

## CONSTRUCTION COVENANT

THIS CONSTRUCTION COVENANT (the “**Covenant**”) is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 2022 (“**Effective Date**”), between the ECONOMIC DEVELOPMENT AUTHORITY OF FALLS CHURCH, a body politic and corporate and political subdivision of the Commonwealth of Virginia, in its proprietary capacity as the owner of certain land in Falls Church, Virginia and not in its governmental or regulatory capacity (“**Owner**”), CITY OF FALLS CHURCH, a city incorporated in the Commonwealth of Virginia, in its proprietary capacity and not in its governmental or regulatory capacity (“**City**”), and FCGP DEVELOPMENT LLC, a Delaware limited liability company (“**FCGP**”), and the ground lessees identified on **Exhibit A** attached hereto, and each of their respective successors and assigns (each, a “**Developer**”, and collectively, the “**Developers**”). Owner, City, and each Developer are each a “**Party**”, or collectively, “**Parties**” to this Covenant.

## RECITALS

R-1. The City and FCGP entered into that certain Comprehensive Agreement, dated June 12, 2019 (as amended, the “**Comprehensive Agreement**”) regarding the development, construction, use, and operation by Developer and its successors and assigns of an approximately 9.45 acre tract of land with an address of 7124 Leesburg Pike, Fall Church, Virginia 22046 (the “**Property**”), for the development project described in the Comprehensive Agreement.

R-2. Owner, as successor-in-interest to City, is the legal owner of a portion of the Property more particularly described on **Exhibit B-1** attached hereto (the “**Leased Property**”). Immediately prior to the recording hereof, City granted and transferred to FCGP Condo Parcel Owner LLC (the “**Condo Parcel Owner**”) fee simple ownership in the remaining portion of the Property more particularly described on **Exhibit B-2** attached hereto (the “**Owned Property**”).

R-3. Owner and Developers, or Developer’s permitted transferee (or its respective affiliate) have entered into the Deeds of Lease, identified on **Exhibit A** attached hereto, each dated as of even date herewith, pursuant to which Developers, or Developer’s permitted transferee (or its respective affiliate) shall lease, sublease, develop, construct, use, maintain and operate the applicable portion of the Leased Property, or cause the applicable portion of the Leased Property to be leased, subleased, developed, constructed, used, maintained and operated as mixed-used development. Condo Parcel Owner shall develop For-Sale Residential Units (as defined herein) on the Owned Property in accordance with the terms and conditions of the Comprehensive Agreement.

R-4. The Common Areas (as defined in the Comprehensive Agreement) are owned by Owner, and pursuant to the Comprehensive Agreement, FCGP will cause the development and construction the Shared Facilities (as defined in the Comprehensive Agreement) e.g., roads and sidewalks, within the Common Areas (the “**Common Improvements**”).

R-5. In the Comprehensive Agreement, City and Developers agreed to execute, enter into, and record this Covenant on the Property, in order to subject the Property to the terms and conditions hereof.

R-6. Accordingly, Developers, for the benefit of Owner and City, agree to develop and construct the Property in accordance with the covenants contained herein.

NOW, THEREFORE, the Parties hereto agree that the Property must be held, leased, 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. Undefined capitalized terms set forth herein shall have the meaning set forth in the following documents (in order of priority if each document has a differing definition from the other): (i) the Comprehensive Agreement; and (ii) the applicable Ground Lease.

**“Applicable Laws”** shall mean any and all applicable present and future laws, rules, orders, ordinances, regulations, statutes, requirements, permits, consents, certificates, approvals, codes and executive orders without regard to the nature or cost of the work required to be done, extraordinary, as well as ordinary, of the United States of America, the Commonwealth of Virginia, the City, and any agency, department, commission, board, bureau, instrumentality or political subdivision of any of the foregoing, now existing or hereafter created, having lawful jurisdiction over the Property or any portion thereof affecting or relating to any Owner or Developer on the Property.

**“Approval Review”** is defined in Section 2.4.2.

**“Approved Construction Drawings”** shall mean the completed final drawings and plans and specifications prepared by an Architect that shall conform to any all required approvals of the City Government (including without limitation, Zoning Approvals) or other authority having jurisdiction over the Property (including, without limitation, the Commonwealth of Virginia or the federal government, as the case may be), as the same may be modified pursuant to Section 2.4 of this Covenant.

**“Architect”** shall mean, “Tenant’s Architect,” as such term is defined in the applicable Ground Lease, and together with respect to the Common Improvements, FCGP’s architect.

**“Building A1 Apartments and Parking Ground Lease”** is defined in Exhibit A.

**“Building A1 Grocery Retail and Parking Ground Lease”** is defined in Exhibit A.

**“Building B1 Office Ground Lease”** is defined in Exhibit A.

**“Building B1 Retail Ground Lease”** is defined in Exhibit A.

**“Building B2 Hotel Ground Lease”** is defined in Exhibit A.

**“Building B2 Retail Ground Lease”** is defined in Exhibit A.

**“Building B3 Garage Ground Lease”** is defined in Exhibit A.

**“Building D1 Senior Housing Ground Lease”** is defined in Exhibit A.

**“Building D1 Retail Ground Lease”** is defined in Exhibit A.

**“Building D2 Apartments Parking Ground Lease”** is defined in Exhibit A.

**“Building D2 Senior Housing Parking Ground Lease”** is defined in Exhibit A.

**“Building D2 Retail Parking Ground Lease”** is defined in Exhibit A.

**“Business Day”** means Monday through Friday, inclusive, other than holidays recognized by the City of Falls Church, Virginia government.

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

**“Certificate of Occupancy”** means a certificate of occupancy for each Project Component, as detailed on Exhibit C attached hereto.

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

**“City Government”** means the city of Falls Church, Virginia or its city council, and any board, agency, authority, department or body that governs or has authority within the city government of the City of Falls Church, Virginia having jurisdiction over all or any portion of the Project Site, in its governmental or regulatory capacity.

**“Condo Parcel Owner”** is defined in the Recitals.

**“Commencement of Construction”** means the commencement of on-site construction of a Building, Project Component or other Construction Work, as applicable, including any excavation or pile driving but not including test borings, test pilings, surveys and similar pre-construction activities.

**“Common Improvements”** is defined in the Recitals.

**“Completion Guaranty”** means the applicable Guaranty or Guaranties.

**“Completion of Construction”** means, with respect to a Project Component, that (i) the applicable Developer has completed construction of the Project Component, except for Punch

List Items, in accordance with the Zoning Approvals, Permits, Applicable Laws, and the Comprehensive Agreement, and (ii) the Certificate of Completion for the Project Component has been issued.

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

“**Construction Agreements**” shall mean any direct agreements for Construction Work performed pursuant to this Covenant and the Comprehensive Agreement.

“**Construction Work**” shall mean any construction of Improvements or demolition work performed by or on behalf of Developers under this Covenant.

“**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.

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

“**Default Rate**” means the lesser of: (i) the highest maximum permissible interest rate in effect in the Commonwealth of Virginia; or (ii) the Prime Rate (hereinafter defined) plus six percent (6%) per annum. “*Prime Rate*” shall mean the prime or base rate announced as such from time to time by Bank of America, N.A., or its successors, at its principal office. In the event Bank of America, N.A. or its successor is no longer in business or no longer publishes a Prime Rate, City, in its reasonable discretion, shall choose another nationally chartered banking institution for the purpose of determining the Prime Rate. Any interest payable under this Covenant with reference to the Prime Rate shall be adjusted on a daily basis, based upon the Prime Rate in effect at the time in question, and shall be calculated on the basis of a 360 day year with twelve months of 30 days each.

“**Developer**” and “**Developers**” are defined in the Preamble.

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

“**Effective Date**” is defined in the Preamble.

“**Environmental Claims**” is defined in Section 3.2.1.

