

Tax Parcel No.: 3-35-8.00-17.00

Prepared By and Return To:
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LEWES WATERFRONT PRESERVE DEVELOPMENT AGREEMENT

THIS LEWES WATERFRONT PRESERVE DEVELOPMENT AGREEMENT entered into this ___ day of _____, 202_, by and among SETTING PROPERTIES, INC., its successors and assigns, a Delaware Corporation (hereinafter referred to as “Developer”), **THE CITY OF LEWES**, a municipal corporation of the State of Delaware (hereinafter referred to as “City”), and **BOARD OF PUBLIC WORKS OF THE CITY OF LEWES**, a chartered utilities board (hereinafter referred to as the “BPW”).

RECITALS

WHEREAS, Developer is the record owner of certain lands situate within the incorporated boundaries of the City and the Service Area of the BPW, being +/- 34.64 acres , located on New Road, Lewes, DE, Tax Parcel ID No. 3-35.8.00-17.00, and further described on plans on file with the City and the BPW and recorded in the Office of the Recorder of Deeds in and for Sussex County, in Plot Book ____, Page _____, and titled Lewes Waterfront Preserve Subdivision, prepared by Civil Engineering Associates, LLC, dated December 15, 2020, and last revised _____ (the “Land Development Plan”). The subject matter of the Land Development Plan may be referred to as the “Project”; the “Property”; the “Development”; or the “Plan.” The Property is zoned AX-RES. The Development includes the Lewes Waterfront Preserve Subdivision of 89 attached residential lots and associated improvements and facilities; and

WHEREAS, the City adopted a Resolution of the Mayor and City Council of the City of Lewes, Delaware _____ on _____ (the “City Resolution”), approving the Land Development Plan, subject to the standard conditions outlined in the Municipal Code of the City (the “Code”) and the special conditions enumerated within the City Resolution, and subsequently the Land Development Plan was recorded in the Office of the Recorder of Deeds in and for Sussex County on _____; and

WHEREAS, Developer has submitted detailed Improvement Construction Plans, dated December 15, 2020, and last revised _____ and is obligated to provide such additional plans for improvements as required by the City and BPW, as applicable, concerning or related to the Development, which plans may include but are not limited to design standards and specifications for sanitary sewer, sediment and erosion control, stormwater management, general grading/lines and grades, landscaping and lighting, said plans and any approved revisions thereto shall

hereafter be referred to as the “Improvement Construction Plans” and shall also be incorporated herein as an integral part of this Agreement; and

WHEREAS, the BPW supervises, manages, controls, and operates electric, water, sewer, and stormwater systems throughout the City (the “BPW System”); and

WHEREAS, Developer has requested the permanent allocation of sufficient water, sewer, and electric capacity for the Development; and

WHEREAS, the BPW desires to allocate electric, water, and sewer capacity for the Development and to provide electric, water, and sewer service, along with stormwater management, provided that Developer constructs, installs, and provides for all electric, water, sewer, and stormwater infrastructure necessary to serve the Development, (collectively, the “BPW Improvements”), pursuant to the Improvement Construction Plans for the BPW Improvements (the “BPW Improvement Plans”), at no cost to the BPW, and, upon acceptance by the BPW, Developer shall dedicate applicable BPW Improvements to the BPW; and

WHEREAS, in addition to the BPW Improvements referenced herein, Developer desires to complete within the Development curbs, sidewalks, landscaping, and other improvements set forth and required in the City Resolution and other applicable authority (collectively, the “City Improvements”) at no cost to the City, and, upon acceptance by the City, as applicable, Developer shall dedicate applicable City Improvements to the City; and

WHEREAS, the City, the BPW, and Developer desire to enter into this Lewes Waterfront Preserve Development Agreement setting forth the mutual understanding and undertakings regarding the construction and financing of the City Improvements and the BPW Improvements and services (collectively, the “Site Improvements”); and

WHEREAS, Developer desires to complete the Site Improvements and other obligations outlined within the Improvement Construction Plans and this Lewes Waterfront Preserve Development Agreement and adhere to other applicable authority concerning or related to the Development; and

NOW THEREFORE, in consideration of the foregoing recitals, which are hereby incorporated into and made a part of this Agreement, and the mutual covenants and agreements set forth below, and other good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, the Developer, City, and BPW hereby agree as follows:

1. **Services.**

1.1. Developer shall comply with the requirements of this Agreement and any other applicable laws, rules, and regulations, as amended from time to time.

