

After recordation, return to:  
Loudoun Commercial Title, LLC  
5 Wirt Street, SW  
Suite 200  
Leesburg, Virginia 20175

**TEMPORARY CONSTRUCTION AND  
ACCESS EASEMENT AGREEMENT**

THIS TEMPORARY CONSTRUCTION AND ACCESS EASEMENT AGREEMENT (“Easement Agreement”), is made as of this \_\_\_\_ day of \_\_\_\_\_, 2022, by and between CITY OF FALLS CHURCH, a city incorporated in the Commonwealth of Virginia, its successors and assigns, as grantor (the “City”) and FCGP DEVELOPMENT LLC, a Delaware limited liability company (“Developer”).

**RECITALS:**

WHEREAS, on June 12, 2019, City and Developer entered into that certain Comprehensive Agreement (the “Original Comprehensive Agreement”), as amended by that certain First Amendment to Comprehensive Agreement, dated February 26, 2021 by and between City and Developer (the “First Amendment”), and as further amended by that certain Second Amendment to Comprehensive Agreement, dated January 24, 2022 by and between City and Developer (the “Second Amendment”, and as further amended by that certain Third Amendment to Comprehensive Agreement dated January 25, 2022 (“Third Amendment” and collectively with the Original Comprehensive Agreement and the First Amendment and the Second Amendment and Third Amendment, and as may be further amended or modified from time to time, being referred to hereafter as, the “Comprehensive Agreement”); which governs the construction of a new mixed-use development (the “Project”) located on the real property (the “Property”), identified in Exhibit A, attached hereto and made a part hereof.

WHEREAS, certain portions of the Property, in connection with the Developer’s development and construction of the Project, may be conveyed, as applicable, by Ground Lease or by Residential Site Deed, each as defined and as more particularly described in the Comprehensive Agreement.

WHEREAS, pursuant to the Comprehensive Agreement, the Project will be developed in two phases, and Developer will close on certain portions of the Property in a first phase (such portions, collectively, the “Phase 1 Property”) and certain portions of the Property in a second phase (such portions, collectively, the “Phase 2 Property”).

WHEREAS, Developer desires to access the Phase 2 Property, as the same is more particularly described in Exhibit B attached hereto and made a part hereof (the “Easement Area”),

in order to begin construction of certain improvements for Phase 1 and Phase 2 (collectively, the “Phase 1 Improvements”) prior to the Phase 2 Closing and to obtain a possessory interest in the Easement Area.

WHEREAS, in connection with the development and construction of the Project pursuant to the terms and conditions of the Comprehensive Agreement, City and Developer agree that it will benefit the Project to grant Developer certain easement rights on, over, across and through the Easement Area for the purpose of access and ingress and egress of motor vehicles, construction equipment and personnel to facilitate the site preparation, staging, temporary parking and related development, construction, and operation of the Phase 1 Improvements prior to the Phase 2 Closing.

WHEREAS, City has agreed to grant the Easement (as defined below) to Developer, subject to the terms and conditions provided in this Easement Agreement.

NOW, THEREFORE, for and in consideration of the foregoing premises, the mutual agreement of the parties hereto, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **Recitals; Undefined Terms.** The above recitals are true and correct and are incorporated herein by this reference. Capitalized terms used in the Recitals and in this Easement Agreement but not otherwise defined herein shall have the meanings ascribed to such terms in the Comprehensive Agreement.
2. **Grant and Use of Temporary Construction and Access Easement.** City does hereby give, grant, and convey unto Developer (and its successors and assigns), the following exclusive temporary construction and access easements (collectively, the “Easement”) throughout the Term (as defined in Section 5 below) for use related to the construction and operation of the Phase 1 Improvements related to the Project:
  - a. **Access Easement** - An access easement on, over, across and through the Easement Area. The easement granted hereby shall be for purposes of pedestrian and vehicular access, ingress, egress, regress, and passage to, from and between the Easement Area and any Phase of the Project for which a Closing has occurred, as well as any publicly dedicated rights-of-way; provided, however, that the use and exercise of such easements, rights and privileges shall not unreasonably affect or interfere with the use (if any) of the Easement Area by City or School Board (if applicable). City reserves the right, from time to time, to cause Developer to replace, reconfigure and relocate any temporary roadways, driveways or entranceways if City determines that any of the foregoing will cause unreasonable interference with publicly dedicated roads or rights-of-way or unwarranted traffic congestion or interference to adjacent property owners’ use or enjoyment of their property; provided City does not unreasonably interfere with the easement rights granted herein.
  - b. **Parking Easement** – A parking easement to locate or relocate parking spaces on a portion of the Easement Area, along with the location or relocation of any

pedestrian walkways required to access the parking spaces, all to be done at Developer's sole cost and expense. The parking easement granted under this Easement Agreement will permit the Easement Area to be used by Developer and Developer's employees, contractors, subcontractors for parking passenger motor vehicles and construction-related vehicles. The Easement Area may also be used by Developer for surface parking in support of any completed Phase 1 Improvements.