“**Environmental Laws**” means any federal, state or local law, ordinance, rule, regulation, requirement, code, resolution, order or decree (including consent decrees and administrative and executive orders) in effect on the date of this Covenant which regulates the use, generation, installation, existence, release, threatened release, discharge, handling, storage, treatment, transportation, decontamination, clean-up, removal, encapsulation, enclosure, abatement or disposal of any Hazardous Materials, including the Comprehensive Environmental Response,

Compensation and Liability Act, 42 U.S.C. Section 9601, *et seq.*, the Hazardous Materials Transportation Act, 49 U.S.C. § 5101, *et seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. Sections 6901, *et seq.*, the Toxic Substance Control Act, 15 U.S.C. Sections 2601, *et seq.*, the Clean Water Act, 33 U.S.C. Sections 1251 *et seq.*, the Emergency Planning and Community Right of Know Act of 1986, 42 U.S.C. § 11001, *et seq.*, and the Virginia State Water Control Law, Va. Code Ann. § 62.1-44.2, *et seq.* their state analogs, and any other federal or State statute, law, ordinance, resolution, code, rule, regulation, order or decree regulating, relating to, or imposing liability or standards of conduct concerning any Hazardous Materials.

“**Event of Default**” is defined in Section 5.1.1.

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

“**Final Completion**” means, with respect to a Project Component, all of the following have occurred: (i) Completion of Construction of the applicable Project Component has occurred, (ii) all Punch List Items prepared in connection with satisfying the conditions to Completion of Construction have been completed or satisfied, (iii) (A) there are no existing mechanics’, laborers’ or materialmens’ liens or similar encumbrances related to the Project Component for which Completion of Construction has occurred, or (B) any existing mechanics’, laborers’ or materialmens’ liens or similar encumbrances on the Project Component are being contested by the Developer in accordance with the applicable provisions of its Ground Lease, and (iv) the applicable statutory lien periods provided in Section 43-4 of the Code of Virginia have expired, or final lien waivers have been delivered.

“**Final Project Budget**” means Developer’s budget for construction of the Project or Project Component, as applicable, that includes a cost itemization prepared by Developer specifying all costs (direct and indirect), including (i) the costs of all labor, materials, and services necessary for the construction of the Project or Project Component, as applicable, and (ii) all other expenses anticipated by Developer incident to the Project or Project Component, as applicable, (including, without limitation, anticipated interest on all financing, taxes and insurance costs) and the construction thereof, which will subject to City’s Approval Review. The Final Project Budget may be modified from time to time in accordance with this Covenant. It is acknowledged and agreed that the Final Project Budget may be separately divided among the Project Components.

“**For-Sale Residential Units**” means the Residential Units to be constructed on the Owned Property, which shall be marketed for sale.

“**Force Majeure**” means an act or event, including, as applicable, an act of God, act of the public enemy, fire, earthquake, flood, explosion, war, invasion, insurrection, riot, mob violence, sabotage, terrorism, fire, unavoidable casualty, failure or unavailability of transportation, strike, lockout, actions of labor unions, a taking by eminent domain, requisitions and laws or orders of government or civil or military authorities, inability to procure or a general shortage or scarcity of labor, equipment, facilities, materials, or supplies in the open market due to enemy action or civil commotion (but not due to (A) costs of such labor, equipment, facilities,

materials or supplies (except as a result of scarcity due to enemy action or civil commotion), (B) Developer's insolvency or financial condition or (C) the availability or applicability of insurance proceeds or condemnation awards), or any other cause, whether similar or dissimilar to the foregoing that is not within the reasonable control of Developer, so long as, in each case, (i) such act or event is not due to the fault or negligence of Developer (or Owner or City, in the event Owner or City's claim is based on a Force Majeure event), (ii) such act or event is not reasonably foreseeable and avoidable by Developer (or Owner or City, in the event Owner or City's claim is based on a Force Majeure event), and (iii) such act or event results in a delay in performance by Developer, Owner or City, as applicable.

**"Ground Lease"** means each certain Deed of Lease by and between Developer, or their respective affiliates, and Owner dated as of even date herewith, regarding the lease of the applicable portion of the Property identified on **Exhibit A**, attached hereto.

**"Hazardous Materials"** means any flammable, explosive, radioactive or reactive materials, any asbestos (whether friable or non-friable, but excluding naturally occurring asbestos), 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, or toxic mold or fungi, 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.

**"Improvements"** means the buildings, fixtures, capital improvements, structures, and appurtenances of every kind and description (including footings and foundations) landscaping, hardscape, and other improvements to be constructed or placed on the Property in accordance with the Zoning Approvals, Comprehensive Agreement, 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 Covenant.

**"Indemnified Parties"** is defined in Section 3.2.1.

**"Institutional Lender"** means a savings bank, a savings and loan association, a commercial bank or trust company (whether acting individually or in a fiduciary capacity); an insurance company organized and existing under the laws of the United States or any state thereof; a real estate investment trust; a religious, educational or eleemosynary institution; a governmental agency, body or entity; an employee, benefit, pension or retirement plan or fund; a commercial credit corporation; a commercial bank or trust company acting as trustee or fiduciary of various pension funds or other tax-exempt funds; or other form of entity that, in its ordinary course of business, is involved in the issuance or holding of mortgage loans secured by commercial developments, or of collateralized mortgage obligations or commercial mortgage backed securities; a corporation or other entity which is owned wholly by any other Institutional

Lender; or similar investment entity or other recognized financial institution that makes commercial loans for projects similar to the Project; or any combination of the foregoing; *provided*, that any such entity that could hold a Mortgage hereunder shall qualify as an Institutional Lender only if such entity: (i) shall be subject to the jurisdiction of the courts of the Commonwealth of Virginia (either state or federal) in any actions relating to the Project or this Covenant, (ii) has assets of at least Two Billion Dollars (\$2,000,000,000).

“**Kiosk Areas Ground Lease**” is defined in Exhibit A.

“**Land Records**” means the land records division of the Circuit Court of Arlington County, Virginia.

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

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

“**Mortgage**” means any deed of trust, indenture, mortgage, or similar instrument which is commonly given to secure advances on real estate and leasehold estates under the laws of the Commonwealth of Virginia, provided such deed of trust, indenture, mortgage, or similar instrument is held by a Mortgagee. A deed of trust, indenture, mortgage or similar interest which is not held by a Mortgagee is not a “Mortgage” as such term is used in this Covenant.

“**Mortgagee**” means the holder of a Mortgage on the Property or a portion thereof, *provided however* that such holder: (a) is an Institutional Lender; (b) has been approved by City prior to the entering into of such Mortgage, which consent shall be in City’s reasonable discretion; or (c) has assumed, purchased or otherwise acquired a Mortgage initially entered into by a “Mortgagee” under clause (a) or (b) herein, on or after Completion of Construction with respect to the Project (or Project Component) encumbered by such Mortgage. No holder of any deed of trust, indenture, mortgage, or similar instrument which constitutes a lien on Developer’s interest in all or any portion of the Project Site will have the rights of a “Mortgagee” in this Agreement unless it meets the definition set forth in the preceding sentence.

“**Notice**” is defined in Section 11.1.

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

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

“**Party(ies)**” is defined in the Preamble.

“**Permits**” means all demolition, site, building, construction, historic preservation, and other permits, approvals, licenses or rights required or necessary to be obtained under Applicable Laws from the City Government or other authority having jurisdiction over the Property (including, without limitation, the Commonwealth of Virginia, the federal government, and any utility company, as the case may be) for the commencement, performance and to achieve

substantial completion of a Project Component or any part thereof in accordance with the Approved Construction Drawings and this Covenant.

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

**“Project”** means the development and construction of the Phase 1 and Phase 2 (if and when the Phase 2 Closing occurs) of the Property in accordance with the Zoning Approvals, the Comprehensive Agreement, the Schedule of Performance, the Approved Construction Drawings, and this Covenant.