1.2. Electric, water, and sewer/wastewater services and facilities, and stormwater management facilities, all as shown on the Land Development Plan, Improvement Construction

Plans, and BPW Improvement Plans, as applicable, through infrastructure installed at the sole expense of Developer, shall be available to the Development, which consists of Lewes Waterfront Preserve Subdivision of 89 attached residential lots and associated improvements and facilities, in accordance with the terms of this Lewes Waterfront Preserve Development Agreement, the BPW Resolutions, rules, and regulations, and any other applicable laws, rules, and regulations, all as amended from time to time.

2. **BPW Improvements.**

2.1. **Design and Construction.** Developer shall construct, install, and provide for the BPW Improvements as outlined in the BPW Improvement Plans, which are to be approved by the BPW in its reasonable discretion.

2.2. **Plan Approval.** Once approved by the BPW, the BPW Improvement Plans shall control and govern unless amended by the written agreement of both Developer and the BPW, except that for any BPW Improvements not completed within one (1) year of this Agreement, said BPW Improvements shall be subject to further review and the Developer shall receive BPW approval of the subject BPW Improvements Plans prior to beginning construction for the subject BPW Improvements based upon then applicable rules, regulations, and standards. Extension of time may be granted by the BPW Board of Directors if, prior to the end of the aforementioned one (1) year period, for good cause shown, the Developer requests such extension through the BPW General Manager.

2.3. **General Standards.** All BPW Improvements shall be constructed by the Developer in accordance with the BPW-approved BPW Improvement Plans. The Developer shall cause all work on the BPW Improvements to be completed in a good and workmanlike manner.

2.4. **Prosecution of Work.** If any work on the BPW Improvements is abandoned, or performed in violation of this Agreement, then the Developer shall promptly act to cause the work to be completed properly.

2.5. **BPW Review and Acceptance.** All work on the BPW Improvements shall be subject to review and approval, per the BPW-approved BPW Improvement Plans, by representatives of the BPW at all times. Developer shall reimburse the BPW for the actual costs of necessary review. Developer shall also pay to the BPW an administrative fee equal to fifteen percent (15%) of invoices from consultants and professionals assisting with the review, approval, inspection, and acceptance of the BPW Improvements in order to offset the expenses incurred by the Lewes BPW in reviewing, approving, inspecting, and accepting the BPW Improvements. The BPW shall provide Developer with a summary of all costs of any review, including the above-referenced administrative fee, charged to the Developer. The BPW shall not accept any dedication of the BPW Improvements until written approval of the condition of the BPW Improvements is provided and an easement is provided to the BPW, according to the provisions of this Agreement or other applicable rule or regulation.

2.6. **Developer Obligation.** Developer accepts responsibility for the costs and expenses of design, permitting, installation, and inspection of all BPW Improvements. Developer shall connect to the BPW System through certain utility connection points located in the BPW's reasonable discretion along the Project's frontage (the "BPW System Connections"). Developer acknowledges that the BPW System Connections and related infrastructure are being constructed by a third-party entity pursuant to that certain Tower Hill Development Agreement, dated September 24, 2020 and recorded in the Office of the Recorder of Deeds in and for Sussex County, State of Delaware at Document Number 2020000047441 (the "Tower Hill Agreement"). Developer accepts responsibility for its share of the costs for the offsite improvements necessary to provide these BPW System Connections as defined and outlined in **EXHIBIT A**, attached hereto and incorporated herein by reference (the "Offsite Improvements"). Developer shall pay to the BPW its share of these Offsite Improvements prior to connecting the BPW Improvements to the BPW System.

2.7. **BPW Obligation.** The BPW agrees, through infrastructure installed at Developer's sole cost and expense, and dedicated to the BPW, to provide water, electric, and sanitary sewer services to Developer for the Development that are intended to be subject to the Resolutions, Policies, Rules and Regulations applicable to the BPW System. The BPW makes no representation and offers no commitment regarding the timing for installation of said infrastructure. The BPW does, however, agree to take commercially reasonable steps to enforce the obligations and expectations within the Tower Hill Agreement. Notwithstanding anything herein to the contrary, the BPW's obligation herein shall be excused for a period of time equal to any delay incurred due to the inability to procure materials, restrictive governmental laws, regulations, or actions, insurrection, war, acts of God, acts of terrorism, pandemic or other reason of like nature not the fault of the BPW.

2.8. **Easement.** Developer hereby grants to the BPW, its successors and assigns, a perpetual easement in, over, and upon the Property, with the right to erect, construct, install and lay, and thereafter use, operate, inspect, repair, maintain, replace, and remove any utility, including but not limited to water, sewer, and electric, including infrastructure and appurtenant facilities. The BPW Improvements shall be placed in accordance with the BPW Improvement Plan, within recorded easements or dedicated street rights of way. Developer, at its sole expense, shall prepare and deliver to the BPW necessary documentation evincing said easements prior to final inspection and acceptance under Section 2.10 herein.

