Street NW, Washington, DC 20001

DONATELLI & BLUE SKYE
DEVELOPMENT
4416 Lee West Hwy, Bethesda, MD 20814

PARCELS F-1 & G-1

09

08.22.2013



C Street, looking West

Eric Colbert & Associates
Architects

717 5th Street NW, Washington DC, 20001

DONATELLI & BLUE SKYE
DEVELOPMENT

4416 East-West Hwy, Bethesda, MD 20814

PARCELS F-1 & G-1

10

08.21.2014

Exhibit E

Form of Construction Covenant

[See attached]

Exhibit E

CONSTRUCTION AND USE COVENANT

THIS CONSTRUCTION AND USE COVENANT (the "**Covenant**") is made as of the _____ day of _____, 201_ ("Effective Date"), between (i) the DISTRICT OF COLUMBIA, a municipal corporation, acting by and through the Office of the Deputy Mayor for Planning and Economic Development (the "**District**") and (ii) DB Residential Hill East, LLC, a District of Columbia limited liability company, and its successors and assigns (the "**Owner**" or "**Developer**").

RECITALS

R-1. District owns the parcel of land located in Washington, D.C., known as Reservation 13 and consisting of approximately 67 acres of land area. District intends to sell to Developer a portion of Reservation 13 known as Parcels F-1 and G-1 (such portion, the "**Property**"), as shown approximately on the plat and legal description attached hereto as Exhibit A.

R-2. District and Owner entered into a Land Disposition Agreement, effective _____, 201_ (the "**Agreement**"), pursuant to which District agreed to convey the Property by deed and Owner agreed to set forth their agreements regarding the development of the property as more particularly set forth in this Covenant.

R-3. Upon execution and delivery of this Covenant by District and Owner at the Closing set forth in the Agreement, the parties shall record this Covenant in the Land Records of the District of Columbia as an encumbrance on the Property.

R-4. The Property has a unique and special importance to District. Accordingly, this Covenant makes particular provision to assure the excellence and integrity of the design and construction of the Project necessary and appropriate to serve District of Columbia residents.

R-5. As required by the Agreement, Owner, for the benefit of District, agrees to construct and use the Property in accordance with the Approved Plans and Specifications agreed upon by the parties, pursuant to the terms and conditions set forth below.

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

ARTICLE I DEFINITIONS AND MISCELLANEOUS PROVISIONS

1.1 DEFINITIONS. For the purposes of this Covenant, the following capitalized terms shall have the meanings ascribed to them below and, unless the context clearly indicates otherwise, shall include the plural as well as the singular. Any capitalized term used herein but not defined herein shall have the meaning ascribed such term in the Agreement.

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

“Affiliate” means with respect to any Person (“first Person”) (i) any other Person directly or indirectly controlling, controlled by, or under common control with such first Person, (ii) any officer, director, partner, shareholder, manager, member or trustee of such first Person, or (iii) any officer, director, general partner, manager, member or trustee of any Person described in clauses (i) or (ii) of this sentence. As used in this definition, the terms “controlling”, “controlled by”, or “under common control with” shall mean the possession, directly or indirectly, of the power to direct, or cause the direction of, the management and policies of a Person, whether through ownership of voting securities, membership interests or partnership interests, by contract or otherwise, or the power to elect at least fifty percent (50%) of the directors, managers, partners or Persons similar authority with respect to the subject Person.

“Affordability Covenant” has the meaning given in the Agreement.

“Affordable Units” has the meaning given in the Agreement.

“Agreement” is defined in the Recitals.

“Applicable Law” means all applicable District of Columbia and federal laws, codes, regulations, and orders, including, without limitation, Environmental Laws, laws relating to historical preservation, laws relating to accessibility for persons with disabilities, the Davis-Bacon Act, AWI Act, and the AWI Environmental Act.

“Approved Plans and Specifications” are the Owner’s Construction Drawings for the Project that were approved by District pursuant to the terms of the Agreement, as the same may be modified pursuant to Section 2.4 of this Covenant.

“Architect” means Colbert & Associates, or another architect of record, licensed to practice architecture in the District of Columbia, which has been selected by Owner for the Project and reasonably approved by District.