- c. **Construction Easement** – To the extent reasonably necessary or desirable for the preparation of the Easement Area and the construction of the Phase 1 Improvements, an easement in, on and over the Easement Area to facilitate and carry out such preparation and construction, including the right to have contractors, subcontractors, personnel, vehicles, machinery, materials, equipment and similar items present therein. This construction easement must be utilized in a manner which will not unreasonably interfere with the use of, or access to, any portion of the Project or any adjacent property by its respective owner. All construction allowed under this Easement shall be done in accordance with the terms of the Comprehensive Agreement and the Construction Covenant.
3. **Reservation of Rights**. Subject to the exclusive rights created herein, City expressly reserves (to itself, its successors and assigns) the right to use, or by virtue of additional licenses, rights-of-way, reservations or easements, any and all portions of the area upon, above, or under the Easement Area (in City's reasonable discretion) for any purpose whatsoever not inconsistent with the rights or purposes herein granted, including, but not limited to, the right of ingress and egress over and across the Easement Area onto any adjacent or contiguous property; provided, such right does not unreasonably interfere with Developer's Easement hereunder.
  4. **Limitation of Rights**. The Easement granted herein creates an exclusive easement, and other than such rights expressly created by this Easement Agreement, Developer does not and may not claim any interest or estate of any kind or extent whatsoever in the Easement Area (subject to Developer's rights to a Closing under the Comprehensive Agreement on the Phase that contains the Easement Area).
  5. **Term**. Developer acknowledges that this Easement Agreement, and Developer's rights in and to the Easement granted herein, shall immediately terminate, expire and be deemed null and void upon the earlier of (i) the Closing on Phase 2 by Developer under the Comprehensive Agreement, or (ii) termination of the Comprehensive Agreement in accordance with its terms.
  6. **Covenants of Developer**. Developer (and its successors, assigns, agents, invitees and employees) shall:
    - a. not interfere with or prevent the normal use and maintenance by City of the Easement Area (if any), or City's adjacent property, provided City's right to use the Easement Area shall be subject to the terms and conditions set forth in Section 3 above;

- b. not intentionally interfere with any existing or hereafter granted license, easement, reservation or right-of-way upon, above, over, through, under or across the Easement Area so long as such license, easement, reservation or right-of-way does not unreasonably interfere with Developer's Easement hereunder; and
  - c. exercise diligent good faith efforts to comply at all times and in all respects with all applicable law. Developer shall also obtain, maintain and comply with all applicable permits (if any) in connection with Developer's use of the Easement Area. Developer shall not, by any act or omission, render City liable for any violation thereof.
7. **Liens.** Developer shall not act (or fail to act) in a way which permits any lien to be filed against the Easement Area for any labor or materials in connection with work of any character performed or claimed to have been performed on the Easement Area at the direction or sufferance of Developer or its assigns. To the extent any such lien is filed against such Easement Area prior to the Phase 2 Closing, without the prior written consent of City, which may be granted or withheld in City's sole, but reasonable discretion (and subject to the terms of the Comprehensive Agreement, if applicable), Developer shall cause the same to be removed by bonding over or otherwise satisfying such lien within thirty (30) days of such lien being filed, and if Developer fails to do so, City shall have the right (but not the obligation) to cause the removal of the same and charge Developer for all of the actual out-of-pocket costs and fees incurred by City in connection with such lien removal, together with interest accruing thereon at an annual rate of interest as set forth in the Comprehensive Agreement, until City's receipt of full payment therefor.
8. **Insurance.** At any and all times while Developer is using the Easement Area pursuant to the terms of this Easement Agreement, Developer shall obtain and maintain general public liability insurance and any and all other types of insurance for the Easement Area in the same amounts and with the same limits as are required to be maintained for any Phase of the Project in accordance with the terms of the Comprehensive Agreement. Further, any insurance requirements to be obtained or observed by Developer under the Comprehensive Agreement (including, without limitation, requirements to name City as an additional insured, delivery of insurance certificates or copies of policies to City, etc.) shall apply to Developer under this Easement Agreement with respect to the Easement Area.
9. **Indemnification.**
- a. Developer shall defend, indemnify and save City and their respective heirs, personal representatives, successors and assigns, harmless from and against any and all claims for injury or death to persons, damage to or loss to property, mechanics or materialman's liens, or any other liability of any nature whatsoever to the full extent permitted by Virginia law, including, without limitation, the cost of any reasonable attorneys' fees and other costs, arising out of or alleged to have arisen out of or occasioned by the use and occupancy of the Easement Area by Developer (and its successors, assigns, employees, contractors, agents, guests and invitees) pursuant to the terms of this Easement Agreement. Notwithstanding the foregoing, in no event shall Developer be required to indemnify City for any claims, damages