2.9. **Deposit.** Developer shall deposit with the BPW an amount, as established separately by the BPW, to cover inspections and legal work or other actual costs associated with the Site Improvements. The deposit will be no less than \$50,000 and will be replenished when requested by the BPW, as appropriate, in \$25,000 increments when the fund balance reaches \$25,000. Developer shall replenish such funds within thirty (30) days' notice from the BPW. Any unused funds shall be returned to Developer within thirty (30) days of final acceptance of all Site Improvements.

2.10. **Completion of BPW Improvements.**

2.10(a). The BPW shall allow connection to the BPW System for the Development, in whole or in part, upon Developer's payment of applicable fees, reimbursement of actual BPW expenses pursuant to this Agreement, or both, as appropriate.

2.10(b). Developer shall disconnect the Property from its present water, sewer, and electric system, if any, prior to connecting to the BPW System. Any existing infrastructure located on the Property shall be abandoned pursuant to State, City, and BPW requirements.

2.10(c). To the extent the BPW Improvements are completed in an incremental or phased manner, the BPW shall allocate capacity from the BPW as appropriate and as available by such incremental or phased BPW Improvements. If Developer intends to construct the Development in phases, City approval of the entire Land Development Plan shall be required before the BPW shall allocate capacity for any portion of the Development.

2.10(d). Upon completion and final inspection, and consistent with this Section, the BPW Improvements shall be dedicated to, and accepted by, BPW in accordance with the procedures specified in this Agreement and the BPW Resolutions, rules, and regulations.

2.10(e). Upon completion of applicable BPW Improvements, and before the BPW Improvements are buried or otherwise covered, Developer shall forward a written request to the BPW for final inspection, approval, and acceptance, of the subject BPW Improvements. Prior to acceptance of the BPW Improvements, Developer shall provide all plans and as-built drawings to the BPW in electronic AutoCad format and PDF format, along with any release of liens associated with installation of the BPW Improvements and other documents requested by the BPW and as required by BPW Resolution and other applicable laws, rules, and regulations to conduct the final inspection. Additionally, all required inspection fees must be paid prior to the final acceptance. The inspector for the BPW shall inspect the BPW Improvements and notify Developer and the BPW of the condition of the subject BPW Improvements.

2.10(f). The BPW, in its sole discretion, may agree to conduct a final inspection and conditionally accept portions of the BPW Improvements subject to final acceptance of the complete BPW Improvements.

2.11. **Payment for BPW Service.** Developer shall pay for utility service as the BPW determines, consistent with practices and policies applicable to similar Projects served by the BPW current and existing at the time payment is to be made, and as amended from time to time. Developer shall pay and be subject to such penalties for noncompliance as established by the BPW, including but not limited to the BPW's right to terminate service in the event of nonpayment and the imposition of a reconnection charge. The Development shall be subject to and bound by the Resolutions, policies, rules, and regulations established by the BPW, as the same may be amended from time to time.

2.12. **Impact Fees.** Upon requesting service, Developer, its successors or assigns, including homeowners, as applicable, shall pay the impact fee for utility service at the rate current and existing at the time of service, which fees may be subject to adjustment at any time pursuant to the BPW rules and regulations, or any other applicable laws, rules, and regulations. If there are any changes to the use or to the structures existing on the Property, either in number, size, style, or kind, such change may become subject to further impact and other fees. Any other fees, existing at the time of application for service shall become due and owing at said point.

2.13. **Tap Fees.** Upon requesting service, Developer, its successors or assigns, including homeowners, as applicable, shall pay the water and sewer tap fees at the rate current and existing at the time of service, which fees may be adjusted by the BPW at any time.

2.14. **Electric Connection Fee.** Upon requesting service, Developer, its successors or assigns, including homeowners, as applicable, shall pay the electric connection fee at the rate current and existing at the time of issuance, which fee may be adjusted by the BPW at any time.

2.15. **Usage Fees.** Developer, its successors or assigns, including homeowners, as applicable, shall be responsible for and subject to the BPW's normal usage charges for utility service at the time of connection, which rates may be subject to change in the future.

2.16. **Water Meters.** Developer shall install the water meter pit and the BPW shall install the water meter after payment is received for the applicable fees and charges.

2.17. **Fire Hydrants.** Developer shall, at its expense, install or cause to be installed on the Property a sufficient number of fire hydrants of such size and of such other specifications as are determined by the State Fire Regulations and as contained in the BPW-approved BPW Improvement Plans.

2.18. **Electric Meters.** Upon requesting service, Developer, its successors or assigns, including homeowners, as applicable, shall purchase from the BPW at the rate current and existing at the time of issuance and install all electric meters required for development of the Property.