“AWI Act” means the “National Capital Revitalization Corporation and Anacostia Waterfront Corporation Reorganization Act of 2008” (D.C. Law 17-138), as amended by Affordable Housing For-Sale and Rental Distribution Amendment Act of 2009” (D.C. Law 18-0107) and codified in D.C. Official Code §§ 2-1226.02 *et seq.*

“AWI Environmental Act” means the “Anacostia Waterfront Environmental Standards Act of 2008” (D.C. Law 17-138), as codified in D.C. Official Code §§ 2-1226.31 *et seq.*

“Bonds” is defined in the Agreement.

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

“CBE Agreement” is that agreement between Owner and DSLBD governing certain obligations of Owner under D.C. Code §§ 2-217.01 *et seq.* and its implementing regulations with respect to the Project.

“Certificate of Final Completion” is defined in Section 2.3.4.

“Certificate of Substantial Completion” means that certificate provided by Owner to the District in connection with Completion of Construction, as required under Section 2.3.3 herein.

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

“Commencement of Construction” means Owner 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 for renovations to commence, and (iv) obtained the Permits and commenced renovation of the Property pursuant to the Approved Plans and Specifications. For purposes of this Agreement, the term “Commencement of Construction” does not mean site exploration, borings to determine foundation conditions, or other pre-construction monitoring or testing to establish background information related to the suitability of the Property for development of the Improvements thereon or the investigations of environmental conditions.

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

“Construction Consultant” is defined in Section 2.1.2.

“Construction Covenants” shall mean those covenants contained in Article II.

“Construction Drawings” shall mean the drawings, plans, and specifications for the Improvements submitted by Owner to District in accordance with the terms of the Agreement.

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

“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.

"Debt Financing" shall mean the financing to be obtained by Owner from an Institutional Lender to fund all or, at Owner's election, part of the costs set forth in the Final Project Budget (including, without limitation, costs of issuance relating to any bond financings issued by the District of Columbia or other governmental agency), and shall expressly exclude Mezzanine Loans and the Equity Investment.

"Deed" means the special warranty deed dated the date hereof conveying the Property to Owner recorded in the Land Records.

"Developer" is defined in the Preamble.

"Development and Completion Guaranty" is that certain Development and Completion Guaranty and executed by the Guarantor(s), which binds the Guarantor to develop and otherwise construct the Project in the manner and within the time frames pursuant to the terms of this Covenant.

"Development Program" has the meaning given in the Agreement.

"Disapproval Notice" is defined in Section 2.4.2.

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

"DOL" is the United States Department of Labor.

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

"Environmental Claims" is defined in Section 3.3.1.

"Environmental Laws" means any present or future federal or District law, statute, common law, rule, order, regulation, permit or other requirement or guideline having the force and effect of law of a federal or District governmental authority and relating to (a) the protection of human health, safety, and the 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) the release of a Hazardous Material into, onto, or about the air, land, surface water, or groundwater, and includes, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq.; the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, 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 (also known as the Clean Water Act), 33 U.S.C. § 1251

et seq.; the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq.; the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, the Clean Air Act, 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, 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.; the AWI Environmental Act, and any similar, implementing or successor law, and any amendment, rule, regulatory order or directive issued thereunder.

“Equity Investment” shall mean all funding provided by any Person or Members with a direct or indirect ownership interest in Owner that is required for the development and construction of the Project exclusive of any Mezzanine Loans and Debt Financing.

“Event of Default” is defined in Section 5.1.1.

“Final Completion” means following Completion of Construction: (i) the completion of all Punch List Items; (ii) the close-out of all construction contracts for the Project; and (iii) the payment of all costs of constructing the Project and receipt by Owner of fully executed and notarized valid releases of liens from all major manufacturers, major suppliers, major subcontractors (for purposes of this Agreement, major manufacturers, major suppliers and major subcontractors shall be those entities with contracts in excess of \$500,000), general contractors, and all other Persons furnishing supplies or labor in connection with the Project with contracts in excess of \$500,000.

“Final Project Budget” means Owner’s budget for construction of the Project that includes a cost itemization prepared by Owner specifying all 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 Owner incident to the Project (including, without limitation, anticipated interest on all financing, taxes and insurance costs) and the construction thereof, which was approved by District prior to the Effective Date. The Final Project Budget is attached hereto as Exhibit C.