or losses resulting from the negligence or willful misconduct of City, its employees, agents, or contractors on the Easement Area during the term of this Easement Agreement.

- b. Developer shall protect, defend, indemnify and hold City harmless from any liens, claims, suits, demands, actions or causes of action made or filed by any architect or contractor with whom Developer has contracted for the design and construction of the Project under the Comprehensive Agreement or made or filed by any other person acting directly or indirectly by, through or under such architect or contractor or otherwise supplying services, labor, materials or equipment to Developer or the Phase 1 Property or the Phase 2 Property, it being understood that City shall not be construed to be the agent or partner of Developer, and Developer assumes all responsibility and liability for the cost of the performance of any construction contracted for or by Developer and any disputes in regard thereto and the agreements therefor.
10. **Breach by Developer.** If Developer materially breaches any provision of this Easement Agreement and fails to cure any such breach within thirty (30) days after written notice thereof is given by City (or, with respect to any such breach the nature of which cannot reasonably be cured within such thirty (30) day period, Developer fails to commence such cure within such thirty (30) day period and to thereafter diligently prosecute such cure to completion), in addition to any other right or remedy available to City at law or in equity, City shall have the right, but not the obligation, to cure any such breach or to terminate this Easement Agreement (subject, in all cases, to the rights of Developer to cure a default or breach under the Comprehensive Agreement). Developer shall reimburse City for any and all out-of-pocket costs incurred by City to exercise its rights hereunder upon demand, together with interest accruing thereon at an annual rate of interest as set forth in the Comprehensive Agreement, until City's receipt of full payment therefor.
11. **Condition of Easement Area.** Developer acknowledges that Developer (i) has physically inspected the Easement Area; and (ii) except as may otherwise be expressly set forth in the Comprehensive Agreement, accepts the Easement Area "AS IS" and "WHERE IS" with full knowledge of the conditions thereof and subject to all existing easements, rights-of-ways, covenants, encumbrances, liens, and restrictions of record. City makes no representations, statements, warranties or agreements to Developer in connection with this Easement Area, including, without limitation, the nature of title (if any) granted herein, except as may be expressly represented or warranted to in the Comprehensive Agreement. Developer's use of the Easement Area is at its own risk and City shall have no liability or obligation for or with respect to any loss or damage to any of Developer's improvements within the Easement Area, except as may otherwise be expressly provided in the Comprehensive Agreement.
12. **Miscellaneous.**
  - a. **Modification.** This Easement Agreement may not be modified or amended in any respect except by a written agreement executed by or on behalf of the parties hereto, in the same manner as executed herein.