2.19. **Transfer of Ownership of the BPW Improvements and Easements to the BPW.** Upon the approval, and prior to final inspection under Section 2.10 herein, of the BPW Improvements to be accepted by the BPW, Developer shall execute, or cause to be executed, such documents as the BPW shall reasonably request to transfer ownership of the BPW Improvements to, and to evidence ownership of, the BPW Improvements by BPW, free and clear of all liens, claims, encumbrances, and restrictions unless otherwise approved by the BPW in writing. Also prior to final inspection, Developer shall grant to the BPW all such reasonable and necessary easements as the BPW may require to install, operate, maintain, service, repair, and replace the BPW Improvements. Ownership by the BPW of the BPW Improvements for connections to residential dwellings shall terminate at the property line of the individual lots contained within the Property, except as otherwise shown on the Land Development Plan or the BPW Improvement Plans.

2.20. **Guarantee of the BPW Improvements.** Developer shall maintain and, as necessary, repair the BPW Improvements to be constructed by Developer until the complete BPW Improvements are accepted by the BPW. Additionally, Developer shall provide the BPW a construction guarantee for the correction of all defects and deficiencies in the BPW Improvements constructed or installed by Developer and accepted by the BPW that occur or become evident within one (1) year after final acceptance by the BPW of the complete BPW Improvements, provided such defect or deficiency is not caused by an action of the BPW. If any such defect or deficiency, not caused by the action of the BPW, occurs or becomes evident during such period, then Developer shall, within thirty (30) days after written demand from the BPW to do so, correct it or cause it to be corrected. If the BPW, in its sole discretion, has to complete an emergency repair, Developer shall fully reimburse the BPW the actual cost of said emergency repair. Developer shall provide a maintenance bond in the amount of ten-percent (10%) of the construction costs of the BPW Improvements or, in the alternative, deposit a sum equal to ten percent (10%) of the construction costs of the BPW Improvements in an escrow account the disposition of which shall be directed by the BPW, for a period of one (1) year from final acceptance by the BPW of the complete BPW Improvements. Upon expiration of the one (1) year maintenance bond period, the BPW shall promptly return the maintenance bond. If the BPW Improvements are accepted in phases, the guarantee requirements of this Section shall apply to each individually accepted phase.

2.21. **Bond.** Developer shall, with BPW approval and before any work is started, put in escrow sufficient funds or provide a performance bond(s) or irrevocable letter of credit(s), in an amount reasonably determined by the BPW to be 150% of the cost of the BPW Improvements. The escrow, performance bond, or irrevocable letter of credit may be provided by a third party on behalf of Developer if Developer so desires. If the BPW Improvements are completed in an incremental or phased manner, the escrowed funds, performance bond, or irrevocable letter of credit may be an amount reasonably determined by the BPW, in its sole discretion, to be 150% of the cost of the BPW Improvements to be constructed by Developer for a given phase. The escrowed funds, performance bond, or irrevocable letter of credit shall not be released until the BPW Improvements for the applicable phase are accepted by the BPW in accordance with Section 2.10 herein.

3. **City Improvements.**

3.1. **Developer Obligations**

3.1(a) **Bond.** Developer shall, with the City's approval, put in escrow sufficient funds or provide a performance bond or irrevocable letter of credit in an amount reasonably determined by the City to be 150-percent of the cost of the City Improvements to be constructed by Developer.

3.1 (b) **Design and Construction.** Developer agrees to design and construct, in accordance with City standards and specifications, all City Improvements necessary to serve the Development at no expense to the City.

3.1 (c) **Public and Emergency Services.** Developer grants to the City a permanent and irrevocable easement over, on, and across the City Improvements for the purposes of enforcing applicable laws and providing public and emergency services to the Development and to adjacent properties.

3.1 (d) **Developer's Guarantee of Maintenance of City Improvements Before Dedication to the City.** Developer shall, at its sole cost and expense, maintain, in a good and clean condition at all times, all City Improvements, including all streets, street lighting, curbs and gutters, sidewalks, and landscaping, until such City Improvements are dedicated to and accepted by the City. The Developer shall be required to provide the City a maintenance bond or letter of credit in the amount of 10% of the cost of City Improvements remaining to be constructed at the date of this Agreement for one year following dedication for the City Improvements, which includes, but is not limited to, curbs and gutters, street lighting, sidewalks, and landscaping (the "warranty"). The Developer shall also be required to provide the City a separate maintenance bond or letter of credit in an amount equal to the replacement cost of the surface course of street asphalt for three (3) years following dedication for the street improvements. Said bonds or approved alternatives shall be returned to the Developer or released upon satisfactory performance of work and materials at the end of the warranty period.