“First Source Agreement” is that agreement between the Owner and the DOES, governing certain obligations of Owner regarding job creation and employment generated as a result of construction of the Project.

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

"Green Building Act" means the Green Building Act of 2006, D.C. Official Code § 6-1451.01, *et seq.*, as amended, and the regulations promulgated thereunder.

"Green Space" means the portion of Parcel G-1 set back from 19th Street, SE and described and shown on the plat attached to Exhibit A, to be constructed and maintained as open green space in accordance with the Development Plan

"Guarantor" shall mean Christopher J. Donatelli and any successor(s) approved by District pursuant to Section 2.10.1. Guarantor must have sufficient net worth and liquidity to satisfy its obligations under such 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.

"Guarantor Submissions" shall mean (a) the last three years of financial statements and tax returns if the Guarantor is an individual and (b) the last three years of audited financial statements and audited balance sheets, profit and loss statements, cash flow statements and other financial reports if the Guarantor is an entity, and such other financial information as District may reasonably request to determine whether such Person has sufficient net worth and liquidity to satisfy the obligations under the Development and Completion Guaranty, together with a summary of such Person's other guaranty obligations and the other contingent obligations of such Person (in each case, certified by such Person or an officer of such Person as being true, correct and complete in all material respects).

"Hazardous Materials" means any flammable, explosive, radioactive, or reactive materials, any asbestos (whether friable or non-friable), any pollutants, contaminants, or other hazardous, dangerous, or toxic chemicals, materials, or substances, any petroleum products or substances or compounds containing petroleum products, including gasoline, diesel fuel, and oil, any polychlorinated biphenyls or substances or compounds containing polychlorinated biphenyls, medical waste, and any other material or substance defined as a "hazardous substance," "hazardous material," "hazardous waste," "toxic materials," "contamination," or "pollution" within the meaning of any Environmental Law.

"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 Program and Approved Plans and Specifications; provided, however, that in no event shall trade fixtures, furniture, operating equipment (in contrast to building equipment), stock in trade, inventory, or other personal property used in connection with the conduct of any business within the Improvements be deemed included in the term "Improvements" as used in this Covenant.

“Indemnified Parties” is defined in Section 3.3.1.

“Institutional Lender” means a Person that (a) lends money to or invests in real estate developers or developments in the ordinary course of its business, (b) is not an Affiliate of Developer or a Prohibited Person, (c) has an aggregate of no less than \$1 billion in assets, and (d) is (i) a commercial bank, investment bank, savings and loan association, trust company or national banking association, acting for its own account; (ii) a finance company principally engaged in the origination of commercial mortgage loans or any financing-related subsidiary of a Fortune 500 company (such as GE Commercial Finance); (iii) an insurance company, acting for its own account; (iv) a public employees’ pension or retirement system, or any other governmental agency supervising the investment of public funds; (v) a pension, retirement, or profit-sharing, or commingled trust or fund for which any bank, trust company, national banking association or investment adviser registered under the Investment Advisors Act of 1940, as amended, is acting as trustee or agent; (vi) a publicly traded real estate investment trust or a trustee or issuer of collateralized mortgage obligations or similar investment entity (provided that such trustee, issuer or other entity is publicly traded or is sponsored by an entity that otherwise constitutes an Institutional Lender); (vii) a governmental agency; (viii) a charitable organization regularly engaged in making loans secured by real estate; (ix) a profit-sharing or commingled trust or fund, the majority of equity investors in which are pension funds, or (x) a corporation, other entity or joint venture that is a wholly owned subsidiary or combination of any one or more of the foregoing entities (including, without limitation, any of the foregoing when acting as trustee for other lender(s) or investor(s) that are not Prohibited Persons, whether or not such other lender(s) or investor(s) are themselves Institutional Lenders). A holder of a bond issued by a governmental agency that is an Institutional Lender shall be deemed to be an Institutional Lender solely for purposes of determining whether such holder, as owner of an interest in the debt issued by such governmental agency, is an Institutional Lender.

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

“Letter of Credit” means either the Deposit Letter of Credit and the Performance Letter of Credit, as applicable, as defined in the Agreement.