**“Project Component”** means the Horizontal Development component of the Project (including the Common Improvements), a Vertical Development, a Building, or a Residential Unit (or group of Residential Units), as applicable.

**“Punch List Items”** means the minor items of work to be completed or corrected prior to final payment to Developer’s general contractor pursuant to its construction contract in order to achieve Final Completion of a Project Component in accordance with the Approved Construction Drawings.

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

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**“Residential Units”** means an individual residential unit(s) (regardless of whether they are multi-family, condominium, or senior housing units) constructed as part of the Project pursuant to the Zoning Approvals. Hotel rooms are not Residential Units.

**“Review Period”** is defined in Section 2.4.2.

**“Schedule of Performance”** means that schedule of performance setting forth the timelines for milestones in the development, construction, and completion of the Project (and for each Developer, its respective Project Component), to be submitted and approved by the City in accordance with its Approval Review in accordance with Section 2.4 below.

**“Submission(s)”** means those certain plans, specifications and other documents, including without limitation, the Zoning Approvals, the Approved Construction Drawings, the Financing Plan, the Final Project Budget(s), the Schedule of Performance, the Merchandizing Plan and other matters to be submitted to City for Approval Review or to the City Government in accordance with the Zoning Approvals.

**“Title Company”** means Walker Title, LLC, 11781 Lee Jackson Memorial Highway, Suite 300, Fairfax, Virginia 22033, Attention: Sam Green, as agent for First American Title Insurance Company.

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<sup>1</sup> NTD: “Replacement Value” is not used in this agreement.



“**Voluntary Concessions**” shall mean those voluntary agreements by Developer contained in that certain document entitled, “Voluntary Concessions, Community Benefits, Terms and Conditions,” that was approved by and will be executed by the City, as part of, and a material condition to, the Zoning Approvals.

“**Zoning Approvals**” shall mean the **SEE Approval** (as defined and used in the *Code of the City of Falls Church, Virginia*), **SESP Approval** (as defined and used in the *Code of the City of Falls Church, Virginia*), the Voluntary Concessions and any and all requisite Governmental Authorities approvals required to permit the development of the Project as set forth in the SEE Approval and subsequent SESP Approval(s) for the respective portions of the development, subject only to those development conditions or similar impositions (including any imposed by the Virginia Department of Transportation) reasonably acceptable to Developer.

1.2 GOVERNING LAW. This Covenant shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia (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 Owner, City, or Developer 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. In the event of any conflict between the Exhibits and Schedules and this Covenant, this Covenant shall control.

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 the Parties 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. None of the Parties, as the case may be, nor any successor-in-interest, shall be considered in default of its obligations under this Covenant, in the event of forced delay in the performance of such obligations due to Force Majeure, and the periods allowed for the performance by the Party(ies) of such obligations(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 1.11 shall notify the other Parties in writing within ten (10) days after it becomes aware of the beginning of any such Force Majeure event, of the cause or causes thereof, with supporting documentation, and requested an extension for the period of the forced delay. If any Party requests any extension on the date of completion of any obligation hereunder due to Force Majeure, it shall be the responsibility of such Party to reasonably demonstrate that the delay was caused specifically by such Force Majeure event and make commercially reasonable efforts to minimize the delay.

1.12 RECITALS. The Recitals of this Covenant are hereby incorporated herein by this reference and made a substantive part of the agreements herein between the Parties.

## ARTICLE II CONSTRUCTION COVENANTS

### 2.1 OBLIGATION TO CONSTRUCT PROJECT.

2.1.1 **Covenant to Develop and Construct.** Each Developer hereby agrees to design, develop, and construct, or cause the design, development, and construction of its Project Component with diligence and continuity (subject to Force Majeure) in accordance with the Comprehensive Agreement, the Zoning Approvals, the Approved Construction Drawings, the Schedule of Performance, and this Covenant. The Project shall be constructed in compliance with all Permits and Applicable Laws, and in a first-class and diligent manner in accordance with industry standards. The cost of development and construction shall be borne solely by each respective Developer, including utilizing funding from governmental resources if agreed upon by the applicable Developers.

2.1.2 **Schedule of Performance.** Each Developer shall provide City with a copy of Developer’s Schedule of Performance for its Project Component for City’s Approval Review in accordance with Section 2.4.2 below, provided each Developer is entitled to modify such Schedule of Performance from time to time as each such Developer deems appropriate

without City's consent, except that each such Developer may not modify the Schedule of Performance in a manner that would reflect a change to the Outside Completion Date (as set forth in Schedule 9.2.4 of the Comprehensive Agreement), without first obtaining City's prior written consent. Developers shall promptly provide a copy of any revised Schedule of Performance to City.

## 2.2 PRE-CONSTRUCTION ITEMS.

2.2.1 **Issuance of Permits.** Developers shall have the sole responsibility for obtaining all Permits from the applicable agency within the City of Falls Church government or other authority. Each Developer shall obtain all Permits required to Commence Construction of the Project Component developed by such Developer in accordance with the Approved Construction Drawings and its Schedule of Performance for any Project Component. A Developer shall submit to City copies of documents evidencing each and every Permit obtained by such Developer(s).

2.2.2 **Site Preparation.** Developers, at their sole cost and expense (which may include funding from outside sources), shall be responsible for all preparation of the Property for development and construction in accordance with the Zoning Approvals and Approved Construction Drawings, including costs for 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 state and local agency approvals and government standards, and Applicable Laws.

## 2.3 CONSTRUCTION RESTRICTIONS AND OBLIGATIONS.

2.3.1 **Commencement of Construction.** Subject to Force Majeure, each Developer agrees that it shall achieve Commencement of Construction for its respective Project Component, and diligently prosecute the development and construction of the Project thereafter, in accordance with the Approved Construction Drawings and the Schedule of Performance.

2.3.2 **General Requirements for Construction Work; Approval of Construction Drawings.** All Construction Work shall comply with the following:

(a) After Commencement of Construction has occurred, such Construction Work shall be completed with reasonable promptness (subject to Force Majeure), in a good and workmanlike manner and in accordance with the Approved Construction Drawings and all Applicable Laws.

(b) At least thirty (30) days before a Developer intends for Commencement of Construction of a Project Component to occur, a Developer shall provide City with the completed final drawings and plans and specifications prepared by the Architect for the City's Approval Review in accordance with Section 2.4. Upon City's approval (or notice of

“no comments” or deemed “no comments”), such drawings, plans and specifications shall be the Approved Construction Drawings.

(c) A Developer shall not commence any Construction Work unless and until (i) Developer shall have obtained and delivered to City copies of all Permits with regard to the Construction Work to be performed, in accordance with Section 8.1.2 of the Comprehensive Agreement, (ii) Developer shall have delivered to City certified copies, certificates or memoranda of the policies of insurance required to be carried under this Covenant, and (iii) Developer has delivered its respective Completion Guaranty in compliance with the terms set forth in Section 4.2 of the Comprehensive Agreement.

(d) Each Developer shall make full and timely payment or shall cause full and timely payment to be made to all contractors, subcontractors, materialmen, engineers, architects or other Persons who have rendered or furnished services or materials for any Construction Work or contest or discharge such matters in a timely fashion, to the extent such matters result in a lien or encumbrance against the Property.

(e) All Construction Work shall be carried out under the supervision of the Architect.

2.3.3 **Construction Agreements.** Excluding any Construction Agreement under One Hundred Dollars (\$100,000.00), all Construction Agreements relating to the development of the Leased Property or Common Improvements shall include the following provisions, subject to any changes requested by such [“Contractor”]/[“Subcontractor”]/[“Materialman”] and approved by Owner, such approval not to be unreasonably withheld:

[“Contractor”]/[“Subcontractor”]/Materialman”] hereby agrees that Owner shall not be liable in any manner for payment or otherwise to [“contractor”]/[“subcontractor”]/[“materialman”] in connection with the purchase of any building materials for the Project and Owner shall have no obligation to pay any compensation to [“contractor”]/[“subcontractor”]/[“materialman”] by reason of such materials becoming incorporated into the Property.