3.1 (e) **Damage to City Improvements.** The Developer shall promptly clean all mud, dirt, or debris deposited on any street, sidewalk, curb, gutter, streetlight, or other City Improvements (whether publicly or privately owned) on the Property by the Developer or any agent of or contractor hired by, or on behalf of, the Developer; and shall repair any damage to any street, sidewalk, curb, gutter, streetlight, landscaping, or other Improvements (whether publicly or privately owned) that may be caused by the activities of the Developer or any agent of or contractor hired by, or on behalf of, the Developer.

3.1 (f) **Costs.** As provided in this Agreement, Developer shall pay all costs, including but not limited to design, construction and inspection, for or relating to the City Improvements.

3.2 **Streets.** All streets, curbs, gutters, sidewalks and streetlights constructed by Developer may be inspected by the City at any time and shall be inspected by the City during and immediately following application of the initial and final surface course of paving.

4. **Insurance Coverage.**

Developer or any site contractor(s) shall obtain and keep in force, until the successful completion of this Agreement, Contractors' Comprehensive General Liability Insurance including Contractual Liability Insurance with the below-referenced minimum coverages. The named insured shall be the Developer, the Developer's site contractor(s), the City, and the BPW. The name of the Development must be included on the certificate of insurance. Construction shall not commence until insurance certificates are provided to the City and the BPW. The insurance certificate shall be required no later than the pre-construction meeting. If insurance lapses for any reason, the City and/or the BPW will coordinate with the agency having jurisdiction to ensure certificates of occupancy shall not be issued until insurance is in force.

- 4.1. Bodily Injury Liability - \$1,000,000 per person with an aggregate limit of \$3,000,000 per occurrence;
- 4.2. Property Damage Liability - \$3,000,000;
- 4.3. Hazards coverage (site contractor(s) only) (explosion, collapse, and underground);
- 4.4. Excess or Umbrella Liability - \$5,000,000.

5. **Environmental Protection Compliance.**

Developer shall comply with all federal, state, and local environmental laws and regulations to the extent that they are applicable to the Improvement Construction Plans.

6. **Failure to Complete or Maintain Improvements.**

6.1. **Site Management Corrective Measures.** Failure of Developer, or its site contractor(s), to properly and promptly install and maintain the Site Improvements as required under this Agreement shall result in the following:

6.1(a). Notwithstanding any notification provision in this Agreement, the BPW, through the General Manager of the BPW or his designees, or the City, as applicable, shall list deficiencies and shall notify Developer that the deficiencies must be corrected within a commercially reasonable specified time. Such notice may be effected by the most expeditious method as decided by the General Manager and/or the City, as applicable, including but not limited to, fax, hand delivery, regular mail, certified mail, telephone, or electronic mail. The BPW, through its designees, and/or the City, as applicable, may notify Developer in advance of any proposed action, but failure of the BPW or the City to do so will not affect Developer's, the BPW's, or the City's rights or obligations hereunder.

6.1(b). Notwithstanding other remedies available in this Agreement, failure to achieve compliance by the date specified herein shall be cause for the BPW and/or the City, as applicable, to take such action, as it or they deem appropriate, including but not limited to the

right to correct the deficiency and draw all costs from the performance guarantee, seek reimbursement, setoff, or other remedy. The determination as to whether there is complete compliance with the notification rests solely with the BPW and/or the City, as the case may be, and shall be made in good faith.

6.2. Demand for Completion of Improvements. The BPW and/or the City, as applicable, may demand that the Site Improvements be installed or constructed prior to the time designated in the BPW rules and regulations, the Code, this Agreement, or other appropriate laws, rules, and regulations governing installation or construction where the BPW and/or the City, as applicable, have reason to believe that Developer does not intend to complete the Site Improvements within a reasonable time. The BPW and/or the City, as applicable, shall provide Developer with a written demand that the Site Improvements enumerated in the notice must be constructed within the time designated in the notice. If Developer fails to meet the terms of completion by the time designated in the notification, the BPW and/or the City, as applicable, may use the proceeds from the performance guarantee to perform any work reasonable to install or construct the subject Site Improvements and to transfer title to the applicable property if appropriate.

6.3. Deteriorating or Unsafe Conditions. If the condition of any Site Improvements presents a health, safety, or welfare risk, the BPW or the City, as applicable, may take immediate corrective action without notice to Developer, provided that the BPW or the City, as applicable, provides notice to the Developer as soon as practicable. The BPW or the City, as applicable, may seek reimbursement, setoff, or use the proceeds from the performance guarantee to perform any work necessary to remove or correct the condition.