“Material Change” means (i) any change in size or design from the Approved Plans and Specifications affecting the general appearance or structural integrity of exterior walls and elevations, building bulk, or number of floors, or a ten percent (10%) or greater change in lot coverage or floor area ratio; (ii) any changes in colors or use of exterior finishing materials substantially affecting architectural appearance from those shown and specified in the Approved Plans and Specifications; (iii) any material change in the functional use and operation of the Project from those shown and specified in the Approved Plans and Specifications; (iv) any changes in design and construction of the Project requiring approval of, or any changes required by, any District of Columbia agency, body, commission or officer (other than District); (v) any change affecting the general appearance of landscape design or plantings from the Approved Plans and Specifications; (vi) any change affecting the general appearance or structural integrity of exterior pavement, pedestrian malls, plazas, retaining walls, pools and fountains, exterior lighting, public art and other site features related to the development of the Project from the Approved Plans and Specifications; (vii) any changes in general pedestrian or vehicular

circulation in, around or through the Project from the Approved Plans and Specifications, (viii) in the case of Affordable Units only, any change in unit location, number, type, unit size, or level of interior finish, from the Approved Plans and Specifications, and (ix) any change to the Development Program.

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

“Mezzanine Loan” means a loan to Owner, one or more of Owner's Members or partners or any Affiliate of Owner which is: (a) for the purpose of financing a portion of the purchase of the Property or construction of the Project, (b) secured by the membership interests of Owner, one or more of Owner's members or partners or any Affiliate of Owner, (c) subordinated to the Debt Financing pursuant to an intercreditor agreement between the lender of the Mezzanine Loan and the lender of the Debt Financing, and (d) is not an Equity Investment, as defined herein, or similar financing provided in consideration of a direct or indirect ownership interest in Owner or the Project.

“Mortgage” shall mean a mortgage, deed of trust, or other security instrument that is recorded against the Property (but no other real property) and secures a loan that provides financing to acquire the Property and to develop and construct the Project, and any refinancing of such a loan.

“Mortgagee” means the holder of a Mortgage securing Debt Financing.

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

“Owner” is defined in the Preamble.

“Owner's Agents” means the Owner's employees, consultants, contractors, subcontractors and representatives.

“Letters of Credit” means the collective reference to the Deposit Letter of Credit and the Performance Letter of Credit as defined in the Agreement.

“Permits” means all site, building, construction, environmental, excavation, remediation 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 the remediation, construction, operation, and maintenance of the Project in accordance with the Development Program, the Agreement and this Covenant.

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

“Prohibited Person” shall mean any of the following Persons: (a) Any Person (or any Person whose operations are directed or controlled by a Person) who has been convicted of or has pleaded guilty in a criminal proceeding for a felony or who is an on-going target of a grand

jury investigation convened pursuant to Applicable Law concerning organized crime; or (b) Any Person organized in or controlled from a country, the effects of the activities with respect to which are regulated or controlled pursuant to the following United States laws and the regulations or executive orders promulgated thereunder: (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.

"Prohibited Uses" shall have the meaning set forth in Section 3.1.3.

"Project" means those Improvements on the Property, and the development, renovation and construction thereof in accordance with the Development Program, the Agreement and this Covenant.

"Project Funding Plan" means the Owner's funding plan that describes the sources and uses of funds for the Project and the methods for obtaining such funds (including the lending sources of all Equity Investment, Debt Financing and Mezzanine Loans and costs of issuance necessary to obtain such funds), as approved by District, and any modifications thereto that have been approved by District.

"Property" is defined in the Recitals.

"Punch List Items" means the minor items of work to be completed or corrected prior to final payment to Owner's general contractor pursuant to its construction contract in order to fully complete the Project in accordance with the Approved Plans and Specifications.

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

"Schedule of Performance" means that schedule of performance setting forth the timelines for milestones in the remediation of the Property and the design, development, construction, and completion of the Project (including a construction timeline in customary form), attached as Exhibit B hereto.

“Second Notice” means that notice given by Owner to District in accordance with Section 2.4.1 herein. Any Second Notice shall (a) be labeled, in bold, 18 point font, as a “SECOND AND FINAL NOTICE”; (b) shall contain the following statement: “A FAILURE TO RESPOND TO THIS NOTICE WITHIN TEN (10) BUSINESS DAYS SHALL CONSTITUTE APPROVAL OF THE PROJECT DRAWINGS [OR FILL IN APPLICABLE ITEM] ORIGINALLY SUBMITTED ON [DATE OF DELIVERY OF SUCH PROJECT DRAWINGS OR OTHER ITEM]”; and (c) be delivered in the manner prescribed in Article XI, in an envelope conspicuously labeled “SECOND AND FINAL NOTICE”.