[“Contractor”]/[“Subcontractor”]/[“Materialman”] hereby agrees that notwithstanding that [“contractor”]/[“subcontractor”]/[“materialman”] performed work at the Property or any part thereof; Owner shall not be liable in any manner for payment or otherwise to [“contractor”]/[“subcontractor”]/[“materialman”] in connection with the work performed at the Property.

Owner, as fee simple owner of the Property, shall be a third party beneficiary of all guarantees and warranties of [“contractor”]/[“subcontractor”]/[“materialman”] hereunder and such guarantees and warranties shall be enforceable against [“contractor”]/[“subcontractor”]/[“materialman”] by Owner.

Owner is not a party to this [“agreement”]/[“contract”] nor will Owner in any way be responsible to any party for any and or all claims of any nature whatsoever arising or which may arise from such [“contract”]/[“agreement”]. Notice is hereby given that Owner shall not be liable for any work performed or to be performed at the Property for Developer, for any materials furnished or to be furnished at the Property for any of the foregoing, and that no mechanic’s or other lien for such work or materials shall attach to or affect the estate or interest of Owner in and to the Property or any part thereof, or any assets of, or funds appropriated to, Owner.”

2.3.4 **Developer’s Certificate of Completion.** Subject to Force Majeure, each Developer shall achieve, or shall cause to be achieved, Completion of Construction for its Project Component on or before the outside date indicated therefor on the Schedule of Performance for such Project Component. Promptly after Developer achieves, or has caused the achievement of, Completion of Construction of a Project Component (other than an individual For-Sale Residential Unit), Developer shall furnish, or shall cause to be furnished, City and Owner with the appropriate Certificate of Occupancy for such Project Component (as described in the Comprehensive Agreement), together with a certificate of substantial completion substantially in the form of AIA Form G704 (together, “**Certificate of Completion**”).

2.3.5 **Residential Unit Certificate of Completion.**

(a) With respect to the construction of For-Sale Residential Units within the Project, the issuance of a Certificate of Completion and the recordation of such Certificate of Completion in the Land Records automatically releases all For-Sale Residential Units from the Construction Covenant in accordance with the terms and conditions of this Covenant and the Comprehensive Agreement, except for those obligations necessary to achieve Final Completion, warranty obligations and to the extent that any obligations of a Developer survive, as expressly provided by the Comprehensive Agreement, or continued obligations of a Developer are required by any Governmental Authority or Zoning Approvals, to the extent of such obligations.

(b) Notwithstanding the provisions of subsection (a) above, with respect to an individual For-Sale Residential Unit, the sale thereof shall be conclusive evidence of the following: (i) that the purchaser of such For-Sale Residential Unit, or any transferee, assignee or successor-in-interest thereof, does not (because of such purchase) incur any obligation hereunder with respect to the construction of the Improvements on the Owned Property or otherwise, (ii) that Owner, City, or any Party thereafter (including any such party’s successor or assigns) shall not have or be entitled to exercise with respect to such For-Sale Residential Unit any rights or remedies or controls that it may otherwise have or be entitled to exercise with respect to the For-Sale Residential Unit as a result of a default in or breach of any provision of this Covenant or the Comprehensive Agreement, and (iii) any holder of a Mortgage pertaining to such For-Sale Residential Unit shall not be bound by this Covenant.

(c) For purposes of this Section 2.3.5, construction of an individual Residential Unit shall be deemed to have been completed in accordance with the provisions of this Covenant and the Comprehensive Agreement when Developer has obtained a temporary or permanent Certificate of Occupancy or similar document or permit that must be obtained as a condition to the lawful occupancy of such Residential Unit from the appropriate Governmental Authority.

## 2.4 SUBMISSIONS.

2.4.1 **Initial Approval and Material Changes.** A Developer shall submit all Submissions for City's written approval and shall not make or cause to be made any material changes to the Submissions without City's prior written approval; except those changes required by a governmental authority pursuant to Section 2.4.5. If a Developer desires to make a material change to any Submission, and such changes do not otherwise require the approval of City Government, Developer shall submit the proposed changes to City for approval per Section 2.4.2.

2.4.2 **City's Review Period.** City shall, in good faith, review a material change to any Approved Construction Drawings within ten (10) Business Days for such submission, and shall review a material change to: (a) the Initial Project Budget or the Final Project Budget (or any iteration of either), (b) the Financing Plan, (c) the Merchandizing Plan, and (d) any other submission that City reviews in its capacity as beneficial owner of the Leased Property which does not have to be submitted to City Government; within fifteen (15) Business Days of such submission (such 10-day or 15-day period being the "**Review Period**"). Within the Review Period, City shall indicate in writing to Developer comments or "no comments". In the event City fails to provide Developer with such notice of comment or no-comments by the expiration of the Review Period, City shall be deemed to have provided no-comments and Developer may proceed with the Submission. The procedures of this Section 2.4.2 will govern City's "**Approval Review**" under which City reviews and comments.

2.4.3 **Comments Notice.** In the event City provides comments to a Developer as provided in Section 2.4.2, the notice shall state the comments with sufficient detail for Developer to determine the nature of the comment and the means to address. City's comments shall be made in good faith. Developer shall have a period of time equal to the Review Period to address the comments of City and shall resubmit the Submission, with such revisions, for City's review. City shall review in good faith such revisions within the Review Period. In the event of any unresolved dispute related to such Submissions (and related revisions), City and Developer shall promptly meet to resolve the disagreement both acting in good faith and consistent with commercial real estate custom and practice.

2.4.4 **No Representation or Liability.** City's review and approval of any Submission shall not be construed as a representation or other assurance that such Submission complies with the Zoning Approvals or any building codes, regulations or standards, including, without limitation, building, engineering and structural design, or any other Applicable Laws.

2.4.5 **Government Required Changes.** Notwithstanding any other provision of this Covenant to the contrary, City acknowledges and agrees that City may not withhold its approval (if otherwise required by the terms of this Covenant) of any proposed changes (whether or not material) to an Approved Construction Drawing that are required by any governmental authority or have been approved by the City Government. Developer shall promptly notify City in writing of any changes required by a governmental authority whether before or during construction.

2.5 **COOPERATION.** Owner agrees to cooperate with Developers to facilitate the development and construction of the Project. Owner, in its reasonable discretion, shall grant (and assist in obtaining), easements and rights of way over the Property as reasonably necessary, for purposes of easements for ingress, egress, utilities (e.g. sewer, water, electric, gas, cable, telecommunications, phone and other similar utilities), maintenance and signage, crane swing, grading, temporary construction, as well as other reasonable easements necessary or desirable for the construction, development, use, maintenance and operation of the Property. Subject to City's approval rights in the Comprehensive Agreement or this Covenant, Owner and City, upon request of Developer, shall execute any site plans, development plans, construction documents, plats, plans, and permits, including without limitation applications needed therefor (e.g., building permits, grading permits, sheeting/shoring permits, occupancy permits or similar permits needed for or by a subtenant, etc.) that are necessary or required to be executed or confirmed by Owner (i.e., the fee owner of the Property) for, related to or in connection with the construction, of the Improvements.

2.6 **INSPECTION AND MONITORING RIGHTS.** In addition to and notwithstanding any monitoring and inspecting requirements of Developer's construction lender and any applicable Virginia and City of Falls Church building and health code requirements, Owner and City shall have the following rights:

2.6.1 **Inspection of Site.** Upon reasonable advance notice written notice to the Developers, Owner and City shall have the right to enter the Property from time to time, accompanied by a representative of Developers, and at no cost or expense to either Owner or City (but at the risk of Owner and City and with Developers being expressly released from any liability related thereto), for the sole purpose of performing routine inspections in connection with the development and construction of the Project; provided that such entry and inspection shall be coordinated with Developers in a manner that will minimize any interference with construction of the Project. Developers understand that Owner and City or their respective representatives will enter the Property for the sole purpose of undertaking the inspection of the Project Components to determine conformance to the Approved Construction Drawings and this Covenant, as applicable, and the applicable Developer shall have the right to accompany those persons during such inspections. City shall be entitled to have its field personnel or other designees attend Developer's job and safety meetings provided such personnel do not interfere with or delay the construction of the Project Component. Each Developer waives any claim that it may have against Owner and City, its officers, directors, employees, agents, consultants, or representatives, arising out of Owner or City representatives' entry upon its Project Component unless resulting from the gross negligence or willful misconduct of said representatives. Any inspection of the Project or access of the Property hereunder shall not be deemed an approval,

warranty, or other certification as to the compliance of the Project or Property with any building codes, regulations, standards, or other Applicable Laws.

2.6.2 **Progress Reports.** From and after the Effective Date and until Developer's issuance of the Certificate of Final Completion for all Project Components, Developers, upon written request by City, shall make written reports to City as to the progress of the construction of the Project, in such form and detail as may reasonably be requested by City, and shall include, among other things, a reasonable number of construction photographs taken since the last report submitted by Developers, detailed statement of adherence to or deviation from the Schedule of Performance and any experienced or anticipated delays or other material construction issues that have arisen since the last report submitted by Developers, and updates on the status of the Final Project Budget. Such progress reports shall be delivered to City by Developers within ten (10) days after request by City, but not more frequently than on a monthly basis.

2.6.3 **Audit Rights.** Upon reasonable prior notice at any time prior to achievement of Completion of Construction, but not more than one (1) time in any twelve (12) month period unless a Developer is found to be in material violation of any obligation imposed hereunder as a result of a prior audit, City shall have the right (at the cost of City unless such Developer is found to be in material violation of any obligation imposed hereunder, in which event such expense shall be borne by such Developer) to inspect the books, records, and corporate documents of such Developer for the purpose of ensuring compliance with this Covenant and to have an independent audit of the construction documents and records. Developers shall cooperate with City in providing City reasonable access to its books and records during normal business hours at Developer's offices for these purposes. Developers shall maintain their books and records in accordance with generally accepted accounting principles, consistently applied. Developers and City may, but shall not be obligated to, jointly agree to use a common accounting firm for the purpose of conducting any such audits.

2.7 MILESTONE NOTICES. Upon achievement of each construction milestone in the Schedule of Performance, Developers shall notify City, and City shall have ten (10) Business Days to inspect the Property and certify to Developers in writing Developers' completion of such milestone.

## 2.8 FINANCING PLAN; FINAL PROJECT BUDGET.

2.8.1 **Financing Plan.** Any material change to the "Financing Plan" that was delivered on or before the Phase 1 Closing shall be subject to City's review and approval as provided in Section 2.4.2, such approval not to be unreasonably withheld, conditioned or delayed.

2.8.2 **Final Project Budget.** Developer shall not make a material change to the Final Project Budget without the prior approval of City, to be provided in accordance with Section 2.4.2.



2.9 MATERIALS INCORPORATED IN PROPERTY. The materials to be incorporated in the Leased Property under this Covenant shall, upon purchase of same and at all times thereafter during the term of the Ground Lease, constitute the property of the tenant thereunder, and upon construction of the Project or the incorporation of such materials therein, title thereto shall vest in the tenant under the Ground Lease, provided however, that nothing in this Section 2.9 shall limit the Owner's vesting of all right, title, and interest in such materials located on the Property at the expiration or earlier termination of the Ground Lease term. Notwithstanding the foregoing, Owner and City shall not be liable in any manner for payment or otherwise to any contractor, subcontractor, laborer or supplier of materials or other Person in connection with the purchase of any such materials.

### **ARTICLE III USE RESTRICTIONS; ENVIRONMENTAL**

3.1 USE RESTRICTIONS. The Property shall be used only for those uses permitted by Applicable Laws and as set forth in the applicable Ground Lease(s).

#### 3.2 ENVIRONMENTAL CLAIMS AND INDEMNIFICATION.

3.2.1 **Compliance with Environmental Laws; Indemnity.** Each Developer hereby covenants that, at its sole cost and expense (as between Owner and City, on one hand, and Developer, on the other hand, provided that the foregoing shall not prohibit Developer from the pursuit of any third party responsible for non-compliance with Environmental Laws), and except as City has otherwise agreed in writing with Developer, it shall comply with all provisions of Environmental Laws applicable to the Property and all uses, improvements, and appurtenances of and to the Property, and shall perform all investigations, removal, remedial actions, cleanup and abatement, corrective action, or other remediation that may be required pursuant to any Environmental Law, and Owner, City, and their officers, agents, and employees (collectively, the "**Indemnified Parties**") shall have no responsibility or liability with respect thereto, except as provided below. Each Developer shall indemnify, defend, and hold Owner and City harmless from and against any and all losses, costs, claims, damages, liabilities, and causes of action of any nature whatsoever (including, without limitation, the reasonable fees and disbursements of counsel and engineering consultants) incurred by or asserted against any Indemnified Parties in connection with, arising out of, in response to, or in any manner relating to (i) Developer's violation of any Environmental Law, (ii) any Contaminant Release or threatened Contaminant Release of a Hazardous Material by Developer or Developer's Agents after the Effective Date, or (iii) any condition of pollution, contamination, or Hazardous Material-related nuisance on, under, or from the Property caused by Developer or Developer's Agents subsequent to the Effective Date ("**Environmental Claims**"); provided, however, that Developer shall not be required to indemnify Owner or any of the other Indemnified Parties if and to the extent that any Environmental Claims arise in connection with the violation of any Environmental Law by Owner, City, or any of their agents, officers, directors, contractors or employees. Notwithstanding the foregoing, if an owner or ground lessee of the Property (or any portion thereof) shall convey its interest therein to a Person, such conveying owner or lessee shall not have any indemnification obligations pursuant to this Section 3.2.1 with respect to

Environmental Claims arising as a result of events occurring subsequent to the date of such conveyance of the Property or such portion or interest thereof.

3.2.2 **Release.** Each Developer, for itself, its former and future officers, directors, agents, and employees, and each of their respective heirs, personal representatives, successors, and assigns, hereby forever releases and discharges the Indemnified Parties and all of their present, former, and future parent, subsidiary, and related entities and all of its and their respective present, former, and future officers, directors, agents, and employees, and each of its and their heirs, personal representatives, successors and assigns, of and from any and all rights, claims, liabilities, causes of action, obligations, and all other debts and demands whatsoever, at law or in equity, whether known or unknown, foreseen or unforeseen, accrued or unaccrued, in connection with any Environmental Claims, except if and to the extent any such rights, claims, liabilities, causes of action, obligations, debts, demands or Environmental Claims arise in connection with the violation of any Environmental Law by Owner, City, or any of their agents, officers, directors, contractors or employees.

#### **ARTICLE IV TERM; RELEASE; SUBORDINATION OF LIENS AND MORTGAGES**

4.1 **TERM OF COVENANT.** The Covenant shall commence on the Effective Date and will terminate upon the release of the final Project Component in accordance with Section 4.2 below.

4.2 **RELEASE.** After: (a) the issuance of a Certificate of Completion for a Project Component; (b) the recordation of such Certificate of Completion in the Land Records for a Project Component; and (c) the delivery of “as built” for such Project Component (or, in lieu thereof, the delivery of original architectural drawings for such Project Component with the appropriate annotations from the architect or engineer demonstrating changes from the original drawings as of Completion of Construction); the Project Component to which such Certificate of Completion applies shall be released from the covenants, terms and conditions of this Covenant with respect to such Project Component, and thereafter the Covenant shall be of no further force or effect with respect to the Project Component to which such Certificate of Completion applies, except for those obligations necessary to achieve Final Completion, warranty obligations and to the extent that continued obligations of Developer are required by any Governmental Authority or Zoning Approvals, to the extent of such obligations. At the request of any Party to this Covenant, and provided that there is no dispute as to the Final Completion of a Project Component, the Parties shall execute a Release with respect to the Developer of such Project Component from this Covenant. In such event, the requesting Developer shall, at its sole cost and expense, prepare such Release and present it to the non-requesting Parties. The non-requesting Parties shall then have ten (10) Business Days from receipt of the proposed Release to review the same and notify the requesting Developers in writing of any material deficiencies or errors in the Release or failure to achieve Final Completion for its Project Component. In the event the non-requesting Parties fail to respond within such ten (10) Business Day period, then the Project Component shall be deemed completed without any deficiency or error. Upon achieving Final Completion of the Project Component or the correction of any material deficiency or error in the

Release, the non-requesting Party shall promptly deliver an original executed Release to the requesting Developer who shall be responsible for causing the Release to be recorded in the Land Records. Any Release not so recorded shall not be deemed valid pursuant to this Article.

4.3 RELEASE OF FOR-SALE RESIDENTIAL UNITS. In order to ensure the marketability of the For-Sale Residential Units and the ability of purchasers to obtain financing therefor, Owner and City covenant and agree that concurrent with Developer's commencement of construction of the For-Sale Residential Units, Owner and City shall deliver into escrow with the Title Company a Release for each and every condominium unit, including any unit comprising common elements of the Owned Property. The Releases described in this paragraph shall be prepared by the Developer of the Owned Property, at such Developer's cost and expense (and shall be filed at such Developer's cost and expense). Upon the issuance of a Certificate of Completion permitting the use and occupancy of a Residential Unit (in each case, as evidenced by written notice (and reasonable supporting documentation) given by Developer to the Title Company and Owner), the Title Company shall release from escrow and record in the Land Records the Release that is applicable to such Residential Unit. Following the recording of any Release pertaining to a For-Sale Residential Unit, the "Property", as used herein, shall be deemed to exclude the For-Sale Residential Unit so released and all portions of the Property not constituting real property that appertain to such For-Sale Residential Unit. The Parties agree that any escrow agreement necessary to carry out the requirements of this section shall be in a form acceptable to Owner and that Developer shall bear all costs incurred under this section and said escrow agreement.

4.4 SUBORDINATION OF LIENS AND MORTGAGES. All Mortgages and other liens affecting all or any portion of the Property shall be subordinate to this Covenant.

## ARTICLE V DEFAULT AND REMEDIES

### 5.1 EVENTS OF DEFAULT.

5.1.1 Each of the following shall constitute an "**Event of Default**" on the part of a Developer, solely with respect to the Project Component(s) to which the default, failure, bankruptcy, insolvency, proceedings, or levy relates:

(a) A Developer defaults in the observance or performance of any material term, covenant, or condition of this Covenant on such Developer's part to be observed or performed and such default shall continue uncured for thirty (30) days after written notice of such default from Owner; provided, that if such default is not capable of being cured within such thirty (30) day period, then such thirty (30) day period shall be extended for an additional reasonable period of time to the extent required to complete such cure not to exceed an additional one hundred eighty (180) days (or such longer period as approved by Owner in its sole and absolute discretion) so long as such Developer commences the cure within such thirty (30) day period and continues to use reasonable efforts to cure the default;

(b) A Developer fails to perform a milestone by the applicable Outside Completion Date set forth in the Schedule of Performance approved by City, subject to Force Majeure;

(c) A Developer admits in writing its inability to pay its debts as they mature or files a petition in bankruptcy or insolvency or for reorganization under any bankruptcy act, or voluntarily takes advantage of any such act by answer or otherwise;

(d) A Developer is adjudicated bankrupt or insolvent by any court of competent jurisdiction;

(e) Involuntary proceedings under any bankruptcy law, insolvency act or similar law for the relief of debtors are instituted against a Developer, or a receiver or trustee is appointed for all or substantially all of the property of a Developer, and such proceedings are not dismissed or the receivership or trusteeship vacated within ninety (90) days after the institution of appointment;

(f) if a levy under execution or attachment (other than a Mortgage) is made against the portion of the Property on which such Developer's Project Component is located and such execution or attachment is not be vacated or removed by court order, bonding, insured over or otherwise within a period of thirty (30) days; or

(g) A Developer fails to use commercially reasonable efforts to obtain or maintain in effect any insurance required of it under this Covenant, or pay any insurance premiums, as and when the same become due and payable.

## 5.2 REMEDIES.

5.2.1 In the event an Event of Default by a Developer occurs hereunder, Owner may elect to pursue any of the following remedies to the extent provided below, all of which are cumulative, solely with respect to the Project Component(s) then subject to the Event of Default:

(a) Owner may cure such Developer's Event of Default at the reasonable cost and expense of Developer, after fifteen (15) Business Days' notice to the Developer. Such Developer shall pay to Owner an amount equal to its reasonable, actual out-of-pocket costs for such cure within thirty (30) Business Days after demand therefor accompanied by invoices substantiating such costs. Any such sums not paid by such Developer within thirty (30) Business Days after demand shall bear interest at the Default Rate until paid;

(b) Owner may pursue specific performance of such Developer's obligations hereunder;

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

(d) Owner may exercise any rights and remedies under Developer's Completion Guaranty for the full and complete payment and performance of any and all of Developer's agreements, obligations, and covenants contained in Article II, Article III, Article VI, Article VII, and Article VIII of this Covenant.

5.2.2 In no event shall Owner, City, or any Developer be liable for any compensatory, consequential, punitive or special damages hereunder.

5.3 OTHER RIGHTS OF MORTGAGEES. A Developer that subjects its Project Component or any portion thereof to a Mortgagee shall notify the Owner of the name and address of the Mortgagee. A Mortgagee may change its address for the purpose of receiving Notices by written Notice to Owner. Any Notice that this Covenant requires be given to a Mortgagee by Owner shall be sent to the last address for such Mortgagee provided in writing to Owner. In any event in which Owner provides Notice to any Developer of an Event of Default with respect to a Project Component or portion thereof or any other default shall simultaneously send a copy of such Notice to the Mortgagee of such Developer prior to Owner exercising any remedy against a Developer as a result of such default or Event of Default hereunder. Such Developer's Mortgagee shall have the right to cure any default or Event of Default by such Developer within thirty (30) days after such Mortgagee's receipt of such Notice (or if such default is susceptible to cure but such cure cannot be reasonably completed within such thirty (30) day period, then within an additional reasonable amount of time, provided that such Mortgagee commences to cure such default within such thirty (30) day period and thereafter diligently pursues the cure to completion).

## **ARTICLE VI INSURANCE OBLIGATIONS**

6.1 INSURANCE COVERAGE. At all times while this Covenant is in effect for the development, construction, maintenance or use of any Improvements on: (i) the Leased Property, each Developer of a Project Component shall maintain all of the insurance required to be carried under the respective Ground Lease (and in compliance with the terms for such insurance coverage in such Ground Lease) for such Leased Property and the Declaration of Covenants, Conditions and Restrictions (as applicable); or (ii) the Owned Property and the Project Component upon which the Common Improvements are constructed, each Developer of a Project Component shall carry the insurance required to be carried under the Declaration of Covenants.

6.2 LIABILITY. The required insurance coverage and limits pursuant to Section 6.1 is the minimum coverage limits Developer is required to carry. HOWEVER, THE REQUIRED MINIMUM INSURANCE REQUIREMENTS PROVIDED ABOVE, WILL NOT IN ANY WAY LIMIT PROJECT DEVELOPER'S LIABILITY UNDER THIS COVENANT.

## **ARTICLE VII CASUALTY**

In the event of damage or destruction to any un-released portion of the Project following the Effective Date, but prior to Developer's issuance of the Certificates of Completion for such un-released portion of the Project, upon its receipt of applicable insurance proceeds, Developer shall be obligated to promptly repair or restore the affected portion of the Project in conformity with the Approved Construction Drawings, subject to changes necessary to comply with then-current building code requirements, as approved by Owner in accordance with the terms of Section 2.4.1. Notwithstanding anything in this Covenant to the contrary, Developer shall not issue the Certificate(s) of Final Completion nor shall Owner release Developer from its development obligations hereunder until Developer has completed its restoration obligations. For avoidance of doubt, with respect to each Project Component, following the issuance of the Certificate of Final Completion, this provision shall be null and void.

### **ARTICLE VIII INDEMNIFICATION**

Each Developer shall indemnify, defend, and hold Owner and City, and their respective officers, employees and agents harmless 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 occurring on or adjacent to its Project Component and directly or indirectly by any acts or omissions of Developer or Developer's Agents; provided however, that the foregoing indemnity shall not apply to any losses, costs, claims, damages, liabilities, and causes of action due to the gross negligence or willful misconduct of Owner, City or such respective officers, employees and agents.

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

This Covenant is and shall be binding upon the Property and shall run with the land for the period of time stated herein. The rights and obligations of Owner, City, each and every Developer, and their respective successors and assigns shall be binding upon and inure to the benefit of the foregoing Parties and their respective successors and assigns.

### **ARTICLE X AMENDMENT OF COVENANT**

This Covenant shall not be amended, modified, or released other than by an instrument in writing executed by a duly authorized official of each Party to this Covenant and to the extent applicable, any Mortgagee holding a Mortgage on the applicable Project Component or portion thereof. Any amendment to this Covenant that materially alters the terms of this Covenant shall be recorded among the Land Records before it shall be deemed effective. A Mortgagee that receives a Notice of a proposed amendment that does not approve (or disapprove) in writing within thirty (30) days of the date of such Notice shall be deemed to have approved such Amendment.

**ARTICLE XI**  
**NOTICES**

11.1 Whenever it is provided in this Covenant that a notice, demand, request, consent, approval, authorization, advice, submission or other communication (each of which is herein referred to as “**Notice**”) is permitted or required to be given to or served upon either of the Parties by the other, and whenever either of the Parties shall desire to give or serve upon the other any Notice with respect hereto, each such Notice shall be in writing and, any law or statute to the contrary notwithstanding, shall not be effective for any purpose unless given or served as follows: (a) electronic mail transmission (with a copy sent the same day by one of the other methods permitted hereunder), (b) reputable overnight courier (with a signed receipt) or (c) hand delivery (with receipt acknowledged in writing by the office of the addressee), in each case to the Parties as follows:

If to City:

City of Falls Church, Virginia  
300 Park Avenue  
Falls Church, Virginia 22046  
Attention: Wyatt Shields, City Manager  
e-mail: [city-manager@fallschurchva.gov](mailto:city-manager@fallschurchva.gov)

With a copy to:

Office of the City Attorney  
300 Park Avenue  
Falls Church, Virginia 22046  
Attention: Carol McCoskrie, City Attorney  
e-mail: [city-attorney@fallschurchva.gov](mailto:city-attorney@fallschurchva.gov)

And with a copy to:

Arent Fox LLP  
1717 K Street, NW  
Washington, D.C. 20006  
Attn: Jeffrey A. Mitchell  
e-mail: [Jeffrey.Mitchell@arentfox.com](mailto:Jeffrey.Mitchell@arentfox.com)

If to Developer, with respect to the Building A1 Apartments and Parking Ground Lease, the Building A1 Grocery Retail and Parking Ground Lease, the Building B2 Hotel Ground Lease, the Building B2 Retail Ground Lease, the Building B3 Garage Ground Lease, the Building D1 Senior Housing Ground Lease, the Building D1 Retail Ground Lease, the Building D2 Apartments Parking Ground Lease, the Building D2 Senior

Housing Parking Ground Lease, the Building D2 Retail Parking Ground Lease, and the Kiosk Areas Ground Lease:

c/o PN Hoffman & Associates, Inc.  
760 Maine Avenue, SW

Washington, DC 20025  
Attention: Shawn Seaman  
e-mail: [sseaman@pnhoffman.com](mailto:sseaman@pnhoffman.com)

With a copy to:

EYA, LLC  
4800 Hampden Lane  
Suite 300, Bethesda, Maryland 20814  
Attention: Frank Connors  
e-mail: [connors@eya.com](mailto:connors@eya.com)

And with a copy to:

Robert G. Gottlieb, Esq.  
Venable LLP  
600 Massachusetts Ave NW,  
Washington, D.C. 20001  
e-mail: [rggottlieb@venable.com](mailto:rggottlieb@venable.com)



With a copy to:

R.J. Davis  
Pillsbury Winthrop Shaw Pittman LLP  
1650 Tysons Boulevard  
McLean, Virginia 22102  
e-mail: [rj.davis@pillsburylaw.com](mailto:rj.davis@pillsburylaw.com)

If to Developer with respect to the Building B1 Office Ground Lease and  
the Building B1 Retail Ground Lease:

TC MidAtlantic Development V, Inc.  
1055 Thomas Jefferson Street, NW  
Suite 600  
Washington, D.C. 20007  
Attn: Campbell Smith  
e-mail: [CSmith6@trammellcrow.com](mailto:CSmith6@trammellcrow.com)  
e-mail cc: [efischer@trammellcrow.com](mailto:efischer@trammellcrow.com); [aweers@trammellcrow.com](mailto:aweers@trammellcrow.com);  
[lsheer@trammellcrow.com](mailto:lsheer@trammellcrow.com); [rrodak@trammellcrow.com](mailto:rrodak@trammellcrow.com)

With a copy to:

Tenenbaum & Saas, P.C.  
4504 Walsh Street  
Suite 200  
Chevy Chase, MD 20815  
Attn: Rick Saas  
e-mail: [rsaas@tspclaw.com](mailto:rsaas@tspclaw.com)

11.2 Any Party may change the address(es) to which any such Notice is to be delivered by furnishing ten (10) days written notice of such change(s) to the other Party in accordance with the provisions of this Section. Any Notice to be given under this Covenant shall be in writing and delivered by the methods set forth herein. If Notice is tendered under the terms of this Covenant and is refused by the intended recipient of the Notice, the Notice shall nonetheless be considered to have been received and shall be effective as of the date received (or refused) by delivery set forth in clauses (b) and (c) of this Section 11.1.

## **ARTICLE XII MISCELLANEOUS**

12.1 ESTOPPEL. Prior to issuance of the Certificate(s) of Final Completion, Owner shall provide to Developer within fifteen (15) Business Days after request (which may be made only in connection with a prospective financing or prospective equity investment in the Project or any portion thereof), an estoppel statement stating whether any default by Developer exists under this Covenant.

12.2 REPRESENTATIVE NOT INDIVIDUALLY LIABLE. No Person other than the Parties to this Covenant, and the permitted assignees of such Parties, shall have any liability or obligation under this Covenant. Without limiting the generality of the foregoing, (i) Developer agrees that no employee, official, consultant, contractor, agent or attorney engaged by Owner or City in connection with this Covenant shall have any liability or obligation to Developer under this Covenant and (ii) Owner and City agree that no Member, employee, consultant, contractor, agent or attorney engaged by Developer in connection with this Covenant shall have any liability or obligation to Owner or City under this Covenant. Nothing in this Section shall be deemed to preclude the liability of any Person for such Person's own fraudulent acts.

12.3 JURISDICTION. This Covenant shall be construed in accordance with and governed by the laws of the Commonwealth of Virginia, without reference to the conflicts of laws provisions thereof. Any suit, action, proceeding or claim relating to this Covenant shall be brought exclusively in the United States District Court for the Eastern District of Virginia or the Circuit Court of Arlington/Falls Church, Virginia. The Parties agree that such courts are the most convenient forum for resolution of any such action and further agree to submit the jurisdiction of such courts and waive any right to object to venue in such courts.

12.4 TIME OF PERFORMANCE. All dates for performance (including cure) shall expire at 5:00 p.m. (Eastern Time) on the performance or cure date. A performance date which falls on a day that is not a Business Day is automatically extended to the next Business Day.

12.5 THIRD PARTY BENEFICIARY. No Person shall be a third party beneficiary of this Covenant.

12.6 WAIVER OF JURY TRIAL. ALL SIGNATORIES HERETO HEREBY, AND ALL PERSONS ACCEPTING AN INTEREST IN THE PROJECT THEREBY, WAIVE THE RIGHT TO TRIAL BY JURY IN CONNECTION WITH ANY LITIGATION ARISING IN RESPECT OF THIS COVENANT.

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

12.8 TIME OF THE ESSENCE. Time is of the essence with respect to all matters set forth in this Covenant. For all deadlines set forth in this Covenant the standard of performance of the Party required to meet such deadlines shall be strict adherence and not reasonable adherence.

12.9 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 Developers and Owner, or Developers and City, nor any acts of the Parties hereto shall be deemed to create any such relationship.

12.10 CONFLICTS. In the event of a conflict or inconsistency between the terms of this Covenant and the Comprehensive Agreement, the terms of this Covenant shall control.

12.11 GENERALLY APPLICABLE OWNER LAW. Developer acknowledges that (i) nothing set forth in this Covenant exempts the Project or any portion thereof from generally applicable laws and regulations in effect from time to time in the Commonwealth of Virginia and City of Falls Church, (ii) execution of this Covenant by Owner and City is not binding upon, and does not affect the jurisdiction of or the exercise of police or regulatory power by, Commonwealth of Virginia and City of Falls Church agencies, including independent agencies of the Commonwealth of Virginia and City of Falls Church in the lawful exercise of their authority, and (iii) no approval (or deemed approval) provided by Owner or City as a contract party to this Covenant shall in any way bind or be considered to be an approval by any City Government agency or independent agency acting in its capacity as a governmental authority (and not as a contract party to this Covenant).

IN WITNESS WHEREOF, the undersigned have caused this Covenant to be executed, acknowledged and delivered for the purposes therein contained.

**OWNER:**

ECONOMIC DEVELOPMENT AUTHORITY OF  
FALLS CHURCH

By: \_\_\_\_\_(SEAL)

Name: \_\_\_\_\_

Title: \_\_\_\_\_

COMMONWEALTH OF \_\_\_\_\_ )  
 ) ss:  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me on this \_\_\_\_ day of \_\_\_\_\_, 2022 by \_\_\_\_\_, the \_\_\_\_\_ of the Economic Development Authority of Falls Church, whose name is subscribed to the within instrument, being authorized to do so on behalf of said organization, has executed the foregoing and annexed document as his/her free act and deed, for the purposes therein contained.

[Notarial Seal]

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

My commission expires:

**CITY:**

CITY OF FALLS CHURCH, VIRGINIA, a city  
incorporated in the Commonwealth of Virginia

By: \_\_\_\_\_ (SEAL)  
Name: Wyatt Shields  
Title: City Manager

Approved as to form:

\_\_\_\_\_  
Carol W. McCoskrie  
City Attorney for the City of Falls Church

COMMONWEALTH OF VIRGINIA      )  
  ) SS:  
CITY OF FALLS CHURCH            )

On this \_\_\_\_ day of \_\_\_\_\_, 2022, before me, \_\_\_\_\_, the undersigned, personally appeared \_\_\_\_\_, known to me (or satisfactorily proven) to be the \_\_\_\_\_ for the CITY OF FALLS CHURCH, VIRGINIA, a city incorporated in the Commonwealth of Virginia, who acknowledged that he executed the same on behalf of the City for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

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

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

[Notarial Seal]



**DEVELOPER:**

FCGP DEVELOPMENT, LLC, a Delaware limited liability company

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

STATE OF \_\_\_\_\_ )  
 ) ss:  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me on this \_\_\_\_ day of \_\_\_\_\_, 2022, by \_\_\_\_\_, the \_\_\_\_\_ of FCGP Development, LLC, a Delaware limited liability company, whose name is subscribed to the within instrument, being authorized to do so on behalf of said Developer, has executed the foregoing and annexed document as his/her free act and deed, for the purposes therein contained.

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

[Notarial Seal]

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

## EXHIBIT A

### LIST OF LEASES

Building A-1 Ground Lease Agreement – Apartments and Parking between City and [Building A1 Apartments and Parking LLC] (the “**Building A1 Apartments and Parking Ground Lease**”)

Building A-1 Ground Lease Agreement – Grocery, Retail and Parking between City and Building A1 Grocery Retail and Parking LLC] (the “**Building A1 Grocery Retail and Parking Ground Lease**”)

Building B-1 Ground Lease Agreement – Office between City and [Building B1 Office TC LLC] (the “**Building B1 Office Ground Lease**”)

Building B-1 Ground Lease Agreement – Retail between City and [Building B1 Retail TC LLC] (the “**Building B1 Retail Ground Lease**”)

Building B-2 Ground Lease Agreement – Hotel between City and [Building B2 Hotel LLC] (the “**Building B2 Hotel Ground Lease**”)

Building B-2 Ground Lease Agreement – Retail between City and [Building B2 Retail LLC] (the “**Building B2 Retail Ground Lease**”)

Building B-3 Ground Lease Agreement – Garage between City and [Building B3 Garage LLC] (the “**Building B3 Garage Ground Lease**”)

Building D-1 Ground Lease Agreement – Senior Housing between City and [Building D1 Senior Housing LLC] (the “**Building D1 Senior Housing Ground Lease**”)

Building D-1 Ground Lease Agreement – Retail between City and [Building D1 Retail LLC] (the “**Building D1 Retail Ground Lease**”)

Building D-2 Ground Lease Agreement – Apartments Parking between City and [Building D2 Apartments Parking LLC] (the “**Building D2 Apartments Parking Ground Lease**”)

Building D-2 Ground Lease Agreement – Senior Housing Parking between City and [Building D2 Senior Housing Parking LLC] (the “**Building D2 Senior Housing Parking Ground Lease**”)

Building D-2 Ground Lease Agreement – Retail Parking between City and [Building D2 Retail Parking LLC] (the “**Building D2 Retail Parking Ground Lease**”)

Kiosk Areas Ground Lease Agreement between City and [Kiosk Areas LLC] (the “**Kiosk Areas Ground Lease**”)



EXHIBIT B-1

DESCRIPTION OF LEASED PROPERTY

EXHIBIT B-2

DESCRIPTION OF OWNED PROPERTY

## EXHIBIT C

### CERTIFICATE OF OCCUPANCY BY PROJECT COMPONENT

- I. Office Building:
  - a. Core & Shell Certificate of Occupancy (or equivalent certification)
- II. Hotel Building (including Civic):
  - a. Certificate of Occupancy for Hotel Use (or equivalent certification)
  - b. Core & Shell Certificate of Occupancy for Civic Use (or equivalent certification)
- III. Multifamily Building/s:
  - a. Certificate of Occupancy (or equivalent certification)
- IV. Condo Building/s:
  - a. Certificate of Occupancy (or equivalent certification)
- V. Senior Housing:
  - a. Certificate of Occupancy (or equivalent certification)
- VI. Retail
  - a. Core & Shell Certificate of Occupancy (or equivalent certification)
- VII. Garage
  - a. Certificate of Occupancy (or equivalent certification)
- VIII. Common Facilities (sidewalks, streets, commons)
  - a. Project Engineer has provided written confirmation of the substantial completion of streetscape and pedestrian and vehicular access and all common areas (including the “Commons”) that are adjacent or abutting, the Premises.