7. Remedies.

7.1. If Developer fails in any manner to perform and carry out each and all of the terms, covenants and conditions of this Agreement, Developer shall be in default and notice in writing shall be given Developer of the default by the BPW and/or the City, as applicable. If Developer fails to cure the default within the commercially reasonable time as may be stated in the notice, the BPW and/or the City, as applicable, may, at its option, terminate and cancel the Agreement or any part thereof, as appropriate, and, at the expense, including all actual costs, attorneys' fees and professional fees, of Developer and its surety, complete the Site Improvements, as applicable, or cause them to be completed.

7.2. In the event of termination, all monies deposited by Developer under the terms of this Agreement shall be retained by the BPW and/or the City, as applicable, but the retention shall not release Developer or its surety from liability for Developer's default. In such event, however, Developer and its surety will be credited with the amount of money so retained toward any amount owed by Developer. If the aggregate amount of monies deposited by Developer exceeds the aggregate amount of all liabilities of Developer to the BPW and the City, any excess monies deposited shall be returned to Developer.

7.3. Termination pursuant to Section 7.1 shall not affect or terminate any of the rights of the BPW or the City as against Developer or its surety then existing, or which may accrue because of the default, and the above provision shall be in addition to all other rights and remedies available to the BPW or the City under the law.

8. **Enforcement.**

8.1. **Additional Remedies.** In addition to any rights stated in this Agreement and the right to draw proceeds from the performance guarantee, if Developer fails to complete the Site Improvements in conformance with this Agreement or violates or fails to perform any material term or provision of this Agreement beyond any applicable notice and cure period, the City and/or BPW, as applicable, may also seek any relief available at law or equity including declaratory relief, equitable relief, specific performance and monetary damages, including actual professional fees and attorneys' fees associated with the enforcement of this Agreement incurred by the City and/or the BPW, as applicable. In addition, if Developer is in violation of any provision of this Agreement beyond any applicable notice and cure period, Developer authorizes the City and/or the BPW, as applicable, each in its sole discretion, to coordinate with the agency having jurisdiction to ensure the suspension of issuance of certificates of occupancy or use for all structures in the Development, as well as ensure the refusal of said jurisdiction to issue new building permits for the Development.

8.2. **Limitation.** If the BPW or the City, as applicable, violates or fails to perform any term or provision of this Agreement, Developer shall be limited to a cause of action for *mandamus*; provided, however, that Developer reserves the right to assert any claim or cause of action against the BPW and/or the City, as applicable, based solely upon the alleged willful misconduct or grossly negligent acts of the BPW and/or the City, as applicable.

8.3. **Right of Entry.** Developer shall allow representatives for the BPW and/or the City, as applicable, access to all parts of Property undergoing development or involving construction of any Site Improvements included in this Agreement. Additionally, in the event Developer fails or declines to complete the required Site Improvements in accordance with the provisions herein contained and beyond any applicable cure period, Developer hereby grants unto each of the BPW and the City, as applicable, and their respective agents, assigns, and designees, the right, privilege and authority to enter the Development in order to complete the Site Improvements as provided herein. The right of entry provided herein shall occur upon prior written notice to the Developer and at reasonable hours and shall be done in a manner that minimizes disturbance to the Property.

9. **Administrative Appeal.**

Developer may appeal to the BPW Board of Directors for relief prior to the initiation of any enforcement action under the terms of this Agreement concerning the BPW Improvements. However, any such appeal must be noticed to the BPW Board of Directors within seven (7) business days of the date of notice from the BPW that action is to be taken.

10. **Binding Effect & Obligations Upon Sale and Transfer.**

10.1. **Successors in Interest.** This Agreement is for the benefit of the City, the BPW, and Developer. Except as otherwise provided, this Agreement shall be binding upon the respective parties to it and upon their successors and assigns; provided, however, that this Agreement shall not be assigned without the prior consent of the City and the BPW, which consent shall not be unreasonably withheld, conditioned, or delayed. The City and the BPW acknowledge and agree that Developer's lender shall have the right to act as Developer's successor if Developer is in default under its loan and as successor in interest Lender shall have all of Developer's rights and obligations under this Agreement. Developer has the duty to inform any such successors or assigns of the obligations under this Agreement. "Successor" shall include any person, firm, corporation or other entity that owns, legally or equitably, any land within the Development but, unless provided otherwise herein, shall not include persons or entities purchasing a home or lot for the purpose of residing in said home or leasing the residential property to persons residing in said home. If the City and the BPW have consented to an assignment of the rights and terms of this Agreement, Developer shall notify the City and the BPW upon the sale or transfer of any interest in the Development to any other party or parties subject to procedures provided in the BPW rules, and regulations. Developer shall inform the City and the BPW of the identity of the new party or parties obligated by the terms of this Agreement within thirty (30) days of any sale or transfer.