“Transfer” means any sale, assignment, conveyance, ground lease (but excluding space leases) with a primary term in excess of thirty (30) years, trust, power, encumbrance or other transfer of the Property or the Improvements or of any portion of the Property or the Improvements, or of any interest in the Property or the Improvements, or any contract or agreement to do any of the same. As used in this Covenant, a Transfer shall also be deemed to have occurred if: (i) in a single transaction or a series of transactions (including without limitation, increased capitalization, merger with another entity, combination with another entity, or other amendments, issuance of additional or new stock, partnership interests or membership interests, reclassification thereof or otherwise), whether related or unrelated, a majority of the membership or beneficial interest in the Developer is sold, transferred, diluted, reduced or otherwise affected resulting in a change in Control of the Developer; or (ii) in a single transaction or series of transactions, whether related or unrelated, a majority of the membership interests in the Developer or in any member of the Developer is sold, transferred, diluted, reduced or otherwise affected (whether directly or indirectly) resulting in a change of Control of the Developer; (iii) an assignment or transfer by operation of law occurs; or (iv) there is a substantial change in the participation of CBEs in the ownership or management of the Developer, which shall mean any change the result of which will be to alter the percentage of the participation by CBEs from that previously presented to the District, or a change that results in the loss of the CBE status.

“Use Covenants” means those covenants contained in Article III.

“Village Square” means that area on Parcel F-1 fronting on 19th Street, SE and housing an entrance to the Stadium-Armory Metro station and described and shown on the plat attached to Exhibit A, to be constructed and maintained as a public square in accordance with the Development Plan.

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

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

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

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

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

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

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

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

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

1.11 FORCE MAJEURE. Neither District nor Developer, as the case may be, nor any successor-in-interest, shall be considered in default to perform its obligations under this Covenant, in the event of forced delay in the performance of such obligations due to Force Majeure. It is the purpose and intent of this provision that in the event of the occurrence of any such Force Majeure event, the time or times for performance of the obligations of Developer shall be extended for the period of the Force Majeure; provided, however that: (a) Developer shall have first notified, within ten (10) days after it becomes aware of the beginning of any such Force Majeure event, District in writing of the cause or causes thereof, with supporting documentation, and requested an extension for the period of the forced delay; (b) in the case of a delay in obtaining Permits, Developer must have filed complete applications for such Permits by the dates set forth in the Schedule of Performance and hired an expediter reasonably acceptable to District to monitor and expedite the Permit process; and (c) Developer must take commercially reasonable actions to minimize the delay. If Developer requests any extension on the date of completion of any obligation hereunder due to Force Majeure, it shall be the responsibility of Developer to reasonably demonstrate that the delay was caused specifically by a delay of a critical path item of such obligation.

ARTICLE II CONSTRUCTION COVENANTS

2.1 OBLIGATION TO CONSTRUCT PROJECT.

2.1.1 **Covenant to Develop and Construct.** Owner hereby agrees to develop, construct, and operate the Project in accordance with the Development Program, Approved Plans and Specifications, the Schedule of Performance and this Covenant. The Project shall be constructed in compliance with all Permits and Applicable Law, including the Green Building Act, and in a first-class and diligent manner in accordance with industry standards. The cost of development and construction of Project thereon shall be borne solely by Owner and completed by the Outside Completion Date as indicated in the Schedule of Performance.

2.1.2 **Construction Consultant.** On or before the Commencement of Construction, the Owner shall appoint a construction consultant (the “**Construction Consultant**”), approved by the District (such approval not to be unreasonably withheld, delayed or conditioned and to be deemed given if no response is given by District within ten (10) Business Days after a request for approval), who shall, among other matters as specified by the Owner, (a) review and report to the District, with respect to the Construction Drawings, the Schedule of Performance, and the conformity of such matters to this Covenant, (b) report to the District on a monthly basis whether the construction of the Project is in adherence to the Schedule of Performance, (c) review and approve whether the construction of the Project is consistent with the requirements of this Covenant and (d) review and report to the District on the District’s issuance of the Certificate of Final Completion. The Construction Consultant shall receive timely reports from the Architect and the Owner, as necessary, and shall promptly report any issues or problems to the District and the Owner. The Construction Consultant’s time, expenses, reports, and certification shall be at Owner’s sole cost and expense, provided that in no event shall such costs and expenses exceed the amount contained in the Final Project Budget.

2.2 PRE-CONSTRUCTION ITEMS.

2.2.1 **Issuance of Permits.** Owner shall have the sole responsibility for obtaining all Permits from the applicable agency within the District of Columbia government or other authority. In no event shall Owner commence site work or construction of all or any portion of the Project until Owner has obtained all Permits necessary to commence and maintain the same, without lapse, to complete the portion of the contemplated work. After approval by District of all Construction Drawings, Owner agrees to diligently pursue obtaining all Permits. From and after the date of any such application until issuance of the Permit, Owner shall report Permit status in writing every thirty (30) days to District. Owner shall submit to District copies of documents evidencing each and every Permit obtained by Owner.

2.2.2 **Site Preparation.** Owner, at its sole cost and expense, shall be responsible for all preparation of the Property for renovation, development and construction in accordance with the Development Program and Approved Plans and Specifications, including, costs associated with the construction of the Project, including the Village Square and Green Space, utility relocation and abandonment, relocation and rearrangement of water and sewer lines and hook-ups, construction or repair of alley ways on the Property, and construction of sidewalks abutting the Property. All such work, including but not limited to, excavation, backfill, and upgrading of the lighting and drainage, shall be performed under all required Permits and in accordance with all

appropriate District of Columbia agency approvals and government standards, and Applicable Law.

2.3 CONSTRUCTION RESTRICTIONS AND OBLIGATIONS.

2.3.1 **Commencement of Construction; Schedule of Performance.** Subject to Force Majeure, Owner agrees that it shall achieve Commencement of Construction within thirty (30) calendar days after Closing and diligently prosecute the development and construction of the Project thereafter in accordance with the Approved Plans and Specifications and the Schedule of Performance. Developer shall deliver to District copies of all Permits required for Commencement of Construction at least ten (10) Business Days prior to Commencement of Construction.

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

2.3.3 **Certificate of Substantial Completion.** Subject to Force Majeure, Owner shall achieve Completion of Construction on or before the Outside Completion Date indicated in the Schedule of Performance. Promptly after Owner achieves Completion of Construction, Owner shall furnish District with a Certificate of Substantial Completion, in which the Owner states under oath that (a) the Project has been completed, subject only to Punch List Items, in accordance with all Approved Plans and Specifications and all Applicable Law (accompanied with a certificate from Architect stating the same) and (b) all of the Construction Covenants herein, including the times for Commencement of Construction and Completion of Construction, have been fully satisfied.

2.3.4 **Certificate of Final Completion.** Subject to Force Majeure, Owner shall achieve Final Completion on or before the Outside Completion Date indicated in the Schedule of Performance. Promptly after Owner achieves Final Completion, Owner shall notify District and certify, under oath, that: (i) all Punch List Items have been completed; (ii) all construction contracts for the Project have been closed-out; and (iii) all costs of constructing the Project have been paid, and Owner has received fully executed and notarized valid releases of liens from all major manufacturers, major suppliers, major subcontractors, general contractors, and all other Persons furnishing supplies or labor in connection with the Project with contracts in excess of \$500,000. Owner shall also provide District with: (i) a certification from the general contractor certifying that the Project has been constructed in accordance with the Approved Plans and Specifications; (ii) a certification from the Architect certifying that the Project has been constructed in accordance with the Approved Plans and Specifications; (iii) copies of all executed retail leases, if any; (iv) a set of as-built drawings; (v) a certification from the Department of Housing and Community Development certifying compliance with the Affordability Covenant; and (vi) the Certificates of Occupancy for the Project (if not previously provided). Following District's final inspection of the Project pursuant to Section 2.7 hereof, provided District accepts Final Completion of the Project, District shall deliver to Owner a certificate ("**Certificate of Final Completion**") in recordable form.