- b. No Assignment; Binding on Successors and Assigns. Except and unless the Comprehensive Agreement is assigned by Developer in accordance with the terms thereof, Developer may not assign or otherwise transfer this Easement Agreement, or any of its rights and obligations hereunder, in whole or in part, without the prior written consent of City, which consent shall not be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing terms of this Section 12(b), each Tenant (and successors, sublessees and assigns of any such Tenant) is hereby permitted to use this Easement Area without further notice or consent to City, in such a manner as Developer reasonably determines, and City acknowledges and approves the same. This Easement Agreement shall be binding upon and shall inure to the benefit of, the successors and permitted assigns of the parties, and where the term “City” or “Developer” is used in this Easement Agreement, it shall mean and include such entity’s respective successors and permitted assigns.
- c. Interpretation and Governing Law. This Easement Agreement shall be governed by and construed under the laws of the Commonwealth of Virginia. Should any provision of this Easement Agreement require judicial interpretation, the parties hereby agree and stipulate that the court interpreting or considering the same shall not apply the presumption that the terms hereof shall be more strictly construed against a party by reason of any rule or conclusion of law that a document should be construed more strictly against the party who itself or through its agents prepared the same, it being agreed that all parties hereto have participated in the preparation of this Easement Agreement and that each party had full opportunity to consult legal counsel of its choice before its execution of this Easement Agreement.
- d. Notice. Any notice required to be given shall be made pursuant to the provisions of the Comprehensive Agreement.
- e. Counterparts. This Easement Agreement may be executed in counterparts; each of which shall be deemed to be an original and all of which shall together constitute one and the same instrument.
- f. Waivers. The parties shall have the right by notice in writing to the other parties to waive any of the provisions of this Easement Agreement that are for the sole benefit of the waiving party. Any failure of a party to insist upon strict compliance with any of the terms and conditions of this Easement Agreement shall not be construed as a waiver of such terms and conditions or of the right of such party to insist at any time thereafter upon such strict compliance.
- g. Headings. The descriptive headings in this Easement Agreement are inserted for convenience only and do not constitute a part of this Easement Agreement.
- h. Third Parties. NO PERSON SHALL BE DEEMED TO BE A THIRD PARTY BENEFICIARY OF THIS EASEMENT AGREEMENT OR ANY PORTION HEREOF.

- i. Jury Trial. ALL SIGNATORIES HERETO WAIVE THE RIGHT TO TRIAL BY JURY IN CONNECTION WITH ANY LITIGATION ARISING IN RESPECT OF THIS EASEMENT AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.
- j. Definition of City. Whenever the term, the “City” is used in this Easement Agreement, unless the term is followed by, “in its governmental capacity,” “in its regulatory capacity,” or words of similar import, the term means, “City, in its proprietary capacity.”
- k. Construction and Interpretation of Easement Agreement. This Easement Agreement has been fully reviewed and approved by the parties hereto and their respective counsel. Accordingly, in interpreting this Easement Agreement, no weight shall be placed upon which party hereto or its counsel drafted the provisions being interpreted. Section headings are for convenience only and shall not be considered in construing this Easement Agreement..

The following words and phrases as used throughout this Easement Agreement shall be construed as follows, unless otherwise modified: (i) “At any time” shall be construed as “at any time or from time to time”; (ii) “Any” shall be construed as “any and all”; (iii) “including” shall be construed as “including but not limited to”; (iv) “will” and “shall” shall each be construed as mandatory; (v) the word “in” with respect to an easement granted or reserved shall mean, as the context may require, “in,” “to,” “on,” “over,” “within,” “through,” “upon,” “across,” “under,” and any one or more of the foregoing.

- l. No Public Rights Created. Nothing herein shall create or be construed to create any rights in or for the benefit of the general public in or to the Easement Area or the Easement granted hereby, and there shall be no public dedication.
- m. Severability. Each paragraph, subparagraph, part, term and provision of this Easement Agreement shall be considered severable, and if; for any reason, any paragraph, term or provision is herein determined to be invalid or contrary to or in conflict with any existing or future law or regulation of a court or agency having valid jurisdiction, such shall not impair the operation or effect the remaining portions, paragraphs, terms and provisions of this Easement Agreement, and the latter will be given full force and effect and will bind the parties hereto; and said invalid paragraphs, terms or provisions shall be deemed not to be part of this Easement Agreement.

**[SIGNATURE PAGE FOLLOWS]**







**Exhibit A**

Depiction of Property

[Parcels D-2 and D-4 as identified on the Plat showing Subdivision of Parcel D-1 Barrett's Hill Subdivision, prepared by Walter L. Philips Incorporated, dated [\_\_\_\_], and recorded among the land records in the Clerk's Office of Arlington County, Virginia as [Instrument No. \_\_\_\_]]

**Exhibit B**

Depiction of Easement Area

[Parcel D-5 as identified on the Plat showing Subdivision of Parcel D-1 Barrett's Hill Subdivision, prepared by Walter L. Philips Incorporated, dated [\_\_\_\_], and recorded among the land records in the Clerk's Office of Arlington County, Virginia as [Instrument No. \_\_\_\_]]