10.2. **Homebuilders and General Contractors.** Developer has the duty to provide notice to any such registered homebuilder or general contractor performing construction activity in this Development of the contents of this Agreement by providing any such registered home builder or general contractor with a copy of the Agreement prior to the construction activity.

10.3. **Third Party Rights.** Nothing herein creates any rights in third parties to enforce the provisions of this Agreement.

10.4. **Recorded Agreement.** The BPW shall, at Developer's sole cost and expense, record this fully executed Agreement with the Office of the Recorder of Deeds in and for Sussex County, State of Delaware following its execution by the parties and approval by the City and BPW.

11. **Miscellaneous.**

11.1. **Cooperation: Challenges to Validity of Agreement.** In the event of any legal or equitable action or other proceeding instituted by any person or entity challenging the validity of any provision of this Agreement, Developer shall indemnify and save the City, the BPW, and their respective officers, agents, and employees harmless against all claims for damages to persons or property including any and all costs, expenses, attorneys' fees, and liability incurred by the City or the BPW. The City and/or the BPW, as applicable, may, in their sole discretion, participate in the defense of any such action but in no way shall such participation relieve Developer of its obligation under this section.

11.2. **Hold Harmless and Indemnification.** Developer shall hold harmless the City and the BPW and their respective officers, agents, employees, and representatives from liability for damage or claims for personal injury including death and property damage which may arise from the direct or indirect operations of Developer or those of its contractors, subcontractors, agents, employees, or other persons acting on its behalf which relate to the Development and/or Site Improvements. Upon the City's or the BPW's request, Developer agrees to and shall defend the City and the BPW, and their respective officers, agents, employees, and representatives, from actions for damages and claims caused or alleged to have been caused by reason of Developer's activities in connection with the Development and/or construction of the Site Improvements. Developer hereby agrees to indemnify the City and the BPW against all claims, expenses (including attorneys' fees), costs, damages, and liability as a result of loss or injury arising out of or in connection with the Development and/or construction of the Site Improvements.

11.3. **Waiver.** Either party shall not be deemed to waive any rights unless such waiver is in writing and signed by the designee for the waiving party authorized to exercise such right.

11.4. **Vested Rights.** The Delaware common law doctrine of vested rights shall determine the vested rights, if any, of Developer.

11.5. **Entire Agreement.** This Agreement, in addition to any referenced plans, estimates, performance guarantees, and attachments, represents the entire agreement between the parties.

11.6. **Severability.** If any provision of this Agreement shall be deemed or held to be invalid or unenforceable for any reason whatsoever, then such invalidity or unenforceability shall not affect any other provision of this Agreement which may be given effect without such invalid or unenforceable provision, and to this end, the provisions of this Agreement are hereby declared to be severable.

11.7. **Immunity.** No provision of this Agreement is intended, or shall be construed, to be a waiver for any purpose by the City and/or the BPW, as applicable, of the provisions of the Delaware Tort Claims Act or any other statutory or common law limiting municipal liability.

11.8. **Sunsetting.** If the Land Development Plan is subject to review pursuant to any sunset provisions of the Code, or any other applicable laws, rules, and regulations, the City and the BPW reserve the sole discretion to modify this Agreement.

11.9. **Effective Date.** This Agreement shall be of no force or effect until the Agreement is recorded in the Office of the Recorder of Deeds in and for Sussex County, at Georgetown, State of Delaware, following all necessary City and BPW approvals. The effective date of this Agreement shall be the recordation date of this Agreement.

11.10. **Signature.** This Agreement may be executed in counterparts.

11.11. **Governing Law.** This Agreement is made under and shall be governed in all respects by the Laws of the State of Delaware. Any litigation under this Agreement shall be initiated in the court of appropriate jurisdiction in the State of Delaware.

11.12. **Notices.** All notices and other communications in connection with this Agreement shall be in writing and shall be deemed delivered to the addresses thereof (1) when delivered in person on a business day at the address set forth below or (2) on the third business day after being deposited in any main or branch United States post office, for delivery by properly addressed, postage prepaid, certified or registered mail, return receipt requested, at the address set forth below.

Notices and communications to the Developer shall be addressed to, and delivered at, the following addresses:

Setting Properties, Inc. P.O. Box 5 Montchanin, DE 19710 Attention: Joseph Setting II, President	<i>with a copy to:</i> Hudson, Jones, Jaywork & Fisher 309 Rehoboth Avenue Rehoboth Beach, DE 19971 Attention: James P. Becker, Esq.
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Notices and communications to the City shall be addressed to, and delivered at, the following addresses:

The City of Lewes P.O. Box 227 Lewes, Delaware 19958 Attention: Mayor City Manager	<i>with a copy to:</i> Baird Mandalas Brockstedt, LLC 6 South State Street Dover, Delaware 19901
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Notices and communications to the BPW shall be addressed to, and delivered at, the following addresses:

Board of Public Works 107 Franklin Street Lewes, Delaware 19958 Attention: General Manager	<i>with a copy to:</i> Tarabicos, Grosso & Hoffman, LLP 100 W. Commons Boulevard, Suite 415 New Castle, Delaware 19720
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By notice complying with the requirements of this Section, each party shall have the right to change the address or addresses or both for all future notices and communications to such party, but no notice of a change of address shall be effective until actually received.

11.13. **Time of Essence.** Except as otherwise provided herein, time is of the essence in the performance of all terms and provisions of this Agreement.

11.14 **Amendments.** This Agreement may be amended from time to time. No amendments to this Agreement shall be effective unless in a written agreement signed by Developer, the City, and the BPW.

11.15. **Conflict.** It is agreed by the parties hereto that, in the event of any conflict between the terms of this Agreement, and the provisions of the Code or BPW rules and regulations and any other applicable law, rules, and regulations, the provisions of the Code or BPW rules and regulations, as applicable, shall be governing and controlling over the terms of this Agreement.

11.16. **Headings.** The headings herein are inserted as a matter of convenience only, and do not define, limit, or describe the scope of this Agreement or the intent of the provisions hereof.

11.17. **Attorneys' Fees.** Within five (5) days of the effective date of this Agreement, Developer agrees to reimburse the BPW \$3,500 and the City \$1,000.00 in connection with the BPW's and City's attorneys' fees and expenses incurred in the drafting, preparation, and review of this Agreement.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, the parties have executed this Agreement on this ____ day of _____ A.D. 202_.

Witness

SETTING PROPERTIES, INC.

By: _____(SEAL)
Name: Joseph Setting II
Title: President

THE CITY OF LEWES

By: _____(SEAL)
Ann Marie Townshend, City Manager

Attest: _____
Ellen Loraine McCabe

THE BOARD OF PUBLIC WORKS OF THE CITY OF LEWES

By: _____(SEAL)
D. Preston Lee, President

Attest: _____
Thomas Panetta, Secretary

STATE OF DELAWARE :
: ss.
COUNTY OF SUSSEX :

BE IT REMEMBERED, that on this ___ day of _____, 202_, personally came before me, the Subscriber, a Notary Public for the State and County aforesaid, **D. PRESTON LEE**, President of the **BOARD OF PUBLIC WORKS of the City of Lewes**, chartered by Act of the State of Delaware, party to this Indenture, known to me personally to be such, and acknowledged this Indenture to be his act and deed, and the act and the deed of the said Board of Public Works; that the signature of the President is in his own proper handwriting; that the seal affixed is the common seal of the said Board of Public Works duly affixed by its authority; and that the act of signing, sealing, acknowledging and delivering the said Indenture was first duly authorized by resolution of the Board of Public Works of the City of Lewes.

GIVEN under my Hand and Seal of Office, the day and year aforesaid.

Notary Public

Print or Type Name of Notary

My Commission Expires:

STATE OF DELAWARE :
: ss.
COUNTY OF SUSSEX :

BE IT REMEMBERED, that on this ___ day of _____, 202_, personally came before me, the Subscriber, a Notary Public for the State and County aforesaid, **ANN MARIE TOWNSHEND**, City Manager of **THE CITY OF LEWES**, a municipal corporation of the State of Delaware, party to this Indenture, known to me personally to be such, and acknowledged this Indenture to be her act and deed, and the act and the deed of the said municipal corporation; that the signature of the City Manager is in her own proper handwriting; that the seal affixed is the common and corporate seal of the said municipal corporation duly affixed by its authority; and that the act of signing, sealing, acknowledging and delivering the said Indenture was first duly authorized by resolution of the City Council of the said municipal corporation.

GIVEN under my Hand and Seal of Office, the day and year aforesaid.

Notary Public

Print or Type Name of Notary

My Commission Expires:

STATE OF DELAWARE :
: **ss.**
COUNTY OF SUSSEX :

BE IT REMEMBERED, that on this ____ day of _____, 2019, personally came before me, the Subscriber, a Notary Public for the State and County aforesaid, Joseph Setting II, President of Setting Properties, Inc., a Delaware Corporation, party to this Indenture, known to me personally to be such, and acknowledged this Indenture to be his act and deed, and the act and the deed of the said limited liability company.

GIVEN under my Hand and Seal of Office, the day and year aforesaid.

Notary Public

Type or Print Name of Notary
Commission Expires: