

# Model Agreement A-1: Joint Development Program Guidelines



Washington Metropolitan Area Transit Authority

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# **JOINT DEVELOPMENT PROGRAM GUIDELINES**

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**Office of Real Estate and Parking**

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## 1.0 INTRODUCTION

These Joint Development Program Guidelines (“**Guidelines**”) of the Washington Metropolitan Area Transit Authority (“**WMATA**”) are designed to help participants navigate WMATA’s Joint Development program. Together with (1) the *WMATA Joint Development Policies* (“**Joint Development Policies**”) (see [Exhibit 1](#), also available on WMATA’s website), and (2) *WMATA’s Station Area Planning Guide* both posted on [www.wmata.com/realestate](http://www.wmata.com/realestate), provide the objectives, policies and processes that govern the Joint Development program.

WMATA owns and/or controls more properties and facilities than those contained in its Joint Development portfolio. WMATA’s Use Regulations generally govern the use of WMATA property by others. However, Joint Development is excluded from the Use Regulations and is instead governed by these Guidelines.

Please visit [www.wmata.com/realestate](http://www.wmata.com/realestate) for more information on WMATA’s Joint Development program, managed by WMATA’s Office of Real Estate & Parking, which can be contacted by email at [realestate@wmata.com](mailto:realestate@wmata.com).

## 2.0 DISTINCTION BETWEEN JOINT DEVELOPMENT AND TRANSIT-ORIENTED DEVELOPMENT

Joint Development is a subset of “transit-oriented development” (“**TOD**”) and explicitly occurs on property owned by a transit authority. Joint Development is defined in and must comply with the Federal Transit Administration’s (“**FTA**”) *Guidance on Joint Development* (“**FTA Guidance**”)¹ and requires the coordinated development of public transportation facilities with non-transit development such as multifamily housing, office, retail and hotels.

TOD includes real estate development located near and around Metrorail stations (defined as within a half-mile walk of a transit station) and Metrobus corridors (defined as within a quarter-mile walk of a major bus corridor) but is not necessarily located on WMATA-owned property. TOD around Metrorail stations and along Metrobus corridors is important in maximizing transit utilization and ridership growth. WMATA encourages high-density, mixed-use, and pedestrian- and bicycle-connected development at, near and around its transit stations, whether it owns developable property at that station or not.

WMATA’s Board of Directors (the “**Board**”) adopted a TOD policy (see [Exhibit 2](#)), which identifies the primary drivers of TOD-related ridership and actions that can be taken by local jurisdictions and landowners/developers to maximize TOD potential.

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¹ *FTA Circular 7050.1A, “Joint Development Guidance,”* dated December 2016 as of this publication and posted online at: <https://www.transit.dot.gov/JointDevelopment>.

### 3.0 SCOPE OF GUIDELINES

These Guidelines apply to Joint Development projects only. They do not apply to the transactions noted below. Requirements for these are contained in the documents listed.

Desired Transaction Type	Transaction requirements are contained in:
Sale of excess property	FTA Circular 5010.E1 <sup>2</sup>
Leasing or interim uses of WMATA property	WMATA's Use Regulations <sup>3</sup> and FTA Circular 5010.E1
Direct connections to WMATA facilities (i.e. connection agreements)	Board Resolution #2011-31
Adjacent construction or other projects occurring within WMATA's "zone of influence"	WMATA's Adjacent Construction Project Manual <sup>4</sup>

### 4.0 WMATA'S JOINT DEVELOPMENT OBJECTIVES

WMATA has one of the most active Joint Development programs in the United States and, although more than 30 Joint Development projects have been completed since the mid-1970s, more than 20 sites remain available for Joint Development.

The objectives for Joint Development are:

- Adhering to the TOD objectives adopted by the Board (see [Exhibit 2](#))
- Maintaining or enhancing transit operations, transit facilities, and/or transit access
- Maximizing revenue from real estate holdings
- Minimizing risk to WMATA
- Maximizing transit ridership
- Increasing reverse commuting, i.e. morning ridership from the core to, and evening ridership to the core from, suburban stations of the system
- Encouraging high-quality design that connects to the surrounding neighborhoods and communities
- Supporting and maintaining consistency with the local jurisdictions' economic development goals

<sup>2</sup> FTA Circular 5010.E1, "Award Management Requirements Circular," dated July 2018 as of this publication and posted online at: [www.transit.dot.gov/regulations-and-guidance/fta-circulars/award-management-requirements-circular-50101e](http://www.transit.dot.gov/regulations-and-guidance/fta-circulars/award-management-requirements-circular-50101e).

<sup>3</sup> "Regulations Concerning the Use of WMATA Property," dated November 2018 as of this publication and posted online at: [www.wmata.com/business/real-estate/policies-forms.cfm](http://www.wmata.com/business/real-estate/policies-forms.cfm).

<sup>4</sup> Posted online at: [www.wmata.com/business/adjacent-construction](http://www.wmata.com/business/adjacent-construction).

## 5.0 JOINT DEVELOPMENT SOLICITATION PROCESS

### 5.1 Developer Selection Process

**Joint Development Solicitation** means a request for qualifications, request for proposals, invitation for bids, or other forms of solicitation for developers and/or investors to develop WMATA's Joint Development property. Generally, the Joint Development Solicitation and developer selection process is as follows:

- WMATA staff seeks Board approval to issue a Joint Development Solicitation.
- Upon receipt of Board approval, staff issues the Joint Development Solicitation, evaluates proposals and selects a qualified developer
- Staff negotiates a development agreement ("**Joint Development Agreement**") with the selected developer, which is not effective until approved by the Board and concurred with by the FTA
- WMATA staff seeks Board approval of the Joint Development Agreement
- Upon receipt of Board approval, staff seeks FTA concurrence of the Joint Development

If, as a result of the Joint Development, there is a sufficiently significant (as determined by WMATA) proposed permanent reduction in or removal of WMATA's transit facilities and/or transit services (as defined in the Mass Transit Plan), WMATA is required to conduct a public hearing (a "**Compact Public Hearing**") to obtain public input (see [Section 9.0](#)). The Board is responsible for reviewing and approving the Compact Public Hearing Staff Report and the proposal to amend the Mass Transit Plan.

### 5.2 Pre-Solicitation Planning and Approvals

Except for the exceptions under [Section 5.6](#), if WMATA desires to offer a property for Joint Development, Board approval is required prior to issuing a Joint Development Solicitation. If the Board approves the issuance of a Joint Development Solicitation, based on the specific project conditions, staff will craft the Joint Development Solicitation (and related developer selection criteria) to best define the Joint Development opportunity.

Typically, in advance of offering a property for Joint Development, although it is not required, WMATA will work with the local jurisdictions' offices of planning and/or economic development, and others, to identify local objectives. These partnerships are essential to improving the pedestrian and bicycle infrastructure within a ½-mile radius connecting to the Metrorail stations (and ¼-mile radius on either side of major Metrobus routes); encourage developer, investor and employer interest in the Joint Development Solicitation; and identify funding options for public and transit infrastructure and/or other amenities.

WMATA will conduct its own analyses of transit needs, market readiness and financial feasibility of a Joint Development prior to seeking Board approval. For example, this could include evaluation of a site's potential development plan (i.e. site plans or "test fits") to ensure it

accommodates WMATA's transit and operational requirements as well as private development. *WMATA's Station Area Planning Guide* lays out planning and access criteria for all modes of transportation used in reaching a Metrorail station and should be used to inform developers about WMATA's proposed organization of its transit facilities. The test fits are illustrative only and are not pre-determined site plans; once engaged, the selected developer will improve and optimize the site plan.

### **5.3 Open Competition Requirement**

Except as noted in Section 5.6, WMATA is required to conduct an open competition for its Joint Development Solicitations. To satisfy this requirement, the Joint Development Solicitation will be advertised publicly (i.e. in a newspaper or other widely-distributed print media, electronic media posting and/or posting on WMATA's website at [www.wmata.com/realestate](http://www.wmata.com/realestate)). A real estate broker may be engaged to offer a property, in which case the public advertisement and/or WMATA website will identify how prospective offerors can contact the real estate broker. A pre-proposal conference to explain the solicitation's objectives and answer questions from prospective offerors may be held.

Once a Joint Development Solicitation is issued, WMATA may not discuss it with external parties, except as specifically provided in the Joint Development Solicitation. All questions about a Joint Development Solicitation must be sent to [realestate@wmata.com](mailto:realestate@wmata.com), and all correspondence directed to this email address will be responded to in writing and shared with all offerors. This rule is very strict and developers should be aware of likely disqualification if found trying to seek to influence WMATA staff or the Board during the solicitation process.

### **5.4 Proposals and Subsequent Negotiations**

Proposals received by the deadline will be evaluated by staff. WMATA first reviews the proposals for responsiveness to the Joint Development Solicitation's requirements and instructions. Any proposals that do not meet the Joint Development Solicitation's requirements and instructions may be rejected as unresponsive.

Proposals are typically evaluated on "best value" criteria, which consider multiple factors affecting a given project. These factors will be defined in each Joint Development Solicitation. WMATA will establish an evaluation committee that will take the pertinent evaluation factors into consideration.

WMATA may, but is not required to, seek a meeting (i.e. interview, presentation, etc.) with one or more developers that submitted a proposal. The discussions may include areas of the proposal that require clarification or improvement, or do not comply with the Joint Development Solicitation in a minor technical, but correctable, manner.

Best and final offers may or may not be requested from developers. Staff will rate each responsive proposal (including best and final offers, if any) and rank the proposals in accordance with the criteria in Section 2.2 of the Joint Development Policies (see Exhibit 1) and other criteria defined in the Joint Development Solicitation. This process will result in one or more developer finalists and commencement of negotiations of a Joint Development Agreement. If negotiations are unsuccessful, WMATA may terminate negotiations and commence negotiations with the second ranked developer, and those ranked thereafter. Alternatively, WMATA may enter competitive negotiations with two or more ranked developers.

The requirements of a typical Joint Development Agreement are noted in Section 6.0. Upon successfully negotiating the terms of a Joint Development Agreement, WMATA staff will present a recommendation to enter into a Joint Development Agreement to the Board for approval. The Joint Development Agreement is deemed effective only upon receipt of Board approval and FTA concurrence (see Section 10.0).

In addition, if a selected developer proposes to reduce or remove transit facilities and/or transit services, such a change would not be approved until a Compact Public Hearing (see Section 9.0) is held and the Board approves the Public Hearing Staff Report and amendment to the Mass Transit Plan recommending such a change. The need and timing for a Compact Public Hearing will be determined project by project.

## 5.5 Privacy and Public Access to Records Policy

The financial information provided in all proposals is confidential until a Joint Development Agreement is executed. Thereafter, staff will maintain all information received for that Joint Development project, including any confidential business information, in accordance with WMATA's Privacy and Public Access to Records Policies ("**PARP**"). PARP is available on WMATA's website, [www.wmata.com/about/records](http://www.wmata.com/about/records).

## 5.6 Exceptions to Open Competition

Generally, WMATA will use an open competition to solicit proposals for development on its Joint Development sites. There are three exceptions to the open competition requirement:

1. Proposed extensions of existing ground leases or fee conveyances to existing ground lessees of the subject land
2. Proposed land assemblages with an adjacent property owner(s) when such adjacent property owner(s) is the only entity(ies) that could feasibly develop the site. For example: the site is too small to develop as a stand-alone development; or the site is not serviced by a public road.
3. Offers from one of the signatories to WMATA's organizational document (the "**WMATA Compact**") or one of the local governments located in the WMATA Transit Zone for a public facility or space to be used and/or operated by the jurisdiction.



If a party believes it falls under one of these exceptions, a letter of interest should be submitted to WMATA providing its explanation of why it qualifies under an exception, a description of the desired project, the timeline under which it is seeking to complete a Joint Development Agreement and/or other transaction documents, and any other information that will improve WMATA's understanding of the opportunity. At its sole and absolute discretion, WMATA may accept or deny the opportunity to exclusively negotiate with the requesting party.

If an exception has been met and WMATA desires to enter into a Joint Development Agreement, WMATA will not issue a Joint Development Solicitation but will, instead, proceed to negotiate a Joint Development Agreement. While such a project may be exempt from the open competition requirement, a Joint Development Agreement with a party exempt from open competition is still subject to Board approval and FTA concurrence.

### **5.7 Other Unsolicited Proposals**

WMATA will not negotiate exclusively with a third-party who submits an unsolicited proposal unless that third-party meets the criteria for one of the exceptions to open competition set forth in Section 5.6.

If a developer/investor that does not fall under one of the exceptions to open competition set forth in Section 5.6 submits an unsolicited proposal, WMATA is not obligated to pursue the opportunity. However, if WMATA decides to pursue a Joint Development opportunity in response to an unsolicited proposal that is not exempt from open competition, a Joint Development Solicitation (as set forth in Sections 5.1 through 5.5) would need to be issued.

To submit an unsolicited proposal, parties (developers/investors and/or jurisdictions) should provide considerable detail on the proposed project, such as, but not limited to, the proposed development, the identity and background of the offeror and its principals, the proposed compensation to WMATA, the schedule for the offer and for the project generally, the existing and proposed zoning and land use controls on the property, and any equity or debt already in place or anticipated.

## **6.0 JOINT DEVELOPMENT AGREEMENTS**

In preparing and negotiating proposals, developers should consider the information in the following sections:

### **6.1 Ground Leases Versus Sales**

WMATA has a strong preference for ground leasing rather than selling land for Joint Development. The primary reason is that compensation over time creates an ongoing source of operating revenue for the agency, and additionally ensures "satisfactory continuing control" as required by the *FTA Guidance*. WMATA will seek to structure payments that keep pace with increases in value over time, whether from density increases, general increases in land value, or

both. This can be accomplished using various compensation structures that achieve financeable ground leases.

As an example of the limited circumstances in which a sale of land would be considered rather than a ground lease, is that residential condominiums that may require, either as a legal matter or as a practical matter, fee ownership of the land.

WMATA seeks “fair market value” in its transactions and relies on open competition, third-party appraisals, and/or valuations provided by real estate advisors to establish value. WMATA staff will not share with potential developers or interested parties other than the FTA appraisals or other valuations it has completed.

Discounts to land value may be permitted in order to fund approved changes in WMATA facilities (i.e. cost of replacement transit facilities) and for which no alternative source of funding is available.

## 6.2 Building WMATA Facilities

A developer may be required to modify existing WMATA facilities (including, but not limited to, bus bays, bus loops, internal private roads, parking, station entrance improvements, stormwater management facilities, power facilities) or build new facilities as part of its overall project. If a Joint Development project involves moving, adding, changing or eliminating transit infrastructure, the Joint Development Solicitation may address an approach for funding such site and transit infrastructure, such as whether WMATA will fund or compensate the developer for the infrastructure or whether the developer is expected to secure funding and finance the infrastructure.

WMATA must approve the design, construction and delivery of its facilities. WMATA’s offices of Joint Development and Adjacent Construction (“**JDAC**”) and Real Estate & Parking conduct this effort.

WMATA often has design and construction standards that differ from those used in the private sector. These standards account for the wear and tear of public transit use and the desire for long life expectancy. Developers are expected to adhere to WMATA’s design standards unless they can present a compelling alternative, which will require approval from JDAC and others.

Modification to or replacement of WMATA facilities is an opportunity to improve, enhance and right-size these transit facilities to address future transit operations and service. The size, quantity and/or location of proposed facilities should result from consideration of the following, as applicable:

- Historic number of transit riders served at that facility
- Estimated new riders from the Joint Development
- Other TOD projects within ½-mile of the affected facility

- Life-cycle costs of facilities
- Long-term asset management plans

If WMATA or a developer proposes permanent changes to WMATA facilities or transit services related to a Joint Development, a Compact Public Hearing is required, as described in [Section 9.0](#) below. The Compact Public Hearing may be held at any time, such as before issuing a Joint Development Solicitation or subsequent to signing a Joint Development Agreement when there is more precise information available about the proposed changes.

### 6.3 WMATA Reviews and Approvals

Even if no transit facilities are to be modified or built as part of the project, WMATA will review a developer's plans to assess whether the proposed development represents high-quality TOD design and does not interfere with existing facilities or transit operations. WMATA's *Station Area Planning Guide* is a comprehensive summary of WMATA's design guidance as it relates to bicycle, bus, parking, pedestrian and other access facilities, and is available on [www.wmata.com/realestate](http://www.wmata.com/realestate).

If WMATA makes the determination that there is potential interference, the developer must modify its plans. Transit operations take priority over real estate development in WMATA's hierarchy. WMATA's *Adjacent Construction Project Manual* provides detailed information about WMATA's engineering and construction management standards and program.

Parts of a Joint Development project that have no impact on WMATA facilities and operations (for example, interior building structure and mechanical equipment and tenant build-out) need not be reviewed by WMATA. WMATA makes the determination of no impact on a project-by-project basis.

Unless WMATA agrees otherwise, JDAC requires developers to post a deposit before undertaking reviews of their projects. JDAC will estimate the amount of the deposit depending on the nature of the work. JDAC draws on the deposit as it does its work. If the deposit is depleted, funds must be added. Upon completion, any unused balance of the deposit will be refunded.

JDAC will also charge fees for escort services when developers must enter restricted WMATA property (e.g., track areas, electrical and machine rooms and the like), and other fees may apply when additional manpower needs are imposed on JDAC.

All third-party employees entering onto WMATA property to do any work of any type must be screened, approved and badged in advance by WMATA as eligible to do work on its property. This process is coordinated through JDAC.

In addition, no developer or other third party is allowed to do work on WMATA's property without written permission. In the case of invasive work, such as soil borings, test pits, Phase II

environmental analyses, noise and vibration studies, or core drilling, the work will require a WMATA Real Estate Permit. The Real Estate Permit and Application can be found on WMATA's website, [www.wmata.com/business/real-estate/policies-forms.cfm#main-content](http://www.wmata.com/business/real-estate/policies-forms.cfm#main-content). In the case of non-invasive work, such as a boundary survey, WMATA may use a simpler document. In each case, the person or entity permitted to do the work must provide the required insurance before starting work.

#### **6.4 Transfer or Assignment of Development Agreements**

Given the long-term nature of ground leases associated with Joint Development projects, WMATA understands that developer and/or development team composition may change over time. Any subsequent project owner or development team member is subject to all requirements in these Guidelines.

Prior to the completion of the construction phase of the Joint Development project, the developer must notify and obtain WMATA's prior written approval of any proposed assignment or change in ownership or development team composition; developers should anticipate that such approval may be withheld in WMATA's sole and absolute discretion. Subsequent to the completion of the construction phase of the Joint Development project, the developer must notify WMATA of any proposed assignment or change in ownership or development team composition. When such changes occur, the developer must provide an updated listing of development participants/principals.

#### **6.5 Developer Coordination with Other Governmental Authorities and Community Outreach**

When used for Joint Development, WMATA property is subject to local land use, planning, zoning, subdivision, site planning, and other entitlement processes and approvals. Therefore, developers should expect their Joint Development projects to undergo customary local entitlement approvals.

Developers are responsible for working with local governmental authorities, local communities, and WMATA to maximize the opportunities, mix of uses, and densities that promote transit ridership, as well as increase pedestrian and bicycle connections to and within the Joint Development site. Developers must also do their own community outreach and will be required to create a proactive community engagement plan. WMATA will cooperate with the developer in seeking entitlement approvals, but the obligation and responsibility for obtaining public approvals remain with the developer.

#### **6.6 Affordable Housing**

Housing located in proximity to transit is demonstrated to achieve greater overall cost of living savings for an individual or family than affordable housing or transit achieves alone. Toward this end, WMATA supports the Washington region's housing and affordable housing production

goals, noting that WMATA does not have an independent affordable housing policy for Joint Development. Instead, Joint Development projects must abide by the local jurisdiction's affordable housing laws and policies and developers should work closely with the local jurisdiction to achieve the local government's affordable housing goals for the project.

## **6.7 Sustainability**

Joint Developments must also meet the green building or sustainability standard of the jurisdiction(s) within which the Joint Development property is located or, in the absence of a local standard, at a minimum meet a nationally-recognized standard such as the U.S. Green Building Council's LEED-Silver certification for neighborhood development and/or for individual buildings.

## **6.8 Transportation Demand Management**

WMATA requires all Joint Development projects to implement Transportation Demand Management (TDM) strategies to further WMATA's goals of increasing transit ridership and reducing motorized vehicle miles traveled within the Washington region. TDM strategies include, but are not limited to, subsidizing a transit benefits program, improving bike and pedestrian access to transit, and providing signage for wayfinding and real-time transit information. Parking capacity also contributes to a project's TDM and will be addressed more specifically in solicitations with consideration of each property's future parking requirements.

Developers will typically, at a minimum, be required to meet the TDM requirements of the local jurisdiction in which the Joint Development project is located. If a local jurisdiction does not have a TDM requirement, WMATA will work with its Joint Development partners to develop a TDM plan.

## **7.0 ROLE OF WMATA BOARD OF DIRECTORS**

The role of the Board of Directors in Joint Development is to:

- Establish WMATA's Joint Development policies
- Review and approve Joint Development projects
- Authorize Compact Public Hearings
- Approve modifications to WMATA's Mass Transit Plan

## **7.1 Board Approvals**

Specific Board approvals may be frequently required for:

- Issuing a Joint Development Solicitation
- Executing a Joint Development Agreement

- Amending a Joint Development Agreement, lease or other similar agreement that reduce compensation to WMATA or otherwise substantially change any material term previously considered by the Board in granting transaction approval
- Authorizing a Compact Public Hearing, if needed
- Approving the Compact Public Hearing staff report and related amendment to the Mass Transit Plan, if applicable

WMATA staff manages the process and preparation for Board approvals. The developer is not required to participate unless requested.

The Board approval process for Joint Development projects first involves a presentation to the Board committee overseeing WMATA's real estate matters and then, if recommended by the committee, referred to the Board for approval. The process may take up to two months to complete from the time the item is initiated by WMATA staff.

## **7.2 Board Approval Criteria**

The Board uses the criteria set forth in Section 2.2 of the Joint Development Policies (see Exhibit 1) in evaluating whether to offer sites for Joint Development and to approve or amend a Joint Development Agreement or other material agreement. The Board may also consider any other relevant information provided by staff.

## **7.3 Integrity and Ethics**

WMATA has strict rules on integrity and ethics as such developers must sign an ethics/integrity certification as part of its proposal. Additionally, at closing, a developer must sign or update a certification regarding ethics and integrity. Exhibit 3 provides a sample certification of ethics and integrity for developers.

## **8.0 ROLE OF WMATA GENERAL MANAGER/CEO AND STAFF**

The General Manager/Chief Executive Officer is responsible for the overall management, administration and conduct of WMATA's Joint Development activities. As of the date of these Guidelines, WMATA's Office of Real Estate & Parking is delegated primary responsibility for implementing all aspects of the Joint Development program, subject to Board approval as required. The Office of Real Estate & Parking recommends Joint Development Solicitations to the General Manager/CEO, and the Board, prepares sites to offer for Joint Development, drafts and issues the Joint Development Solicitations, negotiates agreements with developers, recommends Joint Development Agreements to the General Manager/CEO and Board for approval, manages the process for obtaining FTA concurrence (see Section 10.0), assists in reviewing and approval of project plans, collects revenue, and oversees internal coordination regarding WMATA real property.

JDAC, the Office of General Counsel and other WMATA departments such as Bus Planning, Sustainability, Design and Engineering, and Architecture, also assist in the Joint Development process.

The nomenclature and composition of the various offices within WMATA is subject to change from time to time. Any such changes shall automatically be deemed incorporated into these Guidelines without need for formal amendment.

## **9.0 WMATA COMPACT PUBLIC HEARING**

The WMATA Compact requires a public hearing be conducted whenever a change is made to the Mass Transit Plan for the Metro system. The purpose of the Compact Public Hearing is to obtain public input about proposed changes to WMATA's Mass Transit Plan. This public input is brought to the Board for its consideration.

The scope of a public hearing is different from the scope of the entitlements and permit processes employed by local governments that govern land use and construction. Absent unusual circumstances, hearings held by other governmental bodies will not substitute for the Compact Public Hearing, and *vice versa*.

Once authorized by the Board, the Compact Public Hearing process is managed by the Board Corporate Secretary's Office to include public notice of the Compact Public Hearing and public outreach to encourage participation. WMATA staff will prepare a report of the record established during the public hearing for presentation together with the staff's recommendations to provide to the Board. That report is also published on WMATA's website. A developer should anticipate six (6)-months to complete this process.

In addition, the developer pays the cost of this process to WMATA in advance, up to \$50,000. Any unused portion of this amount is refunded.

## **10.0 FTA CONCURRENCE**

The FTA is both a regulatory and funding agency for American transit authorities. Because the FTA's funds are widely used to fund transit systems, the FTA has significant authority to determine the use and non-use of real estate owned by transit agencies. A vast majority of (if not all) Joint Development projects undertaken by WMATA will be in accordance with the FTA's rules and requirements.

Joint Development projects must be submitted to the FTA for its concurrence and the proposed developer plays little or no role in this process except to provide background information that may be necessary to obtain the FTA's concurrence. WMATA coordinates with the FTA. The FTA's review takes approximately three or four months from the time of submittal but may vary depending on project complexity.

In its review, the FTA will ascertain whether WMATA maintains “satisfactory continuing control” of the Joint Development site for transit purposes and that the property is used for TOD. Fundamentally, the Joint Development project must not compromise WMATA’s transit mission or operations. This requirement for “satisfactory continuing control” distinguishes Joint Development from dispositions of excess/surplus property.

WMATA accomplishes “satisfactory continuing control” through a variety of easements and covenants customized to the particular site. For example, WMATA will retain rights for station entrances, rail right-of-way, bus loops, Kiss & Ride areas, public access, maintenance access, and the like. Agreements will require a covenant that the property be developed in accordance with the FTA’s requirements for TOD and WMATA-approved development plans. as well as require the developer not interfere with WMATA operations, and to indemnify WMATA against interference, etc.

The easements and covenants will be recorded in jurisdictional land records and are intended to have priority over all other documents relating to that transaction, including deeds, ground leases and mortgages.



## **EXHIBIT 3: Ethics and Integrity Certification**

### **OFFEROR'S CERTIFICATIONS**

The undersigned hereby certifies to the best of its knowledge and belief to the Washington Metropolitan Area Transit Authority (“**WMATA**”) that the undersigned and any of its principals:

1. Is/are not presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from an award of contracts by any governmental entity.
2. Has/have not within the past ten (10) years been convicted of or had a civil judgment rendered against it for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a contract or subcontract with any governmental entity; violation of antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating criminal tax laws, or receiving stolen property.
3. Is/are not presently indicted for or otherwise criminally or civilly charged by a governmental entity with commission of any of the offenses enumerated in the previous paragraph.
4. Is/are not in arrears or default of payment of any money or obligation of a value greater than Three Thousand Dollars (\$3,000) to a governmental entity.
5. Has/have no adjudicated violations nor has paid penalties during the past ten (10) years relating to the housing and building laws, regulations, codes and ordinances of any governmental entity.
6. During the past ten (10) years has/have not had a license revoked that was issued in accordance with the housing, building or professional licensing laws, regulations, codes and ordinances of any governmental entity.
7. During the past ten (10) years has not filed any claim against WMATA or been engaged with any litigation, arbitration, mediation or other dispute resolution process with WMATA arising out of or relating to any actual or proposed procurement or contract.

“Principal” means a partner, member, shareholder, officer, director, manager or other Person with management or supervisory responsibilities or who is otherwise in a position to control or significantly influence the undersigned’s activities or finances.

The undersigned further certifies:

a. It has not employed or retained any company or persons (other than a full-time, bona fide employee working solely for it) to solicit or secure a ground lease or fee conveyance from WMATA; and

b. It has not paid or agreed to pay, and shall not pay or give, any company or person (other than a full-time, bona fide employee working solely for it) any fee, commission, percentage, or brokerage fee contingent upon or resulting from the award of a ground lease or fee conveyance from WMATA; and

c. No person or entity currently employed by or under contract with WMATA, or employed by or under contract with WMATA within the past twelve (12) months, or with material input into the matters covered by the proposed ground lease or fee conveyance and employed by or under contract WMATA at any time in the past: has provided any information to it that was not also available to all other persons who responded to the Joint Development Solicitation that led to the proposed ground lease or fee conveyance; is affiliated with or employed by it or has any financial interest in it; provided any assistance to it or its parent, subsidiary or affiliates in responding to the Joint Development Solicitation regarding the site now proposed to be ground leased or acquired in fee; or will benefit financially from the development contemplated by the ground lease or fee conveyance; and

d. Neither the undersigned nor any of its employees, representatives or agents have offered or given gratuities or will offer or give gratuities (in the form of entertainment, gifts or otherwise) to any director, officer or employee of WMATA with the view toward securing favorable treatment in the designation of a Selected Developer (as defined in the Joint Development Solicitation) or in any determination made with respect to developer selection, or in the negotiation, amendment or performance of the Joint Development Agreement (as defined below); and

e. It agrees to furnish information relating to the above as requested by WMATA.

If the undersigned is unable to certify to the foregoing in whole or in part, the undersigned has attached an explanation to this certification.

The undersigned further certifies that:

i. It is aware of and accepts all of the terms of the Joint Development Agreement dated \_\_\_\_\_, 20\_\_ between WMATA and \_\_\_\_\_ (as it may have been amended to date, the "**Joint Development Agreement**"); and

ii. It has the power and authority to enter into the proposed ground lease or fee conveyance and all final documentation as required by WMATA without the consent or joinder of any other party or authority (except as envisioned by the Joint Development Agreement).

These certifications are a material representation of fact upon which reliance will be placed by WMATA. The undersigned shall provide immediate written notice to WMATA if at any time it learns that its certification was erroneous when submitted or has become erroneous since that time. If it is later determined that the undersigned knowingly rendered an erroneous certification or failed to notify WMATA if and when the undersigned gained knowledge that its certification was erroneous when submitted or has become erroneous since that time, then, in addition to any other remedies available to WMATA, WMATA may in its sole and absolute discretion terminate the Joint Development Agreement with respect to this particular ground lease or fee conveyance.

**[NAME OF OFFEROR]**

By: \_\_\_\_\_  
Name:  
Title:

Date: \_\_\_\_\_, 20\_\_

# Model Agreement A-2: Joint Development Solicitation Template

# Washington Metropolitan Area Transit Authority

## Joint Development Solicitation

201\_\_ - \_\_ - \_\_

\_\_\_\_\_ Metro Station

\_\_\_\_\_ Metro Station

\_\_\_\_\_ Metro Station

\_\_\_\_\_ Metro Station

\_\_\_\_\_, 201\_\_

*[To be kept in mind on a Station-specific basis as our internal development proposals are prepared: per BPLN, consider requiring a restroom/break room facility for Bus operators as part of the new/replacement WMATA facilities. Apparently the restrooms in Metro Stations are not always or easily accessible to Bus operators and/or Bus operations begin before or end after Metrorail operations at some Metro Stations.]*



\_\_\_\_\_, 201\_\_

Metro is pleased to offer this Joint Development Solicitation for sites at \_\_\_\_\_ Metro Stations – \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_. This adds even more development opportunities to one of the most successful joint development programs of any transit agency in the United States.

Metro is looking for innovative plans at these sites. Plans should generally promote quality development and placemaking, enhance the local tax base, increase transit ridership, and provide revenue for Metro. All proposals should emphasize the principles of transit-oriented development: safe, walkable and attractive communities providing synergy with the transit service.

Interested respondents should read this document carefully. Among the basic points to highlight, please note that although Metro has sold land in the past and has some legacy sales in progress, Metro's current policy strongly prefers to ground lease, not to sell, our properties. Therefore, all offers must include a ground lease offer and may, at the offeror's option, include a sales offer. Sales will be considered on a case-by-case basis, but usually only if residential condominium use is envisioned or unusual circumstances apply.

The deadline for submitting proposals in response to this Joint Development Solicitation is at 1:30 p.m. Eastern Time on \_\_\_\_\_, 201\_\_.

We encourage you to review this Joint Development Solicitation and to attend our pre-proposal conference on \_\_\_\_\_, 201\_\_ at 2:00 p.m. in the lobby level meeting room at WMATA headquarters, 600 Fifth Street, N.W., Washington, D.C. The pre-proposal conference will give you the opportunity to ask questions about this Joint Development Solicitation. Although attendance is not mandatory, it is advisable. In addition, if you have any general questions about this Joint Development Solicitation, please e-mail us at [realestate@wmata.com](mailto:realestate@wmata.com).

Sincerely,

Stan Wall

Director, Office of Real Estate and Station Planning

**Washington  
Metropolitan Area  
Transit Authority**

600 Fifth Street, NW  
Washington, D.C. 20001  
202/962-1234

By Metrorail:  
Judiciary Square-Red Line  
Gallery Place-Chinatown  
Red, Green and  
Yellow Lines

A District of Columbia  
Maryland and Virginia  
Transit Partnership

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## PART ONE. INTRODUCTION

WMATA invites proposals for the joint development site described in this Joint Development Solicitation. “Joint development” is the Federal Transit Administration’s term for the development by private parties of transit authority properties in a way that is synergistic with the on-site transit use. Joint development is therefore a subset of the broader categories of smart growth and transit-oriented development that are increasingly popular.

WMATA has long been one of the national leaders among transit agencies using their real estate holdings for joint development. Through this process, we have converted many sites, usually but not always next to our Metro Stations, into productive, high-quality, environments. This generates income for the private sector, tax revenue for the local jurisdictions, ridership for WMATA and other transit agencies serving these properties, and rental and sales revenue for WMATA, while also improving the built environment for the benefit of all residents of the National Capital Region we serve. We hope that this Joint Development Solicitation is another step forward in that process.

The available site is described in **Part Two** of this Joint Development Solicitation and the procedures and rules for submission of offers are described in **Part Three**. **The Proposal Form respondents must use to express interest in a Joint Development Site is included in the Attachments.**

**Respondents should be experienced developers of projects comparable to the Project proposed in response to this Joint Development Solicitation.** Professional service providers, building contractors, or other non-developers should not respond to this Joint Development Solicitation on their own but should be identified as part of a responding Developer’s Development Team as more fully discussed below.

## PART TWO. JOINT DEVELOPMENT SITE

WMATA invites proposals for the joint development sites located at the \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ Metro Stations and more fully described in this Part of this Joint Development Solicitation. The offering does not include the Metro Station itself.

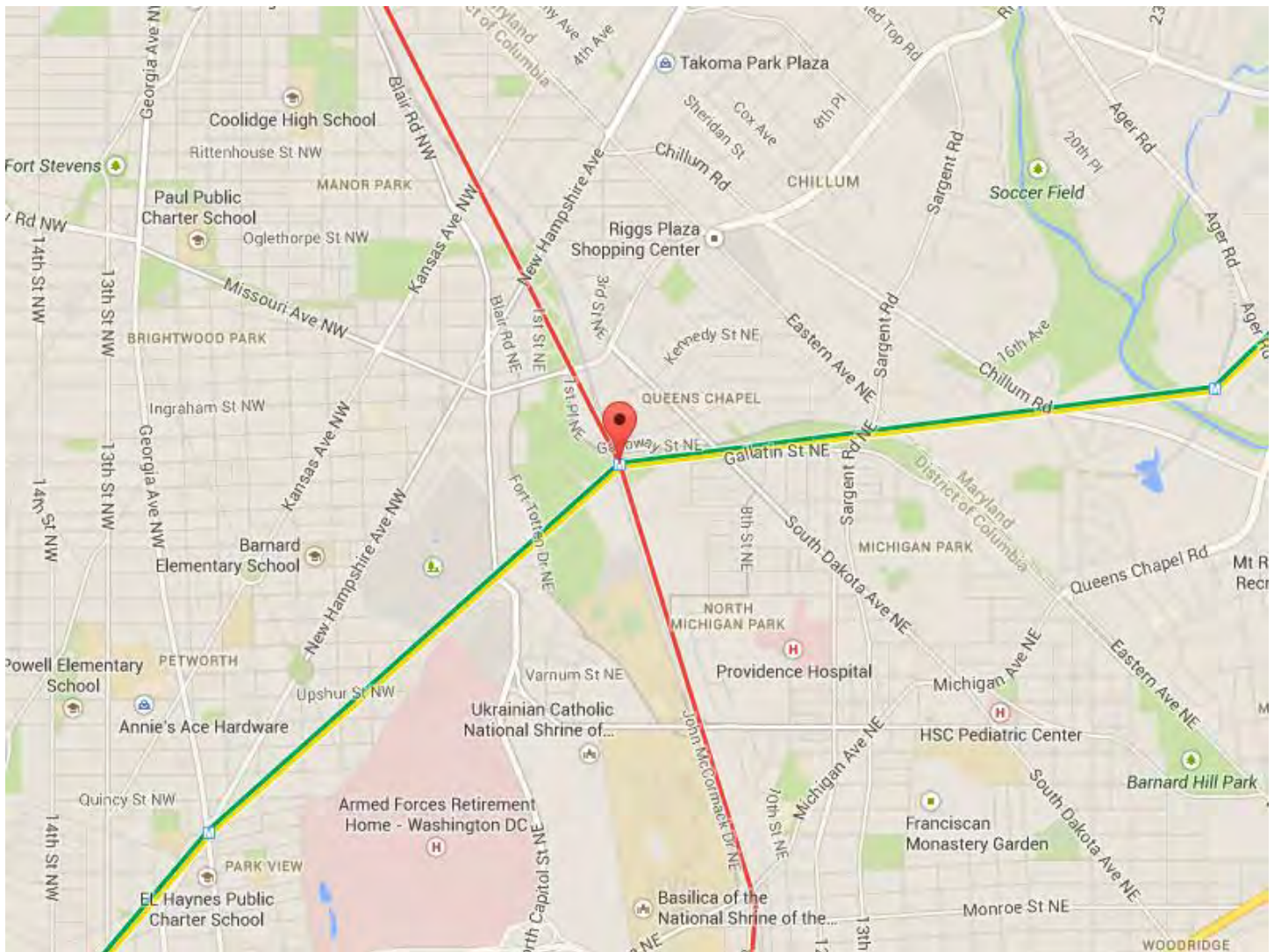
The site description provides guidance on WMATA's own projections of the development potential of the site. WMATA's projections have been shaped through an internal evaluation with participation from an outside consultant. WMATA's analysis considered existing site conditions, current zoning and land use requirements, a desire to place transit-supportive uses as close as possible to the Metro Stations, WMATA's own knowledge of existing and anticipated transit operations and facilities at the site, and compliance with the requirements of this Joint Development Solicitation. The intent is to provide potential Developers with a framework that will facilitate the compatibility of their offers with WMATA's own development objectives. However, WMATA's evaluation is by no means intended to be exclusive of other views, and Developers are invited to submit offers that creatively address the development potential of the site in ways other than presented by WMATA. Developers should submit proposals that they consider desirable, appropriate and feasible.

The site information provided is not expected to take the place of a due diligence investigation by an interested Developer. The information provided is not intended to be all-inclusive nor a representation or warranty by WMATA. Any such representation or warranty is disclaimed.

## FORT TOTTEN METRO STATION (RED AND GREEN/YELLOW LINES) JOINT DEVELOPMENT SOLICITATION #2014-04

### Overview

The Fort Totten Metro Station is located in the District of Columbia's Ward 5 in the Fort Totten neighborhood. This Metro Station is a transfer station served by the Green, Yellow, and Red Lines.



The potential joint development site is a 3.35-acre parcel located at 1<sup>st</sup> Place, NE and Galloway Street, NE, west of the Metro Station. The site is shown in Figure 1 below as the West Parcel.

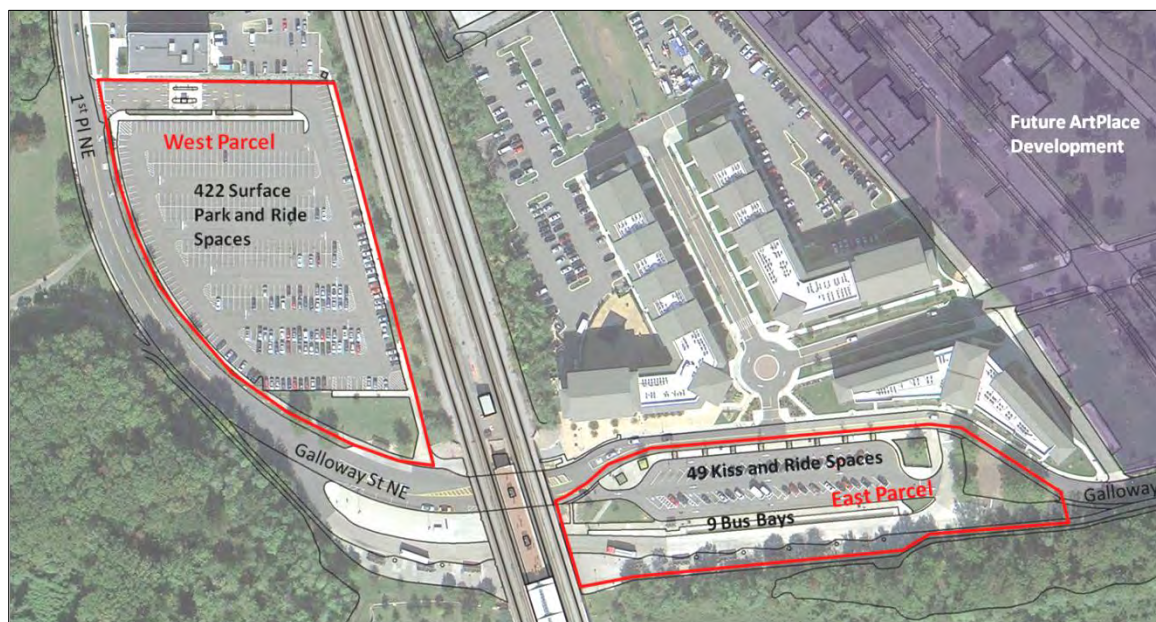


The West Parcel is one block south of the busy Riggs Road, NE and South Dakota Avenue, NE intersection, in close proximity to North Capitol Street. The Metro Station entrance and platform are just southeast of the joint development parcel along Galloway Street, NE. There is pedestrian access to the Metro Station area from Galloway Street, NE and 1<sup>st</sup> Place, NE. There is also a pedestrian walkway through Fort Totten Park to the west of the Metro Station. Existing transit facilities on the site include 422 surface Park & Ride spaces.

The West Parcel is relatively flat with very limited green space; however it is adjacent to the large open space of Fort Totten Park to the west.

WMATA also owns a parcel to the east of the Red Line and CSX rail rights-of-way and south of Galloway Street, NE. This East Parcel is also shown on Figure 1. It accommodates this Metro Station's Kiss & Ride spaces and a bus loop. **The East Parcel is not being offered in this Joint Development Solicitation and Developers should not include it in their Proposals.** Assume that WMATA will continue its current use of the East Parcel.

Figure 1: Fort Totten Existing Station Site



## Development Requirements and Guidelines

### Development Intent and General Requirements

WMATA seeks to achieve a substantial, predominantly residential joint development project on the West Parcel, compatible with surrounding development, including the mixed use projects planned north and east of the Metro Station.

The Metro Station's existing Park & Ride facility is a surface lot that occupies the West Parcel. Under a joint development plan, the spaces are to be consolidated in a Park & Ride garage of at least 425 spaces to be built on the same parcel, freeing up most of the parcel's 3.35-acre footprint for development. WMATA's intent is that the Selected Developer design, finance, and

build the Park & Ride garage and any other affected station improvements in accordance with WMATA standards and review.

Again, the East Parcel containing the bus loop and Kiss & Ride is not part of this Joint Development Solicitation and should not be incorporated into any Proposal.

### Use, Density, and Massing

The joint development program should consist predominantly or entirely of multifamily housing, which may be rental, ownership, or a combination of both. Density should be maximized, consistent with the site's CR zoning. WMATA envisions a development of approximately 300 residential units in structures of up to seven stories. Consistent with zoning, a larger number of units may be proposed provided their scale and character are compatible with current and proposed development in the Metro Station area.

The development is required to comply with the District of Columbia Inclusionary Zoning Program, as set forth in the DC Municipal Regulations (Title 11, Chapter 26, Inclusionary Zoning, and Title 14, Chapter 22, Inclusionary Zoning Implementation). To facilitate compliance, the Inclusionary Zoning Program allows a schedule of bonus densities. The current inclusionary requirement in the CR zoning district is the greater of 8% of the residential gross floor area or 50% of the bonus density utilized.

The development program may also include a childcare center and street-level retail. The latter is particularly encouraged toward the southern end of the site, closest to the station entrance and bus loop.

WMATA may want to reserve 5,000-10,000 square feet of office space for an emergency response center. Any financial offer should include an alternative scenario in which this option is exercised.

Parking for the joint development shall be provided in an on-site structure(s). This parking structure(s) may be either (i) a stand-alone, dedicated garage, separate from the Park & Ride garage also to be constructed, built above or below-grade and not visible from Galloway Street, NE or 1<sup>st</sup> Place, NE along the western frontage of the site, or (ii) one or more dedicated floors of a combined joint development/Park & Ride garage structure, as described below.

Parking for the residential program shall be provided at a ratio consistent with market conditions and District of Columbia requirements. In the CR zoning district, the minimum parking requirement for apartment buildings is one space per three dwelling units. If the development includes ground-level retail, parking for such retail shall not exceed 1.5 spaces per 1,000 square feet of retail space. The schedule of minimum parking requirements in the District of Columbia is provided in DC Municipal Regulations Title 11, Chapter 21, 11-2101.

Except to the extent that parking is provided in a shared structure, all private development amenities, parking, loading, and service facilities shall be independent of WMATA Facilities. (If parking is provided in a shared structure, the Park & Ride facility shall be operated by WMATA.) New buildings shall be separated from WMATA Facilities by the distance established by the WMATA *Adjacent Construction Project* Manual and operable windows or balcony edges of the development shall be set back a minimum of 50 feet from the centerline of the Metro tracks.

## WMATA Park & Ride Facilities

The existing surface Park & Ride lot must be replaced by an on-site Park & Ride garage of at least 425 spaces. The current Park & Ride utilization is 105%; hence the need for at least the current number of parking spaces. The Selected Developer shall design, finance, and construct the Park & Ride garage, which, as previously noted, shall be either:

- a dedicated, stand-alone Park & Ride garage with its own access/egress drive; or
- a combined garage structure, in which the Park & Ride and joint development parking have separate, exclusive access/egress routes (whether located on different floors or sharing a floor(s)).

In either option, WMATA will operate the Park & Ride facilities. The Selected Developer may operate the separate joint development parking. The Selected Developer shall configure the Park & Ride as an “open parking structure” for building code purposes. Illustrative concept plans demonstrating these two options are shown below.

Existing WMATA-operated parking meters must be retained or replaced for WMATA’s benefit. Any new meters must use modern payment, monitoring and space-sensor technology.

## Transit Operations and Vehicular Circulation

The bus bays, Kiss & Ride, short-term parking, and taxi area for the Fort Totten Metro Station are located south and east of the Metro tracks and are not physically affected by this joint development initiative.

Roadways may need to be widened and improved to accommodate WMATA’s current standards for buses.

Potential vehicular circulation patterns are illustrated below (Figures 5 and 6). These figures show allowable access and egress points, which are approximate; the exact location and geometry are to be determined in consultation with WMATA. The following requirements apply:

- The Park & Ride access/egress drive shall remain in its current approximate location, connecting with 1<sup>st</sup> Place, NE along the northern edge of the site.
- The joint development access/egress point on 1<sup>st</sup> Place, NE shall be located at least 200 feet from each of the Park & Ride ingress/egress points to the north and the Galloway Street, NE bus loop entrance to the south. The joint development vehicular access shall be separate from the Park & Ride access, even if the two parking uses are provided in a single structure.
- The Selected Developer shall secure all entitlements and shall design and construct any roadway modifications necessitated by the project, including but not limited to new or modified curb cuts, automobile turning lanes to or from 1<sup>st</sup> Place, NE, and new or modified signalization and signage.

- Loading facilities for the development shall be configured so that trucks can enter the loading facilities without backing in from public roadways.

### Pedestrian and Bicycle Circulation

Pedestrian circulation at the Fort Totten Metro Station is somewhat complex because the joint development site, the future Park & Ride, the bus loop, the Kiss & Ride, and the Metro Station entrance are on different parcels. The joint development site plays an important role in assuring safe and convenient pedestrian connections. As shown in Figures 5 and 6:

- There is a key pedestrian corridor alongside the rail line connecting the Park & Ride to the southern end of the site on Galloway Street, NE, from which pedestrians may proceed to the bus loop or Metro Station entrance. The Selected Developer shall provide a continuous, shaded sidewalk with clear width not less than 18 feet in this corridor, with open sight lines and with lighting, paving, and wayfinding signage acceptable to WMATA.
- If the Park & Ride garage is a dedicated garage structure at or near the northern end of the site, the sidewalk along the rail line shall also provide one or more accessible pedestrian entrances into the development area.
- The sidewalk along the western frontage of the site, on 1<sup>st</sup> Place, NE and Galloway Street, NE, shall be at least 15 feet wide, with lighting, paving, and wayfinding signage approved by WMATA and the District Department of Transportation (DDOT).
- A pedestrian plaza shall be provided and maintained at the southern end of the site.

The Fort Totten Metro Station currently has six bicycle lockers and inverted “U” racks for 10 bicycles. The joint development project shall double the number of existing bike racks and bike lockers and provide a Bike & Ride facility meeting WMATA specifications. Bike facilities shall be located in a location convenient to the station entrance and the nearby Metropolitan Branch Trail segment.

A development plan should improve bicycle connectivity between this Metro Station and the surrounding area. Refer to WMATA’s *Bicycle and Pedestrian Access Improvement Study* (available on WMATA’s website, [www.wmata.com](http://www.wmata.com), click on “About Metro,” then click on “Planning & Development” and then scroll down to “Station Area Plans and Access Improvement Studies”). In particular, bike lanes to create connectivity to bike trails in the area are encouraged.

### Environmental Requirements

The sidewalks along the rail corridor and along the street frontage shall be planted with trees acceptable to WMATA and DDOT.

### Illustrative Concept Plans

For purposes of illustration, WMATA has analyzed and tested two potential joint development



concept plans (Illustrative Concepts A and B), which reflect the two basic options for providing structured parking for WMATA customers and the joint development — separate, stand-alone garages, or a combined structure. Illustrative Concept A is shown in Figure 2, and Illustrative Concept B is shown in Figure 3. The vehicular circulation patterns associated with Illustrative Concepts A and B are shown in Figures 5 and 6, respectively.

Either concept would accomplish WMATA's goals for this project. In preparing their proposed development plans, respondents may use either concept as a point of departure, "mix and match" features from both concepts, or introduce new concepts subject to the specific requirements stated in the preceding sections.

The illustrative concepts show general layout options for Park & Ride and vehicular circulation. The Selected Developer shall work with WMATA to further refine the selected concept to ensure that these facilities meet WMATA requirements. The principal differences between the two concepts are as follows:

#### Illustrative Concept A

- The Park & Ride garage and joint development garages are separate, stand-alone structures, each with its own dedicated access/egress point.
- The Park & Ride garage is located in the northeast portion of the West Parcel, alongside the rail corridor and separated from all joint development structures.
- The remaining joint development footprint is approximately 2.3 acres in size.
- The joint development has dedicated parking within the development footprint, not visible from the street. It has its own access and egress from 1<sup>st</sup> Place, NE.
- The sidewalk alongside the rail corridor from the Park & Ride to the Metro Station is approximately 400 feet long, with multiple pedestrian entrances into the development.

#### Illustrative Concept B

- A single garage structure accommodates both Park & Ride and joint development parking. As shown here, these two uses are isolated from one another on dedicated floors (the first two levels for Park & Ride, the third level for the private joint development), each with its own dedicated access/egress point. However, shared floors are permitted if the spaces and access are physically separated.
- The combined garage serves as an air rights development platform covering most of the west parcel, other than the Park & Ride driveway on the north and a public plaza at the southern tip. Counting areas where development occurs at-grade, a footprint of approximately 2.75 acres is available for development.
- The garage structure is set back from the street frontage along Galloway Street, NE and 1<sup>st</sup> Place NE so that it can be "wrapped" with development that begins at street level. The garage has pedestrian entrances from the sidewalk.

Figure 2: Fort Totten, Illustrative Concept A

- A development opportunity of 2.3 acres remains after the WMATA garage is built
- Stand-alone WMATA Park & Ride replacement garage, with 425 spaces minimum
- Development parking and access independent of WMATA Facilities
- 25-foot clear between WMATA garage and any other structure
- Approx. 300 residential units, 6-7 stories
- Daycare or street-level retail allowed



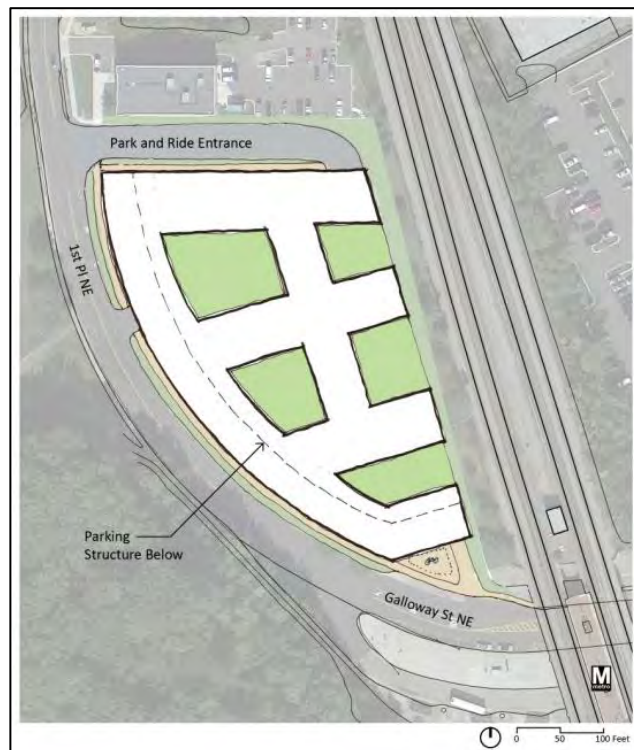
Figure 3: Fort Totten, Illustrative Concept B

### Ground Floor

- A development footprint of 2.75 acres available
- A three-level shared-use garage covers most of the site, except street frontage, Park & Ride driveway, public plaza
- WMATA Park & Ride has dedicated use of first two levels, 425 spaces minimum
- Approx. 300 residential units, including construction on top of garage
- Development “wraps” the street frontage
- Daycare or street-level retail allowed



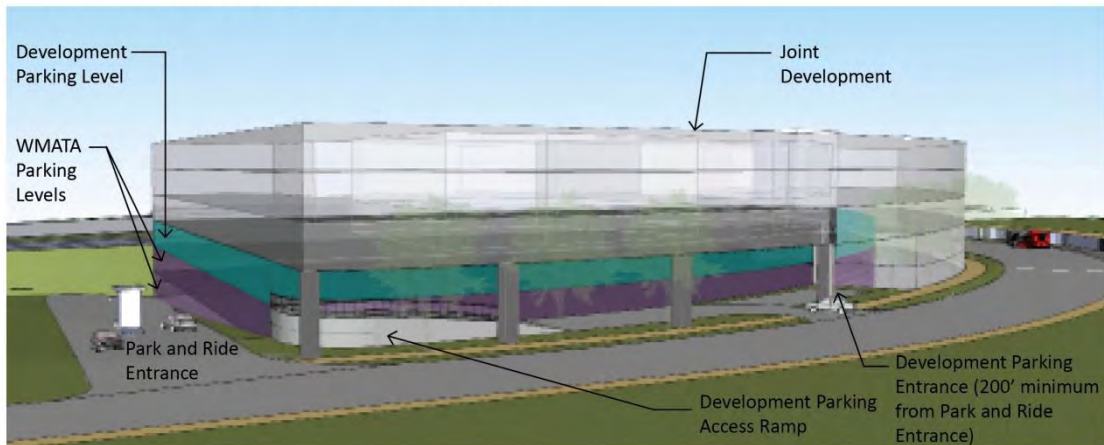
### Upper Floors



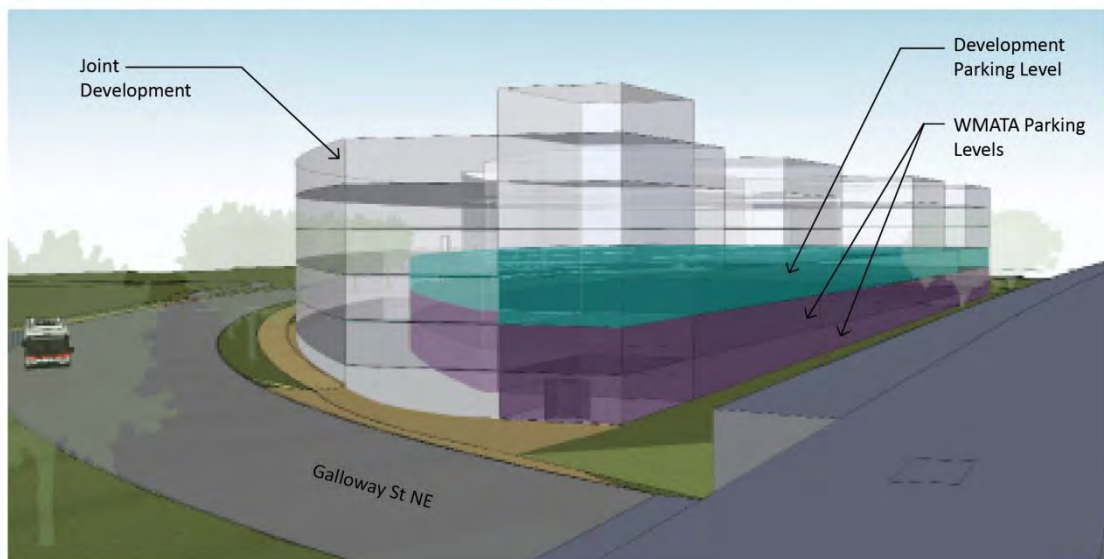
The massing diagrams in Figure 4 below illustrate the three-dimensional relationships among the garage and development components in Illustrative Concept B. (No massing diagram is provided for Illustrative Concept A.)

Figure 4: Fort Totten, Illustrative Concept B Massing Diagrams

### View from Park and Ride Entrance



### View from Station Platform

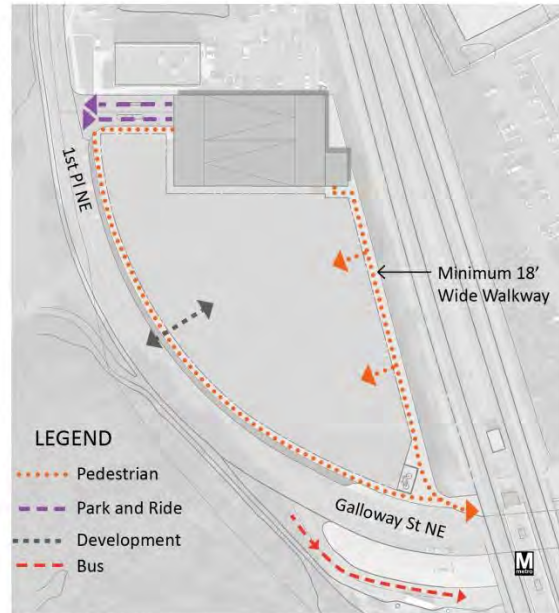




Figures 5 and 6:  
Site Circulation, Illustrative Concepts A and B

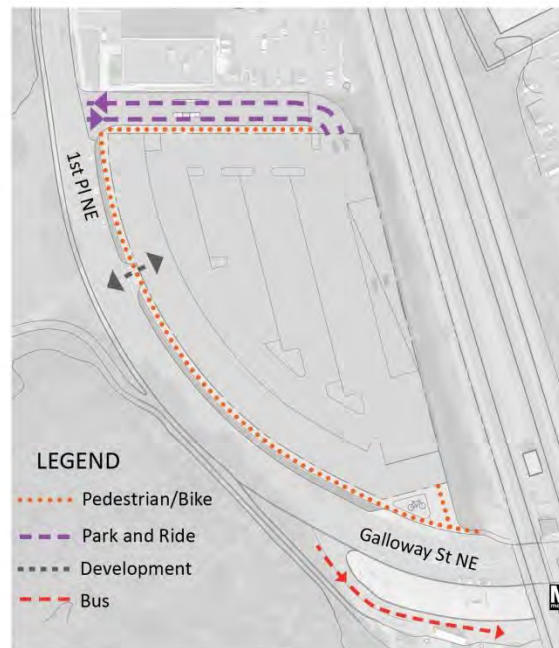
### Fort Totten Concept A Circulation Diagram

- Development access from 1st Pl, NE, not within 200' of Bus or Park and Ride entrance
- Intermediate accessible pedestrian openings into development from sidewalk between garage and station entrance
- Sidewalk between garage and station entrance may be used for development fire access



### Fort Totten Concept B Circulation Diagram

- Development access from 1st Pl, NE, not within 200' of Bus or Park and Ride entrance
- Development access to garage must be independent of WMATA access
- Development parking spaces must be separate from WMATA parking spaces within the garage



## Design Review, Construction Staging, and Interim Operations

The Selected Developer shall prepare and submit to WMATA detailed plans for construction-period staging, maintenance of traffic, and interim operations for WMATA review and approval in compliance with the WMATA *Adjacent Construction Project Manual* and the following:

- If a stand-alone Park & Ride garage is chosen, it must be constructed first, and the existing surface Park & Ride facilities must remain in operation to the greatest degree possible until the Park & Ride garage is completed and placed in service.
- Contractor parking will not be allowed in WMATA facilities and contracts with contractors should specifically so state. Construction plans submitted to WMATA shall show off-site locations for contractor parking.
- A Metro Transit Police Department stationhouse is located north of the offered western parcel and must not be disturbed. Access between the stationhouse and this Metro Station must also be preserved.

## Site Profile

### Area Demographics

This Metro Station serves a well-established community. Homes include low-density, single-family detached homes east of South Dakota Avenue and north of Riggs Road, as well as medium-density apartment buildings directly adjacent to the Metro Station. The neighborhood to the west of the Metro Station maintains a strong residential fabric, and the area is served by scattered commercial uses.

	Fort Totten Station	
	1-Mile Radius	2-Mile Radius
Population	31,213	130,283
Households (HH)	12,698	49,344
Average Persons per HH	2.34	2.53
Average HH Income	\$63,815	\$69,047
Median HH Income	\$52,128	\$59,324
Employment	9,421	42,758

(The above demographic data is from the 2010 Census and MWCOC Round 8.2 2013 Cooperative Forecasts.)

### Planning and Zoning Context

The parcel being offered for joint development is within the Fort Totten Overlay District. It is zoned CR. That allows for a maximum height of 90 feet and an FAR of 6.0. The CR district

permits matter-of-right residential, commercial, recreational, and light industrial development to a maximum lot occupancy of 75% for residential use, 20% for public recreation and community center use (up to 40% with Board of Zoning Adjustment approval), and 100% for all other structures. There are also bonus density provisions. The Comprehensive Land Use Map supports medium density mixed-use development around the Metro Station.

Two relevant planning documents include the Riggs Road & South Dakota Avenue Area Development Plan, adopted by DC Council in 2009, and the WMATA 2010 Fort Totten Access and Joint Development Study. The WMATA Study identified station access improvements as well as potential joint development opportunities at the Metro Station, and the Small Area Plan identified a vision for the broader neighborhood. The WMATA Study is available on WMATA's website, [www.wmata.com](http://www.wmata.com) (click on "About Metro", then click on "Planning and Development" and scroll down to "Station Area Plans").

### Development and Amenities

The area has recently experienced higher density development adjacent to the Metro Station. The Aventine Fort Totten, completed as a joint development project in 2007, is a three-building, garden-style apartment complex with over 300 rental units as well as ground-floor retail space. Between South Dakota Avenue and the Metro Station, the Riggs Plaza apartments will be redeveloped as ArtPlace at Fort Totten. The 16-acre project will contain 929 apartments, 305,000 square feet of retail, and 217,000 square feet of cultural space. In addition, Fort Totten Square will include 350 apartments above a Wal-Mart and structured parking at South Dakota Avenue and Riggs Road, a ten minute walk from this Metro Station.

The Walk Score, which measures pedestrian access to neighborhood amenities, for Fort Totten is 52 out of 100; however the area has the potential to become a model of transit-oriented development over the next 5-10 years with new mixed-use construction.

The District Department of Transportation has completely rebuilt the South Dakota Avenue and Riggs Road intersection to make it safer for pedestrians, replacing freeway-style ramps with crosswalks, sidewalks, benches, and improved lighting.

### Transportation Advantages

The Fort Totten Metro Station provides transit access to the area with service from both the Green/Yellow and Red Lines. Via the Red Line, the Gallery Place-Chinatown Metro Station is a 13 minute trip. Via the Green/Yellow Lines, the Gallery Place-Chinatown Metro Station is also a 13 minute trip and L'Enfant Plaza is a 16 minute trip.

Average weekday Metrorail boarding at this Station in May 2014 was 7,976. (For additional information, WMATA publishes average weekday boarding information for each Metro Station at <http://www.wmata.com/pdfs/planning/2014%2010%20Year%20Historical%20Rail%20Ridership.pdf>.)

The primary mode of access to this Metro Station is bus. There are 17 regular Metrobus routes and one MetroExtra limited stop route that serve this Metro Station. More detailed information about bus service to this Metro Station may be found at [http://www.wmata.com/rail/station\\_bus\\_maps/PDFs/Fort%20Totten%20Station.pdf](http://www.wmata.com/rail/station_bus_maps/PDFs/Fort%20Totten%20Station.pdf).

A Capital Bikeshare station is proposed for this Metro Station on the West Parcel. Capital Bikeshare stations can be relocated on site to suit development footprints.

DDOT is also planning on constructing a segment of the Metropolitan Branch Trail that will run just west of this Metro Station. The Metropolitan Branch Trail is an eight-mile hiker-biker trail that runs from Union Station in the District of Columbia to Silver Spring in Maryland. Travel time from Fort Totten to Union Station via the trail is 30 minutes by bike.

The site has direct vehicular access to Riggs Road, NE and South Dakota Avenue, NE via 1st Place, NE or Galloway Street, NE. South Dakota Avenue, NE is a principal arterial carrying on average 16,400 vehicles per day. Riggs Road, NE is also a principal arterial carrying on average 28,800 vehicles per day.

### **Jurisdictional Contacts**

DC Office of Planning  
1100 4th Street, SW  
Suite E650  
Washington, DC 20024  
Email: [planning@dc.gov](mailto:planning@dc.gov)  
Phone: (202) 442-7600  
Fax: (202) 442-7638



# PART THREE. PROPOSAL SUBMISSION REQUIREMENTS

## SECTION 1: ADMINISTRATIVE INFORMATION

### 1.1 Joint Development Policies and Guidelines

This Joint Development Solicitation is issued in accordance with WMATA's *Joint Development Policies and Guidelines*, which are available at [www.wmata.com/realestate](http://www.wmata.com/realestate) (click "Policies and Forms"). Please note that capitalized terms used in this Joint Development Solicitation are generally defined in **Section 6 of this Part Three**.

### 1.2 Purpose and Scope of Joint Development Solicitation

This Joint Development Solicitation is intended to provide interested Developers with sufficient summary information about WMATA's requirements to facilitate preparation of a Proposal for any one or more Joint Development Sites. However, this Joint Development Solicitation does not attempt to define all of WMATA's Joint Development contract requirements in detail.

If more than one Joint Development Site is offered via this Joint Development Solicitation, a Developer may submit a Proposal on any one or more of the offered Joint Development Sites but is not required to make a Proposal for all the Joint Development Sites. Choosing a Selected Developer will be done independently for each Joint Development Site. (However, if a particular Joint Development Site consists of more than one parcel and the description of that Joint Development Site in this Joint Development Solicitation requires that more than one parcel within that Joint Development site be included in a Proposal, then multiple parcels must be included in a Proposal for that particular Joint Development Site.)

The sites in this Joint Development Solicitation are available primarily under a long-term ground lease. WMATA's preference is to ground lease rather than sell its property. Therefore, all offers must include a ground lease offer and may, at the offeror's option, include a sales offer. If a sale is proposed, the Proposal must clearly demonstrate why a sale is more advantageous to WMATA than a long-term ground lease. The development of residential condominiums in the past has been a common situation in which WMATA considers land sales to enhance the feasibility of the proposed use.

### 1.3 Amendments and Supplements to Joint Development Solicitation

WMATA reserves the right to issue amendments and/or supplements to this Joint Development Solicitation. If an amendment or supplement is issued before the closing date for submission of Proposals, the amendment or supplement will be posted to the [www.wmata.com/realestate](http://www.wmata.com/realestate) web site. If, after the closing date for submission of Proposals, WMATA issues an amendment and/or supplement, it will only be sent to Developers who submitted responsive Proposals for the specific Joint Development Site for which the amendment and/or supplement is being issued. Developers may be required to acknowledge in writing the receipt of an amendment and/or supplement.

### 1.4 Developer's Acceptance of Terms and Conditions

By submitting a Proposal, a Developer is deemed to have agreed to and accepted all terms and conditions set forth in this Joint Development Solicitation and any amendments or supplements issued before the Proposal is submitted.

## 1.5 WMATA's Acceptance/Rejection of Proposals

This Joint Development Solicitation does not commit WMATA to designate a Selected Developer or to enter into a Development Agreement. WMATA reserves the right to accept or reject any or all Proposals. Rejection of a Proposal need not be by an affirmative act on WMATA's part but, as more fully discussed below, WMATA will return the Proposal Security posted by any Developer who is not designated as a Selected Developer. WMATA also reserves the right to reissue this Joint Development Solicitation, issue a different Joint Development Solicitation containing one or more of the same sites, or withdraw a site from being offered, in WMATA's sole and absolute discretion.

## 1.6 Selected Developer Status

A designation as Selected Developer for a Joint Development Site is made by the WMATA Board of Directors, not by WMATA staff. A designation by WMATA staff is only in the nature of a recommendation to the WMATA Board of Directors and is contingent upon Board approval. Designation as Selected Developer does not mean WMATA accepts the Proposal without further negotiation. Rather, the Proposal and the designation are the foundation for further negotiation. WMATA reserves the right to negotiate a Development Agreement with a Selected Developer containing benefits to WMATA that exceed those set forth in the Proposal. (Also see **Sections 1.7 and 1.8** and the definition of "Selected Developer" in **Section 6 in this Part Three**.)

The Developer must pay WMATA an option fee of One Hundred Thousand Dollars (\$100,000) for the right to negotiate a Development Agreement if and when the Developer is designated as the Selected Developer by the WMATA Board of Directors. This fee is nonrefundable except as set forth in **Section 2.7.D of this Part Three**. This fee is in consideration of the right to negotiate a Joint Development Agreement. This fee is addition to, and is separate and distinct from, the other payments, deposits and fees which WMATA requires (including the Proposal Security), the consideration payable to WMATA for the ground lease or purchase price, closing costs and any other sums payable by the Developer. Failure to pay this fee promptly upon designation as Selected Developer will entitle WMATA to terminate that designation in WMATA's sole and exclusive discretion.

## 1.7 Approval of WMATA Board and FTA

The designation of Selected Developer and the terms of a Development Agreement negotiated pursuant to this Joint Development Solicitation are subject to the approval of the WMATA Board of Directors and the FTA. In the case of any Joint Development Site that also includes property owned by a third party, the approval of that third party is also required.

## 1.8 Binding Agreement

An executed Development Agreement approved by the WMATA Board of Directors and by the FTA is the only binding commitment of and by WMATA with respect to a Joint Development Site. Designation of a Selected Developer, WMATA's agreement to a Term Sheet, or any conduct or oral representations by WMATA shall not in any way constitute a binding obligation or commitment by WMATA. By submitting a Proposal, the Developer acknowledges it will have no legal or equitable right to, or interest in, any Joint Development Site except as set forth in an executed Development Agreement. In addition, in the case of a Joint Development Site that is owned in part by a third party, no equitable right to, or interest in, that Joint Development Site exists unless and until that third party joins in the transaction in accordance with its own processes.

## 1.9 Costs

WMATA and any third party owning any part of a Joint Development Site shall not be liable for any costs incurred by a Developer and/or Development Team responding to this Joint Development Solicitation or any costs incurred with respect to the negotiation of the Development Agreement and related final documentation. Each Developer and each Selected Developer and its Development Team shall bear all of its/their own costs in that regard.

## 1.10 Site Visits and Inspections

Many areas of Joint Development Sites are open to the public in the normal course of WMATA's transit operations. Those areas may be visually inspected by Developers during the hours they are open to the public. All other inspections of Joint Development Sites may be arranged by contacting WMATA as stated in **Section 1.13** below and by obtaining a *Right of Entry Agreement* (for non-invasive inspections and testing) or a *Real Estate Permit* (for invasive inspection and testing) from WMATA. In the case of any Joint Development Site that is also owned in part by a third party, entry and inspection on that third party's property also requires its agreement.

## 1.11 Schedule of Activities

Deadline for receipt of written inquiries	_____, 201_, 5:00 pm
Deadline for Initial Proposal submission	_____, 201_, 1:30 pm
Meetings with Developers (if required)	To follow if required
Final Proposals (if required) due	To be determined by WMATA

## 1.12 Pre-Proposal Conference

This Joint Development Site having been previously and fairly recently offered, no pre-Proposal conference is scheduled for this particular Joint Development Solicitation. Developers with questions should follow the process set forth in **Section 1.13** below.

## 1.13 Inquiries

Inquiries concerning this Joint Development Solicitation should be submitted by e-mail to [realestate@wmata.com](mailto:realestate@wmata.com). (This applies only to inquiries. The Proposals themselves must be submitted as set forth in **Section 2 of this Part Three**.)

The deadline for receipt of written inquiries is set forth in **Section 1.11** above. Information that WMATA believes to be of general interest or applicability may be shared publicly. Oral explanations or responses are not binding. WMATA assumes no responsibility for interpretations of this Joint Development Solicitation made by prospective Developers.

## 1.14 Who Should and Should Not Submit Proposals

Developers should be experienced in the development of projects comparable to the Project proposed by the Developer in response to this Joint Development Solicitation. Professional service providers, building contractors, or other non-developers should not respond to this Joint Development Solicitation on their own but should be identified as part of a Developer's Development Team as more fully discussed below.

### **1.15 Ownership and Use of Proposals**

All Proposals become the property of WMATA and may be used as WMATA sees fit, whether or not that particular Proposal is selected.

## SECTION 2: PROPOSAL PREPARATION AND SUBMISSION

### 2.1 Complete Response Required

To be considered, a Developer must submit a complete response to this Joint Development Solicitation for each Joint Development Site in which that Developer is interested. As previously noted, **Part Two** of this Joint Development Solicitation contains what WMATA believes to be acceptable site-specific development parameters for each offered Joint Development Site, but Developers need not fit their Proposals into those parameters. WMATA encourages creative and innovative Proposals which promote Transit-Oriented Development consistent with local land use policies.

### 2.2 Hard Copy

The Initial Proposal must include the Proposal Security. The Proposal Security and one hard copy of each Volume of the Initial Proposal must be received by WMATA not later than the deadline stated in **Section 1.11** above for the submission of the Initial Proposal. The hard copies of each Volume shall be marked "Proposal" and reference the Joint Development Solicitation Number.

The hard copy of the Proposal must be submitted either unbound or in three-ring loose-leaf binders; do not submit a spiral-bound Proposal. All responses must be on standard 8-1/2" x 11" (letter-size) paper, bound lengthwise. Tabs should separate Sections. The contents of Volume 1 and Volume 2 of the Proposal Form (**ATTACHMENT A**), as explained below, should be in physically separate binders. The contents of each volume must comply with and be in response to the topics set forth in **Sections 3.1 and 3.2 of this Part Three**. Proposals should include the identical titles and numbering for each subsection as set forth in **ATTACHMENT A**.

Proposals should be straightforward and contain a concise delineation of the Developer's capability to satisfy the requirements of this Joint Development Solicitation. There is no page limit for any particular part of a response unless otherwise specifically noted, but the total number of pages must not exceed sixty (60) pages, not including any attachments specifically required by this Joint Development Solicitation and not including any renderings. The quality of the information is more important than the quantity. Failure to respond with the requisite information may result in a Developer being eliminated from consideration.

### 2.3 Electronic Copy

An electronic copy of the Proposal must also be submitted. The electronic copy must be in a flash drive, CD or DVD format that is compatible with computers running Microsoft Word 2010, Microsoft Excel 2010 and Adobe Reader XI. The electronic copy should be submitted with the hard copy.

### 2.4 Address for Submission

The package must be submitted to:

Contracting Officer  
Office of Real Estate and Station Planning  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, NW  
Washington, D.C. 20001

The contracting officer may designate a representative to physically accept delivery on his/her behalf.

Proposals may be submitted by mail, by overnight courier, or by hand.

## 2.5 Late Proposals

Timely receipt by WMATA is the Developer's responsibility. Any Proposal received by WMATA after the deadline set in **Section 1.11** shall be considered a late Proposal. A late Proposal may be accepted and evaluated, or rejected, by WMATA in WMATA's sole and absolute discretion.

## 2.6 Display Materials for Meetings

Developers may be required to provide WMATA with displays, poster boards, other visuals, printed material and similar material that may be useful for discussions and meetings between WMATA and jurisdictional representatives and interested community organizations. (Developers will not necessarily be invited to those meetings.)

## 2.7 Proposal Security

- A. Deposit Required: Each Proposal must be accompanied by Proposal Security in the amount of One Hundred Thousand Dollars (\$100,000). (However, as set forth in more detail in **Section 2.8 of this Part Three**, alternative Proposals for the same Joint Development Site require only one Proposal Security.) Acceptable forms of Proposal Security are a bank letter of credit in the form set forth in **ATTACHMENT B**, a cashier's check or a certified check. All Proposal Security must be drawn on a U.S.-based national bank and contain, on the top of Proposal Security document, the Joint Development Solicitation Number and the Joint Development Site name. WMATA will deposit all cash funds into a financial institution of its choice. Interest will not be paid on the Proposal Security. (The Proposal Security is separate from and in addition to the nonrefundable option fee, discussed in **Section 1.6 of this Part Three**, that the Selected Developer will be required to pay upon being so selected.)

A Developer that submits the Proposal Security in the form of a check (instead of as a letter of credit) are advised to also register as a vendor with WMATA so that the cash Proposal Security can be refunded to you if you are not the Selected Developer. Please follow these instructions to register as a vendor:

Payments: In order for WMATA to make payments to any entity, the entity must register itself into our Vendor System here:

[http://wmata.com/business/procurement\\_and\\_contracting/vendor\\_registration.cfm](http://wmata.com/business/procurement_and_contracting/vendor_registration.cfm) under New Vendor Registration. Once the vendor has been successfully entered (it takes about 7 minutes), please send us a confirmation email so that we can have it activated

W-9: Please send us a copy of the entity's W-9

EFT: WMATA requires all payments to be made via Electronic Fund Transfers; please fill out the attached EFT form (**ATTACHMENT C**) and return to us

- B. Return to Non-Selected Developers: No later than fifteen (15) business days after the WMATA Board of Directors identifies and approves the Selected Developer for a specific Joint Development Site, the Proposal Security will be returned to all Developers other than the designated Selected Developer who (i) if the Proposal Security was submitted as a cash payment or by check, submitted the information required by **Section 2.7.B** in order to obtain a refund, and (ii) made Proposals on that Joint Development Site. WMATA shall retain the designated Selected Developer's Proposal Security until a Development Agreement is executed and provisions are made with respect to the disposition of the Proposal Security in the Development Agreement.
- C. Return to Selected Developer for Non-Approval: If closing fails to occur because of the failure of

the WMATA Board of Directors or the FTA to approve the transaction on the terms and conditions set forth in this Joint Development Solicitation, the proposed transaction shall be automatically terminated and WMATA shall return the Proposal Security. (If the Proposal Security was submitted as a cash payment or by check, the Developer must submit the information required by **Section 2.7.B** in order to obtain the refund.) All rights of the Selected Developer under this Joint Development Solicitation shall terminate.

- D. Return to Selected Developer for WMATA Default: If closing fails to occur due to a default by WMATA, the Selected Developer's sole right and remedy shall be to terminate negotiations with WMATA and demand return of the Proposal Security and any otherwise nonrefundable option fee previously paid by the Developer. Except for the Selected Developer's entitlement to the return of the Proposal Security and any previously paid option fee, all rights of the Selected Developer under this Joint Development Solicitation shall terminate. (If the Proposal Security was submitted as a cash payment or by check, the Developer must submit the information required by **Section 2.7.B** in order to obtain the refund.)
- E. Forfeiture to WMATA: If closing fails to occur for any reason other than those stated in the preceding **Section 2.7.B-D**, WMATA shall retain the Proposal Security and any option fee previously paid by the Developer.

## 2.8 Multiple or Alternative Proposals

A Developer may submit multiple Proposals for one Joint Development Site and, if more than one Joint Development Site is offered in a Joint Development Solicitation, may submit Proposals for more than one Joint Development Site. Each Proposal must be separately identified and submitted in accordance with the terms of this Joint Development Solicitation.

Each Proposal must include the requisite Proposal Security. Each Proposal Security applies to a specific Joint Development Site, not to a specific Proposal. A Developer can only win one award for a Joint Development Site but a Developer could be awarded multiple Joint Development Sites. Therefore, if a Developer submits alternative Proposals for the same Joint Development Site, only one Proposal Security for that Joint Development Site is required. If a Developer submits Proposals for more than one Joint Development Site, a separate Proposal Security must be posted for each Joint Development Site for which a Proposal is submitted.

## 2.9 Developer's Certifications

By submitting a Proposal in response to this Joint Development Solicitation, a Developer is deemed to be making each and every one of the following certifications. These certifications are a material representation of fact upon which reliance will be placed by WMATA. The Developer shall provide immediate written notice to WMATA if at any time it learns that its certification was erroneous when submitted or has become erroneous since that time. If it is later determined that the Developer knowingly rendered an erroneous certification or failed to notify WMATA if and when the Developer gained knowledge that its certification was erroneous when submitted or has become erroneous since that time, then, in addition to any other remedies available to WMATA, WMATA may in its sole and absolute discretion terminate any contractual relationship relating to this solicitation with the Developer.

To the extent a Developer cannot make one or more of the following certifications, or wishes to clarify or modify one or more of the following certifications, the Developer must attach a statement to its Proposal expressly addressing the certification it cannot make or is clarifying or altering and explaining why and/or how. In the absence of any such express statement, all certifications will automatically be deemed made.

The Developer hereby certifies to the best of its knowledge and belief that it and any principal of the

Developer:

1. Is/are not presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from an award of contracts by any governmental entity.
2. Has/have not within the past ten (10) years been convicted of or had a civil judgment rendered against it for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a contract or subcontract with any governmental entity; violation of antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating criminal tax laws, or receiving stolen property.
3. Is/are not presently indicted for or otherwise criminally or civilly charged by a governmental entity with commission of any of the offenses enumerated in the previous paragraph.
4. Is/are not in arrears or default of payment of any money or obligation of a value greater than Three Thousand Dollars (\$3,000) to a governmental entity.
5. Has/have no adjudicated violations nor has paid penalties during the past ten (10) years relating to the housing and building laws, regulations, codes and ordinances of any governmental entity.
6. During the past ten (10) years has/have not had a license revoked that was issued in accordance with the housing, building or professional licensing laws, regulations, codes and ordinances of any governmental entity.

“Principal” means a partner, member, shareholder, officer, director, manager or other person with management or supervisory responsibilities or who is otherwise in a position to control or significantly influence the Developer’s activities or finances.

Be advised that WMATA reserves the right to conduct independent background checks on members of the Development Team.

The Developer further certifies:

- a. The Developer has not employed or retained any company or persons (other than a full-time, bona fide employee working solely for the Developer) to solicit or secure a Development Agreement; and
- b. The Developer has not paid or agreed to pay, and shall not pay or give, any company or person (other than a full-time, bona fide employee working solely for the Developer) any fee, commission, percentage, or brokerage fee contingent upon or resulting from the award of a Development Agreement; and
- c. No person or entity currently employed by WMATA, or employed by WMATA within the past twelve (12) months, or with material input into the matters covered by this Joint Development Solicitation and employed by WMATA at any time in the past: has provided any information to the Developer that was not also available to all other persons responding to this Joint Development Solicitation; is affiliated with or employed by the Developer or has any financial interest in the Developer; has provided any assistance to the Developer in responding to this Joint Development Solicitation; or will benefit financially if the Developer is the Selected Developer; and



- d. Neither the Developer nor any of its employees, representatives or agents have offered or given gratuities or will offer or give gratuities (in the form of entertainment, gifts or otherwise) to any director, officer or employee of WMATA with the view toward securing favorable treatment in the designation of a Selected Developer or in any determination made with respect to Developer selection, or in the negotiation, amendment or performance of the Development Agreement;
- e. The Developer agrees to furnish information relating to the above as requested by WMATA;
- f. If selected, the Developer will negotiate in good faith with WMATA; and
- g. The Developer has the power and authority to enter into a Development Agreement and all final documentation as required by WMATA without the consent or joinder of any other party or authority.

## SECTION 3: PROPOSAL FORMAT AND CONTENT

**Attachment A:** The Proposal Form that is **ATTACHMENT A** follows the evaluative format set forth below. Developers must use **ATTACHMENT A** (which they may put on their own word processing system) in submitting their Proposals. The following provisions of this Section are intended to provide Developers with useful information as to how each category might best be answered. Developers should note that the category headings in the left column of **ATTACHMENT A** are abbreviated compared to the information requested below; the headings in **ATTACHMENT A** are informational only, for guidance, and all of the information requested below should be included in the corresponding places in **ATTACHMENT A**.

### 3.1 Volume 1–Technical Information

**Table of Contents:** A table of contents should be included in Volume 1.

**Executive Summary:** Developers should also include an Executive Summary with Volume 1. The Executive Summary for Volume 1 should exclude all financial information and it may not exceed five (5) pages. The Executive Summary for Volume 1 should include an explanation of why WMATA should select the Developer and its Development Team and should specifically address the following points, which are elaborated on below:

- a. Development Team’s experience and prior performance
- b. Degree to which the Project reflects Transit-Oriented Development principles
- c. Compatibility of the Project with local requirements and the affected transit facilities
- d. Effects on WMATA Facilities
- e. Market/financial viability of the Project
- f. Innovation and creativity

The Executive Summary for Volume 1 should be written so that it can be disclosed, verbatim, by WMATA to the public.

#### a. Development Team’s experience and prior performance

**Tab 1: Identification of Developer and Development Team:** The Proposal must include a description of the Developer and the proposed Development Team, including names, addresses, telephone numbers and e-mail addresses of specific personnel, their experience and expertise, and the role of each principal member. The Development Team includes consultants, architects, counsel, brokers, engineers, surveyors, title companies, cost estimators, environmental consultants and other relevant service providers, to the extent known or expected at this stage. Please identify which Team members have worked on any other projects the Developer identifies in its Proposal as comparable to the proposed Project. If the Developer itself is a combination of different entities, the Proposal should explain which entity or person is in charge of the Project and/or of different components of the Project. (See **Section 5.19.C of this Part Three** regarding changes in the Development Team.)

#### **Tab 2: Developer’s Business Entity and Relationship with WMATA:**

A. The Proposal must also include a description of the Developer’s business entity as it currently exists and, if a different entity will be formed, details of the structure of this other entity to the extent known.

B. The Proposal must include a detailed description of how the Project’s ownership and management will be structured, if that is known or anticipatable. If that information is not known

or anticipatable, the Proposal should so state. (Changes in the composition of the Developer will be subject to **Section 5.19.C** below.)

C. The Proposal must identify the past, current or anticipated family, contractual or financial relationship of any member of the Development Team (including but not limited to the Developer, partners or co-venturers, and their respective officers, directors, partners, members, managers, shareholders and other principals and employees) with WMATA or any of its staff or Board Members. The Development Team also must disclose any family, contractual or financial relationship which may give the appearance of a conflict of interest.

D. The Proposal must identify any past or ongoing litigation, or knowledge of threatened litigation, between WMATA and any member, direct or indirect, of the Development Team, or state there is none. If such litigation exists or existed, the Developer must provide the name and case number of the litigation and a description of the subject matter.

E. The Proposal must list any projects on which the Developer, its parent company or any member of the Development Team has defaulted, declared bankruptcy or been adjudicated bankrupt and explain the default or bankruptcy.

F. The Proposal must include detailed information regarding any criminal indictments and felony or fraud convictions of the Developer or any officer, director, partner, member, manager, shareholder or other principal of any person or entity constituting a member of the Development Team.

G. The Proposal must identify any debarments for government contracts by any member, direct or indirect, of the Development Team.

**Tab 3: Previous Projects:** The Proposal must include illustrative materials on three recent successful projects of similar or comparable scope for which substantial financing was obtained. The cited projects must be completed projects in the sense that they have achieved substantial completion and received a certificate of occupancy (or equivalent) and preferably should be stabilized (or resold) projects; projects that are planned or under construction should not be used. State the sources and amounts of debt and equity capital that were raised in previous projects.

## **b. Development Concept**

Note that, in addition to the following standards, the Project will be required to meet certain sustainability requirements more fully set forth in **Section 5.23**.

**Tab 4: Site Plan and Land Uses:** Each Proposal must include a proposed site plan and a narrative description of land uses. In addition to the narrative, one jpeg on a disk, CD or drive, and one full color visual of the site plan at least two (2) feet by three (3) feet in size must accompany the Proposal. The visual may be rolled up or mounted on poster board. Site plans must show:

1. A concept and a site plan. The number of square feet, dwelling units (and the distribution between studios, one-bedroom, two-bedroom and larger spaces), hotel rooms (a/k/a keys) and square footage of meeting/banquet/ballroom space within a hotel, any senior housing, and the square footage of retail space should be provided. The Proposal should explain, narratively and/or visually, how the Project complies with smart growth and sustainability requirements (see **Section 5.23** below) and Transit-Oriented Development principles.

2. A representative rendering (which need not include elevations or sections) and an explanation of the proposed building height(s) by number of stories.
3. Approximate dimensions for WMATA Replacement Facilities.
4. Vehicular, bicycle and pedestrian ways and curb cuts. Approximate curb-to-curb width of all internal streets should be shown. (All streets should be planned and built to applicable jurisdictional standards so that they may be accepted as public streets. WMATA does not envision undertaking the maintenance or repair of any street.)
5. Any dedicated open space. (Any open space should be planned and built to applicable jurisdictional standards so that it may be accepted as public space by a governmental authority other than WMATA. If the open space is not so accepted, the Developer will retain responsibility for it. WMATA does not envision undertaking the maintenance or repair of any open space.)
6. If the project is to be built in phases, include conceptual sequential phase site plans.

**Tab 5: FAR:** The Proposal must identify the permitted floor area ratio (FAR) or other density measure of the site and the Project's proposed FAR or other density measure, as applicable.

**Tab 6: Assemblage:** If the proposed Project consists of an assemblage of the Joint Development Site with adjacent property, the Proposal should identify the adjacent property ownership. If the adjacent property owner and the Developer are not identical (even if related), state whether an executed agreement exists between the adjacent property owner and the Developer defining the method (e.g., sale, ground lease) by which the Developer will obtain the adjacent property and/or if any agreement exists regarding the adjacent property owner's participation in the Project. (NOTE: Because of the difficulty of separating the legal interests of adjoining building owners, WMATA is generally not in favor of any development in which a building or other structure straddles a property line between WMATA and non-WMATA property.)

**c. Compatibility of Project with local requirements and the affected transit facility**

**Tab 7: Existing and Proposed Zoning/Land Use:** The Proposal must identify the existing zoning classification and whether a zoning change is sought. If a zoning change will be sought, specify the proposed zoning category sought. Other entitlements, such as a planned unit development, variance or special exception, should also be identified even if the current zoning classification will not be changed. The Proposal must identify how the Project complies with other local land use requirements, if any, such as master or comprehensive plans, sector plans, existing proffers, development moratoria, adequate public facilities standards, and historic districts.

**d. Effects on WMATA Facilities**

**Tab 8: Effect on and Changes to WMATA Facilities and Public Infrastructure:** See **Section 5.3 of this Part Three** for the necessity of avoiding or minimizing interference with WMATA Facilities and operations. The Proposal must contain an explanation of the anticipated impact that the Project will have, if any, on WMATA Facilities and on public infrastructure (e.g., sanitary sewer, storm sewer, gas, water) serving the site. If an interim and/or permanent reconfiguration or relocation of WMATA Facilities is being proposed, the Proposal must detail the location and general layout and, as appropriate, the pedestrian, bus, taxi, bicycle and private vehicular access to the reconfigured or relocated WMATA Facilities.

All costs associated with a reconfiguration or relocation of WMATA Facilities will be borne solely by the Developer but may be offset against the purchase price or ground rent if so detailed in the comparison of gross price/rent vs. net price/rent addressed in **Section 3.2.a of this Part Three**.

(WMATA's construction requirements are further described in **Section 5.2 of this Part Three**. As addressed later in this Joint Development Solicitation, a reconfiguration or relocation of WMATA Facilities (including, but not limited to, parking) may trigger public hearing requirements under the WMATA Compact.)

**e. Market/financial viability of the Project**

**Tab 9: Ground Lease vs. Sale:** The Proposal must identify the Joint Development Site for which the offer is being made and whether the Developer prefers to ground lease or buy the site, including the following:

**For the (mandatory) proposal of a ground lease:**

1. Identify the portion of the Joint Development Site to be ground leased by location and approximate land area.
2. Specify the Developer's desired ground lease term. No particular ground lease term, other than the shortest practicable ground lease term for the particular project, is preferred by WMATA, but the term, including renewals, may not exceed 98 years.

**If also proposing a purchase/sale** (WMATA's preference is for ground leases, not sales):

1. Identify the portion of the Joint Development Site proposed to be purchased in fee simple by location and approximate land area.
2. Explain why the Project should not be developed under a ground lease and why a sale is more advantageous to WMATA than a long term ground lease. (Keep in mind that this explanation must be sufficient to persuade WMATA that a sale is in *WMATA's* best interest.)

**Tab 10: Market Analysis:** The Proposal must include a market analysis of the applicable site.

**Tab 11: Impact on Local Tax Base and Job Creation:** The Proposal must include a discussion of the Project's financial impact on the Local Jurisdiction as follows:

1. Identify the local property taxes, sales taxes, recordation and transfer taxes, adequate public facilities fees, other fees and contributions, and other local public income.
2. Identify any public facilities (other than WMATA Facilities), and their cost or value, to be derived from the Project.
3. State separately (i) the number of jobs to be created during construction and (ii) the number of new permanent jobs to be created by the Project.
4. Identify any other quantifiable economic benefits to the Local Jurisdiction as a result of the Project.

Be aware that the Local Jurisdiction will not receive Volume 2 of the Proposal. Therefore, any information regarding the impact of the Project on the Local Jurisdiction's finances should be included in Volume 1 notwithstanding that Volume 2 is otherwise intended to address financial matters.

**Tab 12: Governmental Financial Support:** The Proposal should state whether the Project's feasibility is contingent on any local, state or federal government action or financial support other than zoning matters covered above (including, without limitation: a change in regulations; street

or alley closing; funding, including guarantees and issuance of tax-exempt bonds; financing and credit enhancements; leasing of space; or granting of access to the Joint Development Site). Explain the justification and process for obtaining government support.

Tab 13: Project Schedule: The Proposal must include the proposed Project schedule, which at a minimum includes the following tasks and milestones, if applicable. (NOTE: These time periods may, in part, overlap; they need not be entirely sequential.) A critical path schedule should be utilized.

1. Term Sheet negotiations (assume one hundred eighty (180) calendar days from the Proposal submission);
2. Approval of negotiation of Term Sheet and/or designation as the Selected Developer by WMATA's Board of Directors (assume sixty (60) calendar days from the conclusion of Term Sheet negotiations; add thirty (30) days if this period ends in August because the WMATA Board of Directors does not meet in August);
3. Development Agreement and final documentation negotiations and execution (assume one hundred eighty (180) calendar days from approval of negotiation of a Term Sheet and/or designation as the Selected Developer);
4. Approval of Development Agreement and final documentation by WMATA's Board of Directors (assume sixty (60) calendar days from the conclusion of Development Agreement negotiations; add thirty (30) days if this period ends in August because the WMATA Board of Directors does not meet in August);
5. Agreement(s) for the acquisition of parcels to be assembled with the Joint Development Site, if applicable;
6. Concept plan preparation and approval, including interim WMATA Replacement Facilities plan (allow thirty (30) business days for WMATA approval);
7. WMATA Compact public hearing, if any WMATA Facilities serving the public are affected by the development (allow one hundred eighty (180) calendar days after the conclusion of Term Sheet negotiations);
8. Proposed closing date (signing ground lease or conveyance of title) and, if different, the date(s) on which payment(s) will be made to WMATA for the land;
9. Development plan preparation and approval, including interim WMATA Replacement Facilities plan (allow thirty (30) business days for WMATA approval);
10. Local and other governmental approvals and actions (zoning, site plan, alley closings, grants, etc., as applicable);
11. Project financing approval;
12. Schematic design and construction document preparation and approval (allow thirty (30) business days for WMATA approval of each of 35% construction documents, 65% construction documents, and 100% construction documents). NOTE: If documents are not approved, WMATA comments must be addressed and resubmitted for approval, in which case each timeline will be extended.

13. Local permitting process for excavation permits, building permits and the like;
14. Design and construction of interim and permanent WMATA Replacement Facilities, if applicable;
15. Project construction period (per phase, if applicable);
16. Initial occupancy; and
17. Stabilization period.

The schedule should separately identify milestones for the design, construction, occupancy (and, where applicable, cessation of use) of interim and permanent WMATA Facilities.

#### **f. Community involvement**

**Tab 14: Local Jurisdictions:** The Proposal must describe the Developer's contact with Local Jurisdiction staff (representatives' names and meeting dates) and the views and expectations of the Local Jurisdiction regarding the Project, including any existing or anticipated jurisdictional issues or concerns. (General statements that a particular person "provided background information" or "is supportive of our project" are not sufficient.) By "jurisdictional representatives" WMATA means, at a minimum, the planning staff for that jurisdiction and elected officials. When meeting with the listed jurisdictional representative(s), the Developer should request contact information for other jurisdictional representatives and community organizations.

**Tab 15: Community Organizations:** The Proposal must identify each of the community organizations that the Developer has met with and the meeting dates, the specific information that the Developer shared, the reaction of each community organization to the proposed development concept, the issues raised by each community organization, and how the Proposal addresses these issues. (General statements that a particular person "provided input" or "liked our plans" are not sufficient.) By "community organizations," WMATA means local and broader-based civic associations, nearby tenants' organizations, and other citizens' groups that might be expected to take an interest in the project. Broad outreach is desired.

**Tab 16: DBEs:** The Proposal should indicate whether the Developer plans to include Disadvantaged Business Enterprises (DBEs) in its Project and what the Developer's expectation of such involvement is. Specify if the Developer has prior experience with DBEs. (WMATA encourages Developers to include DBEs but does not require the inclusion of DBEs for this Project.)

#### **g. Innovation and Creativity**

**Tab 17: Open-Ended:** By definition, this category is more open-ended than the others. The Developer should feel free in this category to identify any particular aspect of any of the other categorical answers that the Developer believes evidences innovation or creativity.

### **3.2 Volume 2—Economic Information**

The hard copy Volume 2 must be physically separate from Volume 1. Volume 2 should use the following format, which is also a part of **ATTACHMENT A**. As above, with respect to Volume 1 of the Proposal, the following information is provided in an attempt to help Proposals be more responsive to WMATA's needs and practices. The information provided in Volume 2 should be consistent with any similar information –



such as size of the Project, number of floors, amount of space devoted to specific uses, number of parking spaces, rents, and costs – provided in Volume 1.

Table of Contents: A table of contents should be included in Volume 2.

Executive Summary: Developers may include an Executive Summary with Volume 2. The Executive Summary for Volume 2 should address only financial information and it may not exceed five (5) pages. Unlike the Executive Summary for Volume 1, which should be written so that it can be disclosed by WMATA to the public, verbatim, the Executive Summary for Volume 2 will not be distributed.

**a. Financial benefits accruing to WMATA**

Tab 18: Market Value: State the estimated fair market value of WMATA's land or interest in the land, how that value was derived, and the assumptions underlying that value. The market value may be stated on any basis the Developer thinks is useful – for example, per land square foot, per dwelling unit, or per key – but must also be stated per FAR square foot. Two values should be stated. First, state the offered compensation as a gross price without regard to the existence, removal, relocation, reconstruction, replacement of or other work on the WMATA Facilities. Second, state a net price with an offset for the Developer's expectation of the cost of any removal, relocation, reconstruction, replacement of or other work on the WMATA Facilities, with a separate line item for each such WMATA Facility. (If the gross and net prices are the same, so state.) Be advised that the value offered will be verified against an appraisal that WMATA will obtain and that WMATA is expected by its policies to obtain fair market value. (If WMATA agrees to discount the value of the land to reflect the cost of replacing the existing WMATA Facilities and the Developer is able to obtain another source of public subsidy for replacing the existing WMATA Facilities, then WMATA shall be entitled to receive eighty percent (80%) of the subsidy.)

Tab 19: Ground Lease vs. Sale:

**Ground lease**: For the (mandatory) part of the Proposal proposing a ground lease:

Lease Term: State the desired lease term. (It may not exceed 98 years, including renewals.)

Predevelopment Rent: Specify the amount and timing of predevelopment rent, if any, to be paid to WMATA during the interval period after the Development Agreement is executed but before the Project produces income (include the estimated length of this period).

Base Ground Rent: Specify how the base ground rent is to be paid, including the amount of base ground rent and the timing of payments. Base ground rent may be payable either on a regular basis (e.g., monthly, quarterly, annually) or may be based on a capital lease, i.e. a lump sum payment up front instead of periodic ground rent. Proposals that do not offer a lump sum payment up front must state a present value using a three percent (3%) discount rate, including assumptions used in determining the present value. (WMATA may evaluate the certainty of payment, particularly with respect to any payments not payable up front. The Development Agreement in such a situation may include provisions necessary or appropriate to protect WMATA's entitlement to be paid.) A Proposal to ground lease parts of the Joint Development Site sequentially should specify the consideration the Developer is willing to pay, or the method of determining the consideration it is willing to pay (e.g., via an appraisal method), for each individual phase.

Increasing Base Ground Rent Due to Change in Circumstances or Timing: The Proposal must state the method of adjusting the base rent if it is not paid by the date projected and/or the final approved density is greater than that proposed. WMATA expects that the present value of its financial return will not be diminished by delays in the development process.



**Participating Rent:** The Proposal must state WMATA's participating share of gross or net income from the Project, when and on what basis it is payable and, if net income is used, how it is calculated. (WMATA's strong preference is to participate in gross income.) Be advised that even if the Proposal ignores this issue, WMATA will nevertheless still expect to participate in gross or net income and the issue will be negotiated as part of a Term Sheet or Development Agreement.

**Capital Event Rent:** The Proposal must state WMATA's share of proceeds from a capital event, such as an assignment of the leasehold interest, transfer of interest in the Developer's business entity, refinancing or sale of the Project, or any other capital event after construction. The method of determining "proceeds from a capital event" should be defined. Be advised that even if the Proposal ignores this issue, WMATA will nevertheless still expect to participate in the proceeds of capital events and the issue will be negotiated as part of a Term Sheet or Development Agreement.

**Post-Amortization Rent:** The Proposal should state any provision for increasing rent once the costs of any WMATA Replacement Facilities have been amortized.

**Other Rent:** The Proposal should identify any additional payments to WMATA based upon factors chosen by the Developer.

If any rent is to be adjusted on a "mark-to-market" basis, the rent resets should be not less than 5 years or more than 15 years apart.

**Sale:** If the preferred business relationship with WMATA is a sale:

**Predevelopment Payments:** The Proposal must state the amount and timing of predevelopment fees, if any, to be paid to WMATA during the interval period after the Development Agreement is executed but before WMATA realizes income from the sale (include the estimated length of this period).

**Purchase Price:** The Proposal must state the proposed purchase price and the timing of its payment for each portion of the Joint Development Site including:

- a. Proposals that do not offer a lump sum payment up front must state a present value using a three percent (3%) discount rate, including assumptions used in determining the present value. (WMATA may evaluate the certainty of payment, particularly with respect to any payments not payable up front. The Development Agreement in such a situation may include provisions necessary or appropriate to protect WMATA's entitlement to be paid.) A Proposal to buy parts of the Joint Development Site sequentially should specify the consideration the Developer is willing to pay, or the method of determining the consideration it is willing to pay (e.g., via an appraisal method), for each individual phase.
- b. A schedule of purchase price escalations if the sale is not completed by the date projected. WMATA expects that the present value of its financial return will not be diminished by delays in the development process.
- c. The method of adjusting the purchase price if the final approved density is greater than that proposed.

Other Payments: The Proposal should identify the amount and timing of any additional payments to WMATA based upon factors chosen by the Developer.

**b. Other financial information**

Tab 20: Budget and Cash Flow Statement: The Proposal must include a 15 year pre-development, construction and operating period budget and cash flow statement which start in the month in which the Proposal is due. It should include each separate phase of development and land use type by phase and contain at a minimum the following items. It is important that each of the listed items be provided; failure to provide them may result in anything from a time-consuming follow-up request for the missing information to a Proposal being downgraded or rejected for being nonresponsive.

**Financing**

Construction loan rate, term and amount

Mezzanine loan rate, term and amount

Permanent loan rate, term and amount

Loan-to-cost ratio

Loan-to-value ratio

Equity as a percentage of total construction costs (state how much equity is in each of cash, land value, deferred developer's fees, or other categories)

NOTE: WMATA does not provide any financing or other credit terms, nor does WMATA provide any information on the availability of financing or the suitability of the Joint Development Site for financing.

**Construction Costs**

Hard costs on a line item basis

Total hard costs

Soft costs on a line item basis, including any development fees (e.g., construction, project management, financing, guarantor, or other) and, if construction displaces existing parking and interim parking is either not provided or is provided in less quantity than the existing parking being displaced, compensatory interim parking rent to offset WMATA's lost parking revenue

Total soft costs (stated both in dollars and as a percentage of total hard costs)

Cost (hard and soft) of improvements on a unit basis (\$/FAR square foot for office and retail, \$/dwelling unit for residential; \$/key for hotel))

Cost (hard and soft) per structured parking space

Cost (hard and soft) per surface parking space

Cost (hard and soft) of any WMATA garage or other WMATA Replacement Facility, interim or permanent (each facility broken out separately)

**Revenues**

Office rent (\$/gross square foot and number of gross square feet proposed)

Retail rent (\$/gross square foot and number of gross square feet proposed)

Residential rent (\$/dwelling unit and number of dwelling units proposed)

Hotel income (average daily rate (ADR), number of guest rooms proposed, anticipated occupancy rate, revenue per available room (RevPAR), operating expense margin, and total)

Parking income (\$/space/month, number of spaces proposed, and total)

Other revenues

Identify the date on which a 95% occupancy threshold will be achieved (or, if Developer believes stabilization should be otherwise defined, the date of stabilization and the definition used by Developer)

**Operating Costs**

Operating expenses for (all non-debt operating costs, e.g.: direct costs, G&A, taxes, legal, marketing, commissions, etc.) (stated as \$, \$/gross square foot and as a percentage of revenues)

Annual replacement/renovation/reinvestment expenditures and/or reserves (total, \$/gross square foot, \$/dwelling unit and \$/key)

Real estate taxes, licenses, assessments and other similar expenses

Property management fees as a percentage of net operating income

Development and construction management fees as a percentage of Project costs

Annual capital reserve payments as a percentage of net operating income

Debt service (including any fees or expenses associated with loans) and debt service coverage ratio (DSCR)

Base, percentage or participating rent to WMATA

**Returns**

Internal rate of return (for 5-, 10- and 15-year horizons)

Cash-on-cash return

Net operating income

Net cash flow (defined as revenue less operating expenses, debt service and, if applicable, ground rent to WMATA)

Distributions to investors

Free cash flow

Return on equity

Related party fees and charges as a percentage of net operating income

NOTE: The pro forma and any budgets should clearly show as separate line items all of the fees and income that the Developer, its partners and affiliates receive from the Project.

**Land Value**

Land value per square foot

Land value per FAR square foot

Purchase price (if applicable) payable to WMATA

The analysis must be presented in current dollars with an annual escalation rate or present value discount, if applicable, of three percent (3%).

All financial models must be submitted to WMATA on disk as well as hard copy. All financial information must be linked in a single spreadsheet, and all files must be in Microsoft Excel and retain all cell relationships.

**Tab 21: Financial statements:** The Proposal must include copies of the Developer's balance sheets, financial statements and sources and uses of funds statements for the past three fiscal years.

**c. References**

**Tab 22: References:** The Proposal must include statements regarding the Developer's financial creditworthiness and past development experience which can be verified, including the names and addresses of at least three commercial or institutional credit references. At least two of the references should be lending institutions.

## SECTION 4. PROPOSAL REVIEW, EVALUATION, DEVELOPER SELECTION AND POST-SELECTION PROCESS

### 4.1 Proposal Review Process

WMATA will review and evaluate Proposals via the following process:

- A. Evaluation Team: WMATA shall designate an Evaluation Team composed of WMATA's Joint Development staff, assisted by other WMATA staff and consultants, as appropriate. Jurisdictional officials may also be asked to consult with the Evaluation Team. If a third party owns part of a Joint Development Site and WMATA and that third party are offering their respective properties collectively, that third party will also have a role in the Evaluation Team for that particular Joint Development Site. An analysis and evaluation of each Proposal deemed to be reasonably susceptible of being selected for award is conducted.
- B. Non-Responsive Proposals: Proposals that in WMATA's sole and non-reviewable discretion are deemed nonresponsive or not reasonably susceptible of being selected for award will be rejected and any Proposal Security that was posted shall be returned to the Developer. WMATA reserves the right to accept or reject any Proposal without negotiation or discussion.
- C. Further Information from Developers: The Evaluation Team may submit written questions or comments to one or more Developers and/or meet with all or select Developers for an oral presentation and specific discussions about a Proposal. If such meetings are held, details on the oral presentation will be provided as part of the scheduling process. Such questions, comments and discussions will include identifying areas of the Proposal that require clarification or improvement or that do not comply with this Joint Development Solicitation.
- D. Final Proposals: WMATA may make a decision based on the Initial Proposals and the further information elicited about them as discussed above, or may request Final Proposals. If requested by WMATA, some or all Developers submit Final Proposals. The Final Proposal may be significantly changed from the Initial Proposal submitted. WMATA reserves the right to request further clarification of a Final Proposal or to request a revised Final Proposal.
- E. Negotiation of Term Sheet: The Evaluation Team will rate each responsive Proposal based upon the Proposal Evaluation Factors in **Section 4.2 of this Part Three**. The Evaluation Team will then decide to tentatively designate a Selected Developer, subject to the approval of WMATA's Board of Directors. The WMATA Project manager will commence negotiation of a Term Sheet. If negotiations are unsuccessful in WMATA's opinion, WMATA staff may terminate negotiations and commence negotiations with another Developer. Alternatively, WMATA staff may decide upon competitive negotiations with two or more acceptable Developers or WMATA staff may decide to cancel this Joint Development Solicitation with respect to the applicable Joint Development Site.
- F. Recommendation of Selected Developer Status: After the principal business terms for the tentatively Selected Developer's Project have been reduced to a Term Sheet, WMATA staff submits a recommendation regarding the designation of a Selected Developer and approval of the Term Sheet to the Planning, Program Development and Real Estate Committee of WMATA's Board of Directors and subsequently to the WMATA Board of Directors.
- G. Naming of Selected Developer: Designation of a Selected Developer must be approved by the WMATA Board of Directors. Notwithstanding the designation of a Selected Developer or the approval of the Selected Developer by the WMATA Board of Directors, no rights vest in the Selected Developer until a Development Agreement is signed by both parties and approved by the WMATA Board of Directors and the FTA. If a portion of a Joint Development Site is owned by

a third party, that third party must also approve the Selected Developer in accordance with its own processes before rights vest.

## 4.2 Proposal Evaluation Factors

Each Proposal will be evaluated with a view towards providing the best outcome for WMATA in WMATA's sole and absolute discretion in light of then-current FTA regulations. WMATA reserves the right to reject any and all Proposals at any time for any reason. Without limiting the foregoing, the evaluation criteria will be as described below:

### Technical Criteria

- Development Team's experience and prior performance
- Degree to which the Project reflects Transit-Oriented Development principles
- Compatibility of the Project with local requirements and the affected transit facilities
- Effects on WMATA Facilities
- Market/financial viability of the Project
- Innovation and creativity

### Economic Criteria

- Enhanced Metrorail and Metrobus ridership (as determined by WMATA)
- Financial benefits accruing to WMATA

In addition to the specific criteria listed above, the following broader criteria may be applied:

- A. Joint Development: The Joint Development Site is being ground leased or sold for "joint development," i.e. property for private development on a site on which a transit agency maintains operating facilities and may retain an ownership interest, which development emphasizes interconnection and synergy with transit usage and pedestrian, cycling and other non-automotive transport, and contributes to or creates placemaking and a vibrant and high-quality built environment. (WMATA's entitlement to continue its operations on site, and the winning Developer's obligations in avoiding or minimizing interruption with WMATA operations, including the provision of any temporary facilities, shall be included in a declaration of covenants, conditions and restrictions to be recorded at closing.)
- B. Certainty of Closing: WMATA may consider certainty of closing, i.e. the likelihood that a Developer is going to close on the Joint Development Site and not drop the Project even at the risk of forfeiting the Proposal Security, or otherwise slow or complicate the process.
- C. Integrity: WMATA may consider matters reflecting on the integrity, business ethics and character of the Developer, its principals and its Development Team.
- D. Development for Own Account: A Developer should be capable of developing, and intend to develop, all of the proposed development types itself – for which purpose Developers may be joint ventures of multiple persons or companies with experience in different components. Developers should not view themselves as speculators in all or part of the site or as master developers who will obtain some or all entitlements and then retransfer the Joint Development Site in whole or in part, or as developers of only part of the Joint Development Site. Except as stated in **Section 5.19 of this Part Three**, no part of the Joint Development Site may be retransferred, nor may any change of control in the Developer entity occur, unless and until the Joint Development Site is developed. This requirement will be included in covenants, conditions and restrictions recorded at closing.

No particular points or weighting is attributed by WMATA to any criteria. Developers should treat all criteria as having the utmost importance.

Any third party who is offering its property jointly with WMATA may apply its own criteria to the selection process.

### 4.3 Notice of Acceptance or Rejection

Notice by WMATA of acceptance of a Proposal will be deemed to have been sufficiently given when e-mailed to the Developer at the address on the Proposal Form. Notice by WMATA of rejection of a Proposal will be deemed to have been sufficiently given when the Proposal Security posted by that Developer is returned. WMATA's processing of a Proposal Security, a *Right of Entry Agreement* and/or a *Real Estate Permit* will not, in itself, constitute acceptance of the Proposal.

### 4.4 Continuing Offers

Unless a Proposal is withdrawn in accordance with the terms of this Joint Development Solicitation, each Proposal received will be deemed to be a continuing offer good for two hundred ten (210) days or until the Proposal is accepted or rejected by WMATA, whichever first occurs.

### 4.5 Waiver of Irregularities

WMATA may, at its election, waive any minor informality or irregularity in Proposals received.

### 4.6 Post-Selection Process for Selected Developer

- A. Option Fee: A Developer designated by the WMATA Board of Directors as a Selected Developer will be required to pay WMATA, in immediately available funds, an option fee for WMATA's granting to the Selected Developer the exclusive right to negotiate a Development Agreement. The amount and timing of the nonrefundable option fee shall be as set forth in **Section 1.6 of this Part Three**. This option fee is in addition to the Proposal Security.
- B. Community Organizations: If not previously sent by the Developer, a Selected Developer will be required to send a letter to each of the community organizations with which its representatives met to inform them as to how the Proposal presented to WMATA addresses their issues or concerns. A copy of this letter must also be submitted to WMATA.
- C. Negotiation of Term Sheet with WMATA Staff: After designation of a Selected Developer by WMATA staff, the Selected Developer and WMATA staff shall negotiate a Term Sheet. The choice of whether to use WMATA staff or the Selected Developer's team to prepare the first draft of the Term Sheet will be made by WMATA staff.
- D. Approval of Term Sheet. WMATA staff presents the designation as Selected Developer and the proposed Term Sheet to the WMATA Planning, Program Development and Real Estate Committee and then to the WMATA Board of Directors for approval. If and when the approval of the WMATA Board of Directors is given, the Selected Developer's status as such is confirmed. (But, as more fully stated elsewhere in this Joint Development Solicitation, such status gives the Selected Developer no vested rights.)
- E. Negotiation of Development Agreement with WMATA Staff: After WMATA's Board of Directors has designated a Selected Developer and approved the negotiation of a Term Sheet, WMATA staff will negotiate with the Selected Developer a Development Agreement (and other necessary

final documentation) that incorporates the provisions of the Term Sheet. Such Development Agreement shall be completed within one hundred eighty (180) days following the WMATA Board's designation of the Selected Developer and/or approval of the negotiation of a Term Sheet. In the event that this schedule is not met, at WMATA's option the Selected Developer designation expires, the Proposal is no longer viable and WMATA may retain the Proposal Security (in addition to the option fee) in accordance with **Section 2.7 of this Part Three**. If the Selected Developer's status as such so expires, WMATA may re-advertise the Joint Development Site or terminate the offering of the Joint Development Site, in WMATA's sole and absolute discretion. Alternatively, WMATA may choose to reestablish the Selected Developer designation and provide a specific time frame to the Selected Developer for the completion of negotiations

- F. Approval of Joint Development Agreement: WMATA staff submits a summary of the final Development Agreement to WMATA's Planning, Program Development and Real Estate Committee and to the WMATA Board of Directors and makes a recommendation for their approval. If the approval of the WMATA Board of Directors is obtained, WMATA will then request the approval of the FTA. There is no binding agreement between the Selected Developer and WMATA until such time as the WMATA Board of Directors and the FTA have approved the final Development Agreement and the Development Agreement has been executed by both parties. In addition, if a third party has included its own property in a particular Joint Development Site, the joinder of that third party must also occur before a binding agreement is reached.

#### 4.7 Disclosure and Use of Data

- A. Public Access to Records Policy: WMATA is required to brief its Board of Directors on all aspects of a Proposal. The proposed business terms of a Proposal will be held in confidence only until the Development Agreement and all final documentation have been approved and executed. WMATA's "Public Access to Records Policy" is available at [www.wmata.com](http://www.wmata.com) (click "About Metro," then click "Public Records & Reports"). WMATA will endeavor to hold any third party landowner whose property is included in a Joint Development Site to respect and abide by the preceding confidentiality, but WMATA cannot bind a third party to do so, nor shall WMATA incur any liability if a Proposal is not held confidential by a third party.
- B. To Jurisdictional Officials: WMATA also reserves the right to review the zoning and land use aspects of any Proposal with local zoning, land use planning, transportation and environmental officials and with state officials. Additionally, such review may include conducting public hearings, town meetings and similar public forums.

#### 4.8 Protest Policy

The policy and procedure for the administrative resolution of protests involving the designation of a Selected Developer arising pursuant to this Joint Development Solicitation are as follows:

- A. Who May Protest: Only an Interested Party may submit a protest. An "Interested Party" is defined as a Developer who submitted a Proposal for the relevant Joint Development Site pursuant to this Joint Development Solicitation.
- B. Deadline: Protests must be submitted no later than thirty (30) calendar days after WMATA staff's preliminary designation of the Selected Developer. Any protest submitted subsequent to this time may be deemed by WMATA to be untimely and denied on that basis unless WMATA concludes that the issue(s) raised by the protest involves fraud, gross abuse of the selection process, or otherwise indicates substantial prejudice to the integrity of the selection process.

- C. Form of Protest: The Interested Party wishing to file a protest shall submit a written document to WMATA which contains the following:
1. The name and address of the Interested Party;
  2. Description of the nature of the protest;
  3. Identification of the provision(s) of this Joint Development Solicitation or of the *Joint Development Policies and Guidelines* or laws upon which the protest is based;
  4. A statement of the specific relief requested; and
  5. Any documents relevant to the protest.
- D. WMATA Review: WMATA shall carefully review the protest. At the discretion of WMATA, a conference may be held with the Interested Party. WMATA shall have thirty (30) calendar days to render a written decision on the merits of the protest. A determination by WMATA that a protest is meritorious may result in a change in the terms, conditions or format of this Joint Development Solicitation in the form of an amendment, the rejection of a Proposal, the cancellation of this Joint Development Solicitation in whole or in part, or the termination of the designated Selected Developer.
- E. Inapplicability: This protest policy is not applicable to actions taken by WMATA in response to legal proceedings filed in the courts or to actions taken by WMATA in its sole and non-reviewable discretion.



## SECTION 5. WMATA'S REQUIREMENTS AND CONDITIONS

The following requirements and conditions will be included in the Development Agreement and/or other final documentation executed by the Selected Developer and WMATA (such as a ground lease or a recorded declaration of covenants, conditions and restrictions). By submitting a Proposal in response to this Joint Development Solicitation, a Developer is agreeing to accept and comply with these requirements and conditions.

### 5.1 WMATA's Reserved Areas and Interests

The location of WMATA's Reserved Areas and Interests shall be determined by WMATA in its sole and absolute discretion. The conveyance or lease of any WMATA property shall be subject to a reservation by WMATA of a permanent, exclusive and irrevocable covenant, restriction, reserved area and/or easement for the operation and maintenance of present and future WMATA Facilities, WMATA Improvements and WMATA Reserved Areas and Interests. The nature and method of WMATA's operations shall be determined from time to time by WMATA in its sole and absolute discretion.

### 5.2 WMATA's Approval Rights and Adjacent Construction Requirements

The following rights and requirements apply to all Projects:

A. Approval Rights:

WMATA shall have the right to approve in its sole and absolute discretion:

1. Matters that affect the integrity, functionality, efficiency, safety, operation, maintenance, legal compliance, cost or profitability of WMATA's business, customers, operations or activities;
2. Matters that affect WMATA Facilities, WMATA Reserved Areas and Interests, ingress/egress to WMATA Facilities, etc.;
3. Matters that affect any of WMATA's adjacent property;
4. The design and construction of interim and permanent WMATA Replacement Facilities; and
5. Matters that affect the Selected Developer's obligations as they relate to timing (changes in Project schedule) and performance (changes in what will be constructed, e.g., the product mix).

B. WMATA's Comment Rights:

WMATA shall have the right to comment on the development plan/site plan and on other matters concerning the Project which do not fall within the categories set forth in **Section 5.2.A** above. The Selected Developer shall be obligated to consider WMATA's comments and to respond reasonably.

C. WMATA's Construction Requirements:

Projects must be built in compliance with WMATA's adjacent construction criteria as contained in WMATA's then-current *Adjacent Construction Project Manual* and *Real Estate Permit* form (both, along with the *Real Estate Permit Application*, available on WMATA's website, [www.wmata.com](http://www.wmata.com),

under “Business with Metro,” then click on “Adjacent Construction Program”), WMATA’s *Station Site and Access Planning Manual* (which is available on WMATA’s website, [www.wmata.com](http://www.wmata.com) under “About Metro,” then click on “Planning & Development” on the dropdown menu, then scroll down to “Station Area Plans and Access Improvement Studies”), and WMATA’s *Manual of Design Criteria* (available upon written request approved by WMATA). In addition, if any WMATA Facility is constructed by the Developer, in constructing that WMATA Facility the Developer must also comply with WMATA’s Safety and Security Certification policies, which include, among other things, WMATA’s Safety and Security Certification Plan, WMATA’s System Safety Program Plan, the FTA’s *Handbook of Transit Safety and Security Certification* and FTA Circular 5800.1 *Safety and Security Management Guide for Major Capital Projects*, and certain criteria established by the Transportation Safety Institute. Additionally, Developers must comply with WMATA’s requirements for the relocation and maintenance of operations during construction, which include the uninterrupted and unimpeded operation of WMATA Facilities. WMATA will review and approve Developer plans in accordance with established WMATA procedures.

D, WMATA’s Fees for Review and Construction Services

Developers are advised that the *Adjacent Construction Project Manual* requires the payment of review, coordination and, if entry on WMATA Facilities is involved, escort fees to WMATA. For purposes of this subsection, these fees are referred to collectively as “engineering fees.” Developers should prepare their Proposals as if no such engineering fees are payable because the amount of those engineering fees are entirely speculative at the Proposal stage; as more fully set forth in the following paragraph, the amount of the engineering fees will be estimated as the Project moves forward and that amount shall be credited against the consideration otherwise payable to WMATA.

It is anticipated that the engineering fees will be levied as follows, although this is subject to change:

1. Prior to signing a Development Agreement, engineering fees will not be charged.
2. As part of the process of negotiating a Development Agreement, WMATA engineering staff will evaluate the Selected Developer’s schedule, work scope and concept plan. This material should be submitted to WMATA for review three (3) months before the Development Agreement is finalized. WMATA’s engineering staff will then propose an estimated fee schedule for engineering fees, anticipating that the Project will go forward, plans and specifications will be reviewed through 100% construction drawings in accordance with **Section 5.2.C**, Developer will do site inspections and need escorts, a maintenance-of-traffic plan will be negotiated with the involvement of WMATA’s engineering staff, and plans and specifications for any interim WMATA Replacement Facilities will be reviewed and approved. These estimated engineering fees will be deducted from the consideration for the Joint Development Site payable to WMATA but will be paid to WMATA in full when the Development Agreement is signed as a separate line item for WMATA’s estimated engineering fees. If the estimated payment to WMATA is higher than WMATA’s actual engineering fees, the excess paid shall be retained by WMATA as a partial reversal of the deduction against the consideration otherwise payable to WMATA. If the estimated payment to WMATA is lower than WMATA’s actual engineering fees, the deficiency shall be payable by Developer to WMATA as and when billed by WMATA; WMATA may bill, and Developer shall pay, on an estimated basis in advance. Failure to make payment to WMATA may result in WMATA refusing to review materials, perform inspections, provide escorts or do any other work that would be payable by the engineering fees, and may result in WMATA issuing a “stop work” order.

3. As part of the process of negotiating a ground lease or sales contract further to a Development Agreement (which negotiation may or may not be contemporaneous), WMATA engineering staff will provide an estimate of the engineering fees applicable to review of shop drawings, responses to requests for information, change order requests and any plan changes, escort fees during construction, third-party inspection fees incurred by WMATA, and flagmen fees. These estimated engineering fees will be deducted from the consideration for the Joint Development Site payable to WMATA but will be paid to WMATA in full when the closing of the ground lease or sales contract occurs as a separate line item for WMATA's estimated engineering fees. If the estimated payment to WMATA is higher than WMATA's actual engineering fees, the excess paid shall be retained by WMATA as a partial reversal of the deduction against the consideration otherwise payable to WMATA. If the estimated payment to WMATA is lower than WMATA's actual engineering fees, the deficiency shall be payable by Developer to WMATA as and when billed by WMATA; WMATA may bill, and Developer shall pay, on an estimated basis in advance. Failure to make payment to WMATA may result in WMATA refusing to review materials, perform inspections, provide escorts or do any other work that would be payable by the engineering fees, and may result in WMATA issuing a "stop work" order.

### **5.3 Relocation or Replacement of WMATA Facilities**

WMATA Facilities are critical to the efficient operation of the transit system. WMATA operations must be maintained throughout the development process. Therefore, the existing, reconfigured or relocated WMATA Facilities must be accommodated in the site plan. At a minimum, Developers should assume that existing WMATA Facilities must be maintained in place or replaced at the Selected Developer's expense. If the existing WMATA Facilities must be removed before the permanent new WMATA Facilities are completed, the Selected Developer also must provide interim WMATA Facilities at its own expense.

No WMATA Facility may be taken out of service unless a permanent or interim replacement facility is already available, such that there will be no disruption to WMATA operations. Any exception to this requirement with respect to permanent WMATA Facilities is subject to the specific approval of the WMATA Board of Directors. Additionally, the configuration of the relocated or replaced WMATA Facility must be agreed to by WMATA in writing. WMATA shall operate and preferably own any permanent relocated or replaced WMATA Facility, although it is possible for WMATA Facilities to be operated by WMATA via easements.

If any replacement WMATA Facilities are involved, a Proposal should state the offered compensation to WMATA on both a gross and a net basis. First state the offered compensation as a gross price, without regard to the existence, removal, relocation, reconstruction, replacement of or other work on the WMATA Facilities. Second, also show a net price, stating the Developer's expectation of any offset against the gross price for the cost, on a per facility basis, of any removal, relocation, reconstruction, replacement of or other work on the WMATA Facilities.

If WMATA agrees to discount the value of the land to reflect the cost of replacing the existing WMATA Facilities and the Developer is able to obtain another source of public subsidy for replacing the existing WMATA Facilities, then WMATA shall be entitled to receive eighty percent (80%) of the subsidy. This provision shall be incorporated into and survive the execution of the Development Agreement.

### **5.4 Selected Developer's Funding of WMATA Compact Public Hearing**

A change in WMATA Facilities (including bus stop relocations and parking) may trigger a public hearing requirement under the WMATA Compact. The Selected Developer will be required to contribute Fifty Thousand Dollars (\$50,000) towards the cost of the WMATA Compact public hearing, payable sixty (60)

calendar days prior to the date of the public hearing. A failure to pay that sum may be grounds, in WMATA's sole and absolute discretion, for WMATA's revocation of the Selected Developer's status as such. If WMATA's actual public hearing costs are less than that amount, WMATA will credit the remaining funds to any outstanding amount that it is owed by the Selected Developer and, if no amount is owed, the unused balance will be refunded to the Selected Developer.

## 5.5 No Subordination of WMATA's Fee Interest

In the case of a ground lease, WMATA will not subordinate its fee interest in its property except to the covenants, restrictions and easements evidencing the WMATA Reserved Areas and Interests. In a ground lease situation, WMATA will permit *bona fide* lenders to have a leasehold security interest in the Project. The leasehold security interest will be subordinate to WMATA's fee interest, to the covenants, restrictions and easements evidencing the WMATA Reserved Areas and Interests, and to WMATA's right to terminate the ground lease upon a default by the Selected Developer (subject to any right to cure granted to the lender). In a sale situation, any mortgage, deed of trust or other security interest will be subordinate to the covenants, restrictions and easements evidencing the WMATA Retained Areas and Interests.

## 5.6 Federal Transit Administration (FTA) Requirements

WMATA is subject to the requirements of the Federal Transit Administration (FTA). The terms of the Development Agreement negotiated with the Selected Developer, as it pertains to WMATA property, are subject to FTA approval. FTA requires, as a covenant running with the land, that the entire Project constitute a Transit-Oriented Development as defined in the then-current FTA regulations, policies and guidelines. FTA also requires that the Selected Developer comply with certain laws and regulations barring discrimination on the basis of race, color, national origin or disabilities, and further requires compliance with FTA requirements regarding conflicts of interest and debarment. FTA may impose additional requirements which cannot be known until FTA reviews a specific Project,

## 5.7 Americans with Disabilities Act (ADA)

All Projects shall be constructed in compliance with Titles II and III of the Americans with Disabilities Act, 42 USCA Section 12101, et seq., as amended, and any regulations promulgated thereunder (ADA). Developers are also referred to WMATA's *Station Site and Access Planning Manual*, which is available on WMATA's website, [www.wmata.com](http://www.wmata.com) (click on "About Metro," then click on "Planning & Development" on the dropdown menu, then scroll down to "Station Area Plans and Access Improvement Studies") and *Manual of Design Criteria* (available upon written application to WMATA subject to WMATA's approval) for WMATA's own accessibility standards. Whenever WMATA's standards and the ADA differ, the more stringent standard shall apply. Proposals must include a plan indicating how access from the Project to the Metro Station will be provided for persons with disabilities. Additionally, if a Project or any subsequent addition, modification or alteration triggers accessibility-related improvements to the Metro Station, the Selected Developer shall be responsible for the costs of such improvements. The only exceptions are when the accessibility-related improvements predate the date of completion of the Project and are required to be made regardless of the Project or constitute accessibility related improvements that WMATA is implementing at Metro Stations in general as part of its system-wide improvements or alterations.

## 5.8 Direct Connections

If a direct connection to a Metro Station (e.g., a direct entrance into a building or a private bridge between a Metro Station and a building) is part of the overall Project, then in accordance with **Section 5.6** above, FTA may determine that the National Environmental Policy Act, 42 USCA 4321, et seq., as amended, is

applicable to the Project. Additionally, the following laws and their implementing regulations are also applicable to a direct connection:

- A. Rehabilitation Act of 1973, 29 USCA Section 794;
- B. Architectural Barriers Act, 42 USCA Section 4151, et seq.; and
- C. Planning and Design for the Elderly and Handicapped, 49 USCA Section 5301, et seq.

## **5.9 Davis-Bacon Act/Fair Labor Standards Act**

The construction of any WMATA Replacement Facility or WMATA Improvement must comply with the Davis-Bacon Act, 40 USC Section 276a, et seq., and overtime compensation must be paid in compliance with Section 64 of the WMATA Compact and the Fair Labor Standards Act, 29 USCA Section 201, et seq. (1978), as amended. This requirement applies even if the remainder of the Project is not subject to these requirements.

## **5.10 Other Laws, Regulations and Requirements**

Developers are responsible for being fully informed of and complying with the requirements of applicable federal, state, and local jurisdictional laws and regulations. Additionally, the Selected Developer shall be responsible for obtaining, at its own cost and expense, all requisite approvals, licenses and permits.

## **5.11 WMATA's Indemnification Policy**

The Selected Developer and its contractors and subcontractors (and space tenants or subtenants, where applicable) shall indemnify WMATA against all claims, liabilities and costs of whatsoever kind and nature, including environmental claims, which may be imposed upon, or incurred by, or asserted against WMATA in connection with the Selected Developer's performance under the Development Agreement or related agreements. WMATA will accept financial responsibility for environmental damage to the Joint Development Site only to the extent caused by WMATA prior to the transfer of the Joint Development Site to the Selected Developer. Developers are advised that WMATA is otherwise generally precluded from indemnifying them.

## **5.12 WMATA's Insurance Requirements**

The Selected Developer and its contractors and subcontractors must procure and maintain insurance coverage in amounts determined by WMATA, which may include but is not limited to General Liability, All Risk Property, Builder's Risk, Worker's Compensation, Automobile Liability, Contractors' Pollution Legal Liability, Railroad Protective Liability, Rental Value Insurance, Professional Errors and Omissions Liability and Boiler and Machinery.

## **5.13 Completion Bond**

If there are WMATA Improvements (interim and/or permanent) being constructed, WMATA requires the Selected Developer to secure and file with WMATA a completion bond equal to one hundred percent (100%) of the value of the WMATA Improvements. This bond shall name WMATA as the sole obligee for the completion of the WMATA Improvements.

All bonds must be from a federally approved surety company with sufficient assets. All bonds must be in a form acceptable to WMATA and countersigned by a Commonwealth of Virginia, State of Maryland or District of Columbia, as applicable to the Joint Development Site, resident agent of the surety, with a copy of the agent's license as issued by the appropriate Insurance Commissioner.

Alternatively, the Selected Developer may escrow the entire cost of the WMATA Improvements in cash with WMATA or a third party escrow agent (who may be the Selected Developer's construction lender) approved by WMATA. Funds may be drawn from this escrow by the Selected Developer upon submission of draw requests to WMATA and WMATA's approval thereof solely to pay, in arrears, the Selected Developer's actual costs incurred in designing and constructing the WMATA Improvements (excluding any fees or other compensation to the Selected Developer or its affiliates until Final Completion occurs). Should the Selected Developer fail to finally complete the WMATA Improvements as designed and approved by WMATA and on the agreed-upon schedule, WMATA may use the escrowed funds for that purpose. Neither the establishment nor use of the escrowed funds shall be deemed to be liquidated damages or WMATA's sole and exclusive remedy.

#### **5.14 WMATA's Disclaimer of Liability for Information**

WMATA disclaims all responsibility and liability for the completeness or accuracy of any information that it provides. Any error or omission will not constitute grounds or reason for nonperformance by a Developer or be grounds for a claim for allowance, refund or deduction.

#### **5.15 Inspection of Accounting Records**

The Selected Developer will be required to permit WMATA, or any of its duly authorized representatives, at reasonable times and places in the Washington metropolitan area, access to any books, documents, papers and records, including certified financial statements, which are directly pertinent to this Joint Development Solicitation and the Development Agreement. WMATA and/or its representatives shall be permitted to audit, inspect, examine, copy and transcribe such books, documents, papers and records. The Selected Developer shall retain all records for three years after submission of any statement required for determining any payment obligations under the Development Agreement or related agreements.

#### **5.16 WMATA's Tax Exempt Status; Developer's Responsibility**

WMATA is tax exempt pursuant to the WMATA Compact. Any taxes, assessments or impositions on the Project, the Joint Development Site or the ground lease or conveyance anticipated by the Proposal, including (without limitation) real estate taxes, special assessments, and any transfer, recordation, grantor's, stamp, or other documentary tax, shall be assumed and paid by the Selected Developer. In no event shall the Selected Developer assert or attempt to assert for its own benefit an exemption or immunity available to WMATA under the WMATA Compact.

#### **5.17 Increases in Land Value**

WMATA will retain an interest in any development rights in excess of those used by the development constructed pursuant to the Proposal. Under such an arrangement, WMATA will receive payments over and above the purchase price if, upon subsequent rezoning, re-entitling, or redevelopment of the Joint Development Site within twenty-five (25) years of closing, the redevelopment potential or density is greater than the density on which the Proposal's compensation is calculated. This shall be included in the covenants, conditions and restrictions to be recorded at closing or in the ground lease, as applicable.

#### **5.18 Financing Requirements**

- A. Obtaining Financing. The Selected Developer shall be obligated to obtain the requisite financing to consummate the ground lease/sale of the Joint Development Site and the development, construction and final completion of the Project by a reasonable date certain or WMATA may terminate the Development Agreement.



- B. No Cross-Collateralization. The Project may not be cross-collateralized or cross-defaulted with any other property, project or other assets. This prohibition shall be included in the covenants, conditions and restrictions to be recorded at closing.

### 5.19 Assignment of Proposal, Change in Developer or Withdrawal of Developer

WMATA considers the designation of Selected Developer to be in the nature of a personal services contract. The Selected Developer will be designated because of its skill, experience, knowledge and financial standing. Until the Project is Finally Completed, a Developer who submits a Proposal in response to this Joint Development Solicitation may withdraw, assign its Proposal or change the composition of its Development Team only as follows:

- A. Withdrawal of Proposal: At any time prior to designation of the Selected Developer, a Developer may elect to withdraw its Proposal. Under such circumstances, WMATA shall return the Proposal Security without interest.
- B. Assignment of Proposal:
1. At any time prior to designation of the Selected Developer, a Developer may request WMATA's approval to assign its Proposal to another development entity. No purported assignment is valid unless WMATA has given its prior written approval. The Developer and its proposed assignee shall submit all documents required by WMATA before the request will be considered. WMATA is under no obligation to approve the request and may withhold approval in its sole and absolute discretion. If WMATA refuses to grant approval and the Developer does not want to proceed in accordance with its Proposal, WMATA will return the Proposal Security without interest. An assignment may be subject to the requirement of a guaranty pursuant to **Section 5.28** below.
  2. At any time after the designation of the Selected Developer, the Selected Developer may request WMATA's approval to assign its Proposal to another development entity. No purported assignment is valid unless WMATA has given its prior written approval. The Developer and its proposed assignee shall submit all documents required by WMATA before the request will be considered. WMATA is under no obligation to approve the request and may withhold approval in its sole and absolute discretion unless (i) the assignment is to an entity designated as the anticipated Developer in the Proposal, in which case no further WMATA approval is required, or (ii) the assignment is to an entity under the control of the Selected Developer, in which case WMATA shall not unreasonably withhold its approval. If WMATA refuses to grant approval and the Selected Developer does not want to proceed in accordance with its Proposal, the Selected Developer shall so notify WMATA in writing, whereupon the Selected Developer's rights as such shall automatically terminate and WMATA may retain the Proposal Security and any option fee previously paid. An assignment may be subject to the requirement of a guaranty pursuant to **Section 5.28** below.
- C. Change in Composition of Developer or Development Team:
1. A Developer may change its internal composition or its Development Team if it gives notice to WMATA of the change at least ten (10) days before WMATA's tentative designation of the Selected Developer. Thereafter, and before the tentative designation as the Selected Developer, a Developer may change its composition or the composition of its Development Team only with WMATA's prior written approval. WMATA's approval may be withheld in WMATA's sole and absolute discretion. If WMATA does not approve the change and the Developer does not want to proceed in accordance with its Proposal,



the Developer may withdraw its Proposal by giving written notice to WMATA and WMATA will return the Proposal Security without interest.

2. After a tentative designation as the Selected Developer, the Selected Developer must request WMATA's written approval to change its internal composition or the composition of its Development Team. WMATA's approval may be withheld in WMATA's sole and absolute discretion. If WMATA does not approve the change and the Selected Developer does not want to proceed in accordance with its Proposal, WMATA may terminate the Selected Developer designation and retain the Proposal Security and any option fee previously paid.
- D. Other Situations: An assignment or change in the internal composition of the Developer or in the composition of the Development Team which is not addressed above is at the sole and absolute discretion of WMATA. (The foregoing includes, without limitation, a merger, consolidation or division of the Developer.) For any such assignment or change to be valid, WMATA's prior written approval is required. Any purported assignment or change occurring without WMATA's prior written approval shall be void.

## 5.20 Termination of Selected Developer Designation

WMATA may terminate the Selected Developer designation for any of the following reasons and, except as stated otherwise in **Sections 5.20.I, J and K**, retain the Proposal Security and any other deposit held by WMATA. (The refund of the Proposal Security does not affect WMATA's right to retain any option fee under other provisions of this Joint Development Solicitation.) Any such termination shall terminate the Selected Developer's status as such under this Joint Development Solicitation.

- A. No Development Agreement: The Selected Developer fails to negotiate and execute the Development Agreement within one hundred eighty (180) days following the designation of the Selected Developer and/or approval of the negotiation of a Term Sheet by the WMATA Board of Directors.
- B. Bankruptcy: The Selected Developer or any individual or entity holding ownership in or comprising the Selected Developer or the Development Team files a petition in bankruptcy, or a proceeding in bankruptcy is filed against any one or more of them and not dismissed within ninety (90) days after its filing, or any of them is adjudicated to be bankrupt.
- C. Change in Ownership: The ownership structure of the Selected Developer or the identity of anyone in the Development Team changes in violation of **Section 5.19 of this Part Three** above. Structural changes include changes in percentages of ownership interests or changes in ownership of any entity at any tier holding a direct or indirect ownership interest in the Selected Developer.
- D. Assignment of Rights: The Selected Developer assigns its designation or transfers its rights in a Joint Development Solicitation in violation of **Section 5.19 of this Part Three**.
- E. Fraud or Felony: The Selected Developer or any officer, director, partner, member, manager or other principal of any person or entity constituting a member of the Development Team is indicted for, or convicted of, a fraud or a felony.
- F. Integrity: The Selected Developer or any officer, director, partner, member, manager or other principal of any person or entity constituting a member of the Development Team is found not to have a satisfactory record of integrity and business ethics in WMATA's sole and non-reviewable discretion.

- G. Incorrect or Incomplete Information: The Selected Developer provided materially incorrect or incomplete information in any of its submissions to WMATA, as determined in WMATA's sole and non-reviewable discretion.
- H. Noncompliance: The Selected Developer does not comply with this Joint Development Solicitation, its Proposal or the terms of the Development Agreement as negotiated by the parties.
- I. Environmental Issues: In accordance with **Section 5.24 of this Part Three**, the Selected Developer conducts environmental due diligence and as a result modifies its Proposal in a manner which is unacceptable to WMATA. Under such circumstances, WMATA shall return the Proposal Security, less any site restoration costs actually incurred by WMATA and any other sums owed to WMATA.
- J. Protest: If a protest is filed in accordance with **Section 4.8 of this Part Three** and WMATA determines that the designation of the Selected Developer should be terminated. Under such circumstances, WMATA shall return the Proposal Security, less any site restoration costs actually incurred by WMATA and any other sums owed to WMATA.
- K. WMATA's Best Interests: WMATA determines (in its sole and non-reviewable discretion) that termination is in its best interest. Under such circumstances, WMATA shall return the Proposal Security, less any site restoration costs actually incurred by WMATA and any other sums owed to WMATA.

## 5.21 WMATA Station Access Roads and Interior Maintenance Roads

WMATA's Metro Station access roads and interior maintenance roads are often owned, maintained and improved by WMATA. Any anticipated use of such roads by a Project must be addressed in the Proposal and approved by WMATA. If WMATA determines the usage to be more than once per week, WMATA reserves the right to charge the Developer for the cost of usage and wear and tear on a degree of usage principle to be determined on a case-by-case basis. WMATA also reserves the right to reject shared use of its roads if such use is detrimental to its operations.

## 5.22 Developer's Investigative Obligations; As Is, Where Is

A Developer is expected to know all information reasonably ascertainable concerning the size, character, quality and quantity of surface and subsurface materials or obstacles on the Joint Development Site, and the existing utilities on the Joint Development Site. All Joint Development Sites are subject to existing physical and legal conditions, whether of record or not. Additionally, a Developer is expected to know the conditions affecting construction on the Joint Development Site, which include but are not restricted to those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads, the topography and conditions of the ground, and the character of equipment and facilities needed before and during prosecution of the work. Except as may be specifically stated in this Joint Development Solicitation or in a ground lease (or, in the case of a sale, the special warranty deed) or other document delivered at settlement, the Joint Development Site is being ground leased or sold on an "as is, where is" basis and WMATA disclaims all responsibility and liability for the completeness or accuracy of any information that it provides.

## 5.23 Smart Growth and Sustainability

- A. Smart Growth: The Project will be required to employ "smart growth" principles. The Environmental Protection Agency provides its own definition of "smart growth," to which Developers should be able to respond. WMATA has also identified the specific attributes of: the nature of the overall plan and its integration into the surrounding neighborhood (in terms of traffic,

pedestrian and bicycle linkage, compatible land uses, community safety, enhancing the commercial environment, etc.); the uses proposed (which should be “uses,” plural, unless otherwise stated for a specific Joint Development Site in **Part Two** of this Joint Development Solicitation) and their synergy with transit use; the densities of those uses, higher densities being preferred; how the open space on the site is treated and the type of uses proposed; parking reduction strategy (to the extent consistent with any specific requirements in **Part Two** of this Joint Development Solicitation for on-site parking at a particular Joint Development Site); and community involvement. Also see the definition of “Transit-Oriented Development,” which emphasizes some similar concepts.

- B. LEED-ND or Equivalent: If the Project contains two or more buildings and if consistency with the requirements of applicable local land use law allows it, the Project will be required to achieve a minimum standard of LEED for Neighborhood Development (LEED-ND) Silver, or equivalent under a different rating system acceptable to WMATA, for the Joint Development Site. During the site development planning phase the Selected Developer will be required to provide evidence to WMATA that the Project is registered with the U.S. Green Building Council under the LEED-ND rating system or that the Project is enrolled in a comparable program. Following completion, the Project will be required to achieve actual certification under the applicable certification standard. This requirement will also be included in covenants, conditions and restrictions recorded at closing. NOTE: The site plans and test fits provided in **Part Two** of this Joint Development Solicitation have not been vetted for compliance with LEED-ND or any comparable rating system.
- C. LEED for Buildings or Equivalent: Notwithstanding that LEED-ND and comparable rating systems do not require all individual buildings to be LEED certified, (i) all office buildings will be required to achieve at least the Silver level of either LEED for New Construction (LEED-NC) or LEED for Core and Shell (LEED-C+S), or their equivalent under a different rating system acceptable to WMATA, and (ii) all residential buildings and other non-office buildings will be required to achieve at least either a LEED Silver or comparable certification from a different rating system acceptable to WMATA to the extent such ratings are available. During the site development planning phase the Selected Developer will be required to provide evidence to WMATA that the Project is registered with the U.S. Green Building Council under the LEED-NC or LEED-C+S rating systems or that the Project is enrolled in a comparable program. Following completion, the Project will be required to achieve actual certification under the applicable certification standard. This requirement will also be included in covenants, conditions and restrictions recorded at closing.

## 5.24 Environmental Matters

- A. Investigation by Developer: WMATA has undertaken no comprehensive environmental investigations of the presence or absence of contaminated material or other environmental conditions that may affect development except as may be specifically identified in **Part Two** of this Joint Development Solicitation. Interested Developers may request permission to perform a due diligence environmental site assessment prior to Proposal submission, after Proposal submission, or after designation as the Selected Developer. Such due diligence site assessment and all associated costs shall be the sole responsibility of the Developer. Permission will be granted by WMATA to do non-invasive assessments subject to the execution by Developer and then the subsequent execution by WMATA of a *Right of Entry Agreement*. Any invasive testing shall require a specific agreement signed by the parties addressing the nature and scope of the work to be done; WMATA’s standard form *Real Estate Permit* is available on WMATA’s website at [www.wmata.com](http://www.wmata.com), click on “Business with Metro,” then click on “Real Estate” and scroll down to “Policies and Forms.” WMATA shall be provided at no cost to it and in a timely manner with a copy of each test result and report addressing the environmental site investigation.

- B. Contamination Found: If environmental contamination is found that requires a cleanup or remediation of the Joint Development Site under a governmental regulatory agency's review, the Developer may withdraw its Proposal (including any Final Proposal) but is responsible for site restoration costs. In the event that the due diligence environmental site assessment is performed after the designation of the Selected Developer but prior to the execution of the Development Agreement, the Selected Developer and WMATA may negotiate the transaction based upon the levels of contaminated materials or other environmental conditions encountered which would substantially delay development or substantially increase the costs of excavation, removal or disposal of soil/materials or the treatment of groundwater. WMATA, however, will not be liable for the cost of remediating any contamination except contamination arising from the acts or omissions of WMATA while it was the owner of the Joint Development Site. If the parties cannot agree upon the resolution of these issues, the Selected Developer may withdraw its Proposal but the Developer is responsible for site restoration costs, and WMATA has the corresponding right to terminate the Selected Developer designation in accordance with **Section 5.20.I** above.

## 5.25 Title

- A. What Constitutes Good Title: Except for the warranties inherent in a special warranty deed in the case of a sale, WMATA will not represent or warrant title to the Joint Development Site. However, it is expected that title to the Joint Development Site will be good of record and fully merchantable and insurable without exception other than customary title exceptions (including the standard exceptions in an American Land Title Association title insurance policy) and easements, restrictions and covenants of record or necessary or appropriate to evidence WMATA's right, title and interest in and to the Reserved Areas and Interests. (Any monetary liens that affect WMATA generally will not be considered encumbrances against the Joint Development Site for these purposes.) If the foregoing standard is not met, a Developer may terminate its Proposal if WMATA does not cure the problem within sixty (60) days after the Developer gives WMATA notice of the problem. Upon such termination, WMATA shall return the Proposal Security to the Developer.
- B. Obtaining Title Insurance: WMATA is not providing any evidence of title. Any title insurance or other evidence of good title desired by a Developer must be obtained by that Developer at its own cost and expense from a party other than WMATA. WMATA will not pay for any title examination, title report, title commitment, title policy, survey or other title-related matter other than to cure any exception to title not permitted by the preceding paragraph. All conveyancing, notary, settlement and other fees (and, per **Section 5.16 of this Part Three**, all transfer, recordation, grantor's, stamp, or other documentary taxes) shall be paid by the Developer, and WMATA shall have no responsibility for them.
- C. Owner's Affidavit(s): At closing, WMATA will deliver an owner's/seller's affidavit to the Developer's title insurer and an affidavit certifying that WMATA is not a "foreign person" for purposes of tax withholding under the Internal Revenue Code, but such affidavit(s) shall not include any indemnification obligation on the part of WMATA and must be reasonably satisfactory to WMATA.

## 5.26 Parking

Parking at Metro Stations is an important element of Metro service. WMATA is aware that demand for commuter parking at many Metro Stations, particularly terminus stations, considerably exceeds demand; correspondingly, there is often impetus for increasing parking capacity, or at least maintaining the *status quo*. Conversely, WMATA is also aware that Transit-Oriented Development principles generally aim for, or require, a reduction in automobile trip generation and, optimally, a reduction in automobile ownership by residents. WMATA is also mindful that building replacement parking, particularly parking built to

WMATA's own specifications, is expensive. These issues are reconciled on a case-by-case basis, not by a formula or generic policy, and must take into account the planning, zoning and political situations in the applicable Local Jurisdiction.

Generally speaking, WMATA operates its own parking facilities. The general expectation is that, whether or not private parking is provided in a garage shared with Metro commuter parking, the Park & Ride facility shall be operated by WMATA and the Selected Developer shall operate the private parking. Except to the extent that parking is provided in a shared structure, all private development amenities, parking, loading, and service facilities shall be independent of WMATA Facilities.

Parking garages that are WMATA Facilities are built to WMATA's own standards, which are generally above the standards used for private sector garages. (WMATA-owned and operated garages have been built both by WMATA and its contractors and by third-party developers and their contractors using WMATA specifications.)

Shared parking – where Metro commuters and others parking for other purposes share a common facility -- has been implemented only on rare occasions in WMATA's experience.

Notwithstanding the foregoing, WMATA is willing to consider options, such as situations in which the Selected Developer not only builds the replacement commuter parking but also owns, maintains and operates the Metro commuter parking in a parking garage that is not built to WMATA specifications. Proposals for alternative parking approaches must address the following conditions:

- The Selected Developer must satisfy WMATA that Metro commuters will have a sufficient number of spaces in the privately-owned parking garage. The mechanism to achieve that will be determined on a case-by-case basis.
- Metro commuters must not pay more in a privately-owned garage than they would pay in a WMATA-operated garage in the same jurisdiction. (In that regard, (i) WMATA has not, and has no plans to, make its own SmarTrip technology available to private operators, and (ii) WMATA is moving toward an open payment system that accepts credit cards and will one day accept payment by smartphone and other means. The effect is that private operators cannot expect to simply charge WMATA parking rates to commuters who pay for their parking by using a SmarTrip card. A means must be determined whereby Metro commuters can be separately identified for payment purposes if different rates are charged to Metro riders and others who park in a shared parking garage.)
- A portion of the gross parking revenues collected by WMATA are actually "surcharges" levied by the Local Jurisdictions. If the commuter parking at a Metro Station is privately provided, the applicable Local Jurisdiction will lose those "surcharge" revenues. Private parking operators may be required to levy those "surcharges" and pay them to WMATA as part of the parking charges levied on commuter parkers.
- The proposal must clearly state the incremental economic value to WMATA from the proposed alternative approach to parking replacement. The value must be compared to the traditional method of the Selected Developer building a WMATA-owned and operated garage to WMATA's own standards.

WMATA expects that charges for any privately-operated parking built for tenants, whether residential, office, retail or other, on a Joint Development Site will be "unbundled" from the rent otherwise payable. This means that the tenants who use the parking facility will pay separately and directly for their parking as an additional fee so that tenants who do not use the parking facilities do not subsidize the cost of the parking through their rental payments.

If the construction of a project will displace existing Metro-owned parking in whole or in part, either (i) the Selected Developer must provide replacement interim parking to be operated by and satisfactory to WMATA, the revenues from which will be WMATA's, or (ii) the Selected Developer must compensate WMATA for the lost revenue during the time no, or less, parking is provided. This line item is to be shown in the budget that is included in the Proposal.

Contractor parking will not be allowed in WMATA facilities. Contracts with contractors should specifically so state. Construction plans submitted to WMATA shall show off-site locations for contractor parking.

## **5.27 Affordable Housing**

WMATA does not impose any affordable housing requirement of its own. Instead, WMATA's *Joint Development Policies and Guidelines* ([www.wmata.com/realestate](http://www.wmata.com/realestate)) require that developers proposing residential projects on WMATA-owned land must comply with the affordable housing requirements, if any, of the applicable Local Jurisdiction. If affordable housing is proposed, the Proposal should address the amount and nature of it.

## **5.28 Guaranty**

WMATA may require a third party to guarantee some or all of the obligations of the Selected Developer, including but not limited to construction obligations. The form of the guaranty may be a letter of credit issued by a bank in an amount and on terms acceptable to WMATA and/or a guaranty from a parent entity or person determined by WMATA to have sufficient capital or liquidity to ensure payment.

## SECTION 6: DEFINITIONS

### Developer(s)

The entity submitting or contemplating the submission of a Proposal in response to this Joint Development Solicitation. The Developer should be a qualified individual or entity with real estate development-related experience and access to financing sufficient to undertake the proposed Project. If a Developer includes or engages a broker, WMATA will not pay any broker's commission and the Developer shall be solely responsible for the same.

### Development Agreement

The legal document (ground lease, sales contract, combination ground lease/sale contract, master development agreement or other agreement) that constitutes the binding contract between WMATA and the Selected Developer once it is signed by both parties and approved by the WMATA Board of Directors and the FTA (and by any third party whose property is included in that particular Joint Development Site).

### Development Team

The Developer and the principal persons and/or entities (including officers, directors, partners, members, managers or other principals of such persons and/or entities) identified by the Developer as the participants in the Project. If a Development Team includes a broker, WMATA will not pay any broker's commission and the Developer shall be solely responsible for the same.

### Disadvantaged Business Enterprise (DBE)

A DBE is a for-profit, small business concern that is owned and controlled (at least fifty-one percent (51%)) by one or more socially and economically disadvantaged persons. Socially and economically disadvantaged persons are persons who are citizens of the United States or lawfully admitted permanent residents and who are one or more of the following:

- A. Black Americans (meaning persons having origin in any of the Black racial groups of Africa);
- B. Hispanic Americans (meaning persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin regardless of race);
- C. Native Americans (meaning persons who are American Indians, Eskimos, Aleuts or Native Hawaiians);
- D. Asian-Pacific Americans (meaning persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia or Hong Kong);
- E. Subcontinent Asian Americans (meaning persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka); or
- F. Women.

### Evaluation Team

WMATA staff assigned to analyze the Proposals and make recommendations. If a third party's property is collectively offered as part of a particular Joint Development Site, a representative(s) of that third party may also be included in the Evaluation Team.



### **Federal Transit Administration (FTA)**

The federal agency within the U.S. Department of Transportation which administers the federal rules and regulations governing joint development programs and oversees other aspects of real property purchased with federal funds for transit purposes. See Federal Register, Vol. 79, No. 164, August 25, 2014, pages 50728-50733 and *Federal Transit Administration Guidance on Joint Development*, FTA Circular 7050.1, August 25, 2014, as they may be amended, supplemented or otherwise modified from time to time.

### **Final Proposal**

If requested by WMATA, the final document or compilation of documents submitted by the Developer for analysis before the Evaluation Team makes its recommendation. See the definition of "Proposal."

### **Initial Proposal**

The initial document or compilation of documents submitted by the Developer in response to this Joint Development Solicitation. See the definition of "Proposal."

### **Joint Development**

A creative program through which property interests owned and/or controlled by WMATA are marketed to office, retail/commercial, recreational/entertainment, hotel and residential developers with the objective of developing Transit-Oriented Development projects. For purposes of this Joint Development Solicitation, Joint Development is a subset of Transit-Oriented Development in that Joint Development is Transit-Oriented Development that occurs on transit authority-owned property. The FTA's definition of Joint Development can be found in the materials cited under the definition of "FTA," above.

### **Joint Development Policies and Guidelines**

The procedures approved from time to time by the WMATA Board of Directors which govern the Joint Development program, available at [www.wmata.com](http://www.wmata.com) (click on "Business with Metro," then click on "Real Estate" and then click on "Policies and Forms").

### **Joint Development Site(s)**

The property areas and interests identified in **Part Two** of this Joint Development Solicitation.

### **Project**

The Joint Development ideas, concepts and plans that a Developer presents in its Proposal and the evolution and consummation of them.

### **Proposal(s)**

The development-related documents submitted in response to this Joint Development Solicitation. The term Proposal includes the Initial Proposal and, if requested by WMATA, the Final Proposal.

### **Selected Developer**

The Developer granted the exclusive right to negotiate a Development Agreement with WMATA, as determined by the WMATA Board of Directors (not by WMATA staff). Notwithstanding the Selected Developer's selection as such, the Selected Developer has no rights to the Joint Development Site until a Development Agreement has been negotiated and executed by the parties (including any third party whose property may be collectively included in a Joint Development Site) and until the WMATA Board of Directors and the FTA have approved the Development Agreement. A Selected Developer has no right to compensation from WMATA if no such Development Agreement is negotiated, signed and approved. A Selected Developer's right, if any, to compensation from WMATA shall be solely as may be set forth in a signed and approved Development Agreement.

### **Term Sheet**

The nonbinding document which summarizes the development concept, financial structure and other major business terms of the Project.

## Transit-Oriented Development

Transit-oriented development is compact, mixed-use development near transit facilities and high-quality walking environments which leverages transit infrastructure to promote economic development and smart growth (see **Section 5.23 in Part Three** of this Joint Development Solicitation) and caters to shifting market demands and lifestyle preferences. Transit-Oriented Development is about creating sustainable communities where people of all ages and incomes have transportation and housing choices, increasing location efficiency where people can walk, bike and take transit. In addition, transit-oriented development boosts ridership of transit systems and reduces automobile congestion, providing value for both the public and private sectors while creating a sense of community and place.

For WMATA's more specific purposes, Transit-Oriented Development means a development program that is compatible with and synergistic to a heavy rail transit station, including (without limitation): a walkable mixed-use community; active public amenities (such as performance spaces, libraries, day care centers, community meeting rooms, police substations and other uses that attract the public); open space in the form of high-quality small urban parks and plazas with facilities and activities customized to the size and location; the creation of a sense of place; unobtrusive loading and delivery facilities that do not detract from pedestrian and visual attraction; high-quality lighting and safe station areas; good connections with the surrounding properties, streets and neighborhoods where feasible so as to provide them access to the Metro Station by bicycle and on foot; encouragement of transit ridership, whether by rail or by bus, whether by physical design or providing financial incentives; and reduction of automobile dependency by all of the foregoing means and also by other means such as transportation demand management, bike sharing and car sharing, eliminating or reducing free parking and unbundling parking fees from rent. The quality of the integration of the proposed development with the existing Metro Station is an important component of a Transit-Oriented Development.

For informational purposes, sample qualitative and quantitative guidelines for specific attributes of transit-oriented development are also available in the publication entitled "The TOD Standard" published by the Institute for Transportation Development Policy at [www.itdp.org/library/publications](http://www.itdp.org/library/publications). (This publication has not been formally adopted by WMATA and is not binding on WMATA.)

WMATA is aware that the size of any particular Joint Development Site will affect whether, or to what extent, Transit-Oriented Development principles can be effectuated within an individual Project.

## WMATA Compact

Washington Metropolitan Area Transit Authority Compact, Public Law 89-774, 80 Stat. 1324, as it may have been and may hereafter be amended, supplemented or otherwise modified.

## WMATA Facility

Any improvements, structures, infrastructure components, tangible property and/or areas required in the judgment of WMATA for the use, operation, access, maintenance, repair, servicing, replacement or removal of structures and supports, access, parking, operating and service facilities and areas relating to WMATA's operations or activities. WMATA Facilities include, without limitation, the Metro Stations, tunnels, rails, tracks, bus stations, bus bay areas, bus layover spaces, supervisory kiosks, employee bathrooms, electric substations, conduits and lines, communications equipment and structures, pedestrian ways and bridges, waiting and shelter areas, facilities serving people with disabilities, cooling towers, chiller plants, vent and fan shafts, bicycle rack and bicycle locker areas, Bike & Ride facilities, storm water management facilities, landscaping, lighting, Kiss & Ride facilities, Park & Ride facilities, taxi stands, WMATA-operated parking meters, and all other associated facilities. WMATA Facilities are usually owned by WMATA and can be located on land owned by WMATA or, under appropriate circumstances, can be located via covenants, easements or other means on land owned by third parties. WMATA reserves the right to operate all WMATA Facilities in such manner as it sees fit.

As a general rule, WMATA does not make plans and specifications for WMATA Facilities publicly

available. Exceptions are made on a case-by-case basis when a need is demonstrated and the requestor has been approved by WMATA in WMATA's sole and absolute discretion. Accordingly, it is not anticipated that plans and specifications for WMATA Facilities relevant to this Joint Development Solicitation will be made publicly available. However, sufficient information will be made available to the Selected Developer or, in WMATA's sole and absolute discretion, to some or all Developers who WMATA believes might be selected as a Selected Developer.

### **WMATA Improvement(s)**

Those improvements, whether an interim replacement facility or a new facility, which will be designed and/or constructed by the Selected Developer for WMATA in a configuration acceptable to WMATA. Upon final acceptance by WMATA, a WMATA Improvement will become a WMATA Facility.

### **WMATA Replacement Facility**

A WMATA Improvement designed and/or constructed by the Selected Developer for WMATA in a configuration acceptable to WMATA that replaces any displaced or disrupted WMATA Facility and which will be turned over to WMATA.

### **WMATA Reserved Areas and Interests**

Includes (a) all areas of, within or adjacent to the Joint Development Site containing any WMATA Facility; (b) all areas of, within or adjacent to the Joint Development Site relating to the use, operation, access, maintenance, repair, servicing, replacement or removal of any WMATA Facility; and (c) any and all easements and other reserved rights required by WMATA in connection with its use, operation, access, maintenance, repair, servicing, replacement or removal of any WMATA Facility or WMATA operations and business generally, whether expressly provided for or reasonably contemplated.

Covenants, restrictions and easements shall be reserved for, without limitation, easements and reserved rights (whether at, above or below ground level) for:

- (i) the construction, operation, maintenance, repair, replacement, removal or relocation of any and all WMATA Facilities (existing or proposed),
- (ii) any and all service facilities serving any WMATA Facilities,
- (iii) all underground power lines and other utilities,
- (iv) horizontal and vertical support for all WMATA Facilities in, on and about the Joint Development Site, including without limitation, structures, equipment or installations such as foundations, beams, columns, bracing and similar structural features which maintain vertical and horizontal support and are necessary for the maintenance, operation and protection of any WMATA Facility, and
- (v) protection and approval rights satisfactory to WMATA in its sole and unreviewable discretion with respect to limits on loads and pressures which may affect any WMATA Facility, whether vertical or lateral.

Arrangements for relocating, rebuilding or otherwise modifying WMATA Facilities as part of the development of the Project shall also be considered WMATA Reserved Areas and Interests and shall be addressed in the covenants, restrictions and easements referenced above.

Any covenants, restrictions and easements addressing the WMATA Reserved Areas and Interests will have priority over all other documents, including any ground lease or deed and any mortgage, deed of trust or other financing document, incident to the Project.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

**PROPOSAL FORM**  
**for**  
**JOINT DEVELOPMENT SITES**

*Please use a separate Proposal Form  
for each Joint Development Site for which a Proposal is submitted  
and/or  
for multiple Proposals for a single Joint Development Site.*

*This entire Proposal Form should be copied electronically and the responses filled in on that copy, which should then be submitted in both hard copy and electronically to WMATA as the Proposal. The means of submitting a Proposal are spelled out more fully in **Part Three** of the Joint Development Solicitation.*

JOINT DEVELOPMENT SOLICITATION DATED: September 19, 2014

JOINT DEVELOPMENT SITE: Fort Totten Metro Station

JOINT DEVELOPMENT SOLICITATION NUMBER: 2014-04

\_\_\_\_\_  
Printed name of Developer entity (The entity must be a currently legally-existing entity and a full legal name, not a trade name, should be used.)

The Developer submits this Proposal Form to WMATA and agrees to be bound by it.

**DEVELOPER:**

\_\_\_\_\_

Date: \_\_\_\_\_, 201\_\_

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

Printed Name:

Title:

## **PART 3, SECTION 3 INFORMATION**

The information required by **Part Three, Section 3** of the Joint Development Solicitation should be submitted by following the format of the table found on the following pages. To make it easier for Developers to present Proposals, **this entire Proposal Form should be copied electronically and the responses filled in on that separate document, which should then be submitted to WMATA in both hard copy and electronically.** The Proposal may expand the space allotted in the following table for any particular line item or category as the Developer wishes, subject to the overall restriction on length stated in **Part Three, Section 2.2** of the Joint Development Solicitation.

**Volumes 1 and 2 should be physically separate from one another. Within each Volume, each Tab should be physically separate from the other Tabs.**

As stated in **Part Three, Section 3.1** of the Joint Development Solicitation, before completing this table the Developer should insert a Table of Contents for each Volume at the beginning of each Volume, should insert an Executive Summary for Volume 1 and may insert an Executive Summary for Volume 2. The Executive Summary for Volume 1 must specifically address the six bullet points under the subheading “Technical Criteria” and the two bullet points under the subheading “Economic Criteria” in **Part Three, Section 4.2** of the Joint Development Solicitation. Developers are reminded that, as stated in the Joint Development Solicitation, the Executive Summary for Volume 1 may be disclosed to the public and it should be written with that in mind.

Each of the following categories or Tabs as described in the following charts is a short-hand version of a corresponding provision in **Part Three, Sections 3.1** (for Technical Information) and **3.2** (for Economic Information) of the Joint Development Solicitation. Respondents should refer to those Sections for more detail on what information is being sought.

Volume 1 should be submitted as one single volume, document or package, both in hard copy and electronically, as explained above and in the Joint Development Solicitation. Volume 2 should then be in a separate volume, document or package, both in hard copy and electronically.

<b>VOLUME 1-TECHNICAL INFORMATION</b>	
<b>Section 3.1.a: Development Team Experience and Prior Performance</b>	
<b>Tab 1: Identification of Developer and Development Team</b>	
Developer's name (use full legal name, not a trade name):	
Developer's address:	
Name of lead contact at Developer:	

Title of lead contact at Developer:	
Telephone number of lead contact at Developer:	
E-mail address for lead contact at Developer:	
Names and titles of individual Development Team members from within Developer's own organization (attach a resume or other biography for each individual):	
<i>If Developer is a partnership, joint venture, consortium or other organization or team with multiple partners, venturers, members or other participants, include the above information for each of them</i>	
Name of outside service provider who is on Development Team:	
Address of outside service provider:	
Telephone number of outside service provider:	
E-mail address of lead contact at outside service provider:	
Names and titles of individuals working on this Project within this service provider's organization (attach a resume or other biography for each individual):	
<i>Repeat the above information for each outside service provider</i>	
<b>Tab 2: Developer's Business Entity and Relationship with WMATA</b>	
Legal type of Developer's <i>current</i> entity, e.g. sole proprietorship, limited liability company, limited partnership, corporation:	

State of formation of Developer's <i>current</i> entity:	
Legal type of Developer's <i>proposed</i> entity, e.g. sole proprietorship, limited liability company, limited partnership, corporation, if known:	
Identify any past, current or anticipated relationships of any member of Development Team with WMATA per <b>Section 2.3.a</b> <i>[if none, write "None"]</i> :	
Disclose any <i>appearance</i> of a conflict of interest <i>[if none, write "None"]</i> :	
Identify any past or ongoing litigation, or known threatened litigation, with WMATA <i>[if none, write "None"]</i> :	
List any projects on which Developer, its parent(s), or any member of Development Team has defaulted, and explain <i>[if none, write "none"]</i> :	
List any projects on which Developer, its parent(s), or any member of Development Team has gone bankrupt, and explain <i>[if none, write "none"]</i> :	
List any criminal indictments and felony or fraud convictions of Developer, its parent(s), or any member of Development Team, or any principal in any of them <i>[if none, write "none"]</i> :	
Identify any debarments for government contracts by Developer, its parent(s), or any member of Development Team, or any principal in any of them <i>[if none, write "none"]</i> :	
<b>Tab 3: Previous Projects</b>	



Attach illustrative materials on three recent successful and comparable projects that have achieved at least substantial completion and received certificates of occupancy (or equivalent).	
Identify the sources and amounts of debt and equity capital raised for the identified projects:	
<b>Section 3.1.b: Development Concept</b>	
<b>Tab 4: Site Plan and Uses</b>	
<i>Attach a site/concept plan, representative rendering, and a description of land uses per <b>Section 3.1.b</b>. Remember to include the jpeg and large-size visual rendering required by that Section.</i>	
Narratively explain the site/concept plan. Explain how the site plan and land uses comply with smart growth and Transit-Oriented Development principles:	
<b>Tab 5: FAR</b>	
Identify the currently permitted FAR or other density measurement of the site:	
Identify the proposed FAR or other density measure for the site:	
<b>Tab 6: Assemblage</b>	
If Project is part of a property assemblage, provide relevant information here <i>[if not, write "not applicable"]</i> :	
<b>Section 3.1.c: Compatibility of Project with local requirements and the affected transit facility</b>	
<b>Tab 7: Existing and Proposed Zoning/Land Use</b>	

Identify the existing zoning:	
If a zoning change or other entitlement will be sought, identify it here <i>[if none, write "none"]</i> :	
Identify how the Project complies (or does not comply) with other land use requirements:	
<b>Section 3.1.d: Effects on WMATA Facilities</b>	
<b>Tab 8: Effects on and Changes to WMATA Facilities and Public Infrastructure</b>	
Explain the Project's anticipated impact on WMATA Facilities and any proposed interim and/or reconfiguration or relocation of WMATA Facilities <i>[if none, write "none"]</i> :	
Explain the Project's anticipated impact on other public infrastructure <i>[if none, write "none"]</i> :	
<b>Section 3.1.e: Market/financial viability of the Project</b>	
<b>Tab 9: Ground Lease vs. Sale</b>	
State whether the preferred Proposal is to ground lease or to purchase the property (or a combination):	
<b>For the mandatory proposal of a ground lease, respond to the following:</b>	
Identify the portion of the property to be ground leased and its size:	
Specify the desired lease	

term(s), both initial and renewal, not to exceed 98 years:	
<b>If a purchase is proposed as an alternative to a ground lease, respond to the following [if only a ground lease is proposed, skip to Tab 10]:</b>	
Identify the portion of the property to be purchased and its size:	
Explain why a purchase rather than a ground lease is proposed:	
Explain why a purchase is more advantageous to WMATA than a ground lease:	
<b>Tab 10: Market analysis</b>	
Provide a market analysis of the site:	
<b>Tab 11: Impact on Local Tax Base and Job Creation</b>	
Identify impact on Local Jurisdiction's and State's tax base:	
Identify (non-WMATA) public facilities, including cost and value, to be created:	
Identify number of construction jobs:	
Identify number of permanent jobs:	
Identify any other quantifiable economic benefits to Local Jurisdiction [if none, write "None"]:	

<b>Tab 12: Governmental Financial Support</b>	
State whether the Project is contingent upon any governmental action or financial support (other than matters discussed in Tabs 9-11 above) <i>[if none, write "none"]</i> :	
Explain justification for requested action or support:	
Explain process to obtain requested action or support:	
<b>Tab 13: Project Schedule</b>	
Term Sheet negotiations:	
Designation as Selected Developer:	
Development Agreement negotiations:	
WMATA Approval of Development Agreement:	
Assemblage <i>(if not applicable, write "N/A")</i> :	
Concept site plan:	
WMATA Compact hearing (if any WMATA Facilities are affected by the Project):	
Proposed closing date (signing ground lease or sale of land):	
Development plan:	
Local and other governmental approvals and actions (other than permits):	
Project financing:	

35% schematic design and construction documents:	
65% schematic design and construction documents:	
100% schematic design and construction documents:	
Local permits:	
Interim WMATA Replacement Facilities, design <i>(if not applicable, write "N/A")</i> ;	
Interim WMATA Replacement Facilities, construction <i>(if not applicable, write "N/A")</i> ;	
Interim WMATA Replacement Facilities, occupancy <i>(if not applicable, write "N/A")</i> ;	
Interim WMATA Replacement Facilities, cessation <i>(if not applicable, write "N/A")</i> ;	
Permanent WMATA Replacement Facilities, design <i>(if not applicable, write "N/A")</i> ;	
Permanent WMATA Replacement Facilities, construction <i>(if not applicable, write "N/A")</i> ;	
Interim WMATA Replacement Facilities, occupancy <i>(if not applicable, write "N/A")</i> ;	
Construction of Project (per phase, if applicable):	
Initial occupancy:	
Stabilization:	
<b>Section 3.1.f: Community involvement</b>	
<b>Tab 14: Local Jurisdictions</b>	

Identify each governmental staff member Developer has met with regarding the Project <i>[if none, write "none"]</i> :	
State the meeting date(s) for each individual:	
Describe information shared by Developer:	
Describe views and expectations of each individual:	
<i>Repeat the foregoing for each individual</i>	
<b>Tab 15: Community Organizations</b>	
Identify a community organization Developer has met with regarding the Project <i>[if none, write "none"]</i> :	
State the meeting date(s):	
Describe information shared by Developer:	
Describe community organization's reaction(s):	
Describe any issue(s) raised by community organization and Developer's response <i>[if none, write "none"]</i> :	
<i>Repeat the foregoing for each community organization</i>	
<b>Tab 16: DBEs</b>	
Indicate Developer's inclusion of DBEs:	

### Section 3.1.g: Innovation and Creativity

#### Tab 17: Open-ended

Identify any aspect of any other answer evidencing innovation or creativity:

*Developers are reminded that Volume 2 should be physically separate from Volume 1. Volumes 1 and 2 should be in separate documents in the hard copy submission and separate flash drives, CDs or DVDs in the electronic submission.*

*An Executive Summary may be included in Volume 2 but is not required. An Executive Summary for Volume 2 should not exceed five pages.*

*Developers are reminded that Volume 2 is intended for internal WMATA use (including WMATA's outside consultants) and the use of any third party who may own property that may be jointly offered in this Joint Development Solicitation. Information relevant to a Local Jurisdiction should be included in Volume 1.*

## VOLUME 2-ECONOMIC INFORMATION

### Section 3.2.a: Financial benefits accruing to WMATA

#### Tab 18: Market Value

State fair market value of the Joint Development Site including (without limitation) a statement of the value on a dollars per FAR square foot basis [state the offered compensation (1) as a gross value without regard to the existence, removal, relocation, reconstruction, replacement of or other work on the WMATA Facilities and (2) then show Developer's expectation of the cost of any removal, relocation, reconstruction, replacement of or other work on the WMATA Facilities, with separate values shown for separate Facilities, so that a net value is also stated]:



State method of deriving fair market value:	
State assumptions underlying stated value:	
<b>Tab 19: Ground Lease vs. Sale</b>	
<b>For the mandatory proposal of a ground lease, respond to the following:</b>	
Specify the desired lease term(s), both initial and renewal, not to exceed 98 years <i>[this should be the same as the information provided under Tab 9 above]</i> :	
Nonrefundable Option Fee payable upon designation as Selected Developer:	\$100,000.00
Predevelopment rent <i>[if none, write "None"]</i> :	
Base ground rent (state whether base ground rent is payable up front or periodically and, in the latter case, identify the periods and a present value using a 3% discount rate):	
Base rent escalations (as a %), including frequency, if base rent is not payable in full up front:	
Anticipated commencement date for payment of base rent and timing of first escalation if base rent is not payable in full up front:	
If portions of site are to be ground leased sequentially, describe method of determining consideration for each phase <i>[if not applicable, so state]</i> :	
Increasing base ground rent due to changes in	

circumstances or timing:	
State WMATA's participating rent, whether it is calculated on gross or net income, and when it is payable:	
If using net income, define net income <i>[if using gross income, write "not applicable"]</i> :	
State WMATA's share of proceeds from capital events and any deductions, limitations or qualifications from what counts as "proceeds from a capital event."	
State any provision for increasing rent after WMATA Replacement Facilities amortized <i>[if none, write "none"]</i> :	
Increase in rent once cost of any WMATA Replacement Facilities has been amortized:	
Other rent <i>[if none, write "none"]</i> :	
<b>If a purchase is also proposed, respond to the following <i>[if only a ground lease is proposed, skip to Tab 20]</i>:</b>	
Nonrefundable Option Fee payable upon designation as Selected Developer:	\$100,000.00
Predevelopment payments <i>[if none, write "None"]</i> :	
Purchase price:	
If portions of site are to be purchased sequentially, describe method of determining consideration for each phase <i>[if not applicable, so state]</i> :	
Increasing base ground rent due to changes in	

circumstances or timing:	
Method of increasing purchase price if final approved density is greater than proposed:	
Other value <i>[if none, write "None"]</i> :	
<b>Section 3.2.b: Other financial information</b>	
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Financing	
Construction loan rate, term, amount, loan-to-value ratio and loan-to-cost ratio:	
Permanent loan rate, term and amount:	
Equity as a percentage of total construction costs (specifying the different types of equity):	
Revenues per year	
Office rent (\$/gross sf, # of gross sf, and total):	
Retail rent (\$/gross sf, # of gross sf, and total):	
Residential rent (\$/dwelling unit, # of dwelling units, and total):	
Hotel income (ADR, # of guest rooms, RevPAR, operating expense margin, and total):	
Parking income (\$/space/month, # of spaces proposed, and total):	
Other revenues (specify):	
Total revenues in \$:	

Construction Costs	
Hard costs on a line-item basis:	
Total hard costs:	
Soft costs on a line-item basis (including any Developer's fee and, if applicable, compensation for parking taken out of service and not replaced during the construction period):	
Total soft costs (in \$ and as % of hard costs):	
Costs (hard and soft) on a unit basis:	
Cost (hard and soft) per structured parking space:	
Cost (hard and soft) per surface parking space:	
Cost (hard and soft) of any WMATA garage or other WMATA Replacement Facility (broken out separately for each improvement):	
Land value	
Land value per sf:	
Land value per FAR sf:	
Ground rent and, if applicable, purchase price payable to WMATA (state as (1) gross and (2) net after deducting cost of any WMATA Replacement Facility):	
Operating Costs per year	
Operating expenses in \$:	
Operating expenses in \$/gross sf (or per dwelling unit or hotel room):	

Annual replacement, renovation, reinvestment reserves (total, \$/gross square foot, \$/dwelling unit and \$/key)	
Net operating income:	
Operating expenses as a percentage of total revenues:	
Debt service and DSCR:	
Net cash flow (revenue less operating expenses, debt service and ground rent):	
Percentage or participating rent to WMATA:	
Distributions to investors:	
Free cash flow:	
Returns	
Developer's IRR:	
Cash-on-cash return:	
Return on equity:	
Related party fees and charges as a percentage of net operating income	
Property management fees as a percentage of net operating income	
Development and construction management fees as a percentage of Project costs	
Annual capital reserve payments as a percentage of net operating income	
Capital reserve account as a percentage of escalation-adjusted total	
Project cost for years 5, 10, 20	

and 40	
<i>Include a predevelopment, development and operating pro forma in Microsoft Excel as required by Section 3.2.b, Tab 21</i>	
<b>Tab 21: Financial statements</b>	
<i>Attach Developer's balance sheets, financial statements, and sources and uses of funds statements for the past three fiscal years</i>	
<b>Section 3.2.c: References</b>	
<b>Tab 22: References</b> (at least two of the references should be lending institutions)	
Name and address of 1 <sup>st</sup> reference:	
Name and address of 2 <sup>nd</sup> reference:	
Name and address of 3 <sup>rd</sup> reference:	
Names and addresses of any additional references:	

## ATTACHMENT B

[NAME AND ADDRESS OF ISSUING BANK]

NOTE: ADDRESS MUST BE IN THE WASHINGTON, D.C. METROPOLITAN AREA]

### STANDBY IRREVOCABLE LETTER OF CREDIT

[Date]

[Reference Number]

**Washington Metropolitan Area Transit Authority**

600 Fifth Street, N.W.

Washington, D.C. 20001

Attn: Director, Office of Real Estate and Station Planning

Gentlemen:

By the order of \_\_\_\_\_ (the "Applicant"), we hereby open in your favor our irrevocable letter of credit for the amount of \_\_\_\_\_ Dollars (U.S.) (U.S. \$ \_\_\_\_\_), available by your draft(s) at sight drawn on us at the above address and accompanied by a statement purportedly signed by an authorized signer on your behalf substantially in the form of Exhibit A attached hereto. All drafts drawn in compliance with the terms of this instrument will be duly honored upon presentation. Drafts need not be endorsed on this letter of credit itself and the original of this letter of credit need not accompany any presentment. Presentation may be made in person, by messenger or by overnight courier service, or by mail. Presentation shall be made to us at the following address:

\_\_\_\_\_.

This initial term of this letter of credit expires on \_\_\_\_\_, 20\_\_ and shall automatically be renewed from year-to-year thereafter, without amendment or notice to you or to the Applicant, unless we give you actual written notice of nonrenewal at least two (2) months prior to any annual expiration date. Such notice of nonrenewal shall be given by Registered Mail or by overnight courier to your address as stated above or to such other address as you give us notice of, as stated below. Upon your receipt of such notice, you may draw on us prior to the then-relevant expiration date for the unused balance of this letter of credit. If an expiration date is a Saturday, Sunday, legal holiday or other day on which we are not open for business for

the presentment of letters of credit, the expiration date shall automatically be extended to our next business day.

We agree to deliver payment in full of each draft made on this instrument without any processing, check, renegotiation or other fees whatsoever to your offices set forth above, or to such account as you may give us wiring instructions, within thirty-six (36) hours (not including Saturdays, Sundays or legal holidays) after the time of presentment.

We will accept any and all presentations and statements delivered pursuant to this instrument as conclusive, binding and correct. We have no duty to investigate, and shall not investigate or be responsible for, the accuracy, truthfulness, correctness or validity of any such presentment or statement, notwithstanding the claim of any person to the contrary.

Partial drawings are permitted. Draws under this letter of credit will be honored in the order received, as determined by us (any such determination to be conclusive), and to the extent that there remains an amount available to satisfy the most recent draw.

You may change your address for receipt of notices under this letter of credit by giving us notice of your changed address.

Notwithstanding Article 38D of the UCP (as defined below), this letter of credit is transferable, without any transfer fee, and may be transferred successively by subsequent transferees. Transfers shall be effected upon presentation of the original of this letter of credit and any amendments hereto, accompanied by our transfer form appropriately completed.

Except to the extent inconsistent with the express terms of this letter of credit, this letter of credit shall be governed by the Uniform Customs and Practices for Documentary Credits (2007 Rev.), International Chamber of Commerce Publication No. 600 and, to the extent not so governed, by the statutes and case law of the District of Columbia.

Very truly yours,

[NAME OF ISSUING BANK]

By: \_\_\_\_\_  
Name:  
Title:



Exhibit A to  
Letter of Credit

[Date]

[NAME OF ISSUING BANK]  
[ADDRESS OF ISSUING BANK]

Attn: \_\_\_\_\_

Subject:       Your letter of credit number \_\_\_\_\_  
                  dated \_\_\_\_\_, 20\_\_ (the "Letter of Credit")

Gentlemen:

The undersigned hereby certifies that it is entitled to draw on the Letter of Credit under the terms of either (i) that certain Joint Development Solicitation dated as of \_\_\_\_\_, 20\_\_ issued by the Washington Metropolitan Area Transit Authority, as it may have been amended, supplemented, assigned or otherwise modified to date, or (ii) the Letter of Credit itself, as it may have been amended, supplemented, assigned or otherwise modified to date, due to its expiration or nonrenewal.

The undersigned hereby presents the Letter of Credit for payment in the amount of \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

Very truly yours,

[NAME OF THEN-CURRENT BENEFICIARY]

By: \_\_\_\_\_  
    Name:  
    Title:

## ATTACHMENT C

### WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY OFFICE OF ACCOUNTING

#### Electronic Fund Transfer (EFT) Vendor Payment Enrollment Form

To: Accounts Payable Section      Date (MM/DD/YYYY):  
Beth Page  
Tel: 202-962-1674      Vendor #:  
Fax: 202-962-1655

---

#### VENDOR INFORMATION

Vendor Name:

Address:

City:      State:      Zip Code:

*The following individual is authorized to request changes to ACH payment information.*

Name:

Position Title:

Phone Number:      E-mail Address:

---

#### BANK INFORMATION

Bank Name:

Bank Address:

ABA Routing Number (9 digits):

Bank Account Number:

*The following individual will be receiving WMATA payment notification by E-mail*

Name:

Position Title:

Phone Number:      E-mail Address:

---

#### AUTHORIZED SIGNATURE

Print Name:

Position Title:

Signature:      Date (MM/DD/YYYY):

*In using this template, please keep the following in mind:*

- *This is a partially-negotiated document. **It is quite favorable to WMATA but it is not a completely pro-WMATA starting point.***
- ***This is only a template, not a definitive document. It is not a straitjacket. Nor for the most part does it reflect “non-negotiable” WMATA provisions (except in the Article entitled “WMATA-Specific Clauses”). Users of this template should modify it to suit their transactions, rather than modify their transactions to suit this document.***
- *This template assumes a complex multi-phase development with each phase to be handled by a separate development entity, each affiliated with the master developer. (WMATA abhors true “master developers” on its projects but can accept it if the master developer is working through its own affiliates, not selling off development parcels to third party developers.) [If the project is a single-phase development, then use the template Joint Development Agreement for single-phase projects, which is greatly simplified.]*
- *This template JDA assumes that some of the site will be ground leased and some will be sold. (Sales are permitted in this template only for residential condominium development.) Again, if that is not applicable to a particular situation, strip out what is not needed.*
- *This template assumes that the consideration payable to WMATA will be paid in a lump sum at closing(s) as a capitalized ground rent or sales price. It also assumes the payment of participating rent based on gross income and WMATA participation in the (relatively) gross proceeds from capital transactions, including condominium sales. If other payment terms are applicable, customization will be needed.*
- *If Developer wishes to use an affiliated single-purpose entity separate from the Phase Tenant to build the WMATA Replacement Facilities, the Ground Lease (or fee conveyance equivalent) and the Construction Agreement should be cross-defaulted and there probably needs to be some guarantor of the Construction Agreement.*

# Model Agreement A-3: Joint Development Agreement Template

**JOINT DEVELOPMENT AGREEMENT**

**For the**

\_\_\_\_\_ **Metro Station**

**Between**

**Washington Metropolitan Area Transit Authority**

**And**

\_\_\_\_\_

\_\_\_\_\_, 20\_\_

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**JOINT DEVELOPMENT AGREEMENT**

This Joint Development Agreement (as it may be amended, supplemented or otherwise modified from time to time, this “**Agreement**”) is entered into by and between the Washington Metropolitan Area Transit Authority (“**WMATA**”), an interstate compact agency of the Commonwealth of Virginia, the District of Columbia and the State of Maryland, and \_\_\_\_\_ (“**Developer**”), a \_\_\_\_\_, as of \_\_\_\_\_, 20\_\_ (the “**Effective Date**”).

**RECITALS:**

- A. WMATA is the owner of approximately \_\_\_\_\_ acres of land at the \_\_\_\_\_ Metro Station in \_\_\_\_\_, \_\_\_\_\_ (the “**Metro Station**”), as more fully defined in **Section 1.1** [all of which] [or a portion of which] has been proposed for joint development ([the portion proposed for joint development being] the “**WMATA Joint Development Site**”).
- B. The WMATA Joint Development Site is currently in use by WMATA for surface parking as commuter Park & Ride lots, a bus loop, bus bays, a Kiss & Ride area, and other uses ancillary to WMATA’s transit operations.
- C. WMATA issued a Joint Development Solicitation dated \_\_\_\_\_, 20\_\_ (as subsequently amended, the “**JDS**”) for the WMATA Joint Development Site. Developer submitted a Proposal in response. Developer was chosen as the Selected Developer (as defined in the JDS) by WMATA staff on or about \_\_\_\_\_, 20\_\_.
- D. The JDS contemplated development of the WMATA Joint Development Site as a multi-component, mixed use, transit-oriented development project (the “**Project**”).
- E. The WMATA Board of Directors approved the negotiation of a Non-Binding Joint Development Term Sheet with Developer at its meeting on \_\_\_\_\_, 20\_\_.
- F. In furtherance of the foregoing, Developer and WMATA entered into that certain Non-Binding Joint Development Term Sheet dated \_\_\_\_\_, 20\_\_.
- G. In furtherance of the foregoing, in this Agreement WMATA and Developer intend to state the terms under which WMATA will enter into a series of ground leases of parts of the WMATA Joint Development Site (each a “**Phase**”) to component developers (each a “**Phase Tenant**” and collectively “**Phase Tenants**”) designated by Developer (each ground lease being hereinafter referred to as a “**Ground Lease**”) or, in the alternative should a multifamily residential condominium project be proposed on any Phase, for the sale of that Phase to a component developer, and Developer and its Affiliates will develop the same as a mixed-use transit-oriented project and construct certain infrastructure for WMATA, all as more fully set forth below.

NOW, THEREFORE, in consideration of the foregoing, the terms and conditions set forth below, One Dollar (\$1.00), and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

## **ARTICLE 1**

### **GROUND LEASE OF PROPERTY**

#### **1.1. The WMATA Joint Development Site.**

The WMATA Joint Development Site is defined on **Exhibit A** attached hereto. The WMATA Joint Development Site consists of the WMATA Reserved Areas and the Phases.

#### **1.2 General Provisions.**

(a) General Goal. The general goal of this Agreement is to provide the terms and conditions under which WMATA will ground lease or sell parts of the WMATA Joint Development Site in Phases to individual Phase Tenants upon satisfaction of the conditions precedent to closing (as set forth in **Section 13.4**). It is the intent of this Agreement that Phases will be ground leased, not sold, except as set forth in the following sentence. However, if multifamily residential condominiums are proposed on any Phase and the Phase Tenant covenants to legally create a residential condominium regime on that Phase, WMATA will convey fee title to that Phase to a Phase Tenant (who, despite the use of the word “Tenant” in this Agreement, shall be a fee owner, not a lessee) for the sole purpose of developing, financing and selling or leasing residential condominium units on that Phase under the same terms and conditions as apply to a ground leased Phase except that a purchase and sale agreement (instead of a Ground Lease) shall be required for that Phase containing such comparable terms and conditions as may be applicable in the circumstances of a fee conveyance (including, without limitation, provisions for the payment of Participating Rent (to the extent applicable under the terms of **Section 3.5**) and Capital Rent, a Construction Agreement with respect to any WMATA Replacement Facilities paralleling the design and construction provisions that otherwise would be found in a separate Construction Agreement relative to a Ground Lease, and the restraints against sale, assignment, conveyance, transfer, encumbrance and changes in control set forth in this Agreement); provided, however, that not more than \_\_\_\_\_ ( ) Phases may be conveyed for this purpose and not more than \_\_\_\_\_ ( ) condominium units shall be constructed on the WMATA Joint Development Site. Unless otherwise expressly stated, all references in this Agreement to Phase Tenants and to Ground Leases shall also apply to Phase Tenants who obtain fee conveyances.

(b) Obligation to Design, Construct and Pay. Subject to and in accordance with the terms of any applicable fully executed Construction Agreement, the WMATA Replacement Facilities that are part of each Phase shall be designed and constructed by the applicable Phase Tenant. Each Ground Lease (or fee conveyance equivalent) shall be accompanied by a Construction Agreement containing any infrastructure requirements applicable to such Phase.

Upon full execution and delivery of a Ground Lease (or fee conveyance equivalent), a Construction Agreement and all other agreements to be executed between WMATA and a Phase Tenant in connection with a Ground Lease (or fee conveyance equivalent), the relationship between WMATA and the Phase Tenant with respect to such Phase shall be exclusively governed by the CC&Rs, such Ground Lease (or fee conveyance equivalent), such Construction Agreement, and such other agreements executed in connection therewith (and not by this Agreement). Cross-defaults between Developer and a Phase Tenant are governed by **Sections 8.1(d) and 20.10**.

(c) No Cost to WMATA. Unless and to the extent expressly set forth in this Agreement or in the CC&Rs or in any Ground Lease (or documents relating to a fee conveyance) or in any Construction Agreement, in no event shall WMATA be required (i) to pay or contribute to the cost of any work performed by or at the order of Developer or a Phase Tenant, (ii) to consent to any work on or about the WMATA Joint Development Site by any party, (iii) to reconfigure the WMATA Joint Development Site, or (iv) to remove any improvements that WMATA has made or would be permitted to make under the CC&Rs or the Ground Lease or that WMATA has made or makes on a WMATA Reserved Area.

### **1.3 Ratification and Confirmation of WMATA's Retained Rights.**

(a) WMATA's Interest Not Subordinated. Except with respect to any Phase that is conveyed in fee simple to a Phase Tenant in accordance with this Agreement, WMATA's fee simple interest in the WMATA Joint Development Site shall be retained by WMATA and remain unsubordinated to the Ground Leases and any leasehold mortgage financing (but shall be subject and subordinated to the CC&Rs under the terms and conditions of this Agreement).

(b) WMATA Ownership of WMATA Reserved Areas. WMATA shall retain ownership of, and not sell or lease to Developer or any Phase Tenant, the WMATA Reserved Areas, subject to the terms of the CC&Rs. Except for constructing any WMATA Replacement Facilities on the WMATA Reserved Areas pursuant to this Agreement and any rights that may now or hereafter be granted by WMATA to use the same as members of the general public in connection with WMATA's transit operations, Developer and Phase Tenants shall have no right to enter upon or use the WMATA Reserved Areas. Any other rights of entry must be obtained via separate Right of Entry Agreements (for non-invasive entries) and Real Estate Permits (for invasive entries) granted in accordance with WMATA's policies and practices.

(c) Reversion of Improvements. On the expiration or termination of a Ground Lease (by lapse of time or otherwise), sole ownership of the Phase subject to such Ground Lease and the right to possess and use the same shall automatically pass to and be vested in WMATA (subject to the rights of any leasehold mortgagees in the event of a termination before the stated expiration of the term of a Ground Lease, as more fully set forth in the applicable Ground Lease and/or in the CC&Rs). Likewise, any Phase Tenant's ownership in improvements on such portion of the WMATA Joint Development Site (including, but not limited to, Tenant Improvements) which is the subject of a Ground Lease shall also automatically terminate upon the expiration or termination of that Ground Lease, and such title shall automatically pass to and be vested in WMATA, which shall thereafter be the sole owner of such improvements, subject to the terms of the CC&Rs.

Developer and Phase Tenants shall execute, deliver and, if necessary or appropriate in WMATA's reasonable discretion, record instruments and agreements to confirm the foregoing. WMATA shall not retain any interest in any portion of the WMATA Joint Development Site conveyed in fee to a Phase Tenant except to the extent reserved by WMATA in the CC&Rs or in any Phase-specific easements and covenants.

#### **1.4 This Agreement Does Not Convey Leasehold or Fee Rights.**

This Agreement does not create a present leasehold or fee estate in Developer or any Phase Tenant in the WMATA Joint Development Site.

## **ARTICLE 2**

### **NATURE OF DEVELOPMENT; TRANSIT-ORIENTED DEVELOPMENT**

#### **2.1 Parameters of Development.**

(a) Obligation to Design, Finance, Construct and Complete. Developer shall use Commercially Reasonable Business Efforts to cause each Phase Tenant to design, finance, construct and complete the improvements to be constructed on such Phase as described in this Agreement. Developer and each Phase Tenant will work with WMATA, the Local Jurisdiction, the State, and other stakeholders to develop an Approved Development Plan detailing the development of the WMATA Joint Development Site or its Phase, as applicable, the goal of which is to result in a viable, walkable, transit-oriented, mixed-use development consistent with the current master plan for the WMATA Joint Development Site adopted by the Local Jurisdiction, applicable zoning, subdivision and other land use requirements and regulations, the overall project objectives as outlined herein, and physical and market realities. Accomplishing the foregoing may involve resolving conflicting goals and priorities. Developer's responsibilities will include proposing the location of new streets, pedestrian/bicycle paths and public spaces, the location or relocation and reconfiguration of transit uses (and any interim facilities to ensure the continuity of operations during the time between the removal of the current WMATA Facilities and their ultimate replacement), and the location of new buildings and their size, height and uses. In furtherance of the foregoing, Developer will be required to create site plans, attend meetings with stakeholders, create presentation materials and make presentations, and revise plans as needed. In accordance with the schedule to be developed as part of the Approved Development Plan for each Phase, Developer shall or shall cause a Phase Tenant to develop cost estimates for the WMATA Replacement Facilities to be constructed on or relating to such Phase and other public improvements and a plan showing the financing of them.

(b) Nature and Scope. The overall Project shall be developed in Phases, each Phase occupying a discrete parcel within the WMATA Joint Development Site. The Tenant Improvements shall be designed consistently with buildings located proximate to the WMATA Joint Development Site. The nature and scope of the proposed Project is more fully set forth on **Exhibit B** attached hereto. **Exhibit B** may be modified from time to time by agreement of the parties as the Project evolves and physical and market realities dictate.

(c) Additional Developer Tasks. Further to the foregoing, Developer shall be responsible for the following tasks:

(i) coordinating and cooperating with WMATA to determine the most appropriate and convenient locations for the improvement and replacement of the WMATA bus bays and other WMATA Facilities at the Metro Station, and also developing a plan for (A) their construction and/or improvement and (B) the construction and operation of interim replacement facilities during the period of construction of the permanent facilities or any improvement to the existing facilities.

(ii) coordinating and cooperating with WMATA to develop a plan to accommodate the access needs of existing and anticipated transit patrons who utilize the parking facilities on the WMATA Joint Development Site.

(iii) coordinating and cooperating with WMATA in locating, designing, constructing and operating any interim replacement facilities during the period of construction of the permanent facilities or any improvement to the existing facilities, such locating to be a collaborative effort, such design and construction to be undertaken by Developer or a Phase Tenant at its expense, and such operation to be undertaken by WMATA at its expense. WMATA and Developer shall work collaboratively to determine if it is possible to keep any part of the existing WMATA-owned and WMATA-operated surface parking lot on the WMATA Joint Development Site in service during construction of the Project, with the goal of minimizing the loss of commuter parking during the construction of the Project.

(iv) conducting site analyses of the WMATA Joint Development Site and producing the Survey.

(v) assessing the state of title as set forth in **Article 10**.

(vi) identifying potential users and tenants of the WMATA Joint Development Site.

(vii) identifying elements to be included in the Proposed Development Plans -- including building footprints for WMATA Replacement Facilities, locations for access and parking, loading docks, non-WMATA public infrastructure, public space, and new streets, determining site circulation and connectivity, and determining utility locations -- and preparing Proposed Development Plans and fiscal impact analyses thereof.

(viii) retaining consultants.

(ix) coordinating with nearby stakeholders, including community groups.

(x) coordinating with key landowners other than WMATA to insure, to the extent feasible and in the best interests of the parties hereto, that development in accordance with

the Approved Development Plans minimizes conflicts with those key landowners and the existing and potential development of their sites while creating the maximum connectivity between the WMATA Joint Development Site and those nearby properties.

(xi) preparing preliminary cost estimates for any public improvements for which it plans to seek reimbursement or assistance from WMATA or any other public body or agency.

(xii) coordinating and obtaining the approval of WMATA for the scheduling and release of information related to the Project.

(d) WMATA Responsibilities. WMATA will be responsible for:

(i) obtaining all required approvals from WMATA's Board of Directors (it being understood that nothing contained herein or inferable herefrom shall obligate WMATA's Board of Directors to grant any such approvals except in its sole discretion);

(ii) prosecuting in good faith and with reasonable diligence any required approvals or concurrences from the FTA (it being understood that nothing contained herein obligates the FTA to grant any approval or concurrence);

(iii) conducting any public hearings required under the WMATA Compact;

(iv) subject to the satisfaction of all conditions precedent to closing for the benefit of WMATA under this Agreement, entering into individual Ground Leases (or fee conveyances) of the Phases; and

(v) reasonably cooperating with the Local Jurisdiction, Developer and Phase Tenants in providing timely consideration of requested approvals, information and decisions reasonably required from WMATA in furtherance of the Project and as otherwise may be required under **Section 28.17**.

## **2.2 Transit-Oriented Development.**

(a) TOD Required. The design and use of the Project must also be within the parameters of a Transit-Oriented Development and be maintained with a Continuing Transit Orientation and in accordance with the JDS and FTA regulations and guidelines. Without limiting the foregoing: (i) the Project as a whole must provide convenient pedestrian and vehicular access to a transit station; (ii) the Tenant Improvements must incorporate private investment including office, commercial, or residential development; (iii) the Project must enhance the effectiveness of a mass transit project, i.e., Metrorail, and the non-transit element must be physically or functionally related to the mass transit project, and (iv) the Project must create non-vehicular capital improvements that result in increased transit usage.

(b) Minimizing Parking. Developer shall cause Phase Tenants to provide parking for all components of their respective Phases but, consistent with the requirement for Transit-Oriented



Development, to minimize the number of parking spaces, the overall area dedicated to parking, and the area devoted to surface parking that does not lie underneath a building, provide as few parking spaces as the market will allow consistent with applicable zoning and other land use requirements, and, where practicable, implement shared parking among the private sector (non-commuter) users, parking demand management and other techniques. Without limiting the foregoing, parking for residential units will be provided at a ratio that does not exceed \_\_\_\_\_ (\_\_\_\_) parking space per unit, parking for the retail space shall not exceed \_\_\_\_\_ spaces per one thousand (1,000) rentable square feet, and parking for office space shall not exceed \_\_\_\_\_ spaces per one thousand (1,000) rentable square feet. Phase Tenants shall incorporate bike-share, car-sharing and electric car charging stations into the Project.

(c) WMATA Replacement Facilities. A basic principle which governs the Project is that WMATA Replacement Facilities or other public facilities related to any given Phase must be relocated or replaced before or in conjunction with the development of that Phase and in a manner consistent with an Approved Development Plan and an MOT Plan.

(d) WMATA Approval. An Approved Development Plan shall constitute WMATA's acknowledgement that the Project or applicable Phase, as so designed, meets the requirements of this Section as of the date of such approval (or deemed approval). WMATA's approval or deemed approval of design issues shall not apply to any subsequent changes in the plans and specifications or to any new plans and specifications that affect the matters covered by **Sections 2.2(a) and (b)**.

## **2.3 Sustainability.**

Each Phase Tenant shall design and construct the applicable Tenant Improvements on and to its Phase to achieve LEED Silver certification in a category appropriate to their use or to another a nationally recognized equivalent standard to the LEED rating system. Developer must design and oversee the development of the Project to achieve LEED-ND (Neighborhood Development) Silver certification or another nationally recognized equivalent standard. In each case, actual certification by Green Building Certification, Inc. (f/k/a Green Building Certification Institute) or a successor person chosen for that purpose by the US Green Building Council, or an equivalent third party if an equivalent non-LEED standard is used, is required. The provisions of this subparagraph shall be incorporated into each Ground Lease and/or the CC&Rs.

## **2.4 Infrastructure.**

(a) General Replacement. The parties recognize that the Project will require substantial funds for infrastructure. There will be general infrastructure improvements such as roads and utility improvements, including stormwater facilities. There also will be WMATA Replacement Facilities required, as more fully set forth in **Article 8**. After WMATA approves an Approved Project Development Plan or plans for the WMATA Replacement Facilities, as applicable, WMATA will adhere to the agreed-upon scope unless it determines that changes to the WMATA Replacement Facilities are necessary and it provides funding for such changes to the agreed-upon scope of the WMATA Replacement Facilities. Any changes made at the request of Developer or a Phase Tenant will be at the requesting party's cost.

(b) Financing Infrastructure. WMATA does not have funding to pay for any of the WMATA Replacement Facilities or other infrastructure improvements other than out of the cash Consideration. Developer will use Commercially Reasonable Business Efforts to obtain funding for required infrastructure, whether such infrastructure is to be provided by Developer or by a Phase Tenant. It is Developer's obligation to use Commercially Reasonable Business Efforts to identify possible funding sources to pay for such infrastructure, except as provided in the next-to-last sentence of **Section 2.4(a)** above. Developer may seek some or all of such funding from third party governmental sources, which sources may include grants, forgivable loans, tax increment financings and payments-in-lieu-of-taxes.

(c) WMATA Approval. Any infrastructure or other development proposed to be constructed by Developer or a Phase Tenant on any portion of the WMATA Joint Development Site not then subject to a Ground Lease or owned in fee by a Phase Tenant shall require the prior written approval of WMATA, which approval shall be granted or withheld in WMATA's sole and absolute discretion unless otherwise provided for under the terms of the CC&Rs. Unless WMATA specifically agrees to allow such infrastructure or other development to remain in place in the event of a termination of this Agreement or any earlier removal of the affected real estate from the WMATA Joint Development Site, or otherwise provided for under the CC&Rs or an applicable Ground Lease, Developer may be required, at the option of WMATA, to remove any or all of said infrastructure or other development at Developer's sole cost and expense.

### **ARTICLE 3 CONSIDERATION**

#### **3.1 Generally.**

The total consideration (the "**Consideration**") for the WMATA Joint Development Site shall consist of a combination of cash as set forth in this Article and the WMATA Replacement Facilities. The Consideration in the aggregate, and the Consideration payable for each Phase, shall be the fair market value, determined as provided in this Article, plus any Option Fee. As is further provided in this Article, the cash Consideration for each Phase is payable in part upfront in a lump sum as each separate Phase of the WMATA Joint Development Site is ground leased or sold to Phase Tenants and in part through payment of Participating Rent and Capital Rent associated with the future operation of each Phase.

#### **3.2 Deposit.**

(a) Generally. Within five (5) Business Days following the last to occur of execution of this Agreement, its approval by the WMATA Board of Directors and concurrence therein by the FTA, Developer will deliver to WMATA a Deposit in the sum of \_\_\_\_\_ percent (\_\_\_%) of the Consideration (said amount, together with all interest accruing thereon, the "**Deposit**"). The Deposit shall be held by WMATA in accordance with the terms of this Agreement. The Deposit may be posted either in cash or in the form of a letter of credit meeting the standards below (the

**“Letter of Credit”**). If the Deposit is held in cash, WMATA will not be obligated to invest the Deposit in an interest-bearing account. Failure to deliver the Deposit as required by this subsection will entitle WMATA to terminate this Agreement and Developer’s status at any time until the Deposit is paid, in WMATA’s sole and absolute discretion. At Closing, the Deposit will be applied to the Consideration, if the Deposit was posted in cash, or will be returned to Developer, if the Deposit was posted as a letter of credit.

(b) Letter of Credit.

(i) The Letter of Credit shall be in the form of **Exhibit F** or, in WMATA’s sole and absolute discretion, may be in such other form but the Letter of Credit shall provide, at a minimum, the following: (i) the Letter of Credit must be issued by a commercial bank reasonably acceptable to WMATA and must be presentable in the Washington, D.C. metropolitan area; (ii) the Letter of Credit must be payable at sight without presentation of any other documents, statements, or authorizations and must allow for partial draws; (iii) the Letter of Credit must have a minimum term of one (1) year and provide for its automatic renewal on a year-to-year basis unless the issuer gives WMATA at least two (2) months’ prior written notice of nonrenewal, and the final expiration date of the Letter of Credit must not be any earlier than three (3) months after the scheduled expiration date of the Term; and (iv) the Letter of Credit must be freely transferable to any successor of WMATA and Tenant shall be responsible for the payment of any transfer fee or other cost incident to such a transfer (or, in the alternative, Tenant must obtain a replacement Letter of Credit running to the benefit of a successor of WMATA, and Tenant shall be responsible for the cost thereof, and upon receipt of the replacement Letter of Credit by WMATA the prior Letter of Credit shall be returned and may be cancelled); if Tenant fails to make such payment, WMATA may do so at Tenant’s expense and Tenant shall reimburse WMATA for the same, and shall pay late fees and default interest as set forth in **Section 20.5**.

(ii) The Letter of Credit may be drawn upon by WMATA under the terms and circumstances set forth in this Agreement as applicable to the Deposit generally, or if the issuer gives notice of nonrenewal to WMATA and a replacement Letter of Credit (or the cash equivalent) is not delivered to WMATA at least thirty (30) days prior to the non-renewed Letter of Credit’s expiration date, or if, without notice of nonrenewal having been given, the term of the Letter of Credit will expire within thirty (30) days and no replacement or renewal letter of credit (or cash equivalent) has been delivered to WMATA, or if there is a dispute between WMATA and Tenant on the date which is thirty (30) days prior to the stated expiration date of the Letter of Credit, or if WMATA at any time reasonably determines that the issuer is not solvent or that the issuer has been put into conservatorship, receivership or any similar program by any governmental authority having jurisdiction over the issuer, or if WMATA at any time reasonably determines that there is a likelihood for any other reason that the issue would not honor the Letter of Credit if it was presented for payment. If WMATA draws on the Letter of Credit at any time when WMATA is not otherwise entitled to draw on the Letter of Credit, WMATA shall retain the proceeds of the Letter of Credit as a cash Deposit until the first to occur of (i) a replacement Letter of Credit is delivered to WMATA, at which time WMATA shall return the cash to Tenant, (ii) an Event of Default occurs, at which time WMATA shall

have the rights to the Deposit as set forth in this Agreement, or (iii) Tenant is entitled to the return of the Deposit, at which time WMATA shall return the cash to Tenant.

(iii) Notwithstanding anything to the contrary in the foregoing, it is understood and agreed that WMATA's willingness to accept a Letter of Credit as the Deposit in lieu of cash is an accommodation to Tenant and Tenant bears all risk of the issuer failing, refusing, or being unable to honor a draw on the Letter of Credit. If the issuer fails, refuses or is unable to honor a draw on the Letter of Credit, Tenant shall be obligated to immediately, upon WMATA's giving Notice of such failure or refusal, deliver a replacement Letter of Credit meeting the terms of this subsection (or a cash equivalent) to serve as the Deposit.

(iv) Tenant waives any and all rights it may have to contest, enjoin, or otherwise interfere with the issuer's honoring a draw on the Letter of Credit. Tenant's sole remedy shall be against WMATA directly via a claim that WMATA has made an improper draw.

### **3.3 Option Fee.**

If and when (i) this Agreement is fully executed, (ii) the WMATA Board of Directors approves the negotiation of this Agreement and (iii) FTA's concurrence is received in accordance with **Section 12.1**, Developer shall pay WMATA the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) (the "**Option Fee**") as consideration for WMATA's agreeing to negotiate this Agreement. The Option Fee shall be solely WMATA's property and is not refundable. The Option Fee is in addition to, and is separate and distinct from, the other payments, deposits and fees payable by Developer and the Tenant, including the Consideration, the deposit required to pay the costs of any WMATA Compact Hearing, closing costs and other sums payable by Developer or the Tenant.

### **3.4 Development Value.**

(a) Payment to WMATA. The value of each portion of the WMATA Joint Development Site allocated to each Phase shall be established as set forth below to determine the Development Value of that Phase. WMATA will be paid the Development Value for each Phase in a capitalized lump sum lease or fee payment at closing of each Ground Lease or fee transfer, subject to the Valuation Credit if the Valuation Credit is applicable. No monthly, annual or other periodic payments of the Development Value are required. No Development Value shall be payable to WMATA for any parcel that is used solely for WMATA Reserved Areas or for any park, roadway or used solely for any other public or semi-public use; provided, however, that the value contributed to the Project by any land on the WMATA Joint Development Site that is used for any park, roadway or any other public or semi-public use shall be considered in the determination of the value of each Phase benefitted thereby.

(b) Determining Development Value.

(i) For each Phase the parties will establish a Development Value, as described below. “**Development Value**” of a Phase will be established promptly after Developer gives WMATA Notice under **Section 13.3** of an intended closing. The Development Value shall be established using the appraisal process described below, and assuming that the Phase has been improved by any WMATA Replacement Facilities necessary for that Phase. The Development Value for a Phase shall be multiplied by the number of square feet of each type of use and summed across all use types in that Phase, but in no event less than zero. The Development Value as so determined is due and payable in a lump sum to WMATA at closing of the Ground Lease or conveyance of a Phase. The full cost of the permanent WMATA Replacement Facilities to be borne by Developer or a Phase Tenant (including any market rate development fee that is approved by WMATA pursuant to **Section 14.6**) for that Phase, as stipulated at closing of the applicable Ground Lease or fee conveyance, shall offset the cash Development Value payable to WMATA by Developer or that Phase Tenant. The offset proceeds shall be placed in the WMATA Replacement Facilities Escrow Account. No credit is given against the Development Value for the cost of any interim WMATA Replacement Facilities or for any general infrastructure for the Project.

(ii) Development Value will be established by a third-party appraisal for each separate intended use of the Phase. For a Phase that is to be subjected to a Ground Lease, the Development Value will be a per FAR square-foot capitalized lease value, depending on the proposed use of the Phase, based on an unsubordinated 98-year Ground Lease. For a Phase that is to be sold in fee, the Development Value will be a per FAR square value for the fee simple value of land to be conveyed to a Phase Tenant for the proposed residential condominium development. The appraisal will be conducted promptly after Developer gives WMATA Notice under **Section 13.3** of an intended closing. The appraisal shall use the following process to determine a per FAR square foot value for each use proposed for the applicable Phase.

(A) Developer and WMATA shall attempt in good faith to mutually agree upon a single appraiser from WMATA’s list of approved appraisers who has no interest in the WMATA Joint Development Site or the parties within thirty (30) days Developer gives WMATA Notice under **Section 13.3** of an intended closing. If Developer and WMATA are able to agree upon the appraiser, such appraiser shall be the sole appraiser to establish the Development Value.

(B) If Developer and WMATA are unable to agree upon a single appraiser within the foregoing time limit, then each party shall select one appraiser who has no interest in the parties or the WMATA Joint Development Site from WMATA’s list of approved appraisers within thirty (30) days after either party invokes this subsection by Notice to the other party.

(C) All appraisals shall be prepared in accordance with the joint agreed appraisal instructions attached hereto as **Exhibit C** and any additional appraisal instructions that have been jointly agreed upon by the parties at the time of the appraisal. No Person shall engage in any *ex parte* communications regarding the Project or this Agreement with any appraiser after that appraiser is engaged.

(D) The appraiser (or each appraiser) shall be given sixty (60) days in which to submit to both Developer and WMATA a written appraisal report for the Joint Development Site.

(E) The Development Value for each use will be the value determined by the appraisal(s) as follows:

(I) If there is a single appraiser jointly selected by the parties, that appraiser's appraisal shall establish the Development Value for each use.

(II) If each party selected an appraiser pursuant to **Section 3.4(b)(ii)(B)** and the lower of the appraised values determined by those two appraisers on a use-by-use basis is within ten percent (10%) of the higher of the appraised values for a particular use, then the arithmetical average of the two appraisals shall be the Development Value for that use.

(III) If each party selected an appraiser pursuant to **Section 3.4(b)(ii)(B)** and the lower of the appraised values determined by those two appraisers is not within ten percent (10%) of the higher of the appraised values on each and every use-by-use basis, then the two appraisers shall be instructed by WMATA to meet and attempt to reconcile their appraisals to see if they can bring the lower of the two appraised values within ten percent (10%) of the higher of the two appraised values for any one or more uses. (The appraisers need not agree on a single value for any one or more uses or for a Phase or the Project.) If the two appraisers can bring their appraisals within the foregoing range for any one or more uses, they shall jointly report their respective appraised amounts to both parties and the arithmetic average of the two appraisals shall be the Development Value for each use that is within the foregoing range.

(IV) If the two appraisers cannot bring their appraisals within the foregoing range for any one or more uses, the two appraisers shall name a third appraiser who has no interest in the parties or the WMATA Joint Development Site from WMATA's list of approved appraisers within thirty (30) days after the last to occur of WMATA declaring the appraisers to be at an impasse, giving Notice to Developer of that impasse, and either WMATA or Developer giving Notice to the other that it desires the two appraisers to select a third appraiser. If the two appraisers cannot timely agree on a third appraiser, the two appraisers shall each suggest up to two additional appraisers to the parties at the expiration of that thirty (30) day period and WMATA shall pick the name of the third appraiser by a blind drawing from a hat. If that appraiser declines the assignment, WMATA shall repeat the process until an appraiser is chosen. If neither of the first two appraisers suggests the name of any third appraiser within the period stated in this subsection, then WMATA shall unilaterally appoint a third appraiser meeting the foregoing qualifications.

(V) The third appraiser shall then appraise the WMATA Joint Development Site as set forth in **Sections 3.4(b)(ii)(C)** and **(D)** but only for those uses as to which the first two appraisers could not reach agreement within the aforesaid range. The third appraiser shall be given sixty (60) days from the date of engagement to prepare its appraisal report using the

appraisal instructions attached hereto as **Exhibit C** and any additional appraisal instructions that have been jointly agreed upon by the parties at the time of the appraisal. The third appraiser shall deliver its appraisal report to both parties upon its completion. If the value reported by the third appraiser for any such use is between the values reported by the first two appraisers for that use, then the Development Value for that use will be the value reported by the third appraiser. If the value reported by the third appraiser for any such use is below the lower of the two values reported by the first two appraisers for that use, then the Development Value for that use will be the lower of the values reported by the first two appraisers. If the value reported by the third appraiser for any such use is above the higher of the two values reported by the first two appraisers for that use, then the Development Value for that use will be the higher of the values reported by the first two appraisers.

(F) Neither party shall have any *ex parte* communications with any appraiser except to engage the appraiser and, if applicable, for WMATA to contact the appraisers to attempt to reconcile their appraisals and/or to engage a third appraiser, as set forth above, and to remind the appraisers of upcoming deadlines and other administrative matters.

(G) If Developer and WMATA agree upon a single appraiser, the cost of the appraiser shall be shared equally by WMATA and Developer. If two appraisers are used, then each of Developer and WMATA shall pay the cost of the appraiser appointed by it. If a third appraiser is also used, Developer and WMATA shall share the costs of the third appraiser equally. Each party shall promptly pay the appraiser(s) used that party's share of the cost.

(H) WMATA and Developer acknowledge that valuation will be subject to any required governmental process, such as concurrence by the FTA.

### **3.5 Participating Rent.**

(a) Participating Rent Defined. **"Participating Rent"** shall be equal to \_\_\_\_\_ percent (\_\_\_\_%) of gross receipts from operations actually received (or, as set forth below, deemed received) by a Phase Tenant, using cash basis accounting, without regard to debt service, real estate taxes, operating expenses, capital expenses, other costs and expenses, internal rate of return, return on investment, developer's fees or any other profit or return to the Phase Tenant or any third party, subject to the following:

(i) "Gross receipts from operations" shall include the proceeds of business interruption insurance and rent loss insurance, or such other insurance as may from time to time replace such insurance as is commonly issued as of the Effective Date but shall not include sums received by the Phase Tenant as the proceeds of other insurance paid as a result of casualty loss or property damage.

(ii) "Gross receipts from operations" shall not include the proceeds of Capital Events, including the sale of any residential condominium units.

(iii) In the event any Phase that is developed as a residential condominium, the rents generated by any condominium units on that Phase that are leased by Developer, the Phase Tenant, or any of their Affiliates shall be included in “gross receipts from operations.”

(iv) Any rents received by any third party who is not an Affiliate of Developer or the applicable Phase Tenant shall not be included in “gross receipts from operations” except to the extent Developer, the applicable Phase Tenant or an Affiliate receives any of the same from the third party. Without limiting the foregoing, “gross receipts from operations” does not include any rents received by non-Affiliate third party owners of any condominium units on a Phase, whether received directly by such third party owners or via a rental pool, but revenues received by a Phase Tenant or its Affiliates from leasing condominium units on behalf of third party unit owners or from operating a rental pool shall be included in “gross receipts from operations.”

(v) Whenever the Phase Tenant is in whole or in part an owner-occupier of the Private Development Area or an Affiliate of a space tenant who is paying the Phase Tenant rent other than fair market rent or there exists any other circumstance under which the occupant of the Private Development Area is not paying fair market rent to the Phase Tenant, “gross receipts from operations” shall be “deemed gross receipts from operations” (as hereinafter defined) instead of gross receipts from operations actually received. The Phase Tenant shall promptly Notify WMATA if and when the circumstances defined in the first clause of this subparagraph exist. Deemed gross receipts from operations shall be determined as follows:

(x) If the Phase Tenant or an Affiliate of the Phase Tenant was the occupant of the Private Development Area under a prior arm’s-length space lease whose originally-stated term had not expired, the deemed gross receipts from operations shall be the rent and other consideration payable under that space lease for as long as the term of that space lease remains in effect or would have remained in effect had it not been terminated or merged.

(y) In all other circumstances, the deemed gross receipts from operations shall be the equivalent of then-applicable market rent and any other consideration for the applicable portion of the Private Development Area that would be payable to the Phase Tenant under a hypothetical arm’s-length space lease for the portion of the Private Development Area occupied by the Phase Tenant or an Affiliate of the Phase Tenant. For purposes of determining the rent and other consideration that would be payable under such an arm’s-length space lease, the deemed rent shall be one hundred percent (100%) of the amount of base annual rent per rentable square foot then being charged in comparable buildings located within

\_\_\_\_\_ (the “Comparable Market”) for space comparable to the Private Development Area and taking into consideration all other relevant factors establishing similarity or dissimilarity between the comparable lease and the occupancy of the Private Development Area by the space tenant, including, without limitation, size and location of the Private Development Area, building standard work letter and/or tenant improvement allowances previously given, if any, quality and



quantity of any existing tenant improvements, quality and creditworthiness of the space tenant, amenities offered, and other generally applicable concessions, if any. The process by which deemed gross receipts are determined shall be via a three-broker method as set forth in the Ground Lease.

(b) Making Payment. Participating Rent shall be paid in arrears no later than April 1 of each calendar year for the preceding calendar year (or portion thereof after the expiration of the foregoing abatement period).

### **3.6 Capital Rent.**

(a) Capital Rent Payable.

(i) Subject to exceptions set forth in **Section 3.6(b)** below, as and when any assignment or other transfer of a Ground Lease, sale of or conveyance of any interest in real property, sale of shares or a proprietary lease or equivalent in a cooperative entity, financing secured by a mortgage, deed of trust, deed to secure debt or any other similar encumbrance of a Ground Lease or a Phase, financing secured by an assignment, pledge, hypothecation or other security interest in a direct or indirect ownership interest in Developer or a Phase Tenant, or direct or indirect change in the person(s) who has an ownership interest in Developer or a Phase Tenant at any tier of ownership occurs, or any other transfer of ownership of a leasehold or fee estate or ownership interest therein, or when any of the foregoing occurs that involves an Affiliate of Developer or a Phase Tenant who is the owner of a condominium unit or shares and a proprietary lease (or equivalent) in a cooperative entity (each a “**Capital Event**”), Developer or the applicable Phase Tenant or Affiliate shall pay WMATA Capital Rent on or before the first to occur of (A) the date that is the date any proceeds from the Capital Event are distributed to any member, partner, shareholder or other holder of an equity interest in Developer, that Phase Tenant or the Affiliate, as applicable, or (B) five (5) days after the Capital Event.

(ii) “**Capital Rent**” shall equal \_\_\_\_\_ percent (\_\_\_%) of the Net Proceeds (A) as shown on the settlement statement for the Capital Event signed by the assignor/transferor/seller and the assignee/transferee/purchaser and so certified by them as being true, correct and complete, or (B) if the Capital Event is not of the type that generates such a settlement statement, then as shown in a statement containing the economic terms, structure and documentation needed to determine the Capital Rent due and so certified by Developer, the Phase Tenant or the Affiliate to WMATA as being true, correct and complete. Unless the Capital Event is either a financing of the type described in **Section 3.6(a)(i)** or an arm’s-length sale of a condominium unit or cooperative shares or a proprietary lease in the ordinary course of business to a third-party who is not an Affiliate of Developer or the applicable Phase Tenant, the assignee/transferor/seller and the assignee/transferee/purchaser shall be jointly and severally liable for the payment of the applicable Capital Rent.

(b) Exemptions From Capital Rent. Notwithstanding the foregoing provisions of this Section, no Capital Rent shall be due or payable with respect to any:

(i) financings to the extent the proceeds of the same are used solely to finance construction of the Project or to refinance such a construction loan or any other mortgage loan secured by the Ground Lease or the Phase. To the extent such a loan is used for purposes other than (A) construction of the Project, or (B) refinancing of the hard and soft costs of construction of the Project, or (C) refinancing of any non-construction loan where the refinanced amount is in excess of the fair market value of the Ground Lease or the Phase, Capital Rent shall be payable on those loan proceeds. (Capital Rent shall also be payable on any other financing).

(ii) transfers at any time among or between any Person already holding, at any tier, an ownership interest in Developer in the case of transfers of an interest within Developer or a Phase Tenant in the case of transfers of an interest within Phase Tenant.

(iii) transfers at any tier of ownership pursuant to a final order of any bankruptcy court.

(iv) transfers within any Person already holding, at any tier, an ownership interest in Developer or a Phase Tenant for succession or estate planning purposes or as a result of transfer upon death by will or intestacy.

(v) the sale of a residential condominium unit or of stock and a proprietary lease in a cooperative (A) by Developer or a Phase Tenant to an Affiliate (but sales by Affiliates to any third party and sales by Developer and Phase Tenant to any non-Affiliates shall be subject to the payment of Capital Rent) and/or (B) by any seller, assignor or other transferor who is not Developer, a Phase Tenant or an Affiliate of Developer or a Phase Tenant.

(vi) the financing or refinancing of any condominium unit or proprietary lease by any non-Affiliate (but financings and refinancings by Developer, Phase Tenants and Affiliates shall be Capital Events subject to the payment of Capital Rent to the extent set forth elsewhere in this Section);

(vii) insurance proceeds arising from a casualty loss, except that Capital Rent shall apply to the extent such proceeds are in excess of the amount spent on repairing or replacing damage arising from that loss.

(viii) a parent company merger, sale or sale of all or substantially all of its assets in an arm's-length transaction not undertaken for the purpose of avoiding the provisions of this Section.

### **3.7 Additional Development Value.**

(a) Additional Payment Due to WMATA. If the WMATA Joint Development Site is subsequently rezoned, re-entitled or redeveloped (“**Additional Development Value Event**”) within twenty-five (25) years after the date of closing, then on the Additional Development Value Payment Date, the applicable Phase Tenant shall pay WMATA [REDACTED] percent ([REDACTED]%) of the increase, if any, in the fair market value of the WMATA Joint Development Site

immediately after such event occurs as a result of the Additional Development Value Event over the fair market value of the WMATA Joint Development Site immediately before such event occurred (the “**Additional Development Value Payment**”). Such increase in fair market value shall be established by the process set forth in this Section. The Additional Development Value Event shall be deemed to have occurred upon the application by or on behalf of the Phase Tenant for the Additional Development Value Event, including, without limitation, the filing of an application for a zoning variance or special exception, the filing of an application for a planned unit development, the filing of an application for a building permit, or the filing of a site plan or similar document. Notwithstanding the foregoing, the Additional Development Value Payment Date shall occur only if the triggering event pertaining to the Additional Development Value Event is successful and the applicable permit, approval, redevelopment or other event is actually granted or occurs and, in that event, the “**Additional Development Value Payment Triggering Date**” shall be the date the applicable permit, approval, redevelopment or other event is granted or occurs. If the Additional Development Value Event occurs within the foregoing twenty-five (25) year period and the Additional Development Value Payment Triggering Date occurs after the expiration of said twenty-five (25) year period, the additional compensation payable under this Section shall be due and payable to WMATA.

(b) Notices to WMATA. The Phase Tenant shall give Notice to WMATA whenever it applies for any rezoning, zoning variance, special exception, planned unit development, governmental permit or license, or other approval of any sort that could lead to an Additional Development Value Event. Such Notice shall include a narrative description in plain English of the potential Additional Development Value Event that could ensue, an anticipated schedule or timeline for the described process (which shall not constitute a covenant on the Phase Tenant’s part), and the hoped-for result. The Phase Tenant shall thereafter keep WMATA informed of the progress of the matter as reasonably appropriate but not less frequently than every three (3) months and shall give Notice to WMATA when the Additional Development Value Triggering Date occurs. Nothing in this Section shall create a commitment or obligation on the part of the Phase Tenant to pursue any Additional Development Value Event. The Phase Tenant may determine to not pursue the rezoning, zoning variance, special exception, planned unit development, governmental permit or license, or other approval of any sort that could lead to an Additional Development Value Event and, if the Phase Tenant so decides, the Phase Tenant shall promptly give Notice of such decision to WMATA.

(c) Determining the Additional Development Value Payment.

(i) Upon the occurrence of the Additional Development Value Payment Triggering Date, the Additional Development Value Payment shall be determined as set forth in this subsection (c). If WMATA and the applicable Phase Tenant can agree on the Additional Development Value Payment, then the amount so agreed upon shall be the Additional Development Value Payment for that Additional Development Value Event. If WMATA and the applicable Phase Tenant do not desire to negotiate the Additional Development Value Payment, or if they cannot agree on the Additional Development Value Payment within thirty (30) days after either of them gives the other Notice of a desire to negotiate the Additional Development Value Payment, the Additional Development Value Payment shall be established using the appraisal

process described below. The Additional Development Value Payment as so determined is due and payable in a lump sum to WMATA on the Additional Development Value Payment Date unless WMATA and the applicable Phase Tenant agree otherwise in their sole and absolute discretions.

(ii) Unless the parties agree on the Additional Development Value Payment as set forth above, the Additional Development Value Payment will be established by a third-party appraisal. The appraisal will be conducted promptly after either WMATA or the Phase Tenant gives the other Notice invoking the appraisal method. The appraisal shall use the following process to determine the Additional Development Value Payment:

(A) WMATA and the Phase Tenant shall attempt in good faith to mutually agree upon a single appraiser from WMATA's list of approved appraisers who has no interest in the WMATA Joint Development Site or the parties within thirty (30) days after either party invokes the appraisal method by Notice to the other party. If they are able to agree upon the appraiser, such appraiser shall be the sole appraiser to establish the Additional Development Value Payment.

(B) If WMATA and the Phase Tenant are unable to agree upon a single appraiser within the foregoing time limit, then each of them shall select one appraiser who has no interest in the parties or the WMATA Joint Development Site from WMATA's list of approved appraisers within thirty (30) days after either of them invokes this sub-subsection by Notice to the other.

(C) WMATA and the Phase Tenant shall give the appraiser(s) joint instructions including the definition herein of the Additional Development Value Payment, the nature of the Additional Development Value Event and Additional Development Value Payment Triggering Date. If WMATA and the Phase Tenant agree on any other joint instructions to the appraiser(s), they may provide them. Neither party shall provide any unilateral instructions to the appraiser(s).

(D) The appraiser (or each appraiser) shall be given sixty (60) days in which to submit to both the Phase Tenant and WMATA a written appraisal report for the Additional Development Value Payment.

(E) The Additional Development Value Payment for each use will be the value determined by the appraisal(s) as follows:

(I) If there is a single appraiser jointly selected, that appraiser's appraisal shall establish the Additional Development Value Payment.

(II) If WMATA and the Phase Tenant each selected an appraiser pursuant to **Section 3.7(c)(ii)(B)** and the lower of the appraised values determined by those two appraisers on a use-by-use basis is within ten percent (10%) of the higher of the appraised values

for a particular use, then the arithmetical average of the two appraisals shall be the Development Value for that use.

(III) If WMATA and the Phase Tenant each selected an appraiser pursuant to **Section 3.7(c)(ii)(B)** and the lower of the appraised values determined by those two appraisers is not within ten percent (10%) of the higher of the appraised values on each and every use-by-use basis, then the first two appraisers shall name a third appraiser who has no interest in the parties or the WMATA Joint Development Site from WMATA's list of approved appraisers within thirty (30) days after either party gives Notice to the other party that the values are not within said range. The third appraiser shall then appraise the Additional Development Value Payment as set forth above. If the value reported by the third appraiser is between the values reported by the first two appraisers, then the Additional Development Value Payment for that use will be the average of the value reported by the third appraiser and the value of whichever value reported by the first two appraisers is closer to the value reported by the third appraiser. If the value reported by the third appraiser is below the lower of the two values reported by the first two appraisers, then the Additional Development Value Payment for that use will be the lower of the values reported by the first two appraisers. If the value reported by the third appraiser is above the higher of the two values reported by the first two appraisers, then the Additional Development Value Payment will be the higher of the values reported by the first two appraisers.

(F) If the parties agree upon a single appraiser, the cost of the appraiser shall be shared equally by WMATA and the Phase Tenant. If two appraisers are used, then each of WMATA and the Phase Tenant shall pay the cost of the appraiser appointed by it. If a third appraiser is also used, the Phase Tenant and WMATA shall share the costs of the third appraiser equally. Each party shall promptly pay the appraiser(s) used that party's share of the cost.

(G) The valuation will be subject to any required governmental process, such as concurrence by the FTA.

### **3.8 Method of Payment**

Unless WMATA specifies otherwise, all payments to WMATA shall be made by electronic funds transfer to such account(s) as WMATA may direct from time to time. Nothing in this Section precludes WMATA from accepting payment by other means from time to time in its sole and absolute discretion, but no such acceptance by WMATA shall constitute a precedent, a waiver of this Section or a bar to WMATA's enforcement of this Section.

### **3.9 Financial Reporting, Audits, Confidentiality.**

(a) Annual Financial Reporting. Not later than each May 1, Developer and each Phase Tenant shall submit to WMATA an audited financial statement for such year prepared by Developer's or that Phase Tenant's independent certified public accountant and reported on the same basis as Developer or that Phase Tenant reports its federal income tax. Each such annual financial statement shall report in separate categories each type of revenue and expense related to the operation of the Phase for that year, and also shall report all revenues, expenses, and other

payments associated with any Participating Rent and Capital Event(s). The foregoing notwithstanding, the obligation to provide financial statements with respect to any Phase purchased for condominium purposes shall terminate upon the last to occur of (i) the closing of the last condominium unit sold within such Phase to a bona fide, arm's-length purchaser or (ii) the cessation of the Phase Tenant's or an Affiliate's management or operation of a rental pool for the third-party condominium units.

(b) Right to Inspect and Audit.

(i) WMATA or its designated representative(s) may, during normal business hours and upon at least five (5) Business Days' Notice to Developer or a Phase Tenant inspect, take extracts from, and make copies of the books and records of Developer or that Phase Tenant (or the management company or entity then managing the Tenant Improvements) for the purpose of verifying any financial statement submitted to WMATA pursuant to this Article and/or to conduct an independent audit of such books and records as are relevant to a determination as to the proper amount of Participating Rent or Capital Rent that is payable. Any such inspection or audit must be conducted within a period of five (5) years after a financial statement is submitted by Developer or a Phase Tenant for the calendar year WMATA desires to inspect or audit.

(ii) Copies of all leases between Developer or a Phase Tenant and any space tenant shall be available for inspection and copying by WMATA or its agent. Developer's or a Phase Tenant's failure to provide any financial statement to WMATA as required by this Article or to allow WMATA access to its books, records, and leases as required by this Section shall constitute an Event of Default and shall toll the five (5) year period for inspection or audit.

(iii) Any such inspection or audit shall be at WMATA's sole cost and expense; provided, however, if the inspection or audit discloses the existence of a variance for any year of five percent (5%) or more in excess of the amount required to be paid to WMATA, such inspection or audit shall be at Developer's or the applicable Phase Tenant's, as the case may be, expense. In addition, if WMATA's inspection or audit discloses that Participating Rent or Capital Rent actually due to WMATA is in excess of the amount previously paid by Developer or the Phase Tenant to WMATA with respect to any event or period, then the amount of such excess actually due to WMATA, plus interest at the Default Rate on such excess amount, shall be paid within thirty (30) days following WMATA's Notice setting forth in reasonable detail the amount due and the calculations used in making the determination. If Developer or the applicable Phase Tenant disputes the calculations, it shall so Notify WMATA and, subject to any different dispute resolution procedure specified in any Ground Lease, the dispute shall be resolved by binding arbitration by and in accordance with the commercial disputes rules of the American Arbitration Association (or such successor as may then exist or, if no successor then exists, such other independent arbiter as the parties may then agree).

(c) Confidentiality. All information and/or materials provided by Developer or a Phase Tenant pursuant to this Section shall be confidential and shall not be disclosed by WMATA, other than (i) pursuant to a subpoena or court order, or (ii) in litigation, insolvency proceedings of any type, mediation, or arbitration with or involving Developer or a Phase Tenant concerning a dispute

to which such information or materials is or are materially germane, or (iii) in accordance with WMATA's Public Access To Records Policy (or any replacement thereof). Nothing in this subsection shall be deemed to limit any employees, officers, or directors of WMATA, or any auditors, attorneys, or other consultants hired by WMATA or their respective employees, from reviewing and analyzing the information and/or materials obtained and discussing and sharing such information and/or materials among themselves and with Developer or the applicable Phase Tenant or its or their representatives.

## **ARTICLE 4 SCHEDULE**

### **4.1 Anticipated Schedule.**

Developer's current anticipated schedule and sequence of Phase development is attached hereto as **Exhibit B**. Subject to Developer's right to reprioritize the order in which Phases are Ground Leased or purchased pursuant to this Article and to Excusable Delays, Developer and each Phase Tenant shall use Commercially Reasonable Business Efforts to adhere to that schedule (with a Phase Tenant only being responsible for development of its own Phase), as it may be amended from time to time. Developer shall engage consultants, meet with public and private stakeholders, and draw up plans and specifications for the Project as a whole and for the individual Phases sufficient to allow Developer or Phase Tenants, as applicable, to meet the schedule.

### **4.2 Developer's Flexibility.**

Subject to the provisions of **Sections 13.1 and 13.2**, Developer reserves the timing and sequence of ground leasing or buying Phases and developing Phases to its reasonable discretion, except that Phase \_\_\_ as shown on **Exhibit B** shall be the first Phase to go to closing and shall be ground leased, not sold. After Phase \_\_\_ is ground leased, Developer may thereafter ground lease or purchase, or cause Phase Tenants to ground lease or purchase, future Phases in any order.

### **4.3 Expiration of this Agreement.**

The term of this Agreement shall expire upon the later to occur of Substantial Completion of all of the Tenant Improvements and Final Completion of the WMATA Replacement Facilities. All terms of this Agreement relating to the termination of this Agreement shall also apply to the expiration of this Agreement and *vice versa*. The expiration of this Agreement shall not release a party from any obligation that accrued prior to the date of expiration or from the consequences of a party's failure to perform any obligation that accrued prior to the date of expiration. Each party shall promptly execute and deliver such agreements and instruments as may be reasonably requested to confirm the expiration or termination of this Agreement.

## **ARTICLE 5 DEVELOPMENT PROGRAM**

### **5.1 Developer's Overall Obligations.**

Subject to the terms and conditions set forth in this Agreement, Developer shall cause the WMATA Joint Development Site to be planned for development in accordance with **Exhibit B** attached hereto, subject to such changes to **Exhibit B** as may otherwise be permitted by the terms of this Agreement. Subject to **Article 16**, Developer shall form Affiliates to be Phase Tenants who are qualified to develop their respective Phases in accordance with this Agreement, the Ground Leases, the Construction Agreements and the CC&Rs. Developer shall cause the Phase Tenants to go to closing for their respective Ground Leases or fee conveyances in accordance with the terms of this Agreement.

### **5.2 Proposed Development Plans.**

(a) Creation of Proposed Development Plans. Not later than (i) \_\_\_\_\_ ( ) days after the Effective Date, Developer shall prepare and submit to WMATA a proposed development plan for the overall Project that is in accord with the terms of this Agreement and (ii) six (6) months before the anticipated closing date for any Phase, Developer shall prepare and submit to WMATA a proposed development plan for that Phase. Each proposed development plan for the overall Project and for each Phase is referred to in this Agreement as a **“Proposed Development Plan.”**

(b) Contents of Proposed Development Plan.

(i) Subject to WMATA's right to approve the same under following **Section 5.2(c)**, Developer shall amend or supplement the Proposed Development Plan for the overall Project as Developer determines concept site plans, massing plans, siting of WMATA Replacement Facilities, siting of public infrastructure, and any other matters which Developer anticipates presenting to the Local Jurisdiction in connection with obtaining Entitlements at that stage of the Project.

(ii) The Proposed Development Plan submitted for each Phase pursuant to **Section 5.2(a)** shall include preliminary subdivision plans, building envelopes, site plans, conceptual designs (including exterior treatments), conceptual streetscaping, locations for WMATA's own directional signage, a proposed MOT Plan, and infrastructure consistent with and to the extent prepared as part of the information which Developer anticipates presenting to the Local Jurisdiction in connection with obtaining Entitlements for that Phase and shall also specifically address the design, cost, financing and sequencing of the WMATA Replacement Facilities for that Phase.

(iii) Each Proposed Development Plan shall also comply with the WMATA Design and Construction Standards insofar as they are applicable to the Project under the terms of this Agreement.



(iv) In each case, Developer shall provide WMATA with any additional information in Developer's possession or control that WMATA may reasonably request to assist WMATA in evaluating the Proposed Development Plans, but specifically excluding Developer's financial or marketing projections.

(c) Approval of Proposed Development Plans.

(i) WMATA will have the right to withhold its approval of any Proposed Development Plan (or any revisions thereto) as an Unconditional WMATA Approval Matter if any aspect thereof: (A) affects the integrity, functionality, efficiency, safety, operation, maintenance, legal compliance, cost or profitability of WMATA's business, customers, operations or activities; (B) lies within the WMATA Zone of Influence or otherwise affects WMATA Facilities, WMATA Reserved Areas, ingress/egress to WMATA Facilities, and similar matters; (C) affects any of WMATA's adjacent property; (D) with respect to the design and construction of interim and permanent WMATA Replacement Facilities and of any Tenant Improvements is not in compliance with the WMATA Design and Construction Standards; (E) affects Developer's obligations as they relate to timing (changes in Project schedule) and performance (changes in what will be constructed, e.g., the product mix); and/or (F) affects the Consideration. In addition, WMATA shall have the right to withhold its approval of any Proposed Development Plan (and any revisions thereof) if the exterior elements facing the WMATA Facilities are materially different than the exterior elements of any other façade of the same structure; WMATA's approval under this sentence shall not be unreasonably withheld, conditioned or delayed.

(ii) WMATA expressly acknowledges and agrees that, except as set forth in **Sections 5.2(c)(i)** and **9.1**, it shall have no right to approve or disapprove any aspects of the Proposed Development Plan relating to drawings and specifications for Tenant Improvements outside of the WMATA Zone of Influence.

(iii) WMATA shall deliver Notice of approval or disapproval of a Proposed Development Plan within thirty (30) Business Days after Developer's delivery of that Proposed Development Plan (including all additional information and documentation pursuant to **Section 5.2(b)**). WMATA's failure to deliver approval within such time with respect to any matter that is a WMATA Unconditional Approval Matter shall be deemed to be Notice of WMATA's disapproval of that matter.

(iv) In the event that WMATA disapproves a Proposed Development Plan or approves a Proposed Development Plan subject to qualification, WMATA shall deliver Notice to Developer of such disapproval or qualified approval, stating in as much detail as is reasonably practicable, given the state of completion of the Proposed Development Plan, the nature of WMATA's objections or qualifications, as the case may be. Developer shall use Commercially Reasonable Business Efforts to satisfy WMATA's objections and qualifications without materially decreasing the proposed density to be built on the Phases and without altering the division between the WMATA Facilities and the portion of the WMATA Joint Development Site to be privately developed. Developer shall have a period of ten (10) Business Days after delivery of such Notice

from WMATA within which to revise and resubmit the applicable Proposed Development Plan to WMATA addressing each of the issues raised by WMATA; however, if such objections or qualifications cannot reasonably be addressed within (10) Business Days using Commercially Reasonable Business Efforts, Developer shall be allowed additional time (not to exceed an additional thirty (30) days) as is reasonably necessary to address the objections or qualifications. The above process shall be repeated until the Proposed Development Plan is approved by WMATA; provided however that (A) if after the third (3<sup>rd</sup>) such submission of a Proposed Development Plan for the entire Project, WMATA disapproves the submission, either party may terminate this Agreement by Notice to the other party, and (B) if after the third (3<sup>rd</sup>) such submission with respect to the Proposed Development Plan for a Phase to be submitted under **Section 5.2(a)**, WMATA disapproves the submission, either party may terminate this Agreement with respect to that Phase by Notice to the other party. Each Proposed Development Plan as approved by WMATA is hereinafter referred to as the “**Approved Development Plan**” for the Project or for the applicable Phase.

(d) Changes to Approved Development Plan. After WMATA has approved a Proposed Development Plan in accordance with **Section 5.2(c)** above, Developer may not make changes thereto with respect to any matters for which WMATA’s approval is required. Any proposed changes shall be promptly submitted to WMATA for WMATA’s approval or disapproval in accordance with the procedures set forth in this Article.

(e) No Assumption of Liability or Waiver of Rights. WMATA accepts no liability and waives none of its rights under this Agreement solely by reason of its approval of any Proposed Development Plan, nor shall its approval be construed to be a warranty thereof, except that WMATA’s approval of an Approved Development Plan shall constitute a waiver of any right by WMATA to object to any subsequent submission to the extent of the information disclosed in the applicable precursor Proposed Development Plan as so approved by WMATA.

### **5.3 Implementation of Approved Development Plan.**

(a) Consistency Required. All actions undertaken by Developer and Phase Tenants shall be consistent with the Approved Development Plans.

(b) Delegation to Phase Tenants. Developer may design Tenant Improvements and/or WMATA Replacement Facilities, or Developer may delegate those tasks in whole or in part to Phase Tenants. It is not anticipated that Developer will be constructing any Tenant Improvements or WMATA Replacement Facilities. It is anticipated that such construction will be undertaken only by or on behalf of Phase Tenants under terms and conditions set forth in the CC&Rs and/or in the Ground Leases (or fee equivalents) and Construction Agreements. Accordingly, this Agreement addresses the standards applicable to such design and construction only in the most general sense. Should Developer undertake any such construction, such construction will be subject to all of the provisions of the CC&Rs and Ground Leases or fee conveyances applicable thereto as if set forth in full herein. If Developer’s construction predates the establishment of the CC&Rs and/or Ground Leases or fee conveyances, Developer’s design and construction shall be subject to WMATA’s review and approval in WMATA’s sole and absolute discretion and the

execution of a Construction Agreement in connection with that work.

#### **5.4 No Tenant Improvements Before Closing.**

Construction of Tenant Improvements on a Phase shall not commence prior to closing on that Phase.

#### **5.5 CC&Rs, Template Ground Lease and Construction Agreement.**

(a) Deadline. Promptly after the Effective Date, the parties shall diligently commence negotiation of the CC&Rs, a template form of a Ground Lease (or an improved template if a template is attached to this Agreement) for the Phases, and a template form of the Construction Agreement (or an improved template if a template is attached to this Agreement). If such documents are not drafted and agreed to within \_\_\_\_\_ (\_\_) days/months after the Effective Date, either party may thereafter terminate this Agreement by giving Notice to the other party no later than the day before the parties reach agreement on the CC&Rs, a template (or improved template) form of a Ground Lease and a template (or an improved template) form of the Construction Agreement for the Phases. Such termination shall not waive or release any obligation or liability accrued under this Agreement prior to the date of the Notice of termination.

(b) Content of Ground Lease. [The initially agreed-upon template form of the Ground Lease is attached as **Exhibit G**. As stated in **Section 4.3(a)** above, the parties may continue to negotiate to improve that template form.] OR [Each Ground Lease shall provide, among other things, that:

(i) the Ground Lease is subject and subordinate to WMATA's fee simple interest in any land ground leased;

(ii) the Ground Lease (and any fee conveyance) is subject to the CC&Rs and to any Phase-specific easements and covenants placed on the applicable Phase;

(iii) the Phase Tenant assumes and is bound by the payment and performance obligations under this Agreement, the Entitlements and the Approved Development Plan applicable to the subject Phase;

(iv) the Ground Lease has a term of ninety-eight (98) years after its signing;

(v) the Ground Lease is separate and independent of any other Ground Lease or fee conveyance for purposes of financing, collateralization and rental payment (i.e., Ground Leases will not be cross-collateralized or cross-defaulted with each other or with Phases conveyed in fee but, as stated in **Section 20.10(b)**, Ground Leases shall be cross-defaulted to the Construction Agreements for their Phase);

(vi) the Phase and all Tenant Improvements thereon will revert to WMATA at the end of the term of the Ground Lease;

- (vii) signage is permitted as set forth in **Section 6.3**;
- (viii) the Phase shall not include the WMATA Reserved Areas; and
- (ix) the provisions of **Section 21.1** shall apply.]

Any fee conveyance in lieu of a Ground Lease will be subject to all of the foregoing in a comparable document appropriate to a fee conveyance except **clauses (iv) and (vi)**. After it is fully negotiated and agreed upon by Developer and WMATA, the template Ground Lease shall be modified on a Phase-by-Phase basis as may be necessary or appropriate to address any Phase-specific issues, including, to the extent not separately addressed in a Phase-specific Construction Agreement, the design and construction of the WMATA Replacement Facilities applicable to that Phase.

(c) Content of CC&Rs.

- (i) The CC&Rs shall, among other things:
  - (A) create perpetual exclusive easements in favor of WMATA and each Phase Tenant for the maintenance, operation, repair, use, replacement and general protection of the WMATA Facilities and the Project (including the right to erect directional signage to the Metro Station and other WMATA Facilities on the streets, roads and other circulation paths on the WMATA Joint Development Site, including Phases subjected to Ground Leases or sold in fee, subject to WMATA's approval rights pursuant to **Section 6.3(c)** and to obtaining any applicable governmental approval);
  - (B) create any temporary construction easements required in connection with the development and construction of the WMATA Facilities or the Tenant Improvements;
  - (C) protect each Phase Tenant's interests in and operations at the WMATA Joint Development Site and prohibit any potential adverse impact on the Project (but the foregoing does not require WMATA to waive any provision of this Agreement, the CC&Rs, any Ground Lease, any easement or any Construction Agreement or to approve or consent to any matter when such approval or consent may be withheld in WMATA's sole and exclusive discretion);
  - (D) waive claims against WMATA arising from or related to noise, light or vibration from WMATA's transit operations;
  - (E) restrict each Phase Tenant's right to make modifications, alterations or improvements which violate the Approved Development Plan or the CC&Rs;
  - (F) contain a mechanism for payment Participating Rent, Capital Rent and any common area maintenance charges, and enforcement of the payment obligation;

(G) provide for indemnification requirements similar to those in this Agreement;

(H) provide that neither the construction nor the operation of the Project shall cause any material interference with any WMATA Facilities or WMATA's operations, including the free flow of vehicular, bicycle or pedestrian traffic to and from the Metro Station, that existing transit operations shall continue unimpeded by the Project on the WMATA Joint Development Site and existing WMATA Facilities shall remain in operation until an interim and/or permanent replacement facility acceptable to WMATA is placed in service, all as more fully set forth in an MOT Plan, and incorporating the provisions of **Section 8.2**;

(I) require Phase Tenants to comply with WMATA's Design and Construction Standards at all times with respect to all WMATA Facilities and, to the extent provided for in this Agreement, to the Tenant Improvements, and contain the rights of WMATA to approve plans and specifications as set forth in **Article 9**;

(J) require Developer and Phase Tenants to maintain insurance in accordance with **Section 18.2**;

(K) provide that buildings shall be located at least twenty-five (25) feet away from any WMATA Facility and operable windows and balcony edges of the development shall be at least fifty (50) feet from the centerline of the Metro tracks;

(L) provide that WMATA shall not exercise its rights of approval or consent to or under any easements, covenants, conditions and restrictions therein so as to deny Developer or a Phase Tenant the material benefits of this Agreement or a Ground Lease or fee conveyance (but the foregoing does not require WMATA to waive any provision of this Agreement, the CC&Rs, any Ground Lease, any easement or any Construction Agreement or to approve or consent to any matter when such approval or consent may be withheld in WMATA's sole and exclusive discretion);

(M) provide for the addition of additional Phases to the CC&Rs as more fully set forth in this **subsection (c)**;

(N) require that the Project meet the sustainability standards set forth in **Section 2.3**;

(O) include the provisions of **Section 21.1**;

(P) [IF APPLICABLE: contain any prohibitions against certain kinds of development on the Phases as set forth in **Sections(s) \_\_\_\_**];

(Q) contain such other provisions as may be stated elsewhere in this Agreement to be set forth therein; and

(R) contain such other terms and conditions as shall be reasonably required by the parties consistent with the terms of this Agreement.

(ii) The CC&Rs as finally approved by WMATA and Developer and any Phase Tenant then in existence shall be recorded among the land records of the Local Jurisdiction as to the affected Phase or, if WMATA so elects, to the entire WMATA Joint Development Site. If the CC&Rs are not initially recorded against the entire WMATA Joint Development Site, the CC&Rs shall be expanded from time to time to apply to additional Phases as each Phase is ground leased or sold. The approval or joinder of a prior Phase Tenant shall not be required to expand the CC&Rs or to impose new CC&Rs on a subsequent Phase.

(iii) Upon the execution of new or expanded CC&Rs applicable to a Phase in which it has an interest, WMATA, each Phase Tenant and each mortgagee holding a lien interest therein shall subordinate its fee and lien interest in any property subject to the CC&Rs to such CC&Rs.

(d) Content of Construction Agreement. WMATA and each Phase Tenant constructing WMATA Replacement Facilities shall enter into a Construction Agreement for the WMATA Replacement Facilities on that Phase Tenant's Phase that shall include, among other things, the following: (i) the Phase Tenant's obligation to construct and Finally Complete the WMATA Replacement Facilities; (ii) the processes, standards and requirements applicable to the WMATA Replacement Facilities, including access requirements and an MOT Plan, required materials, compliance with applicable laws, the payment of WMATA's review and inspection fees, and the scheduling and nature of plans and specifications; (iii) WMATA's inspection rights; (iv) the Phase Tenant's insurance and indemnification obligations; (iv) the Phase Tenant's safety and security obligations; (v) the provisions of **Section 21.1**; and (vi) a mechanism for determining that Substantial Completion and Final Completion of the WMATA Replacement Facilities have occurred.

## **5.6 Patents, Trademarks and Royalties.**

Developer will not infringe upon any other person's or entity's patent, copyright, trademark or other exclusive rights. Developer will not engage in unfair competition or business practices or violate any laws with respect to labelling or governing the description of merchandise or services. Developer will not violate so-called "fair trade" laws. All payments for royalties and patent rights, registered designs, trademarks or names, copyright and other protected rights, and all fees which are or become payable for or in connection with any matter or thing used or required to be used in the performance of this Agreement or to be supplied under this Agreement, shall solely be the responsibility of Developer and shall be paid by Developer to those to whom such payments are owed and at the time which they become payable.

## **ARTICLE 6**

### **USES**

#### **6.1 Uses and Densities.**

The Phase Tenants shall develop their respective Phases consistent with the uses and densities set forth in **Exhibit B** or as may otherwise be set forth in the Approved Development Plan as the same may be finally approved and entitled by the Local Jurisdiction. Developer shall use Commercially Reasonable Business Efforts to cause the Phases to be so developed. All such development shall be in accordance with the Approved Development Plan and the CC&Rs. Each Phase Tenant shall develop the Tenant Improvements on its Phase consistent with the foregoing. No other uses or lesser densities for each use shall be constructed on the WMATA Joint Development Site.

#### **6.2 Condominiums.**

(a) Fee Conveyances Allowed. It is WMATA's strong preference that Phases be Ground Leased and not sold in fee. The only Phases for which fee conveyances are permitted and the only use for which fee conveyances are permitted are Phases to be developed as market-rate residential condominium units (and any affordable or moderately-priced dwelling units as may be required by the Local Jurisdiction or the State ancillary to said market-rate units) if Developer makes the determination set forth in **Section 6.2(b)**. At least six (6) months prior to the planned date for closing on a Phase which Developer or a Phase Tenant anticipates developing as residential condominiums, Developer shall Notify WMATA that Developer will proceed under **Section 6.2(b)**.

(b) Market Rate Option. Developer may cause WMATA to convey fee simple title to a Phase(s) for the development of residential condominium units under this subsection. To acquire fee title to a Phase under this subsection, Developer shall conduct market studies to determine whether it is commercially reasonable for a Phase Tenant to develop and sell market-rate condominiums (with such affordable or moderately-priced housing component, if any, as may then be required by the Local Jurisdiction or the State) on that Phase on a leasehold estate and without any discount against the Development Value for that Phase. If Developer determines such development and sale on a leasehold estate are not feasible but that it is commercially reasonable to develop that Phase as market rate condominiums on a fee estate without any discount against the Development Value for that Phase, then Developer shall have the right to request, by Notice to WMATA given at least six (6) months before closing on that Phase, to purchase, rather than ground lease, that Phase in fee simple for that purpose. WMATA shall have the right to review and approve the market study and the request for a fee simple purchase, such approval not to be unreasonably withheld, conditioned or delayed. For purposes of this Section, marketability and feasibility mean that Developer believes a Phase Tenant will be able to sell market-rate condominium units at not less than ninety-five percent (95%) of then-current market rates.

(c) Recorded Restriction on Use. If a Phase is acquired for the purpose of developing residential condominiums, a covenant shall be recorded in the land records of the Local

Jurisdiction at closing of the conveyance mandating (i) that such Phase be developed solely as a residential condominium, any ancillary convenience retail use, and any parking incidental to those uses, and for no other purposes, and (ii) that Commercially Reasonable Business Efforts be used to sell condominium units therein. The provisions of this Agreement regarding Participating Rent and Capital Rent shall apply to the leasing and sale of condominium units by Developer and a Phase Tenant and their respective Affiliates.

### 6.3 Signage.

(a) Prior to Ground Lease. Prior to the execution of a Ground Lease (or fee conveyance) for a Phase, no signage for the Project is permitted on that Phase except (i) with WMATA's approval, not to be unreasonably withheld, conditioned or delayed, a sign announcing the name, sponsorship, marketing, financing and construction of the Project, on the condition that such signage in compliance with all applicable laws and does not interfere with WMATA Facilities, the WMATA Reserved Areas or WMATA operations, and (ii) otherwise to the extent approved by WMATA in its sole and absolute discretion. Any sign must be authorized pursuant to a separate written permit from WMATA for that purpose.

(b) After Closing. Subject to **Section 6.3(c)**, after the applicable closing, a Ground Lease and the CC&Rs shall permit signage on that Phase as may be permitted by the applicable Local Jurisdiction.

(c) Signs Referring to WMATA Facilities. Notwithstanding the foregoing or anything else in this Agreement, all signs which refer to or are designed or intended to interface with or provide direction to the Metro Station or any other WMATA Facility must be approved in advance by WMATA for content, location, materials, color, font, and construction method. Any such sign installed by Developer or a Phase Tenant shall comply with the WMATA Design and Construction Standards. WMATA shall determine such compliance in its sole and absolute discretion.

(d) WMATA's Own Signs. WMATA has the right to erect suitable and reasonable directional signage to WMATA Facilities as set forth in **Section 4.3(c)(i)** and in accordance with the Approved Development Plan.

## ARTICLE 7 ENTITLEMENTS

### 7.1 Zoning.

(a) Current Zoning. The WMATA Joint Development Site is currently zoned \_\_\_\_\_. Subject to **Section 7.1(b)** below, it is anticipated that said zoning status will be satisfactory for the Project. ***[IF PLANNING, ZONING OR OTHER LAND USE CHANGES ARE ANTICIPATED, SPELL THEM OUT HERE]***



(b) Developer to Obtain Modifications. Developer and Phase Tenants shall use Commercially Reasonable Business Efforts at their own expense to obtain any modifications or waivers of current Entitlements that are necessary or appropriate for the Project.

(c) Effect on Value. Any change in zoning category or other material change in zoning that enhances the value of the WMATA Joint Development Site or any Phase shall be taken into account in determining the Development Value.

## **7.2 Other Entitlements.**

(a) Developer Responsibility. Developer or the applicable Phase Tenant shall be responsible for all Entitlements, including complying with adequate public facility requirements, subdivision, site plan and record plat requirements, stormwater management standards, tree conservation requirements, noise standards, and the like. Developer or the applicable Phase Tenant shall also be responsible for obtaining any and all Entitlements that may be applicable to any work to be undertaken by Developer or a Phase Tenant on the Project. Developer and/or the applicable Phase Tenant shall use Commercially Reasonable Business Efforts to obtain all Entitlements necessary. Developer and each Phase Tenant shall undertake all of the foregoing at its own expense.

(b) Certain Modifications Prohibited. Notwithstanding anything in this Article to the contrary, Developer and Phase Tenants shall not have the right to seek changes, modifications to or waivers of current Entitlements that are inconsistent with any express provision of this Agreement or an Approved Development Plan, or that would have a material adverse effect on (i) the WMATA Facilities (including a Phase Tenant's ability to construct any WMATA Replacement Facilities) and/or the WMATA Reserved Areas, (ii) the operation of the Metro Station or of WMATA's transit operations, (iii) the development potential of the WMATA Joint Development Site, or (iv) the Consideration. Developer shall not seek or accept any Entitlements or modifications or waivers thereof that change the zoning category of the WMATA Joint Development Site or any portion thereof or that are not in accordance with the Approved Development Plan. Any change, modification or waiver subject to the immediately preceding sentences shall be subject to WMATA's review and approval, which may be withheld in WMATA's sole and absolute discretion.

## **7.3 WMATA Involvement.**

(a) WMATA Approval.

(i) Developer shall give WMATA Notice of any new Entitlement or modification or change to an Entitlement applicable to the WMATA Joint Development Site, whether or not the modification or change requires WMATA's consent. WMATA will have ten (10) Business Days in which to review any application for a new, modified or changed Entitlement.

(ii) Subject to **Sections 7.1** and **7.2(b)**, Developer and Phase Tenants shall have the right to seek such modifications to or waivers of current Entitlements as are reasonably

necessary to permit the intended development of the Project in accordance with the Approved Development Plan and the CC&Rs without the consent of WMATA.

(iii) Any new Entitlement or modification or change of Entitlements that is not permitted under **Section 7.3(a)(ii)** shall be subject to WMATA's review and approval. WMATA will have the right to withhold its approval in its sole and absolute discretion of any application for any new, modified or changed Entitlement that is subject to its approval. Developer will revise applications based upon WMATA's comments within ten (10) Business Days after WMATA Notifies Developer of WMATA's comments. The foregoing process shall be repeated until the application is approved by WMATA or withdrawn by Developer. If after the third such submission WMATA disapproves the submission and Developer absent such approval is not reasonably able to proceed with the Project using Commercially Reasonable Business Efforts, then in such event, either party shall have the right, by delivery of Notice to the other party within thirty (30) days after such deadlock is reached, to terminate this Agreement.

(b) WMATA Cooperation. Except for matters that are subject to WMATA's sole and absolute discretion, WMATA will reasonably assist and cooperate with Developer and each Phase Tenant in the Entitlements process upon reasonable request. WMATA's obligation created by this Section includes, without limitation, executing and delivering applications for Entitlements, consents, approvals, licenses, and permits required by any governmental body having jurisdiction over the Project. All assistance and cooperation by WMATA shall be at Developer's or the applicable Phase Tenant's sole cost and expense. Notwithstanding the foregoing or anything else in this Agreement to the contrary, in no event shall WMATA be required to (i) incur any out-of-pocket costs or impose a significant burden on its personnel, (ii) appoint Developer, any Phase Tenant or any other Person its attorney-in-fact or agent for signing any such application or implementing its cooperation, (iii) convey or encumber its property except by the CC&Rs, Ground Leases, Phase-specific covenants and easements, or such routine utility rights-of-way as WMATA may approve in its reasonable discretion, and/or (iv) accept or expose itself to any actual or potential performance or financial obligation or liability by reason of such cooperation and assistance.

#### **7.4 Quarterly Reports to WMATA.**

During the Entitlements process, Developer shall provide WMATA with quarterly reports updating the status of the Entitlements process and all other governmental approvals applied for by Developer with respect to the WMATA Joint Development Site in order for WMATA to monitor the progress thereof. Upon receipt of written request therefor, Developer shall provide to WMATA any additional information related to the Entitlements within Developer's possession or control, including copies of any notices Developer receives that the WMATA Joint Development Site may be rezoned or subjected to new Entitlements, and such other information as WMATA may reasonably request, but specifically excluding Developer's financial or marketing projections, any privileged communications, and any trade secrets or other proprietary information.

## **7.5 Failure to Obtain Entitlements.**

(a) No Withdrawal by Developer. Developer shall not withdraw its application for Entitlements without the prior written consent of WMATA, which consent shall not be unreasonably withheld, conditioned or delayed unless WMATA has exercised its rights under **Section 7.5(d)**.

(b) Notices to WMATA. If Developer is unsuccessful in obtaining a new Entitlement or a modification or change to an existing Entitlement and such failure will have a materially adverse effect on the Project in Developer's commercially reasonable opinion, Developer shall have the obligations referenced in this subsection. Developer shall Notify WMATA of Developer's failure to obtain the Entitlements and of the availability of any right to appeal and whether Developer intends to appeal. Developer also shall Notify WMATA of the filing of any appeal (and provide a copy thereof) or of the expiration of any appeal period without an appeal being filed. Developer also shall Notify WMATA of the outcome of any appeal.

(c) Rights to Terminate. If Developer has exercised Commercially Reasonable Business Efforts to obtain the Entitlements but has failed to obtain the Entitlements and has given Notices required by **Section 7.5(b)**, Developer and WMATA shall each have the right, exercised within thirty (30) days after the applicable governmental body denies Developer's application and either Developer's appeal has failed or the time period for Developer to appeal has expired without an appeal being filed, to terminate this Agreement by Notice to the other party. No such termination shall waive, release or otherwise affect any obligation or liability accrued under this Agreement before the date of such termination Notice.

(d) WMATA Succeeds to Ownership. In WMATA's sole and absolute discretion, and at the option of WMATA, exercisable by delivery of Notice to Developer, upon the expiration or termination of this Agreement WMATA shall succeed to all right, title and interest of Developer in an application for Entitlements and shall have the unrestricted right, directly or through its designee, to intervene in and continue pursuit of Entitlements without payment of any sums to Developer. Any costs incurred by WMATA of prosecuting or securing Entitlements after the date of expiration or termination of this Agreement shall be borne by WMATA.

(e) Developer's Cooperation. Developer shall execute and deliver to WMATA on demand by WMATA all such assignments and other documents as shall be reasonably requested by WMATA to pursue Entitlements after the expiration or termination of this Agreement and/or to appeal any adverse determination by the Local Jurisdiction or any other governmental authority having jurisdiction. Developer's obligations under this subsection shall survive the expiration or termination of this Agreement.

(f) Not a Default by WMATA or Developer. The failure of Developer or a Phase Tenant to obtain any Entitlement shall not be chargeable to or constitute a default on the part of WMATA, it being understood that Developer and the Phase Tenants assume all risks of failure to obtain Entitlements. Subject to Developer performing its obligations under this Article, the failure

of Developer or a Phase Tenant to obtain any Entitlement shall not be chargeable to or constitute a default on the part of Developer.

## **7.6 Right to Contest Laws.**

(a) Developer's Right. Developer or an applicable Phase Tenant, as applicable, shall have the right, at its sole cost, but not the obligation, to contest the application or validity, in whole or in part, of any applicable law purported to be applied to the Project or any part thereof by appropriate proceedings and WMATA may participate therein. No such contest shall be allowed without WMATA's prior consent if the contest (i) shall diminish, abrogate or affect to the detriment of WMATA the contesting party's obligations under this Agreement, (ii) may cause any portion of the WMATA Joint Development Site or any interest of WMATA or Developer or a Phase Tenant, as applicable, therein to be in danger of being forfeited or lost, or (iii) may place any party to this Agreement or to a Ground Lease (or fee equivalent) or any officer, director, member, partner, or employee of such party in jeopardy of receiving any fine, penalty, or other sanction (civil or criminal). If Developer or a Phase Tenant elects to contest as hereinabove set forth, it shall give prompt Notice to WMATA providing a detailed explanation of why it has elected to contest such matter.

(b) WMATA's Right. WMATA shall have the right, at its sole cost, but not the obligation, to contest the application or validity, in whole or in part, of any applicable law purported to be applied to the WMATA Joint Development Site, except to the extent such contest affects or jeopardizes Developer's obligations under this Agreement, by appropriate proceedings and Developer or any applicable Phase Tenant may participate therein.

## **ARTICLE 8 WMATA FACILITIES AND OPERATIONS**

### **8.1 Conditions Precedent to Construction.**

(a) Construction Cost and Contract. At closing of any Ground Lease or fee conveyance on a Phase that involves the construction of any WMATA Replacement Facilities and before construction on those WMATA Replacement Facilities or any Tenant Improvements on that Phase commences, Developer, WMATA and the applicable Phase Tenant must agree on a stipulated cost, not including contingency, of the applicable WMATA Replacement Facilities. That cost shall be determined on an open-book basis and with WMATA's participation in bidding conferences with prospective general contractors in conjunction with WMATA's approval (or deemed approval) of plans and specifications pursuant to **Article 9**. The Phase Tenant must enter into either a guaranteed maximum price or a fixed price construction contract for such WMATA Replacement Facilities from a general contractor reasonably acceptable to WMATA and at a cost not in excess of the agreed-upon cost, not including any contingency.

(b) Payment and Performance Bonds.

(i) At closing of any Ground Lease or fee conveyance on a Phase that involves the construction of any WMATA Replacement Facilities and before construction of any WMATA Replacement Facilities or Tenant Improvements on that Phase commences, the applicable Phase Tenant shall provide WMATA with payment and performance bonds for the hard costs of such WMATA Replacement Facilities naming WMATA and the construction lender as co- or dual obligees; the payment and performance bond(s) may be provided to the applicable Phase Tenant and then by the applicable Phase Tenant to WMATA by the Phase Tenant's general contractor.. Each payment and performance bond shall be in the full amount of the hard costs of the applicable WMATA Replacement Facilities or Tenant Improvements. All bonds shall be written on such bond forms as WMATA may accept in its reasonable discretion (Developer acknowledging that WMATA need not accept a bond written on an AIA form or on a form acceptable to other governmental authorities). All bonds shall be issued by a surety qualified to write such bonds in the State, listed as an acceptable surety on the then-current list maintained by the U.S. Department of the Treasury (or such other Federal government department or agency that shall succeed to keeping such list in the future), and otherwise acceptable to WMATA in its reasonable discretion.

(ii) Before commencing construction of any Tenant Improvements, each Phase Tenant shall provide for its Phase payment and performance bonds in the amount of the hard costs of the applicable Tenant Improvements. Such bonds shall meet all of the requirements of **Section 8.1(b)(i)** except that WMATA agrees that payment and performance bonds issued on the then-current AIA forms will be satisfactory to it for the purposes of this subsection.

(c) WMATA Replacement Facilities Escrow Agreement.

(i) Before the applicable Phase Tenant commences construction of any WMATA Replacement Facilities or Tenant Improvements on any Phase that includes WMATA Replacement Facilities, WMATA and the applicable Phase Tenant must enter into an escrow agreement with the applicable third-party construction lender for that Phase, in form and content satisfactory to WMATA in its sole and absolute discretion (the "**WMATA Replacement Facilities Escrow Agreement**").

(ii) The WMATA Replacement Facilities Escrow Agreement shall provide, among other things:

(A) that a dollar amount equal to the cost of construction agreed to pursuant to **Section 8.1(a)** plus fifteen percent (15%) (the "**WMATA Replacement Facilities Escrow Amount**") shall be maintained in a segregated account solely for the purposes of constructing the WMATA Replacement Facilities and shall not be commingled with or used for any costs other than those of the WMATA Replacement Facilities unless and until released in accordance with **clauses (F) and (G)** below;

(B) for the release of funds from the WMATA Replacement Facilities Escrow Amount on a percentage-of-completion basis as the WMATA Replacement Facilities are

constructed, such percentage-of-completion and entitlement to payment to be determined by the construction lender or a third party construction manager in the same manner as customarily used in the construction lending industry (including, without limitation, architect's certifications, verifications of invoices, lien waivers, private inspections and governmental inspections), with provisions equivalent to loan balancing provisions in a construction loan so that the amount of money in the escrow shall always equal or exceed the estimated remaining cost to Finally Complete the WMATA Replacement Facilities;

(C) that the applicable Phase Tenant shall be responsible for funding any shortfall that may exist from time to time in the projected cost of Finally Completing the WMATA Replacement Facilities by such means as it and the escrow agent may agree, except that WMATA shall be responsible for funding the cost of any change orders to the WMATA Replacement Facilities that arise from changes in scope or design initiated by WMATA;

(D) that the applicable Phase Tenant, not WMATA, shall be responsible for all costs that exceed the WMATA Replacement Facilities Escrow Amount including, without limitation, those that arise from unforeseen site conditions, environmental issues, changes in conditions, field changes, errors or omissions by the applicable Phase Tenant or its design or construction consultants, contractors, subcontractors, employees or agents, or any other cause;

(E) any funds added to the WMATA Replacement Facilities Escrow Amount from time to time shall be part of and treated the same as funds originally included in the WMATA Replacement Facilities Escrow Amount, including handling in accordance with the WMATA Replacement Facilities Escrow Agreement.

(F) if (I) the Phase Tenant fails to Finally Complete the applicable WMATA Replacement Facilities in accordance with the terms of the applicable Ground Lease or Construction Agreement beyond the expiration of any applicable notice and cure period and (II) such Phase Tenant's construction lender declines to or fails to Finally Complete such WMATA Replacement Facilities in accordance with the applicable Ground Lease or Construction Agreement, then WMATA shall be entitled to the WMATA Replacement Facilities Escrow Amount for its own use and the escrow agent shall deliver such proceeds to WMATA upon demand, but the delivery of such proceeds to WMATA shall not be liquidated damages or WMATA's sole and exclusive remedy;

(G) upon the Final Completion of the applicable WMATA Replacement Facilities, (I) any surplus remaining in the WMATA Replacement Facilities Escrow Amount from the sums originally deposited therein and from any additional amounts deposited therein by WMATA shall be paid to WMATA and (II) any surplus then remaining in the WMATA Replacement Facilities Escrow Amount shall belong to Developer or the applicable Phase Tenant as they may agree between themselves and so notify the escrow agent.

(iii) The amounts escrowed under this subsection are separate from and do not affect the escrow required to determine Final Completion of the WMATA Replacement Facilities.

(d) Subordination of Development Fee. Before commencing construction of any WMATA Replacement Facilities or Tenant Improvements on a Phase that includes WMATA Replacement Facilities, Developer and the applicable Phase Tenant shall enter into an agreement with WMATA, satisfactory to WMATA in its reasonable discretion, subordinating any and all development and project management fees, howsoever called, either of them might be entitled to with respect to that Phase until such time as the WMATA Replacement Facilities on that Phase have been Finally Completed and the escrowed funds are released as set forth in **Section 8.1(c)(ii)**. Such subordination agreement shall provide, without limitation, that any such development or project management fee shall not be paid to Developer and/or the applicable Phase Tenant until Final Completion of the WMATA Replacement Facilities occurs and, instead, as any development or project management fee is earned and payable it shall remain in or be paid into the WMATA Replacement Facilities Escrow Amount and be subject to the terms of the WMATA Replacement Facilities Escrow Agreement.

(e) Shared Parking Garage. The process set forth in this Section shall also be used for the construction of any garage in which parking is to be shared between WMATA and a Phase Tenant (or such Phase Tenant's own tenants and customers) if WMATA hereafter agrees, in its sole and absolute discretion, to any such shared parking.

(f) Developer's Responsibility for Final Completion of WMATA Facilities.

(i) Developer and the applicable Phase Tenant shall be jointly and severally responsible for the Final Completion of any WMATA Replacement Facilities applicable to that Phase Tenant's Phase (whether located on or off the applicable Phase) even though the direct responsibility for those WMATA Replacement Facilities is borne by a Phase Tenant. Construction of the applicable WMATA Replacement Facility must occur prior to or simultaneous with the construction of that Phase of Tenant Improvements. A Phase Tenant's default in doing so (after any notice and cure period afforded to it under its Ground Lease or Construction Agreement) shall constitute an Event of Default under this Agreement without any further Notice or cure opportunity being afforded.

(ii) Regardless of whether an Event of Default occurs under the preceding clause, no Tenant Improvements will be allowed to take occupancy or otherwise be placed in service unless and until all WMATA Replacement Facilities applicable to that Phase and any prior Phase have been Substantially Completed.

(g) Not a Release or Mitigation of Responsibility. Nothing in this Section releases, mitigates, waives or otherwise affects the obligation of a Phase Tenant (i) to Substantially Complete the Tenant Improvements applicable to its Phase or (ii) to Finally Complete the WMATA Replacement Facilities applicable to its Phase.

## **8.2 Protection of WMATA Operations and Facilities.**

(a) No Interference. WMATA's first priority is transit operations. WMATA does not enter into real estate development projects if there is any expectation or anticipation that the project

could deleteriously affect WMATA Facilities or operations (except to the extent set forth in an MOT Plan). Without limiting the foregoing, the provisions of **Section 4.3(c)(i)(I)-(K)** shall be applicable to any development activity.

(b) WMATA Right to Self-Protect.

(i) During construction by Developer or a Phase Tenant of any WMATA Replacement Facilities or any Tenant Improvements next to WMATA Facilities, WMATA's inspectors shall have: (A) reasonable daily access to such Tenant Improvements and WMATA Replacement Facilities for the purpose of determining whether such construction operations pose a safety risk to the public or to any other WMATA Replacement Facilities or WMATA Facilities, and to confirm that the construction of the WMATA Replacement Facilities conforms with the WMATA Design and Construction Standards and the approved working drawings and specifications for the design and construction of any WMATA Replacement Facilities to be constructed by a Phase Tenant, including relevant architectural, structural, electrical, mechanical, sheeting and shoring, excavation and utility drawings; and (B) uninterrupted access to WMATA Facilities.

(ii) Any nonconformity between the WMATA Replacement Facilities and the approved working drawings and specifications shall be resolved in accordance with the procedures implemented by WMATA pursuant to the WMATA Design and Construction Standards.

(iii) Developer and Phase Tenants, as applicable, shall promptly respond to reasonable requests of WMATA's inspector(s) if construction operations pose a safety risk to the public or to any WMATA Facilities or WMATA Replacement Facilities or to their operation; provided, however, that in the event of a conflict between a WMATA inspector and an authorized inspector of the Local Jurisdiction as to a matter of compliance with local code, the ruling of the Local Jurisdiction shall govern. WMATA inspectors shall have the right to issue, or, for matters also within the authority of the Local Jurisdiction, ask the applicable Local Jurisdiction to issue, a "stop work order" with respect to construction that poses a safety risk or that is not in compliance with the Approved Development Plan or the approved plans and specifications, and Developer and the applicable Phase Tenant shall abide by that "stop work order." WMATA shall further have the right, anything in this Agreement to the contrary notwithstanding, to seek a court injunction, directive or similar relief in order to enforce an inspector's instructions under the terms of this subsection. The foregoing provisions shall be included in the CC&Rs and, if WMATA deems it advisable, in each Ground Lease and Construction Agreement.

(c) All Other WMATA Rights Retained. Except as specifically provided in this Agreement, any Ground Lease and in the CC&Rs, nothing in this Agreement limits or otherwise affects WMATA's right to use the WMATA Joint Development Site for its own purposes prior to closing on a Ground Lease (or fee conveyance) for that particular Phase and, whether before or after any closing on a Phase, to operate WMATA Facilities and in the WMATA Reserved Areas and to provide transportation services in such manner as it may determine from time to time, including at the Metro Station. The foregoing includes, without limitation, determining standards of operation, hours of operation, the types of equipment used, the frequency of service, and the



ability to close or suspend the use of the Metro Station or any entrances or escalators and elevators therein.

### **8.3     Parking.**

(a)     Replacement Required. As part of the Project, portions of or all of the existing WMATA-owned and WMATA-operated surface Park & Ride lots located at the Metro Station will need to be relocated and/or replaced in a manner approved by WMATA. Developer and/or Phase Tenants shall be responsible for such relocation and/or replacement and shall use Commercially Reasonable Business Efforts to accomplish the same. The timing and extent of such relocations will depend on the location and timing of the specific Phase or Phases and the nature of any interim site activation. No existing WMATA parking may be taken out of service for the Project unless and until its interim or permanent replacement parking is in operation.

(b)     Cost and Revenue. The cost of implementing the foregoing parking replacement options will be borne solely by Developer or a Phase Tenant and/or by any non-WMATA public authority that Developer may induce to pay for the same. The replacement parking will be owned and operated by WMATA for its own benefit and Developer and Phase Tenants will not share in the revenues from the replacement parking nor will Developer or Phase Tenants bear any of the operating expenses of the replacement parking.

(c)     Interim Phasing. WMATA and Developer shall work cooperatively to determine if it is possible to keep any part of the existing WMATA-owned and WMATA-operated surface Park & Ride lot at the Metro Station in service during construction of the Project, with the goal of minimizing the loss of commuter parking during the construction of the Project.

(d)     Current Parking Protections. The applicable Phase Tenant shall be responsible for any changes to the existing WMATA Park & Ride garage at the Metro Station necessitated by such Phase Tenant's Phase, including moving entry/exit gates, lighting, wiring, signage and benches. Notwithstanding the foregoing provisions of this Section, interference shall be permitted to the extent set forth in an MOT Plan.

### **8.4     Bus Loop; Kiss & Ride.**

(a)     Replacement Required. As part of the Project, the existing WMATA-owned and WMATA-operated bus loop and Kiss & Ride facility located at the Metro Station [are not on the WMATA Joint Development Site and must not be impacted by the construction or operation of the Project.] OR [must be relocated and/or replaced. Developer and/or a Phase Tenant shall be responsible for such relocation and/or replacement and shall use Commercially Reasonable Business Efforts to accomplish the same. Any permanent relocation or replacement of the bus loop and Kiss & Ride facility shall be WMATA-owned and WMATA-operated.

(b)     WMATA Standards. Any WMATA Replacement Facilities provided under this Section must be built to WMATA Design and Construction Standards. WMATA has provided Developer with a concept plan for the replacement bus loop and the Kiss & Ride facility showing

its location, traffic flow, the number of lanes and amount of land needed, and other basic details. That concept plan will be the basis for planning a relocated or replacement facility. In addition, any relocated or replaced bus loop shall be upgraded at Developer's or a Phase Tenant's expense with respect to street furniture, shelters and canopies to meet WMATA Design and Construction Standards.

(c) Interim Replacement Facilities. Interim WMATA Replacement Facilities may be necessary during the relocation or replacement of the current bus loop and Kiss & Ride facility. Any interim WMATA Replacement Facilities providing bus and/or Kiss & Ride service shall have at least two exit lanes (but may have only one entry lane) and must be operational before the current bus loop and Kiss & Ride facility may be taken out of service and remain in operation until such time as the permanent WMATA Replacement Facility for bus and Kiss & Ride service is placed in service. The level of service to be provided by any interim WMATA Replacement Facility must be satisfactory to WMATA in its sole and absolute discretion, but in exercising its discretion WMATA acknowledges that the location and quality of interim WMATA Replacement Facilities will not match the location and quality of the permanent WMATA Replacement Facilities. The capital cost of providing, and the responsibility for, and cost of, operating (including any utility and stormwater management costs), maintaining and repairing, any interim WMATA Replacement Facilities shall be borne by Developer, Phase Tenant(s) and/or by any non-WMATA public authority as Developer may induce to pay for the same; WMATA shall not bear any of such costs. WMATA will have sole operational control over the operation of such interim WMATA Replacement Facilities. To facilitate implementation of the provisions of this subsection, Developer and WMATA will develop an MOT Plan for maintaining WMATA operations and interim operations during periods of construction.]

## **8.5 Pedestrian and Bicycle Improvements.**

Developer and Phase Tenants shall comply with WMATA Design and Construction Standards with respect to the existing and future pedestrian and bicycle improvements on the WMATA Joint Development Site. Pedestrian and bicycle improvements will be part of the WMATA Replacement Facilities for which Developer and/or Phase Tenants are responsible.

## **8.6 Offset of Costs.**

The provisions of **Section 3.4(b)(i)** regarding offsetting the costs of permanent WMATA Replacement Facilities against the Consideration payable to WMATA applies to the permanent (but not interim) WMATA Replacement Facilities provided under this Article. No credit is given against the Consideration for the cost of any interim WMATA Replacement Facilities or for any general infrastructure for the Project.

## **8.7 Noise, Light, Electric Current and Vibration.**

No claims shall be made by Developer, by any Phase Tenant or by any Person claiming by or through them against WMATA arising from noise, light, electric current or vibration caused from WMATA's normal transportation-related operation of the WMATA Facilities. **In agreeing**

to the foregoing, Developer and Phase Tenants are aware that the WMATA Joint Development Site is proximate to an operating train yard used to support Metrorail operations.

## **8.8 Non-WMATA Infrastructure.**

(a) Non-Applicability of this Article. Except for the provisions of this Article regarding posting payment and performance bonds, making completion of WMATA Replacement Facilities a condition precedent for various matters affecting other development activities, and **Sections 8.2 and 8.7**, the provisions of this Article do not apply to any infrastructure necessary or appropriate for the Project other than WMATA Facilities. Developer and Phase Tenants shall be solely responsible for designing, constructing, operating, maintaining, repairing and replacing any non-WMATA infrastructure and for paying the cost of the same, except to the extent another governmental authority agrees to accept such obligation. WMATA shall have no obligation or liability with respect to any of the foregoing.

(b) Roads Built to Public Street Standards. All road improvements built by Developer and Phase Tenants for the Project shall be designed and constructed to the public road standards of the Local Jurisdiction.

## **ARTICLE 9 PLANS AND SPECIFICATIONS**

### **9.1 Submission of Plans to WMATA for Review and Approval.**

(a) WMATA Approval Rights. Developer shall submit plans and specifications for each Phase (including any WMATA Replacement Facilities thereon or ancillary thereto) to WMATA for review and approval in accordance with the terms of this Article and shall not submit proposed plans and specifications to the applicable jurisdictional authorities for any Phase or any WMATA Replacement Facilities until WMATA has reviewed and approved (or is deemed to have approved) in accordance with this Article those plans and specifications that relate to any of the following:

(i) WMATA will have the right to approve in its sole and absolute discretion: (A) matters that affect the integrity, functionality, efficiency, safety, operation, maintenance, legal compliance, cost or profitability of WMATA's business, customers, operations or activities; (B) matters within the WMATA Zone of Influence or that otherwise affect WMATA Facilities, WMATA Reserved Areas, ingress/egress to WMATA Facilities, and similar matters; (C) matters that affect any of WMATA's adjacent property; (D) the design and construction of interim and permanent WMATA Replacement Facilities and of any Developer Improvements that may also be subject to the WMATA Design and Construction Standards; (E) matters that affect Developer's obligations as they relate to timing (changes in Project schedule) and performance (changes in what will be constructed, e.g., the product mix); and/or (F) anything that affects the Consideration.

(ii) WMATA shall have the right to withhold its approval of any plans and specifications (or any revisions thereof) if the exterior elements thereof facing any WMATA Facilities (including, without limitation, finishes, materials, windows, mechanical, electrical and plumbing equipment, and loading docks and other building infrastructure) are materially different than the exterior elements thereof on any other façade. WMATA's approval under this clause shall not be unreasonably withheld, conditioned or delayed.

(b) WMATA Approval Not Required. Except as set forth in **Section 9.1(a)**, WMATA shall have no right to approve or disapprove any aspects of the Proposed Development Plan relating to (i) drawings and specifications for Tenant Improvements outside of the WMATA Zone of Influence, (ii) any aspect of buildings and other improvements that are outside of the WMATA Zone of Influence that do not have a direct, material impact on WMATA's operations, or (iii) exterior elevations, materials and colors, interior finishes and layouts, color, materials, landscape and hardscape for the Tenant Improvements.

## **9.2 Obtaining WMATA Approval.**

(a) WMATA Approval Process. Developer shall submit to WMATA all plans and specifications for the Project. WMATA shall review and approve or disapprove those of the proposed plans and specifications that are within its scope of review pursuant to **Section 9.1** within thirty (30) Business Days after Developer's delivery of the proposed plans and specifications, including all required information and documentation set forth above, to WMATA.

(b) WMATA Disapproval. In the event that WMATA disapproves the proposed plans and specifications or approves the proposed plans and specifications subject to qualification, WMATA shall deliver Notice to Developer of such disapproval or qualified approval, stating in as much detail as is reasonably practicable, given the state of completion of the proposed plans and specifications, the nature of WMATA's objections or qualifications, as the case may be. Developer shall have a period of ten (10) Business Days after the giving of such Notice within which to revise and resubmit the proposed plans and specifications to WMATA addressing each of the issues raised by WMATA; however, if such objections or qualifications cannot reasonably be addressed within ten (10) Business Days using Commercially Reasonable Business Efforts, Developer shall be allowed additional time (not to exceed thirty (30) days in the aggregate) as is reasonably necessary to address the objections or qualifications. Developer shall use Commercially Reasonable Business Efforts to satisfy WMATA's objections and qualifications.

(c) Repeat Process. The above process shall be repeated until the proposed plans and specifications are approved by WMATA. If a particular proposed plan or specification is not approved after its third (3<sup>rd</sup>) iteration is submitted to WMATA for approval, the parties shall meet and use Commercially Reasonable Business Efforts to determine whether a mutually acceptable plan or specification can be agreed to. If no agreement is reached within thirty (30) Business Days after either party invokes the right and obligation to meet by Notice to the other, then either party may terminate this Agreement upon Notice to the other party given within thirty (30) days after such thirty (30) Business Day period expires. No such termination shall waive, release or

otherwise affect any obligation or liability accrued under this Agreement before the date of such termination Notice.

(d) No Changes after Approval. Once WMATA has approved the proposed plans and specifications, Developer may not make changes to the approved plans and specifications that are subject to WMATA review and approval under **Section 9.1** without WMATA's prior written approval, subject to **Sections 5.2(b), 5.2(c) and 7.3(a)**. Any proposed changes for which WMATA approval is required shall be promptly submitted to WMATA for WMATA's approval in accordance with the procedures set forth in this Section for re-submissions.

(e) Defects in WMATA's Own Standards. If Developer or a Phase Tenant discovers a defect in the WMATA Design and Construction Standards or an inconsistency between the plans and specifications and the WMATA Design and Construction Standards, the defect or inconsistency should be brought to WMATA's attention as promptly as possible and Developer or the applicable Phase Tenant should promptly send WMATA a request for information or clarification.

### **9.3 Deemed Approval**

If a party fails to timely respond within a specifically-stated period set forth in this Agreement or, if no specific period is stated, within thirty (30) days, to any request for an approval or consent when approval or consent is not to be unreasonably withheld, conditioned or delayed, the requesting party may send the non-responding party a reminder Notice. The reminder Notice shall state in **bold type** and ALL CAPITALS **"THIS NOTICE AFFECTS MATERIAL RIGHTS OF THE REQUESTING PARTY WITH RESPECT TO THE [REDACTED] JOINT DEVELOPMENT PROJECT; YOUR FAILURE TO TIMELY RESPOND COULD RESULT IN YOUR DEEMED APPROVAL"** and the reminder Notice shall explain the nature of the approval or consent sought. If the non-responding party fails to respond to the reminder Notice within fifteen (15) days after the reminder Notice is given and such approval or consent is not to be unreasonably withheld, conditioned or delayed, then the non-responding party's approval or consent shall be deemed to have been given or obtained and shall be deemed to authorize the requesting party to proceed with the matter for which approval or request was sought. However, (i) the foregoing does not apply when WMATA's approval or consent relates to a WMATA Unconditional Approval Matter or may otherwise be withheld in WMATA's sole and absolute discretion, and (ii) nothing in this Section applies to any modification of an Approved Development Plan, to any modification of the Ground Lease template (or to any modification of an executed Ground Lease) or the Construction Agreement template (or to any modification of an executed Construction Agreement), or to any modification of the CC&Rs.

### **9.4 Effect of WMATA Approval or Deemed Approval.**

(a) WMATA Not Liable. WMATA accepts no liability and waives none of its rights under this Agreement solely by reason of its approval or deemed approval of any plans and

specifications, nor shall its approval be construed to be a warranty regarding the quality or means of construction of any WMATA Facilities or Tenant Improvements, except that:

(i) WMATA's approval of the plans and specifications shall constitute a waiver by WMATA of any right to damages or any other relief based upon a claim that any Tenant Improvements adversely affect the operation, ingress to, egress from, safety or security of WMATA Facilities if such Tenant Improvements are constructed in accordance with such plans and specifications (as they may be amended in accordance with this Agreement) and the WMATA Design and Construction Standards;

(ii) WMATA's approval thereof shall be a waiver of any right to object to any matter which WMATA previously approved, to the extent of the information disclosed therein;

(iii) No consent or approval (or deemed approval) by WMATA will be interpreted as a waiver by WMATA or assumption of performance or financial obligation or liability or risk by WMATA except to the extent expressly so agreed in WMATA's consent or approval;

(iv) WMATA's approval of the proposed plans and specifications shall constitute a waiver of any right by WMATA to object to any subsequent submission substantially consistent with the level of detail to the extent of the information disclosed in the approved plans and specifications (but shall not constitute a waiver of WMATA's approval rights hereunder). (Example: WMATA may have previously approved a building but if a subsequent submission shows the loading dock in a location which interferes with transit uses, WMATA has not waived any rights and may object.)

(b) Litigation. In no event shall WMATA be required to institute, defend against, or otherwise participate in litigation or any other dispute resolution process arising from or relating to the design and construction of the Project. The foregoing shall not preclude the applicable Phase Tenant from initiating such litigation or other dispute resolution process in WMATA's name against a third party if and when WMATA is a required party to establish the legal sufficiency of the pleadings or filing, in which event WMATA shall cooperate with the applicable Phase Tenant in connection with such pleading or filing.

## **9.5 No Damages for Delay.**

WMATA's failure or refusal to give any consent, approval or determination shall not give rise to any claim for, and Developer and Phase Tenants shall not be entitled to any damages for, WMATA's failure or refusal to give such consent, approval or determination. The only remedies for such failure or refusal are termination in accordance with **Section 9.2** and deemed approval in accordance with **Section 9.3** and/or, in circumstances where WMATA's consent is not to be unreasonably withheld, conditioned or delayed, an action for specific performance or injunction.

## **ARTICLE 10**

### **TITLE**

#### **10.1 Survey.**

Within forty-five (45) days after the Effective Date, Developer, at Developer's sole cost and expense, shall submit to WMATA a boundary survey for the WMATA Joint Development Site showing all existing above-ground improvements thereon (the "**Survey**"). The Survey shall be in a form compliant with current ALTA/NSPS standards for urban land surveys and shall be certified as of a date satisfactory to enable Title Insurer to delete standard survey exceptions from the title insurance policy to be issued pursuant to the Title Commitment.

#### **10.2 Title Commitment.**

Within forty-five (45) days after the Effective Date, Developer, at Developer's sole cost and expense, shall deliver to WMATA a commitment for a leasehold estate title insurance policy ("**Title Commitment**") issued on the then-current ALTA form by a reputable title insurance company (or agent thereof) licensed to issue title insurance policies in the State ("**Title Insurer**"), together with legible copies of all documents referenced as an exception to title in the Title Commitment.

#### **10.3 Title Permitted Exceptions.**

(a) Title Exception Notice. Within forty-five (45) days after the Effective Date, Developer shall give WMATA Notice ("**Title Exception Notice**") of all matters shown on the Survey and all title exceptions in the Title Commitment to which Developer objects ("**Title Objectionable Matters**"). Anything to the contrary herein notwithstanding, Developer shall not have any right to object to any Title Permitted Exception.

(b) WMATA Cure. If WMATA is willing to take such actions as may be required to cause any Title Objectionable Matters to be removed from the Survey or the Title Commitment or to be insured over by Title Insurer, WMATA shall give Developer Notice of the Title Objectionable Matters it will cause to be removed or insured over not later than twenty-one (21) days after the giving of the Title Exception Notice. The failure of WMATA to timely give such Notice shall be deemed an election by WMATA not to remedy any Title Objectionable Matters. WMATA's failure to include in WMATA's Notice a particular matter or exception among those WMATA will cause to be remedied shall be deemed an election by WMATA not to remedy those Title Objectionable Matters that are omitted in WMATA's Notice. Except for Title Objectionable Matters that WMATA has expressly undertaken to remove or as set forth in this Section, WMATA shall not be required to undertake efforts to remove any lien, encumbrance, security interest, exception, objection or other matter, to cause Title Insurer to insure over the same, to make any expenditure of money or to institute litigation or any other judicial or administrative proceeding, and WMATA may elect not to discharge the same. WMATA shall use Commercially Reasonable Business Efforts to cure any Title Objectionable Matter raised by Developer that WMATA has agreed to cure.

(c) Developer's Right to Terminate. If WMATA does not timely agree to cure any Title Objectionable Matters, Developer may, but shall not be required to, elect to terminate this Agreement by giving Notice to WMATA not later than twenty-one (21) days after the date WMATA gave Notice (or failed to give Notice within the period specified in **Section 10.3(b)**) in response to Developer's Title Exception Notice. If Developer so terminates this Agreement, the Deposit shall be returned to Developer and Developer and WMATA shall have no further rights or obligations under this Agreement except for any obligations that have accrued prior to the date of termination and are not satisfied.

(d) Developer Acceptance of WMATA Response. If Developer does not timely give such Notice to WMATA of Developer's election to terminate this Agreement under **Section 10.3(c)**, Developer shall be deemed to have waived any objection to survey matters or title exceptions existing as of the date of the Title Commitment and the Survey, except those WMATA agreed to address. All such matters, objections and exceptions other than those that WMATA has expressly undertaken to remove shall be "**Title Permitted Exceptions.**" In addition to the foregoing, "Title Permitted Exceptions" shall include the CC&Rs and any Phase-specific covenants and easements, other liens, encumbrances and defects in title arising from zoning, subdivision, environmental, building or land use ordinances, laws, regulations, restrictions or orders of any legal authority now or hereafter having or acquiring jurisdiction over the WMATA Joint Development Site or over the use and improvement thereof, and any judgments, pending lawsuits or similar matters that may affect WMATA but are not specifically listed as title exceptions in the Title Commitment for the applicable Phase. Anything to the contrary herein notwithstanding, Developer shall not have any right to terminate this Agreement on account of any Title Permitted Exception.

(e) Later-Arising Title Issues. After the date of the initial Title Commitment, WMATA shall not mortgage, lease or otherwise encumber any Phase. If any such mortgage, lease or other encumbrance is placed or entered into by WMATA, the same shall automatically be an Title Objectionable Matter. If any mechanic's lien, materialmen's lien, judgment lien, pending lawsuit or other involuntary lien or encumbrance is recorded against any Phase after the date of the initial Title Commitment, the same shall automatically be an Title Objectionable Matter. Developer shall have the right to terminate this Agreement with respect to any Phase if at closing an updated title search reveals any liens, encumbrances or title defects not existing as of the date of the initial Title Commitment which WMATA has not satisfied, released, or caused Title Insurer to insure title against. No such termination shall waive, release or otherwise affect any obligation or liability accrued under this Agreement before the date of such termination Notice.

#### **10.4 Title at Closing.**

(a) Developer Termination. If, on the date set for closing on any Ground Lease or fee conveyance, the state of title to the applicable Phase is other than as required in this Agreement, Developer or the proposed Phase Tenant may terminate this Agreement with respect to that Phase by Notice to WMATA, subject to **Section 10.4(b)**. If Developer or the applicable Phase Tenant does not terminate by such Notice on or before the applicable closing date, Developer and the



applicable Phase Tenant shall be deemed to have waived any survey or title matter and Developer or Phase Tenant shall be required to consummate the Ground Lease or fee conveyance.

(b) Postponement of Closing. If Developer or the proposed Phase Tenant timely gives WMATA Notice of termination under **Section 10.4(a)**, WMATA may postpone the closing date at its sole option and may elect to attempt to satisfy such objection for a period not to exceed ten (10) calendar days. Should WMATA be able to satisfy such objection (including by, where allowed by the other provisions of this Article, causing Title Insurer to issue a title insurance policy without that exception), or should Developer or the proposed Phase Tenant waive such objection by Notice to WMATA within such period for satisfaction, then closing shall take place on the postponed closing date or such earlier date as the parties may agree. If WMATA is unable to satisfy such objection after the cure period described above to Developer's or the proposed Phase Tenant's satisfaction, Developer may terminate this Agreement with respect to that Phase by Notice to WMATA given no later than two (2) Business Days after the rescheduled closing date. If Developer so terminates this Agreement with respect to a Phase, Developer and WMATA shall have no further rights or obligations under this Agreement with respect to that Phase except for any obligations that have accrued to the date of termination and are not satisfied.

#### **10.5 Developer Not to Affect Title.**

(a) Developer. Developer shall keep the WMATA Joint Development Site free and clear of all liens and encumbrances of all type (including, without limitation, mortgages, deeds of trust, and mechanics', materialmen's and other similar liens) arising out of or relating to anything done by or for the benefit of Developer. Developer shall not grant any easements, licenses or other rights in or to the WMATA Joint Development Site; the foregoing does not preclude Phase Tenants from doing so in accordance with **Section 10.5(b)**. All work or construction by or for Developer and all other obligations of Developer relating to the WMATA Joint Development Site shall be paid for in full and any liens or encumbrances arising therefrom shall be discharged by and at the expense of Developer. Developer shall pay any such sums and cause to be released or bonded over any such lien or encumbrance within thirty (30) days of Developer's obtaining knowledge thereof or before the next closing occurs, whichever first occurs, without need for Notice from WMATA, or an Event of Default shall occur. Developer's indemnification obligations under this Agreement shall apply to this Section.

(b) Phase Tenants. This Section shall not apply to Phase Tenants. The right, or lack of right, by Phase Tenants to affect title shall be set forth in their respective Ground Leases (or documents in lieu thereof in the case of a fee conveyance) and/or in the CC&Rs.

### **ARTICLE 11 WMATA COMPACT HEARING**

#### **11.1 Need for WMATA Compact Hearing.**

If the Project affects existing WMATA Facilities, those effects require a public hearing in

accordance with the WMATA Compact (“**WMATA Compact Hearing**”). WMATA shall conduct the WMATA Compact Hearing. WMATA shall begin the process of scheduling and shall thereafter hold the WMATA Compact Hearing after this Agreement has been executed by the parties and approved by WMATA’s Board of Directors and after Developer has provided WMATA with all concept plans and specifications necessary or appropriate in WMATA’s reasonable determination for holding the WMATA Compact Hearing. Depending on the scope of the Project and the scheduling of the impacts on the WMATA Facilities, more than one WMATA Compact Hearing may be necessary. After each WMATA Compact Hearing, WMATA shall prepare a report of that WMATA Compact Hearing and its responses to issues and questions raised in accordance with WMATA’s standard practices. The report and WMATA’s responses shall then be subject to the approval of the WMATA Board of Directors.

### **11.2 Developer’s Contribution to Cost of WMATA Compact Hearing.**

Developer shall advance Fifty Thousand Dollars (\$50,000) towards the cost of each WMATA Compact Hearing. Any money so advanced but not used for the conduct of the applicable WMATA Compact Hearing and its follow-up shall be returned to Developer. Developer shall not be responsible for any costs of the WMATA Compact Hearing process in excess of Fifty Thousand Dollars (\$50,000) for each WMATA Compact Hearing.

### **11.3 Revisions as a Result of WMATA Compact Hearing.**

(a) Revisions Required. If the WMATA Compact Hearing process creates the need for revisions to the design of the Project, the site plan or any other documents required in the approval process, Developer shall revise the Proposed or Approved Development Plan, at Developer’s sole cost and expense, within thirty (30) days after WMATA’s written request; provided, however, if Developer promptly commences to revise the Proposed or Approved Development Plan within the thirty (30) day period and diligently pursues such revisions to completion using Commercially Reasonable Business Efforts but the revisions cannot reasonably be completed within thirty (30) days, Developer shall so Notify WMATA within that thirty (30)-day period and shall be allowed additional time (not to exceed an additional sixty (60) days) as is reasonably necessary to complete the revisions.

(b) Right to Terminate.

(i) Notwithstanding **Section 11.3(a)**, if any revisions arising from the WMATA Compact Hearing process require material changes to the Proposed or Approved Development Plan such that Developer reasonably believes that the Project is not feasible, Developer may terminate this Agreement *in toto* by giving Notice of termination to WMATA within thirty (30) days after WMATA’s written request for revisions.

(ii) If Developer fails to either (A) deliver the revisions to WMATA within thirty (30) days after receipt of WMATA’s written request for such revisions or (B) give Notice to WMATA within thirty (30) days after receipt of WMATA’s written request for such revisions that an extension of time is needed under **Section 11.3(a)** and thereafter provide WMATA with the

revisions within the time specified in **Section 11.3(a)**, Developer shall be deemed to have terminated this Agreement.

(iii) If WMATA's Board of Directors disapproves the Proposed Development Plan for the Project or any Phase submitted pursuant to **Section 5.2(a)** or a modification to the Approved Development Plan for the Project as a result of the WMATA Compact Hearing, Developer shall have the right to terminate this Agreement by giving Notice of termination to WMATA within thirty (30) days after WMATA gives Developer Notice of said Board of Directors disapproval.

(iv) If this Agreement is terminated under this Section, WMATA shall return the Deposit, to the extent it has not been drawn upon, to Developer and the parties shall be released from any obligation or liability thereafter except for any that has accrued under this Agreement prior to the date the Notice of termination is given.

## **ARTICLE 12**

### **FTA CONCURRENCE**

#### **12.1 FTA Concurrence Required.**

This transaction will be subject to the concurrence of the FTA in accordance with the FTA's "Guidance on Joint Development," FTA Circular C 7050.1A (December 29, 2016), as it may be amended, supplemented, or otherwise modified from time to time, including, without limitation, Chapter VI thereof entitled "Joint Development Project Review Process for FTA-Assisted Projects." WMATA shall use Commercially Reasonable Business Efforts, including by completing and submitting documents required of it by such Guidance on Joint Development, to obtain such concurrence at its own expense. Developer understands that FTA concurrence cannot be sought until after this Agreement has been executed by the parties and the Development Value has been determined. WMATA shall request FTA concurrence for the entire Project in one omnibus concurrence but Developer understands that FTA concurrence may also be required for each Ground Lease or fee conveyance in lieu thereof and that such concurrence may not be sought until the Development Value for that Phase has been established and mutually agreed to between Developer, the applicable Phase Tenant, and WMATA. Developer bears all risk and costs and expenses should any of those efforts be unsuccessful.

#### **12.2 If FTA Concurrence to this Agreement Is Not Obtained.**

In the event that FTA concurrence is not forthcoming for this Agreement within six (6) months after this Agreement is submitted to the FTA for its concurrence, WMATA shall so Notify Developer and this Agreement shall automatically terminate. Upon such termination, Developer shall deliver to WMATA, at Developer's expense, all reports and studies of the WMATA Joint Development Site generated by Developer, a Phase Tenant or third parties for any of them relating to environmental conditions, soil conditions, title, and plans and specifications for any WMATA Replacement Facilities, together with an assignment to WMATA of their right, title and interest

thereto in form and substance acceptable to WMATA, which obligations shall survive the termination of this Agreement and shall be enforceable by specific performance or other equitable remedies. Any obligations or liabilities previously accrued with respect to or under this Agreement shall survive such termination.

### **12.3 If FTA Concurrence to a Phase Transfer Is Not Obtained.**

In the event that FTA concurrence is not forthcoming for any Ground Lease or fee conveyance in lieu thereof within ninety (90) days after such transaction is submitted to the FTA for its concurrence, WMATA shall so Notify Developer. This Agreement shall thereupon terminate with respect to that Phase unless either party elects, by Notice to the other party given within thirty (30) days after WMATA gives Notice of the FTA's non-concurrence, to keep this Agreement in effect with respect to that Phase. If this Agreement is so retained in effect with respect to that Phase, the parties shall negotiate in good faith to reform the proposed terms of that Ground Lease or fee conveyance and to seek FTA concurrence in that transaction; notwithstanding the foregoing, neither party is obligated to reach agreement on such a reformation. If WMATA and Developer do not reach agreement within ninety (90) days after a party gives Notice to keep this Agreement in effect, this Agreement shall automatically terminate with respect to that Phase unless both parties agree, in their respective sole and absolute discretions, to keep this Agreement in effect for that Phase on such terms and conditions as they may then agree. If such agreement is reached between the parties, the portion of the Project applicable to that Phase shall be resubmitted to the FTA for its concurrence as set forth above. Upon any termination under this Section, Developer shall deliver to WMATA, at Developer's expense, all reports and studies of that Phase generated by Developer, a Phase Tenant or third parties for any of them relating to environmental conditions, soil conditions, title, and plans and specifications for any WMATA Replacement Facilities, together with an assignment to WMATA of their right, title and interest thereto in form and substance acceptable to WMATA, which obligations shall survive the termination of this Agreement and shall be enforceable by specific performance or other equitable remedies. Any obligations or liabilities previously accrued with respect to or under this Agreement shall survive such termination.

## **ARTICLE 13 PRE-CLOSING**

### **13.1 Deadline for Initial Closing.**

Closing of the Ground Lease or fee conveyance for \_\_\_\_\_ *[insert identification of first phase if there is a particular phase that must go first]* and the start of construction of the WMATA Replacement Facilities set forth in **Section 8.4** and, to the extent applicable to that Phase, **Section 8.3** must occur no later than the first to occur of (i) \_\_\_\_\_ ( ) months after the date of this Agreement or (ii) fifteen (15) days after the last to occur of (A) title to that Phase is in the condition set forth in **Article 10**, (B) the Ground Lease document (or, in the case of a fee conveyance, comparable provisions in a separate contractual agreement), the CC&Rs, the Construction Agreement applicable to that Phase, and any

supplemental easements applicable to that Phase have been agreed to, (C) the WMATA Board of Directors has approved the negotiation and execution of this Agreement, and (D) the FTA concurs in this Agreement and the particular Phase transaction. Construction shall start within thirty (30) days after the closing and, subject to Excusable Delays, construction on that first Phase must be Substantially Completed within two (2) years after the start of construction. If such closing cannot occur and/or the start of such construction cannot occur by the dates set forth above in this Section because any of the foregoing conditions precedent delays the same, the parties shall use diligent efforts to cause such closing and/or the start of such construction to occur as soon thereafter as is practicable. If such closing does not occur on or before \_\_\_\_\_ *[insert a later absolute deadline]* for any reason (including Excusable Delay), this Agreement shall automatically terminate unless both parties agree, in their respective sole and absolute discretions, to keep this Agreement in effect on such terms and conditions as they may then agree. Upon any termination under this Section, Developer shall deliver to WMATA, at Developer's expense, all reports and studies generated by Developer, a Phase Tenant or third parties for any of them relating to environmental conditions, soil conditions, title, and plans and specifications for any WMATA Replacement Facilities, together with an assignment to WMATA of their right, title and interest thereto in form and substance acceptable to WMATA, which obligations shall survive the termination of this Agreement and shall be enforceable by specific performance or other equitable remedies. Any obligations or liabilities previously accrued with respect to or under this Agreement shall survive such termination.

### **13.2 Deadlines for Subsequent Closings.**

(a) First \_\_\_\_\_ Phases. Within \_\_\_\_\_ ( ) years after the Effective Date, Developer or Phase Tenants shall close Ground Leases or fee purchases on at least \_\_\_\_\_ ( ) Phases. Within \_\_\_\_\_ ( ) years after the Effective Date, Developer or Phase Tenants shall obtain certificates of occupancy (or equivalents) from the Local Jurisdiction for the Tenant Improvements on those Phases, for the WMATA Replacement Facilities associated with those Phases, and for the WMATA Replacement Facilities set forth in **Section 8.4**.

(b) All Phases. Within \_\_\_\_\_ ( ) years after the Effective Date, Developer or Phase Tenants shall close Ground Leases or fee purchases for all Phases. Within \_\_\_\_\_ ( ) years after the Effective Date, Developer or Phase Tenants shall obtain certificates of occupancy (or equivalents) from the Local Jurisdiction for the Tenant Improvements and WMATA Replacement Facilities on all Phases.

### **13.3 Establishing Closing Dates.**

(a) Advance Notice by Developer.

(i) At least four (4) months prior to the anticipated closing date for each Ground Lease or fee conveyance, Developer shall give WMATA (A) Notice of the anticipated closing date for such Ground Lease or fee conveyance, (B) the identity, experience, expertise, financial capability and other credentials of Developer's designee for the Phase Tenant of that Phase, (C) a copy of the proposed Ground Lease with any Phase-specific changes clearly identified therein (or

a draft of any equivalent document to be used in the case of a fee conveyance), (D) a copy of the proposed Construction Agreement, if any, with any Phase-specific changes clearly identified therein, (E) drafts of any Phase-specific easements, covenants or other encumbrances, and (F) the certification attached hereto as **Exhibit E** signed by the proposed Phase Tenant. Developer and/or one or more of its members or Affiliates thereof must be the managing partner or operating member of such Phase Tenant. Developer shall also provide additional information about the proposed Phase Tenant as WMATA may reasonably request.

(ii) WMATA shall have the right to approve a Phase Tenant, which approval shall not be unreasonably withheld, conditioned or delayed.

(iii) WMATA shall have the right to approve the form and substance of the proposed Phase-specific Ground Lease or fee simple conveyance equivalent, any proposed Phase-specific Construction Agreement and any Phase-specific easements, covenants or other encumbrances, which approval shall not be unreasonably withheld, conditioned or delayed if any requested changes therein do not affect the compensation to be paid to WMATA, impose any new or additional fees, costs or expenses on WMATA, change the Approved Development Plan or the scope or schedule of the Phase or the WMATA Replacement Facilities (as applicable), or otherwise materially affect WMATA's rights or obligations.

(b) Postponement of Closing Date(s). Upon not less than thirty (30) days' prior Notice to the other party, and notwithstanding the schedule set forth in this Agreement, and in addition to any other right to postpone, the scheduled closing date for any Ground Lease or fee conveyance may be postponed by a party for a reasonable time not to exceed thirty (30) days; provided, however, that WMATA may not postpone any scheduled closing date under this subsection if any financing commitment available to the applicable Phase Tenant would expire during that postponement and the applicable Phase Tenant objects to the postponement.

#### **13.4 Conditions Precedent to Closings.**

(a) Mutual Conditions Precedent. It shall be a condition precedent to WMATA's and a Phase Tenant's obligations to close on any Phase that:

(i) The boundary lines of that Phase have been agreed to by WMATA and Developer;

(ii) Plans and specifications for any WMATA Replacement Facilities, the cost of the WMATA Replacement Facilities pursuant to **Section 8.1(a)**, and an MOT Plan applicable to that Phase have been agreed to;

(iii) Developer and WMATA shall have agreed upon the CC&Rs;

(iv) If the Phase is to be ground leased, a Phase-specific Ground Lease has been agreed to by WMATA and the applicable Phase Tenant. For any closing involving a fee conveyance in lieu of a Ground Lease, WMATA and the applicable Phase Tenant have agreed on

documents containing the same or similar substantive terms as would otherwise be included in a Ground Lease and related documents so that the substantive terms of the conveyance are substantially similar except for the closing being a conveyance of a fee interest instead of a leasehold estate;

(v) For any Phase involving the construction of any WMATA Replacement Facilities, WMATA, the applicable Phase Tenant and the applicable third-party construction lender financing the Tenant Improvements on or associated with that Phase have agreed on a Phase-specific Construction Agreement, the applicable WMATA Replacement Facilities Escrow Amount, and a WMATA Replacement Facilities Escrow Agreement, and WMATA, Developer and the applicable Phase Tenant have agreed on an agreement subordinating any development or project management fee pursuant to **Section 8.1(d)**;

(vi) Any Phase-specific easements, covenants or other encumbrances have been agreed to by WMATA and the applicable Phase Tenant;

(vii) The bonds to be posted pursuant to **Section 8.1(b)** have been approved by WMATA;

(viii) The WMATA Compact Hearing process has been completed, including approval by the WMATA Board of Directors of the final staff report, and the results thereof are acceptable to both WMATA and Developer;

(ix) The WMATA Board of Directors has approved the negotiation and execution of this Agreement by WMATA;

(x) The WMATA Board of Directors has approved the Consideration;

(xiii) The FTA has concurred in this Agreement and in the conveyance of the applicable Phase to WMATA's satisfaction;

(xiv) There has been no material Taking with respect to that Phase, no litigation shall exist preventing the consummation of that closing or the performance of the obligations contemplated by this Agreement, the CC&Rs, and the applicable Ground Lease (or comparable documents in the event of a fee conveyance), and, if applicable, the Construction Agreement, and no litigation is, to the knowledge of either party, threatened that could declare any of those obligations to be illegal, invalid or non-binding.

(b) Approved Development Plan. It shall be a condition precedent to WMATA's obligation to close on any Phase that there be an Approved Development Plan for the overall Project and, if required for a particular Phase, an Approved Development Plan for that Phase.

(c) Identity of Phase Tenant. It shall be a condition precedent to WMATA's obligation to close on any Phase that the Phase Tenant for that Phase has been approved or deemed approved by WMATA pursuant to **Section 13.3(a)**.

(d) Plans and Specs. It shall be a condition precedent to WMATA's obligation to close on any Phase that (i) WMATA shall have approved, or be deemed to have approved, plans and specifications for all aspect of the Project applicable to that Phase over which WMATA shall have the right to review and approve in accordance with **Section 9.1**, and (ii) the applicable Phase Tenant shall deliver such bonds as are required by the terms of **Section 8.1(b)**.

(e) Advance Deliverables. It shall be a condition precedent to WMATA's obligation to close on any Phase that Developer or the applicable Phase Tenant shall provide to WMATA the following within the time frame required by **Section 6.2** for matters subject to that Section or **Section 13.3(a)** for matters subject to that Section and no later than sixty (60) days prior to such closing for all other matters:

(i) written evidence of debt and equity financing commitments and/or other governmental financial support sufficient for completion of the relevant Phase, including the Tenant Improvements and any WMATA Replacement Facilities;

(ii) a copy of the proposed Ground Lease (or a draft of any equivalent document to be used in the case of a fee conveyance) with any Phase-specific changes from the template form clearly identified therein;

(iii) a copy of any applicable Construction Agreement with any Phase-specific changes from the template form clearly identified therein;

(iv) a copy of any proposed easements, covenants and other encumbrances that are proposed;

(v) the certification attached hereto as **Exhibit E** signed by the proposed Phase Tenant;

(vi) the Notices required by **Section 6.2** ("Condominiums") for any Phase that a Phase Tenant desires to acquire in fee simple;

(vii) such other information as WMATA reasonably shall have requested concerning Developer's or the applicable Phase Tenant's compliance with governmental requirements, procedures, or other circumstances which were imposed or implemented after the Effective Date; and

(viii) such other similar information as WMATA reasonably shall have requested consistent with information which would be provided by a developer or a ground lessee (or fee purchaser) in similar commercial transactions in the Washington, D.C. metropolitan area.

WMATA's approval of any of the foregoing shall not be unreasonably withheld, conditioned or delayed; provided, however, that WMATA shall have the right to approve or reject in its sole and absolute discretion anything that affects the compensation to be paid to WMATA, imposes any



new or additional fees, costs or expenses on WMATA, changes the Approved Development Plan or the scope or schedule of the Phase, could result in the subordination of WMATA's interest to the interest of Phase Tenant or its lenders or other third parties, or otherwise materially affects WMATA's rights or obligations.

(f) Title. It shall be a condition precedent to a Phase Tenant's obligation to close that title to the applicable Phase be in the condition required by **Section 10.4** and that, if legally required in order to convey leasehold or fee title to the applicable Phase, that the Phase to be conveyed shall be its own separate parcel, subdivided pursuant to a subdivision plat recorded in the applicable land records. It shall be a condition precedent to WMATA's obligation to close that no liens or encumbrances exist for which Developer is responsible pursuant to **Section 10.5(a)**.

(g) No Default. It shall be a condition precedent to WMATA's obligation to close that the construction obligations regarding WMATA Replacement Facilities set forth in **Section 8.1** have been satisfied, that no Event of Default shall exist and that, as more fully set forth in **Section 14.4(f)**, all accrued obligations are satisfied.

(h) Causing Conditions to be Satisfied or Fail. Each party shall use Commercially Reasonable Business Efforts to cause all conditions precedent to its obligation to close and over which it has control to be satisfied. A party may not rely on the failure of a condition precedent to avoid its obligation to close if that party has caused the failure of the condition precedent or has failed to use Commercially Reasonable Business Efforts to cause the condition precedent to be satisfied.

### **13.5 WMATA's Operations Prior to Closing.**

Prior to entering into a Ground Lease (or fee conveyance equivalent) for a Phase, WMATA shall have at all times the unrestricted right to perform any work desired by WMATA on that Phase except work that would delay or make development by Developer or any Phase Tenant materially more costly or materially more burdensome than would have otherwise been the case in the absence of WMATA's performance of such work unless WMATA removes the same prior to the closing; provided, that WMATA shall be permitted to make before any such closing any improvements it is or would be permitted to make under the CC&Rs or a Ground Lease after any such closing. WMATA shall not grant any easement or enter into any service contracts, management contracts, maintenance contracts, equipment leases, occupancy leases, licenses, occupancy agreements, other contracts or agreements, or claims or rights of occupancy (other than any created by Developer or any Phase Tenant or any that relate solely to any WMATA Facilities) except any that terminate or can be terminated effective as of closing of a Ground Lease or fee conveyance for the affected Phase.

### **13.6 Entry onto WMATA Joint Development Site.**

Notwithstanding that Developer and Phase Tenants are responsible for their own due diligence about the WMATA Joint Development Site, this Agreement does not grant Developer or any Phase Tenant the right to enter onto the WMATA Joint Development Site for any purpose.

Upon closing on a Ground Lease or a fee conveyance for a Phase, entry onto that Phase shall be permitted under the terms of the Ground Lease or fee conveyance. Any other entry shall be subject to WMATA's then-current standards for allowing such entry. Without limiting the foregoing, as of the Effective Date WMATA requires the execution of a Right of Entry Agreement for non-invasive entries and a Real Estate Permit before any physically invasive entry or testing may be made of the WMATA Joint Development Site or before any preparatory work on the WMATA Facilities is done. Developer and/or a Phase Tenant, as applicable, shall be responsible for any unauthorized entries on the WMATA Joint Development Site by them or their agents, contractors or consultants or by anyone claiming by or through them.

## **ARTICLE 14 CLOSING**

### **14.1 Generally.**

The closing for a Ground Lease or a fee conveyance shall be in accordance with the process set forth in this Article. Closings shall be held at such location in the Local Jurisdiction **[IF THE LOCAL JURISDICTION IS NOT WASHINGTON, D.C., ADD: or in Washington, D.C.]** as Developer shall specify in a Notice to WMATA. Neither party shall be required to physically attend such closing but may instead effectuate its part of the closing by timely making its deliveries in escrow to Title Insurer. Upon the request of either party to the other, delivered at least five (5) days before the applicable closing, WMATA and Developer shall establish a pre-closing escrow with Title Insurer pursuant to written escrow instructions prepared by or at the direction of WMATA and Developer; provided that the Phase Tenant shall not be required to deposit any monies into the escrow prior to the closing. Counsel for WMATA and Developer are hereby authorized to execute the escrow instructions, as well as any amendments thereto, on behalf of their respective clients.

### **14.2 Actions at Ground Lease Closing.**

(a) WMATA to Clear Title. At each Ground Lease closing, WMATA shall deliver and convey to the applicable Phase Tenant good and marketable leasehold title to the applicable Phase in accordance with **Section 10.3**. WMATA shall cause any service contracts, management contracts, maintenance contracts, equipment leases, occupancy leases, licenses, occupancy agreements, other contracts or agreements, or claims or rights of occupancy (other than any created by Developer or any Phase Tenant or any that relate solely to any WMATA Facilities) to be terminated effective no later than the date of closing at WMATA's sole cost and expense.

(b) WMATA's Deliveries. At closing of any Ground Lease, WMATA shall deliver or cause to be delivered to Phase Tenant and/or Title Insurer, as the case may be, through the escrow or otherwise, the following, duly executed and acknowledged (where appropriate) by WMATA:

(i) if the CC&Rs have not yet been recorded in the land records of the Local Jurisdiction against that particular Phase, the CC&Rs, or if the CC&Rs were previously recorded

but not against that Phase, an amendment to the previously recorded CC&Rs expanding the CC&Rs to cover that Phase in form suitable for recording in the land records of the Local Jurisdiction;

(ii) any Phase-specific covenants or easements previously agreed to by WMATA in form suitable for recording in the land records of the Local Jurisdiction;

(iii) a written stipulation of the Development Value for that Phase;

(iv) the Ground Lease for that Phase;

(v) the Ground Lease Memorandum for that Phase in form suitable for recording in the land records of the Local Jurisdiction;

(vi) the Construction Agreement, if applicable, for that Phase and, if a Construction Agreement is applicable, the WMATA Replacement Facilities Escrow Agreement and an agreement regarding the subordination of development fees pursuant to **Section 8.1(d)** for that Phase.

(vii) the MOT Plan for that Phase and any other documents required to be delivered by the ground lessor to the ground lessee at closing pursuant to the terms of the Ground Lease;

(viii) counterparts of any state and local transfer tax declarations stating WMATA's exemption from taxation;

(ix) an owner's or seller's affidavit addressed to Title Insurer in customary form in the Washington, D.C. metropolitan area, except that WMATA shall not be obligated to undertake any indemnification, hold harmless or reimbursement obligation;

(x) counterparts of an agreed-upon settlement statement showing all closing costs and prorations;

(xi) such other documents and instruments as may be required by any other provision of this Agreement or as may be reasonably necessary to consummate the transactions contemplated hereby.

(c) Phase Tenant's Deliveries. At closing of any Ground Lease, the applicable Phase Tenant shall deliver or cause to be delivered to WMATA and/or Title Insurer, as the case may be, through the escrow or otherwise, the following, duly executed and acknowledged (where appropriate) by that Phase Tenant:

(i) if the CC&Rs have not yet been recorded in the land records of the Local Jurisdiction against the particular Phase, the CC&Rs or, if the CC&Rs were previously recorded but not against that Phase, an amendment to the previously recorded CC&Rs expanding the

CC&Rs to cover that Phase in form suitable for recording in the land records of the Local Jurisdiction;

(ii) evidence of the assignment to that Phase Tenant of Developer's rights with respect to that Phase in accordance with **Section 16.1**, including such evidence as WMATA may reasonably request that Phase Tenant is an Affiliate of Developer or otherwise entitled to be an assignee of Developer's under **Section 16.1**;

(iii) any Phase-specific covenants or easements previously agreed to by Developer or the applicable Phase Tenant in form suitable for recording in the land records of the Local Jurisdiction;

(iv) a written stipulation of the Development Value for that Phase;

(v) the Development Value for that Phase to the extent payable at closing;

(vi) the Ground Lease for that Phase;

(vii) the Ground Lease Memorandum for that Phase in form suitable for recording in the land records of the Local Jurisdiction;

(viii) the Construction Agreement, if applicable, for that Phase and, if a Construction Agreement is applicable, the WMATA Replacement Facilities Escrow Agreement and an agreement regarding the subordination of development fees pursuant to **Section 8.1(d)** for that Phase.

(ix) the payment and performance bonds applicable to that Phase pursuant to **Section 8.1(b)**;

(x) the MOT Plan for that Phase and any other documents required to be delivered by the ground lessee to the ground lessor at closing pursuant to the terms of the Ground Lease;

(xi) counterparts of any state and local transfer tax declarations stating WMATA's exemption from taxation;

(xiii) such affidavits and undertakings acceptable to Title Insurer as Title Insurer may reasonably require to insure Phase Tenant's leasehold estate in the Phase;

(xiii) counterparts of an agreed-upon settlement statement showing all closing costs and prorations;

(xiv) such other documents and instruments as may be required by any other provision of this Agreement or as may be reasonably necessary to consummate the transactions contemplated hereby.

### **14.3 Actions at Sale Closing.**

(a) WMATA to Clear Title. At each sale closing, WMATA shall deliver and convey to the applicable Phase Tenant good and marketable fee simple title to the applicable Phase in accordance with **Section 10.3**. WMATA shall cause any service contracts, management contracts, maintenance contracts, equipment leases, occupancy leases, licenses, occupancy agreements, other contracts or agreements, or claims or rights of occupancy (other than any created by Developer or any Phase Tenant or any that relate solely to any WMATA Facilities) to be terminated effective no later than the date of closing at WMATA's sole cost and expense.

(b) WMATA's Deliveries. At closing of the sale of any Phase, WMATA shall deliver or cause to be delivered to Phase Tenant and/or Title Insurer, as the case may be, through the escrow or otherwise, the following, duly executed and acknowledged (where appropriate) by WMATA:

(i) if the CC&Rs have not yet been recorded in the land records of the Local Jurisdiction against the particular Phase, the CC&Rs, or if the CC&Rs were previously recorded but not against that Phase, an amendment to the previously recorded CC&Rs expanding the CC&Rs to cover that Phase in form suitable for recording in the land records of the Local Jurisdiction;

(ii) any Phase-specific covenants or easements in form suitable for recording in the land records of the Local Jurisdiction;

(iii) a written stipulation of the Development Value for that Phase;

(iv) a special warranty deed for that Phase in form suitable for recording in the land records of the Local Jurisdiction;

(v) the Construction Agreement, if applicable, for that Phase and, if a Construction Agreement is applicable, the WMATA Replacement Facilities Escrow Agreement for that Phase and an agreement regarding the subordination of development and project management fees pursuant to **Section 8.1(d)** for that Phase;

(vi) the MOT Plan for that Phase;

(vii) counterparts of any state and local transfer tax declarations stating WMATA's exemption from taxation;

(viii) an owner's or seller's affidavit in customary form in the Washington, D.C. metropolitan area, except that WMATA shall not be obligated to undertake any indemnification, hold harmless or reimbursement obligation;

(ix) counterparts of an agreed-upon settlement statement showing all closing costs and prorations;

(x) such other documents and instruments as may be required by any other provision of this Agreement or as may be reasonably necessary to consummate the transactions contemplated hereby.

(c) Phase Tenant's Deliveries. At closing of any purchase of a fee simple interest in a Phase, the applicable Phase Tenant shall deliver or cause to be delivered to WMATA and/or Title Insurer, as the case may be, through the escrow or otherwise, the following, duly executed and acknowledged (where appropriate) by that Phase Tenant:

(i) if the CC&Rs have not yet been recorded in the land records of the Local Jurisdiction against the particular Phase, the CC&Rs, or, if the CC&Rs were previously recorded but not against that Phase, an amendment to the CC&Rs expanding the CC&Rs to cover that Phase in form suitable for recording in the land records of the Local Jurisdiction;

(ii) evidence of the assignment to that Phase Tenant of Developer's rights with respect to that Phase in accordance with **Section 16.1**, including such evidence as WMATA may reasonably request that Phase Tenant is an Affiliate of Developer or otherwise entitled to be an assignee of Developer's under **Section 16.1**;

(iii) any Phase-specific covenants or easements in form suitable for recording in the land records of the Local Jurisdiction including the covenant referenced in **Section 1.2** to legally create a residential condominium regime on the Phase (which covenant may instead be incorporated into the CC&Rs);

(iv) a written stipulation of the Development Value for that Phase;

(v) the Development Value for that Phase to the extent payable at closing;

(vi) the Construction Agreement, if applicable, for that Phase and, if a Construction Agreement is applicable, the WMATA Replacement Facilities Escrow Agreement and an agreement regarding the subordination of development fees pursuant to **Section 8.1(d)** for that Phase.

(vii) the payment and performance bonds applicable to that Phase pursuant to **Section 8.1(d)**;

(viii) the MOT Plan for that Phase;

(ix) counterparts of any state and local transfer tax declarations stating WMATA's exemption from taxation;

(x) such affidavits and undertakings acceptable to Title Insurer as Title Insurer may reasonably require to insure Phase Tenant's fee estate in the Phase;

(xi) counterparts of an agreed-upon settlement statement showing all closing costs and prorations;

(xii) such other documents and instruments as may be required by any other provision of this Agreement or as may be reasonably necessary to consummate the transactions contemplated hereby.

#### **14.4 Closing Costs and Prorations.**

(a) Clearing Title. WMATA shall pay any cost to clear title so that title to the WMATA Joint Development Site is in the condition required to be delivered by WMATA by **Article 10**. Other costs to clear title shall be borne by Developer and/or the applicable Phase Tenant.

(b) Closing Costs. Except to the extent Developer pays any of the following, each Phase Tenant will pay: all transfer and recordation taxes applicable to a Ground Lease (or any memorandum thereof) or fee conveyance of its Phase (WMATA shall claim an exemption from and shall not pay any transfer or recordation taxes); any title search fees, title commitment fees, title insurance premiums and other costs for the title insurance policy; all surveyor's fees and expense for the survey; any settlement or closing fee or other charge levied by the settlement agent; any recording charges levied by the recording clerk (except for those incident to clearing title as set forth above); and any and all other miscellaneous fees, charges and other costs and expenses incident to the closing and the transactions contemplated herein with respect to its Phase.

(c) Appraisal Costs. Appraisal fees and costs shall be allocated as set forth in **Section 3.4(b)**.

(d) Real Estate Taxes. Real estate taxes, income and other items shall be prorated as of the closing date. WMATA's tax-exempt status will be taken into account with respect to all real estate, personal property, ad valorem and similar taxes for the WMATA Joint Development Site and all assessments such that WMATA will not be required to pay any portion of those taxes and assessments.

(e) Attorney's Fees. Each party shall pay its own attorney's fees.

(f) Developer's Accrued Obligations. Any obligations of Developer accrued to WMATA in respect of any Phase prior to execution and delivery of a Ground Lease (or fee conveyance equivalent), such as a reimbursement of costs, and remaining unpaid or otherwise unfulfilled at the time of any closing shall be paid or fulfilled at that closing as a condition to WMATA's obligation to closing. Nothing contained in this Agreement shall be deemed to constitute a release of Developer in respect of any pre-closing accrued liability or any surviving indemnity obligations of Developer under this Agreement.

#### **14.5 Developer's Fees.**

Developer, each Phase Tenant and their respective Affiliates are entitled to charge and receive market rate fees for master planning, site development, securing funding, and overseeing the design and construction of the Project and each Phase, as applicable. Developer, each Phase Tenant and their respective Affiliates may include such market rate fees in the cost of any WMATA Replacement Facility designed and/or constructed by them in accordance with this Agreement to the extent that such fee can be included in the amount offset against the Consideration otherwise payable at closing of a Ground Lease or fee conveyance pursuant to **Section 3.4**. Any such market rate development fee must be clearly identified as a line item in a budget approved by WMATA for the WMATA Replacement Facilities. Except as set forth in the preceding sentences, in no event shall WMATA be responsible for the payment of such fees, and all of such fees shall be charged to and payable by Phase Tenants or other third parties.

#### **14.6 WMATA Not Responsible for Other Costs.**

Except as may be expressly set forth in this Agreement, the CC&Rs, and/or any Ground Lease or comparable contractual agreement in the case of a fee conveyance, (i) in no event shall WMATA be responsible for any fees, costs or expenses incurred by Developer or any Phase Tenant, and (ii) all costs and expenses relating to the Project shall be obligations solely of Developer or any Phase Tenant.

#### **14.7 Post-Closing Inapplicability of this Agreement**

Upon the successful conclusion of a closing of a Ground Lease or a fee conveyance for a Phase, the Phase that is so ground leased or conveyed shall no longer be subject to this Agreement and shall be subject only to the terms of the documents that are executed and/or delivered pursuant to **Section 14.2** or **14.3**, as applicable.

### **ARTICLE 15** **AS IS, WHERE IS; REPRESENTATIONS AND WARRANTIES**

#### **15.1 As Is, Where Is.**

(a) As Is. Except for the representations and warranties set forth in **Section 15.2** and any faults, defects and other conditions on or affecting the WMATA Joint Development Site which WMATA is required to remedy, cure or address under an express provision of this Agreement (including, without limitation, WMATA's obligation to convey title in accordance with **Article 10**), the WMATA Joint Development Site will be ground leased and/or purchased "**AS IS**," "**WHERE IS**," and "**WITH ALL FAULTS AND LATENT DEFECTS**." WMATA makes no representation or warranty as to marketability, habitability, feasibility of the Project, fitness for any particular use, compliance with law, environmental condition, or any other matter not expressly set forth in **Section 15.2**, and any representation or warranty on such matters is disclaimed.



(b) No Warranty of Information by WMATA. Any materials regarding the WMATA Joint Development Site provided by WMATA or its agents, contractors or consultants are provided only for convenience. WMATA makes no representation or warranty regarding the sufficiency, completeness or accuracy of that material and Developer relies thereon at Developer's sole risk. It was and is Developer's and each Phase Tenant's responsibility to review and conduct any independent analyses, studies, reports, investigations and inspections as it considers appropriate to investigate the WMATA Joint Development Site, including (without limitation) investigating zoning and building code requirements, environmental conditions, soils and other physical characteristics, market conditions, the WMATA Joint Development Site's compliance with laws, rules, ordinances or regulations, and the WMATA Joint Development Site's financial earning capacity and projected expenses.

(c) No Warranty of Deliverables by Developer. Any and all materials (including without limitation architectural and engineering plans and specifications, permits and authorizations) regarding the WMATA Joint Development Site that may be assigned to WMATA by Developer or its agents, contractors or consultants or any Phase Tenant in the event of termination of this Agreement or any Ground Lease are provided in their "as is" condition. Neither Developer nor any Phase Tenant shall make any representation or warranty regarding the sufficiency, completeness or accuracy of that material and WMATA relies thereon at WMATA's sole risk.

## **15.2 Representations and Warranties by WMATA.**

WMATA represents and warrants to Developer as of the Effective Date as follows:

(a) Entity Existence. WMATA is a body corporate and politic, organized pursuant to Public Law 89-774, 80 Stat. 1324; Maryland Acts of General Assembly, Chapter 869-1965; Virginia Acts of Assembly, Chapter 2-1966; and Resolution of the District of Columbia Board of Commissioners adopted November 15, 1966.

(b) Power and Authority. Subject to holding any WMATA Compact Hearing that may be necessary, the approval of the Board of Directors of WMATA and the notice to and concurrence by FTA as required under **Article 12**, WMATA has the power and authority to sell and ground lease the WMATA Joint Development Site and to execute this Agreement and has taken the actions required for the execution and delivery of this Agreement.

(c) No Litigation. There is no pending or, to WMATA's knowledge, threatened litigation, arbitration, other dispute resolution proceeding or governmental proceeding preventing the consummation of the ground leasing or sale of the WMATA Joint Development Site by WMATA to any Phase Tenant in accordance with the terms of this Agreement, or any threatened litigation, arbitration, other dispute resolution proceeding or governmental proceeding that, if determined adversely, would declare illegal, invalid or non-binding any of the material covenants or obligations of WMATA set forth in this Agreement.

(d) No Violation of Other Obligation. Subject to the requirements set forth in this Agreement for the approval of the WMATA Board of Directors and obtaining the concurrence of the FTA as required under **Article 12**, the execution, delivery and performance of this Agreement does not, and the consummation of the transactions contemplated hereby will not, violate any provision of any agreement, instrument, order, judgment or decree or, to WMATA's knowledge, any applicable law or regulation to which WMATA is a party or by which it or any of its assets is bound.

(e) No Joinder Required. Subject to the requirements set forth in this Agreement for the approval of the WMATA Board of Directors and obtaining the concurrence of the FTA as required under **Article 12**, the joinder of no person other than WMATA is necessary in order to convey the WMATA Joint Development Site to a Phase Tenant in accordance with the terms and conditions of this Agreement.

(f) Not a Foreign Person. WMATA is not a "foreign person" within the meaning of Section 1445 of the Internal Revenue Code.

Any representation and warranty made to the knowledge of WMATA shall not be deemed to imply any duty of inquiry. For purposes of this Agreement, the term "knowledge" as it relates to WMATA shall mean and refer to only the actual knowledge of the undersigned representative of WMATA, and shall not be construed to refer to the knowledge of any other officer, director, agent, employee or representative of WMATA, or any Affiliate of WMATA, or to impose upon the undersigned any duty to investigate the matter to which such actual knowledge or the absence thereof pertains, or to impose upon the undersigned any individual personal liability.

### **15.3 Representations and Warranties by Developer.**

Developer represents and warrants to WMATA as of the Effective Date as follows:

(a) Entity Existence. Developer is a \_\_\_\_\_, duly formed and validly existing under the laws of \_\_\_\_\_ and in good standing under the laws of the State.

(b) Members. The sole [shareholders] [members] [partners] of Developer are \_\_\_\_\_ and \_\_\_\_\_.

(c) Power and Authority. Developer has the power and authority to cause Phase Tenants to ground lease and/or purchase the WMATA Joint Development Site, to construct the WMATA Replacement Facilities in accordance with the terms and conditions of this Agreement, and to execute and perform its obligations under this Agreement and has taken the actions required for the execution and delivery of this Agreement; and no consent of Developer's officers, partners or members is required to so empower or authorize Developer.

(d) No Litigation. There is no pending or, to Developer's knowledge, threatened litigation, arbitration, other dispute resolution proceeding or governmental proceeding preventing the consummation of the ground leasing or sale of the WMATA Joint Development Site by

WMATA to any Phase Tenant in accordance with the terms of this Agreement, or any threatened litigation, arbitration, other dispute resolution proceeding or governmental proceeding that, if determined adversely, would declare illegal, invalid or non-binding any of the material covenants or obligations of Developer or WMATA set forth in this Agreement.

(e) No Violation of Other Obligation. The execution, delivery and performance of this Agreement does not, and the consummation of the transactions contemplated hereby will not, violate any provision of any agreement, instrument, order, judgment or decree or, to Developer's knowledge, any applicable law or regulation to which Developer is a party or by which it or any of its assets is bound.

(f) No Joinder. The joinder of no Person other than Developer and its Affiliates is necessary for Developer to cause Phase Tenants to ground lease and/or purchase the WMATA Joint Development Site in accordance with the terms and conditions of this Agreement or for Developer to fulfill Developer's other obligations subject to and in conformity with the terms and conditions of this Agreement.

(g) Joint Development Solicitation. All representations and warranties made or deemed made by Developer in the JDS or Developer's proposal in response thereto are true and accurate as of the date made and as of the Effective Date.

## **ARTICLE 16**

### **TRANSFERS OF OWNERSHIP OR CONTROL**

#### **16.1 By Developer.**

(a) Non-Transferable. Developer has been selected as the master developer of the WMATA Joint Development Site through a competition based on its particular qualifications. The continuing primary and direct involvement of Developer and its principals in the development of the Project is a material covenant and condition to this Agreement. This Agreement is therefore a personal services contract. Unless expressly approved in writing by WMATA, which approval may be withheld in WMATA's sole and absolute discretion, or except as expressly permitted in this Section, (i) Developer shall not transfer, assign or otherwise convey its rights under this Agreement, which prohibition includes mergers, consolidations and divisions of Developer, and (ii) no sale, conveyance, assignment, pledge, encumbrance or other transfer of any ownership interest in Developer, whether directly or indirectly or at any tier of ownership, is permitted if the effect of such sale, conveyance, assignment or other transfer, individually or when aggregated with other sales, conveyances, assignments or other transfers, is to effect either a change in the operational control of Developer, whether by ownership, contract or otherwise, or a sale or conveyance of fifty percent (50%) or more of the ownership interests in Developer away from the current members therein or their Affiliates or the Persons in control thereof as of the Effective Date.

(b) Exemptions. The prohibitions in this Section shall not apply to any of the following sales, assignments, conveyances, pledges, encumbrances or other transfers:

(i) any borrowing by Developer from any bona fide institutional lender, which loan may be secured by a pledge or assignment of Developer's rights under this Agreement or of any or all of the membership interests in Developer, if the proceeds of such borrowing are to be used solely for the acquisition, development, construction and operation of the Project;

(ii) the admission of additional members to Developer in exchange for Equity contributions to Developer to permit Developer to perform its obligations under this Agreement, which contributions may result in a dilution of the membership interests in Developer and/or granting certain management rights as may be customary in the marketplace at the time to newly admitted members upon the occurrence of certain events involving Developer's failure to perform its obligations under this Agreement or to otherwise diligently pursue the Project;

(iii) the exercise of rights by a lender to or Equity investor in Developer if an Event of Default occurs, including, without limitation, a foreclosure sale, a deed in lieu of foreclosure, and/or a takeover of management by an Equity investor, and the subsequent sale or conveyance of Developer's rights under this Agreement or the membership interests in Developer to a purchaser at foreclosure or a collateral sale by such lender, Equity investor or their designees;

(iv) any assignment of development rights with respect to an individual Phase to a Phase Tenant who is an Affiliate of Developer or of its members as identified in **Section 15.3**;

(v) an assignment to a community association established under the CC&Rs of the rights to any portion of the WMATA Joint Development Site which is to be used for public or quasi-public purposes in accordance with the Approved Development Plan;

(vi) the dedication of portions of the WMATA Joint Development Site to the public in accordance with the Approved Development Plan;

(vii) transfers of interests of members of Developer due to death, disability, legal disqualification from owning property, corporate reorganization (that does not include consideration to Developer), merger (that does not include consideration to Developer) or the like;

(viii) transfers among or between then-existing members of Developer or any of their constituent members;

(x) sales, transfers or other exchanges of ownership interests within a publicly-traded entity via a regulated stock exchange or other public exchange;

(xi) mergers, consolidations or divisions of Developer or its parent companies or members, and acquisitions and sales of all or substantially all of the assets of the parent companies of members of Developer or either member therein, that are not implemented for the purpose of evading the restrictions of this Article.

## **16.2 By Phase Tenant.**

(a) Non-Transferable. No sale, assignment, conveyance, pledge, encumbrance or other transfer of any Ground Lease or fee interest or any portion of the WMATA Joint Development Site by a Phase Tenant, no merger, consolidation or division of a Phase Tenant, and no sale, conveyance, assignment or other transfer of any ownership interest in a Phase Tenant, whether directly or indirectly or at any tier of ownership, is permitted if the effect of such sale, conveyance, assignment or other transfer, individually or when aggregated with other sales, conveyances, assignments or other transfers, is to effect either a change in the operational control of the Phase Tenant, whether by ownership, contract or otherwise, or a sale or conveyance of fifty percent (50%) or more of the ownership interests in that Phase Tenant away from the current members therein or their Affiliates or the persons in control thereof as of the date that Phase Tenant ground leased or acquired fee title to its Phase(s) except (i) after the WMATA Replacement Facilities required to be constructed by Developer or that Phase Tenant under **Article 8** have been Substantially Completed, and Substantial Completion of the Tenant Improvements to be constructed on that Phase has occurred, or (ii) if expressly approved in writing by WMATA, which approval may be withheld in WMATA's sole and absolute discretion, or (iii) as expressly permitted in this Section.

(b) Exemptions. The prohibitions in this Section shall not apply to any of the following sales, assignments, conveyances, pledges, encumbrances or other transfers:

(i) any borrowing by a Phase Tenant from any bona fide institutional lender or from Developer solely for purposes of furthering the acquisition, development, construction, operation, tenanting, renovation or reconstruction of the Project, which may be secured by a pledge or assignment of the Phase Tenant's rights under the Ground Lease (or the Phase Tenant's ownership of the land) or of any or all of the membership interests in the Phase Tenant;

(ii) the addition of additional members to the Phase Tenant in exchange for Equity contributions to that Phase Tenant to permit the Phase Tenant to perform its obligations under its Ground Lease (or comparable contractual agreement in the event of a fee conveyance), which contributions may result in a dilution of the membership interests in the Phase Tenant and/or granting certain management rights as may be customary in the marketplace at the time to newly admitted members upon the occurrence of certain events involving Phase Tenant's failure to perform its obligations under the Ground Lease (or comparable contractual agreement in the event of a fee conveyance) or to otherwise diligently pursue the Project;

(iii) the exercise of rights by a lender to or Equity investor in the Phase Tenant if an Event of Default by that Phase Tenant occurs, including, without limitation, a foreclosure sale, a deed in lieu of foreclosure, and/or a takeover of management by an Equity investor, and the subsequent sale or conveyance of the Phase Tenant's rights under the Ground Lease (or comparable contractual agreement regarding ownership of the land) or the membership interests in Phase Tenant to a purchaser at foreclosure or a collateral sale by such lender, Equity investor or their designees;

(iv) an assignment to a community association established under the CC&Rs of the rights to any portion of the WMATA Joint Development Site which is to be used for public or quasi-public purposes in accordance with the Approved Development Plan;

(v) the dedication of portions of the WMATA Joint Development Site to the public in accordance with the Approved Development Plan;

(vi) transfers of interests of members of a Phase Tenant due to death, disability, legal disqualification from owning property, corporate reorganization (that does not include consideration to the Phase Tenant), merger (that does not include consideration to the Phase Tenant) or the like;

(vii) transfers among or between then-existing members of a Phase Tenant or any of its constituent members;

(viii) arm's-length conveyances of title in fee to unrelated third party residential condominium unit purchasers in the ordinary course of business;

(ix) sales, transfers or other exchanges of ownership interests within a publicly-traded entity via a regulated stock exchange or other public exchange;

(x) mergers, consolidations and divisions, and acquisitions and sales of all or substantially all of the assets of the parent company of a Phase Tenant, that are not implemented for the purpose of evading the restrictions of this Article.

### **16.3 Implementing a Transfer.**

(a) Advance Notice to WMATA. If and when Developer or any Phase Tenant, or any member, partner, shareholder or other owner of an Equity interest at any tier in Developer or any Phase Tenant, receives an offer to engage in any transaction referenced in **Section 16.1** or **16.2** that it intends to accept and such transaction is not exempted under **Sections 16.1(b)** or **16.2(b)**, Developer or the Phase Tenant, as applicable, will furnish a copy of the offer and any other relevant information to WMATA.

(b) Information About Transferee; Annual Report. If any transaction referenced in this Article closes, whether or not exempt from WMATA's approval, Developer or the Phase Tenant, as applicable, shall notify WMATA of the transaction and provide the name of the buyer, assignee or other transferee, its address for Notices, and such information about it as WMATA may deem reasonable. In addition, Developer and each Phase Tenant shall provide WMATA with an audited statement no later than April 1 of each calendar year providing complete information about any transaction covered by this Article during the prior calendar year, even if exempt from WMATA's approval, or certifying to the absence of any such transactions. Unless and to the extent the transaction has been publicly reported, WMATA shall maintain all information provided to it under this Article as confidential and proprietary except to the extent disclosure is required or

appropriate (i) pursuant to a subpoena or court order, or (ii) in litigation, insolvency proceedings of any type, mediation, or arbitration with or involving Developer or a Phase Tenant concerning a dispute to which such information or material is materially germane, or (iii) in accordance with WMATA's Public Access To Records Policy (or any replacement thereof). Nothing in this subsection shall be deemed to limit any employees, officers, or directors of WMATA, or any auditors, attorneys, or other consultants hired by WMATA or their respective employees, from reviewing and analyzing the information or material obtained, and discussing and sharing such information and material among themselves and with Developer or the applicable Phase Tenant or its or their representatives to the full extent possible under WMATA's Public Access to Records Policy, as it may be amended, replaced or otherwise modified from time to time.

(c) WMATA Audit Right. WMATA reserves the right to audit Developer and any Phase Tenant to determine compliance with the provisions of this Article. Any such audit shall be at WMATA's own cost unless such audit determines that a material omission has occurred and/or that Capital Rent due to WMATA from any transaction has been understated by five percent (5%) or more, in which event the audit shall be at the expense of Developer or the Phase Tenant, as applicable.

#### **16.4 Violative Transfers Void.**

Any transaction entered into in violation of this Article shall be null and void and shall also be an Event of Default.

#### **16.5 Post-Transfer Liability.**

A buyer, assignee or transferee under this Article shall assume all rights and obligations of the seller, assignor or transferor for the remaining term of this Agreement. Unless so stated otherwise elsewhere in this Agreement, no transaction of the types referenced in this Article shall release Developer or the seller, assignor or transferor from any of its previously accrued obligations under this Agreement.

### **ARTICLE 17 ENVIRONMENTAL MATTERS**

#### **17.1 Covenants of Developer and WMATA.**

(a) Compliance with Applicable Law. All work undertaken by Developer and Phase Tenants must be in compliance with all applicable environmental laws. WMATA reserves the right to enter the WMATA Joint Development Site and to inspect any work undertaken by Developer and Phase Tenants for the purpose of determining that compliance. Notwithstanding any inspection it may conduct, WMATA shall not have any responsibility for that compliance.

(b) Deliver Studies to WMATA. Developer shall promptly deliver to WMATA copies of all Phase I and Phase II environmental site assessments, all soil samplings and all supporting

information and data (including tests and studies), if any, Developer or its Affiliates obtain with respect to the WMATA Joint Development Site. WMATA shall have the right to confer directly with and obtain relevant information from the parties preparing such environmental site assessments or performing services in connection therewith at Developer's expense, but not to cause such consultants to perform any services for WMATA relating to the Project, including, without limitation, the preparation of any additional reports.

(c) Deliver Violation Notices to WMATA. Developer shall promptly deliver to WMATA copies of all written notices (whether from a governmental authority or any other person, including any Phase Tenant) received by Developer alleging that any release of a Hazardous Material(s) has occurred on or from the WMATA Joint Development Site.

(d) Remediation by Developer. Developer shall remediate any environmental condition required as a result of Developer's activities under this Agreement or any Right of Entry Agreement or Real Estate Permit WMATA may hereafter issue to Developer, or from any pre-existing condition affecting any portion of the WMATA Joint Development Site.

(e) Deliver Violation Notices to Developer. WMATA shall deliver to Developer copies of all written notices whether from a governmental authority or any other Person, excluding Developer, any Phase Tenant and their Affiliates, received by WMATA alleging that any release of a Hazardous Material(s) has occurred on or from the WMATA Joint Development Site.

## **17.2 Remediation by Phase Tenants.**

The CC&Rs and/or each Ground Lease or fee conveyance in lieu thereof shall require each Phase Tenant to perform any environmental remediation required for its Phase. No remediation shall be undertaken except in compliance with applicable law. WMATA shall have the right to approve all remediation plans, including the actions to be taken, disposal plans, the schedule, effect on WMATA Facilities and operations, and the identity of all contractors; WMATA's approval to the foregoing shall not be unreasonably withheld, conditioned or delayed.

## **17.3 Hazardous Materials.**

Developer, Phase Tenants and their Affiliates shall not cause or permit Hazardous Materials to be used, generated, stored or disposed of, on or from the WMATA Joint Development Site; provided, however, that the foregoing prohibition shall not apply to any materials which are used in the ordinary course of development of property and construction of improvements, or in the ordinary operation of a Phase Tenant's business or the business conducted on its Phase, provided that the same are used, generated, stored and disposed of in accordance with all applicable law.



## **ARTICLE 18**

### **INDEMNIFICATION AND INSURANCE**

#### **18.1 Indemnification.**

(a) By Developer. Developer and its successors and assigns will indemnify, defend at their expense (with counsel reasonably acceptable to WMATA) and hold harmless WMATA and its directors, officers, employees, and contractors and agents from and against all claims, actions, suits, proceedings, liabilities, obligations, losses, damages, penalties, costs and expenses (including reasonable attorneys' fees and costs) of any kind or nature that may arise in connection with (i) any personal injury, death or loss or damage to property arising out of Developer's or its consultants' and contractors' activities under this Agreement unless caused by the negligence or willful misconduct of WMATA, its agents, contractors or employees and/or (ii) the installation, use, generation, removal, treatment, disposal, storage or presence of Hazardous Materials on, in or under the WMATA Joint Development Site by any person. Each Phase Tenant shall be required to similarly indemnify WMATA in its Ground Lease (or comparable contractual agreement in a fee conveyance) and/or in the CC&Rs. Developer and/or any responsible Phase Tenant shall promptly pay any and all damages and expenses covered by the preceding sentences. As between Developer, on the one hand, and Phase Tenants, on the other hand, the foregoing obligation is a several obligation, not a joint and several obligation. Developer shall be responsible only for its own acts and omissions and the acts and omissions of its consultants and contractors, and each Phase Tenant shall be responsible only for its own acts and omissions and the acts and omissions of its consultants and contractors and for the installation, use, generation, removal, treatment, disposal, storage or presence of any Hazardous Materials by any other Person.

(b) Exception. Neither Developer nor any Phase Tenant hereby undertakes any indemnification of any other party with respect to any acts or omissions of any members of the general public or WMATA's customers; provided, however, that the foregoing clause shall not extinguish WMATA's entitlement to indemnification in cases of any injury or damage to members of the general public or WMATA customers or their property if they or their property are injured or damaged by or as a result of the acts or omissions of Developer or its Affiliates (or any other Person for whom they may be responsible under this Section) and the injured or damaged Person makes claim against WMATA.

(c) By WMATA. WMATA shall not have any indemnification obligations to Developer or any Phase Tenant.

#### **18.2 Insurance.**

Developer and its consultants, contractors and subcontractors will maintain at all times, at their sole cost and expense, insurance coverages and policies to protect each of them and WMATA from claims that may arise out of the Project. The scope and limits of such coverages and policies required to be carried by Developer are set forth on **Exhibit D**. The scope and limits of such coverages and policies required to be carried by each Phase Tenant and its consultants, contractors and subcontractors will be set forth in the CC&Rs and/or in each Ground Lease (or equivalent in

the event of a fee conveyance). The carrying or failure to carry the requisite insurance, or the occurrence of an event that is not covered by insurance, shall not be a limitation on the indemnification obligation set forth above.

### **18.3 Mutual Waiver of Subrogation.**

Each party hereby releases and discharges the other party and its directors, partners, members, other principals, officers, employees, contractors, agents, and business invitees from any claims and rights of recovery for personal injury, death, damage or loss to any Person or property, including the Tenant Improvements or any WMATA Facilities and any other improvements in or on any portion of the WMATA Joint Development Site, caused by or resulting from any risks insured against under any insurance policies carried by such damaged or injured party and in force at the time of any such damage or loss, or required to be carried, regardless of the cause of the damage or loss (including the negligence of such party or its directors, partners, members, other principals, officers, employees, contractors, agents, and business invitees) to the extent of the insurance policy's coverage or that would have been covered had the required insurance been carried. Each party shall obtain at its sole cost and expense any special endorsements required by its insurer to evidence compliance with the aforementioned waiver. The form of endorsement must be acceptable to WMATA. The foregoing shall not constitute a limitation or waiver of any maintenance obligations hereunder. The failure to insure shall not void this waiver.

### **18.4 Survival.**

The provisions of this Article shall survive the expiration or earlier termination of this Agreement.

## **ARTICLE 19 EVENTS OF DEFAULT**

### **19.1 Payments to WMATA.**

If Developer defaults in the due and punctual payment of any moneys due under this Agreement and such default continues for a period of thirty (30) days after Notice from WMATA to Developer or, if a shorter period is specified in this Agreement to cure such nonpayment, then within such shorter period, or, if the default is the failure to perform at closing, in which event no Notice and cure period shall be applicable, an **"Event of Default"** shall occur.

### **19.2 Failure to Close on Schedule.**

If Developer fails to close on any Phase within the time period required by this Agreement, then, except to the extent such failure is excused by an Excusable Delay, an **"Event of Default"** shall occur.

### **19.3 Default Under CC&Rs.**

If Developer defaults under the CC&Rs and such default is not cured within any period provided in the CC&Rs for notice and/or cure thereof, then an **‘Event of Default’** shall occur.

### **19.4 Failure to Maintain Insurance.**

If Developer fails to maintain the insurance required by this Agreement and/or fails to provide evidence of such insurance coverage to WMATA and such failure continues for a period of seven (7) days after Notice from WMATA to Developer, then an **“Event of Default”** shall occur.

### **19.5 Voluntary Bankruptcy.**

If Developer (or any guarantor or surety of Developer’s obligations under this Agreement) files any petition in bankruptcy or any petition or answer seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future Federal or State bankruptcy law, or any other present or future applicable Federal, State or other law, or if Developer (or such guarantor or surety) is adjudicated bankrupt or insolvent, or Developer (or such guarantor or surety) seeks, or consents to or acquiesces in, the appointment of any trustee, receiver or liquidator of Developer (or such guarantor or surety) or of all or any substantial part of its assets or Developer’s interest under this Agreement, except any such trustee, receiver or liquidator appointed at the request of a leasehold mortgagee exercising its remedies under its leasehold mortgage, an **“Event of Default”** shall occur.

### **19.6 Involuntary Bankruptcy.**

If within one hundred twenty (120) days after the commencement of any proceeding against Developer (or any guarantor or surety of Developer’s obligations under this Agreement) seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future Federal or State bankruptcy or insolvency law, or any other present or future applicable Federal, State or other law, such proceedings have not been dismissed, or if within one hundred twenty (120) days after the appointment without the consent or acquiescence of Developer (or such guarantor or surety) or of any trustee, receiver or liquidator of Developer (or such guarantor or surety) or of all or any substantial part of Developer’s (or such guarantor’s or surety’s) assets or of Developer’s interest under this Agreement, except any such trustee, receiver or liquidator appointed at the request of a leasehold mortgagee exercising its remedies under its leasehold mortgage, such appointment is not vacated or stayed on appeal or otherwise canceled, and if stayed, within one hundred twenty (120) days after the expiration of any such stay such appointment is canceled, an **“Event of Default”** shall occur.

### **19.7 Willful Misrepresentation or Omission.**

(a) If Developer makes any willful or material misrepresentation in this Agreement or in any other material submission to WMATA related to this Project and such willful or material

misrepresentation materially adversely affects WMATA, an **“Event of Default”** shall occur without any Notice or cure period being afforded for the same. WMATA’s determination of a material adverse effect shall be in WMATA’s sole and absolute discretion.

(b) If Developer makes any willful or material omission in this Agreement or in any other material submission to WMATA related to this Project and such willful or material omission materially adversely affects WMATA and is not cured within thirty (30) days after Notice from WMATA to Developer, an **“Event of Default”** shall occur. WMATA’s determination of a material adverse effect shall be in WMATA’s sole and absolute discretion.

#### **19.8 Other Specified Defaults.**

Whenever this Agreement expressly states that a specified event, situation or circumstance shall constitute an Event of Default, an **“Event of Default”** shall exist without any further Notice or cure period being afforded.

#### **19.9 Failure to Design, Construct and Complete the WMATA Replacement Facilities.**

If a Phase Tenant fails to design, construct and complete the WMATA Replacement Facilities or otherwise defaults under its Construction Agreement (after any notice and cure period afforded to it under its Ground Lease or Construction Agreement), an **“Event of Default”** shall occur without any further Notice or cure opportunity being afforded.

#### **19.10 Other Failures to Perform.**

If (i) Developer fails to use Commercially Reasonable Business Efforts to obtain the Entitlements, or (ii) subject to Excusable Delays, Developer fails to comply with any non-monetary time schedule contained in or referred to in this Agreement or the CC&Rs, or (iii) Developer fails to observe or perform any of the other non-monetary conditions, agreements, terms, covenants, or other provisions contained in this Agreement not otherwise specified to be an Event of Default and, in any such event such failure continues for a period of thirty (30) days after Notice from WMATA to Developer, an **“Event of Default”** shall occur. However, if Developer promptly commences to cure a default under the preceding clauses within the stated thirty (30) day period, and such default is curable but such default is not susceptible of being cured within the stated thirty (30) days, the cure period shall be extended for such additional time as may be reasonably necessary to cure such default, not to exceed an additional one hundred twenty (120) days, provided: (x) Developer uses Commercially Reasonable Business Efforts to cure the failure; (y) that such extension shall not subject WMATA to any liability, loss or penalty; and (z) that throughout such period Developer complies fully and timely with all of its other obligations under this Agreement regardless of any Notice or cure period that otherwise might be applicable.

## **ARTICLE 20**

### **WMATA'S REMEDIES**

If an Event of Default occurs, in addition to any other rights and remedies WMATA may have under this Agreement and at law and in equity, WMATA shall have the option to do any one or more of the following:

#### **20.1 Continue Agreement in Effect.**

For any Event of Default other than one involving Developer's or a Phase Tenant's failure to timely close on a Phase under the terms and conditions of this Agreement, WMATA may (i) continue this Agreement in full force and effect, (ii) collect all sums owed to it, (iii) enforce by legal proceedings or otherwise every term and provision of this Agreement, (iv) notwithstanding that this Agreement remains in full force and effect, suspend Developer's rights to obtain Phases via Ground Leases or fee conveyances, (v) seize the Deposit or any sums posted by Developer as prepayment for any obligation arising under this Agreement and apply the same to any amount owed to WMATA, without the same constituting liquidated damages or an exclusive remedy, (vi) seek damages for any accrued unpaid monetary obligation under this Agreement, (vii) enforce its right to obtain assignments of plans, specifications, permits, and other work product as set forth elsewhere in this Agreement, and/or (viii) specifically enforce any obligation to restore or remediate any conditions created by Developer.

#### **20.2 Termination.**

(a) WMATA's Remedies. If the Event of Default is Developer's or a Phase Tenant's failure to timely close on a Phase under the terms and conditions of this Agreement or to complete the WMATA Replacement Facilities or if the Event of Default is any other circumstance or event that WMATA believes in its sole but reasonable discretion has a material adverse effect on the WMATA Facilities, the WMATA Reserved Areas, WMATA operations, or WMATA as an entity, WMATA may re-enter the WMATA Joint Development Site to the extent it has not already been ground leased or conveyed in fee to a Phase Tenant and by Notice to Developer terminate this Agreement on the date specified in such Notice. Such Notice shall not create any additional cure rights or cure periods and WMATA may reject any attempted cure. Except for Phase Tenants who have separate Ground Leases or fee conveyances with WMATA, which shall not be affected by this Section and shall continue in effect in accordance with their terms, Developer and each other Person in possession or entitled to possession of the WMATA Joint Development Site shall then quit and peacefully surrender the WMATA Joint Development Site to WMATA. Developer shall restore the WMATA Joint Development Site to at least its condition and appearance on the date of this Agreement, including, without limitation, repairing all damage to the WMATA Joint Development Site arising from the activities of Developer, its agents, contractors or employees, and closing or filling all test pits, wells and borings. Developer shall also deliver to WMATA, at Developer's expense, all reports and studies of the WMATA Joint Development Site generated by Developer or by third parties for Developer relating to environmental conditions, soil conditions, title, and plans and specifications for any WMATA Replacement Facilities, together with an assignment, without representation or warranty, to WMATA of Developer's right, title and interest

thereto in form and substance acceptable to WMATA. WMATA may seize the Deposit or any other sums posted by Developer as prepayment for any obligation arising under this Agreement and apply the same to any amount owed to WMATA, without the same constituting liquidated damages or an exclusive remedy.

(b) Termination Not a Release. No such termination shall waive, release or otherwise affect any obligation or liability accrued under this Agreement before the date of such termination, all of which shall survive the termination of this Agreement and shall be enforceable by specific performance or other equitable remedies. Developer shall remain liable for any direct damages incurred by WMATA in connection with or arising from such termination, including, without limitation, reasonable attorney's fees and court costs, the fees, costs and expenses of finding a replacement developer for the WMATA Joint Development Site, and the costs of repairing any damage to the WMATA Joint Development Site. WMATA shall have the right to prove and collect, in full, damages incurred prior the termination of this Agreement. WMATA shall not be obligated to mitigate damages for Developer's benefit and, if any such mitigation is nevertheless required, the burden of proof shall be on Developer to prove the amount of damages that could have been avoided.

### **20.3 Cure of Developer's Default by WMATA.**

(a) WMATA's Right to Cure. For any Event of Default other than one involving Developer's or a Phase Tenant's failure to timely close on a Phase under the terms and conditions of this Agreement, and without prejudice to any other right or remedy of WMATA, if there shall be an Event of Default or a circumstance that could, with the passage of time or the giving of Notice (or both) constitute an Event Default, WMATA may cure the same at the expense of Developer:

(i) immediately (A) in the case of an emergency, (B) where the Event of Default or potential Event of Default interferes with the WMATA Reserved Areas or any WMATA Facilities, or with any portion of the WMATA Joint Development Site not under the control of Developer, or with WMATA's activities or operations, (C) if the Event of Default or potential Event of Default results in a violation of applicable law (unless such violation does not need to be cured immediately to avoid incurring any fines, penalties or other sanctions), (D) if the Event of Default or potential Event of Default is the failure to maintain insurance or could result in the cancellation of any insurance policy maintained by or for the benefit of WMATA, or (E) if WMATA believes in its sole but reasonable discretion that the health and safety of WMATA's patrons, employees or other Persons are or may be affected.

(ii) if the potential Event of Default ripens into an actual Event of Default by the giving of Notice and does not fall within any of the categories in **clause (i)** above, then upon the potential Event of Default ripening into an actual Event of Default without further Notice.

(iii) if the potential Event of Default ripens into an actual Event of Default without the giving of Notice and does not fall within any of the categories in **clause (i)** above, then upon the giving of thirty (30) days' Notice after the Event of Default occurs.

Such remedy may consist of, without limitation, making a payment, conducting maintenance or repair, curing a violation of law, procuring insurance, adopting safety measures, removing impediments or interference, and/or constructing all or a portion of the Project.

(b) No Waiver. WMATA's exercise of the foregoing remedies does not waive the underlying Developer obligation or the Event of Default, nor shall WMATA be liable to Developer for any loss, cost, expense, damage or other consequence arising from or in connection with WMATA's efforts.

(c) Reimbursement. All reasonable costs incurred by WMATA in curing Events of Default, including, without limitation, reasonable attorneys' fees, shall be reimbursed by Developer within thirty (30) days after WMATA's delivery to Developer of a written demand therefor, together with an administrative fee equal to ten percent (10%) of the amount owed and together with interest on the amount owed, from the date such costs were paid by WMATA, at the Default Rate.

#### **20.4 Injunctive Relief**

If Developer is in default under this Agreement, a Ground Lease, the CC&Rs or the Construction Agreement, whether or not such default constitutes an Event of Default, or if Developer threatens to default, WMATA may seek and obtain a temporary restraining order, injunction or other equitable relief. Developer acknowledges that monetary damages do not constitute an adequate remedy for non-monetary default, particularly with respect to matters of design and construction procedures and quality, assignment, conveyance, transfer, encumbrance, changes in control, and matters affecting title to the WMATA Joint Development Site.

#### **20.5 Late Charges; Default Rate of Interest.**

(a) Late Charge. In the event Developer is more than ten (10) days late in paying to WMATA or its designee any payment due under this Agreement, then without the need for any Notice to Developer that such payment was not made when due and regardless whether the nonpayment or late payment is an Event of Default, Developer shall pay WMATA a late charge equal to five percent (5%) of the delinquent amount.

(b) Default Interest. Any amount due from Developer to WMATA hereunder which is not paid within ten (10) days after the date due shall bear interest at an annual rate (the "**Default Rate**") equal to four percent (4%) in excess of the prime rate as published in the Wall Street Journal newspaper or any successor to that newspaper, retroactive to the date WMATA incurred that cost. If the Wall Street Journal shall cease publication and there is no successor, then WMATA shall name a comparable publication or index.

(c) No Waiver. The payment to WMATA of a late charge as set forth above or interest at the Default Rate shall not constitute a waiver on the part of WMATA of any rights or remedies of WMATA arising out of the nonpayment or Event of Default.

## **20.6 Remedies Cumulative.**

To the extent not inconsistent with each other or expressly stated to be limited, the remedies set forth above shall be cumulative and more than one may be exercised for any Event of Default. The remedies set forth above shall also be cumulative with any indemnification obligation Developer may have and/or with any remedy WMATA may have under the CC&Rs, under any third-party guaranty or surety of Developer's obligations, or under any other agreement between WMATA and Developer. WMATA, in addition to all the rights and remedies provided herein, shall also have all the rights and remedies afforded by law and in equity (including injunctive relief and specific performance), all of which shall also be cumulative. However, the exercise of any rights under this Section shall be consistent with applicable Federal and State bankruptcy laws and regulations to the extent applicable.

## **20.7 Developer's Continued Liability.**

If an Event of Default occurs, then no expiration or termination of this Agreement shall relieve Developer of its liability and obligations that accrued under this Agreement prior to the date of expiration or termination. Such liability and obligations shall survive such expiration or termination.

## **20.8 No Waiver of Breach.**

No failure by WMATA to insist upon the strict performance of any of the terms of this Agreement or to exercise any right or remedy consequent upon a breach thereof, and no acceptance by WMATA of sums owed to it during the continuance of any such breach, shall constitute a waiver of any such breach or of any of the terms of this Agreement. None of the terms of this Agreement to be kept, observed or performed by Developer and no breach thereof shall be waived, altered or modified except by a written instrument executed by WMATA. No waiver of any default of Developer shall be implied from any omission by WMATA to take any action on account of such default if such default persists or is repeated, and no express waiver shall affect any default other than the default specified in the express waiver and then only for the time and to the extent therein stated. One or more waivers by WMATA shall not be construed as a waiver of a subsequent breach of the same covenant, term or condition.

## **20.9 Attorney's Fees.**

In the event of any Event of Default, if WMATA brings suit Developer agrees to pay such attorneys' fees and such other collection fees as WMATA may reasonably incur.

## **20.10 Cross-Defaults.**

(a) Developer's Obligations. Notwithstanding anything to the contrary stated or implied by this Agreement, (i) except as set forth in **Section 8.1(f)**, Developer shall not be liable for the failure of any Phase Tenant to comply with the terms of this Agreement, any Ground Lease



or equivalent in the event of a fee transfer, the CC&Rs and/or any Construction Agreement to which Developer is not a party, and (ii) no Phase Tenant shall be liable for the failure of any other Phase Tenant or Developer to comply with the terms of this Agreement, such other Phase Tenant's Ground Lease (or equivalent in the event of a fee transfer) or Construction Agreement, or the CC&Rs.

(b) Phase Tenant's Obligations. Upon execution of a Ground Lease for a Phase, a Phase Tenant's obligations and liability shall be solely those contained in its Ground Lease (or, in the case of a fee conveyance, any contractual agreement containing comparable terms), the CC&Rs, any easements encumbering its Phase, and the terms of the Construction Agreement applicable to that Phase Tenant's Phase. Each Ground Lease shall be cross-defaulted to the other documents referenced in this subsection and each Construction Agreement shall be cross-defaulted to the Ground Lease applicable to that Phase.

## **ARTICLE 21**

### **OTHER REQUIREMENTS IMPOSED ON DEVELOPER AND PHASE TENANTS**

#### **21.1 Americans with Disabilities Act.**

(a) Compliance Required. All Tenant Improvements and all WMATA Replacement Facilities constructed by Developer and/or Phase Tenants shall comply with Title II and III of the Americans with Disabilities Act and any similar requirements of the State or Local Jurisdiction, as the same may be amended from time to time and any regulations adopted pursuant thereto (collectively, "**ADA**").

(b) Compliance Not Required. Notwithstanding the above, neither Developer nor a Phase Tenant shall be responsible for any (i) ADA-related improvements to the Metro Station to the extent such requirements predate the date of closing of the Ground Lease or fee equivalent and which would be required to be made to the Metro Station regardless of the Project, or (ii) any ADA-related improvements that WMATA is implementing at Metrorail stations as part of its system-wide improvements or alterations.

(c) Run with the Land. The provisions of this Section shall be included in each Ground Lease and the CC&Rs, or documents executed contemporaneously therewith.

#### **21.2 Payment of Impositions.**

(a) WMATA Exemption. WMATA is a tax-exempt regional body politic and shall not be responsible for the payment of any Impositions as a result of this Agreement. To the extent that WMATA is not exempt from the payment of Impositions, WMATA's sole liability and obligation shall be to pay to the taxing authority on a current basis such Impositions that WMATA has routinely paid and is legally required to pay with respect to the WMATA Joint Development Site until the closing of a Ground Lease or fee conveyance for that part of the WMATA Joint Development Site. WMATA's liability under this Section shall terminate as to a Phase on the date

of such a closing for such Phase with respect to Impositions thereafter accruing. Nothing in this Agreement is intended to or shall be construed to require WMATA to make any payments to any taxing authority for any of the WMATA Joint Development Site.

(b) Developer and Phase Tenants. Any Impositions resulting from Developer's pre-development activities will be the responsibility of Developer. Under each Ground Lease or fee conveyance, the applicable Phase Tenant will be responsible for any and all Impositions, taxes, insurance and other operating costs of the Project applicable to that Phase.

(c) Challenges. Subject to the following sentence, each party and each Phase Tenant is authorized to challenge or contest any Imposition levied on it or its property. No contest shall be allowed to be conducted by WMATA or Developer or a Phase Tenant, as applicable, that may: (i) cause any portion of the WMATA Joint Development site or any interest of WMATA or Developer or Phase Tenant, as applicable, therein to be in danger of being forfeited or lost; or (ii) place any party to this Agreement or to a Ground Lease, or any officer, director, member, partner, or employee of such party, in jeopardy of receiving any fine, penalty, or other sanction (civil or criminal).

### **21.3 Bankruptcy Remoteness.**

Each Phase Tenant:

(a) shall be formed and operated to be a bankruptcy-remote special-purpose entity with the sole purpose of developing, constructing, financing, selling, renovating and leasing the Phases and constructing the WMATA Replacement Facilities, or, in the case of a Phase Tenant, do the foregoing only for its own Phase and any related WMATA Replacement Facilities, and for conducting activities incidental thereto;

(b) shall not engage in any business unrelated to such purpose and activities;

(c) shall not have any assets other than those related thereto or any indebtedness other than related thereto;

(d) shall maintain its own separate books and records and have its own accounts, in each case which are separate and apart from the books and records and accounts of any other Person;

(e) shall be subject to all of the limitations on powers set forth in the organizational documentation of each such entity and, if applicable, that of its general partner or managing member; and

(f) shall hold itself out as being a person separate and apart from any other Person, and

(g) otherwise satisfy usual current market criteria for constituting a single purpose entity, except for any obligation to have an "independent" director.

## **ARTICLE 22**

### **ESTOPPEL CERTIFICATES**

#### **22.1 Certificate by WMATA.**

WMATA agrees, upon not less than twenty-one (21) days' prior Notice from Developer, to execute, acknowledge and deliver a written statement to Developer, to any Phase Tenant, to their prospective assignees, or to their prospective or actual mortgage lenders taking a security interest in a leasehold or fee estate in a Phase, which certifies: (i) that this Agreement is unmodified and in full force and effect (or if modified that this Agreement is in full force and effect as modified and states the modifications); (ii) to the knowledge of WMATA whether Developer is in default in keeping, observing and performing any of the terms of this Agreement, and, if in default, specifies each such default of which WMATA has knowledge; (iii) to the knowledge of WMATA as to the existence of any offsets, counterclaims or defenses to this Agreement on the part of Developer or WMATA; and (iv) any other factual matters relating to this Agreement or to the applicable Phase which reasonably may be requested, except as to proprietary or confidential information. No personal liability shall be assumed by or attach to the individual signing such certification on behalf of WMATA as a result of so signing.

#### **22.2 Certificate by Developer.**

Developer agrees, upon not less than twenty-one (21) days' prior Notice from WMATA, to execute, acknowledge and deliver a written statement to WMATA which certifies: (i) that this Agreement is unmodified and in full force and effect (or if modified that this Agreement is in full force and effect as modified and states the modifications); (ii) to the knowledge of Developer whether WMATA is in default in keeping, observing and performing any of the terms of this Agreement, and, if in default, specifies each such default of which Developer has knowledge; (iii) to the knowledge of Developer as to the existence of any offsets, counterclaims or defenses to this Agreement on the part of Developer or WMATA; and (iv) any other factual matters relating to this Agreement or to the applicable Phase which reasonably may be requested, except as to proprietary or confidential information. No personal liability shall be assumed by or attach to the individual signing such certification on behalf of Developer as a result of so signing.

## **ARTICLE 23**

### **DAMAGE AND DESTRUCTION**

All risk of loss to the WMATA Joint Development Site by casualty shall remain with WMATA during the term of this Agreement prior to the closing of a Ground Lease or fee conveyance for a Phase, at which time that Phase shall be governed in this regard solely by the CC&Rs and its Ground Lease or fee conveyance documents. Notwithstanding the foregoing, but subject to the waiver of subrogation provided for in this Agreement, Developer shall be solely responsible and shall bear all risks and obligations relating to all of the following: (i) all activities

of Developer, its agents, employees and contractors; (ii) damage to the WMATA Joint Development Site caused by the negligence or intentional acts of Developer, its agents, employees and contractors; (iii) Developer's insurance and indemnity under the terms of this Agreement; and (iv) Developer's insurance and indemnity and other obligations under and subject to the terms and conditions of any right of entry agreement.

## **ARTICLE 24 CONDEMNATION**

### **24.1 Total Taking.**

If during the term of this Agreement, there should be a Taking of the entire WMATA Joint Development Site not then or previously subject to a Ground Lease or sold, such Taking shall be deemed to have caused this Agreement to terminate and expire on the date on which title to the Taken property vests in the condemnor, and WMATA shall thereupon release and return to Developer the Deposit (to the extent not previously drawn upon by WMATA), in which event the parties shall be released from all further obligation or liability under this Agreement except for any accrued prior to the date of termination.

### **24.2 Partial Taking**

If during the term of this Agreement, there should be a Taking of less than the entire WMATA Joint Development Site not then or previously subject to a Ground Lease or sold and any portion of the WMATA Joint Development Site remaining cannot reasonably be adequately restored, replaced or reconfigured so as to constitute a Phase (or Phases) of commercially reasonable usefulness, design, construction, and economic feasibility, then Developer shall have the right to release such portion as cannot be restored, replaced or reconfigured from the operation of this Agreement upon Notice to WMATA within one hundred twenty (120) days after the date on which title to the Taken property vests in the condemnor. Said Notice shall state the date of release, which shall not be earlier than the date on which title to the Taken property vests in the condemnor and shall identify the area released. Upon such release, the parties shall be released from all further obligation or liability under this Agreement with respect to the portion of the WMATA Joint Development Site so Taken except for any obligation or liability accrued as of the date of termination. With respect to the portion of the WMATA Joint Development Site which is the object of the partial Taking, Developer shall, at its own cost and expense, (i) repair all damage done to the WMATA Joint Development Site by Developer or its agents, contractors or employees, (ii) promptly close all test pits or wells, if any, made by or on behalf of Developer, and (iii) restore the WMATA Joint Development Site as nearly as possible to at least its former condition, appearance and quality, which obligation shall survive the termination of this Agreement.

### **24.3 Condemnation Proceeds.**

Except as to Phases that have been ground leased, in which event the proceeds of a Taking shall be allocated as set forth in the Ground Lease, and to Phases that have been sold, in which

event the proceeds of a Taking shall be vested in the holder of fee title, the condemnation proceeds for a Taking shall vest entirely in WMATA. To the extent Developer has any right, title or interest in or to any such proceeds, Developer hereby assigns its right, title and interest to WMATA and shall execute and deliver such assurances of the foregoing as may reasonably be requested.

## **ARTICLE 25**

### **NOTICES**

#### **25.1 Notices in Writing**

All notices, demands or requests (“**Notices**”) given to a party to this Agreement must be in writing in hard copy or e-mailed or faxed to be effective. E-mails shall be effective as Notices only if, and to the extent, the e-mail transmits a hard copy attachment. Oral notices are not effective.

#### **25.2 Service Procedures**

All Notices shall be: (i) personally delivered; or (ii) sent by registered or certified United States mail, postage prepaid, return receipt requested; or (iii) sent by local hand-delivery for same-Business Day or next-Business Day delivery; or (iv) sent by a nationally recognized courier service for next-Business Day delivery; or (v) subject to **Section 25.1**, if an e-mail address or fax number is stated below, sent by e-mail or by fax. Notices shall be deemed to have been given on the earlier of actual receipt, or in the case of mailing by United States Mail, the third (3<sup>rd</sup>) Business Day after the date so mailed; provided, however, that any Notice sent by e-mail or by fax and received after 3:00 pm shall be deemed effective as of the next Business Day. Any Notice refused, or that is incapable of delivery due to an incorrect or out-of-date address provided by the intended recipient, shall be considered delivered on the earlier of the actual date of refusal or on the date provided in the previous sentence. A party may change its address for Notices at any time and from time to time by giving Notice to the other parties of whom it has been given Notice. Notices may be given by attorneys on behalf of their client.

#### **25.3 Notices to Developer**

All Notices to Developer shall be deemed to have been properly given if addressed to Developer as follows (or to such other address of which Notice is given as set forth above):

Original to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

E-mail: \_\_\_\_\_

and

One copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_  
E-mail: \_\_\_\_\_

#### **25.4 Notices to WMATA**

All Notices to WMATA shall be deemed to have been properly given if addressed to WMATA as follows (or to such other address of which Notice is given as set forth above):

Original to: Vice President  
Office of Real Estate and Parking  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, NW  
Washington, DC 20001  
E-mail: [realestate@WMATA.com](mailto:realestate@WMATA.com)

and

One copy to: General Counsel  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, NW  
Washington, DC 20001  
Fax No.: 202-962-2550

and, if the Notice involves insurance, with one copy to:

Director of Risk, Insurance and Third-Party Liability  
Office of Risk Management  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, NW  
Washington, DC 20001

and, if the Notice relates to Entitlements or design or construction matters, with one copy to:

Vice President  
Engineering Support Branch  
Office of the Chief Engineer  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, NW  
Washington, DC 20001  
Fax No.: 202-962-1105

## **ARTICLE 26**

### **WMATA-SPECIFIC CLAUSES**

#### **26.1 No Waiver of Sovereign Immunity**

Nothing in this Agreement shall be deemed or construed to constitute a waiver of WMATA's sovereign immunity.

#### **26.2 Anti-Deficiency Clause**

All obligations of WMATA under this Agreement that directly or indirectly require the expenditure by WMATA of any of its funds are subject to the appropriation and availability of funding through WMATA's budgetary procedures. Notwithstanding the foregoing, if Developer shall have obtained a final, nonappealable judgment against WMATA that Developer is entitled to unpaid reimbursement or other payment from WMATA under this Agreement or any other legal agreement entered into in furtherance of this Agreement and funds for such reimbursement or other payment have not been appropriated and made available through WMATA's budgetary procedures, then Developer shall have the right to deduct the amount for which Developer has a judgment against WMATA from any payment thereafter due by Developer to WMATA. Except as set forth in the preceding sentence, Developer has no right of offset or deduction against WMATA.

#### **26.3 Officials Not to Benefit**

##### **A. WMATA Personnel**

No officer, board member, or employee or agent of WMATA or any member of any such person's immediate family (which term "immediate family" shall, for purposes of this Section, mean the parent, spouse, sibling, child, grandparent, or grandchild of any of the foregoing persons), directly or through a third party, has or will have during his tenure with WMATA or within one (1) year thereafter any financial or other interest in, or in common with, Developer or any of its Affiliates. Developer will comply, and will contractually obligate each of its third-party contractors at any tier to comply, with the provisions of Executive Orders 12549 and 12689, "Debarment and Suspension," 31 USC §6101 note, and U.S. Department of Transportation regulations on Debarment and Suspension at 49 CFR Part 29, as they may be amended, supplemented, replaced or otherwise modified from time to time. Developer shall include the

requirements of the preceding sentence in each lease (other than a residential occupancy lease), license, or contract for work on the Joint Development Site, and shall require each sublessee (other than a residential tenant), licensee, or contractor for work on the Joint Development Site to require compliance with those requirements and include them in any lower tier subcontract.

**B. Public Officials**

No member (i.e., Representative or Senator) of or delegate to Congress, or any similar official, or any member of such person's family, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom, but this provision shall not apply if this Agreement is made with a corporation or other entity with which such official or family member has only a *de minimis* contractual or ownership interest. Developer warrants, represents, and agrees that as of the Effective Date no person described in this subsection, nor any Affiliate of such person, had any such interest in Developer. Developer must forthwith deliver written Notice to WMATA of any breach of the foregoing warranty, representation, and agreement, and must make reasonable inquiries from time to time to determine whether any such breach has occurred.

**26.4 Gratuities**

In connection with this Agreement, or any amendments or modifications of this Agreement, the giving of, or offering to give, gratuities (in the form of entertainment, gifts or otherwise) by Developer or any consultant, agent, representative, or other person deemed to be acting on behalf of Developer or any consultant, agent, contractor, subcontractor or supplier furnishing material to or performing work under this Agreement, or any agent, representative, or other person deemed to be acting on behalf of such supplier or subcontractor, to any director, officer or employee of WMATA, or to any director, officer, employee or agent of any of WMATA's agents, consultants or representatives, with a view toward securing an agreement or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to performance under, this Agreement or any agreement that will be negotiated, is expressly forbidden. The terms of this Section will be broadly construed and strictly enforced. Any violation of this provision will constitute an Event of Default and will not be subject to cure.

**26.5 Use of WMATA Compact**

Developer understands and agrees that it may not assert for its own benefit, or attempt to assert, any exemption from liability under applicable laws, including the payment of Impositions or sales taxes or any immunity from claims, available to WMATA under the WMATA Compact.

**26.6 WMATA's Approvals and Consents to Be by Contracting Officer.**

Except as may otherwise be specified in this Agreement, wherever an approval or consent is required by WMATA under this Agreement, such approval or consent shall be deemed to have been validly given only if given by WMATA's Contracting Officer or such Contracting Officer's designee.



## **ARTICLE 27**

### **INCORPORATION OF JDS BY REFERENCE**

To the extent there is a specific provision in this Agreement that is inconsistent with or in conflict with a specific provision in the JDS, this Agreement shall govern. In all other respects, this Agreement incorporates the JDS by reference.

## **ARTICLE 28**

### **MISCELLANEOUS**

#### **28.1 Invalid or Unenforceable Terms.**

If any provision of this Agreement or the application of such provision to any Person or situation shall be held invalid or unenforceable, the remainder of this Agreement and the application of such provision to Persons or situations other than those held invalid or unenforceable shall not be affected and shall continue valid and be enforced to the fullest extent permitted by law. Any such invalid or unenforceable provision shall be deemed automatically reformed to render the same as close in meaning and effect as the original provision but still valid and enforceable.

#### **28.2 Headings, Captions, Etc.**

The Article headings, Section headings and subsection captions of this Agreement and the Table of Contents contained in this Agreement are for convenience and reference only and in no way define, limit or describe the scope or intent of this Agreement nor in any way affect this Agreement.

#### **28.3 Gender and Number.**

Wherever the context so permits, the singular shall include the plural, the plural shall include the singular, and the use of any gender shall be deemed to include all or no genders.

#### **28.4 Exhibits.**

Each Exhibit to this Agreement is incorporated into this Agreement by reference and forms an essential part of this Agreement. Any Exhibit which is not physically attached to this Agreement shall be treated as if it were part of this Agreement nevertheless.

**28.5 Entire Agreement; Amendment.**

(a) Entire Agreement. This Agreement and the Exhibits hereto contain the complete and integrated agreement between the parties with respect to the subject hereof, and all other prior communications and agreements, written or oral, are superseded hereby unless incorporated in this Agreement by reference.

(b) Amendment. This Agreement may be amended or modified only by an instrument in writing executed by the parties.

**28.6 Successors and Assigns.**

The terms herein contained shall bind and inure to the benefit of the parties and their successors and permitted assigns, except as otherwise provided herein.

**28.7 Counterparts.**

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and together shall constitute one document.

**28.8 Construction of Agreement Against Draftsman.**

In no event shall this Agreement be construed more strongly against any one Person solely because such Person or its representative acted as draftsman hereof, it being acknowledged by the parties that both have been represented by competent legal counsel, that this Agreement has been subject to substantial negotiation, and that all parties have contributed substantially to the preparation of this Agreement.

**28.9 Relationship of Parties.**

This Agreement does not create the relationship of landlord and tenant, principal and agent, mortgagee and mortgagor, or of partnership or of joint venture or of any association or agency between WMATA and Developer. The sole relationship created between these parties by this Agreement is that of parties contracting as to certain rights and obligations with respect to the WMATA Joint Development Site.

**28.10 Recordation of Agreement.**

This Agreement shall not be recorded in the land records. If this Agreement or any portion thereof is recorded, WMATA is hereby authorized, as attorney-in-fact and agent, to record a release or termination thereof in the land records so that this Agreement is no longer of record.

**28.11 Consent or Approval.**

(a) Reasonable Implied. Except as otherwise specifically provided in this Agreement, whenever a party's consent or approval is required under this Agreement, such consent or approval shall not be unreasonably withheld, conditioned or delayed.

(b) Writing Required. Whenever this Agreement requires WMATA's or Developer's consent or approval, such consent or approval shall (i) not be effective unless in writing (except to the extent that such consent or approval is deemed to have been given pursuant to the terms of this Agreement), and (ii) apply only to the specific act or transaction so approved or consented to and shall not relieve one party of the obligation of obtaining the other party's prior written consent or approval to any future similar act or transaction when so required by the terms of this Agreement.

**28.12 No Brokerage Commissions.**

Each party represents to the other that no real estate broker or other Person is entitled to claim a commission as a result of the execution and delivery of this Agreement by such party.

**28.13 Governing Law.**

This Agreement shall be governed by the laws of the State in which the WMATA Joint Development Site is located, without regard to its principles of conflicts of laws, except that when that law conflicts with the WMATA Compact, WMATA shall be bound by the WMATA Compact.

**28.14 Computation of Time.**

In the computation of any period of time provided for by this Agreement or by law, the day of the act or event from which such period of time runs shall be excluded, and the last day of such period shall be included, unless it is a Saturday, Sunday, or legal holiday, in which case the period shall be deemed to run until the end of the next Business Day.

**28.15 Survival.**

The terms and conditions of this Agreement survive the termination of this Agreement.

**28.16 Time of the Essence.**

Time is of the essence with respect to all provisions of this Agreement.

**28.17 Further Assurances.**

(a) Generally. Upon request by any party hereto, the other party shall do, execute, acknowledge and deliver, or cause to be done, executed, acknowledged and delivered, all further acts and deeds, assignments, transfers, conveyances, easements, and assurances as may be reasonably required to better effectuate the transactions contemplated by this Agreement, but only

to the extent such actions are consistent with the terms and conditions of this Agreement and do not materially adversely affect the rights of the affected party or subject the affected party to any material costs, expenses, or liabilities.

(b) After Closings. From and after each closing, the parties shall each (i) reasonably cooperate with the other and shall provide any appropriate easements on the property owned by the other party, if any, for purposes of access, ingress, egress, road dedications, slope, grading or utilities, provided that none of the same adversely and materially interfere with the contemplated development of the parcel to be burdened by such easements or impose any liability on the affected party, and (ii) correct and confirm minor, immaterial changes in the description of the various parcels of land that comprise the Project as long as such changes are not due to an intentional act or omission or willful misconduct by any party hereto and are consistent with the terms and conditions of this Agreement. The provisions of this subsection shall survive closing.

## **ARTICLE 29**

### **DEFINED TERMS**

Whenever used in this Agreement, the following defined terms shall have the following meaning:

**ADA** – As defined in **Section 21.1(a)**.

**Additional Development Value Event** – As defined in **Section 3.7**.

**Additional Development Value Payment** – As defined in **Section 3.7**.

**Additional Development Value Payment Triggering Date** – As defined in **Section 3.7**.

**Affiliate** – With respect to any Person, any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with such other Person. Any Affiliates that wishes to be a successor Developer or a Phase Tenant must complete and submit to WMATA a certification in the form of **Exhibit E** and successfully pass a standard WMATA background check.

**Agreement** – As defined in the preamble.

**Approved Development Plan** – As defined in **Section 5.2(c)(iv)**.

**Business Day** -- A work day from Monday through Friday that is not a Federal, State of Maryland, Commonwealth of Virginia or District of Columbia holiday observed by WMATA. “Observed” shall mean for this purpose that WMATA’s headquarters office is generally closed for business that day even if WMATA is operating transit service that day. All references to “days” that do not use the defined term “Business Day” mean a calendar day.

**Capital Event** – As defined in **Section 3.6(a)(i)**.

**Capital Rent** – As defined in **Section 3.6(a)(ii)**.

**CC&Rs** – Covenants, conditions and restrictions providing for the operation of the WMATA Joint Development Site as an integrated, mixed-use, Transit-Oriented Development project in accordance with the terms of this Agreement and protecting the WMATA Facilities and WMATA's continued operations. The CC&Rs will be prior and superior to any Ground Lease or fee conveyance and to any mortgage encumbering the same and will apply to the entire WMATA Joint Development Site. The CC&Rs shall be recorded in the land records of the Local Jurisdiction. The CC&Rs need not be recorded against the entire WMATA Joint Development Site at one time but may be recorded serially against each Phase at such time(s) as that Phase is ground leased or conveyed in fee simple to Phase Tenants.

**Commercially Reasonable Business Efforts** -- The timely and diligent undertaking of all steps usually, customarily and fiscally prudent under the circumstances that an experienced real estate developer or mortgagee, as applicable, takes to lawfully achieve the objective to which the particular effort pertains.

**Consideration** – As defined in **Section 3.1**.

**Construction Agreement** – An agreement between WMATA, on the one hand, and Developer and/or a Phase Tenant, on the other hand, setting forth the terms and conditions under which construction may proceed on the WMATA Replacement Facilities. A Construction Agreement may be a separate agreement or it may be a part of a Ground Lease and/or the CC&Rs.

**Continuing Transit Orientation**—A development pattern that is consistent with Transit-Oriented Development.

**Default Rate** – As defined in **Section 20.5(b)**.

**Deposit** – As defined in **Section 3.2**.

**Developer** – As defined in the preamble, and its permitted successors and assigns.

**Development Value** – As defined in **Section 3.4**.

**Effective Date** – As defined in the preamble.

**Entitlements** – Zoning, land use and subdivision and site plan approvals, and other similar permits and approval from non-WMATA governmental entities for the WMATA Joint Development Site and/or the Tenant Improvements consistent with the Approved Development Plan, but not including building permits, excavation permits, curb cut permits, public space permits, certificates of occupancy and other similar permits.

**Equity** – Any cash equity, equity earned from excess land value, and any fees earned by and payable to but not yet paid to any member, partner, shareholder or other principal in Developer or a Phase Tenant, as applicable, for securing funding, for project management or for other services to Developer or the Phase Tenant, as such equity increases or decreases from time to time. Cash equity shall include cash, tangible personal property, and tradable investment securities issued by third parties, any or all of which are used by Developer or the Phase Tenant to pay third parties for costs properly allocable to the initial hard and soft costs of the Project or repairs, replacements, or restorations of Tenant Improvements. A written binding commitment to provide cash equity to the Project in consideration of New Markets Tax Credits, Low Income Housing Tax Credits, Historic Preservation Tax Credits or other comparable tax credits now or hereafter administered through the Federal Government or any State or local government, or through a payment-in-lieu-of-taxes (a/k/a PILOT) program administered by a State or local government, may constitute cash equity if the commitment and the third party making the commitment are approved by WMATA. Developer and Phase Tenants shall provide documentation reasonably satisfactory to WMATA to support the categorization and repayment of any item claimed as Equity.

**Event of Default** – As defined in **Article 19**.

**Excusable Delay** -- Delays due to strikes, labor disputes, acts of God, floods, fires, governmental restrictions not in existence on the date the applicable construction plans and specifications were submitted to WMATA for approval, enemy action, civil commotion, unavoidable casualty, sabotage, restraint by court or public authority, FTA concurrence and WMATA Compact Hearing delays beyond those set forth on any written and agreed-upon schedule, WMATA's failure to approve when such approval is requested in accordance with the terms of this Agreement and reasonable approval is required but the provisions hereof regarding "deemed approval" are not effective because of bankruptcy, insolvency, receivership or other legal condition staying the effectiveness of any "deemed approval" clause in this Agreement, and other similar matters outside of the control of Developer. General economic conditions, an Event of Default, lack of funds, failure to make or receive payment, weather patterns that do not reach the level of acts of God, bankruptcy, and/or insolvency shall not give rise to Excusable Delay. Any delay resulting from Excusable Delays shall extend the time on a day-for-day basis for completion and performance hereunder and Developer shall not be liable for loss or damage or deemed to be in default hereof due to such delay; provided, however, Developer is obligated to use Commercially Reasonable Business Efforts to avoid the occurrence of the delay or to minimize the impact of the delay on the progress of the Project; provided, further, that Excusable Delay shall not constitute grounds for delaying any payment due to WMATA or for vacating the WMATA Joint Development Site on a timely basis. Developer shall Notify WMATA of Excusable Delays within three (3) Business Days of happening with reasonable detail as to the nature of the claimed Excusable Delay and again within three (3) Business Days after the cessation of the claimed Excusable Delay; failure of Developer to timely Notify WMATA shall negate that claim of Excusable Delay.

**Final Completion, Finally Complete** and any similar term -- "Final Completion" or "Finally Complete" or any similar term means, with respect to any WMATA Replacement

Facilities, the Substantial Completion thereof and thereafter the final completion and operational readiness thereof, including:

- the completion of all punch list items;
- all State, county and municipal inspections have been successfully completed;
- the delivery to WMATA of two (2) hard copy sets and four (4) electronic copies in PDF format and AutoCAD format (or such formats as may hereafter replace the same) of the as-built drawings;
- the delivery to WMATA of an assignment to WMATA of all a Phase Tenant's non-WMATA-generated design documents, specifications and shop drawings;
- the delivery to WMATA of an as-built Survey of the WMATA Joint Development Site (or the applicable Phase);
- the delivery to WMATA of a certificate of occupancy (or equivalent), elevator permits, a final release for all site work and utility work, and all other permits by the governmental authority(ies) that issues the same in the jurisdiction in which the particular WMATA Replacement Facility is located;
- the delivery to WMATA of a final certificate of completion on the then-current form promulgated by the American Institute of Architects (or such other professional organization that may succeed to its role of promulgating industry-standard forms of this type) from the project architect for such WMATA Replacement Facilities;
- the delivery to WMATA of an unconditional waiver of liens by the Phase Tenant's general contractor;
- the delivery to WMATA of a consent of any surety to the final release of retainage;
- the clearing of the appropriate area of all equipment, materials, tools and rubbish;
- the delivery to WMATA of a waiver by Developer and/or Phase Tenant, as applicable, and, if by a Phase Tenant then also by that Phase Tenant's Construction SPE, in form and substance reasonably acceptable to WMATA, of all claims against WMATA other than those of which Notice was previously given to WMATA and that remain unsettled;
- the issuance by WMATA of a certificate of final completion or acceptance, the issuance of which is a WMATA Unconditional Approval Matter.

**FTA** – The U.S. Federal Transit Administration and its successors from time to time with governing authority or oversight over WMATA's joint development activities through funding or regulatory power.

**Ground Lease** – As defined in the **Recitals**.

**Ground Lease Memorandum** – A memorandum or short form of a Ground Lease in form suitable for recording in the land records of the Local Jurisdiction. The Ground Lease Memorandum shall contain only such information as is necessary or appropriate to create record notice of the Phase Tenant's leasehold estate to that Phase, including the names of the ground lessor and ground lessee, a description of the Phase, the length of term of the leasehold estate (and any options to extend the same), a statement that the Ground Lease and the Ground Lease

Memorandum are subject and subordinate to the CC&Rs, and a statement that WMATA, acting unilaterally as attorney-in-fact or agent for the Phase Tenant, may, upon the expiration or termination of the Ground Lease, execute and record a release or other termination of the Ground Lease Memorandum sufficient to remove record notice of it.

**Hazardous Materials** -- Any and all materials, substances and wastes that are or become regulated by any governmental authority or pose a material threat to human health, safety or the environment, including (a) any materials, substances or wastes defined as a “hazardous waste”, “hazardous material”, “hazardous substance”, “extremely hazardous waste” or “restricted hazardous waste” under any Laws, (b) petroleum and petroleum by-products, (c) asbestos, (d) polychlorinated biphenyls, or (e) radioactive materials.

**Impositions** -- All real estate taxes and assessments, special assessments, business improvement district fees or charges, school taxes, water district taxes, other special taxing district levies, sewer and water charges, vault or other public space charges, excise taxes, levies, license and permit fees, utility fees, and other taxes, fees and charges of any similar nature which are required to be paid with respect to the WMATA Joint Development Site.

**JDS** – As defined in the **Recitals**.

**LEED** – Leadership in Environmental and Energy Design as promulgated from time to time by the US Green Building Council (USGBC) or its successors. The standard in effect at the time an improvement or site plan is registered with the USGBC shall be the applicable standard for those improvements or that plan.

**Letter of Credit** – As defined in **Section 3.2**.

**Local Jurisdiction** – \_\_\_\_\_.

**Major Subcontractor** – A subcontractor to a Phase Tenant’s general contractor with a subcontract price of Five Hundred Thousand Dollars (\$500,000) or more.

**Metro Station** – As defined in the **Recitals**.

**MOT Plan** – A maintenance of traffic plan that is prepared by Developer or a Phase Tenant and has been approved by WMATA and, if necessary, the Local Jurisdiction and the State, providing for the continuation of pedestrian, bicycle, bus, shuttle, taxi, Kiss & Ride and Park & Ride and other vehicular access through, over and under the WMATA Joint Development Site.

**Net Proceeds** -- Upon the occurrence of a Capital Event, the Net Proceeds are the full (gross) transaction revenues to Developer or the Phase Tenant and any Affiliate receiving transaction revenues from such Capital Event), including the face amount of any promissory note or other payment obligation and the fair market value of any non-monetary property received by Developer or the Phase Tenant, (a) less any reasonable and customary transactional costs incurred by Developer or the Phase Tenant or Affiliate, as applicable, in connection with that Capital Event,



including real estate taxes, special assessments and other similar governmental charges customarily payable at such a Capital Event, transfer and recording taxes or similar documentary stamp taxes, charges for recording documents in the land records, title and survey costs, reasonable legal fees payable to outside counsel for both the borrower and the lender, and financing commissions and fees, but not including any costs attributable to tax credit proceeds, and (b) less repayment of Developer's or the Phase Tenant's, as applicable, unamortized principal Project debt secured by an arm's-length mortgage, deed of trust, deed to secure debt, sale-leaseback agreement or other similar instrument securing the repayment of indebtedness to the extent such repayment is actually made.

**Notice** – As defined in **Section 25.1**.

**Notify** – To give Notice.

**Option Fee** – As defined in **Section 3.3**.

**Participating Rent** – As defined in **Section 3.5(a)**.

**Person** -- Includes any individual, corporation, partnership, joint venture, association, trust, government or any agency or political subdivision thereof, or any other private or public entity.

**Phase** – As defined in the **Recitals**. The defined term “Phase” applies to both Phases that are ground leased and Phases that are sold in fee, unless the text expressly states otherwise or unless it is clear from the context that only a ground leased Phase or an owned Phase, as the case may be, is meant.

**Phase Tenant(s)** – As defined in the **Recitals**. The term “Phase Tenant” applies to lessees under Ground Leases and persons who own Phases in fee other than WMATA and its successors and assigns.

**Project** – As multi-component, mixed-use, transit-oriented development project contained approximately \_\_\_\_\_.

**Proposed Development Plan** – As defined in **Section 5.2(a)**.

**State** – The [Commonwealth of Virginia] [District of Columbia] [State of Maryland].

**Substantial Completion, Substantially Complete** and any similar term – Whether for a WMATA Replacement Facility or a Tenant Improvement, Substantial Completion shall mean that:

(a) the inspecting or design architect has issued a certificate of substantial completion for it on the then-current form issued by the American Institute of Architects (or a successor organization) for the WMATA Replacement Facility or the Tenant Improvement (including all of the residential units in the latter) subject to punch list items that do not materially

impede the operation of the WMATA Replacement Facility or the Tenant Improvement, as applicable, and that are not a material portion of the cost of the WMATA Replacement Facility or Tenant Improvement to complete;

(b) issuance by the Local Jurisdiction of a certificate of occupancy, non-residential use permit, residential use permit or their equivalent for the WMATA Replacement Facility or Tenant Improvement; and

(c) the delivery to WMATA of two (2) hard copy sets and four (4) electronic copies in PDF format and AutoCAD format (or such formats as may hereafter replace the same) of the as-built drawings.

If Substantial Completion is being determined for a WMATA Replacement Facility, the following shall also apply:

(w) WMATA has either (i) accepted the WMATA Replacement Facility in writing expressly acknowledging that the facility is Substantially Complete within the meaning of this Agreement or (ii) put the WMATA Replacement Facility into regular transit operation;

(x) a safety and security certification is issued by the applicable Phase Tenant, and all operating and maintenance manuals for systems and equipment to the extent the manufacturer, supplier or dealer therein issues the same, all keys, all spare parts, and all warranties (and, to the extent necessary or appropriate, an assignment to WMATA of the same) have been delivered to WMATA;

(y) operating and maintenance training for the WMATA Replacement Facilities has been provided to and completed by WMATA personnel in accordance with then-applicable WMATA standards; and

(z) (i) if Developer or the applicable Phase Tenant still has posted with WMATA the payment or performance bond(s) required by this Agreement with respect to that WMATA Replacement Facility, and Developer or the applicable Phase Tenant has escrowed with WMATA cash in the amount of one hundred twenty-five percent (125%) of the estimated cost, as mutually determined by Developer or the applicable Phase Tenant, on the one hand, and WMATA on the other hand, to Finally Complete that WMATA Replacement Facility, or (ii) if the aforesaid bond(s) is not still posted with WMATA, that Developer or the applicable Phase Tenant has escrowed with WMATA cash in the amount of one hundred fifty percent (150%) of the estimated cost, as mutually determined by Developer or the applicable Phase Tenant, on the one hand, and WMATA on the other hand, to Finally Complete that WMATA Replacement Facility.

**Survey** – As defined in **Section 10.1**.

**Taking** – An act of condemnation or eminent domain or sale in lieu thereof. “Taking” does not include any exactions, dedications, fees, use restrictions, proffers, other Entitlements or Title Permitted Exceptions.

**Tenant Improvements** -- All buildings, portions of buildings, site amenities, infrastructure and parking existing or to be constructed by a Phase Tenant on the WMATA Joint Development Site and owned by Phase Tenant in accordance with this Agreement, and all replacements, additions and substitutes of, to and for the same. The WMATA Facilities are not “Tenant Improvements” even if constructed by a Phase Tenant because the WMATA Facilities are owned by WMATA.

**Title Commitment** – As defined in **Section 10.2**.

**Title Exception Notice** – As defined in **Section 10.3(a)**.

**Title Insurer** – As defined in **Section 10.2**.

**Title Objectionable Matter** – As defined in **Section 10.3**.

**Title Permitted Exceptions** – As defined in **Section 10.3(d)**.

**Transit-Oriented Development** -- As applicable to design and construction on the WMATA Joint Development Site and the subsequent maintenance and operation thereof: (a) the Tenant Improvements’ design enhances the effectiveness of a mass transit project and is physically or functionally related to the mass transit project; (b) the Tenant Improvements create new or enhanced coordination between mass transit and other forms of transportation; (c) the Tenant Improvements provide or facilitate convenient pedestrian and vehicular access to a mass transit project; (d) the Tenant Improvements incorporate non-vehicular capital improvements that are designed to result in increased mass transit usage in corridors supporting fixed guideway systems; (e) the Tenant Improvements enhance urban economic development or incorporate private investments including office, commercial, retail, hospitality, or residential development; and (f) the Tenant Improvements comply with any then-current FTA regulations, policies or guidelines applicable to joint development. Without limiting the foregoing, Transit-Oriented Development emphasizes a mix of uses, safe and convenient pedestrian and bicycle connectivity, attractive streetscapes and “placemaking,” and a de-emphasis on automobile travel and parking other than surface parking on streets.

**WMATA** – As defined in the preamble, and its successors and assigns.

**WMATA Compact** -- The organizational document governing WMATA, Public Law 89-774, 80 Stat. 1324, Maryland Acts of General Assembly, Chapter 869-1965, Virginia Acts of Assembly, Chapter 2-1966, and Resolution of D.C. Board of Commissioners adopted November 15, 1966, each as it may have been or may hereafter be amended, supplemented, replaced or otherwise amended. The WMATA Compact is codified in: District of Columbia Code Section 9-

1107.1; Section 10-204 of the Transportation Article of the Annotated Code of Maryland; and Virginia Code Sections 56-529 and 56-530 and the “Compacts” volume.

**WMATA Compact Hearing** – As defined in **Section 11.1.**

**WMATA Design and Construction Standards** -- The WMATA Adjacent Construction Project Manual, the WMATA Station Area Planning Guide, the WMATA Manual of Design Criteria (both Facilities and Systems), the WMATA 2016 CAD Standards, the WMATA Manual of Design Criteria, the WMATA survey datum for the WMATA Joint Development Site, the WMATA Standard Specifications, Standard Drawings and Design Directive Drawings, the WMATA Tram/LRT Guideline Design Criteria, the WMATA Construction Safety and Environmental Manual, the WMATA ADA Accessibility Checklist, and the WMATA Manual of Graphic Standards, as any of the foregoing may be amended, supplemented, modified or replaced from time to time. All references in this Agreement to WMATA Design and Construction Standards or words of similar effect refer to the standard or specification in effect on the date design of the particular improvement begins, as established by a written Notice from Developer or a Phase Tenant to WMATA to that effect; provided, however, that if construction of the applicable improvement does not begin within three (3) years after design of that improvement begins, then WMATA may require that the improvement be redesigned to meet more current WMATA Design and Construction Standards.

**WMATA Facilities** - The WMATA Reserved Areas and the adjoining tracks and Metro Station, entrances/exits, passageways (surface and subsurface), ramps, retaining walls, and other facilities for the Metro Station, including all improvements, infrastructure components, tangible property, structures and supports, access, curbing, guttering, drains, storm water facilities, utilities, parking (including lots, garages, spaces, meters, gates and revenue-collection facilities) located on the WMATA Reserved Areas; and all improvements, facilities, equipment, structures and other tangible property used in the operation, access to and from, maintenance, repair, servicing, removal and/or replacement of WMATA’s train, bus or other transit operations, wherever located, including all WMATA Replacement Facilities, rail stations, rails, tunnels, tracks, bus bays, bus lay-over bays, bus transfer areas, supervisor kiosks, employee bathrooms, electric substations, conduits and lines, pedestrian walkways, waiting and shelter areas, facilities serving persons with disabilities, cooling towers, chiller plants, vent and fan shafts, bicycle rack and locker areas, Bike & Ride facilities, parking lots and parking garages, Kiss & Ride facilities, storage and maintenance yards and facilities, and all other associated facilities notwithstanding that some of the facilities may have been constructed by or at the expense of Developer, a Phase Tenant or another third party. The WMATA Facilities are and shall be owned by WMATA and shall not be conveyed or leased to Developer or any Phase Tenant. WMATA reserves all rights relating thereto, including making additions or other alterations, demolishing all or any part of them, changing the nature of their use, changing the name of the Metro Station, and determining the use (or non-use) thereof, all in WMATA’s sole and absolute discretion.

**WMATA Joint Development Site** – As defined in **Section 1.1.**

**WMATA Replacement Facilities** - Those improvements being designed and/or constructed by Developer or a Phase Tenant for WMATA. As each WMATA Replacement Facility achieves Substantial Completion, it will be turned over to WMATA and will thereafter be part of the WMATA Facilities. Notwithstanding that they are to be constructed by Developer and/or Phase Tenants, the WMATA Replacement Facilities shall be owned by WMATA and shall not be conveyed or leased to Developer or any Phase Tenant.

**WMATA Replacement Facilities Escrow Agreement** – As defined in **Section 8.1(c)**.

**WMATA Replacement Facilities Escrow Amount** – As defined in **Section 8.1(c)**.

**WMATA Reserved Areas** – The portion of the WMATA Joint Development Site used or to be used for purposes of the location, construction, reconstruction, maintenance, replacement and operation of WMATA Facilities. The WMATA Reserved Areas are owned by WMATA and shall not be conveyed or leased to Developer or any Phase Tenant. Unless otherwise specifically stated, the WMATA Reserved Areas include all areas on which the WMATA Facilities are, or are hereafter, located. The floor area ratio and any other density-based development criteria for the Project shall not include the WMATA Reserved Areas.

**WMATA Unconditional Approval Matters** – Anything WMATA has the right to approve or disapprove in WMATA's sole, absolute, and subjective discretion, notwithstanding any express or implied duty of good faith and fair dealing.

**WMATA Zone of Influence** – As defined in the WMATA Design and Construction Standards. WMATA shall determine the scope of the WMATA Zone of Influence if there is any ambiguity or vagueness in the WMATA Design and Construction Standards.

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the Effective Date.

**WMATA:**  
**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Developer:**

\_\_\_\_\_

By: \_\_\_\_\_,  
a \_\_\_\_\_,  
its \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Exhibits**

A	--	The WMATA Joint Development Site
B	--	Scope and Schedule of the Development Project
C	--	Approved Appraisal Instructions
D	--	Required Insurance Coverage for Developer
E	--	Phase Tenant's Certifications
F	--	Letter of Credit
[G	--	Template Ground Lease]

**EXHIBIT A**

**THE WMATA JOINT DEVELOPMENT SITE**

The land located in \_\_\_\_\_, \_\_\_\_\_ and defined as:



**EXHIBIT B**

**SCOPE AND SCHEDULE OF THE DEVELOPMENT PROJECT**

**EXHIBIT C**

**AGREED-UPON APPRAISAL INSTRUCTIONS**

\_\_\_\_\_ APPRAISAL SCOPE OF WORK

Owner: Washington Metropolitan Area Transit Authority

Property: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Property Area: Approximately \_\_\_\_\_ [square feet] [acres]  
*Note: The above is the gross area of the entire project. The actual leased or sold area for each phase of the overall project will be less.*

Current Facilities: Surface daily parking lot, \_\_\_\_\_ spaces  
Kiss & Ride parking, \_\_\_\_\_ spaces including \_\_ motorcycle spaces (the Kiss & Ride area includes a taxi stand and a car-sharing stand)  
Total, \_\_\_\_\_ parking spaces  
\_\_\_\_\_ ( ) bus bays  
\_\_\_\_\_ ( ) bicycle lockers  
\_\_\_\_\_ ( ) bicycle racks  
Other: \_\_\_\_\_

Current Zoning: \_\_\_\_\_  
Proposed Zoning: \_\_\_\_\_

Comments: Development is intended to occur on the surface parking lots on the property. Bus bays and Metro Kiss & Ride parking will be reconfigured and Metro surface Park & Ride parking will be relocated, but all of these events and costs are outside of the scope of this appraisal. The existing parking garages will remain as they are now.

Reference Materials: A survey of property

The latest general development plan will be furnished.

To establish Development Value for each phase of the overall project (a "Phase"), a general development plan for the Phase will be furnished. (Development Value is more fully defined below.)

The most recent commitment for title insurance reflecting the current state of title to the property.

Any available environmental assessments relating to the property.

Requirements:

All values should be based on the market value of the property, [as entitled under current zoning] [as proposed to be rezoned as set forth below and on the assumption that the proposed rezoning is successful] and ready for construction (“Development Value”). The appraisal shall also assume that the Phase has been improved by any WMATA replacement facilities for that Phase.

The appraiser shall provide each of the following for the property:

Each of the potential uses listed below is to be valued as follows for:

- a 98-year unsubordinated ground lease in the case of all uses that are not residential condominiums stated on (i) a per square foot basis for office and retail spaces, (ii) a per key/room basis for hotel use; and (iii) a per unit basis for multifamily residential uses.
- a fee simple conveyance for the use of residential condominiums, stated on a per unit basis.

In each case the appraiser is to assume a single lump sum payment at closing.

WMATA is also entitled to certain additional rent as described in the Joint Development Agreement. The appraiser is to consider the participation provisions, but it is not required calculate a detailed discounted present value of that additional rent in arriving at the appraiser’s opinion of value.

The potential uses for the property are as follows:

- multi-family rental apartments
- multi-family condominiums
- stand-alone retail
- office
- select (limited) service hotel
- in-line retail on the first floor of a multi-story residential or commercial building
- full line grocery either stand alone or within a mixed-use retail/residential or retail/office
- food-oriented retail on pad sites designed to be physically integrated into the remainder of the project in accordance with transit-oriented development principles.

Type of Report:           Summary Appraisal Report

The appraisal shall be completed in accordance with Title XI of the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA) and the Uniform Standards of Professional Appraisal (USPAP), as amended through the date of the appraisal. The Scope of Work section of the appraisal must comply with AO 28, AO 29 and the Competency Provisions of USPAP. The appraisal shall also conform to the regulations of the Office of the Comptroller of the Currency and the Board of Governors of the Federal Reserve System.

Due Date:                 Draft due sixty (60) days after notice to proceed. The complete report shall be due ten (10) days after the receipt of comments on the preliminary draft.

Parties to Receive Appraisal:

Copies of the initial draft and final appraisal are to be delivered electronically and via overnight delivery simultaneously to:

Office of Real Estate and Parking  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, NW  
Washington, DC 20001  
Attn: Steven A. Teitelbaum ([steitelbaum@WMATA.com](mailto:steitelbaum@WMATA.com))  
Attn: James B. Abadian ([jbabadian@WMATA.com](mailto:jbabadian@WMATA.com))

and to

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_  
E-mail: \_\_\_\_\_

Neither party shall have any *ex parte* communications with any appraiser except to engage the appraiser and, if applicable, for WMATA to contact the appraisers to attempt to reconcile their appraisals and/or to engage a third appraiser, as set forth above, and to remind the appraisers of upcoming deadlines and other administrative matters.

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If there are two appraisers selected by the parties, the appraisers shall be so notified and the appraisers are advised that they shall proceed as follows:

At the end of the stated period for conducting the appraisals, the appraisers shall submit copies of their appraisals to both parties. If an appraiser fails to timely submit an appraisal, that appraiser's work shall be disregarded and the other appraisal shall be determinative.

If the appraised values for any one or more uses reported by the two appraisers are within ten percent (10%) of the higher of the two appraised values for that use(s), then the final value for that use(s) shall be the arithmetic average of the two appraised values. If the lower of the two appraised values reported by the two appraisers is not within ten percent (10%) of the higher of the two appraised values for all uses, then the two appraisers shall be given notice by WMATA that they are to meet and try to reconcile their appraisals for that use(s) to within the stated range.

If the two appraisers are not able to meet, or are able to meet but cannot reconcile their appraisals within the stated range within a time period determined by WMATA, they may be instructed by either party to jointly designate a third appraiser within thirty (30) days. All appraisers, including those selected or recommended by any other appraisers, must be on WMATA's then-current list of approved appraisers for the District of Columbia. The appraisers will be provided with that list at the appropriate time.

If the two appraisers are not able to jointly designate a third appraiser within the stated time period, each of the two appraisers shall provide WMATA with the names of two appraisers, who may be the same or may be different; WMATA shall then pick the third appraiser by picking its name out of a hat in which the names of the recommended appraisers are placed. (If that appraiser declines the appointment, WMATA shall repeat the procedure until a third appraiser is engaged. If neither of the first two appraisers provides the name of a suggested third appraiser to WMATA, WMATA shall unilaterally select the third appraiser.)

The third appraiser shall be given a copy of these Appraisal Instructions and shall appraise the Property *de novo* for each and every use for which the first two appraisers could not reconcile their appraisals to bring them within the range stated above. The third appraiser shall act in accordance with these Appraisal Instructions. The third appraiser shall not refer to or even be given a copy of the first two appraisals. The third appraiser shall be instructed to complete its appraisal within sixty (60) days after it is notified of its appointment. The third appraiser shall deliver its appraisal report to both parties upon its completion.

If the value reported by the third appraiser for any use is between the values reported by the first two appraisers for that use, then the value for that use will be the value reported by the third appraiser. If the value reported by the third appraiser for any such use is below

the lower of the two values reported by the first two appraisers for that use, then the value for that use will be the lower of the values reported by the first two appraisers. If the value reported by the third appraiser for any such use is above the higher of the two values reported by the first two appraisers for that use, then the value for that use will be the higher of the values reported by the first two appraisers.

**EXHIBIT D**

**REQUIRED INSURANCE COVERAGE FOR DEVELOPER**  
**(Non-Construction Activities)**

*NOTE: This Exhibit addresses insurance that is required prior to closing in anticipation of no material activity on-site by Developer prior to closing. At closing, more extensive insurance will be required either in a ground lease or in a project construction coordination agreement as befits a period during which actual construction activity is occurring and, in the case of a ground lease, thereafter during the term of the ground lease.*

**General Requirement to Maintain Insurance**

During the entire term of this Agreement, Developer shall, at its cost and expense, procure and maintain, or cause to be procured and maintained and shall require, to the extent applicable, its general contractors to procure and maintain, at their respective sole cost, the insurance set forth in this Exhibit. The insurance required below sets a minimum level and Developer may carry or may require its general contractors and subcontractors to carry additional insurance.

Developer shall provide to WMATA a current certificate of insurance and all applicable endorsements for all insurance required herein upon execution of this Agreement and within ten (10) days of each policy renewal. In addition to the foregoing, at any time, but not more frequently than once every twelve (12) months, within ten (10) days following request by WMATA, Developer shall provide WMATA with copies of all policies of insurance and/or current certificates of insurance and applicable endorsements required by this Exhibit. WMATA's receipt and/or review of a policy or a certificate does not constitute approval thereof.

The terms "insurance policy" and "insurance policies" as used in this Exhibit shall be deemed to include any extension or renewals of such insurance policies.

**General Standards for Insurance**

All insurance prescribed by this Exhibit will:

- (i) be in such form and with such provisions as are generally considered standard provisions for the type of insurance involved, except when this Exhibit may expressly require otherwise;
- (ii) be written on an "occurrence" (not a "claims made") basis, except as may be expressly permitted by this Exhibit;

(iii) contain a waiver of subrogation endorsement on the part of the insurer waiving its rights in compliance with **Article 18**.

Insurance required may be satisfied by blanket or umbrella policies.

Insurance companies shall be rated by A.M. Best and shall carry at least an “A-” rating and “Financial Size Category” of at least “VII” or better. If A.M. Best is no longer providing such ratings or changes its rating system at any time, it and/or they shall be replaced with a comparable rating agency and/or comparable ratings as WMATA may approve in its reasonable discretion.

The insurance policies required by this Exhibit shall not be cancelled, terminated, or modified (except such modifications that (i) do not diminish the scope and limits required herein and (ii) do not adversely affect WMATA or the Project) without thirty (30) days’ prior written Notice from the insurer to WMATA. Developer shall obtain its insurer’s agreement that the requisite insurance policies shall not be modified (except to increase the amount of coverage) without thirty (30) days’ prior written Notice to WMATA. If a required insurance policy is not reinstated or replaced within such thirty (30) day period, irrespective of any other Notice, default, discussion or cure provisions or procedures in this Agreement, then such failure to reinstate or replace shall constitute an Event of Default without any further cure period being afforded.

If Developer becomes aware of any reduction in the coverage required by this Exhibit, or in the protection afforded WMATA thereunder, Developer shall provide Notice to WMATA within five (5) days.

WMATA, its directors, partners, members, other principals, officers, employees, contractors, agents and representatives, by endorsements, shall be named as additional insureds in respect to liability arising out of the activities of Developer in connection with this Agreement (except on workers’ compensation insurance). Year 2014 ISO additional insured endorsements or similar endorsements are not acceptable. Coverage provided to additional insureds shall be for claims arising out of both ongoing operations and products/completed operations. Coverage available to additional insureds under the products and completed operations coverage shall be limited only by the time of repose applicable in the jurisdiction in which the WMATA Joint Development Site is located.

All insurance policies may contain a mortgagee and loss payee clause in favor of a leasehold mortgagee.

Developer’s insurance coverage shall be primary and non-contributory insurance with respect to WMATA, its directors, partners, members, other principals, officers, employees, contractors, agents, and representatives. Any insurance or self-insurance maintained by WMATA and its directors, partners, members, other principals, officers, employees, contractors, agents and representatives shall not contribute to Developer’s insurance or benefit Developer in any way.

No acceptance, review or approval of any certificate of insurance, insurance agreement or endorsement by WMATA shall relieve or release, or be construed to relieve or release, Developer



from any liability, duty, or obligation assumed by, or imposed upon, it by the provisions of this Agreement or to impose any obligation upon WMATA.

### **Certificates of Insurance**

WMATA shall be provided with an ACORD certificate of insurance as evidence that the insurance requirements of this Exhibit have been satisfied. Certificates of insurance should be e-mailed to [COI@WMATA.com](mailto:COI@WMATA.com). Failure to provide certificates of insurance may result in Developer and its contractors being denied access to work locations on or adjacent to WMATA property.

The certificate holder should read:

Washington Metropolitan Area Transit Authority  
Office of Risk Management  
Room 8F  
600 Fifth Street, N.W.  
Washington, D.C. 20001

The certificate of insurance shall also state:

- The name of the Metro Station at which the WMATA Joint Development Site is located and the name of the primary contact at WMATA for the procurement.
- The names of all additional insureds on the applicable policy.
- That each additional insured is such on a primary and non-contributory basis.
- That each additional insured is such for ongoing operations, in addition to the products and completed operations coverage.
- That the coverage or endorsement providing a waiver of subrogation is in accordance with this Exhibit.
- That the issuing insurance company will Notify WMATA of cancellation, termination or modification, as stated above, at least thirty (30) days before the same is effective. Use of “will endeavor to” or similar wording is not acceptable.

### **Required Coverage**

All insurance policies required to be maintained by Developer must have the scope and limits set forth below (subject to adjustment as set forth in this Exhibit).

If the required minimum limits delineated below can only be met when applying an umbrella or excess liability policy, the umbrella or excess liability policy must follow the form of the underlying policy and be extended to “drop down” to become primary in the event the primary limits are reduced or the aggregate limits are exhausted.

Self-insured retentions and/or deductibles cannot exceed One Hundred Thousand Dollars (\$100,000) unless approved by WMATA in writing.

#### Commercial General Liability Insurance

Developer shall carry commercial general liability insurance, including coverage for terrorism. Failure to carry contractual liability insurance covering an indemnification obligation shall not relieve the indemnification obligation.

This insurance shall be carried in ISO Occurrence Form CG0001 (12/04) or its equivalent. Equivalency shall be determined by WMATA as a WMATA Unconditional Approval Matter. The policy shall be endorsed with ISO endorsement CG 25 03 03 97, Designated Construction Project(s) General Aggregate Limit, and designate “any and all construction projects” as the designated construction project. The policy shall be endorsed with ISO endorsement CG 25 04 03 97, Designated Location General Aggregate Limit, and designate “any and all locations” as the designated location.

This insurance shall have coverage limits of Five Million Dollars (\$5,000,000) per occurrence and Ten Million Dollars (\$10,000,000) in the aggregate.

The policy may have commercially reasonable self-insured retention or deductibles, not to exceed the limit stated in the “Required Coverage” heading of this Exhibit.

Defense coverage must be provided for additional insureds.

Defense costs (allocate loss adjustment expenses) must be included and outside the policy limits for all primary and umbrella excess policies.

#### Business Automobile Liability Insurance

Developer shall carry business automobile liability insurance against claims for bodily injury and property damage arising out of the ownership, maintenance or use of any owned, hired or non-owned motor vehicle. This insurance shall have minimum combined single limits of Two Million Dollars (\$2,000,000) per occurrence.

Business automobile insurance shall be written on ISO business auto coverage form CA 00 01 03 016 or its equivalent. Equivalency shall be determined by WMATA as a WMATA Unconditional Approval Matter.

#### Adjustments in Required Coverage

WMATA has the right to review and adjust, not more frequently than once every year, the types of coverage and policy limits outlined in this Exhibit, provided that the coverages are of a type and with limits similar to those carried by other reputable developers of comparable properties

located in the Washington, DC metropolitan area. Developer shall make or cause to be made any necessary adjustments in such limits or in types of coverage.

#### **WMATA's Right to Obtain Insurance for Developer**

If Developer fails to maintain any insurance required by this Agreement, WMATA may, upon at least fifteen (15) days prior written Notice to Developer, procure and maintain such insurance at the expense of Developer. WMATA shall Notify Developer of the date, purposes, and amounts of any such payments made or legally committed by WMATA, and any amounts of money paid or legally committed to be paid therefor by WMATA prior to Developer obtaining the requisite insurance and providing evidence thereof to WMATA shall be repaid to WMATA within three (3) days after written demand with interest thereon at the Default Rate from the date paid by WMATA to the date of payment by Developer plus an administrative fee of ten percent (10%).

#### **Developer's Obligation to Collect Proceeds**

Whenever any event occurs that could trigger a recovery under an insurance policy required by this Agreement, Developer shall promptly make proof of loss and shall proceed promptly to endeavor to collect all valid claims.

**EXHIBIT E**

**PHASE TENANT'S CERTIFICATIONS**

The undersigned hereby certifies to the best of its knowledge and belief to the Washington Metropolitan Area Transit Authority (“WMATA”) that the undersigned and any of its principals:

1. Is/are not presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from an award of contracts by any governmental entity.

2. Has/have not within the past ten (10) years been convicted of or had a civil judgment rendered against it for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a contract or subcontract with any governmental entity; violation of antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating criminal tax laws, or receiving stolen property.

3. Is/are not presently indicted for or otherwise criminally or civilly charged by a governmental entity with commission of any of the offenses enumerated in the previous paragraph.

4. Is/are not in arrears or default of payment of any money or obligation of a value greater than Three Thousand Dollars (\$3,000) to a governmental entity.

5. Has/have no adjudicated violations nor has paid penalties during the past ten (10) years relating to the housing and building laws, regulations, codes and ordinances of any governmental entity.

6. During the past ten (10) years has/have not had a license revoked that was issued in accordance with the housing, building or professional licensing laws, regulations, codes and ordinances of any governmental entity.

“Principal” means a partner, member, shareholder, officer, director, manager or other person with management or supervisory responsibilities or who is otherwise in a position to control or significantly influence the undersigned’s activities or finances.

The undersigned further certifies:

a. It has not employed or retained any company or persons (other than a full-time, bona fide employee working solely for it) to solicit or secure a ground lease or fee conveyance from WMATA; and

b. It has not paid or agreed to pay, and shall not pay or give, any company or person (other than a full-time, bona fide employee working solely for it) any fee, commission, percentage,

or brokerage fee contingent upon or resulting from the award of a ground lease or fee conveyance from WMATA; and

c. No person or entity currently employed by or under contract with WMATA, or employed by or under contract with WMATA within the past twelve (12) months, or with material input into the matters covered by the proposed ground lease or fee conveyance and employed by or under contract with WMATA at any time in the past: has provided any information to it that was not also available to all other persons who responded to the Joint Development Solicitation or other offering that led to the proposed ground lease or fee conveyance; is affiliated with or employed by it or has any financial interest in it; provided any assistance to it or its parent, subsidiary or affiliates in responding to the Joint Development Solicitation or other offering regarding the site now proposed to be ground leased or acquired in fee; or will benefit financially from the development contemplated by the ground lease or fee conveyance; and

d. Neither the undersigned nor any of its employees, representatives or agents have offered or given gratuities or will offer or give gratuities (in the form of entertainment, gifts or otherwise) to any director, officer or employee of WMATA with the view toward securing favorable treatment in the selection of a developer pursuant to the Joint Development Solicitation or other offering or in any determination made with respect to developer selection, or in the negotiation, amendment or performance of the Joint Development Agreement (as defined below); and

e. It agrees to furnish information relating to the above as requested by WMATA.

If the undersigned is unable to certify to the foregoing in whole or in part, the undersigned has attached an explanation to this certification.

The undersigned further certifies that:

i. It is aware of and accepts all of the terms of the Joint Development Agreement dated \_\_\_\_\_, 20\_\_ between WMATA and \_\_\_\_\_ (as it may have been amended to date, the “**Joint Development Agreement**”); and

ii. It has the power and authority to enter into the proposed ground lease or fee conveyance and all final documentation as required by WMATA without the consent or joinder of any other party or authority (except as envisioned by the Joint Development Agreement).

These certifications are a material representation of fact upon which reliance will be placed by WMATA. The undersigned shall provide immediate written notice to WMATA if at any time it learns that its certification was erroneous when submitted or has become erroneous since that time. If it is later determined that the undersigned knowingly rendered an erroneous certification or failed to notify WMATA if and when the undersigned gained knowledge that its certification was erroneous when submitted or has become erroneous since that time, then, in addition to any other remedies available to WMATA, WMATA may in its sole and absolute discretion terminate the Joint Development Agreement with respect to this particular ground lease or fee conveyance.

*WMATA JDA Template*  
*Draft Dated:* \_\_\_\_\_, 201\_\_  
*Deadline for Signing:* \_\_\_\_\_, 201\_\_

**[NAME OF PROPOSED PHASE TENANT]**

By: \_\_\_\_\_  
Name:  
Title:

Date: \_\_\_\_\_, 201\_\_

**EXHIBIT F**

**FORM OF LETTER OF CREDIT**

[NAME AND ADDRESS OF ISSUING BANK]

NOTE: ADDRESS MUST BE IN THE WASHINGTON, D.C. METROPOLITAN AREA]

STANDBY IRREVOCABLE LETTER OF CREDIT

[Date]

[Reference Number]

**Washington Metropolitan Area Transit Authority**

600 Fifth Street, N.W.

Washington, D.C. 20001

Attn: Vice President, Office of Real Estate and Parking

Gentlemen:

By the order of \_\_\_\_\_ (the "Applicant"), we hereby open in your favor our irrevocable letter of credit for the amount of \_\_\_\_\_ Dollars (U.S.) (U.S. \$ \_\_\_\_\_), available by your draft(s) at sight drawn on us at the above address and accompanied by a statement purportedly signed by an authorized signer on your behalf substantially in the form of Exhibit A attached hereto. All drafts drawn in compliance with the terms of this instrument will be duly honored upon presentation. Drafts need not be endorsed on this letter of credit itself and the original of this letter of credit need not accompany any presentment. Presentation may be made in person, by messenger or by overnight courier service, or by mail. Presentation shall be made to us at the following address:

\_\_\_\_\_.

This initial term of this letter of credit expires on \_\_\_\_\_, 20\_\_ and shall automatically be renewed from year-to-year thereafter, without amendment or notice to you or to the Applicant, unless we give you actual written notice of nonrenewal at least two (2) months prior to any annual expiration date. Such notice of nonrenewal shall be given by Registered Mail or by overnight courier to your address as stated above or to such other address as you give us notice of, as stated below. Upon your receipt of such notice, you may draw on us prior to the then-relevant expiration date for the unused balance of this letter of credit. If an expiration date is a Saturday, Sunday, legal holiday or other day on which we are not open for business for

the presentment of letters of credit, the expiration date shall automatically be extended to our next business day.

We agree to deliver payment in full of each draft made on this instrument, without any processing, check, renegotiation or other fees whatsoever, to your offices set forth above, or to such account as you may give us wiring instructions, within thirty-six (36) hours (not including Saturdays, Sundays or legal holidays) after the time of presentment.

We will accept any and all presentations and statements delivered pursuant to this instrument as conclusive, binding and correct. We have no duty to investigate, and shall not investigate or be responsible for, the accuracy, truthfulness, correctness or validity of any such presentment or statement, notwithstanding the claim of any person to the contrary.

Partial drawings are permitted. Draws under this letter of credit will be honored in the order received, as determined by us (any such determination to be conclusive), and to the extent that there remains an amount available to satisfy the most recent draw.

You may change your address for receipt of notices under this letter of credit by giving us notice of your changed address.

Notwithstanding Article 38D of the UCP (as defined below), this letter of credit is transferable, without any transfer fee, and may be transferred successively by subsequent transferees. Transfers shall be effected upon presentation of the original of this letter of credit and any amendments hereto, accompanied by our transfer form appropriately completed.

Except to the extent inconsistent with the express terms of this letter of credit, this letter of credit shall be governed by the Uniform Customs and Practices for Documentary Credits (2007 Rev.), International Chamber of Commerce Publication No. 600 (the "UCP") and, to the extent not so governed, by the statutes and case law of the District of Columbia.

Very truly yours,

[NAME OF ISSUING BANK]

By: \_\_\_\_\_  
Name:  
Title:



Exhibit A to  
Letter of Credit

[Date]

[NAME OF ISSUING BANK]  
[ADDRESS OF ISSUING BANK]

Attn: \_\_\_\_\_

Subject:       Your letter of credit number \_\_\_\_\_  
                  dated \_\_\_\_\_, 20\_\_ (the "Letter of Credit")

Gentlemen:

The undersigned hereby certifies that it is entitled to draw on the Letter of Credit under the terms of either (i) that certain Joint Development Agreement dated as of \_\_\_\_\_, 20\_\_ between the Washington Metropolitan Area Transit Authority and \_\_\_\_\_, as it may have been amended, supplemented, assigned or otherwise modified to date, or (ii) the Letter of Credit itself, as it may have been amended, supplemented, assigned or otherwise modified to date.

The undersigned hereby presents the Letter of Credit for payment in the amount of \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

Very truly yours,

[NAME OF THEN-CURRENT BENEFICIARY]

By: \_\_\_\_\_  
      Name:  
      Title:

**[EXHIBIT G**

**TEMPLATE GROUND LEASE**

Attached is a template form of Ground Lease that the parties envision using as the base form for Phase-specific Ground Leases. The attached template has not been fully-negotiated by the parties and is subject to such negotiation, each party being free, in its sole and absolute discretion, to agree or not agree to any changes.

In addition, there are provisions in the template form Ground Lease that are intended to be moved out of the Ground Lease and into the CC&Rs for the entire Project and/or into the Construction Agreements for each individual Phase. Those provisions are nevertheless included at this time so as to evidence the expectations of the parties as to what the CC&Rs and the Construction Agreements will address.]

# Model Agreement A-4: Joint Development Ground Lease Template

Particular attention should be paid to provisions highlighted in yellow when drafting an actual ground lease from this template. Some highlighting reflects blanks to be filled in, but other highlighting reflects provisions that may not be advisable to offer in a first draft or that may be highly negotiable.

## **GROUND LEASE**

**Washington Metropolitan Area Transit Authority,  
WMATA/Landlord**

and

\_\_\_\_\_  
Tenant

\_\_\_\_\_  
Metro Station

**[City, State]**

\_\_\_\_\_, 20\_\_

*[Landlord and Developer recognize that this form of Ground Lease will have to be customized to each individual parcel that is leased.]*

*[This Ground Lease assumes that the following will have occurred before this Ground Lease is signed. If that is not the case, new provisions will have to be added to this Ground Lease, or alternative arrangement made, in each case satisfactory to WMATA, to address them.*

- *A development plan has been agreed to by Developer and WMATA and, if applicable the applicable County and/or State, including:*
  - *A replacement plan for WMATA facilities has been approved by WMATA and signed by Developer and/or Tenant, the contract documents to implement that replacement plan are ready to be signed, and funding is available to implement the replacement plan*
  - *Any WMATA, State or County parking that needs to be relocated or replaced has been relocated or replaced (or arrangements satisfactory to WMATA/State/County for future relocation or replacement have been made) and the amount of parking allowed on this Leased Premises has been determined*
  - *“The deal” regarding any privately constructed parking garage to be used by Metro commuters has been documented*
- *The CC&Rs (if applicable) have been recorded in the land records (or are going to be recorded in the land records prior to the memorandum of this Ground Lease) and any parcel-specific addendum to the CC&Rs is agreed to*
- *Developer has represented and warranted to Landlord that Tenant is an Affiliate of Developer*
- *Tenant has been approved by Landlord pursuant to the Joint Development Agreement*
- *FTA approval is obtained [if then required by FTA regulations or policies then in place]*

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## GROUND LEASE

**THIS GROUND LEASE** is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ (the “**Effective Date**”), and is made by and between the **Washington Metropolitan Area Transit Authority**, an interstate compact agency of the Commonwealth of Virginia, the District of Columbia and the State of Maryland (“**Landlord**”), and \_\_\_\_\_, a \_\_\_\_\_ (“**Tenant**”).

### RECITALS:

**R-1. WHEREAS**, Landlord issued a [Joint Development Solicitation] [Request for Qualifications] [Request for Proposals] [other] dated \_\_\_\_\_, 20\_\_ for property located at the \_\_\_\_\_ Metro Station in [City, County, State] (the “**Overall Site**”); and

**R-2. WHEREAS**, on \_\_\_\_\_, 20\_\_ Landlord and \_\_\_\_\_ (“**Developer**”) entered into a Joint Development Agreement for the Leased Premises (as amended, supplemented or otherwise modified to date, the “**Joint Development Agreement**”) and Landlord’s Board of Directors authorized the negotiation and execution of the Joint Development Agreement on \_\_\_\_\_, 20\_\_; and

**R-3. WHEREAS**, the Overall Site is more fully described in **Section 2.01** and is intended to be subdivided into roads, WMATA Reserved Areas, open space, and a portion or portions for development to be ground leased [and/or sold] [on a phased basis] to [an Affiliate][Affiliates] of Developer; and

**R-4. WHEREAS**, Developer has requested that Landlord lease a portion of the Overall Site, such portion being the Leased Premises, to Tenant; and

**R-5. WHEREAS**, in compliance with the Joint Development Agreement, Landlord and Tenant wish to enter into this Ground Lease for a portion of the Leased Premises.

**NOW THEREFORE**, for and in consideration of the agreements, terms, covenants, and conditions hereinafter set forth, the parties hereby agree as follows:

## ARTICLE 1

### DEMISE AND TERM

#### **Section 1.01 Demise**

##### A. Leasing

Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, the Leased Premises on the terms and conditions set forth in this Ground Lease.

##### B. Fee vs. Leasehold Interest

Landlord's fee simple right, title and interest in the Leased Premises shall be and remain in Landlord on an unsubordinated basis for and during the Term. All Tenant Improvements shall be owned in fee simple by Tenant during the Term. On the expiration or the termination of this Ground Lease (by lapse of time or otherwise), sole ownership and control of the land that is the Leased Premises and of the Tenant Improvements, and the right to possess and use the same, shall automatically be vested solely in Landlord and the entirety of Tenant's estate, including its fee ownership in Tenant Improvements, shall automatically terminate. Notwithstanding Tenant's ownership of the Tenant Improvements during the Term, fee ownership of all facilities and structures built on any WMATA Reserved Area shall at all times be and remain solely in the name of WMATA. Landlord and Tenant shall execute, deliver and record such confirmations of the foregoing as may be reasonably requested by either of them from time to time.

#### **Section 1.02 Lease Term**

Unless terminated earlier, the term of this Ground Lease (the "Term") shall be for a period of **ninety-nine (99)** years commencing at 12:01 a.m., Eastern Time, on the Effective Date and ending at 11:59 p.m., Eastern Time, on the date that is the day before the **one hundredth (100<sup>th</sup>)** anniversary of the Effective Date. Said expiration date shall not be extended even if it is not a Business Day, for Unavoidable Delay or any other reason.

#### **Section 1.03: **Partial** Termination of Joint Development Agreement**

Each party hereto shall execute, deliver, and, if necessary or appropriate, record at Tenant's expense, any document reasonably requested to evidence the **partial** termination of the Joint Development Agreement **with respect to the Leased Premises** in accordance with the terms of the Joint Development Agreement; provided, however, that this termination shall not terminate any provision of the Joint Development Agreement that, by its terms, survives its expiration or termination.

## ARTICLE 2

### LEASED PREMISES

#### **Section 2.01 Defined**

The Leased Premises are shown on **Exhibit 2.01-1** and described in **Exhibit 2.10-2**. The Leased Premises are a portion of the Overall Site.

#### **Section 2.02 Exceptions and Reservations**

##### **A. WMATA Reserved Areas**

Tenant's lease of the Leased Premises is subject to WMATA's reservation of a portion(s) of the Leased Premises for the location, construction, reconstruction, maintenance, replacement and operation of WMATA Facilities and free and unfettered access to such portion(s) under, across and above the Leased Premises by WMATA personnel, agents and contractors for the purpose of installing, operating, maintaining, repairing, removing and replacing WMATA Facilities therein. [If there are any specific easement-type rights, really reservations, they can be detailed in this subsection.] The areas so excepted and reserved (not including the areas used for access as aforesaid) are hereinafter referred to as the "**WMATA Reserved Areas**" and are set forth in **Exhibit 2.02**. Unless otherwise specifically stated, the WMATA Reserved Areas include all areas on which the WMATA Facilities are, or are hereafter, located from time to time even if not shown on **Exhibit 2.02**. The floor area ratio and any other density-based development criteria for the Leased Premises shall not include the WMATA Reserved Areas.

##### **B. WMATA Replacement Facilities**

Tenant may be obligated by the terms of this Ground Lease to construct certain improvements for Landlord (the "**WMATA Replacement Facilities**") as described herein which may be within the WMATA Reserved Areas or which may be on nearby property owned by Landlord. When accepted by Landlord, these WMATA Replacement Facilities will thereafter be part of the WMATA Facilities.

##### **C. Developer's Decisions**

Tenant recognizes that under the Joint Development Agreement, Developer has made decisions and has or may have filed for and obtained Entitlements which affect the Leased Premises, including land use, access, roadway network, utilities (which may be shared), environmental assessments, and Landlord's operations and reservations. Tenant acknowledges and agrees to accept all of the same. Landlord makes no representation or warranty about the (non-)existence of any Entitlements, the likelihood of obtaining any Entitlements in the future, or the existence, value or quality of any of Developer's decisions, and any such representation or warranty on Landlord's part is expressly disclaimed.

### ARTICLE 3

#### SECURITY DEPOSIT

##### **Section 3.01    Posting**

###### A.     Delivery

Within two (2) Business Days after the Effective Date, Tenant shall deliver to Landlord a security deposit of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) (the “**Security Deposit**”). If Tenant fails to timely deliver the Security Deposit, Landlord may terminate this Ground Lease at any time upon Notice to Tenant until the Security Deposit is delivered.

###### B.     Letter of Credit

1.       Tenant shall have the right to deposit and maintain the Security Deposit as an irrevocable commercial standby letter of credit in form and substance acceptable to Landlord (the “**Letter of Credit**”).

2.       The Letter of Credit shall be in the form of **Exhibit 3.01.B** or, in Landlord’s sole and absolute discretion, may be in such other form but the Letter of Credit shall provide, at a minimum, the following: (i) the Letter of Credit must be issued by a commercial bank reasonably acceptable to Landlord and must be presentable in the Washington, D.C. metropolitan area; (ii) the Letter of Credit must be payable at sight without presentation of any other documents, statements, or authorizations and must allow for partial draws; (iii) the Letter of Credit must have a minimum term of one (1) year and provide for its automatic renewal on a year-to-year basis unless the issuer gives Landlord at least two (2) months’ prior written notice of nonrenewal, and the final expiration date of the Letter of Credit must not be any earlier than three (3) months after the scheduled expiration date of the Term; and (iv) the Letter of Credit must be freely transferable to any successor Landlord and Tenant shall be responsible for the payment of any transfer fee or other cost incident to such a transfer (or, in the alternative, Tenant must obtain a replacement Letter of Credit running to the benefit of a successor Landlord, and Tenant shall be responsible for the cost thereof, and upon receipt of the replacement Letter of Credit by Landlord the prior Letter of Credit shall be returned and may be cancelled); if Tenant fails to make such payment, Landlord may do so at Tenant’s expense and Tenant shall reimburse Landlord for the same, and shall pay late fees and default interest set forth in **Section 4.05**, as Additional Rent.

3.       Notwithstanding anything to the contrary in this Section, it is understood and agreed that Landlord’s willingness to accept a Letter of Credit as the Security Deposit in lieu of cash is an accommodation to Tenant and Tenant bears all risk of the issuer failing, refusing, or being unable to honor a draw on the Letter of Credit. If the issuer fails, refuses or is unable to honor a draw on the Letter of Credit, Tenant shall be obligated to immediately, upon Landlord’s giving Notice of such failure or refusal, deliver a replacement Letter of Credit meeting the terms of this subsection (or a cash equivalent) to serve as the Security Deposit.

## **Section 3.02    Terms Governing Security Deposit**

### **A.        Not Prepayment of Rent**

The Security Deposit is in addition to, and not in lieu of, any payment of the Rent.

### **B.        Draw by Landlord**

1.        The Security Deposit shall be held by Landlord as security for the faithful and timely performance by Tenant of all its obligations under this Ground Lease. Neither the requirement of the Security Deposit nor any draw on it shall, however, be deemed to make the Security Deposit a measure of liquidated damages or Landlord's sole and exclusive remedy. Landlord's right to draw on the Security Deposit is in addition to, and not in lieu of, Landlord's other remedies under this Ground Lease or at law or in equity. Within ten (10) days after each and every draw on the Security Deposit, Tenant shall deposit additional sums with Landlord in an amount sufficient to restore the Security Deposit to its original principal amount.

2.        The Security Deposit may be drawn upon by Landlord under any of the following circumstances: (a) if any Event of Default occurs; or (b) if the issuer of the Letter of Credit gives notice of nonrenewal to Landlord and a replacement Letter of Credit (or the cash equivalent) is not delivered to Landlord at least thirty (30) days prior to the non-renewed Letter of Credit's expiration date; or (c) if, without notice of nonrenewal having been given, the term of the Letter of Credit will expire within thirty (30) days and no replacement or renewal letter of credit (or cash equivalent) has been delivered to Landlord; or (d) if there is a dispute between Landlord and Tenant on the date which is thirty (30) days prior to the stated expiration date of the Letter of Credit; or (e) if Landlord at any time reasonably determines that the issuer of the Letter of Credit is not solvent or that the issuer has been put into conservatorship, receivership or any similar program by any governmental authority having jurisdiction over the issuer, or if Landlord at any time reasonably determines that there is a likelihood for any other reason that the issue would not honor the Letter of Credit if it was presented for payment; or (f) any other circumstance or event occurs that by the terms of this Ground Lease entitles Landlord to draw on the Security Deposit.

3.        If Landlord draws on the Letter of Credit at any time when Landlord is not otherwise entitled to seize the proceeds of the Security Deposit pursuant to the terms of this Ground Lease, Landlord shall retain the proceeds of the Letter of Credit as a cash Security Deposit until the first to occur of (i) a replacement Letter of Credit is delivered to Landlord, at which time Landlord shall return the cash to Tenant, (ii) an Event of Default or other circumstance entitling Landlord to seize the proceeds of the Security Deposit occurs, at which time Landlord shall have the rights to the Security Deposit as set forth in this Ground Lease, or (iii) Tenant is entitled to the return of the Security Deposit, at which time Landlord shall return the cash to Tenant.

4.        Tenant waives any and all rights it may have to contest, enjoin, or otherwise interfere with the issuer's honoring a draw on the Letter of Credit. Tenant's sole remedy shall be against Landlord directly via a claim that Landlord has made an improper draw.

C. Interest

If the Security Deposit is held in cash, Landlord shall hold the Security Deposit in an account which may or may not bear interest, at Landlord's sole option. No interest shall be payable to Tenant.

D. Commingling

Landlord may co-mingle the Security Deposit with other funds.

E. Transfer By Landlord Upon Sale

If Landlord sells or conveys the Leased Premises, the transferor Landlord shall transfer the Security Deposit to the transferee Landlord. Tenant shall thereupon look solely to the transferee Landlord for the handling and return of the Security Deposit. After such transfer occurs, the transferor Landlord shall have no further responsibility or obligation with respect to the Security Deposit.

F. No Assignment by Tenant

Tenant shall not assign, encumber, pledge, hypothecate or otherwise transfer its interest in the Security Deposit except as part of an Assignment or a Leasehold Mortgage. Landlord shall not be bound by any assignment, encumbrance, pledge, hypothecation or other transfer of the Security Deposit except as part of an Assignment or a Leasehold Mortgage that is implemented in accordance with the terms of this Ground Lease.

## ARTICLE 4

### RENT, FINANCIAL STATEMENTS AND AUDITS

#### **Section 4.01 Rent Generally**

All payments owed to Landlord pursuant to this Ground Lease shall be considered "**Rent.**"

A. Rent Payment

1. Unless Landlord specifies otherwise, all payments to Landlord shall be made by electronic funds transfer to such account(s) as Landlord may direct from time to time. Nothing in this Section precludes Landlord from accepting payment by other means from time to time in its sole and absolute discretion, but no such acceptance by Landlord shall constitute a precedent, a waiver of this Section or a bar to Landlord's enforcement of this Section. If Landlord issues Tenant an account number, that account number shall accompany all payments. Unless Landlord specifies otherwise from time to time by Notice to Tenant, payments shall be made to Landlord as follows:



Routing Transit Number 121000248  
Wells Fargo Bank, N.A.  
1753 Pinnacle Drive  
3<sup>rd</sup> Floor, South Tower  
McLean, Virginia 22102

WMATA Account Number: 2000035167097  
Account Name: Washington Metro Area Transit Authority Revenue Fund Account  
Account Address: 600 Fifth Street, N.W.  
Washington, D.C. 20001

Reference Information: include as applicable: (1) invoice number; (2) customer/vendor number assigned by WMATA; (3) reason for wire; (4) project name; and (5) name of WMATA contact person.

If payments by electronic funds transfers are not possible at any given time, payments shall be sent to:

WMATA  
P.O. Box 75971  
Baltimore, MD 21275-5971

2. While WMATA is the Landlord, each time Rent is paid, Tenant shall also notify WMATA of each and every payment of Rent, including the date, dollar amount, and the category(ies) of Rent to which the payment is attributable. Notwithstanding **Article 24**, such notice shall be given by e-mail to WMATA's Office of Real Estate and Parking (or its successors) at [realestate@wmata.com](mailto:realestate@wmata.com) or by such other means or to such other address as Landlord may give Notice of from time to time.

B. Independent Covenant

Tenant recognizes that the Rent payment obligation is an independent covenant by Tenant running to Landlord's benefit, and that the Rent payment obligation is separate from any duties or responsibilities of Landlord that may be asserted to delay or to defeat, in whole or in part, this undertaking and commitment of Tenant. Unless and to the extent otherwise expressly stated in this Ground Lease, Rent shall be paid by Tenant without notice, demand, diminution, reduction, suspension, condition or offset.

C. Triple Net

Except as may otherwise be expressly set forth elsewhere in this Ground Lease, this Ground Lease is a "triple net" lease. Except as may otherwise be expressly set forth elsewhere in this Ground Lease, all Rent is payable free or net of all costs, expenses, charges, liabilities, obligations, claims, demands, fees, fines, Impositions, or other sums arising from or relating to the Project, regardless of their kind or nature, however characterized, foreseeable or unforeseeable, ordinary or extraordinary. Nothing in this subsection affects the applicability of any provision of this Ground Lease that expressly obligates Landlord to pay any sums.

## Section 4.02 Base Rent

### A. Rent Components

Tenant shall pay Landlord as **“Base Rent”** on the Effective Date the Net Development Value. The Development Value shall be established using the Appraisal Process, which shall assume that the Leased Premises has been improved by any WMATA Replacement Facilities necessary for the Project. The Development Value shall be multiplied by the number of square feet of each type of use and summed across all use types in the Project, but in no event less than zero. The Development Value as so determined is due and payable in a lump sum to WMATA at execution of this Ground Lease. No credit is given against the Development Value for the cost of any interim WMATA Replacement Facilities or for any general infrastructure for the Project.

### B. Definitions

1. **“Aggregate Current Value”** is established by multiplying the Current Value for each use within a component by the square footage of each type of use of the component and adding each result together.

2. **“Aggregate Development Value”** is established by multiplying the Development Value for each use within a component by the square footage of each type of use of the component and adding each result together.

3. **“Appraisal Method”** is defined in the Definitions Article.

4. **“Current Value”** is established by agreement of the parties or by the Appraisal Method for the intended uses of the Leased Premises as a dollar value per square foot of floor area ratio permitted on the Leased Premises for office, retail, hotel and multifamily residential uses as entitled under zoning in effect on the Effective Date and assuming that the Leased Premises are ready for construction on the Effective Date. If the Leased Premises are used or permitted for two or more uses, then the Current Value shall be determined separately for each use and the separate values shall be added together to create a single Current Value for the Leased Premises.

5. **“Development Value”** is established by agreement of the parties or by the Appraisal Method for the intended uses of the Leased Premises as a dollar value per square foot of floor area ratio permitted on the Leased Premises for office, retail, hotel and multifamily residential uses as entitled under zoning in effect on the Effective Date and again immediately prior to the date on which the applicable governmental authorities issue a certificate of occupancy or equivalent allowing the use and occupancy of the Tenant Improvements. If the Leased Premises are used or permitted for two or more uses, then the Development Value shall be determined separately for each use and the separate values shall be added together to create a single Development Value for the Leased Premises.

6. **“Net Development Value”** equals the Aggregate Development Value minus the Aggregate Current Value, except that in no case will the Net Development Value be less than the Aggregate Current Value.

### Section 4.03 Participating Rent

#### A. Payable

Tenant shall pay Landlord Participating Rent as set forth in the CC&Rs. The terms of the CC&Rs applicable to the payment of Participating Rent are incorporated into this Ground Lease by this reference.

OR

Except as set forth in the following sentence, Participating Rent shall be paid by Tenant to Landlord annually no later than April 1 of each calendar year. As to the installment of Participating Rent that is due and payable for the final full or partial calendar year during the Term, such installment shall be paid by Tenant to Landlord within one hundred twenty (120) days following the date upon which this Ground Lease expires or is terminated. The payment of Participating Rent shall be accompanied by a copy of the financial statement required by **Section 4.07**.

#### B. Participating Rent Defined.

**"Participating Rent"** shall be equal to two percent (2%) of **"Gross Income"** actually received or, as set forth below, deemed received, by Tenant, using cash basis accounting, without regard to debt service, real estate taxes, operating expenses, capital expenses, other costs and expenses, internal rate of return, return on investment, developer's fees or any other profit or return to the Tenant or any third party, subject to the following:

1. Gross Income shall include the proceeds of business interruption insurance and rent loss insurance, or such other insurance as may from time to time replace such insurance as is commonly issued as of the commencement of the Term, but shall not include sums received by Tenant as the proceeds of other insurance paid as a result of casualty loss or property damage.

2. Gross Income shall not include the proceeds of Capital Events, including the sale of any residential condominium units.

3. In the event that the Leased Premises are developed as a residential condominium and sells fifteen percent (15%) or fewer, measured by residential unit count, of the residential units in the Leased Premises, the rents generated by any of such residential condominium units that are leased by Developer, Tenant or any of their Affiliates shall be included in Gross Income. In the event that the Leased Premises are developed as a residential condominium and sells more than fifteen percent (15%), measured by unit count, of the residential units in the Leased Premises, the rents generated by any of such residential condominium units that are leased by Developer, Tenant or any of their Affiliates shall not be included in Gross Income.

4. Any rents received by any third party who is not an Affiliate of Developer or Tenant shall not be included in Gross Income except to the extent Developer, Tenant or an Affiliate receives any of the same from the third party. Without limiting the foregoing, Gross Income does not include any rents received by non-Affiliate third party owners of any residential condominium units on the Leased Premises, whether received directly by such third party owners or via a rental pool, but revenues received by Tenant

or its Affiliates from leasing residential condominium units on behalf of third party unit owners or from operating a rental pool shall be included in Gross Income.

5. Whenever Tenant is in whole or in part an owner-occupier of the Leased Premises or an Affiliate of a space tenant who is paying Tenant rent other than fair market rent or there exists any other circumstance under which the occupant of the Leased Premises is not paying fair market rent to Tenant, Gross Income shall be “deemed Gross Income” (as hereinafter defined) instead of Gross Income actually received. Tenant shall promptly Notify Landlord if and when the circumstances defined in the first clause of this subparagraph exist. Deemed Gross Income shall be determined as follows:

(a) If Tenant or an Affiliate of Tenant was the occupant of the Leased Premises under a prior arm’s-length Sublease whose originally-stated term had not expired, the deemed Gross Income shall be the rent and other consideration payable under that Sublease for as long as the term of that Sublease remains in effect or would have remained in effect had it not been terminated.

(b) In all other circumstances, the deemed Gross Income shall be the equivalent of then-applicable market rent and any other consideration for the applicable portion of the Leased Premises that would be payable to Tenant under a hypothetical arm’s-length Sublease for the portion of the Leased Premises occupied by Tenant or an Affiliate of Tenant. For purposes of determining the rent and other consideration that would be payable under such an arm’s-length Sublease, the deemed rent shall be one hundred percent (100%) of the amount of base annual rent per rentable square foot then being charged in comparable buildings located **within one (1) mile of the Metro Station** (the “Comparable Market”) for space comparable to the Tenant Improvements and taking into consideration all other relevant factors establishing similarity or dissimilarity between the comparable lease and the occupancy of the Tenant Improvements by the space tenant, including, without limitation, size and location of the Tenant Improvements, building standard work letter and/or tenant improvement allowances previously given, if any, quality and quantity of any existing tenant improvements, quality and creditworthiness of the space tenant, amenities offered, and other generally applicable concessions, if any. The process by which deemed Gross Income is determined is set forth below.

(c) Landlord shall Notify Tenant of Landlord’s proposed deemed Gross Income. Tenant shall have thirty (30) days thereafter in which to Notify Landlord whether Tenant agrees or disagrees with Landlord’s proposal. Tenant’s failure to give timely notice shall constitute acceptance of Landlord’s proposal. If Tenant Notifies Landlord that Tenant disagrees, and if Landlord and Tenant do not agree on the deemed Gross Income within thirty (30) days after Tenant gives Notice of disagreement, then within thirty (30) days after the expiration of the preceding thirty (30) day period, each party shall Notify the other setting forth the name and address of a Broker (as hereinafter defined) selected by such party who has agreed to act in such capacity to determine the deemed Gross Income. If either party shall fail to select a Broker as aforesaid, the deemed Gross Income shall be determined by the Broker selected by the other party. Each Broker shall thereupon independently make his/her determination of the market rent and any other consideration that is applicable within twenty (20) days after the appointment of the second Broker. If the two Brokers’ determinations are not the same, but the higher of such two values is not more

than one hundred five percent (105%) of the lower of them, then the deemed Gross Income shall be deemed to be the average of the two values. If the higher of such two values is more than one hundred five percent (105%) of the lower of them, then the two Brokers shall jointly appoint a third Broker within ten (10) days after the second of the two determinations described above has been rendered. The third Broker shall independently make his determination of the market rent and any other consideration that is applicable within twenty (20) days after his appointment. The highest and lowest determinations of value among the three Brokers shall be disregarded and the remaining determination shall be deemed to be the deemed Gross Income.

(d) **“Broker”** shall mean a real estate broker or salesperson who is licensed in the jurisdiction in which the Leased Premises are located, who has been regularly engaged in such capacity in the business of commercial office leasing and located in the Comparable Market for at least ten (10) years immediately preceding such person’s appointment, and who is not and for the three (3) years preceding his appointment has not been an employee of the party employing him or the spouse, sibling, child, aunt, uncle, niece, nephew, first cousin, grandparent (or great-grandparent) or grandchild (or great-grandchild) of any employee of the party employing him. Each party shall pay for the cost of its Broker and one-half of the cost of the third Broker.

(e) Within thirty (30) days after Notice requesting the same, such Notice to be given after (i) the date on which Landlord and Tenant agree upon the actual or the deemed Gross Income or (ii) the date on which the deemed Gross Income is otherwise determined by the method aforesaid, Landlord and Tenant shall execute an amendment to this Ground Lease setting forth the actual or the deemed Gross Income. The failure of either party to execute such amendment shall not affect the legally binding nature of Tenant’s obligation to continue paying Participating Rent in accordance with the determination of actual or deemed Gross Income.

**C. Initial Abatement.**

No Participating Rent shall be payable until twelve (12) calendar months after the Leased Premises has received its certificate of occupancy (or equivalent) from the Local Jurisdiction. In the event different uses or Tenant Improvements on the Leased Premises receive their certificates of occupancy (or equivalent) at different times, the twelve-month abatement period for each such use or Tenant Improvement shall be calculated separately from the date of issuance of the certificate of occupancy (or equivalent) for that use or Tenant Improvement.

**D. Commercially Reasonable Business Efforts to Keep Space Leased**

Tenant and its management agent shall use Commercially Reasonable Business Efforts to lease all space in the Tenant Improvements available for rent at the then-current fair market value rate for similar properties and uses in the same jurisdiction as the Leased Premises. If Tenant fails to do so, any space that is not so leased shall be deemed to be leased at the then-current fair market value rent, determined as set forth in **Section 4.03.B**, for purposes of calculating Participating Rent. Notwithstanding the obligation set forth in the first sentence of this subsection, occupancy of space by Tenant or its Affiliates shall not be a default, but such occupancy shall not result in any reduction in Rent payable; in the event Tenant or its Affiliates shall occupy the Tenant Improvements in part or in their entirety, Participating Rent shall be

determined in accordance with **Section 4.03.B.**

#### **Section 4.04 Capital Rent**

##### **A. Payment**

Tenant shall pay Landlord Capital Rent as set forth in the CC&Rs. The terms of the CC&Rs applicable to the payment of Capital Rent are incorporated into this Ground Lease by this reference.

**OR**

Tenant shall pay Landlord “**Capital Rent**” equal to \_\_\_\_\_ percent (\_\_\_%) of Tenant’s share of the Net Proceeds of Capital Events. Tenant shall pay Landlord the Capital Rent on the first to occur of (i) five (5) Business Days after the occurrence of a Capital Event or (ii) any distribution from the Capital Event being made to any director, officer, partner, member, investor, shareholder or other principal in Tenant. No later than Tenant’s submission of the Capital Rent, Tenant shall deliver to Landlord a copy of the settlement statement for such Capital Event and the calculations supporting the amount of Capital Rent, each certified by Tenant to be true, complete and correct. The assignor and the assignee, the seller and the buyer, the transferor and the transferee, or any other combination of Tenant and a third party shall be jointly and severally liable for payment of the Capital Rent; the preceding clause shall not apply to a Leasehold Mortgagee who is not, and whose Affiliates are not, a party to the Capital Event in any capacity other than arms’-length lender.

##### **B. Capital Event Notices**

Tenant shall deliver to Landlord Notice of an anticipated Capital Event promptly following the execution of a contract, loan commitment or other binding agreement in anticipation of such anticipated Capital Event and no less than thirty (30) days prior to the scheduled closing date of the anticipated Capital Event. The Notice shall set forth Tenant’s preliminary estimate of the gross proceeds, Net Proceeds and Capital Rent anticipated therefrom. The Notice shall be for informational purposes only, and shall not create an expectation of, nor entitle Landlord to rely upon, the closing of such anticipated Capital Event or the amount of Capital Rent therefrom; Landlord shall be entitled to Capital Rent only upon the occurrence of a Capital Event and only in the amount based upon the actual Net Proceeds of such Capital Event.

#### **Section 4.05 Late Fees, Interest and Collection Costs**

##### **A. Late Fee**

In the event that any Rent due Landlord is not paid within five (5) Business Days after its due date, a late fee of five percent (5%) of the overdue payment shall automatically be due and payable as Additional Rent, without any Notice or other demand being necessary. The payment of such a late fee shall not constitute a waiver on the part of Landlord of any rights or remedies arising out of an Event of Default for late payment.

##### **B. Late Interest**

In the event that any Rent due Landlord shall be overdue for a period of five (5) Business Days or more from the specified due date, interest at the Default Rate on the sum overdue shall be payable

retroactive from the date the payment was first due until the date actually paid to Landlord shall immediately begin to accrue and be payable as Additional Rent to Landlord, without Notice or other demand being necessary. The payment of such late interest shall not constitute a waiver on the part of Landlord of any rights or remedies arising out of an Event of Default.

C. Costs of Collection

If Landlord sends a default Notice for nonpayment of Rent, undertakes collection efforts, or initiates any legal proceeding for any Rent, Tenant shall pay as Additional Rent any reasonable attorneys' fees, court costs and other collection costs Landlord may incur.

**Section 4.06 Recharacterizing Gross Income or Net Proceeds**

Tenant shall not take any action to recharacterize, or the effect of which is to recharacterize, rents, income, revenues, costs or expenses of the Project so as to result in a diminution in Rent to Landlord, or take any action to recharacterize, or the effect of which is to recharacterize Gross Income or Net Proceeds.

**Section 4.07 Financial Statements**

Not later than the April 1 following the end of each calendar year within the Term, or within ninety (90) days after the last full or partial calendar year of the Term, as applicable, Tenant shall submit to Landlord a financial statement for such year with respect to the Leased Premises prepared by Tenant's independent certified public accountant and reported on the same basis as Tenant reports its federal income tax. Each such annual financial statement shall report in separate categories each type of revenue and expense related to the operation, financing and/or sale or other transfer or disposition of the Leased Premises for that calendar year. Tenant or its independent certified public accountant shall certify the accuracy and completeness of the financial statement.

**Section 4.08 Inspection of Tenant's Books and Independent Audits**

A. Landlord's Rights

Landlord or its designated representative(s) may, during normal business hours and upon at least five (5) Business Days' advance Notice to Tenant, (1) inspect and make copies of the books and records of Tenant and/or any current or former management agent, property manager, financial manager or other similar provider of similar services, and/or (2) cause a formal audit to be made by an independent certified public accountant of the books and records of Tenant and/or any current or former management agent, property manager, financial manager or other similar provider of similar services, but only with respect to the Project and for the purpose of verifying any financial statement submitted, or that was required to be submitted but was not submitted, to Landlord pursuant to this Ground Lease. Tenant shall cause any such third party to provide Landlord or its designated representative(s) with the books and records and to cooperate in Landlord's exercise of its rights under this **Section 4.08**. Except as set forth in **Section 4.08.B** below, any such inspection or audit must be conducted within a period of three (3) years after a financial statement is submitted by Tenant or, if no required financial statement was submitted when required, at any time before that financial statement is submitted. Landlord shall be limited to one (1) inspection and one (1) audit per calendar year, except that if there is a Capital Event then Landlord may conduct one

additional inspection and one additional audit for each such Capital Event. Such inspection or audit by Landlord shall not unreasonably disturb or interfere with the operations of the Tenant Improvements or of the management company or entity then managing the Tenant Improvements. Any amounts determined to be owed to Landlord as a result of any such inspection or audit, together with late fees and late interest as provided in **Section 4.05** retroactive to the date payment should have been made, shall be payable to Landlord within fifteen (15) days following Notice to Tenant that such amount is due.

B. Tenant's Books and Records

Copies of all (i) Subleases, (ii) purchase and sale contracts between Tenant and any third parties that result in an Assignment, (iii) Leasehold Mortgages and accompanying promissory notes, construction loan agreements and other documents evidencing or securing indebtedness necessary or appropriate to establish that the principal amount secured by the Leasehold Mortgage(s) is in fact the total amount of that Capital Event, and (iv) other materials not listed in the foregoing clauses, in each case to the extent relevant to the determination of any amounts owed to Landlord under this Article, including settlement statements, shall be available for inspection copying and audit by Landlord or its agents or auditors, except that, in the case of residential Subleases, if there are more than twenty (20) residential Subleases then in lieu of providing each residential lease Tenant may provide a copy of its form residential lease and a statement of any material discrepancies between such form lease and any Subleases with residential Subtenants. Tenant's failure to provide or to cause any third party to provide any financial statement to Landlord as required by this Article or to allow Landlord access to its books, records, and leases as required by this Article, or any interference by Tenant or its employees, agents or contractors with Landlord's exercise of its inspection or audit rights under this Article shall toll the period for inspection and audit and shall constitute a default under this Ground Lease subject to applicable notice and cure provisions. Except for the foregoing that is otherwise publicly available, Landlord shall hold such materials confidential in accordance with **Article 29**.

C. Underpayment/Overpayment

1. In the event it is ever determined that Tenant has underpaid Participating Rent and/or Capital Rent, then Tenant shall pay the shortfall to Landlord within thirty (30) days after Landlord Notifies Tenant of the amount of the shortfall.

2. In the event that it is ever determined by any inspection or audit conducted by Landlord that Tenant has paid more Rent to Landlord than was due, then the amount of the overpayment shall be credited as follows: first, as set forth in **Section 4.08.D**; second, to replenish the Security Deposit if replenishment is required under **Section 3.02.B**; third, to any previously due but unpaid Rent; fourth, to the next installment(s) of Rent until the overpayment is exhausted; and fifth, if any overpayment has not been credited as set forth in the preceding clauses when the Term expires in accordance with its terms without there being any Rent owed to Landlord, the balance shall be refunded to Tenant upon such expiration.

D. Costs

Any such inspection or audit shall be at Landlord's sole cost and expense except that if the inspection or audit determines that: (1) the amount owed to Landlord was understated by five percent (5%) of the correct amount or more, then (a) the inspection or audit shall be at Tenant's expense, payable upon demand as Additional Rent and (b) the amount underpaid shall bear interest at the Default Rate retroactive



to the date it should originally have been paid through the date it is paid; or (2) the amount paid to Landlord exceeded the amount that was actually due to Landlord, the cost of the inspection or audit shall first be credited against any overpayment before any credit is given to Tenant.

#### **Section 4.09     Priority of Payment**

Notwithstanding anything contained to the contrary in any other provision of this Ground Lease, payment of the Rent shall have priority over any other obligation of Tenant. Without limiting the foregoing, payment of Rent is not subordinate to Leasehold Mortgages.

#### **Section 4.10     Renegotiation of Rent**

If the use(s) of the Leased Premises at any time changes, if Alterations are made, or if the Tenant Improvements are at any time proposed to be (or, if Landlord determines, have been) re-developed during the Term such that the value of the Leased Premises and/or the Tenant Improvements are greater than the value anticipated on the Effective Date by this Lease, Tenant shall give Landlord prompt Notice of such proposal (or, in the case of a Landlord determination, complete information about such re-development), and then Base Rent and/or Participating Rent will be equitably readjusted by agreement of Tenant and Landlord. The effective date of any change in Rent shall be the date of the change in the use of the Leased Premises or the date of substantial completion of the relevant Tenant Improvements, which effective date may be retroactive. If no agreement can be reached within one hundred eighty (180) days after Tenant's Notice to Landlord, or, if applicable, after Landlord has given Notice to Tenant of Landlord's determination that a re-development has occurred, then the current fair market value of Net Development Value and Participating Rent resulting from such increase in value shall be decided by the Appraisal Method. Under no circumstances will any Rent be reduced.

### **ARTICLE 5**

#### **IMPOSITIONS**

##### **Section 5.01     Tenant's Obligation to Pay Impositions**

###### **A.     Tenant's Obligation**

Tenant shall pay or cause to be timely paid all Impositions before any fine, penalty, interest or cost may be added thereto or become due or is imposed by operation of law for the nonpayment thereof. Tenant shall give notice to Landlord of Tenant's payment of all Impositions as and when paid. Notwithstanding **Article 24**, such notice shall be given by e-mail to WMATA's Office of Real Estate and Parking (or its successors) at [realestate@wmata.com](mailto:realestate@wmata.com) or by such other means or to such other address as Landlord may give Notice of from time to time. Tenant shall promptly provide Landlord with Notice, including a copy, of any notice Tenant receives alleging that Tenant has not paid any Imposition when due. Tenant acknowledges that WMATA and the WMATA Facilities are tax-exempt and that it shall not look to WMATA for the payment of any Imposition.

B. Landlord's Exemption Benefiting Tenant

Although WMATA and the WMATA Facilities are tax-exempt, that tax exemption does not benefit Tenant or any property now or hereafter owned by Tenant. If at any time during the Term due to changes in applicable law Tenant becomes entitled to the benefit of Landlord's tax exemption so that Tenant is relieved of liability for the payment of any Imposition on the Leased Premises or the Tenant Improvements without a substitute Imposition or an increase in another Imposition being implemented in place thereof, Tenant shall pay to Landlord as Additional Rent one-half (1/2) of the savings resulting therefrom (after payment or reimbursement to third parties of all costs of effectuating such savings) as such savings are realized from time to time. Such payments shall be payable to Landlord on the date(s) on which the Imposition from which Tenant has been relieved of liability would have been due and payable.

**Section 5.02 Payment of Impositions in Installments**

A. Fiscal Period Included Within Lease Term

If by law any Imposition may be paid in installments (regardless of whether interest shall accrue on the unpaid balance of such Imposition), Tenant may exercise the option to pay the Imposition and any accrued interest on the unpaid balance in installments. In such event, Tenant shall pay the installments as they become due during the Term. Those installments which are to become due and payable after the expiration or sooner termination of the Term, but which relate to a fiscal period fully included in the Term, shall be paid in full by Tenant during the Term.

B. Fiscal Period Extending Past Lease Term

Any Imposition which relates to a fiscal period partly occurring within the Term and partly occurring either prior to the commencement of the Term or after the expiration of the Term shall be adjusted between Landlord and Tenant so that Tenant pays only that portion of such Imposition which is attributable to the portion of the fiscal period included in the Term, and Landlord, if so obligated, shall pay the remainder thereof.

C. Refunds

Any refunds of an Imposition paid by Tenant shall be allocated between Landlord and Tenant in accordance with their respective obligations, if any, to have paid that Imposition in accordance with this Section.

**Section 5.03 Challenge to Impositions**

A. Tenant's Rights

Tenant shall have the right to contest the amount or validity, in whole or in part, of any Imposition by appropriate proceedings diligently conducted in good faith, but, subject to the following sentence, only after payment of such Imposition. However, if the applicable taxing authority allows such a contest to be made without paying the Imposition, then Tenant may postpone or defer payment of such Imposition until the first to occur of the expiration or termination of this Ground Lease or a final decision is rendered on the

contest if:

1. Neither the Tenant Improvements and/or the Leased Premises, nor any part thereof, nor Landlord's interest in the Leased Premises, would by reason of such postponement or deferment be in danger of being forfeited or lost; and

2. Neither Landlord nor any director, officer or employee of Landlord will be in jeopardy of any payment obligation or of any fine, penalty or other civil or criminal sanction; and

3. Tenant establishes an escrow account with a recognized financial institution in the amount so contested and unpaid, together with all interest, fines and penalties in connection therewith, and all charges that may or might be assessed against or become a charge on the Tenant Improvements and/or the Leased Premises or Landlord's interest in the Leased Premises, or any part thereof, in such proceedings. Upon the termination of any such proceedings, the escrow account and Tenant, as necessary, shall pay the amount of such Imposition or part thereof, if any, as finally determined in such proceedings, together with any costs, fees, including attorney's fees, interest, penalties and any other liability in connection therewith. The provisions of this Section and the establishment of an escrow account are not intended by the parties to create any rights or third-party beneficiary rights in a non-party to this Ground Lease in the escrow account monies.

**B. Landlord's Obligations**

Landlord shall not be required to join in any proceedings referred to in this Section unless the provisions of any law, rule or regulation at the time in effect shall require that such proceedings be brought by or in the underlying fee owner's name. In such an event, Landlord shall join in such proceedings or permit the same to be brought in Landlord's name. Landlord shall not ultimately be subjected to any liability for the payment of any fees, including attorney's fees, costs and expenses in connection with such proceedings. Tenant agrees to pay such fees, including reasonable attorney's fees costs and expenses or, on demand, to make reimbursement to Landlord for such expenses.

**C. Landlord's Rights**

If Tenant does not intend to contest the amount or validity of any Imposition, Tenant shall give Notice to Landlord at least thirty (30) days before the last date by which a contest of the same may be filed of Tenant's intent to not contest the Imposition. Landlord may thereupon contest the Imposition. If Landlord contests an Imposition, the cost of doing so shall be paid by Landlord but Tenant shall reimburse Landlord for such costs as Additional Rent out of any refund received by Tenant in the Imposition challenged by Landlord and out of any reduction in Impositions realized by Tenant as a result of such challenge by Landlord, but only to the extent that such refund or reduction is realized or received by Tenant.

**Section 5.04 Evidence of Payment of Impositions**

Tenant shall furnish Landlord with satisfactory evidence of the payment of any Imposition promptly after Tenant pays the same. Notwithstanding **Article 24**, such notice shall be given by e-mail to WMATA's Office of Real Estate and Parking (or its successors) at [realestate@wmata.com](mailto:realestate@wmata.com) or by such other means or to such other address as Landlord may give Notice of from time to time.

## **ARTICLE 6**

### **COMPLIANCE WITH LAWS**

#### **Section 6.01 Americans with Disabilities Act**

##### **A. Tenant Improvements and WMATA Replacement Facilities**

All Tenant Improvements and, to the extent designed and/or constructed by Tenant or an Affiliate of Tenant, WMATA Replacement Facilities shall comply with Titles II and III of the Americans with Disabilities Act, 42 USC §12101, et seq., as amended, or any successor or comparable Federal, State or local law hereafter adopted, and any regulations promulgated thereunder ("**ADA**"). If directly and solely as a result of the Tenant Improvements or, to the extent designed and/or constructed by Tenant or an Affiliate or Tenant, the initial WMATA Replacement Facilities, or any subsequent alteration, addition or modification to the Tenant Improvements (but not any subsequent alteration, addition or modification of the WMATA Replacement Facilities), ADA-related improvements to the Metro Station or other WMATA Facilities are required by law, Tenant shall be solely responsible for the cost of all such improvements except as provided in **Section 6.01.B**.

##### **B. Metro Station**

Notwithstanding the above, Tenant shall not be responsible for any ADA- related improvements to the Metro Station whose need predates the date of Final Completion of the Tenant Improvements or any WMATA Replacement Facilities and which would be required to be made to the Metro Station regardless of the Tenant Improvements or WMATA Replacement Facilities or which WMATA is implementing at Metrorail stations in general as part of system-wide improvements or alterations.

#### **Section 6.02 Civil Rights Act**

At all times hereafter with respect to the Leased Premises (other than any WMATA Reserved Areas), including in connection with construction or operation by Tenant and/or Tenant's employees, agents and contractors of any Tenant Improvements or facilities (other than WMATA Facilities) on the Leased Premises, Tenant will comply and will cause its employees, agents and contractors to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §200d, et seq., (prohibiting discrimination based on race, color or national origin), and as applicable 49 C.F.R. §§23.7 and 27.9(b), and 42 U.S.C. Sec. 12101, et seq., as amended (prohibiting discrimination based on disability and requiring compliance with the ADA).

#### **Section 6.03 Other Laws, Regulations and Ordinances**

Tenant, at its sole cost and expense, shall promptly comply with all present and future applicable laws, regulations and ordinances not specifically addressed in this Article and shall cause its Subtenants to do so, except that matters covered by **Article 7** shall be governed by that Article. To the extent that Tenant's compliance shall require the cooperation and participation of Landlord and Landlord is so Notified by Tenant, Landlord agrees to so cooperate and participate; provided that in no event shall WMATA as

Landlord be required to incur any out-of-pocket expense, impose a significant burden on its personnel, or impose significant usage burdens on the WMATA Facilities in so cooperating, the determination of a significant burden being a WMATA Unconditional Approval Matter. Said cooperation and participation shall include the right, but not the obligation, of Landlord to cause or attempt to cause such public authorities to waive or revoke the request for a specific action, at no cost to Landlord, upon the request of Tenant.

#### **Section 6.04 Right to Contest**

After Notice to the other party, each party shall have the right to contest by appropriate legal proceedings diligently conducted in good faith, in its name and without cost or expense to the other party, the validity or application of any law, regulation or ordinance. The other party may participate at its own expense. No such contest shall diminish, abrogate or otherwise affect any of the contesting party's obligations under this Ground Lease. Notwithstanding the foregoing, Tenant may not contest if the contest may (i) unreasonably burden or otherwise cause any portion of the Leased Premises or any interest of Landlord or Tenant to be in danger of being forfeited or lost or (ii) place either Landlord or Tenant, or any director, officer, partner, member, shareholder, other principal, or employee thereof in danger of being criminally or civilly fined, penalized or subject to other sanction.

#### **Section 6.05 Compliance with Certificate of Occupancy**

Tenant shall not use or allow the Leased Premises and/or the Tenant Improvements, or any part thereof, to be used or occupied for any dangerous or unlawful purpose, or in violation of any certificate of occupancy, residential use permit or any equivalent authorization issued by applicable governmental authorities. Additionally, Tenant shall not suffer any act to be done or any item to be brought thereon which may be dangerous or may make void or voidable any insurance then in force.

#### **Section 6.06 Business Improvement Districts**

##### **A. Existing BID**

If the Leased Premises are at any time within a business improvement district or equivalent, then (i) Tenant shall be solely responsible for paying all Impositions relating thereto and (ii) Tenant shall have the power to participate in the governance of the business improvement district or equivalent for as long as no Tenant Disqualifying Circumstance exists and that Tenant is then current in its payment of any Impositions relating to the business improvement district or equivalent. If such condition fails, then Landlord shall have the power to participate in governance in lieu of Tenant until such time as the condition is no longer failed.

##### **B. Proposed BID**

If the Leased Premises are not now in a business improvement district or equivalent and a proposal is hereafter made to include the Leased Premises in a business improvement district or equivalent that will mandate the payment of taxes, fees, levies or other charges and the owner of the Leased Premises is entitled to vote for or against such proposal, then Tenant shall have the power to so vote except during the duration of a Tenant Disqualifying Circumstance, in which event Landlord shall have the power to so vote.

## **Section 6.07     Patents, Trademarks and Royalties**

Tenant will not infringe upon any other person's or entity's patent, copyright, trademark or other exclusive rights. Tenant will not engage in unfair competition or business practices or violate any laws with respect to labelling or governing the description of merchandise or services. Tenant will not violate so-called "fair trade" laws. All payments for royalties and patent rights, registered designs, trademarks or names, copyright and other protected rights, and all fees which are or became payable for or in connection with any matter or thing used or required to be used in the performance of this Ground Lease or to be supplied under this Ground Lease, shall solely be the responsibility of Tenant and shall be paid by Tenant to those to whom such payments are owed and at the time which they become payable.

## **Section 6.08     Notices Alleging Noncompliance**

Tenant shall promptly Notify Landlord of any notice, including by providing a copy thereof, Tenant receives from any governmental authority, utility company, insurance carrier, insurance rating bureau, Leasehold Mortgagee, and/or issuer of any Letter of Credit to the effect that Tenant is not in compliance with applicable law, with any monetary or non-monetary obligation owed by Tenant, that insurance coverage or a Letter of Credit may not be renewed, or that the Leased Premises may be subjected to a change in Entitlements. The giving of such Notice to Landlord does not create or imply any obligation on Landlord's part to cause Tenant to correct the situation, correct the situation itself, or take any other action, and any such obligation is expressly negated hereby.

## **ARTICLE 7**

### **ENVIRONMENTAL MATTERS**

## **Section 7.01     Hazardous Materials**

### **A.     Tenant's Covenants**

Tenant represents, warrants, and covenants to Landlord that:

1.     Tenant, the Leased Premises and the Tenant Improvements will remain in compliance with all applicable laws, ordinances, and regulations (including consent decrees and administrative orders) relating to public health and safety and protection of the environment, including those statutes, laws, regulations, and ordinances identified in the definition of Hazardous Materials, all as amended and modified from time to time (collectively, "**Environmental Laws**"). Tenant will obtain and comply with all governmental permits relating to the use or operation of the Leased Premises and the Tenant Improvements required by applicable Environmental Laws. Tenant will conduct and complete all investigations, studies, sampling, and testing procedures and all remedial, removal, and other actions necessary to clean up and remove all Hazardous Materials on, from or affecting the Leased Premises and the Tenant Improvements in accordance with all applicable Environmental Laws and to the satisfaction of Landlord.

2.     Tenant will not cause or permit any release, use, generation, processing, production,

refining, manufacture, storage, treatment, transportation, or disposal of Hazardous Materials, on, in, under, to or from the Leased Premises and/or the Tenant Improvements. Tenant will promptly Notify Landlord if Tenant has or acquires notice or knowledge that any Hazardous Material has been or is threatened to be released, used, generated, processed, produced, refined, manufactured, stored, treated, transported or disposed of on, in, under, to or from the Leased Premises and/or the Tenant Improvements. If any Hazardous Material is found on the Leased Premises and/or the Tenant Improvements, Tenant, at its own cost and expense, will immediately take such action as is necessary to detain the spread of and remove the Hazardous Material to the complete satisfaction of Landlord and the appropriate governmental authorities. Any tax credits or other benefits arising in connection with any remediation undertaken pursuant to this subsection shall accrue to the benefit of Tenant. The foregoing provisions of this subsection shall not prohibit or, subject to the following subsection, require Notice of, the entry and parking of motor vehicles carrying flammable liquids solely for the purpose of their own propulsion or the use, storage and/or disposal of any liquid or material typically used in the ordinary course of business in the construction, operation or maintenance of facilities of the type comprising the Tenant Improvements, provided such use and storage is in accordance with all applicable Environmental Laws.

3. Tenant will Notify Landlord and provide copies within five (5) Business Days after receipt of all written complaints, claims, citations, demands, inquiries, reports, or notices relating to the condition of the Leased Premises and/or the Tenant Improvements or compliance with Environmental Laws. Tenant will supply Landlord within five (5) Business Days with copies of all notices, reports, correspondence, and submissions made by Tenant to the United States Environmental Protection Agency, the United States Occupational Safety and Health Administration, and any other local, state, or federal authority which requires submission of any information concerning environmental matters or hazardous wastes or substances pursuant to Environmental Laws. Tenant shall deliver prompt Notice to Landlord of all proceedings and meetings with applicable Governmental Authorities regarding the presence of Hazardous Materials on the Leased Premises and/or the Tenant Improvements, and Landlord shall have the right to attend such meetings and proceedings. Tenant will promptly cure and have dismissed with prejudice to the satisfaction of Landlord any actions and proceeding brought pursuant to any Environmental Laws.

4. Tenant will keep the Leased Premises and/or the Tenant Improvements, and, to the extent arising from the actions of Tenant or its invitees, guests, employees, agents or contractors, the Overall Site, free of any lien imposed pursuant to any Environmental Law. Tenant shall Notify Landlord within five (5) Business Days of Tenant gaining knowledge of any liens threatened or attached against the Leased Premises and/or the Tenant Improvements and/or the Overall Site pursuant to any Environmental Law. If such a lien is filed against the Leased Premises and/or the Tenant Improvements, or, to the extent Tenant is responsible for such lien under the first sentence of this subsection, the Overall Site, then, within thirty (30) days after Tenant obtains knowledge of a lien against the Leased Premises, the Tenant Improvements and/or the Overall Site and before any governmental authority commences proceedings to sell the Leased Premises, the Tenant Improvements and/or the Overall Site pursuant to the lien, whichever first occurs, Tenant will either (1) pay the claim and remove the lien from the Leased Premises, the Tenant Improvements and/or the Overall Site, or (2) furnish either (i) a bond or cash deposit reasonably satisfactory to Landlord and Landlord's title insurance company in an amount sufficient to remove the lien or (ii) other security satisfactory to Landlord and to any superior mortgagee or lessee in an amount not less than that which is sufficient to discharge the claim from which the lien arises.

5. Landlord and Landlord's agents, servants, and employees including, without

limitation, legal counsel and environmental consultants and engineers retained by Landlord, may (but without the obligation or duty so to do), at any time and from time to time, on not less than five (5) Business Days' Notice to Tenant (except in the event of an emergency in which case no notice will be required), inspect the Leased Premises to determine whether Tenant is complying with Tenant's obligations set forth in this Section and perform environmental inspections and samplings, during regular business hours (except in the event of an emergency) or during such other hours as Landlord and Tenant may agree. If Tenant is not in compliance with applicable Environmental Laws, Landlord will have the right (but not the obligation), in addition to Landlord's other remedies available at law and in equity, to enter upon the Leased Premises immediately and take such action as Landlord in its sole judgment deems appropriate to remediate any actual or threatened contamination or other violation caused by Tenant's failure to comply. Landlord will use reasonable efforts to minimize interference with Tenant's business but will not be liable for any interference caused by Landlord's entry and remediation efforts. Upon completion of any sampling or testing Landlord will (at Tenant's expense if Landlord's actions are a result of Tenant's failure to comply with this Section) restore the affected area of the Leased Premises from any damage caused by Landlord's sampling and testing.

6. If Tenant fails to comply with any of the warranties, representations and covenants set forth in this **Article 7**, Landlord may cause the removal (or other cleanup acceptable to Landlord) of any Hazardous Material from the Leased Premises, the Tenant Improvements and/or the Overall Site. Unless and to the extent it is determined that the remediation of the Leased Premises and/or the Tenant Improvements was necessary as the result of anything caused by Landlord, its agents, employees or contractors, or if the problem affects the Overall Site and Tenant is responsible for the problem pursuant to the first sentence of preceding **clause 5**, the costs of Hazardous Material removal and any other cleanup (including transportation and storage costs) will be Additional Rent under this Ground Lease, whether or not a court has ordered the cleanup, and such costs will become due and payable on demand by Landlord. Tenant will give Landlord, its agents, and employees access to the Leased Premises and/or the Tenant Improvements to remove or otherwise clean up any Hazardous Material. Landlord, however, has no affirmative obligation to remove or otherwise clean up any Hazardous Material, and this Ground Lease will not be construed as creating any such obligation.

7. Tenant shall, and shall cause its agents, consultants, contractors, and subcontractors within the scope of their acts or omissions or the acts or omissions of those under them, to indemnify, defend (with counsel reasonably acceptable to Landlord and at Tenant's sole cost), and hold Landlord and Landlord's affiliates, directors, officers, employees, and agents, all of whom shall be deemed to be intended third party beneficiaries of this subsection, free and harmless from and against all claims, demands, actions, suits, other proceedings, liabilities, obligations, penalties, judgments, damages (including consequential damages), losses, costs, disbursements or expenses of any kind (including attorneys' and experts' fees and expenses and fees and expenses incurred in investigating, defending, or prosecuting any litigation, claim, or proceeding) that may at any time be imposed upon, incurred by, or asserted or awarded against Landlord or any of them in connection with or arising from or out of:

(a) any Hazardous Material on, in, under, or affecting all or any portion of the Leased Premises and/or the Tenant Improvements unless and to the extent it is determined that the Hazardous Material was present as the result of something done by Landlord, its agents, employees or contractors, or any Hazardous Material on, in, under or affecting all or any portion of the Overall Site and Tenant is responsible therefor under the first sentence of preceding **clause 4**;



(b) any misrepresentation, inaccuracy, or breach of any warranty, covenant, or agreement contained or referred to in this Article;

(c) any violation or claim of violation by Tenant of any Environmental Law; or

(d) the imposition of any lien for the recovery of any costs for environmental cleanup or other response costs relating to the release or threatened release of Hazardous Material unless and to the extent it is determined that the Hazardous Material was released as the result of something done by Landlord, its agents, employees or contractors.

8. Tenant and its successors and assigns waive, release, and agree not to make any claim or bring any cost recovery action against Landlord under any Environmental Laws now existing or enacted after the Effective Date. To the extent that Landlord is strictly liable under any Environmental Law, Tenant's obligation to Landlord under this indemnity will likewise be without regard to fault on the part of Tenant with respect to the violation or condition that results in liability to Landlord.

**B. Landlord's Covenants**

Landlord will not permit any release, use, generation, processing, production, refining, manufacture, storage, treatment, transportation, or disposal of Hazardous Materials, on, in, under, or from the Leased Premises and/or the Tenant Improvements. This restriction shall not apply to prevent the entry and parking of motor vehicles carrying flammable liquids solely for the purpose of their own propulsion or to prohibit use, storage and/or disposal of any liquid or material typically used in the construction, operation or maintenance of facilities of the type comprising the WMATA Facilities, provided such use and storage is in accordance with all applicable laws, regulations and ordinances.

**Section 7.02 Environmental Reports**

Tenant shall promptly deliver, or cause any third-party consultant or contractor to promptly deliver, to Landlord any environmental studies, Phase I or Phase II environmental assessments, environmental sampling or testing, or other environmental information in its possession regarding the Leased Premises. If Landlord from time to time desires any additional information about environmental matters affecting the Leased Premises and/or the Tenant Improvements, Landlord may request such information from Tenant and, to the extent such information then exists, Tenant shall use Commercially Reasonable Business Efforts to provide such information to Landlord, including by obtaining the same from its consultants or contractors.

**Section 7.03 Survival**

The provisions of this Article will be in addition to any and all obligations and liabilities Tenant may have to Landlord at common law and will survive the expiration or termination of this Ground Lease.

## **ARTICLE 8**

### **INSURANCE**

#### **Section 8.01 Tenant's Insurance Coverage**

Tenant, its contractors and subcontractors shall procure and maintain, at its or their own cost and expense, the insurance required by **Exhibit 8.01**.

#### **Section 8.02 Compliance with Insurance Requirements**

Tenant shall observe and comply with, or shall cause to be observed and complied with, all the requirements of the insurance policies at any time in force with respect to the Leased Premises and the Tenant Improvements. Tenant shall not do, or permit anything to be done, in, on or about the Leased Premises, or bring or keep anything thereon, which shall increase the rate of insurance on the Leased Premises or on any property, real or personal, thereon or on any activity conducted thereon. If any act or omission shall result directly in the increase in rates applicable to any insurance policy(ies) carried by Landlord or WMATA, or results directly in any other increased cost to Landlord or WMATA in order to comply with insurance requirements, then Tenant shall reimburse Landlord or WMATA, as applicable, as Additional Rent for the amount of such increased rate or costs within fifteen (15) days after receipt of a statement therefor from Landlord or WMATA. Tenant shall promptly Notify Landlord of any notice Tenant receives cancelling, terminating, or not renewing Tenant's insurance coverage or threatening to do so.

## **ARTICLE 9**

### **INDEMNIFICATION**

#### **Section 9.01 Tenant's Indemnification of Landlord**

##### **A. Indemnification**

Tenant will indemnify Landlord and Landlord's members, shareholders, partners, other principals, directors, officers, employees, agents, contractors and other representatives, but not its patrons or invitees, defend them against, and hold each of them harmless from, any and all demands, claims, causes of action, suits, actions, other proceedings, judgments, awards, fines, penalties, damages, losses, costs, expenses and other liabilities (including without limitation attorneys' fees and court costs) arising from or in connection with:

- (a) the use, occupancy, control, management, operation and/or possession of the Leased Premises or any adjoining streets, roads, sidewalks or curbs by Tenant or any person claiming under Tenant; and/or
- (b) any activity, work, or thing done or permitted by Tenant on or about the Leased Premises or any adjoining streets, roads, sidewalks or curbs; and/or

(c) any acts, omissions, or negligence of (i) Tenant or any person claiming under Tenant or, (ii) in the course of or relating to their work by or on behalf of Tenant or any person claiming under Tenant, the employees, agents, contractors, invitees, or visitors of Tenant or any such person; and/or

(d) any breach, violation, or nonperformance by (i) Tenant or any person claiming under Tenant of any term, covenant, or provision of this Ground Lease, the CC&Rs or any law, ordinance, or governmental requirement of any kind or (ii) in the course of or relating to their work by or on behalf of Tenant or any person claiming under Tenant, the employees, agents, contractors, invitees, or visitors of Tenant or any such person of any term, covenant, or provision of this Ground Lease, the CC&Rs or any law, ordinance, or governmental requirement of any kind; and/or

(e) any accident, injury or damage to the person, property or business of Tenant, its employees, agents, contractors, invitees, visitors or any other person entering on the Leased Premises under the express or implied invitation of Tenant or its Subtenants; and/or

(f) any claims made by any Leasehold Mortgagee or any Subtenant or any person claiming by or through them.

[Notwithstanding anything to the contrary in the foregoing, Tenant shall have no obligation to indemnify under the preceding clauses to the extent caused by the gross negligence of willful misconduct of Landlord or its agents, contractors or employees.] The indemnification set forth in this Article is in addition to any other indemnification obligation set forth in this Ground Lease or in the CC&Rs or that Tenant may have to Landlord at common law, and is a joint and several obligation with any similar indemnification Tenant or an Affiliate of Tenant may have to WMATA under any agreement whereby Tenant or an Affiliate of Tenant is to design and/or construct WMATA Replacement Facilities.

#### B. Defense

1. If any suit, action or proceeding is brought, or any other claim is made, against Landlord, its lenders, employees, or agents by reason of any such claim, Tenant, upon Notice from Landlord, will defend the same at Tenant's expense with counsel satisfactory to Landlord; if Landlord does not believe, in good faith, that Tenant's own counsel can represent Landlord because of a conflict of interest between Landlord and Tenant or between Landlord and Tenant's own counsel, Landlord may elect to be represented by counsel of its own choosing at Tenant's expense. Tenant's or Tenant's counsel shall keep Landlord advised of matters, shall consult with Landlord's and/or Landlord's counsel on such matters, and shall allow Landlord and/or Landlord's counsel to attend meetings and proceedings.

2. Tenant is in exclusive control of the Leased Premises except to the extent this Ground Lease or the CC&Rs reserves a right for the WMATA Facilities thereon or a right to inspect, to use for access or utilities, to cure defaults, or for any other purpose. Landlord's exercise of those rights shall not impose on Landlord any liability to Tenant or any third party and shall not be a defense to Tenant's liability and obligation except as may be expressly provided elsewhere in this Ground Lease or in the CC&Rs.

C. By Subtenants, Contractors, Etc.

Tenant shall also require each of its contractors, subcontractors and Subtenants to provide the foregoing indemnification and defense. Without limiting the means to accomplish the foregoing, provisions in any Subleases or in any contracts that indemnify Tenant may expressly run to the benefit of Landlord as well.

**Section 9.02 Survival**

The provisions of this Article will survive the expiration or termination of this Ground Lease.

**ARTICLE 10**

**USES AND ENTITLEMENTS**

**Section 10.01 Uses and Densities**

The uses and the densities that Landlord approves for the Leased Premises require Transit-Oriented Development generally and, more specifically, are solely those set forth in **Exhibit 10.01**; no other uses or minimum densities for each use shall be constructed on the Leased Premises. **Notwithstanding any use or density that may otherwise be permitted by this Ground Lease, the use of the Leased Premises must comply with the CC&Rs.**

**Section 10.02 Local Jurisdictional Plans**

If the preliminary plan, conceptual site plan and/or the detailed site plan or their equivalents (collectively, the **“Local Jurisdictional Plans”**) for the Leased Premises have not been approved by Landlord (and, if WMATA is no longer the Landlord, from WMATA) before the Effective Date, Tenant shall use Commercially Reasonable Business Efforts to pursue such approvals from Landlord and WMATA in accordance with the terms of this Section.

A. Contents

The proposed Local Jurisdictional Plans shall include building envelopes, site plans, conceptual designs, landscaping and infrastructure consistent with and to the extent prepared as part of the information which Tenant anticipates presenting to the Local Jurisdictional authorities in connection with Entitlements being applied for at such time. The proposed Local Jurisdictional Plans shall show uses, density, loading and vehicular access for the Tenant Improvements and the WMATA Replacement Facilities to be located on the Leased Premises. The proposed Local Jurisdictional Plans shall: (a) be substantially in accordance with the applicable zoning ordinance (or any requested variance, special exception, amendment or other change or exemption thereto); (b) be in compliance with Transit-Oriented Development principles and the WMATA Design and Construction Standards in effect as of the date on which they are submitted; and (c) not contain, propose or constitute an acceptance of any restrictions, or the imposition of any requirements, that would or could result in any adverse impact on the safety of, ingress to or egress from, the security of and/or the operations of WMATA Reserved Areas or WMATA Facilities. Tenant shall provide

Landlord and WMATA with any additional information in Developer's or Tenant's possession or control that Landlord or WMATA may reasonably request to assist Landlord or WMATA in evaluating the proposed Local Jurisdictional Plans, but specifically excluding Developer's or Tenant's financial or marketing projections.

B. No Transfer From Overall Site

In no event may any development rights attributable to the Leased Premises be sold, assigned or otherwise transferred to any site or property not located within the Overall Site.

C. Submission to Local Jurisdiction

Tenant shall not submit proposed Local Jurisdictional Plans to the applicable jurisdictional authorities until Landlord and WMATA have reviewed and either commented on or approved the same in accordance with this Section.

D. Approval Process

1. Landlord and WMATA shall review and approve or disapprove the proposed Local Jurisdictional Plans within thirty (30) Business Days after Tenant's delivery of the proposed Local Jurisdictional Plans, including all required information and documentation set forth above, to Landlord and WMATA.

2. Landlord's and WMATA's approval of the proposed Local Jurisdictional Plans shall not be unreasonably withheld, conditioned or delayed, except that WMATA's approval shall be a WMATA Unconditional Approval Matter to the extent, in WMATA's sole and non-reviewable discretion, the proposed Local Jurisdictional Plans: (a) interfere with the structure or operation of the Metro Station, any other WMATA Facilities or the WMATA Reserved Areas (including the free flow of traffic, vehicular and pedestrian, to and from the WMATA Reserved Areas); (b) interfere with the integrity, functionality, efficiency, safety, operation, maintenance, or legal compliance of WMATA's operations or activities; (c) propose any matters within the WMATA Zone of Influence if such matters are covered by the WMATA Design and Construction Standards; (d) propose any matters that affect any adjacent property owned by WMATA; (d) relate to the design and/or construction of any interim or permanent WMATA Replacement Facilities; (e) would cause the Leased Premises to not be a Transit-Oriented Development; and/or (f) propose changes to the Project Schedule or a development plan for the Leased Premises previously approved by WMATA. Notwithstanding the foregoing, WMATA's review and approval rights with respect to Submissions of the Local Jurisdictional Plans shall be limited in so much as WMATA will not review exterior elevations, materials and colors and interior finishes, layouts, color and materials for the Tenant Improvements except to the extent preceding **clauses (c) and/or (d)** may be applicable.

3. In the event that Landlord or WMATA disapproves the proposed Local Jurisdictional Plans or approves the proposed Local Jurisdictional Plans subject to qualification, Landlord and/or WMATA, as applicable, shall deliver Notice to Tenant of such disapproval or qualified approval, stating in as much detail as is reasonably practicable, given the state of completion of the proposed Local Jurisdictional Plans, the nature of Landlord's or WMATA's objections or qualifications, as the case may be. Tenant shall have a period of ten (10) days after delivery of such Notice within which to revise and resubmit the proposed Local Jurisdictional Plans to Landlord and WMATA addressing each of the issues raised by Landlord or WMATA;

however, if such objections or qualifications cannot reasonably be addressed within (10) days using Commercially Reasonable Business Efforts, Tenant shall be allowed additional time (not to exceed thirty (30) days in total) as is reasonably necessary to address the objections or qualifications. Tenant shall use Commercially Reasonable Business Efforts to satisfy Landlord's and WMATA's objections and qualifications.

4. The above process shall be repeated until the proposed Local Jurisdictional Plans are approved by Landlord and WMATA. If a proposed Local Jurisdictional Plan is not approved after its third (3<sup>rd</sup>) iteration is submitted to Landlord and WMATA for approval, the parties shall meet and use Commercially Reasonable Business Efforts to determine whether a mutually acceptable Local Jurisdictional Plan can be agreed to. If no agreement is reached within thirty (30) Business Days after either party invokes the right and obligation to meet by Notice to the other, then either party may terminate this Ground Lease upon Notice to the other party given within thirty (30) days after such thirty (30) Business Day period expires; if WMATA is not the Landlord at the applicable time, then WMATA shall not have the right to terminate this Ground Lease under this sentence but no Tenant Improvements may be constructed that have not obtained WMATA's approval under the preceding subsections.

E. No Changes After Approval

Once Landlord and WMATA have approved the proposed Local Jurisdictional Plans, Tenant may not make material changes to the approved Local Jurisdictional Plans without Landlord's and WMATA's prior written approval, not to be unreasonably withheld, conditioned or delayed except with respect to WMATA Unconditional Approval Matters identified above. Any proposed changes shall be promptly submitted to Landlord and WMATA for their approval in accordance with the procedures set forth in this Section for re-Submissions.

F. No Assumption of Liability or Waiver of Rights

Landlord and WMATA accept no liability and waive none of their rights under this Ground Lease solely by reason of its approval of the proposed Local Jurisdictional Plans, nor shall their approval be construed to be a warranty thereof, except that their approval of the proposed Local Jurisdictional Plans shall constitute a waiver of any right to object to any subsequent Submission to the same level of detail to the extent of the information disclosed in the approved Local Jurisdictional Plans but shall not constitute a waiver of their other approval rights hereunder. (Example: Landlord or WMATA may have previously approved a building but if a subsequent Submission shows the loading dock in a location which interferes with transit uses, WMATA has not waived any rights and may object.)

### **Section 10.03 Entitlements**

A. Tenant's Efforts to Obtain Entitlements

1. Following approval of the Local Jurisdictional Plans, Tenant shall use Commercially Reasonable Business Efforts to obtain other permits, approvals and entitlements (including subdivision, record plat, and demolition, excavation, building, curb cut and similar permits, approvals, and consents) for the Leased Premises and/or the Tenant Improvements consistent with the approved Local Jurisdictional Plans and the CC&Rs ("**Entitlements**"). Tenant agrees that the Leased Premises are currently zoned \_\_\_\_\_, that such zoning category is acceptable for the Project, and that Tenant's right

and obligation to seek Entitlements does not include a rezoning of the Leased Premises. If Developer has begun the process of obtaining Entitlements, Tenant shall use Commercially Reasonable Business Efforts to complete the process.

2. Tenant shall not apply for any Entitlements without first following the standards and procedures set forth in **Section 10.02**, which is incorporated herein by reference with the word "Entitlement(s)" substituted therein wherever "Local Jurisdictional Plans" appears. To the extent there is any conflict or inconsistency between **Section 10.02** and this Section, then this Section shall govern as to Entitlements. Tenant shall neither submit to, nor accept from, any governmental authority having jurisdiction proposals (oral or written) that (a) are materially inconsistent with the approved Local Jurisdictional Plans, (b) are materially adverse to Landlord (which determination is, if it affects WMATA Facilities, WMATA Reserved Areas or WMATA's operations, a WMATA Unconditional Approval Matter), (c) require a material change in the approved Local Jurisdictional Plans, (d) could affect the Project Schedule, (e) change the zoning category of the Overall Site or any portion of it, or (f) contain, propose or constitute an acceptance of anything that would be a WMATA Unconditional Approval Matter under **Section 10.02**. Tenant shall not withdraw its application for Entitlements without the prior written consent of Landlord, which consent shall not be unreasonably withheld.

3. In the event any application for an Entitlement is denied in whole or in part, Tenant shall Notify Landlord at least fifteen (15) days before the end of any appeal period of any decision by Tenant not to appeal the denial and such Notice shall include a reasonably detailed explanation for Tenant's decision to not appeal. Tenant shall Notify Landlord of the filing of any appeal and provide a copy of such appeal to Landlord. If any application for an Entitlement is denied in whole or in part and the denial is not timely appealed, or the denial is appealed but all appeals are exhausted without a favorable final result, and in either case the denial makes the Project infeasible or impossible, Landlord may terminate this Ground Lease by Notice to Tenant and Tenant, if it used Commercially Reasonable Business Efforts to obtain the Entitlements, may terminate this Ground Lease by Notice to Landlord.

4. Landlord will reasonably assist and cooperate with Tenant in the Entitlements process upon Tenant's reasonable request and at Tenant's sole cost and expense; provided, however, that: (a) Landlord is not required to reasonably assist or cooperate with respect to any matter that Landlord or WMATA has disapproved under **Section 10.02** or **Section 10.03.A.2** above; (b) in no event shall Landlord be required to incur any out-of-pocket costs, impose a significant burden on its personnel, or impose significant usage demands on its personnel; (c) Tenant shall pay all costs (including reasonable attorneys' fees and court costs) in connection therewith and the provisions of **Article 9** shall be applicable thereto; (d) Landlord shall not be required to appoint Tenant or any other person as Landlord's attorney-in-fact or agent for signing any application for Entitlements or in pursuing Entitlements; (e) Landlord shall not be required to convey or encumber its property except by **the CC&Rs**, this Ground Lease and such routine utility rights-of-way as Landlord may approve in its reasonable discretion, but Landlord shall not be required to accept any obligation to indemnify or otherwise breach any anti-deficiency law, regulation or requirement applicable to it in so doing; (f) Landlord shall not be exposed to actual or potential performance or financial obligation or liability by reason of such cooperation and assistance; and (g) in no event shall Landlord be required to institute, defend against, or otherwise participate in litigation or any other dispute resolution process regarding the Entitlements or the denial thereof. The foregoing shall not preclude Tenant from initiating such litigation or other dispute resolution process in Landlord's name if and when Landlord is a required party to establish the legal sufficiency of the pleadings or filing, in which event Landlord shall cooperate with

Tenant in connection with such pleading or filing.

**B. Quarterly Reports to Landlord**

During the Entitlements process, Tenant shall provide Landlord with quarterly reports updating the status of the Entitlements process and all other approvals applied for by Tenant with respect to the Leased Premises. Tenant shall provide to Landlord any additional information related to the Entitlements within Tenant's possession or control, including copies of any notices Tenant receives that the Leased Premises may be rezoned or subjected to new Entitlements, and such other information as Landlord may reasonably request, but specifically excluding Tenant's financial or marketing projections, any privileged communications, any trade secrets or other proprietary information.

**C. Entitlements Following Expiration/Termination**

1. In Landlord's sole and absolute discretion, and at the option of Landlord, exercisable by delivery of Notice to Tenant, upon the expiration or termination of this Ground Lease Landlord shall succeed to all right, title and interest of Tenant in an application for Entitlements and shall have the unrestricted right, directly or through its designee, to intervene in and continue pursuit of Entitlements without payment of any sums to Tenant. Any costs incurred by Landlord of prosecuting or securing Entitlements after the date of termination of this Ground Lease shall be borne by Landlord.

2. Tenant shall execute and deliver to Landlord on demand by Landlord all such assignments and other documents as shall be reasonably requested by Landlord to pursue Entitlements after the expiration or termination of this Ground Lease and/or to appeal any adverse determination by any governmental authority having jurisdiction. The foregoing sentence shall not be construed as diminishing or abrogating Landlord's remedies in the event Tenant has not exercised its Commercially Reasonable Business Efforts to obtain Entitlements or is otherwise in an Event of Default under this Ground Lease.

**ARTICLE 11**

**DESIGN AND CONSTRUCTION OF TENANT IMPROVEMENTS**

**Section 11.01 Tenant Improvements and Infrastructure**

**A. Completion of Tenant Improvements**

Tenant, at its own cost, shall design, construct, equip and Finally Complete the Tenant Improvements, and thereafter alter, improve, restore, demolish and rebuild in conformity with the plans approved by Landlord and in accordance with the provisions of this Ground Lease and the CC&Rs.

**B. Approval Process**

1. If the Tenant Improvements Plans and Specifications have not been approved by Landlord and WMATA before the Effective Date, Tenant shall use Commercially Reasonable Business Efforts to pursue such approvals from Landlord and WMATA in accordance with the terms of this Section.



2. (a) The proposed Tenant Improvements Plans and Specifications shall, to the extent applicable to the particular iteration thereof:

(i) include building envelopes, site plans, conceptual designs, elevations, landscaping and infrastructure consistent with and to the extent prepared as part of the information which Developer or Tenant anticipates presenting to the Local Jurisdictional authorities in connection with the Tenant Improvements proposed to be constructed;

(ii) show uses, density, loading and vehicular access for the Tenant Improvements and any WMATA Replacement Facilities to be located on the Leased Premises;

(iii) include a written and, where applicable, graphic description of the physical impact that construction will have on the WMATA Facilities, including any penetrations, borings, test pits or other subsurface investigations, or, alternatively, a statement by a professional engineer of the expected lack of any such impact;

(iv) include an outline of the critical construction procedures, (including but not limited to procedures concerning the interface with the WMATA Facilities) and all temporary construction work (including blasting, supportive excavation, shoring, false work and form work), stating proposed means and methods and the approximate duration of each activity;

(v) be substantially in accordance with the approved Local Jurisdictional Plans and Entitlements;

(vi) comply with Transit-Oriented Development principles and the WMATA Design and Construction Standards in effect as of the date on which they are submitted; and

(vii) not contain, propose or constitute an acceptance of any restrictions, or the imposition of any requirements, that would or could result in any adverse impact on the safety of, ingress to or egress from, the security of and/or the operations of WMATA Reserved Areas or WMATA Facilities or, the alternative, contain a proposed maintenance of traffic plan to address impacts on the WMATA Reserved Areas and/or the WMATA Facilities.

(b) Tenant shall provide Landlord and WMATA with any additional information in Developer's or Tenant's possession or control that Landlord or WMATA may reasonably request to assist them in evaluating the proposed Tenant Improvements Plans and Specifications, but specifically excluding Developer's or Tenant's financial or marketing projections. If and when Tenant knows that anything proposed in the Tenant Improvements Plans and Specifications is at variance with applicable law or the WMATA Design and Construction Standards, Tenant promptly shall so Notify Landlord and WMATA and thereafter effectuate corrections in a manner approved by

Landlord and WMATA. No claim for compensation, a change to the Project Schedule, or Unavoidable Delay shall result from such differences.

(c) Tenant shall provide Landlord and WMATA with such number of copies and in such commercially reasonable format of the proposed Tenant Improvements Plans and Specifications as Landlord and/or WMATA may request. Any Submission made after 2:00 pm shall be deemed to be made at 9:00 am on the next Business Day.

3. (a) Landlord and WMATA shall review and approve or disapprove the proposed Tenant Improvements Plans and Specifications within thirty (30) Business Days after Tenant's delivery of the proposed Tenant Improvements Plans and Specifications, including all required information and documentation set forth above. Landlord's and WMATA's approval of the proposed Tenant Improvements Plans and Specifications shall not be unreasonably withheld, conditioned or delayed except that WMATA's approval shall be a WMATA Unconditional Approval Matter to the extent set forth in **Section 10.02.D.2**, which is incorporated in this subsection by this reference. Notwithstanding the foregoing, WMATA's review and approval rights with respect to Submissions of the Tenant Improvements Plans and Specifications shall be limited in so much as WMATA will not review exterior elevations, materials and colors and interior finishes, layouts, color and materials for the Tenant Improvements except to the extent **Section 10.02.D.2(c)** and/or **(d)** may be applicable to the Tenant Improvements Plans and Specifications.

(b) Tenant shall not submit proposed Tenant Improvements Plans and Specifications to the applicable jurisdictional authorities until Landlord and WMATA have reviewed and either commented on or approved the same in accordance with this subsection.

(c) In the event that Landlord or WMATA disapproves the proposed Tenant Improvements Plans and Specifications or approves the proposed Tenant Improvements Plans and Specifications subject to qualification, Landlord or WMATA, as applicable, shall deliver Notice to Tenant of such disapproval or qualified approval, stating in as much detail as is reasonably practicable, given the state of completion of the proposed Tenant Improvements Plans and Specifications, the nature of the objections or qualifications, as the case may be. Tenant shall have a period of ten (10) days after delivery of such Notice within which to revise and resubmit the proposed Tenant Improvements Plan and Specifications to Landlord and WMATA addressing each of the issues raised by Landlord and/or WMATA; however, if such objections or qualifications cannot reasonably be addressed within (10) days using Commercially Reasonable Business Efforts, Tenant shall be allowed additional time (not to exceed thirty (30) days in total) as is reasonably necessary to address the objections or qualifications. Tenant shall use Commercially Reasonable Business Efforts to satisfy Landlord's and WMATA's objections and qualifications.

(d) The above process shall be repeated until the proposed Tenant Improvements Plans and Specifications are approved by Landlord and WMATA. If a proposed Tenant Improvements Plans and Specifications is not approved after its third (3<sup>rd</sup>) iteration is submitted to Landlord for approval, the parties shall meet and use Commercially Reasonable Business Efforts to determine whether mutually acceptable Tenant Improvements Plans and Specifications can be agreed to. If no agreement is reached within thirty (30) Business Days after either party invokes the right and obligation to meet by Notice to the other, then either party may

terminate this Ground Lease upon Notice to the other party given within thirty (30) days after such thirty (30) Business Day period expires; if WMATA is not the Landlord at the applicable time, then WMATA shall not have the right to terminate this Ground Lease under this sentence but no Tenant Improvements may be constructed that have not obtained WMATA's approval under the preceding subsections.

C. Changes

Once Landlord and WMATA have approved the proposed Tenant Improvements Plans and Specifications, Tenant may not make material changes to the approved Tenant Improvements Plans and Specifications without Landlord's and WMATA's prior written approval, not to be unreasonably withheld, conditioned or delayed except with respect to WMATA Unconditional Approval Matters. Any proposed changes shall be promptly submitted to Landlord and WMATA for their approval in accordance with the procedures set forth in this Section for re-Submissions.

D. No Assumption of Liability or Waiver of Rights

Landlord and WMATA accept no liability and waive none of their rights under this Ground Lease solely by reason of its approval of the proposed Tenant Improvements Plans and Specifications, nor shall its approval be construed to be a warranty thereof, except that their approval of the proposed Tenant Improvements Plans and Specifications shall constitute a waiver of any right to object to any subsequent Submission to the same level of detail to the extent of the information disclosed in the approved Tenant Improvements Plans and Specifications but shall not constitute a waiver of their other approval rights hereunder). (Example: Landlord or WMATA may have previously approved a building but if a subsequent Submission shows the loading dock in a location which interferes with transit uses, WMATA has not waived any rights and may object.)

E. Tenant's Obligations Regarding Infrastructure

Tenant shall be responsible for notifying all utility companies of the work to be done by or for Tenant, for marking the location of utility lines prior to commencing construction, and generally for coordinating with utility providers. Tenant will pay all infrastructure costs required by the Entitlements and/or ancillary to the Tenant Improvements, including (without limitation) any interim or temporary WMATA Replacement Facilities, except any required exclusively for permanent WMATA Replacement Facilities and approved by WMATA as part of the Entitlements process. Infrastructure includes, but is not limited to, public utilities, curbs, gutters, storm sewers, sidewalks and roads. To the extent applicable, roads, stormwater management facilities and wet utilities shall be designed, built, operated, maintained, repaired and replaced in accordance with the codes and standards of the Local Jurisdiction and the WMATA Adjacent Construction Project Manual as it may apply to non-WMATA Facilities, and, unless the applicable Local Jurisdiction expressly agrees otherwise and Tenant expressly accepts responsibility for maintenance and replacement, shall be dedicated to and accepted by a Local Jurisdiction for maintenance and replacement responsibility; Landlord and WMATA will not have any responsibility for their maintenance or replacement.

F. No Interference with Existing WMATA Facilities

Tenant's development and use of the Leased Premises shall not materially adversely interfere, as determined by WMATA as an Unconditional Approval Matter, with the operations of the WMATA Facilities except as may be expressly provided for in this Ground Lease, unless prior arrangements have been made or are hereafter made in writing between WMATA and Tenant. In furtherance, but not in limitation, of the foregoing, Tenant shall not displace or take out of service, nor cause to be displaced or taken out of service, any WMATA Facilities (or access to WMATA Facilities) until Tenant has first replaced the same with WMATA Replacement Facilities (or substitute access) built to WMATA's satisfaction (as a WMATA Unconditional Approval Matter) in accordance with the terms of this Ground Lease. Tenant shall at no cost to WMATA repair all damage to any WMATA Facilities that are damaged while constructing the Tenant Improvements. To the extent construction of the Tenant Improvements may affect any WMATA Facilities, Tenant agrees to consider in good faith engaging a construction manager and/or a construction company with experience working on or around WMATA Facilities.

G. Development Costs

Tenant shall be responsible for all costs and expenses related to the Leased Premises and/or the Tenant Improvements, including all pre-development costs (such as Entitlements) and all costs associated with constructing, installing, operating and maintaining any and all Tenant Improvements (including any WMATA Replacement Facilities to be constructed as part of any alterations, restoration and/or rebuilding of the Tenant Improvements) and related infrastructure, subject to and in accordance with the terms and provisions of this Ground Lease **and the CC&Rs**. Tenant's responsibility includes paying for all internal costs Landlord or WMATA incurs in plan reviews, construction oversight, escorts, flagging, support services, use of WMATA equipment, administrative costs and other similar costs relating to the Tenant Improvements. Tenant acknowledges that if it requires access to non-public WMATA Facilities it may be required to pay for full shifts of WMATA's escort personnel even if such personnel work less than a full shift in providing access. Costs payable to or on behalf of WMATA shall be prefunded into an account maintained by WMATA solely for that purpose and the amount to be maintained in that account shall cover the estimated costs of the next twelve (12) months on a rolling basis, with supplemental funds to be deposited by Tenant as and when so notified by WMATA; any funds remaining in that account upon Final Completion of the Tenant Improvements and the costs accrued related thereto shall be refunded by WMATA to Tenant. In addition to WMATA's other remedies if such account is not sufficiently funded at any time, WMATA need not provide support for or cooperate in pursuing the work until the account is sufficiently funded, notwithstanding any other provision of this Ground Lease, without giving rise to any claim of Unavoidable Delay. The foregoing shall not limit or restrict Tenant's ability to seek third party funding, other governmental contribution or reimbursement of such pre-development costs from entities other than Landlord or WMATA.

**Section 11.02 Local Codes, Laws, Regulations and Ordinances, Etc.**

A. Generally

Tenant agrees that the Tenant Improvements shall comply with this Ground Lease, **the CC&Rs**, and the Entitlements.

B. Support During Permit Process

Consistent with Landlord's approval of Tenant's site plan and the Tenant Improvements Plans and Specifications, Landlord agrees to give positive support for any special exceptions, variances, permits, licenses, or other authorizations for which Landlord is obligated to cooperate pursuant to the terms of this Ground Lease, including appearing and giving testimony before any governmental authority, provided that Landlord incurs no out-of-pocket cost or expense and no performance or financial obligation or liability by reason of such support or execution of such documents.

C. Easements

Landlord and Tenant agree to join in all grants of easements for the installation, maintenance, repair and replacement of electric, telephone, gas, water, sanitary and storm sewer and such other public utilities and facilities as may be reasonably necessary for the Tenant Improvements; provided, however, that: (a) Landlord is not required to reasonably assist or cooperate with respect to any matter that Landlord or WMATA has disapproved under **Section 10.02** or **Section 10.03.A.2** above; (b) in no event shall Landlord be required to incur any out-of-pocket costs, impose a significant burden on its personnel, or impose significant usage demands on its personnel; (c) Tenant shall pay all costs (including reasonable attorneys' fees and court costs) in connection therewith and the provisions of **Article 9** shall be applicable thereto; (d) Landlord shall not be required to appoint Tenant or any other person as Landlord's attorney-in-fact or agent for signing any application for easements or in pursuing easements; (e) Landlord shall not be required to accept any obligation to indemnify or otherwise breach any anti-deficiency law, regulation or requirement applicable to it in so doing; (f) Landlord shall not be exposed to actual or potential performance or financial obligation or liability by reason of such cooperation and assistance; and (g) in no event shall Landlord be required to institute, defend against, or otherwise participate in litigation or any other dispute resolution process regarding the pursuit of easements or the denial thereof. The foregoing shall not preclude Tenant from initiating such litigation or other dispute resolution process in Landlord's name if and when Landlord is a required party to establish the legal sufficiency of the pleadings or filing, in which event Landlord shall cooperate with Tenant in connection with such pleading or filing.

E. Closing/Opening Alleys and Streets

Landlord agrees to join, when appropriate, in petitions and applications for closing and/or opening of public alleys or streets, as well as relocations and/or dedications of such public alleys and/or streets when consistent with the approved Tenant Improvements Plans and Specifications.

F. Expenses

Any charges or expenses incurred pursuant to this Section shall be borne solely by Tenant.

**Section 11.03 Applicability of the CC&Rs**

All design, construction, maintenance, repair, alteration, demolition, reconstruction and/or replacement of the Tenant Improvements, infrastructure or other improvements shall be subject to the provisions of the CC&Rs with, as the context may make necessary or appropriate, the word "Tenant" substituted for the word "Developer" and the words "Tenant Improvements" substituted for the words

“Non-WMATA Improvements” as defined therein. If necessary or appropriate due to the Tenant Improvements Plans and Specifications, Landlord, WMATA, Tenant and Developer shall amend the CC&Rs. Tenant shall be responsible for obtaining Developer’s joinder to any such amendment.

#### **Section 11.04 Diligent Prosecution and Completion of Tenant Improvements**

##### **A. Commencement of the Work**

1. Subject to Unavoidable Delays and to **Section 11.04.A.2**, Tenant shall commence material construction of the Tenant Improvements, infrastructure or other work (other than WMATA Replacement Facilities, which are governed by **Article 12**) in accordance with the Project Schedule.

2. Notwithstanding **Section 11.04.A.1**, Tenant shall not commence construction until Tenant has met all of the following conditions:

(a) Tenant has furnished Landlord with evidence satisfactory to Landlord in Landlord’s sole and absolute discretion (which evidence may include, by way of example, a written commitment for Leasehold Mortgage financing and a commitment for sufficient equity to pay any costs not covered by such financing) that Tenant has sufficient funding available to it to complete the construction to be undertaken.

(b) Tenant has contacted all appropriate utility companies and Miss Utility and verified the location, depth and nature of all utilities above, on or under the Leased Premises and any areas adjacent thereto that might be affected by the construction.

(c) Landlord and WMATA have approved the Tenant Improvements Plans and Specifications for the work to be undertaken in accordance with this Article and the CC&Rs.

(d) Tenant has delivered to Landlord copies of the plans and specifications for the work to be undertaken, approved by the Senior Leasehold Mortgagee, if any, and stamped “approved” (or equivalent) by the governmental agency having jurisdiction, together with copies of all permits, approvals and authorizations required by the applicable governmental authorities to begin the next phase of construction.

(e) Tenant has delivered to Landlord a fully executed and delivered (i) design contract between Tenant and its architect and a construction contract between Tenant and its general contractor, (ii) design-build contract with an entity capable of performing the same, or (iii) design contract between Tenant and its architect and a construction management contract between Tenant and a construction manager, together with a construction contract with the general contractor to undertake the work to be done, each approved by the Senior Leasehold Mortgagee if so required by the Senior Leasehold Mortgagee. Each contract with an architect, design-builder, construction manager or contractor shall contain the following clause: “The undersigned acknowledges that *[name of Tenant]* \_\_\_\_\_ (“Tenant”) has assigned this contract to the landlord under the Ground Lease dated \_\_\_\_\_, 20\_\_\_\_, as it may have been amended, supplemented or otherwise modified, between the Washington Metropolitan Area Transit Authority (“Landlord”) and Tenant. Such assignment is subject to the rights of any

construction lender secured by a mortgage or deed of trust on Tenant's leasehold estate. The undersigned consents to that assignment to Landlord. At Landlord's written request, the undersigned shall perform under this contract for the benefit of Landlord, provided only that Landlord pays the undersigned for all sums previously due but not yet paid and all sums due on account of the undersigned's performance for Landlord. Landlord's election to have the undersigned perform this contract shall not be deemed to be an assumption of this contract by Landlord. Nothing in this paragraph limits the rights of the undersigned and Tenant to in good faith amend, supplement or otherwise modify this contract, except this provision, without Landlord's consent. This paragraph may not be amended without Landlord's written consent. Landlord is an intended third-party beneficiary of this paragraph."

(f) Tenant has delivered to Landlord a collateral assignment to Landlord of Tenant's right, title and interest in and to the contracts referenced in the preceding **clause (e)**, all working plans, specifications, drawings and construction documents relating to the work to be performed, and all intellectual property rights associated with the foregoing, which assignment shall be in form and substance acceptable to Landlord in Landlord's reasonable discretion; provided, however, that any such assignment shall be subject to the rights of any Leasehold Mortgagee(s) and that Landlord may not exercise its rights as assignee unless and until this Ground Lease has been terminated and the Senior Leasehold Mortgagee has failed to timely exercise its right to a new lease under **Section 17.02.C**.

(g) Tenant has provided Landlord with all insurance required by this Ground Lease **or by the CC&Rs** applicable to the work to be performed.

B. Prosecution of the Work

After the commencement of construction, Tenant shall use Commercially Reasonable Business Efforts to insure timely Final Completion of the Tenant Improvements in accordance with this Ground Lease. If Tenant shall fail or refuse to perform or carry out the work required to be done under this Ground Lease, and in the manner provided, or should fail to prosecute the work diligently and expeditiously, or should unnecessarily delay the same, Landlord shall have the right to take such action against Tenant or against the surety on its bond or against both of them to insure completion of Tenant Improvements in accordance with the provisions of this Ground Lease, and/or to seize the Security Deposit or exercise its other remedies if an Event of Default should occur as a result thereof. If Landlord terminates this Ground Lease under this subsection, Landlord will retain all rights associated with the approved Local Jurisdictional Plans.

C. Schedule

1. [The schedule to be adhered to by Tenant for completion of the Tenant Improvements and the WMATA Replacement Facilities (the "**Project Schedule**") is attached as **Exhibit 11.04.C**.] OR [Within thirty (30) days after the Effective Date, Tenant shall prepare and submit to Landlord a project schedule for the Tenant Improvements and the WMATA Replacement Facilities (the "**Project Schedule**"). The Project Schedule shall be subject to Landlord's and, if WMATA Facilities are affected, WMATA's, approval, not to be unreasonably withheld, conditioned or delayed; Landlord's and WMATA's approval shall not give rise to any liability of or waiver by Landlord or WMATA or otherwise prejudice Landlord's or WMATA's rights under this Ground Lease. The Project Schedule shall provide for the

expeditious preparation, completion and submission by Tenant of the Tenant Improvements Plans and Specifications and the expeditious and practical execution of all work required for each component of the Project, including the commencement and completion dates for each material aspect of the Project. The Project Schedule shall be coordinated with Landlord, WMATA and Tenant's architect so that all activities connected with the construction of the Project shall be performed in an orderly and timely fashion and shall not adversely affect the operations, safety or security of any WMATA Facilities. The Project Schedule shall include reasonable allowances for periods of time required for Landlord's and, where applicable, WMATA's review and approval and for inspections and approvals by the various governmental authorities having jurisdiction over the Project. The Project Schedule shall also include sufficient time to obtain WMATA's approval of a site-specific work plan and/or a General Orders and Track Rights application if the work is within any WMATA right-of-way or other operational area. If requested by Landlord or WMATA, the general contractor and any construction manager shall supplement the Project Schedule with a portrayal thereof in the form of a bar graph.] Tenant's timely completion of the Project in accordance with the Project Schedule, subject to and in conformity with the terms and provisions of this Ground Lease, is of the essence of this Ground Lease.

2. Tenant shall prepare a monthly schedule summary report in such form, detail and character as is reasonably approved by Landlord. The report shall identify the significant Project Schedule milestones achieved during the preceding month, identify those milestones that were not achieved and explain why they were not achieved, identify all change orders approved during the preceding month, and shall include a detailed schedule of the current month's and following month's activities in accord with the Project Schedule. Accompanying the report shall be an updated and current Project Schedule as proposed by Tenant for Landlord's or, where applicable, WMATA's approval, not to be unreasonably withheld, conditioned or delayed.

3. After the commencement of construction of the Tenant Improvements, Tenant shall hold job meetings at the Leased Premises on a regular basis and also before any new material phase of construction is undertaken, or as is reasonably requested by Landlord (but not more frequently than once per calendar month), at such time as is mutually acceptable to Landlord and Tenant. If there are WMATA Facilities at the Leased Premises or affected by the work, WMATA shall be invited to attend such meetings. At such meetings, the progress of the Tenant Improvements shall be reported in reasonable detail, including safety and security issues and compliance with the then-current Project Schedule, including both performance to date and anticipated activity during the next month. Tenant shall cause its project manager, construction manager, quality assurance and quality control personnel, general contractor and each major subcontractor then performing work on the Project to have a competent representative present at each such meeting to report on the condition of its work and to receive information. Landlord and WMATA shall be given reasonable advance notice of each such meeting and given the opportunity to attend and participate; Landlord's and WMATA's participation in any such meeting shall not make Landlord or WMATA responsible for any aspect of the performance of the Project. Meeting minutes shall be prepared by Tenant and distributed within three (3) days following the meeting.

#### D. Completion

Construction of the Tenant Improvements must be substantially complete and ready for occupancy, as evidenced by the issuance of an unconditional base building, core and shell certificate of occupancy by the governmental authority having jurisdiction and the issuance of a certificate of substantial completion by



the Project's architect, by the date stated for substantial completion or occupancy in the Project Schedule. Upon achieving substantial completion, Tenant will thereafter diligently prosecute the work to Final Completion within \_\_\_\_\_ (\_\_\_\_) days after substantial completion is achieved. The foregoing deadlines shall be extended for any Unavoidable Delays to the extent of actual delay caused thereby.

E. Safety

1. Tenant shall be responsible for performing the Tenant Improvements in a safe manner. Without limiting the foregoing, Tenant shall take all actions and implement all protections necessary to ensure that its construction-related activities pose no threat to the safety of persons or the environment and cause no damage to the Leased Premises, including providing and maintaining barricades, fences, signs, lighting and other safety devices.

2. Tenant shall be responsible for developing and implementing a safety and security certification plan in accordance with 49 CFR Parts 611 and 633 and the FTA Handbook for Transit Safety and Security Certification, FTA Circular 5800.1, as they be hereafter be amended, supplemented, replaced or otherwise modified from time to time, and any safety and security protocols WMATA may implement from time to time for work on its property.

3. Tenant shall display information signs at the Leased Premises clearly indicating the identity of the party responsible for the work being performed.

**Section 11.05 Real Estate Permits**

Nothing in this Ground Lease grants Tenant or its Affiliates any permission or right to do any work, invasive or not, on any part of the Overall Site outside the Leased Premises itself; all permissions and rights granted in this Ground Lease apply only to the Leased Premises. If Tenant wishes to do any work outside the Leased Premises, Tenant must apply for and obtain from WMATA such permission and right. As of the Effective Date, the process for doing so is for Tenant or its would-be contractor to apply for a WMATA Real Estate Permit (for invasive work) or a WMATA Right of Entry Agreement (for non-invasive work). The process of applying for and obtaining a WMATA Real Estate Permit can be long, depending on the nature and scope of the work proposed. Tenant is referred to the WMATA website ([www.wmata.com](http://www.wmata.com)) for that process and the applicable forms.

**Section 11.06 Inspections**

At the time that final approval is granted by Landlord and WMATA to the Tenant Improvements Plans and Specifications, subject to change by Notice to Tenant from time to time thereafter, Landlord and WMATA may designate in writing an inspector(s) who shall have full access to the Leased Premises and Tenant's construction for the purposes set forth below. Landlord's and WMATA's inspector(s) shall be notified of and shall have the right to attend job progress meetings and shall receive copies of the meeting minutes. Landlord's and WMATA's inspector(s) shall have full access to the Leased Premises, Tenant's construction and Tenant's progress and quality assurance/control files to determine the safety of operations with respect to WMATA Facilities and to determine if construction is in conformance with the approved Tenant Improvements Plans and Specifications. Such inspector(s) shall have the absolute authority to stop Tenant's construction of the Tenant Improvements if in his reasonable opinion, Tenant's contractor(s) or

subcontractor(s) is/are working (i) in a dangerous or unsafe manner that could cause personal injury or damage to property, (iii) in a manner that adversely affect the WMATA Facilities, or (ii) not in conformance with the approved Tenant Improvements Plans and Specifications. Such inspector(s) shall also have the right to issue corrective notices to Tenant for work that is dangerous or unsafe or that is not in conformance with the approved WMATA Replacement Facilities Plans and Specifications, and Tenant shall promptly undertake and complete the corrective action identified in such notice. The authority of Landlord's and WMATA's inspector(s) shall be incorporated into all of Tenant's construction contracts. Fees for WMATA's inspector will be paid by Tenant in accordance with WMATA's Adjacent Construction Project Manual.

#### **Section 11.07 As-Built Drawings**

Tenant shall require its contractor(s) to maintain As-Built Drawings during the construction of Tenant Improvements. Within three (3) months following the completion date of each phase of construction, Tenant shall provide two (2) hard copies and four (4) electronic media copies of the As-Built Drawings in native AutoCAD and PDF formats or other format acceptable to Landlord and WMATA for the Tenant Improvements.

### **ARTICLE 12**

#### **DESIGN AND CONSTRUCTION OF WMATA REPLACEMENT FACILITIES**

##### **Section 12.01 Existing WMATA Facilities**

###### **A. Existing WMATA Facilities to Remain in Place**

Except as shown on the approved Tenant Improvements Plans and Specifications and the WMATA Replacement Facilities Plans and Specifications, all existing WMATA Facilities on the Overall Site will remain in place. Any existing WMATA Facility that is to be replaced, relocated and/or altered as a result of the Project must remain in operation unless and until the applicable WMATA Replacement Facility is placed in service by WMATA.

###### **B. Plans of Existing WMATA Facilities**

If the proposed Tenant Improvements will affect or be affected by existing WMATA Facilities, then, upon written request, WMATA will make available for Tenant's review all readily available drawings and specifications of the existing WMATA Facilities on the Leased Premises. WMATA assumes no responsibility or liability for the completeness or accuracy of the information supplied and Tenant may not rely on any such drawings or specifications. It is expressly agreed that Tenant accepts the Leased Premises and subjacent and adjacent areas in their "as is" condition, including any possible concrete overpours, sheeting and shoring which remain in place, inaccurate location of utilities or portions of the facilities, and the like, regardless of what the materials provided by WMATA may show. It shall be Tenant's responsibility to take whatever actions it deems necessary to determine the actual location of existing facilities, structures, and utilities on the Leased Premises, and Tenant agrees that the materials provided by WMATA will not be the subject of any claim whatsoever against WMATA or its directors, officers, employees, agents, contractors or other representatives.

## **Section 12.02 Tenant's Obligation to Design and Construct WMATA Facilities**

### **A. Diligent Prosecution and Completion**

Tenant, at its own cost, shall, or shall cause an Affiliate approved by WMATA to, design, construct, reconstruct, relocate, equip and Finally Complete the WMATA Replacement Facilities in accordance with the Project Schedule, the approved Tenant Improvements Plans and Specifications, the WMATA Replacement Facilities Plans and Specifications and any other plans and specifications which have been or are hereafter approved by WMATA. Tenant shall, or shall cause an Affiliate approved by WMATA to, Finally Complete the WMATA Replacement Facilities not later than the date Tenant receives its initial occupancy permit for the Tenant Improvements. WMATA may intervene with the applicable governmental authorities to prevent the issuance of an occupancy permit for the Tenant Improvements if the WMATA Replacement Facilities have not been Finally Completed. If Tenant receives its initial occupancy permit before the WMATA Replacement Facilities have been Finally Completed, then as between WMATA and Tenant it shall be as if the occupancy permit had not been received prior to the Final Completion of the WMATA Replacement Facilities and, without limiting the foregoing, Tenant shall not open the Tenant Improvements for use and occupancy until the WMATA Replacement Facilities are Finally Completed.

### **B. Costs**

1. Unless WMATA has otherwise agreed to pay for the same pursuant to this Ground Lease or in a separate written agreement, Tenant shall be responsible for all costs and expenses related to the WMATA Replacement Facilities, including all pre-development costs (such as Entitlements), all fees payable under WMATA's Adjacent Construction Project Manual as in effect from time to time, and all costs associated with designing, constructing, installing, testing and putting into operation any and all WMATA Replacement Facilities and related infrastructure. Tenant's responsibility includes paying for all internal costs WMATA incurs in plan reviews, construction oversight, escorts, flagging, support services, use of WMATA equipment, administrative costs and other similar costs relating to the Tenant Improvements. Tenant acknowledges that if Tenant requires access to non-public WMATA Facilities it will need WMATA-provided escorts for that purpose and Tenant may be required to pay for full shifts of such escorts even if such escorts work less than a full shift on the Project.

2. Costs payable to or on behalf of WMATA shall be prefunded into an account maintained by WMATA solely for that purpose and the amount to be maintained in that account shall cover the estimated costs of the next twelve (12) months on a rolling basis, with supplemental funds to be deposited by Tenant as and when so notified by WMATA; any funds remaining in that account upon Final Completion of the Tenant Improvements and the costs accrued related thereto shall be refunded by WMATA to Tenant. In addition to WMATA's other remedies if such account is not sufficiently funded at any time, WMATA need not provide support for or cooperate in pursuing the work until the account is sufficiently funded, notwithstanding any other provision of this Ground Lease, without giving rise to any claim of Unavoidable Delay. The foregoing shall not limit or restrict Tenant's ability to seek third party funding, other governmental contribution or reimbursement of such pre-development costs from entities other than WMATA.

C. Creating WMATA Replacement Facilities Plans and Specifications

If the WMATA Replacement Facilities Plans and Specifications have not been approved by WMATA before the Effective Date, Tenant shall cause the WMATA Replacement Facilities Plans and Specifications to be prepared simultaneously with the Tenant Improvements Plans and Specifications and Tenant shall use Commercially Reasonable Business Efforts to pursue WMATA's approval in accordance with the terms of this Section.

1. The proposed WMATA Replacement Facilities Plans and Specifications shall:

- (a) include building envelopes, site plans, conceptual designs, elevations, landscaping and infrastructure consistent with and to the extent prepared as part of the information which Developer or Tenant anticipates presenting to the Local Jurisdictional authorities in connection with the WMATA Replacement Facilities proposed to be constructed;
- (b) show loading and vehicular access for the WMATA Replacement Facilities;
- (c) include a written and, where applicable, graphic description of the physical impact that construction will have on existing WMATA Facilities, including any penetrations, borings, test pits or other subsurface investigations, demonstrate how the WMATA Replacement Facilities will be integrated into the existing WMATA Facilities, and include the procedures that will be employed for commissioning, testing and demonstrating the operational effectiveness of the WMATA Replacement Facilities;
- (d) include an outline of the critical construction procedures, (including but not limited to procedures concerning the interface with the WMATA Facilities) and all temporary construction work (including blasting, supportive excavation, shoring, false work and form work), state proposed means and methods and the approximate duration of each activity;
- (e) be substantially in accordance with the Entitlements;
- (f) comply with Transit-Oriented Development principles and the WMATA Design and Construction Standards in effect as of the date on which they are submitted;
- (g) describe the quality control and quality assurance programs to be implemented as part of the construction of the WMATA Replacement Facilities; and
- (h) not contain, propose or constitute an acceptance of any restrictions, or the imposition of any requirements, that would or could result in any adverse impact on the safety of, ingress to or egress from, the security of and/or the operations of WMATA Reserved Areas or WMATA Facilities.

Tenant shall provide WMATA with any additional information in Developer's or Tenant's possession or control that WMATA may reasonably request to assist WMATA in evaluating the proposed WMATA Replacement Facilities Plans and Specifications, but specifically excluding Developer's or Tenant's financial or marketing projections. If and when Tenant knows that anything proposed in the WMATA Replacement

Facilities Plans and Specifications is at variance with applicable law or the WMATA Design and Construction Standards, Tenant promptly shall so Notify WMATA and thereafter effectuate corrections in a manner approved by WMATA. No claim for additional compensation, a change to the Project Schedule, or Unavoidable Delay shall result from such differences.

2. Tenant shall provide WMATA with at least seven (7) paper copies and one (1) electronic (PDF) copy, or such other copies and in such manner as WMATA may then require, of the proposed WMATA Replacement Facilities Plans and Specifications. WMATA shall review and approve or disapprove the proposed WMATA Replacement Facilities Plans and Specifications within thirty (30) Business Days after Tenant's delivery of the proposed WMATA Replacement Facilities Plans and Specifications, including all required information and documentation set forth above, to WMATA. WMATA's approval of the proposed WMATA Replacement Facilities Plans and Specifications shall be a WMATA Unconditional Approval Matter. Any submission to WMATA made after 2:00 pm shall be deemed to be made at 9:00 am on the next Business Day. Tenant shall not submit proposed WMATA Replacement Facilities Plans and Specifications to the applicable jurisdictional authorities until WMATA has reviewed and either commented on or approved the same in accordance with this subsection.

3. In the event that WMATA disapproves the proposed WMATA Replacement Facilities Plans and Specifications or approves the proposed WMATA Replacement Facilities Plans and Specifications subject to qualification, WMATA shall deliver Notice to Tenant of such disapproval or qualified approval, stating in as much detail as is reasonably practicable the nature of WMATA's objections or qualifications, as the case may be. Tenant shall have a period of ten (10) days after delivery of such Notice within which to revise and resubmit the proposed WMATA Replacement Facilities Plans and Specifications to WMATA addressing each of the issues raised by WMATA; however, if such objections or qualifications cannot reasonably be addressed within (10) days using Commercially Reasonable Business Efforts, Tenant shall be allowed additional time (not to exceed thirty (30) days in total) as is reasonably necessary to address the objections or qualifications. Tenant shall use Commercially Reasonable Business Efforts to satisfy WMATA's objections and qualifications.

4. The above process shall be repeated until the proposed WMATA Replacement Facilities Plans and Specifications are approved by WMATA. If a particular proposed WMATA Replacement Facilities Plans and Specifications is not approved after its third (3<sup>rd</sup>) iteration is submitted to WMATA for approval, the parties shall meet and use Commercially Reasonable Business Efforts to determine whether mutually acceptable WMATA Replacement Facilities Plans and Specifications can be agreed to. If no agreement is reached within thirty (30) Business Days after either party invokes the right and obligation to meet by Notice to the other and if WMATA is then the Landlord, then either party may terminate this Ground Lease upon Notice to the other party given within thirty (30) days after such thirty (30) Business Day period expires.

5. Once WMATA has approved the proposed WMATA Replacement Facilities Plans and Specifications, Tenant may not make material changes to the approved WMATA Replacement Facilities Plans and Specifications without WMATA's prior written approval as a WMATA Unconditional Approval Matter. Any proposed changes shall be promptly submitted to WMATA for WMATA's approval in accordance with the procedures set forth in this Section for re-submissions.

6. WMATA accepts no liability and waives none of its rights under this Ground Lease solely by reason of its approval of the proposed WMATA Replacement Facilities Plans and Specifications, nor shall its approval be construed to be a warranty thereof, except that WMATA's approval of the proposed WMATA Replacement Facilities Plans and Specifications shall constitute a waiver of any right by WMATA to object to any subsequent Submission to the same level of detail to the extent of the information disclosed in the approved WMATA Replacement Facilities Plans and Specifications (but shall not constitute a waiver of WMATA's approval rights hereunder).

D. Commencement of the Work

1. Subject to Unavoidable Delays, Tenant shall commence material construction of the WMATA Replacement Facilities in accordance with the Project Schedule.

2. Tenant shall not commence construction until Tenant has met all of the following conditions:

(a) Tenant has obtained a Real Estate Permit (or such successor document as WMATA may from time to time utilize) from WMATA to allow Tenant's work to affect WMATA's real property and improvements.

(b) Tenant has furnished WMATA with evidence reasonably satisfactory to WMATA that Tenant has sufficient funds available to it to complete the construction to be undertaken, which funds may be, without limitation, any to be paid by WMATA pursuant to this Ground Lease or any separate agreement relating to payment for the WMATA Replacement Facilities or a written commitment for Leasehold Mortgage financing and sufficient equity to pay for any shortfall between the amount to be so financed and the anticipated cost of the WMATA Replacement Facilities.

(c) Tenant has contacted all appropriate utilities and verified the location, depth and nature of all utilities affecting the Leased Premises and any areas adjacent thereto that might be affected by the construction.

(d) WMATA has approved the WMATA Replacement Facilities Plans and Specifications for the work to be undertaken in accordance with this Article and the CC&Rs

(e) Tenant has delivered to WMATA copies of the plans and specifications for the work to be undertaken, approved by the Senior Leasehold Mortgagee if such consent is required by the Senior Leasehold Mortgagee, and stamped "approved" (or equivalent) by the governmental agency having jurisdiction, together with copies of all permits, approvals and authorizations required by the applicable governmental authorities to begin the next phase of construction.

(f) Tenant has delivered to WMATA a fully executed and delivered (i) design contract between Tenant and its architect and a construction contract between Tenant and its general contractor, (ii) design-build contract with an entity capable of performing the same, or (iii) design contract between Tenant and its architect and a construction management contract between Tenant and a construction manager, together with a construction contract with the general

contractor to undertake the work to be done, each approved by the Senior Leasehold Mortgagee. Tenant agrees to consider in good faith hiring a construction manager and/or a general contractor with experience working on WMATA Facilities. Each contract with an architect, design-builder, construction manager or contractor shall contain the following clause: "The undersigned acknowledges that *[name of Tenant]* \_\_\_\_\_ ("Tenant") has assigned this contract to the Washington Metropolitan Area Transit Authority ("WMATA") WMATA under the Ground Lease dated \_\_\_\_\_, 20\_\_\_\_, as it may have been amended, supplemented or otherwise modified, between WMATA and Tenant. Such assignment is subject to the rights of any construction lender secured by a mortgage or deed of trust on Tenant's leasehold estate. The undersigned consents to that assignment to WMATA. At WMATA's written request, the undersigned shall perform under this contract for the benefit of WMATA, provided only that WMATA pays the undersigned for all sums previously due but not yet paid and all sums due on account of the undersigned's performance for WMATA. WMATA's election to have the undersigned perform this contract shall not be deemed to be an assumption of this contract by WMATA. Nothing in this paragraph limits the rights of the undersigned and Tenant to in good faith amend, supplement or otherwise modify this contract, except this provision, without WMATA's consent. This paragraph may not be amended without WMATA's written consent. WMATA is an intended third-party beneficiary of this paragraph."

(g) Tenant has delivered to WMATA an assignment to WMATA of Tenant's right, title and interest in and to the contracts referenced in the preceding **clause (f)**, all working plans, specifications, drawings and construction documents relating to the work to be performed, and all intellectual property rights associated with the foregoing, which assignment shall be in form and substance acceptable to WMATA in WMATA's reasonable discretion; provided, however, that any such assignment shall be subject to the rights of any Leasehold Mortgagee(s) and that WMATA may not exercise its rights as assignee unless and until this Ground Lease has been terminated and the Senior Leasehold Mortgagee has failed to timely exercise its right to a new lease under **Section 17.02.C**.

(h) Tenant has provided WMATA with all insurance required by this Ground Lease **or by the CC&Rs** applicable to the work to be performed.

(i) The bonds required by **Section 12.08** have been delivered to WMATA.

(j) Tenant has provided WMATA with sufficient funds to pay the costs of any third-party inspectors used by WMATA.

(k) Tenant provides WMATA with evidence that Tenant has hired the requisite quality control and quality assurance managers.

E. Safety

1. Tenant shall be responsible for constructing the WMATA Replacement Facilities in a safe manner. Without limiting the foregoing, Tenant shall take all actions and implement all protections necessary to ensure that its construction-related activities pose no threat to the safety of persons or the environment and cause no damage to the Leased Premises, including providing and maintaining barricades,

fences, signs, lighting and other safety devices.

2. Tenant shall be responsible for developing and implementing a safety and security certification plan in accordance with 49 CFR Parts 611 and 633 and the FTA Handbook for Transit Safety and Security Certification, FTA Circular 5800.1, as they be hereafter be amended, supplemented, replaced or otherwise modified from time to time, and any safety and security protocols WMATA may implement from time to time for work on its property.

3. Tenant shall display information signs at the Leased Premises clearly indicating the identity of the party responsible for the work being performed.

F. Project Schedule

1. Tenant shall perform the work associated with the WMATA Replacement Facilities in accordance with the Project Schedule. Tenant's timely completion of the WMATA Replacement Facilities in accordance with the Project Schedule, subject to and in conformity with the terms and provisions of this Ground Lease, is of the essence of this Ground Lease.

2. Tenant shall prepare a monthly schedule summary report with respect to the WMATA Replacement Facilities in such form, detail and character as is reasonably approved by WMATA. The report shall identify the significant Project Schedule milestones achieved during the preceding month, identify those milestones that were not achieved and explain why they were not achieved, identify all change orders approved during the preceding month, and shall include a detailed schedule of the current month's and following month's activities in accord with the Project Schedule. Accompanying the report shall be an updated and current Project Schedule as proposed by Tenant for WMATA's approval, not to be unreasonably withheld, conditioned or delayed.

3. After the commencement of construction of the WMATA Replacement Facilities, Tenant shall hold job meetings at the Leased Premises on a regular basis and also before any new material phase of construction is undertaken, or as is reasonably requested by WMATA (but not more frequently than once per calendar month), at such time as is mutually acceptable to WMATA and Tenant. At such meetings, the progress of the WMATA Replacement Facilities shall be reported in reasonable detail, including safety and security issues and compliance with the then-current Project Schedule, including both performance to date and anticipated activity during the next month. Tenant shall cause its project manager, construction manager, quality assurance and quality control personnel, general contractor and each major subcontractor then performing work on the Project to have a competent representative present at each such meeting to report on the condition of its work and to receive information. WMATA shall be given reasonable advance notice of each such meeting and given the opportunity to attend and participate; WMATA's participation in any such meeting shall not make WMATA responsible for any aspect of the performance of the Project. Meeting minutes shall be prepared by Tenant and distributed within three (3) days following the meeting.

G. Quality of WMATA Replacement Facilities

1. If required by WMATA, Tenant shall furnish reasonably satisfactory evidence as to the kind and quality of materials and equipment to be used in the WMATA Replacement Facilities and the



methods of using them. All manufactured articles, materials and equipment shall be new and shall be stored, applied, installed, tested, connected, erected, used, cleaned and conditioned by Tenant as directed by the manufacturer unless otherwise specified or approved by WMATA. Construction not meeting the foregoing standard is at Tenant's risk, including the risk of rejection by WMATA and Tenant's obligation to remove and replace the same.

2. Tenant shall create and implement a quality control and quality assurance plan meeting the following parameters:

(a) The quality control and quality assurance plan shall address quality assurance in organization, oversight, design, development, installation, inspection, review and recordkeeping. The plan shall be consistent with ISO 9001:2008 standards, as they may be amended, supplemented, replaced or otherwise modified from time to time. The plan shall be submitted to WMATA for review and approval as part of the proposed WMATA Replacement Facilities Plans and Specifications.

(b) Tenant shall name one individual who is independent of Tenant, any construction manager, the general contractor and any subcontractors as the quality control manager for the WMATA Replacement Facilities. The quality control manager shall perform, or hire an independent third party to perform, inspection and testing of the construction of the WMATA Replacement Facilities. The quality control manager must be a licensed professional engineer in the jurisdiction in which the Project is located with at least eight (8) years of experience designing, supervising, monitoring and/or inspecting projects similar to the WMATA Replacement Facilities. The quality control manager shall be responsible for all quality control activities and act as the primary contact on quality control issues. The quality control manager's role must be limited to providing quality control management and must be independent of the design and construction personnel, and compensation must be independent of any profit made by Tenant or its Affiliates on the Project or on the WMATA Replacement Facilities.

(c) Tenant shall name one individual who is independent of Tenant, the general contractor, any subcontractors and the quality control manager as the quality assurance manager for the WMATA Replacement Facilities. The quality assurance manager may be, but need not be, employed by or affiliated with any construction manager used on the Project. The quality assurance manager must be a professional with the requisite experience in quality assurance to handle an assignment of the scope of the WMATA Replacement Facilities. The quality assurance manager shall ensure that the approved quality control plan is implemented.

#### H. Repairs to Damaged WMATA Facilities

Tenant shall at no cost to WMATA repair all damage to any WMATA Facilities that are damaged during construction of the WMATA Replacement Facilities. Any such repair work shall be handled as if it was new construction of WMATA Replacement Facilities under this Article.

#### I. As-Built Drawings

Tenant shall require its contractor(s) to maintain As-Built Drawings during the construction of the

WMATA Replacement Facilities. Within three (3) months following the completion date of each phase of construction, Tenant shall provide WMATA with copies of the As-Built Drawings for the relevant WMATA Replacement Facilities in accordance with the definition of “Final Completion.”

J. WMATA’s Rights and Remedies

In the event Tenant or its Affiliates shall fail or refuse to perform or carry out the work required to be done under the terms of this Ground Lease or under any separate contract with WMATA with respect to the WMATA Replacement Facilities, and in the manner provided, or should fail to prosecute the work diligently and expeditiously, should unnecessarily delay the same, or fail to Finally Complete the WMATA Replacement Facilities by the date required by the Project Schedule, WMATA shall have the right to take such action against Tenant or against the surety on its bond or against both of them to insure completion of the WMATA Replacement Facilities in accordance with the provisions of this Ground Lease and/or to protect WMATA’s transit operations, and may declare the existence of an Event of Default (subject to any Notice and cure periods that may be applicable under this Ground Lease). WMATA will retain all rights associated with the approved Local Jurisdictional Plans and the WMATA Replacement Facilities Plans and Specifications.

**Section 12.03 Final Completion**

A. Process

When Tenant in good faith considers the WMATA Replacement Facilities to be sufficiently complete and ready for inspection for Final Completion, Tenant shall so Notify WMATA and request that WMATA and Tenant jointly inspect the WMATA Replacement Facilities within ten (10) Business Days. If any incomplete items relate to safety issues or to matters that are expected to require more than thirty (30) days to complete, or if WMATA does not consider the WMATA Replacement Facilities to be ready for inspection for any other reason or, after inspection, if there are punch list items or other reasons as a result of which WMATA does not consider the WMATA Replacement Facilities to be Finally Complete, WMATA shall promptly Notify Tenant and give reasons therefor. Tenant shall take corrective action with respect to any item so identified by WMATA. This process will be repeated until the parties agree that the WMATA Replacement Facilities are Finally Complete.

B. Effect

Final Completion shall constitute a waiver of all claims by WMATA against Tenant except claims arising from defective design, latent defects, fraud or such gross mistakes as may amount to fraud, or as regards to WMATA’s right under any warranty or guarantee as provided in **Section 12.07**.

**Section 12.04 Inspections**

WMATA may from time to time designate by Notice to Tenant an inspector(s) for the purposes set forth below. WMATA’s inspector shall be notified of and shall have the right to attend job progress meetings and shall receive copies of the meeting minutes. WMATA’s inspector(s) shall have full access to the Leased Premises, Tenant’s construction and Tenant’s progress and quality assurance/control files to determine the safety of operations with respect to WMATA Facilities and to determine if construction is in conformance with the approved WMATA Replacement Facility Plans and Specifications. Such inspector(s)

shall have the absolute authority to stop Tenant's construction of the WMATA Replacement Facilities if in his reasonable opinion, Tenant's contractor(s) or subcontractor(s) is/are working (i) in a dangerous or unsafe manner that could cause personal injury or property damage, (ii) in a manner that could adversely affect the WMATA Facilities, or (iii) not in conformance with the approved WMATA Replacement Facilities Plans and Specifications. Such inspector(s) shall also have the right to issue corrective notices to Tenant for work that is dangerous or unsafe or that is not in conformance with the approved WMATA Replacement Facilities Plans and Specifications, and Tenant shall promptly undertake and complete the corrective action identified in such notice. The authority of WMATA's inspector shall be incorporated into all of Tenant's construction contracts. Fees for WMATA's inspector will be paid by Tenant in accordance with WMATA's Adjacent Construction Project Manual.

#### **Section 12.05 Local Codes, Laws, Regulations and Ordinances, Etc.**

##### **A. Generally**

Tenant agrees that the WMATA Replacement Facilities shall comply with this Ground Lease, the WMATA Design and Construction Standards, and the local zoning regulations and building codes and other applicable laws, regulations and ordinances, and that it shall be Tenant's responsibility to obtain the requisite building permits and/or approvals for the WMATA Replacement Facilities.

##### **B. Support During Permit Process**

Consistent with WMATA's approval of the WMATA Replacement Facilities Plans and Specifications, WMATA agrees to give positive support for any special exceptions, variances, permits, licenses, or other authorizations for which WMATA is obligated to cooperate pursuant to the terms of this Ground Lease, including appearing and giving testimony before any governmental authority, provided that WMATA incurs no out-of-pocket cost or expense and no performance or financial obligation or liability by reason of such support or execution of such documents.

##### **C. Easements**

Landlord, WMATA and Tenant agree to join in all grants of easements (i) for the installation, maintenance, repair and replacement of electric, telephone, gas, water, sanitary and storm sewer and such other public utilities and facilities as may be reasonably necessary for the construction and/or operation of the WMATA Replacement Facilities, provided that such easements do not materially adversely affect WMATA's operations or access to WMATA Facilities, as determined by WMATA as a WMATA Unconditional Approval Matter, and (ii) referenced in the CC&Rs as if Tenant were the "Developer" thereunder.

##### **D. Closing/Opening Alleys and Streets**

Landlord and WMATA agree to join, when appropriate, in petitions and applications for closing and/or opening of public alleys or streets, as well as relocations and/or dedications of such public alleys and/or streets when consistent with the approved WMATA Replacement Facilities Plans and Specifications.

E. Expenses

Any charges or expenses incurred pursuant to this Section shall be borne solely by Tenant.

**Section 12.06 Applicability of the CC&Rs**

All design, construction, alteration, demolition and reconstruction of the WMATA Replacement Facilities shall be subject to those provisions of the CC&Rs applicable thereto with, as the context may make necessary or appropriate, the word "Tenant" substituted for the word "Developer" and the words "WMATA Replacement Facilities" substituted for the words "Developer Parcel Improvements" or any equivalent therein. If necessary or appropriate due to the WMATA Replacement Facilities Plans and Specifications, Landlord, WMATA, Tenant and Developer shall amend the CC&Rs. Tenant shall be responsible for obtaining Developer's joinder to any such amendment.

**Section 12.07 Warranties**

A. Tenant's One Year Warranty

In addition to any other warranties required by or provided in this Ground Lease, Tenant and/or its contractor shall remedy, at their own expense, any failure of the WMATA Replacement Facilities to conform with the final WMATA Replacement Facilities Plans and Specifications and/or the WMATA Design and Construction Standards, and any defect of material, workmanship or design therein (but excluding any defect of any design furnished by WMATA and ordinary wear and tear), provided that WMATA gives Tenant Notice of any such failure or defect not later than one (1) year after Final Completion of the WMATA Replacement Facilities. Tenant, at its own expense, shall also remedy any damage to other WMATA property which is the direct result of any such failure or defect. Failure of Tenant's contractor to timely comply with directions to remedy shall not relieve Tenant of its own obligation to remove and replace defective work. Any work repaired or replaced pursuant to this Section shall also be subject to the provisions of this Section to the same extent as work originally performed. Except in a case of an emergency, when WMATA may initiate its own cure without Notice, if Tenant fails to remedy the failure or defect within thirty (30) days after WMATA gives it Notice of the problem (subject to extension, not to exceed an additional sixty (60) days, for such reasonable time as may be necessary to effect a cure if a cure is not practicable within the initial thirty (30) days but a cure is possible and if Tenant promptly initiates a cure within the initial thirty (30) days and diligently prosecutes the cure to completion), WMATA shall have the right to replace, repair or otherwise remedy such failure or defect at Tenant's expense. Any cure undertaken by WMATA shall not waive or release Tenant from the consequences of Tenant's failure to cure or from being in an Event of Default. At the end of the aforesaid one (1) year period, Tenant's work shall be deemed to have been finally and conclusively accepted by WMATA except as to items identified during that one-year period, latent defects, fraud or such gross mistakes as may amount to fraud.

B. Contractor's Warranties

All warranties and guaranties of equipment, installation or materials furnished to Tenant or its (sub)contractors by any manufacturer or supplier shall be deemed to run to the benefit of, and are hereby assigned by Tenant to, WMATA. Tenant shall deliver to WMATA two (2) clean, complete and legible copies of all warranties and guaranties of equipment, installation or materials referenced in the preceding

sentence, together with duly executed instruments assigning them to WMATA. Subject to any greater requirement in the WMATA Design and Construction Standards, Tenant shall also deliver to WMATA two (2) clean, complete and legible copies of all manufacturers' instructions, related maintenance manuals, training manuals or videos or the like, replacement lists, detailed drawings and any technical requirements necessary to operate and maintain such equipment and materials or needed to maintain the effectiveness of any such warranties.

C. Rights Additive

The rights and remedies of WMATA provided in this Section are in addition to and do not limit any rights afforded to WMATA by any other provision of this Ground Lease **or the CC&Rs**.

D. Survive Expiration or Termination

The obligations of Tenant and its (sub)contractors under this Section and the rights of WMATA under this Section shall survive the expiration or termination of this Ground Lease.

## **Section 12.08 Payment and Performance Bonds**

A. General Requirements

Before undertaking any construction of WMATA Replacement Facilities, Tenant and/or its general contractor shall secure and file with WMATA the bonds set forth in this Section. Tenant may not begin construction until the bonds are delivered to WMATA. The bonds must be obtained from a federally-approved surety company having sufficient assets and approved by WMATA, and shall be countersigned by a District of Columbia, Maryland, or Virginia resident agent of the surety, as applicable, with a copy of the agent's license as issued by the relevant jurisdiction's Department of Insurance or equivalent. Each bond shall provide that (i) the obligations of the surety shall be unconditionally activated upon the occurrence of an Event of Default or of any other event or circumstance that under this Ground Lease entitles WMATA to make a claim on the bond, and (ii) WMATA shall be given written notice by the surety concurrently with the surety's notice to Tenant of any default by Tenant or its contractors under the construction contract, the bond or any other document relating to the Project.

B. Terms of Payment and Performance Bonds

Tenant and/or its general contractor must post a payment and performance bond(s) equal to one hundred percent (100%) of the aggregate hard and soft costs of the Project and naming WMATA as the insured for the benefit of laborers, subcontractors, material suppliers, and others that have or may have claims or liens against the WMATA Replacement Facilities or the Overall Site. The bonds may be dual or co-obligee bonds running to the benefit of both WMATA and the Senior Leasehold Mortgagee but shall not include any provision to the effect that nonpayment or any other default by Tenant or any Leasehold Mortgagee shall release, reduce or otherwise affect the surety's obligations to WMATA. The bonds shall be substantially in the form set forth in **Exhibits 12.08.B-1 and 12.08.B-2**. Said bond(s) shall name WMATA as the property owner and obligee and shall cover the lien-free completion of the WMATA Replacement Facilities in accordance with the provisions of this Ground Lease. Tenant shall provide WMATA with the original payment and performance bond(s) together with such documents as may be reasonably requested

by WMATA. Such documents may include, but not be limited to, a copy of the construction financing commitment indicating the availability of funds to complete construction of the Tenant Improvements.

#### **Section 12.09 Disclaimer of Liability**

WMATA accepts no liability and waives none of its rights under this Ground Lease solely by reason of its approval of any drawings or specifications or by inspecting, having the right to inspect, or requiring the correction of any construction. WMATA's approval shall not be construed to be a warranty of any such drawings or specifications. No inspection conducted by WMATA shall be construed to be a warranty, guarantee, or assurance of the adequacy of the contractor's work or of the Improvements constructed. The inspection conducted is for WMATA's sole benefit and is for no other party's benefit, including that of Tenant. WMATA accepts no liability for any construction defects, flaws or mistakes and waives none of its legal rights.

### **ARTICLE 13**

#### **ALTERATIONS BY TENANT**

##### **Section 13.01 Rights and Responsibilities**

###### **A. Tenant's Right to Make Alterations**

Subject to compliance with the following conditions, Tenant shall have the right during the Term, at Tenant's sole cost and expense, to modify, remodel, expand, alter, demolish and/or reconstruct the Tenant Improvements or any portion thereof ("**Alterations**"):

1. The method, schedule, plans and specifications for the Alterations shall be submitted to Landlord and WMATA pursuant to **Article 11** for Landlord's and WMATA's approval in accordance with the provisions for review and approval contained in **Article 11**.
2. Alterations must not change or adversely affect any WMATA Facilities except as may be required by laws, regulations and ordinances or as may be agreed to by WMATA as a WMATA Unconditional Approval Matter, subject in each case to **Section 13.01.A.3**.
3. Tenant, at its sole cost and expense, must maintain Landlord's and WMATA's rights of access and vertical and horizontal support.
4. Demolition shall be permitted only if (i) it is preliminary to and in connection with the building of new Tenant Improvements that have been approved by Landlord and WMATA in accordance with the terms of this Ground Lease, (ii) required by applicable law, (iii) the result of a Taking or a casualty loss, or (iv) needed to abate a dangerous or unsafe condition that is not economical to otherwise repair or ameliorate.

B. Landlord's and WMATA's Approval

Landlord's and WMATA's approval of the Alterations will be granted or withheld under the same standards as set forth in **Article 11**. Landlord and WMATA accept no liability and waive no rights under this Ground Lease by reason of its approval of the method, schedule, plans and specifications for any Alterations. Notwithstanding anything to the contrary in this Ground Lease, Landlord's and WMATA's approval rights do not apply to any modifications, construction, replacements, or repair in the nature of "tenant work" or tenant finish work, as such terms are customarily used, that do not affect the structure of the Tenant Improvements or adversely affect any WMATA Facilities (the determination of no adverse effect shall be made by WMATA as a WMATA Unconditional Approval Matter), or in the normal and periodic maintenance, operation and repair of the Tenant Improvements.

**Section 13.02 Adjustment in Rent**

Upon completion of Alterations, Base Rent and Participating Rent shall be increased in accordance with **Section 4.10**, if applicable. In no event shall Tenant be entitled to an abatement, allowance, reduction or suspension of the Base Rent or Participating Rent by reason of such Alterations, nor shall Tenant be released of or from any other obligations imposed upon Tenant under this Ground Lease by reason of such Alterations.

**ARTICLE 14**

**OPERATIONS**

**Section 14.01 General Standard for Operating Tenant Improvements**

Tenant shall operate the Tenant Improvements in a reputable manner and to a standard at least consistent with the typical standards of similar improvements in the jurisdiction in which the Tenant Improvements are located.

**Section 14.02 No Interference**

A. Mutual Noninterference

Subject to the more specific requirements set forth in this Article, Landlord and Tenant agree to perform and exercise their rights and obligations under this Ground Lease so as not to unnecessarily or unreasonably interfere with the other's use, occupancy, or enjoyment of the Leased Premises, the Tenant Improvements, the WMATA Facilities and the WMATA Reserved Areas. The provisions of this Section shall be subject to any other provision of this Ground Lease **or of the CC&Rs** establishing a different standard.

B. Noninterference with WMATA Operations

Except as may be approved by WMATA as an Unconditional WMATA Approval Matter, neither the Tenant Improvements nor Tenant's or any Subtenant's construction or operations shall restrict or impede WMATA's operations or WMATA's ability to realize transit revenues in the normal course of business. No

interference is permitted with the free flow of pedestrian and vehicular traffic to and from the WMATA Facilities and the WMATA Reserved Areas. Except for security enclosures around the Metro Station entrances and other WMATA Facilities reasonably necessary for security or maintenance/repair purposes, no fence, or any other structure shall be placed, kept, permitted or maintained in such a fashion as to materially adversely interfere with pedestrian traffic to and from the Tenant Improvements and to and from the WMATA Facilities. The aforesaid shall not apply to fences designed to promote pedestrian and bicycling safety, such as fences in the median of bus lanes or along rail rights-of-way to channel pedestrians and cyclists to crosswalks. Notwithstanding the foregoing, Tenant may close the Tenant Improvements upon Notice to Landlord, and WMATA may close the WMATA Facilities and WMATA Reserved Areas, and deny access to the public at such times and in such manner as is deemed reasonably necessary by Tenant or WMATA, as applicable, to undertake the construction, demolition, operation, alteration or repair of the Tenant Improvements or the WMATA Facilities and the WMATA Reserved Areas, respectively, provided such closing by Tenant shall not have a material adverse effect on WMATA Facilities or operations. WMATA's determination of a material adverse effect shall be a WMATA Unconditional Approval Matter.

#### **Section 14.03 Use of WMATA Reserved Areas**

Tenant and all Subtenants are strictly prohibited from conducting any operations, sales, promotions, advertising or special events on any WMATA Reserved Areas without the prior written approval of WMATA as a WMATA Unconditional Approval Matter. Tenant shall include the foregoing prohibition in all Subleases. As part of WMATA's approval of Tenant's use of any WMATA Reserved Areas, Tenant may be required to provide adequate security personnel and flagmen to assure that both access to and egress from WMATA Facilities are not hindered. Tenant shall give WMATA no less than twenty-one (21) days' Notice of any event or promotion held by Tenant or its Subtenants which may impede or affect patrons traveling to and from WMATA Facilities. Tenant shall include in its written notice to WMATA an explanation of the security, maintenance of traffic plan, insurance and clean up procedures that it will provide. Tenant's failure to abide by the aforesaid or to otherwise adhere to the terms of this Article shall be an Event of Default.

#### **Section 14.04 Maintenance and Repair of Utilities**

Landlord, WMATA and Tenant agree to maintain and repair, and each is given the right to replace, relocate, and remove, utility facilities necessary for the operation of their respective improvements, provided that such repair activity does not materially adversely interfere with the other's operations. WMATA's determination of a material adverse effect on its operations is a WMATA Unconditional Approval Matter. Landlord, WMATA and Tenant shall be responsible for, and pay the operating cost of, all utilities required solely for the operation of its own facilities.

#### **Section 14.05 Signage**

##### **A. Tenant Improvements Signage**

Tenant shall be permitted:

1. Subject to Landlord's approval, not to be unreasonably withheld, conditioned or delayed, to designate a name by which Tenant Improvements shall be known.



2. To erect or to permit the erection of signs on the Leased Premises identifying the Tenant Improvements and particular uses therein, including the marketing, financing and construction thereof, as long as such signs comply with the CC&Rs and all applicable Federal, state, municipal and county laws, regulations and ordinances and do not interfere with WMATA Facilities, WMATA Reserved Areas or WMATA operations in other than a *de minimis* manner.

B. Signs Referring to WMATA and WMATA Facilities

All signs which are designed to interface with WMATA Facilities must be approved in advance by WMATA as to both content and location. Such approval shall be a WMATA Unconditional Approval Matter.

## **ARTICLE 15**

### **REPAIRS AND MAINTENANCE**

#### **Section 15.01 Tenant's Responsibilities**

Except to the extent any portion of the Leased Premises is accepted by a governmental authority for public maintenance, Tenant, at its sole cost and expense, shall keep and maintain the Leased Premises (other than any WMATA Facilities and WMATA Reserved Areas that may be located therein) and all Tenant Improvements in good condition and repair. Tenant shall make all necessary repairs to the Tenant Improvements, or any part thereof, interior and exterior, structural and nonstructural, ordinary and extraordinary, foreseen and unforeseen, and shall keep the Leased Premises and the Tenant Improvements, or any part thereof, in good condition, free of all dangerous or hazardous conditions including dirt, rubbish, snow and ice, and free of vermin, rodents, bugs and other pests.

#### **Section 15.02 WMATA's Responsibilities**

A. WMATA Facilities and Reserved Areas

Subject to WMATA's rights under any warranty and/or against any surety, WMATA, at its sole cost and expense, shall keep and maintain all WMATA Facilities and WMATA Reserved Areas on or adjacent to the Leased Premises in good condition and repair. The WMATA Facilities on the Leased Premises may be repaired, altered, or removed by WMATA at any time upon prior Notice to Tenant (except in the case of a *bona fide* emergency, when no Notice is required). In the event a WMATA Facility is removed, WMATA promptly shall repair all physical damage caused to the Tenant Improvements by such removal and shall promptly restore the same to the same condition as existed immediately prior to such removal.

B. Suspension of Service

WMATA reserves the right to close or suspend service of escalators, elevators and/or Metro Station entrances and Metrorail and/or Metrobus operations as required by WMATA's operations, capital improvement program or for any other purpose.

C. No Other Landlord Responsibility

Except as may otherwise be provided in this Ground Lease, neither Landlord nor WMATA shall have any obligation with respect to the maintenance and repair of the Leased Premises or the Tenant Improvements.

**ARTICLE 16**

**ENTRY ON LEASED PREMISES BY LANDLORD AND WMATA**

**Section 16.01 Right of Entry for Inspection**

Landlord and its authorized representatives shall have the right to enter the Leased Premises and the Tenant Improvements at all times to inspect for compliance with this Ground Lease, and WMATA and its authorized representatives shall have the right to enter the Overall Site at any time to access any WMATA Facilities thereon, provided Landlord gives reasonable advance Notice to Tenant of at least twenty-four (24) hours (except (i) no Notice is necessary from WMATA to access WMATA Facilities located on the Overall Site and (ii) in an emergency, when no Notice shall be necessary). Tenant may require that Landlord and WMATA be accompanied on its inspection by Tenant's representative, except when accessing WMATA Facilities or in an emergency. Any such entry by Landlord or WMATA and/or their authorized representatives shall be subject to the rights of then-existing Subtenants of whose rights Landlord or WMATA, as applicable, has Notice, which rights shall not include the right to exclude Landlord and/or WMATA from portions of the Property controlled by Subtenants. (This Section does not apply to entry related to construction of the Tenant Improvements or to Alterations, as such entry is controlled by **Articles 11 and 12.**)

**Section 16.02 Limitations on Entry**

In exercising the right of entry granted in **Section 16.01**, Landlord and WMATA shall whenever reasonably practical, avoid entering bona fide security areas of the Leased Premises and the Tenant Improvements of which Tenant has given Landlord or WMATA, as applicable, Notice.

**ARTICLE 17**

**ASSIGNMENTS, EQUITY, MORTGAGES, SUBLEASES**

**Section 17.01 Tenant's Right to Assign**

A. Prior to Final Completion of Project

1. The expertise needed during the planning, design and construction phases of the Project makes this a personal services contract during those phases. The skills, experience, knowledge, experience and financial standing of Tenant's principals are a material inducement to Landlord's entering into this Ground Lease.

2. Until Final Completion of the Project, Tenant shall maintain a team of directors, members, principals, officers, employees, consultants and contractors who, individually and in the aggregate, have the skills, experience, knowledge and reputation necessary or appropriate to Finally Complete the Project; the personnel who comprise the foregoing team may change from time to time as the Project progresses. The Composition of Tenant and the project team assembled as of the Effective Date to satisfy the preceding sentence is shown on **Exhibit 17.01.A**; upon request from time to time, Tenant shall provide Landlord with the then-current Composition of Tenant and a list of the then-current team members and their areas of expertise.

3. No Assignment prior to the Final Completion of the Tenant Improvements and the WMATA Replacement Facilities is permitted unless the same is approved in writing by Landlord in its sole and absolute discretion and, if WMATA Replacement Facilities are to be constructed, by WMATA as a WMATA Unconditional Approval Matter. Notwithstanding the foregoing, no consent by Landlord or by WMATA is required for any of the following Assignments:

(a) a Leasehold Mortgage (and documents ancillary thereto) securing only the Tenant Improvements and Tenant's leasehold interest in the Leased Premises and any personalty relating thereto, or, in the case of a Mezzanine Loan, securing only the ownership interests in an entity with a direct or indirect interest in the Tenant Improvements and Tenant's leasehold interest in the Leased Premises and any personalty relating thereto, whose proceeds are to be used solely for the planning, design, and/or construction of the Project;

(b) a Leasehold Mortgage Assignment;

(c) the addition of additional partners, members, stockholders or other holders of ownership interests in Tenant in exchange for equity contributions to Tenant to permit Tenant to perform its obligations under this Ground Lease, which contributions may result in a dilution of the ownership interests in Tenant and a Change in Composition of Tenant;

(d) if an default under a Leasehold Mortgage or an Event of Default (or circumstance that could, with the giving of notice or the passage of time, or both, constitute an Event of Default) under this Ground Lease occurs and there is a subsequent sale, assignment or other conveyance of Tenant's rights under this Ground Lease to a purchaser at a foreclosure sale or via assignment, deed-in-lieu of foreclosure, conveyance via judicially-administered bankruptcy or other insolvency proceeding, or other right or remedy under the Leasehold Mortgage by that Leasehold Mortgagee or management rights within Tenant are transferred to or assumed by partners, members, stockholders or other holders of ownership interests who are not now in control of Tenant;

(e) the dedication to the public of a portion of the Leased Premises in accordance with the approved Local Jurisdictional Plans or an assignment or dedication to a community association established under the CC&Rs of any portion of the Leased Premises to be used for public or quasi-public purposes in accordance with the approved Local Jurisdictional Plans;

(f) transfers of interests of partners, members, stockholders or other owners in

Tenant due to death, disability, legal disqualification from owning property, or corporate reorganization or merger that does not include consideration to Tenant and whose purpose is not in whole or in part to evade the provisions of this Ground Lease governing Assignment;

(g) transfers of interests in Tenant between the then-existing partners, members, shareholders or other owners of interests within Tenant; and

(h) sales, transfers or other exchanges of ownership interests within publicly traded entities via a regulated stock exchange or other public exchange; and

(i) if the permitted use of the Leased Premises pursuant to this Ground Lease is a condominium, arm's-length conveyances of fee title (subject to this Ground Lease) of condominium units to unrelated third-party unit purchasers in the ordinary course of business.

**B. After Final Completion of Project**

After Final Completion of the Project, except for Assignments permitted under **Section 17.01.A.3(a)** et seq. above without Landlord's approval, no Assignment is permitted without Landlord's prior written approval, which approval shall not be unreasonably withheld, delayed or conditioned.

**C. Conditions**

All Assignments shall be made expressly subject to the terms, covenants and conditions of this Ground Lease and in accordance with the following provisions:

1. No Assignment (including a Leasehold Mortgage or Leasehold Mortgagee Assignment) is permitted to any person or entity (i) who, if Landlord is a governmental authority, cannot and does not truthfully fill out the affidavit attached hereto as **Exhibit 17.01.C** (or such successor thereto as Landlord may promulgate from time to time) and/or (ii) who may not be a Subtenant under **Section 17.03.A.2**.

2. When and if Tenant or a Leasehold Mortgagee enters into an agreement with a third party for an Assignment, Tenant or the Leasehold Mortgagee, as applicable, will furnish a copy of the documentation and any other relevant information to Landlord (including, if Landlord is a governmental authority, the affidavit attached hereto as **Exhibit 17.01.C**) and, if WMATA's approval is required pursuant to **Section 17.01.A.3**, to WMATA.

3. The Assignment shall not be binding on Landlord or, if applicable, WMATA, until a duly executed copy of the Assignment (and, if the Assignment is a recorded document, a recorded copy stamped by the land records of the place of recording with the date, time and recording reference) and all other pertinent documents are delivered to and, if Landlord and/or WMATA has approval rights, approved by Landlord and, if applicable, WMATA. These documents shall designate the name and address of the assignee and the post office address of the place to which all Notices required by this Ground Lease shall be sent.

4. The assignor Tenant or the Leasehold Mortgagee who is making the Assignment, as applicable, and the assignee Tenant shall be jointly and severally responsible to Landlord for the payment of any transfer, recordation, grantor's, stamp or other documentary taxes, fees, charges and other costs and expenses that may be levied on or incident to the Assignment. (The foregoing shall not prohibit the assignor Tenant or the Leasehold Mortgagee who is making the Assignment, as applicable, and the assignee Tenant from allocating such responsibility between themselves *vis a vis* the obligation to pay any of the foregoing to any governmental entity or to each other.)

5. An assignee Tenant (and all succeeding and successor assignees) shall assume all rights and obligations of Tenant under this Ground Lease previously accrued and/or pertaining to the then unexpired Term.

6. An Assignment shall not relieve the assignor Tenant of its liabilities and obligations under this Ground Lease accrued prior to the effective date of the Assignment. Without limiting the foregoing, the assignor Tenant shall and have retain joint and several liability with each subsequent assignee Tenant for the payment of any Rent that is due and payable or accruing as of the date of the Assignment, including any Rent for the period spanning the Assignment where the Rent is determined by gross or net receipts, gross or net income, or other measure of revenue and/or expenses for the relevant period. This subsection shall not apply to any Leasehold Mortgagee in its capacity as assignor in a Leasehold Mortgage Assignment.

7. Landlord and WMATA reserve the right to audit Tenant to determine compliance with this Section. Any such audit shall be at the expense of the party conducting it, except that Tenant shall pay the costs of such audit if the audit determines that an Assignment has occurred and Landlord or WMATA was not given Notice of it or, when their approval is required by the terms of this Ground Lease, did not approve it, or if the audit determines that Capital Rent was due from the Assignment and not paid or was paid but underpaid by five percent (5%) or more of the Capital Rent that should have been paid.

D. Violation

An Assignment or purported Assignment in violation of this Section shall constitute an Event of Default and shall be null and void.

**Section 17.02 Leasehold Mortgages**

A. Granting Leasehold Mortgages

Tenant shall have the right from time to time to grant Leasehold Mortgages without the consent of Landlord. No other leasehold mortgage, deed of trust, deed to secure debt, pledge, hypothecation, security agreement or similar encumbrance encumbering all or part of Tenant's interest in this Ground Lease, the Leased Premises or the Tenant Improvements is permitted. No mortgage, deed of trust or other lien or encumbrance granted by or imposed on Tenant may or shall affect Landlord's fee interest in the Leased Premises, Landlord's reversionary interest and estate in the Tenant Improvements, or any WMATA Facilities. A purported Leasehold Mortgage that does not comply with the definition thereof or with this Section, and/or any other leasehold mortgage, deed of trust, deed to secure debt, pledge, hypothecation, security agreement or similar encumbrance encumbering all or part of Tenant's interest in this Ground Lease, the

Leased Premises or the Tenant Improvements, shall be null and void and the granting of the same shall constitute an Event of Default.

**B. Leasehold Mortgagee's General Rights and Responsibilities**

Except to the extent a Leasehold Mortgage (or any document of which Landlord is given Notice and a copy ancillary to or secured by a Leasehold Mortgage) expressly waives any one or more of the following, in which case such waiver shall govern:

1. If a default occurs under this Ground Lease by Tenant, each Leasehold Mortgagee shall be given Notice by Landlord of such default and the following shall apply:

(a) The Leasehold Mortgagee shall have a period of either (i) fifteen (15) days after Tenant's cure period under this Ground Lease expires in which to cure monetary defaults or (ii) subject to **Section 17.02.B.1(b)**, thirty (30) days after Tenant's cure period under this Ground Lease expires in which to cure non-monetary defaults. To exercise its rights under this subsection, a Leasehold Mortgagee must Notify Landlord of the Leasehold Mortgagee's doing so or intent to do so at or prior to doing so.

(b) If a Leasehold Mortgagee cannot reasonably cure a non-monetary default despite the exercise of Commercially Reasonable Business Efforts within the time period set forth in **Section 17.02.B.1(a)(ii)**, then, on the condition precedent that the Leasehold Mortgagee has cured, within the time period set forth in **Section 17.02.B.1(a)**, all other defaults by Tenant and given Landlord Notice of the Leasehold Mortgagee's intent to exercise the following rights: (i) the Leasehold Mortgagee shall be afforded an additional period of time, not to exceed forty-five (45) days beyond the period stated in **Section 17.02.B.1(a)(ii)**, in which to cure such non-monetary default on the condition that the Leasehold Mortgagee uses Commercially Reasonable Business Efforts to proceed with such cure; and (ii) if the Leasehold Mortgagee cannot reasonably cure the non-monetary default without obtaining possession of the Leased Premises or the Tenant Improvements, the Leasehold Mortgagee shall be afforded an additional period of time, not to exceed an additional one (1) year beyond the period stated in **Section 17.02.B.1(a)(ii)**, in which to obtain possession and cure such non-monetary default on the condition that the Leasehold Mortgagee initiates foreclosure, proceedings for appointment of a receiver, or other applicable process within four (4) months after the period stated in **Section 17.02.B.1(a)(ii)** and thereafter uses Commercially Reasonable Business Efforts to proceed with such cure. A Leasehold Mortgagee shall have the right to enter the Leased Premises and/or the Tenant Improvements, but not any WMATA Facilities thereon or therein, to exercise its rights under this subsection.

(c) If a Leasehold Mortgagee obtains the leasehold interest in the Leased Premises and the Tenant Improvements by means of a foreclosure sale, assignment, deed-in-lieu of foreclosure, conveyance via judicially-administered bankruptcy or other insolvency proceeding, or other right or remedy under the Leasehold Mortgage, Landlord shall waive any default by Tenant that (i) arises from any lien attaching solely to Tenant's estate and that is junior to that Leasehold Mortgagee's Leasehold Mortgage, and/or (ii) a Leasehold Mortgagee or a successor Tenant who acquires its interest by one of the means referenced in this subsection cannot cure despite and after the exercise of Commercially Reasonable Business Efforts.

(d) A Leasehold Mortgagee may abandon its efforts to cure or cause Tenant to cure at any time in the Leasehold Mortgagee's sole and absolute discretion but must give Notice of such abandonment to Landlord. Upon such abandonment, Landlord's rights and remedies against Tenant shall be automatically and fully reinstated and the Leasehold Mortgagee shall have no further rights with respect to that default but shall retain its right to a new lease under **Section 17.02.C**.

2. Except upon the occurrence of an Event of Default or a Taking, there shall be no amendment, change, modification, termination or cancellation of this Ground Lease without the written consent of the Senior Leasehold Mortgagee.

3. No Leasehold Mortgagee shall become liable under the provisions of this Ground Lease or any lease executed pursuant to **Section 17.02.C** except when such Leasehold Mortgagee becomes an assignee Tenant as set forth in the definition of "Assignment."

4. Leasehold Mortgagees shall have the right to hold a foreclosure sale, take title to the leasehold estate in the Leased Premises and Tenant's ownership interest in the Tenant Improvements, and make Leasehold Mortgagee Assignments as set forth in **Section 17.01**. Any Assignment (except a later Leasehold Mortgagee Assignment) following a Leasehold Mortgage Assignment shall again be subject to the terms of this Ground Lease.

5. A Leasehold Mortgagee may exercise any or all of Tenant rights or perform any of Tenant's obligations under this Ground Lease on the condition that the Leasehold Mortgagee shall Notify Landlord of such Leasehold Mortgagee's doing so no later than so doing.

6. Any Leasehold Mortgagee who cures a default by Tenant or an Event of Default under this Ground Lease shall be subrogated to any rights of Landlord against Tenant to collect the amount so paid to Landlord by the Leasehold Mortgagee with respect to such default or Event of Default, but such right of subrogation shall not extend to any other right or remedy of Landlord under or relating to this Ground Lease.

7. If at any time more than one Leasehold Mortgage exists:

(a) Any reference to Notice to a Leasehold Mortgagee refers to all Leasehold Mortgagees unless expressly stated otherwise in this Ground Lease.

(b) Unless the Leasehold Mortgagees agree otherwise among themselves and Notify Landlord and Tenant of such agreement, the Senior Leasehold Mortgagee may exercise any and all rights to consent or grant approvals for all Leasehold Mortgagees and take all actions allowed to Leasehold Mortgagees without need for the consultation with or consent of other Leasehold Mortgagees, and such consent, approval or action by the Senior Leasehold Mortgagee may be relied upon by Landlord and Tenant as the binding act of all Leasehold Mortgagees.

(c) To the extent the Senior Leasehold Mortgagee does not exercise its rights under **Section 17.02.B.1**, any other Leasehold Mortgagee may do so in order of its priority, but no

time period shall be extended by reason thereof; if Leasehold Mortgagees do not agree on their relative priority, the order of priority shall be determined by the title insurer of the Senior Leasehold Mortgagee.

8. Regardless of the date(s) of execution or recordation, the following shall at all times be superior in priority, right, and interest to the lien of any Leasehold Mortgagee: (i) the lien of any existing bondholder, mortgagee, lienholder, or other encumbrancer (including but not limited to any right of the Federal Government to reimbursement) to which the revenues and/or assets of Landlord have been or may in the future become pledged; (ii) any amendment, modification, recasting, or other change in the loan and security arrangements between Landlord and any such bondholder, lienholder, or other encumbrancer; and (iii) the lien of any replacement lender for any such bondholder, mortgagee, lienholder, or other encumbrancer.

9. The provisions of this Section shall, for the benefit of each Leasehold Mortgagee, parties claiming under or through a Leasehold Mortgagee, Landlord, and parties claiming under or through Landlord, survive the termination, rejection or disaffirmance of this Ground Lease, and thereafter shall continue in full force and effect in accordance with its provisions and stated time limitations upon the Senior Leasehold Mortgagee for implementation or expiry to the same extent as if this Section were a separate and independent contract made by Landlord, Tenant and each Leasehold Mortgagee.

10. The provisions of this Section are intended to create third-party beneficiary rights for the benefit of any Leasehold Mortgagee and may be relied upon and shall be enforceable by any Leasehold Mortgagee. If a Leasehold Mortgagee invokes the provisions of this Section in any manner, any obligations and terms that may pertain to such Leasehold Mortgagee in this Section are fully applicable to that Leasehold Mortgagee and those obligations and terms may be enforced by Landlord.

C. Right to New Lease

1. In the case of termination of this Ground Lease for any reason other than (i) a Taking, (ii) a total casualty loss, or (iii) any other event consented to by all Leasehold Mortgagees, or in the event this Ground Lease is rejected or disaffirmed pursuant to any bankruptcy, insolvency or other law affecting creditor's rights, the Senior Leasehold Mortgagee shall have the right to obtain a new ground lease in accordance with this **Section 17.02.C**. The following shall then apply:

(a) Landlord shall give prompt written notice to the Senior Leasehold Mortgagee of any termination entitling the Senior Leasehold Mortgagee to a new lease. If requested in writing by the Senior Leasehold Mortgagee within thirty (30) days after receipt of such written notice of termination, Landlord shall promptly deliver a proposed new lease for the Leased Premises to the Senior Leasehold Mortgagee. The new lease shall be for the remainder of the Term, and shall contain the same covenants, conditions, limitations and agreements contained in this Ground Lease except for those provisions which must be modified to reflect the termination, rejection or disaffirmance and the passage of time and the provisions stated in this Section. In addition, such new lease shall be expressly subject to the rights, if any, of Tenant under the terminated Ground Lease (without thereby implying or acknowledging the existence of any such rights). Subject to **Section 17.02.D**, the new lease shall continue to maintain the same priority as this Ground Lease with regard to any mortgage on the Leased Premises or any part thereof or any



interest therein, or any other lien, charge or encumbrance thereon, whether or not the same shall be in existence on the effective date of the new lease.

(b) Landlord's obligation to execute a new lease shall be contingent upon the following conditions precedent: (i) the Senior Leasehold Mortgagee's cure of any Rent defaults existing hereunder and the payment of all of Landlord's expenses relating to or arising from the Event of Default, including reasonable attorneys' fees and court costs; (ii) in the case of non-Rent defaults which are reasonably susceptible to being cured by the Senior Leasehold Mortgagee without any need for the Senior Leasehold Mortgagee to first obtain possession of the Leased Premises, the Senior Leasehold Mortgagee promptly (but in all events within thirty (30) days after Landlord proffers the new lease) cures all such non-Rent defaults; (iii) in the case of non-Rent defaults which are reasonably susceptible of being cured by the Senior Leasehold Mortgagee upon the Senior Leasehold Mortgagee's obtaining possession of the Leased Premises, the Senior Leasehold Mortgagee promptly (but in all events within thirty (30) days after Landlord proffers the new lease) institutes and thereafter diligently prosecutes foreclosure and/or other proceedings under its Leasehold Mortgage in order to obtain possession of the Leased Premises as soon as feasible and the Senior Leasehold Mortgagee agrees in the new lease that, upon obtaining possession, it will promptly (but in all events within thirty (30) days after obtaining possession) commence to cure and diligently prosecute the cure to completion using Commercially Reasonable Business Efforts, but in no event later than one hundred twenty (120) days after obtaining possession; and (iv) the Leasehold Mortgagee uses reasonable efforts to prevent the occurrence of any future Event of Default prior to signing the new lease. Landlord may require that the Senior Leasehold Mortgagee's agreement to the foregoing be incorporated into any new lease or in a separate and binding legal document, and that the Senior Leasehold Mortgagee's failure to cure as aforesaid shall automatically be an Event of Default hereunder and under the new lease without any further Notice or opportunity to cure or to obtain another new lease.

(c) If, not later than thirty (30) calendar days after Landlord's delivery to the Senior Leasehold Mortgagee of a proposed new lease on the same terms and conditions as stated above, the Senior Leasehold Mortgagee has failed to satisfy the foregoing conditions and execute the new lease, any obligations upon Landlord to enter into such a new lease shall forthwith expire and the Senior Leasehold Mortgagee shall have no further rights under this subsection.

(d) For so long as the Senior Leasehold Mortgagee shall have the right to enter into a new ground lease with Landlord pursuant to this subsection, (i) Landlord shall not enter into a new lease or ground lease of all or any part of the Leased Premises with any person or entity other than the Senior Leasehold Mortgagee without the prior written consent of the Senior Leasehold Mortgagee, and (ii) Landlord shall not cancel any Sublease or accept any cancellation, termination or surrender thereof (unless such termination is pursuant to the terms of that Sublease or shall be effected as a matter of law on the termination of this Ground Lease) or enter into new Subleases without the consent of the Senior Leasehold Mortgagee.

(e) Upon the execution and delivery of a new lease under this **Section 17.02.C**, all Subleases with respect to the Leased Premises which theretofore may have been assigned to, or made by, Landlord, any Subtenants' security deposits in Landlord's actual possession, and any service contracts entered into by Landlord with respect to the Leased Premises shall be assigned

and transferred, without recourse, by Landlord to the ground lessee named in such new lease.

(f) All costs and expenses (including reasonable attorneys' fees and court costs) incurred by Landlord in preparing, tendering and entering into any new lease with a Leasehold Mortgagee shall be at the Leasehold Mortgagee's cost and expense, payable upon demand, whether or not such a new lease is entered into. A Leasehold Mortgagee's failure to make such payment shall be an Event of Default under both this Ground Lease and any new lease (should one be entered into) without further Notice or opportunity to cure and, until such payment is made, Landlord shall have no obligation to enter into a new lease.

2. If there is more than one Leasehold Mortgage, Landlord shall only recognize the Senior Leasehold Mortgagee requesting a new lease as being entitled to the rights afforded by this **Section 17.02.C**.

3. Nothing herein contained shall be deemed to impose an obligation on Landlord to deliver physical possession of or warrant title to the Leased Premises and the Tenant Improvements to any Leasehold Mortgagee, nor shall Landlord be required to or deemed to warrant or covenant quiet enjoyment against any claim by Tenant arising out of or relating to the terminated Ground Lease. Landlord agrees, however, that Landlord will, at the cost and expense of the Senior Leasehold Mortgagee seeking a new lease, cooperate in the prosecution of summary proceedings to evict the then-defaulting Tenant or other occupants of the Leased Premises and the Tenant Improvements, *provided* the Senior Leasehold Mortgagee previously agrees, in form reasonably acceptable to Landlord, to indemnify, defend (through separate counsel of Landlord's choice, if Landlord so requests), and save Landlord harmless from any claims, counterclaims, or other proceedings against or involving Landlord related to Landlord's cooperation with the Senior Leasehold Mortgagee pursuant to the terms of this subsection.

D. Recognition Agreements

Tenant will obtain from each lender providing any financing with respect to this Ground Lease, the Leased Premises or the Tenant Improvements a written agreement for the benefit of Landlord that protects Landlord's interests in the Leased Premises. Among other things, such agreement will confirm: (i) that subject to the terms and conditions of the loan documents evidencing and securing such Leasehold Mortgagee's loan, until Final Completion of the Project is achieved the proceeds of loan collateral, guaranties, bonds, insurance and the like will be applied to the costs and expenses of completing the Project prior to payment of outstanding principal indebtedness; (ii) the non-subordination of Landlord's fee interest to Tenant and any Leasehold Mortgage; **and** (iii) that Tenant's leasehold interest in this Ground Lease, the Leased Premises and the Tenant Improvements shall not be cross-defaulted or cross-collateralized with any other property (but, for avoidance of doubt, the inclusion of a Leasehold Mortgage in a securitized pool of mortgages or similarly structured transaction shall not be deemed to violate the prohibition against cross-defaulted and cross-collateralized mortgages); **and (iv) that the lender's liens will be subject and subordinate to the CC&Rs.**

E. Separate Fee and Leasehold Estates

If Tenant's position in this Ground Lease and Landlord's fee interest in the Leased Premises and/or the Tenant Improvements are ever held by the same person or entity, they shall remain separate and

distinct estates and shall not merge unless and until (i) the consent of all Leasehold Mortgagees and any holder of a security interest in Landlord's interest in the Leased Premises pursuant to **Section 17.05.B.1** are obtained, and (ii) Tenant and WMATA enter into an independent agreement setting forth the provisions of this Ground Lease that are for the benefit of WMATA.

F. Mezzanine Loans

1. For all purposes of this Ground Lease, the term "Leasehold Mortgagee" includes any Institutional Lender providing financing to Tenant, the repayment of which is secured by the pledge of the direct or indirect ownership interests in Tenant ("**Mezzanine Loan**"). A lender making a Mezzanine Loan ("**Mezzanine Lender**") shall have all of the rights of a Leasehold Mortgagee under this Ground Lease; provided, however, that a Mezzanine Lender's rights shall be subordinate to the rights of any Leasehold Mortgagee that is the beneficiary of a mortgage, deed of trust, deed to secure debt or other comparable instrument encumbering Tenant's leasehold estate in the Leased Premises.

2. Any Mezzanine Loan may be secured only by the pledge of the direct or indirect ownership interests in Tenant and shall not be cross-defaulted or cross-collateralized with any other property or interests. For avoidance of doubt, the inclusion of a Mezzanine Loan in a securitized pool of loans or similarly structured transactions shall not be deemed to violate the preceding prohibition against cross-defaulted and/or cross-collateralized Mezzanine Loans.

**Section 17.03 Subleases**

A. Tenant's Right to Enter Into

1. Except while a Tenant Disqualifying Circumstance exists or as set forth in **Section 17.03.A.2**, Tenant shall have the absolute right to Sublease all or any portion of the Leased Premises and Tenant Improvements to be occupied by the Subtenant for the conduct of business consistent with the uses permitted in this Ground Lease without the consent of Landlord. Tenant shall give Landlord Notice of all Subleases, including the address of each Subtenant. Any Sublease must have a term (including renewals) that ends no later than the expiration date of the Term. Subleases shall be subject and subordinate to this Ground Lease in all respects. Each Sublease shall contain a notification to the Subtenant of Landlord's rights under **Section 17.03.B** and the following or a substantially similar equivalent:

"All terms, covenants and provisions of this lease and all rights, remedies and options of the tenant under this lease are and shall at all times be fully subject and subordinate in all respect to the Ground Lease dated \_\_\_\_\_, 20\_\_ by and between the Washington Metropolitan Area Transit Authority, as ground lessor, and the landlord under this lease (or its predecessor-in-interest), as the ground lessee, as such Ground Lease may have been or may hereafter be amended, supplemented or otherwise modified (the "Ground Lease"). The tenant shall do nothing that violates the Ground Lease. Subject to the following sentence, if the Ground Lease terminates for any reason, this lease shall automatically terminate and the tenant shall have no rights against the ground lessor under the Ground Lease. However, if the ground lessor under the Ground Lease so elects, this lease shall not terminate upon the termination of the Ground Lease, in which event (i) this lease shall remain in full force and effect, (ii) the tenant shall attorn to the ground lessor and recognize the ground lessor as the tenant's direct landlord under this lease, and (iii) the tenant waives any law or other right the

tenant may have to terminate this lease itself or surrender possession of the premises demised hereby upon the termination of the Ground Lease. If this lease remains in effect, at the request of the ground lessor under the Ground Lease the tenant shall execute and deliver any document necessary or appropriate to evidence that this lease remains in effect and the tenant's attornment to the new direct landlord. The ground lessor under the Ground Lease is hereby appointed as the tenant's attorney-in-fact, irrevocably, with full power of substitution, to execute and deliver any such document; such appointment is coupled with an interest."

Any purported Sublease entered into in violation of this **Section 17.03** shall be an Event of Default and shall be null and void.

2. Tenant may not enter into any Sublease with or allow occupancy by any foreign government, the United Nations, or any agency, department, bureau, ministry or subdivision of any of them or any person, natural or legal, having sovereign immunity except (i) the United States of America, any State, Territory, District or other political subdivision of the United States of America, or any political subdivision of any State, Territory or District of the United States of America, or (ii) any natural person who is a Subtenant for personal residential purposes.

3. Tenant shall cause its Subtenants to abide by the terms of this Ground Lease; any breach of a Sublease by a Subtenant that causes a breach of this Ground Lease shall be a breach of this Ground Lease by Tenant.

**B. Landlord's Right to Collect Rents Under Sublease**

Tenant irrevocably assigns, transfers and sets over to Landlord all of Tenant's right, title and interest in and to each Sublease, including all rent and other sums payable to Tenant under each Sublease. However, until an Event of Default occurs, Tenant shall have a license to collect all such rent and other sums. Such license shall automatically terminate upon the occurrence of an Event of Default without further Notice and Landlord may thereupon exercise all of Tenant's right, title and interest in and to the Subleases, including collecting rents under any Sublease, but such collection shall not constitute recognition of such Subtenant nor a waiver of any of Landlord's right to proceed against Tenant and such Subtenant pursuant to law for any violation hereof. Landlord shall have a right of entry and possession to enforce the rights granted to it in this **Section 17.03.B**.

**C. SNDAs and Recognition Agreements for Certain Subleases**

1. Except while any Tenant Disqualifying Circumstance exists, for any commercial (but not residential) Sublease that complies with the requirements of this Ground Lease applicable to Subleases and that has a term, including renewal options, of five (5) years or more but that ends at least one Business Day prior to the expiration date of the Term, Landlord agrees to enter into a subordination, nondisturbance and attornment agreement or a recognition agreement (in either case, a "**Recognition Agreement**") with such Subtenant and Tenant in a form reasonably acceptable to Landlord, Tenant and Subtenant; provided, however, that while Landlord is WMATA or another government agency, the Recognition Agreement shall be written on Landlord's then-current form with such changes thereto as Landlord may agree to make in its sole and absolute discretion. Any Recognition Agreement shall apply only to the Sublease as it is presented to Landlord in connection with the request for a Recognition Agreement; the Recognition Agreement shall

not apply to any amendment, supplement or modification of the Sublease unless Landlord agrees to that amendment, supplement or modification.

2. It shall be a condition precedent to Landlord's entering into a Recognition Agreement that: (a) a complete copy of the applicable Sublease is given to Landlord and that Landlord has had the opportunity to review and approve the same, which approval shall not be unreasonably withheld, conditioned or delayed, and to exclude from the Recognition Agreement any provisions thereof that Landlord believes in good faith are problematic for it; (b) the applicable Sublease contains the waiver provision set forth in **Section 30.07**; (c) Tenant and the Subtenant each, jointly or separately, certifies in writing to Landlord that Subtenant is not an Affiliate of Tenant and that the Sublease is on then-prevailing market terms; (d) Tenant certifies to Landlord whether there is then any Leasehold Mortgagee and, if there is a Leasehold Mortgagee, that the Sublease has been approved by each Leasehold Mortgagee having approval rights and that Subtenant, Tenant and at least one Leasehold Mortgagee have entered into a subordination, nondisturbance and attornment agreement of their own with respect to the Sublease (without thereby binding Landlord to follow the terms thereof in the Recognition Agreement); and (e) Tenant and Subtenant have each signed three (3) counterpart originals of the proposed Recognition Agreement.

3. A Recognition Agreement shall not be recorded nor recordable in the land records. If any such Recognition Agreement is nevertheless recorded, Landlord may unilaterally, as Tenant's and the Subtenant's attorney-in-fact, which appointment is hereby made and is coupled with an interest and is irrevocable, record a document in the land records evidencing the termination and release of the Recognition Agreement (but without thereby affecting the Sublease itself).

#### **Section 17.04 Equity**

Tenant's equity in the Project shall equal an amount not less than twenty percent (20%) of the total development costs of the Tenant Improvements, as they may be Altered from time to time. Tenant shall demonstrate to Landlord's satisfaction compliance with this requirement upon the first to occur of (i) obtaining a commitment for interim construction financing for the Tenant Improvements or any Alterations, or upon the modification of any Leasehold Mortgage providing funds for the Tenant Improvements and/or any Alterations, as applicable, and (ii) the date at which a construction permit is issued for the Tenant Improvements or any Alterations. Tenant's equity shall consist of any cash equity, equity earned from excess land value, and any fees earned by and payable to but not yet paid to any member, partner, shareholder or other principal in Tenant for securing funding, for project management or for other services to Tenant, as such equity increases or decreases from time to time. Cash equity shall include cash, tangible personal property, and tradable investment securities issued by third parties, any or all of which are used by Tenant to pay third parties for costs properly allocable to the initial hard and soft costs of the Project or repairs, replacements, or restorations of the Tenant Improvements. A written binding commitment to provide cash equity to the Project in consideration of New Markets Tax Credits, Low Income Housing Tax Credits, Historic Preservation Tax Credits, Opportunity Zone Tax Credits or other comparable tax credits now or hereafter administered through the Federal Government or any State or local government, or through a payment-in-lieu-of-taxes program administered by a State or local government, may constitute cash equity if the commitment and the third party making the commitment are approved by Landlord, such approval not to be unreasonably withheld, conditioned or delayed. Tenant shall provide documentation reasonably satisfactory to Landlord to support the categorization and repayment of any item claimed by Tenant as

equity.

#### **Section 17.05 Landlord's Rights to Transfer, Sell, Mortgage or Assign**

##### **A. Absolute Right of Transfer**

Landlord reserves the absolute right at any time and from time to time to transfer (and lease back, if applicable) all or any part of its fee interest in the Leased Premises, all or any part of its reversionary fee interest in the Tenant Improvements, and/or all or any part of its interest in this Ground Lease, to any third party, public or private. Any transfer by Landlord shall be subject to this Ground Lease. Upon the closing or consummation or any such transfer, the transferor Landlord shall be automatically freed and relieved from all liability, excluding any liability previously accrued, for the performance of any obligations or liabilities to be performed by Landlord thereafter.

##### **B. Mortgages**

1. Landlord reserves the absolute right at any time and from time to time to mortgage, grant a deed of trust, deed to secure debt, and/or security agreement or otherwise pledge, encumber, hypothecate and otherwise grant security interests in the Leased Premises and/or all or any of its interest in this Ground Lease to any third party, public or private. Any of the foregoing so granted shall be subject to this Ground Lease.

2. Upon any foreclosure, deed-in-lieu of foreclosure, trustee's sale, bankruptcy sale, or other similar event that transfers Landlord's right, title and interest in and to this Ground Lease to a person or entity named in the preceding subsections, or to any nominee, designee, Affiliate or third party acting by or through such person or entity, Tenant and its successors and assigns, as well as (if applicable) any Leasehold Mortgagee and its successor and assigns which has obtained or has become entitled to obtain a new lease, shall atorn to the such person or entity and its successors and assigns as the new Landlord under this Ground Lease.

##### **C. No Option to Purchase**

Neither Tenant nor any person acting by or through Tenant shall have any right, privilege, option or other entitlement to purchase all or any portion of the Leased Premises, nor shall any of them have any right of first refusal, first offer, first negotiation, or any right, privilege, option or similar entitlement thereto. All of the foregoing are expressly waived by Tenant.

### **ARTICLE 18**

#### **LIENS**

#### **Section 18.01 Keep Property Free of Liens**

Tenant shall keep the WMATA Reserved Areas and WMATA Facilities and, except for encumbrances recorded prior to the Effective Date in the land record of the jurisdiction in which the Leased Premises are

located, the CC&Rs, easements and rights-of-way granted in accordance with the terms of this Ground Lease, and Leasehold Mortgages, the Leased Premises and the Tenant Improvements free and clear of mortgages, deeds of trust, mechanics', materialmen's, broker's and other liens, or other encumbrances of any type, including those for or arising out of, or in connection with, work or labor done, services performed, or materials or appliances used or furnished in connection with Tenant's construction, maintenance and operations and those of its partners, members, shareholders, directors, officers, other principals, employees, agents, contractors, lenders and other third parties with whom it may do business. Tenant's failure to do so or to pay, discharge or otherwise cause the lien to be removed as an encumbrance on title within thirty (30) days after obtaining knowledge of the filing of such lien, subject to Tenant's rights under **Section 18.02** below, shall be an Event of Default. Any work or construction by, for, or permitted by Tenant, or any obligations incurred by Tenant, shall be promptly and fully paid and discharged by Tenant. All claims on which any such lien may or could be based shall be satisfied by Tenant, subject to Tenant's right to contest the same pursuant to **Section 18.02**. If Tenant does not take action under this Section or **Section 18.02** on a timely basis, Landlord (or, if the lien affects the WMATA Reserved Areas and/or any WMATA Facilities, WMATA) may, at its option, pay, discharge or otherwise cause the lien to be removed at Tenant's expense, payable on demand; if payment is to be made to Landlord, the amount due shall be Additional Rent. The indemnification obligation set forth in **Article 9** shall apply to this Section.

#### **Section 18.02   Contesting Liens**

If Tenant desires to contest any lien, it shall Notify Landlord (and, if the lien affects the WMATA Reserved Areas or the WMATA Facilities, WMATA) of its intention within thirty (30) days after obtaining knowledge of the filing of such lien. In such case, an Event of Default shall not exist provided that Tenant (without demand) (i) protects Landlord and/or, if applicable, WMATA, by posting a good and sufficient bond against any such lien and any cost, liability, or damage arising out of such contest within said thirty (30) day period, and (ii) diligently contests such lien at its own cost and expense. Upon the court's final determination that the lien is valid, Tenant shall satisfy and discharge such lien within sixty (60) days of such determination or an Event of Default shall exist. Notwithstanding the foregoing, Tenant may not contest any lien if the contest may (x) unreasonably burden or otherwise cause any portion of the Overall Site or any interest of Landlord, WMATA, Developer or Tenant to be in danger of being forfeited or lost or (y) place either Landlord, WMATA or Tenant, or any director, officer, partner, member, shareholder, other principal, or employee thereof, in danger of being criminally or civilly fined, penalized or subject to other sanction. In the event of any contest, Tenant shall protect and indemnify Landlord and WMATA against all loss, expense, attorney's fees, and damage resulting therefrom and the indemnification provisions of **Article 9** shall apply.

#### **Section 18.03   Advise Landlord**

Tenant shall post appropriate notices of Landlord's non-responsibility for all new construction or Alterations. Tenant shall give Landlord no less than thirty (30) days advance Notice of the commencement of any new construction or Alteration estimated to cost in excess of Seven Hundred Fifty Thousand Dollars (\$750,000), such amount to increase on each anniversary of the Effective Date by the percentage rate of increase in the Consumer Price Index last published prior to the Effective Date and last published prior to such anniversary date.

#### **Section 18.04 Survive Termination**

Tenant's obligations and liabilities under this Article shall survive the expiration or termination of this Ground Lease.

### **ARTICLE 19**

#### **QUIET ENJOYMENT; TITLE**

##### **Section 19.01 Tenant's Quiet Enjoyment**

Provided no Event of Default then exists, Tenant shall quietly enjoy the Leased Premises and the Tenant Improvements without hindrance or molestation by Landlord or by anyone claiming by, under or through Landlord, subject, however, to the exceptions, reservations and conditions of this Ground Lease.

##### **Section 19.02 Title to the Land**

The Leased Premises are leased subject to all matters recorded prior to the recordation of the memorandum of this Ground Lease referenced in **Section 31.08** (and, if recorded thereafter but contemporaneously, **the CC&Rs and** any other documents that may be recorded in connection with the transaction referenced in this Ground Lease) in the land records of the jurisdiction in which the Leased Premises are located, to all matters that a survey of the Leased Premises made in accordance with the then-current standards of the National Society of Professional Surveyors and the American Land Title Association (or organizations succeeding to their functions on the Effective Date) would show, and to all applicable governmental rules and regulations. Tenant shall be solely responsible for obtaining, at its own cost, any policy of title insurance, survey or other assurance of the status of its leasehold estate. Landlord makes no representation or warranty, express or implied, with respect to the foregoing and any such representation or warranty is expressly negated. Nothing in this Ground Lease and no action or inaction taken by Landlord pursuant to this Ground Lease shall be deemed to grant any right, title, interest, lien, charge or other encumbrance in, on or affecting the Overall Site except for the leasehold estate in the Leased Premises created by this Ground Lease.

##### **Section 19.03 Title to the Improvements**

Notwithstanding anything to the contrary in this Ground Lease:

1. WMATA shall own in fee simple all WMATA Facilities, including any located on the Leased Premises and built by or at the expense of Tenant.
2. During the Term, Tenant shall own all Tenant Improvements and all furniture, fixtures and equipment placed therein by Tenant (except to the extent that Tenant and a Subtenant may agree that Subtenant owns any of the same). After the Term, Landlord shall own all Tenant Improvements and all furniture, fixtures and equipment therein. The transfer of title from Tenant to Landlord shall be automatic upon the expiration or termination of this Ground Lease, but Tenant shall execute, deliver and record such further assurances of the foregoing as may reasonably be requested from time to time; such



obligation shall survive the expiration or termination of this Ground Lease.

## **ARTICLE 20**

### **DAMAGE AND DESTRUCTION**

#### **Section 20.01 Tenant's Duties and Obligations**

##### **A. General**

Subject to the other provisions of this Article, if the Leased Premises and/or the Tenant Improvements, or any part thereof, become damaged or destroyed by fire or other casualty, Tenant, at its sole cost and expense, shall repair, alter, restore, replace or rebuild the same as nearly as reasonably possible to its value, condition and character. (This Section does not cover improvements made by or for Subtenants.) Tenant shall have the obligation to repair, alter, restore, replace or rebuild regardless of whether such casualty loss is covered by insurance and whether the insurance proceeds are sufficient to cover Tenant's expenses. Such repairs, alterations, restorations, replacements or rebuilding may include any Alterations that Tenant may elect to make in conformity with the provisions of this Ground Lease. This work shall comply with all applicable requirements of this Ground Lease.

##### **B. If Cost to Repair Exceeds 50% of Appraised Value**

If the estimated cost to repair, alter, restore, replace or rebuild any Tenant Improvements or the Leased Premises (as determined by a mutually acceptable cost estimate from a third party selected and engaged by Tenant) exceeds fifty percent (50%) of the fair market value (after the work is done) of those Tenant Improvements as of the date of the casualty (as determined by a mutually acceptable appraisal from a third party appraiser who is approved by Landlord, such approval not to be unreasonably withheld, conditioned or delayed, and who is selected and engaged by Tenant), then Tenant shall be entitled to terminate this Ground Lease by Notice given to Landlord within thirty (30) days after the receipt of the appraisal. If Tenant gives such Notice of termination, this Ground Lease shall terminate on the date Tenant gives Landlord Notice that the Leased Premises has been surrendered to Landlord in the then-current condition of the Leased Premises or, if so decided by Landlord by Notice to Tenant, in the condition required by **Section 20.01.C**. Subject to any obligation or liability accrued prior to the effective date of such termination, the other provisions of this **Section 20.01** and any other provision of this Ground Lease that survives termination, after such termination becomes effective neither Tenant nor Landlord shall have any further obligation to one another under the terms of this Ground Lease. All Subleases shall contain a paragraph putting such Subtenant on notice that its right of occupancy in or about the Tenant Improvements may be terminated if a casualty results in such a termination of this Ground Lease or a decision to raze the Tenant Improvements.

##### **C. Tenant's Obligations Upon Termination**

1. If Tenant terminates this Ground Lease pursuant to **Section 20.01.B**, then Landlord, at its option, may within sixty (60) days after Tenant's termination Notice to Landlord require by Notice to Tenant the restoration and re-grading of the Leased Premises as provided in this **Section 20.01.C**. Tenant

shall thereupon with due diligence, but in no event later than one hundred eighty (180) days after Landlord's Notice to Tenant, complete the removal of all surface and (to the extent not serving other properties) subsurface Tenant Improvements without damaging or interfering with any of Landlord's operations or the operations or physical condition of any WMATA Facilities. Tenant shall have the salvage and use of all material from the razing of the Improvements. Tenant shall surrender the Leased Premises to Landlord in a condition that is level with the surrounding street grade and, unless Landlord Notifies Tenant otherwise, with a four (4)-inch coating of compressed macadam, all of which must be reasonably acceptable to Landlord and consistent with plans and specifications to be provided by Landlord. To the extent there are any Tenant or Subtenant insurance proceeds which are or may become available to Tenant or Landlord with respect to or as a result of such casualty, such proceeds shall be applied in the following order of priority:

- (a) to the removal and re-grading required by this **Section 20.01.C**; then
- (b) to the repair and/or replacement, to WMATA's satisfaction, of any WMATA Facilities that are covered by the insurance policy and have been adversely affected by this casualty or by the restoration and re-grading required by this **Section 21.01.C**; then
- (c) to all Impositions with respect to this Ground Lease and/or the Leased Premises that are payable by Tenant; then
- (d) to the payment and removal of record of all Leasehold Mortgages, liens, encumbrances, or other claims against the Leased Premises arising under, by, or through Tenant; then
- (e) to any other amounts due from Tenant to Landlord with respect to this Ground Lease and/or the Leased Premises; and last
- (f) to Tenant.

Subject to the rights of any Senior Leasehold Mortgagee, Landlord shall exercise control over any available insurance proceeds to ensure that the work and payments specified in this subsection are fulfilled. **Items (a) through (e)** of this subsection shall be paid current by Tenant through the date of surrender of the Leased Premises in condition acceptable to Landlord. If the proceeds of available insurance are insufficient to pay the obligations described in **items (a) through (e)**, then Tenant shall pay such obligations from its own funds.

2. If Landlord does not require the restoration and re-grading of the Leased Premises pursuant to the preceding subsection, Landlord shall be entitled to and Tenant shall assign to Landlord: (a) all of Tenant's right, title, and interest in and to the Tenant Improvements and any existing Subleases; and (b) subject to the rights of Leasehold Mortgagees, all available insurance proceeds. Landlord shall first apply such insurance proceeds according to the order of precedence specified in **items (a) through (e)** in **Section 20.01.C.1**. Any remaining insurance proceeds shall be the sole property of Landlord.

3. In the event of termination under this subsection, Tenant and Landlord shall execute and deliver to each other and, if necessary or appropriate, record in the land records, such documents as may be reasonably necessary to evidence such termination. Tenant agrees to execute documents reasonably necessary to effectuate prior agreements upon the termination of this Ground Lease.

D. Application of Insurance Proceeds if Lease is Not Terminated

If this Ground Lease is not terminated pursuant to this **Section 20.01** and no Tenant Disqualifying Circumstance exists, the proceeds of any property damage insurance shall be disbursed as follows, subject to the rights of any Leasehold Mortgagee:

1. If the reasonably estimated cost of the repair, restoration, or rebuilding of the Tenant Improvements in accordance with the standards required by **the CC&Rs and** this Ground Lease are not more than \_\_\_\_\_ Dollars (\$ \_\_\_\_\_), increased by any rate of increase in the Consumer Price Index between the Effective Date and the date of the casualty, all proceeds of property damage insurance shall be paid to Tenant for use for such repair, restoration or rebuilding.

2. If the reasonably estimated cost of the repair, restoration, or rebuilding of the Tenant Improvements in accordance with the standards required by **the CC&Rs and** this Ground Lease are more than the amount set forth in preceding **Section 20.01.D.1**, increased as set forth therein, the proceeds of property damage insurance shall be paid into escrow at held by the Senior Leasehold Mortgagee, if any (and, if there is no Senior Leasehold Mortgagee at that time, an escrow held by an Institutional Lender approved by Landlord, such approval not to be unreasonably withheld, conditioned or delayed) for disbursement in accordance with the following provisions:

(a) No disbursements shall be made unless and until the following conditions are met:

(i) Tenant delivers to Landlord a final and complete set of the plans and specifications for the repair, restoration or rebuilding, which shall be subject to the approval of Landlord under the terms and conditions of this Ground Lease applicable to Alterations.

(ii) Tenant delivers to Landlord a certification of the estimated cost of the repair, restoration or rebuilding from an architect or construction cost estimator approved by Landlord. If the net proceeds of insurance available for the repair, restoration or rebuilding are less than the estimated cost determined under the preceding subsection or as re-estimated at any time, Tenant shall deliver to the Institutional Lender additional funds to make up the deficiency.

(iii) Tenant delivers to Landlord copies of all permits, approvals and authorizations required by the governmental authorities having jurisdiction over the repair, restoration or rebuilding.

(b) Once the foregoing conditions have been satisfied, Tenant may submit to Landlord and the Institutional Lender draw requests, which Landlord shall promptly review, approve and notify the Institutional Lender in writing of Landlord's approval or non-approval. Upon receipt of Landlord's approval, the Institutional Lender may disburse the approved amount, less in each case a ten percent (10%) retainage until Final Completion is achieved, to Tenant. Landlord's

approval of any draw request shall be contingent upon the following conditions:

(i) Tenant has delivered to Landlord a certificate from Tenant's independent architect or project manager that the repair, reconstruction or rebuilding has progressed substantially in accordance with the plans and specifications approved by Landlord and the sums requested are due and payable for the work completed to date.

(ii) Tenant has delivered to Landlord a lien waiver(s) and/or release of any previous liens signed by Tenant's general contractor, each subcontractor whose contract sum is more than ten percent (10%) of the estimated cost of the repair, restoration or rebuilding, and any construction manager, design-builder or other third party with mechanic's lien or comparable lien rights. Any such lien waiver may contain an exclusion for work done and not yet paid for but to be paid for from the sums then being requisitioned. If any mechanic's lien then exists and no release of lien is presented, Tenant may instead discharge the lien by bonding it and such discharge shall satisfy the condition set forth in this clause.

(iii) Tenant has delivered to Landlord a statement that no stop work notices have been issued by any governmental authority having jurisdiction.

(c) Upon achieving substantial completion of the repair, restoration or rebuilding, Tenant may request disbursement of the remaining escrowed proceeds, less one hundred fifty percent (150%) of the estimated cost of any remaining punch list items, as such list and the cost is approved by Landlord. Further disbursements of escrowed funds shall occur not more frequently than monthly as punch list items are completed, subject to the same terms and conditions as set forth above in this subsection. Such disbursements shall be in the amount of one hundred percent (100%) of the approved estimated cost of the punch list item. The balance of the escrowed funds shall occur following Final Completion of the repair, restoration or rebuilding, subject to the same terms and conditions as set forth above in this subsection.

(d) Tenant shall pay all of the Institutional Lender's fees and expenses and all out-of-pocket costs incurred by Landlord in connection with such repair, restoration or rebuilding, including those incurred for engineering, construction management, legal, permit and other services. Reimbursement to Landlord shall be Additional Rent payable within twenty (20) days after Notice is given to Tenant.

## **Section 20.02 Interference with WMATA Facilities**

Tenant shall not allow the Leased Premises and/or the Tenant Improvements, or any part thereof, to remain damaged so as to interfere with the safe use of WMATA Facilities and/or access thereto. Should the damaged Leased Premises and/or Tenant Improvements, or any part thereof, materially affect in any way WMATA Facilities and/or access thereto, Tenant shall repair such damage within thirty (30) days after the occurrence of the damage (subject to Tenant obtaining any required building or other permits to allow such repairs, which permits Tenant shall endeavor to obtain with Commercially Reasonable Business Efforts) or, if such damage cannot be repaired with said thirty (30) days despite Commercially Reasonable Business Efforts, Tenant shall commence such repair with said thirty (30) days and thereafter diligently prosecute the

repair to completion. Tenant shall be responsible for any damage and/or injury resulting from the damage to the Leased Premises and/or the Tenant Improvements, including damage or injury to or on the WMATA Facilities. WMATA may perform the foregoing work at Tenant's expense as Additional Rent if Tenant fails to promptly do so.

### **Section 20.03 Landlord's and WMATA's Approval of Construction Plans and Tenant's Performance of Work**

Except as otherwise provided in this Article, the conditions under which any work is to be performed, and the methods of proceeding with and performing the same, shall be governed by **Article 11**, **Article 12** and **Article 13**.

### **Section 20.04 Surrender of Lease**

Except as provided in **Section 20.01.B**, no destruction or damage to the Leased Premises and/or the Tenant Improvements, or any part thereof, by fire or any other occurrence, nor the prohibition of or interference with Tenant's use of the Leased Premises and/or the Tenant Improvements, shall permit Tenant to surrender this Ground Lease or shall relieve Tenant from its liability to pay the full Rent or from any of its other obligations under this Ground Lease. In addition, Tenant waives any rights now or hereafter conferred upon it by statute or otherwise to quit or surrender this Ground Lease or the Leased Premises and the Tenant Improvements, or any part thereof, or to any suspension, diminution, abatement or reduction of Rent on account thereof.

### **Section 20.05 Survive Termination**

Tenant's obligations and liabilities under this Article shall survive the expiration or termination of this Ground Lease.

## **ARTICLE 21**

### **CONDEMNATION**

#### **Section 21.01 Permanent Total Taking**

If during the Term, there should be a permanent Taking of all of the Leased Premises and/or the Tenant Improvements ("**Total Taking**"), the Total Taking shall be deemed to have caused this Ground Lease to terminate and expire on the date title to the Leased Premises and/or the Tenant Improvements vests in the condemning authority. However, Tenant's right to recover a portion of the award for the value of Tenant's title and estate in and to the Tenant Improvements shall survive such termination in accordance with **Section 21.06** and applicable laws and regulations. Tenant shall promptly execute, acknowledge, deliver and, if necessary or appropriate, record in the land records such documents as may reasonably be necessary to evidence any termination under this Section.

## **Section 21.02 Permanent Partial Taking**

### **A. Tenant's Right to Terminate Lease**

If the permanent Taking involves less than all of the Leased Premises and/or the Tenant Improvements ("**Partial Taking**"), and the portion of the Leased Premises and/or the Tenant Improvements remaining cannot be adequately restored, repaired or reconstructed so as to constitute a complete architectural unit of substantially the same usefulness, design, construction, and economic feasibility as existed immediately before such Partial Taking (as determined in the reasonable discretion of Tenant), then Tenant shall have the right to terminate this Ground Lease upon Notice to Landlord within one hundred twenty (120) days after the date of the Partial Taking. This Notice shall state the date of termination, which shall not be earlier than the date title to the Leased Premises and/or the Tenant Improvements vests in the condemning authority. Tenant shall promptly execute, acknowledge, and deliver such documents as may reasonably be necessary to evidence any termination under this subsection.

### **B. Lease Not Terminated**

If this Ground Lease is not terminated for a Partial Taking pursuant to **Section 21.02.A** above, then as to the portion of the Leased Premises and/or the Tenant Improvements taken in such condemnation proceedings, this Ground Lease shall terminate in accordance with the applicable terms of this Ground Lease and any Rent expressly calculated on the size of the Leased Premises and/or the Tenant Improvements shall thereafter be reduced in proportion to the reduction in the rentable areas of the Leased Premises and the Tenant Improvements; if Rent is not expressly calculated on the size of the Leased Premises and/or the Tenant Improvements, then no adjustment in Rent shall be made. Tenant shall promptly repair, restore, rebuild or replace the damaged or destroyed Tenant Improvements to the extent necessary to remove any interference with Landlord's operations arising or resulting from the Partial Taking, all at Tenant's own cost and expense. Tenant shall proceed, at its own cost and expense, to make an adequate restoration, repair or reconstruction, or, at Tenant's choice, to construct new Tenant Improvements upon the part of the Leased Premises not taken, such restoration, repair or construction to be done in accordance with the terms of this Ground Lease applicable thereto (and any Rent that was expressly calculated based on the size of the Tenant Improvements shall be proportionately increased). The proceeds of any condemnation award shall be made available to Tenant for such repair, restoration, rebuilding or replacement under the same terms and conditions as apply to the use of insurance proceeds as set forth in **Sections 20.01.D** and **20.03**.

## **Section 21.03 Temporary Taking**

If all or any part of the Leased Premises and/or Tenant Improvements are temporarily Taken and this Ground Lease is not terminated or terminable pursuant to **Sections 21.01** or **21.02**, this Ground Lease shall not terminate, nor shall the Rent abate or Tenant's non-monetary obligations be affected except to the extent Tenant may be prevented from performing such non-monetary obligations by the terms of the Taking. In such case, Tenant shall continue to pay, in the manner and at the times herein specified, the full amount of Rent, and, except to the extent that Tenant may be prevented from so doing pursuant to the terms of the order of the condemning authority, Tenant shall be obligated to perform and observe all of the other terms, covenants, conditions and all obligations hereof upon the part of Tenant to be performed and observed, as though such Taking had not occurred.

#### **Section 21.04 Tenant's Continuing Responsibility**

The Rent shall be paid to the later of the date title vests in the condemning authority or the date of Tenant's physically vacating the Leased Premises or portion thereof. Tenant shall, in all other respects, keep, observe and perform all the terms of this Ground Lease up to such date.

#### **Section 21.05 Distribution of Proceeds**

##### **A. Intervention**

If the Leased Premises, the Tenant Improvements and/or the WMATA Facilities shall be Taken, Landlord, WMATA and Tenant (but not a Subtenant) each shall be entitled to intervene in the proceeding and claim their respective distributive share. Landlord, WMATA and Tenant shall each bear their respective costs, attorney and expert fees, and all other expenses incurred in the determination and collection of such an award.

##### **B. Total Taking or Partial Taking Resulting in Termination**

1. The condemnation proceeds resulting from a Total Taking or from a Partial Taking resulting in the termination of this Ground Lease shall be divided between Landlord, WMATA and Tenant as follows: (a) Landlord shall receive an amount equal to the full fair market value of Landlord's reversionary fee interest in the Leased Premises and the Tenant Improvements, both discounted to present value by the Discount Rate, plus the present value, discounted to present value at the Discount Rate, of Landlord's expected income stream from the Leased Premises for the balance of the then-current Term (without regard to the early termination); (b) WMATA shall receive an amount equal to the value of any WMATA Facilities so taken; and (c) subject to the rights of any Leasehold Mortgagee, Tenant shall receive the balance of the condemnation award; *provided*, that to the extent the balance of the condemnation award exceeds (i) Tenant debt secured by a Leasehold Mortgage, plus (ii) any claims of Subtenants, plus (iii) the return to Tenant of any equity (as defined in **Section 17.04**), such excess shall be divided equally between Landlord and Tenant. It is the intention of this Section that the sum of the foregoing amounts shall equal one hundred percent (100%) of the condemnation award.

2. It shall be the obligation of Tenant first to apply its share of the condemnation award to any claims by Leasehold Mortgagees under their Leasehold Mortgages in accordance with the terms and priorities of such Leasehold Mortgages. To the extent not so applied, Tenant may apply Tenant's share of the condemnation award to claims (if any such claims exist) to any entitlement in Tenant's share of the condemnation award by Subtenants, but in no event shall any Subtenant be deemed a third-party beneficiary under this Section. Landlord and WMATA shall have no responsibility or obligation with respect to the foregoing. Tenant shall indemnify, defend, and save Landlord and WMATA harmless from any claims by Leasehold Mortgagees and/or Subtenants of the Leased Premises or the Tenant Improvements involving Landlord's, WMATA's and Tenant's respective shares of the condemnation award.

##### **C. Partial Taking Not Resulting in Termination**

In the event of any permanent Partial Taking of the Leased Premises and/or the Tenant Improvements that does not result in the termination of this Ground Lease, Tenant shall be entitled to that

portion of the condemnation award necessary to repahir, restore or reconstruct the Tenant Improvements or to construct new Tenant Improvements, and Landlord shall be entitled to the remainder of the condemnation award. If the part of the award paid to Tenant is insufficient to pay fully for such restoration, repair, reconstruction or construction, Tenant shall pay the excess cost thereof. If a Leasehold Mortgage so provides, the condemnation award may be payable to a Leasehold Mortgagee for application by the Leasehold Mortgagee to Tenant's restoration, repair, reconstruction or construction obligations. If no Leasehold Mortgagee requires that the condemnation award be paid to it, then the condemnation award shall be payable to Tenant under the terms and conditions set forth in **Section 20.01.D** as if the condemnation award was insurance proceeds.

**D. Non-Termination Temporary Taking**

In the event of any temporary Taking referenced in **Section 21.03**, Tenant shall be entitled to receive the entire amount of any award made for such Taking subject to the provisions of that Section, whether paid by way of damages, rent or otherwise, unless the period of such Taking shall extend beyond the expiration date of the Term. In such latter case, the award shall be apportioned between Landlord and Tenant as of the date of expiration of the Term and Landlord shall also receive the entire portion of the award that is attributable to physical damage to the Leased Premises and the Tenant Improvements (if appropriate) and the restoration thereof to the condition immediately prior to the Taking. Upon the termination of any period of temporary Taking prior to the expiration of the Term, Tenant shall, at its sole cost and expense, restore the Leased Premises and the Tenant Improvements, as nearly as reasonably possible, to the same condition that existed immediately prior to such Taking.

**Section 21.06 Survive Termination**

Tenant's obligations and liabilities under this Article shall survive the expiration or termination of this Ground Lease.

**ARTICLE 22**

**SURRENDER**

**Section 22.01 Surrender of Leased Premises and Tenant Improvements**

On the last day of the Term or upon any earlier termination of this Ground Lease, except to the extent Tenant obtains the prior written approval of Landlord to allow specific Tenant Improvements to remain in place, Tenant shall be required to remove at its own cost and expense any or all of the Tenant Improvements promptly after the first to occur of the expiration of the Term or the termination of this Ground Lease. Tenant shall surrender to Landlord the Leased Premises and such of the Tenant Improvements as may be permitted to remain without delay, in good order, condition and repair, reasonable wear and tear excepted, free and clear of any mortgages, liens, or Impositions except those placed by Landlord or arising from work done by Landlord and free and clear of all Subleases (except any expressly agreed by Landlord in writing to remain in Landlord's sole and absolute discretion) and free and clear of any signage (including footings and foundations and restoration of the ground) installed by or for the account of Tenant or any Subtenant. Tenant's failure to do so shall be an Event of Default. Unavoidable



Delay shall not be an excuse to such surrender. Tenant shall not remove any WMATA Facilities without the express written authorization of WMATA, which authorization shall be a WMATA Unconditional Approval Matter. Tenant shall execute, deliver and, if applicable, record any documents reasonably requested by Landlord to evidence such expiration or termination and the vesting of fee title to the Tenant Improvements in Landlord, including a termination of any memorandum or short form of this Ground Lease then of record.

If Tenant fails to execute, deliver and/or record such documents within fifteen (15) days after Notice from Landlord, Landlord may do so unilaterally on Tenant's behalf and Landlord is hereby appointed Tenant's attorney-in-fact, which appointment is vested with an interest, to do so. Tenant shall also execute and deliver all licenses, permits, approvals, warranties and guaranties (and any Subleases that Landlord has agreed to continue in effect, together with any security deposits, rent or other sums relating to the period from and after the last day of the Term) then in effect for the Leased Premises and/or the Tenant Improvements, together with such assignments of the foregoing to Landlord as Landlord may reasonably request, and all As-Built Drawings for the Tenant Improvements, utility and service provider information, maintenance and inspection records, and other books and records relating to the Leased Premises and the Tenant Improvements. Tenant shall generally cooperate to achieve an orderly transition of operations from Tenant to Landlord without interruption.

#### **Section 22.02 Removal of Personal Property, Trade Fixtures**

Tenant and any Subtenant who purchased or otherwise provided signs, furniture, furnishings, trade fixtures, and business equipment and/or other similar items may remove such items at or prior to the termination or expiration of this Ground Lease. However, if such removal will injure any Tenant Improvements or necessitate changes in or repairs to the Tenant Improvements, Tenant or such Subtenant, whichever shall be applicable, shall repair or restore the Tenant Improvements to their condition immediately preceding the removal of such furniture, furnishings, trade fixtures and business equipment, or Tenant and such Subtenant shall be jointly and severally liable to pay or cause to be paid to Landlord the cost of repair or restoration necessitated by such removal.

#### **Section 22.03 Personal Property and Trade Fixtures Not Removed**

Any personal property of Tenant or any Subtenant which shall remain in or on the Leased Premises or the Tenant Improvements after the termination or expiration of this Ground Lease shall be deemed to have been abandoned, and either may be retained by Landlord as its property, without any compensation to Tenant or any Subtenant, or be disposed of, without accountability, in such manner as Landlord may see fit. Tenant shall reimburse Landlord as Additional Rent for any cost or expense incurred by Landlord in disposing of any such property.

#### **Section 22.04 Landlord's Responsibility**

Landlord shall not be responsible for any loss or damage occurring to any property owned by Tenant or any Subtenant other than any such loss or damage that results solely from the negligent or intentional acts or omissions of Landlord and/or its agents, employees and/or contractors.

#### **Section 22.05 Holdover**

If Tenant fails to vacate the Leased Premises and/or the Tenant Improvements in accordance with

this Article, Tenant shall be deemed to be a holdover tenant at sufferance. Tenant shall be liable to Landlord for all losses, damages, liabilities, costs and expenses incurred by Landlord as a result of or arising from such holdover and shall defend, indemnify and hold Landlord harmless from and against any of the same. The foregoing shall include (i) the costs and expenses of causing Tenant to vacate, whether by eviction or other dispossession proceedings or otherwise, including court costs and reasonably attorneys' fees, and (ii) all damages incurred by Landlord in connection with such holdover, including lost opportunity costs and any claims made by any successor tenants or occupants of the Leased Premises and/or the Tenant Improvements arising from the delay. In addition, Tenant shall pay Landlord Rent for the period of any such holdover, on a *per diem* basis, such Rent for the first month of the holdover to be one hundred fifty percent (150%), for each subsequent month of the holdover through the sixth (6<sup>th</sup>) month one hundred seventy-five percent (175%), and for each month thereafter two hundred percent (200%) of the greater of the then Base Rent or the then fair market rent for the Leased Premises and/or the Tenant Improvements as determined by a broker or appraiser engaged by Landlord; all Additional Rent provided for in this Ground Lease shall also continue to be applicable during the period of any such holdover.

#### **Section 22.06 No Implied Surrender**

No act or thing done by Tenant or Landlord during the Term shall be deemed to be the surrender, or acceptance of surrender, of possession or the termination of this Ground Lease except in accordance with the terms of this Ground Lease or as may be expressly agreed in writing by Landlord and Tenant. Without limiting the foregoing, the delivery or acceptance of keys shall not be deemed the surrender or acceptance of surrender of possession or to evidence termination.

#### **Section 22.07 Survive Termination**

The provisions of this Article shall survive any termination or expiration of this Ground Lease.

### **ARTICLE 23**

#### **DEFAULT PROVISIONS**

##### **Section 23.01 Events of Default**

###### **A. Monetary Obligations**

If Tenant defaults in the due and punctual payment of any Rent due under this Ground Lease or in the due and punctual payment of any Impositions, insurance premiums, or other charges or monetary amounts required to be paid to Landlord or any third party under this Ground Lease, and (i) if Tenant has not defaulted in that same or a substantially similar obligation more than two (2) times in the preceding twelve (12) months and such default continues for a period of ten (10) days after Notice from Landlord to Tenant or, if a shorter period is specified in this Ground Lease to cure such nonpayment, then within such shorter period, or (ii) if Tenant has defaulted in that same or a substantially similar obligation more than two (2) times in the preceding (12) months, an **"Event of Default"** shall occur.

B. Non-Monetary Obligations

If (i) Tenant fails to use Commercially Reasonable Business Efforts to obtain the Entitlements, or (ii) Tenant fails to comply with any non-monetary time schedule contained in or referred to in this Ground Lease **or the CC&Rs**, or (iii) Tenant fails to observe or perform any of the other non-monetary conditions, agreements, terms, covenants, schedules, or other provisions contained in this Ground Lease not otherwise specified to be an Event of Default and, in any such event, (x) Tenant has not failed to timely and full perform that same or a substantially similar obligation more than two (2) times in the preceding twelve (12) months and such failure continues for a period of thirty (30) days after Notice from Landlord to Tenant, with a copy of such Notice to any Senior Leasehold Mortgagee, or (y) Tenant has failed to timely and fully perform the same or a substantially similar obligation more than two (2) times in the preceding twelve (12) months, an **“Event of Default”** shall occur. However, if Tenant promptly commences to cure a default under preceding **clause (x)** within the stated thirty (30) day period, and such default is curable but such default is not susceptible of being cured within the stated thirty (30) days, the cure period shall be extended for such additional time as may be reasonably necessary to cure such default, not to exceed an additional one hundred twenty (120) days, provided: (1) Tenant uses Commercially Reasonable Business Efforts to cure the failure; (2) that such extension shall not subject Landlord to any liability, loss or penalty; and (3) that throughout such period Tenant complies fully and timely with all of its other obligations under this Ground Lease, including but not limited to, the payment of Base Rent and Additional Rent, regardless of any Notice or cure period that otherwise might be applicable.

C. Construction Defaults

An **“Event of Default”** shall occur if (i) Tenant fails to perform construction on the Project within the time periods set forth in the Project Schedule, or (ii) any Affiliate of Tenant engaged to design or construct the WMATA Replacement Facilities pursuant to a separate contract fails to perform any of its obligations under that separate contract (after the expiration of any notice and/or cure period set forth therein).

D. Insurance Defaults

If Tenant fails to comply with any obligation to maintain the insurance required by this Ground Lease and/or fails to provide evidence of such insurance coverage to Landlord, then (i) if Tenant has not failed to timely and fully perform the same or a substantially similar obligation more than two (2) times in the preceding twelve (12) months and such failure continues for a period of seven (7) days after Notice from Landlord to Tenant, or (ii) if Tenant has failed to timely and fully perform the same or a substantially similar obligation more than two (2) times in the preceding twelve (12) months, then an **“Event of Default”** shall occur.

E. Guarantor/Surety Defaults

If any guarantor or surety of Tenant’s obligations (including the issuer of a Letter of Credit) (i) under this Ground Lease defaults hereunder and such default continues for a period of thirty (30) days after Notice from Landlord to Tenant, or (ii) under **the CC&Rs or** any other agreement or document applicable to the Project defaults thereunder and such default is not cured within any applicable notice and/or cure period set forth therein, an **“Event of Default”** shall occur.

F. Bankruptcy-Related Actions

1. If Tenant or any guarantor or surety of Tenant's obligations under this Ground Lease, the CC&Rs or any agreement or document relating thereto is adjudicated bankrupt or insolvent, or files any petition or answer seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future Federal or State bankruptcy law, or any other present or future applicable Federal, State or other law, or Tenant or such guarantor or surety seeks, or consents to or acquiesces in, the appointment of any trustee, receiver or liquidator of Tenant or such guarantor or surety, or of all or any substantial part of its assets, or any of the Tenant Improvements or Tenant's leasehold interest in the Leased Premises, or of any interest of Tenant hereunder, except any such trustee, receiver or liquidator appointed at the request of a Leasehold Mortgagee exercising its remedies under its Leasehold Mortgage, an **"Event of Default"** shall occur.

2. If within one hundred twenty (120) days after the commencement of any proceeding against Tenant or any guarantor or surety of Tenant's obligations under this Ground Lease, the CC&Rs or any agreement or document relating thereto seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future Federal or State bankruptcy or insolvency law, or any other present or future applicable Federal, State or other law, such proceedings have not been dismissed, or if within one hundred twenty (120) days after the appointment without the consent or acquiescence of Tenant or such guarantor or surety of any trustee, receiver or liquidator of Tenant or such guarantor or surety, or of all or any substantial part of its assets or of any Tenant Improvements or Tenant's leasehold interest in the Leased Premises, or any other interest of Tenant hereunder, except any such trustee, receiver or liquidator appointed at the request of a Leasehold Mortgagee exercising its remedies under its Leasehold Mortgage, such appointment is not vacated or stayed on appeal or otherwise canceled, and if stayed, within one hundred twenty (120) days after the expiration of any such stay such appointment is canceled, an **"Event of Default"** shall occur.

G. Misrepresentation

If Tenant makes any willful or material misrepresentation or omission in this Ground Lease or in any other material submission to Landlord or to any governmental authority, or if any guarantor or surety of Tenant's obligations under this Ground Lease, the CC&Rs or any agreement or document relating hereto makes any willful or material misrepresentation or omission therein and such willful or material misrepresentation or omission materially adversely affects Landlord, an **"Event of Default"** shall occur without any Notice or cure period being afforded for the same. Landlord's determination of a material adverse effect shall be in Landlord's sole and absolute discretion.

H. CC&Rs

If Tenant defaults under the CC&Rs and such default is not cured within any period provided in the CC&Rs for notice and/or cure thereof, then an **"Event of Default"** shall occur.

I. Other Specified Circumstances

Whenever this Ground Lease expressly states that a specified event, situation or circumstance shall constitute an Event of Default, an **"Event of Default"** shall exist without any further Notice or cure period

being afforded.

### **Section 23.02 Curing of Default by Senior Leasehold Mortgagee**

The Senior Leasehold Mortgagee shall have the right to cure a default by Tenant on the terms and in the manner specified in **Section 17.02.B**.

### **Section 23.03 Landlord's Remedies**

If an Event of Default occurs and if a Leasehold Mortgagee does not timely cure the default in accordance with **Section 17.02.B**, in addition to any other rights and remedies Landlord may have under this Ground Lease and at law and in equity, and whether or not Tenant vacates the Leased Premises and Tenant Improvements, Landlord shall have the option to do any one or more of the following:

#### **A. Continue Lease**

Landlord may continue this Ground Lease in full force and effect, collect by legal proceedings or otherwise the Base Rent and Additional Rent, and enforce by legal proceedings or otherwise every term and provision of this Ground Lease. In connection therewith, Landlord may re-enter the Leased Premises and the Tenant Improvements and evict or dispossess Tenant by process of law or, if permitted by applicable law, by self-help, without the same constituting a termination of this Ground Lease. No notice of re-entry need be given, and such notice and all rights of redemption or comparable rights are hereby waived to the extent allowed by applicable law. No re-entry by Landlord shall absolve or release Tenant from liability under this Ground Lease. Landlord may seize the Security Deposit or any sums posted by Tenant as prepayment for any obligation arising under this Ground Lease and apply the same to any amount owed to Landlord, without the same constituting liquidated damages or an exclusive remedy. Tenant waives the right to make any counterclaim in any action or proceeding to enforce Landlord's rights under this Section, but such waiver shall not bar Tenant from raising its claim in a separate and unconsolidated action or proceeding. Landlord may re-let the Leased Premises for such rent and upon such terms as Landlord deems appropriate under the circumstances, Landlord may collect and retain all proceeds arising from such re-letting, and Tenant shall remain liable for any damages incurred by Landlord, including, without limitation, any deficiency in Rent, reasonable attorneys' fees and court costs, the fees, costs and expenses of re-letting the Leased Premises, and the costs of repairing any damage to the Tenant Improvements or the Leased Premises and/or of putting the same into leasable condition. Any such damages incurred by Landlord may be recovered by Landlord at the time of re-letting or in separate actions brought from time to time or such action may be deferred until the stated expiration of the Term; Tenant agrees that the cause of action for such damages shall not be deemed to have accrued until the stated expiration date of the Term and waives any statute of limitations or other similar defense or claim to the contrary. Tenant shall not be entitled to receive any excess of rents collected from a third party over the Rent reserved in this Ground Lease. Nothing in the foregoing imposes or shall be deemed to impose any obligation on the part of Landlord to mitigate damages for Tenant's benefit and, if any such mitigation is nevertheless required, the burden of proof shall be on Tenant to prove Landlord's failure to comply and the amount of damages that could have been avoided. Tenant waives and surrenders for itself and all those claiming by or under it, including Subtenants and creditors, any right or privilege it or any of them may have under any present or future applicable law to redeem the Leased Premises and/or the Tenant Improvements, to continue to occupy or possess the Leased Premises and the Tenant Improvements, and, if this Ground Lease has been terminated,

to continue or reinstate this Ground Lease. The preceding sentence is subject to the Senior Leasehold Mortgagee's right to obtain a new lease as set forth in **Section 17.02.C**.

**B. Terminate Lease**

Landlord may re-enter the Leased Premises and by Notice to Tenant terminate this Ground Lease on the date specified in such Notice, subject to the Senior Leasehold Mortgagee's rights pursuant to **Section 17.02.C**. Such Notice shall not create any additional cure rights or cure periods and Landlord may reject any attempted cure. Tenant and each other person or entity in possession or entitled to possession of the Leased Premises and/or the Tenant Improvements shall then quit and peacefully surrender the Leased Premises and the Tenant Improvements to Landlord. Tenant shall also deliver to Landlord, at Tenant's expense, (i) all reports and studies of the Leased Premises generated by or Tenant or by third parties for Tenant relating to environmental conditions, soil conditions, title, and architectural or engineering plats, plans or surveys, together with an assignment to Landlord of Tenant's right, title and interest thereto in form and substance acceptable to Landlord, and (ii) copies of all pending or previously denied applications for Entitlements, together with an assignment to Landlord of Tenant's right, title and interest thereto in form and substance acceptable to Landlord, which obligations shall survive the termination of this Ground Lease and shall be enforceable by specific performance or other equitable remedies. Landlord may seize the Security Deposit or any other sums posted by Tenant as prepayment for any obligation arising under this Ground Lease and apply the same to any amount owed to Landlord, without the same constituting liquidated damages or an exclusive remedy. Landlord shall be entitled to recover from Tenant the difference, discounted to present value by applying the Discount Rate, between the Rent that would have been payable for the unexpired Term had this Ground Lease not been terminated and the rental value of the Leased Premises for that same period (unless a statute then governs and limits the amount Landlord may so collect, in which case the statute shall govern). In making the foregoing calculation, the rental value of the Leased Premises shall be deemed *prima facie* to be the actual rental received by Landlord upon a re-letting or, if there is no such re-letting, the estimated cash rental value as determined by a broker, appraiser or other consultant selected by Landlord. The provisions of this subsection shall be without prejudice to Landlord's right to prove and collect, in full, damages incurred or Rent accrued but not paid prior to the termination of this Ground Lease. Tenant waives and surrenders for itself and all those claiming by or under it, including Subtenants and creditors, any right or privilege it or any of them may have under any present or future applicable law to redeem the Leased Premises and/or the Tenant Improvements, to continue to occupy or possess the Leased Premises and the Tenant Improvements, and, if this Ground Lease has been terminated, to continue or reinstate this Ground Lease. The preceding sentence is subject to the Senior Leasehold Mortgagee's right to obtain a new lease as set forth in **Section 17.02.C**.

**C. Cure at Tenant's Expense**

Landlord may attempt to repair, replace or otherwise remedy the Event of Default (i) in the case of an emergency, (ii) where the Event of Default interferes with the WMATA Reserved Areas or with any portion of the Overall Site not part of the Leased Premises, or with WMATA's activities or operations, (iii) if the Event of Default is, or results in, the non-prosecution of the Project, (iv) if the Event of Default results in a violation of applicable law (unless such violation does not need to be cured immediately to avoid incurring any fines, penalties or other sanctions), (v) if the Event of Default could result in the cancellation of any insurance policy maintained by or for the benefit of Landlord, or (vi) if WMATA believes in its sole but reasonable discretion that the health and safety of WMATA's patrons, employees or other persons are or

may be affected. Such remedy may consist of, without limitation, making a payment, conducting maintenance or repair, curing a violation of law, procuring insurance, adopting safety measures, removing impediments or interference with the WMATA Reserved Areas or with any portion of the Overall Site not part of the Leased Premises or with WMATA's activities or operations, and/or constructing all or a portion of the Project; notwithstanding the foregoing, Landlord shall not exercise its right to construct all or a portion of the Project if the Senior Leasehold Mortgagee timely exercises its right to cure under **Section 17.02.B**. Landlord's exercise of the foregoing remedies does not waive the underlying Tenant obligation or the Event of Default, nor shall Landlord be liable to Tenant for any loss, cost, expense, damage or other consequence arising from or in connection with Landlord's efforts. All reasonable costs incurred by Landlord under this subsection, including (without limitation) reasonable attorneys' fees, together with interest thereon at the Default Rate from the date Landlord paid such costs until the date of repayment by Tenant, shall be paid by Tenant to Landlord as Additional Rent within thirty (30) days after Landlord makes written demand on Tenant for such payment.

**D. Effect of Payment**

Unless a payment fully cures all monetary defaults that then exist, Landlord's receipt of payment from or on behalf of Tenant shall not reinstate or continue the Term or this Ground Lease if they have been terminated, nor shall such receipt otherwise waive, withdraw or affect any Notice previously given to Tenant or a Leasehold Mortgagee or any right or remedy available to Landlord. Landlord may also continue to receive partial payments without affecting any of the foregoing unless and until partial payment is made.

**E. Cumulative Remedies**

To the extent not inconsistent with each other, the remedies set forth above shall be cumulative and more than one may be exercised for any Event of Default. The remedies set forth above shall also be cumulative with any indemnification obligation Tenant may have and/or with any remedy Landlord or WMATA may have **under the CC&Rs**, under any third-party guaranty or surety of Tenant's obligations, or under any other agreement between Landlord and/or WMATA and Developer and/or Tenant. Landlord and WMATA, in addition to all the rights and remedies provided herein, shall also have all the rights and remedies afforded by law and in equity (including injunctive relief and specific performance), all of which shall also be cumulative. However, the exercise of any rights under this Section shall be consistent with applicable Federal and State bankruptcy laws and regulations to the extent applicable.

**Section 23.04 Tenant's Continued Liability**

If an Event of Default occurs, then no expiration or termination of this Ground Lease shall relieve Tenant of its liability and obligations under this Ground Lease. Such liability and obligations shall survive such expiration or termination. In the event of any such expiration or termination, whether or not the Leased Premises and/or the Tenant Improvements, or any part thereof, shall have been relet, Tenant shall pay to Landlord the requisite Base Rent and Additional Rent in accordance with the terms of this Ground Lease, less any amounts or rent collected by Landlord as a result of reletting the Leased Premises.

**Section 23.05 No Waiver of Breach**

No failure by Landlord or, where applicable, WMATA to insist upon the strict performance of any of

the terms of this Ground Lease or to exercise any right or remedy consequent upon a breach thereof, and no acceptance by Landlord of full or partial Rent during the continuance of any such breach, shall constitute a waiver of any such breach or of any of the terms of this Ground Lease. None of the terms of this Ground Lease to be kept, observed or performed by Tenant and no breach thereof shall be waived, altered or modified except by a written instrument executed by Landlord or, where applicable, WMATA. No waiver of any default of Tenant shall be implied from any omission by Landlord or WMATA to take any action on account of such default if such default persists or is repeated, and no express waiver shall affect any default other than the default specified in the express waiver and then only for the time and to the extent therein stated. One or more waivers by Landlord or WMATA shall not be construed as a waiver of a subsequent breach of the same covenant, term or condition.

#### **Section 23.06 Attorney's Fees**

In the event of any Event of Default, if Landlord brings suit for collection of the Rent, or in case the Rent has to be collected upon demand by an attorney, or if Landlord incurs any other attorneys' fees and/or court costs in enforcing the terms of this Ground Lease, Tenant agrees to pay such attorneys' fees, court costs and such other collection fees as Landlord may reasonably incur.

#### **Section 23.07 Injunctive Relief**

If Tenant is in default under this Ground Lease **or the CC&Rs**, whether or not such default constitutes an Event of Default, or if Tenant threatens to default, Landlord or, where applicable, WMATA, may seek and obtain a temporary restraining order, injunction or other equitable relief. Tenant acknowledges that monetary damages do not constitute an adequate remedy for non-monetary default, particularly with respect to matters of design and construction procedures and quality, Assignment, and matters affecting title to the Leased Premises.

### **ARTICLE 24**

#### **NOTICES**

##### **Section 24.01 Notices in Writing**

All notices, demands or requests ("**Notices**") given to a party to this Ground Lease must be in writing in hard copy to be effective. Oral and/or e-mailed notices, demands or requests shall not be effective except that e-mails that transmit hard copy attachments shall be effective as to the hard copy attachments.

##### **Section 24.02 Service Procedures**

All Notices shall be: (1) personally delivered; (2) sent by registered or certified United States mail, postage prepaid, return receipt requested; (3) sent by local hand-delivery for same-day or next-Business Day delivery or by a nationally recognized courier service for next-Business Day delivery; (4) sent by facsimile to any intended recipient who has provided a number for facsimile transmissions; or (5) subject to the caveat in the final clause of **Section 24.01**, sent by e-mail. Notices shall be deemed to have been given on the earlier of actual receipt, or in the case of mailing by United States Mail, the third (3<sup>rd</sup>) Business Day after the date so mailed or, in



the case of overnight courier or e-mail, on the first Business Day after delivery to such courier, or, in the case of an e-mail or facsimile, on the date received if received before 2:00 pm Eastern time and otherwise on the next Business Day. Any Notice refused, or that is incapable of delivery due to an incorrect or out-of-date address provided by the intended recipient, shall be considered delivered on the earlier of the actual date of refusal or on the date provided in the previous sentence. A party may change its address for Notices at any time and from time to time by giving Notice to the other parties of whom it has been given Notice. Notices may be given by attorneys on behalf of their client.

#### **Section 24.03 Notice to Tenant**

All Notices by Landlord to Tenant shall be deemed to have been properly given if addressed to Tenant as follows (or to such other address of which Notice is given as set forth in **Section 24.02**):

Original to: [ADDRESS]

and

One copy to: [ADDRESS]

And, if the Notice relates to an Event of Default or potential Event of Default, one copy to the Senior Leasehold Mortgagee, if any, of whom Landlord has been given Notice.

#### **Section 24.04 Notice to Landlord**

All Notices to Landlord shall be deemed to have been properly given if addressed to Landlord as follows (or to such other address of which Notice is given as set forth in **Section 24.02**):

Original to: Vice President  
Office of Real Estate and Parking  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, NW  
Washington, DC 20001  
e-mail: realestate@wmata.com

and

One copy to: General Counsel  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, NW  
Washington, DC 20001  
Fax: 202-962-2550

and

One copy to: Any mortgagee of Landlord's interest of whom Tenant has been given Notice.

and, if the Notice involves insurance, with one copy to:

Director of Risk, Insurance and Third-Party Liability  
Office of Insurance, Room 8F  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, NW  
Washington, DC 20001

and, if the Notice relates to Entitlements or design or construction matters, with one copy to:

Senior Program Manager  
Office of Joint Development and Adjacent Construction  
Washington Metropolitan Area Transit Authority  
3500 Pennsy Drive  
Building C, Room C-105  
Landover, Maryland 20785

#### **Section 24.05 Notice to Senior Leasehold Mortgagee**

The Senior Leasehold Mortgagee and other Leasehold Mortgagees shall be deemed to have been properly given Notice if addressed to such party at the address furnished pursuant to the definition of "Leasehold Mortgagee."

### **ARTICLE 25**

#### **ESTOPPEL CERTIFICATES**

##### **Section 25.01 Estoppel Certificate by Landlord**

Landlord agrees, upon not less than twenty (20) days prior Notice from Tenant or from any then-existing Leasehold Mortgagee, to execute and furnish a written statement which: (1) certifies that this Ground Lease is unmodified and in full force and effect (or if modified that this Ground Lease is in full force and effect as modified and states the modifications); (2) states to the knowledge of Landlord whether Tenant is in default in keeping, observing and performing any of the terms of this Ground Lease, and, if in default, specifies each such

default of which Landlord may have knowledge; (3) certifies to the knowledge of Landlord as to the existence of any offsets, counterclaims or defenses to this Ground Lease on the part of Landlord; (4) states the amount of the most recent payment of Rent by Tenant; and (5) sets forth any other factual matters regarding this Ground Lease which reasonably may be requested except as to proprietary or confidential information. For purposes of such a certificate, the knowledge of WMATA shall be limited to the then-current actual knowledge of the signatory of such certificate and no knowledge shall be deemed to that individual. It is intended that any such statement delivered pursuant to this Section may be relied upon by Tenant, any prospective assignee of Tenant's interest in this Ground Lease, any existing or prospective Leasehold Mortgagee or any assignee of any Leasehold Mortgagee. Reliance on such certificate may not extend to any default of Tenant or to any other matter as to which Landlord shall have no actual knowledge.

#### **Section 25.02 Estoppel Certificate by Tenant**

Tenant agrees, upon not less than twenty (20) days prior Notice from Landlord or from any then-existing mortgagee of the Overall Site, to execute and furnish a written statement which: (1) certifies that this Ground Lease is unmodified and in full force and effect (or if modified that this Ground Lease is in full force and effect as modified and states the modifications); (2) states to the knowledge of Tenant whether Landlord is in default in keeping, observing and performing any of the terms of this Ground Lease, and, if in default, specifies each such default of which Tenant may have knowledge; (3) certifies to the knowledge of Tenant as to the existence of any offsets, counterclaims or defenses to this Ground Lease on the part of Tenant; (4) states the amount of the most recent payment of Rent by Tenant; and (5) sets forth any other factual matters regarding this Ground Lease which reasonably may be requested except as to proprietary or confidential information. For purposes of such a certificate, the knowledge of Tenant shall be limited to the then-current actual knowledge of the signatory of such certificate and no knowledge shall be deemed to that individual. It is intended that any such statement delivered pursuant to this section may be relied upon by Landlord and any prospective purchaser or mortgagee of the fee interest in the Overall Site, and any assignee of this Ground Lease. Reliance on such certificate may not extend to any default of Landlord or to any other matter as to which Tenant shall have no actual knowledge.

### **ARTICLE 26**

#### **REPRESENTATIONS AND WARRANTIES**

##### **Section 26.01 Landlord's Representations and Warranties**

Landlord hereby represents and warrants that, to the actual knowledge of its Vice President of the Office of Real Estate and Parking (without such Vice President assuming any personal liability hereunder), and regardless of the actual or constructive knowledge of any other director, officer, employee, agent, contractor or representative of Landlord:

A. Landlord legally exists, is in good standing under Federal and local laws, and is authorized to conduct the business in which it is engaged.

B. Landlord has full power and authority to enter into this Ground Lease, subject to the potential need for approval by the FTA, and the person signing this Ground Lease on behalf of Landlord has

the authority to bind Landlord and to enter into this transaction.

C. Landlord's execution, delivery and performance of this Ground Lease and the consummation of this transaction will not: (1) violate any law or any order of any court or governmental authority with proper jurisdiction; or (2) result in a breach or default under any contract or other binding commitment of Landlord or any provision of the organizational documents of Landlord.

D. Landlord will, on the Effective Date, deliver possession of the Leased Premises to Tenant free and clear of any and all tenancies and occupancies except as may be approved by Tenant in writing, subject only to the exceptions and rights on behalf of Landlord as set forth in this Ground Lease and matters referenced in **Section 19.02**.

E. There are no actions, suits, arbitrations, governmental investigations or other proceedings pending, or to the knowledge of WMATA, threatened, which might adversely affect its right to enter into or perform under the agreements set forth in this Ground Lease.

F. There are no condemnation proceedings pending or, to Landlord's knowledge, threatened with respect to the Leased Premises.

#### **Section 26.02 Tenant's Representations and Warranties**

Tenant hereby represents and warrants that:

A. Tenant is a [REDACTED] duly organized, validly existing and in good standing under the laws of [REDACTED], is authorized to transact business in the jurisdiction in which the Leased Premises are located, and is authorized to conduct the business in which it is now engaged.

B. Tenant is an Affiliate of Developer.

C. Tenant has full power and authority to enter into this Ground Lease and the person signing this Ground Lease on behalf of Tenant has the authority to bind Tenant and to enter into this transaction.

D. The execution, delivery and performance of this Ground Lease have been duly and validly authorized by all requisite actions of Tenant.

E. Tenant's execution, delivery and performance of this Ground Lease and the consummation of this transaction will not: (1) violate any law or any order of any court or governmental authority with proper jurisdiction; or (2) result in a breach or default under any contract or other binding commitment of Tenant or any provision of the organizational documents of Tenant.

F. Tenant is in compliance with **Section 26.03**.

G. There are no actions, suits, arbitrations, governmental investigations or other proceedings pending, or to the knowledge of Tenant threatened, which might adversely affect its right to enter into or perform this Ground Lease.

H. Neither Tenant nor any person or entity who or which is a manager, partner, member, shareholder or other principal of Tenant has been convicted of a felony or is controlled by one or more persons or entities who or which has been convicted of a felony or been the subject of the termination of any other agreement with WMATA because of such person's or entity's default thereunder.

#### **Section 26.03 Bankruptcy Remoteness**

Tenant shall not have the power to and shall not engage in any business unrelated to the developing, constructing, operating, maintaining, repairing, renovating, replacing, financing and owning the Tenant Improvements and leasing the Leased Premises (and the Assignment thereof) in accordance with the provisions of this Ground Lease, and activities incidental thereto. Tenant shall not have any assets other than those referenced in the preceding sentence or any indebtedness other than indebtedness incurred for the foregoing purposes. Tenant shall maintain its own books and records and have its own accounts, in each case separate from those of any other person or entity (but consolidated financial statements and joint accounts shall be permitted as long as the separate assets and operations of each entity are easily identifiable). Tenant shall hold itself out as being a person or entity separate and apart from any other person or entity. Tenant shall otherwise satisfy customary market criteria, as such criteria change from time to time, for constituting a single-purpose entity, except for any obligation to have an independent director.

#### **Section 26.04 As Is, Where Is**

Except for the representations and warranties made by Landlord as set forth in **Section 26.01**, the Leased Premises are being leased by Tenant in its "as is, where is" condition with all faults. Tenant has conducted and reviewed such analyses, studies, reports, investigations, and inspections as it deemed necessary or appropriate in connection with the Leased Premises. Tenant shall not have the benefit of, and Tenant is not relying upon, any information provided by Landlord. Without limiting the foregoing, Landlord has not made and is not making any statements, representations or warranties about itself, the value of the Leased Premises, the feasibility, suitability, physical or environmental condition of the Leased Premises, title to the Leased Premises, zoning, building code or other matters affecting the development potential or use of the Leased Premises, the compliance or lack of compliance of the Leased Premises with any Federal, State or local law, ordinance, order, permit, rule or regulation, any other attribute of the Leased Premises or any other matter. All of the foregoing are expressly disclaimed. If Landlord has provided, or hereafter provides, any documents, opinions or work product of its own or of consultants, surveyors, architects, engineers, title companies, governmental authorities or any other persons or entities, Landlord has done so or hereafter does so only for the convenience of Tenant to help Tenant perform its own evaluations and not so that Tenant may legally rely upon them; Tenant shall not rely on them and the provision of such documents, opinions or work product shall not create or give rise to any liability of or against Landlord or its directors, officers, employees, consultants, surveyors, architects, engineers, title companies or any other persons or entities.

## ARTICLE 27

### APPROVALS AND CONSENTS

#### **Section 27.01 Reasonable Consent Unless Otherwise Stated**

Except for WMATA Unconditional Approval Matters or as may be otherwise stated in this Ground Lease, whenever this Ground Lease requires a party's consent, approval or determination, such consent, approval or determination: (i) will not be unreasonably withheld, conditioned or delayed unless the request relates to or materially impacts, in Landlord's sole and nonreviewable discretion, Landlord's operations, in which event Landlord may withhold or condition its consent, approval or determination in its sole, absolute and subjective discretion for any reason or no reason; (ii) will be effective only if in writing; and (iii) will apply only to the specific act or transaction so approved, consented to, or determined, and will not relieve a party of the obligation of obtaining prior written consent, approval or determination with respect to any future similar act or transaction. Whenever Tenant requests Landlord's consent, approval or determination (whether or not provided for herein), Tenant shall pay to Landlord, on demand, any expenses incurred by Landlord (including reasonable legal fees and costs, if any) in connection therewith without limitation. Any disapproval that requires objective reasonableness shall specify with particularity the reasons for disapproval.

#### **Section 27.02 Time Period for Review**

##### **A. Review Period**

Wherever in this Ground Lease approval of a party is required, and unless a different time limit is provided herein, such approval or disapproval shall be given in writing within twenty-one (21) days following Notice of the item to be so approved or disapproved together with appropriate supporting materials.

##### **B. Deemed Approval**

If a party fails to timely respond to any request for an approval or consent when approval or consent is not to be unreasonably withheld, conditioned or delayed, the requesting party may send the non-responding party a reminder Notice, which reminder Notice shall state in **bold type** and ALL CAPITALS **"THIS NOTICE AFFECTS MATERIAL RIGHTS OF THE REQUESTING PARTY WITH RESPECT TO THE \_\_\_\_\_ JOINT DEVELOPMENT PROJECT AND YOUR FAILURE TO TIMELY RESPOND COULD RESULT IN YOUR DEEMED APPROVAL"** and explaining the nature of the approval or consent sought. If the non-responding party fails to respond to the reminder request within fourteen (14) days after the reminder Notice is given and such approval or consent is not to be unreasonably withheld, conditioned or delayed, then the non-responding party's approval or consent shall be deemed to have been given or obtained and shall be deemed to authorize the requesting party to proceed with the matter for which approval or request was sought. However, (i) the foregoing does not apply when approval or consent is a WMATA Unconditional Approval Matter or may otherwise be withheld in WMATA's sole or absolute discretion, (ii) nothing in the foregoing shall apply to any modification of a previously approved conceptual, development, operational or site plan, or to a modification of this Ground Lease, the CC&Rs, or any other legal document or a request to enter into any legal document, and (iii) no such deemed consent or approval shall subject Landlord to any

obligation to perform on Tenant's behalf should Tenant not perform or cause Landlord to incur any other performance or financial obligation.

C. No Damages for Delay

Where provision is made in this Ground Lease for Landlord's consent, approval or determination, and Tenant shall request such consent, approval or determination, and Landlord shall fail or refuse to give such consent, approval or determination, Tenant shall not be entitled to any damages for withholding by Landlord of its consent, approval or determination, it being intended that Tenant's sole remedies shall be as set forth in **Section 27.02.B** and/or an action for specific performance or injunction, and that such remedy shall be available only in those cases where Landlord is not permitted to unreasonably withhold its consent, approval or determination pursuant to the terms of this Ground Lease.

**Section 27.03 Consent by Authorized Officer**

Whenever an approval or consent is required from WMATA under this Ground Lease, such approval or consent shall be deemed to have been validly given only if given by WMATA's General Manager/Chief Executive Officer or Vice President of Real Estate and Parking or their designee(s) (or their successors should titles or responsibilities within WMATA change hereafter), or if the approval or consent relates to matters covered by **Article 8**, by WMATA's Office of Insurance (or its successors), or deemed given under **Section 27.02.B**.

**ARTICLE 28**

**EXCULPATION**

**Section 28.01 Of Landlord**

Landlord's liability under this Ground Lease shall be limited to its interest and equity in, and income from, the portions of the Leased Premises other than the WMATA Reserved Areas, and no personal liability of Landlord shall be inferred from any provision of this Ground Lease. The foregoing provisions of this Section shall not prevent Tenant from offsetting any sums due from Landlord under this Ground Lease against any sums due to Landlord by Tenant if and to the extent such offset is expressly permitted by this Ground Lease.

**Section 28.02 No Personal Liability**

Except as may be set forth in any guaranty, indemnification agreement or other agreement stating otherwise and signed by the person or entity to be bound thereby, no director, officer, manager, member, partner, shareholder, trustee, trust beneficiary, or employee of a party shall have personal liability under this Ground Lease for any liability or obligation under this Ground Lease or for the performance of any other covenants or agreements under this Ground Lease.

## **ARTICLE 29**

### **CONFIDENTIALITY**

#### **Section 29.01 Confidentiality of Certain Terms**

The financial terms of this Ground Lease, all financial statements provided by Tenant to Landlord pursuant to this Ground Lease, and any environmental information provided pursuant to **Section 7.02** shall be confidential and shall not be disclosed by Landlord or Tenant except to any of their principals, officers, employees, agents and independent contractors or:

1. pursuant to a subpoena or court order; each party shall provide prompt Notice to the other party of any subpoena or court order seeking such disclosure so as to provide the other party with time to seek a protective order or other equitable relief.
2. in the course of any litigation, insolvency or bankruptcy proceedings of any type, mediation, arbitration or other dispute resolution proceeding involving Landlord and Tenant concerning this Ground Lease, the Joint Development Agreement or another matter as to which such information or materials are germane.
3. as otherwise required by law or by any applicable governmental authority.
4. as required to consummate any transaction or event contemplated by this Ground Lease, including, without limitation, any inspection or audit by or on behalf of Landlord, any Capital Event, any Assignment, and obtaining the Entitlements.
5. as required by lenders or prospective lenders to Landlord or Tenant or investors or prospective investors in Landlord or Tenant who agree to keep the information or material confidential in accordance with the terms of this Section.
6. as necessary or appropriate to enable accountants, counsel and other advisors or consultants to Landlord, WMATA or Tenant to provide services to them in connection with this Ground Lease if such persons agree to keep the information or material confidential in accordance with the terms of this Section.
7. as WMATA may be required to disclose the same in accordance with its Public Access to Records Policy, as the same may be amended, supplemented, replaced or otherwise modified from time to time.
8. for such information as becomes publicly available without the breach of this Section.

#### **Section 29.02 Non-Confidentiality of Other Terms**

Any terms of this Ground Lease not referenced as confidential in **Section 29.01** are not confidential.



### **Section 29.03 Internal Evaluations**

Nothing in this Article shall be deemed to limit the access to, analysis of, and use of the financial terms of this Ground Lease, all financial statements provided by Tenant to Landlord pursuant to this Ground Lease, and any environmental information provided pursuant to **Section 7.02** by any directors, officers or employees of Landlord or by any auditors, attorneys or other consultants engaged by Landlord to review the same for Landlord's internal purposes.

## **ARTICLE 30**

### **WMATA-SPECIFIC CLAUSES**

#### **30.01 No Waiver of Sovereign Immunity**

Nothing in this Ground Lease shall be deemed or construed to constitute a waiver of WMATA's sovereign immunity.

#### **Section 30.02 Anti-Deficiency Clause**

All obligations of WMATA under this Ground Lease that directly or indirectly require the expenditure by WMATA of any of its funds are subject to the appropriation and availability of funding through WMATA's budgetary procedures. Notwithstanding the foregoing, if Tenant shall have obtained a final, non-appealable judgment against WMATA that Tenant is entitled to unpaid reimbursement or other payment from WMATA pursuant to this Ground Lease and funds for such reimbursement or other payment have not been appropriated and made available through WMATA's budgetary procedures, then Tenant shall have the right to deduct the amount for which Tenant has a judgment against WMATA from any payment thereafter due by Tenant to WMATA. Except as set forth in the preceding sentence, Tenant has no right of offset or deduction against WMATA.

#### **Section 30.03 Officials Not to Benefit**

##### **A. WMATA Personnel**

No officer, board member, or employee or agent of WMATA or any member of any such person's family (which term "immediate family" shall, for purposes of this Section, mean the parent, spouse, sibling, child, grandparent, or grandchild of any of the foregoing persons), directly or through a third party, has or will have during his tenure with WMATA or within one (1) year thereafter any financial or other interest in, or in common with, Tenant or any of its Affiliates. Tenant will comply, and will contractually obligate each of its third-party contractors at any tier to comply, with the provisions of Executive Orders 12549 and 12689, "Debarment and Suspension," 31 USC §6101 note, and U.S. Department of Transportation regulations on Debarment and Suspension at 49 CFR Part 29, as they may be amended, supplemented, replaced or otherwise modified from time to time. Tenant shall include the requirements of the preceding sentence in each Sublease, license, or contract for work on the Leased Premises, and shall require each sublessee, licensee, or contractor for work on the Leased Premises to require compliance with those requirements and include them in any lower tier subcontract.

B. Public Officials

No member (i.e., Representative or Senator) of or delegate to Congress, or any similar official, or the President or Vice President of the United States, or any member of such person's family (as defined above), shall be admitted to any share or part of this Ground Lease, or to any benefit that may arise therefrom, but this provision shall not apply if this Ground Lease is made with a corporation or other entity with which such official or family member has only a *de minimis* contractual or ownership interest. Tenant warrants, represents, and agrees that as of the Effective Date no person described in this subsection, nor any Affiliate of such person, had any such interest in Tenant. Tenant must forthwith deliver written Notice to WMATA of any breach of the foregoing warranty, representation, and agreement, and must make reasonable inquiries from time to time to determine whether any such breach has occurred.

**Section 30.04 Gratuities**

In connection with this Ground Lease, or any amendments or modifications of this Ground Lease, the giving of, or offering to give, gratuities (in the form of entertainment, gifts or otherwise) by Tenant or any consultant, agent, representative, or other person deemed to be acting on behalf of Tenant or any consultant, agent, contractor, subcontractor or supplier furnishing material to or performing work under this Ground Lease, or any agent, representative, or other person deemed to be acting on behalf of such supplier or subcontractor, to any director, officer or employee of WMATA, or to any director, officer, employee or agent of any of WMATA's agents, consultants or representatives, with a view toward securing an agreement or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to performance under, this Ground Lease or any agreement that will be negotiated, is expressly forbidden. The terms of this Section will be broadly construed and strictly enforced. Any violation of this provision will constitute an Event of Default and will not be subject to cure.

**Section 30.05 Use of WMATA Compact**

Tenant understands and agrees that it may not assert for its own benefit, or attempt to assert, any exemption from liability under applicable laws, including the payment of Impositions or sales taxes or any immunity from claims, available to WMATA under the WMATA Compact.

**Section 30.06 FTA Requirements and Approval**

A. Transit-Oriented Development

Tenant covenants that the Tenant Improvements shall constitute Transit-Oriented Development. This requirement shall remain in effect throughout the Term. Landlord acknowledges that the initial Tenant Improvements, if constructed and operated in accordance with the Tenant Improvements Plans and Specifications, constitute Tenant-Oriented Development for purposes of this Section.

B. Satisfactory Continuing Control

Tenant acknowledges that WMATA is the recipient of Federal grant moneys through the FTA and that those grant moneys funded, in whole or in part, WMATA's acquisition of the Leased Premises. Tenant

further acknowledges that, pursuant to FTA grant requirements, WMATA must demonstrate and retain “satisfactory continuing control,” as defined by the FTA from time to time, over the Leased Premises. Tenant agrees that this Ground Lease will be subject to any such requirement now or hereafter applicable and, in furtherance but not in limitation of the foregoing, Tenant will not exercise any right given to it under this Ground Lease in a manner that compromises or diminishes WMATA’s ability to retain “satisfactory continuing control” over the Leased Premises. For purpose of information, under current FTA regulations “satisfactory continuing control” is defined as the legal assurance that FTA-funded property will remain available for use for its originally intended purpose throughout its useful life until disposition; for this Overall Site, the originally intended purpose is as a Metrorail station and related transit functions.

C. The Federal Interest

Tenant acknowledges the Federal interest in the Leased Premises and agrees that it will take no action which compromises or otherwise diminishes such interest.

D. Other Federal Laws

Tenant acknowledges that WMATA must comply with various Federal statutes, regulations, orders, certifications, assurances and other laws, including those set forth in the FTA Master Agreement (available on the FTA’s website) governing transit projects supported by Federal assistance awarded through the FTA. Tenant agrees that it will take no action that could cause WMATA to be out of compliance with such obligation, and that Tenant will take no action permitted by State or local law to the extent such laws conflict with Federal law.

E. FTA Approval or Concurrence

Tenant acknowledges that this Ground Lease may be subject to FTA’s approval or concurrence. If so, it shall be WMATA’s obligation to obtain such approval or concurrence, and Tenant shall reasonably cooperate therein. Such approval or concurrence shall be *prima facie* evidence that the FTA has agreed that WMATA is retaining “satisfactory continuing control” under the FTA’s current standards for purposes of Section 30.06.B above. Tenant also acknowledges that FTA’s approval or concurrence may require Tenant’s compliance with certain laws, regulations and other requirements of the FTA imposed upon WMATA. If such approval or concurrence is denied, this Ground Lease shall automatically terminate and be of no further force and effect upon receipt of notice of denial. If such approval or concurrence is neither obtained nor denied within six (6) months after the Effective Date, either party may, by Notice to the other, at any time thereafter (unless and until the FTA’s approval or concurrence is obtained) terminate this Ground Lease by Notice to the other party. If this Ground Lease is terminated under this subsection, the parties shall be released from any and all obligations and liabilities that might thereafter arise under this Ground Lease except those that relate to actions to be taken by the parties upon the expiration of termination of the Term and/or this Ground Lease and those that by their terms survive the expiration or termination of this Ground Lease.

**Section 30.07 Noise, Light, Vibrations, Stray Electrical Current**

No claims shall be made by Tenant or any Subtenant against WMATA arising from noise, light, vibration or stray electrical current caused from WMATA’s operations. Tenant shall include a provision to

this effect in its form Subleases and shall use Commercially Reasonable Business Efforts to ensure that such a provision is included in each executed Sublease; Tenant shall Notify WMATA of any executed Sublease that does not include such a provision. Tenant shall defend, indemnify and hold WMATA harmless from and against noise-related, light-related, vibration-related and stray current-related complaints, claims, demands, suits, actions and proceedings made or brought by owners, Subtenants or users of the Leased Premises and/or the Tenant Improvements and any damages, liabilities, costs and expenses arising therefrom. The provisions of this Section will be in addition to any and all obligations and liabilities Tenant may have to WMATA at common law and will survive the expiration or termination of this Ground Lease.

#### **Section 30.08 Davis-Bacon Act**

Tenant agrees that all WMATA Replacement Facilities that Tenant or its Affiliates constructs must be and shall be built in compliance with the Davis-Bacon Act, 40 USC §276a, *et seq.* The foregoing requirement does not apply to the Tenant Improvements.

### **ARTICLE 31**

#### **MISCELLANEOUS**

#### **Section 31.01 Invalid or Unenforceable Term**

If any provision of this Ground Lease or the application thereof to any person or situation is held to be illegal, invalid or unenforceable under present or future laws, such provision or application will be fully severable. This Ground Lease will be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this Ground Lease and the remaining provisions of this Ground Lease will remain in full force and effect and may not be affected by the illegal, invalid or unenforceable provision or by its severance from this Ground Lease.

#### **Section 31.02 Governing Law and Venue**

The laws of the jurisdiction in which the Leased Premises are located govern the validity, interpretation, construction, and performance of this Ground Lease, except that the parties acknowledge that WMATA is bound by the WMATA Compact and that to the extent of any conflict between the laws of such jurisdiction and the WMATA Compact, the WMATA Compact shall govern WMATA. As long as WMATA is the Landlord or otherwise a party to any lawsuit, action or other judicial proceeding relating to or arising under this Ground Lease, jurisdiction for the resolution of any disputes arising out of this Ground Lease shall lie solely in the United States District Court in the jurisdiction in which the Leased Premises are located except that no provision of this Ground Lease shall constitute a waiver of WMATA's immunity under the WMATA Compact or a consent to the jurisdiction of any tribunal except as provided in Section 81 of the WMATA Compact.

#### **Section 31.03 Successors and Assigns**

Whether or not specific reference is made to successors and assigns in each term or provision of this

Ground Lease, all of the terms and provisions of this Ground Lease shall be binding upon and inure to the benefit of the permitted successors and assigns of the parties hereto.

#### **Section 31.04   Runs with the Land**

This Ground Lease and the rights of Landlord and Tenant set forth herein are made for the benefit of and shall burden the parties and their respective permitted successors and assigns and shall operate as covenants running with the Leased Premises.

#### **Section 31.05   Amendments**

Except following an Event of Default or a Taking, or as set forth in **Section 20.01.B** following a casualty event, when termination may occur in accordance with the other provisions of this Ground Lease, including compliance with the rights of any Leasehold Mortgagee, this Ground Lease may be amended, changed, modified or canceled only by a written agreement signed by each party and with, to the extent required by **Section 17.02.B.2**, the consent of the Senior Leasehold Mortgagee.

#### **Section 31.06   Multiple Counterparts**

This Ground Lease may be executed in a number of identical counterparts. If so executed, each of such counterparts is deemed an original for all purposes and all such counterparts will, collectively, constitute one document. In making proof of this Ground Lease, it is not necessary to produce or account for more than one such counterpart.

#### **Section 31.07   Third Party Beneficiaries**

Should WMATA and Landlord ever be separate entities, (i) all provisions of this Ground Lease using the defined term “WMATA” shall continue in full force and effect for the benefit of WMATA and not for Landlord, and for that purpose WMATA shall be an intended third-party beneficiary of this Ground Lease even if it is ever not Landlord and, (ii) conversely, all provisions of this Ground Lease using the defined term “Landlord” shall continue in full force and effect for the benefit of the then-Landlord and not for WMATA. Except as stated in the preceding sentence or as may expressly be stated elsewhere in this Ground Lease, and then only in the situations so stated, this Ground Lease is not intended to give or confer any benefits, rights, privileges, claims or remedies to any person or entity as a third-party beneficiary.

#### **Section 31.08   No Recordation**

The parties shall not record this Ground Lease among the land records of any jurisdiction unless such recordation may be required by law. Upon request by a party, the parties shall record a memorandum of this Ground Lease in the land records of the jurisdiction in which the Leased Premises are located. Such memorandum shall set forth only the matters stated in the sample memorandum attached as **Exhibit 31.08** and any such other details as may be necessary under the laws of the jurisdiction in which the Leased Premises are located to give effective notice of the existence of Tenant’s leasehold interest in the Leased Premises and title to the Tenant Improvements. Upon the expiration or termination of this Ground Lease, Tenant shall execute and deliver a recordable document that evidences the expiration or termination of this

Ground Lease and of any recorded document that provides notice of this Ground Lease. If Tenant fails to do so upon request, Tenant hereby appoints Landlord as Tenant's attorney-in-fact, which appointment is coupled with an interest, to execute and record the same in the name of and on behalf of Tenant. [Tenant shall pay the cost of recording any such memorandum, termination or release, including all recordation and transfer taxes, other documentary or stamp taxes or charges, all recording fees, and all other costs and expenses of any type in connection with such recordation; Landlord shall have no responsibility for the same.] OR [Tenant shall pay any recordation taxes or similar stamp taxes or charges levied on grantees, lessees or transferees, and the cost of recording any such memorandum, termination or release. Landlord shall pay any grantor's or transfer taxes or similar stamp taxes or charges levied on grantor's, lessors or transferors; provided, however, that WMATA is a tax-exempt governmental authority and nothing in the foregoing shall waive its right to claim an exemption from any such taxes or charges that would otherwise be levied on it as Landlord.]

### **Section 31.09 Appendices, Exhibits and Schedules**

All appendices, exhibits and schedules expressly referred to in this Ground Lease will be deemed to be attached to this Ground Lease, and all appendices, exhibits and schedules deemed attached are incorporated by reference into this Ground Lease as if fully set forth in this Ground Lease. Each appendix, exhibit or schedule attached or deemed attached to this Ground Lease will be of significance equal to that of any text in the body of this Ground Lease.

### **Section 31.10 Headings and Captions**

The titles, headings, subheadings, captions, and arrangements used in this Ground Lease are for convenience and reference only, and do not in any way define, affect, limit, amplify, modify or describe the terms and provisions of this Ground Lease.

### **Section 31.11 Number and Gender of Words**

Whenever in this Ground Lease the singular number is used, the same will include the plural where appropriate, and *vice versa*, and words of any gender will include each other gender where appropriate.

### **Section 31.12 Interpretation and Construction**

#### **A. Both Parties Represented**

No provision of this Ground Lease will be construed in favor of, or against, any particular party by reason of any presumption with respect to the drafting of this Ground Lease. Both parties are represented by counsel and have fully participated in the negotiation and wording of this Ground Lease.

#### **B. Meaning of Short Forms**

To the extent the context requires or permits, (i) any reference to the word "including" or "includes" means "including, without limitation;" (ii) any reference to the word "includes" means "includes, but is not limited to;" (iii) any reference to "may" means "may, but is not obligated to" or "may, at its option;" (iv) any

reference to the phrase "may not" means "is prevented or prohibited from" or "is not required to;" and (v) reference to the phrase "at any time" also means "from time to time."

C. Drafts

The submission of drafts, comments to drafts, and changes from drafts to this final Ground Lease shall not bind either party nor shall they be considered in determining the meaning of this Ground Lease.

**Section 31.13 Time of the Essence**

Time is of the essence with respect to the observance and performance of all obligations under this Ground Lease.

**Section 31.14 Cumulative Remedies and Waiver**

Except as may otherwise be expressly provided, no remedy in this Ground Lease conferred or reserved is intended to be exclusive of any other available remedy or remedies, but each and every such remedy will be cumulative and will be in addition to every other remedy given under this Ground Lease or now or hereafter existing at law or in equity. No delay or omission to exercise any right or power accruing upon any default, omission or failure of performance hereunder will impair any right or power or be construed as a waiver thereof, but any such right and power may be exercised from time to time and as often as deemed expedient. No waiver, release or relinquishment of any rights or obligations under this Ground Lease may be established by conduct, custom or course of dealing. In order to be enforceable, any waiver, release or relinquishment must be in writing and signed by the party to be charged therewith.

**Section 31.15 Time Periods**

Except as may be expressly set forth in this Ground Lease, should the last day of a time period or any due date fall on day that is not a Business Day, then the next Business Day thereafter shall be considered the end of the time period or due date.

**Section 31.16 Relationship of Parties**

This Ground Lease does not create the relationship of principal and agent, or mortgagee and mortgagor, or of partnership or joint venture, or of any association or agency between Landlord and Tenant. The only relationship created is that of landlord and tenant.

**Section 31.17 Costs and Expenses**

Except to the extent of any obligation for which this Ground Lease specifies otherwise, each party shall be deemed to be required to perform its obligations under this Ground Lease at its own cost and expense, and each party may only exercise its rights and privileges under this Ground Lease at its sole cost, risk and expense.

### **Section 31.18 Disclaimers**

Except as may be expressly provided elsewhere in this Ground Lease, Landlord does not have any obligation to make any change, demolition or improvement of or to the Leased Premises, including any necessary or appropriate to bring the Leased Premises into compliance with applicable laws.

### **Section 31.19 Incorporation of Recitals by Reference**

The recitals first set forth above are hereby incorporated herein and made a part hereof as if fully set forth in this Ground Lease.

### **Section 31.20 Waiver of Jury Trial**

LANDLORD AND TENANT EACH WAIVES ANY RIGHT IT MAY HAVE TO TRIAL BY JURY IN ANY ACTION, PROCEEDING, COUNTERCLAIM OR OTHER PROCEEDING BROUGHT BY EITHER OF THEM AGAINST THE OTHER OF THEM IN ANY MATTER RELATING TO, ARISING FROM OR IN CONNECTION WITH THIS GROUND LEASE, THE RELATIONSHIP OF LANDLORD AND TENANT, OR TENANT'S USE AND OCCUPANCY OF THE LEASED PREMISES. THE PRECEDING WAIVER INCLUDES ANY CLAIM OF INJURY OR DAMAGE AND ANY PROCEEDING SEEKING INJUNCTIVE OR ANY OTHER EQUITABLE RELIEF.

### **Section 31.21 Priority Over Joint Development Agreement; Subordination to CC&Rs**

#### **A. Joint Development Agreement**

In the event of any conflict or inconsistency between the Joint Development Agreement and this Ground Lease, the terms of this Ground Lease shall govern as between Landlord and Tenant and the terms of the Joint Development Agreement shall govern as between Landlord and Developer. The preceding sentence does not supersede **Section 31.23** or incorporate the Joint Development Agreement into this Ground Lease and no such incorporation shall exist by implication; the preceding sentence is inserted only as a point of clarification should there be any differences between this Ground Lease and the Joint Development Agreement in addressing the same or similar issues.

#### **B. CC&Rs**

This Ground Lease is subject to and subordinate to the CC&Rs. In the event of any conflict or inconsistency between the CC&Rs and this Ground Lease, the terms of the CC&Rs shall govern.

### **Section 31.22 No Brokers**

Each party represents and warrants to the other party that it has not engaged or otherwise used any broker, finder or other person or entity who is entitled to or who may claim a commission, fee or other compensation in connection with this Ground Lease or the transaction from which it arose except that \_\_\_\_\_ hereby discloses that it has engaged or used \_\_\_\_\_ as a broker, finder or other person or entity who is entitled to or may claim a commission, fee or other compensation and the party making the foregoing disclosure shall be solely responsible for the payment of any such commission,



fee or other compensation.

### **Section 31.23 Entire Agreement**

This Ground Lease, any appendices, schedules, and exhibits expressly referred to in any Section of this Ground Lease, the CC&Rs and any other agreements expressly referred to in this Ground Lease as having been executed or approved by the parties contain the entire agreement between or among the parties with respect to the Leased Premises, and, except as may be expressly stated in this Ground Lease, supersede all prior agreements and understandings between or among the parties, if any, relating to the Leased Premises (including the Joint Development Agreement).

## **ARTICLE 32**

### **DEFINITIONS**

The following terms when used in this Ground Lease shall be defined as follows:

**ADA** – Defined in **Section 6.01.A**.

**Additional Rent** - Any amounts that this Ground Lease requires Tenant to pay other than Base Rent.

**Affiliate** – With respect to any person or entity, any other person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with such other person or entity.

**Aggregate Current Value** – Defined in **Section 4.02.B**.

**Aggregate Development Value** – Defined in **Section 4.02.B**.

**Alterations** – Defined in **Section 13.01.A**.

**Appraisal Method** –The appraisal will be conducted prior to the execution of this Ground Lease in accordance with the procedure set forth in the Joint Development Agreement (or equivalent) pursuant to which this Ground Lease is executed.

**As-Built Drawings** – A complete set of drawings and specifications showing the improvements constructed, redlined/clouded to show all field changes and all as shop drawings as finally implemented. The As-Built Drawings shall be prepared in accordance with WMATA's Adjacent Construction Project Manual in effect at the time and shall be certified by Tenant and/or its architect or professional engineer in charge of the improvements that the As-Built Drawings depict accurately the improvements as constructed, that the improvements are in accordance with the applicable professional standard of care, and that the improvements comply with the terms of this Ground Lease.

**Assignment** – Any assignment, sale, conveyance, exchange, pledge, hypothecation, mortgage or other transfer of this Ground Lease, the Leased Premises or the Tenant Improvements, and/or any change in the Composition of Tenant, but not including Subleases.

**Base Rent** – Defined in **Section 4.02**.

**Broker** – Defined in **Section 4.03.B**.

**Business Day** - A workday from Monday through Friday that is not a Federal, State of Maryland, Commonwealth of Virginia or District of Columbia holiday observed by Landlord. If WMATA is the Landlord, “observed” shall mean for this purpose that WMATA’s chief administrative office is generally closed for business that day even if WMATA is operating transit service that day. All references to “days” that do not use the defined term “Business Day” mean a calendar day.

**Capital Event** - Any transaction involving an Assignment except as specified in **Section 17.01.A.3**.

**Capital Rent** - An amount paid by Tenant to Landlord upon a Capital Event.

**CC&Rs** – Covenants, conditions, restrictions, easements and other agreements applicable to the Leased Premises, as they may be amended, supplemented or otherwise modified from time to time. The CC&Rs include the Declaration of Covenants, Conditions, Easements and Operating Agreement dated as of \_\_\_\_\_, 20\_\_ by WMATA and recorded on \_\_\_\_\_, 201\_\_ in the land records of [County, State] in Book \_\_\_\_\_, Page \_\_\_\_\_.

**Commercially Reasonable Business Efforts** - The timely and diligent undertaking of all steps usually, customarily and fiscally prudent under the circumstances that an experienced real estate developer or mortgagee, as applicable, takes to lawfully achieve the objective to which the particular effort pertains.

**Comparable Market** – Defined in **Section 4.03.B**.

**Composition of Tenant** - The individual and/or entities that have an ownership interest in Tenant, with disclosure of the specific percentages of ownership of each individual and/or entity. In the case of entities with an ownership in Tenant, also included are the individuals and/or entities with an ownership interest in such entities, either directly or through intermediate entities at any tier or level, and the respective percentages of ownership in such entities, intermediate or otherwise. A merger, consolidation or division of Tenant or an entity owning an interest in Tenant shall be deemed a change in the Composition of Tenant.

**Consumer Price Index** – The United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index for All Urban Consumers (also known as the CPI-U), All Items, for the DC-MD-VA-WVA area, 1982-1984 = 100. If the manner in which said Consumer Price Index is maintained shall be substantially revised, including a change in the base index year, an adjustment shall be made by the parties to the revised index so as to obtain results equivalent, as nearly as possible, to those which would have been obtained had such Consumer Price Index not been revised. If the Consumer Price Index shall become unavailable to the public for any reason, including its discontinuation, then Landlord shall substitute a comparable index based upon changes in the cost of living or purchasing power in the Washington, D.C.

metropolitan area as published by another government agency or, if no such alternative index is available, then as published by major bank or other financial institution, university, recognized financial publication or other reputable source. The Consumer Price Index last published prior to the Effective Date was published in \_\_\_\_\_, 20\_\_ and had a value of \_\_\_\_\_.

**Current Value** – Defined in **Section 4.02.B**.

**Default Rate** -- The prime rate of interest for money center banks as published in *The Wall Street Journal* on the date on which any particular obligation to pay interest under this Ground Lease is incurred plus four percent (4%) per annum, but in no event higher than any applicable interest rate allowed in the jurisdiction in which the Leased Premises are located. In the event *The Wall Street Journal* is no longer published or is published but no longer publishes prime rates, Landlord shall choose a comparable source of determining the Default Rate.

**Developer** – Defined in the Recitals.

**Development Value** – Defined in **Section 4.02.B**.

**Discount Rate** – The interest rate applicable on the day the Event of Default or other circumstance triggering the application of the discount calculation to United States Treasury Bonds having a maturity date closest to the scheduled expiration date of the then-current Term. Should the use or sale of United States Treasury Bonds ever be discontinued or should there be no United States Treasury Bond with an appropriate maturity date, Landlord may substitute another discount interest rate index having a comparable effect.

**Effective Date** – Defined in the preamble.

**Entitlements** – Defined in **Section 10.03.A**.

**Event of Default** – Defined in **Section 23.01**.

**Environmental Laws** – Defined in **Section 7.01**.

**Final Completion/Finally Complete** -- “Final Completion” (or Finally Complete) means:

(a) with respect to any Tenant Improvements, the clearing of the appropriate area of all equipment, materials, tools and rubbish, and Tenant’s receipt and delivery to Landlord of:

- (i) a certificate of occupancy by the governmental authority that issues the same in the jurisdiction in which the Leased Premises are located; (ii) a certificate of substantial completion on the then-current form promulgated by the American Institute of Architects (or such other professional organization that may succeed to its role of promulgating industry-standard forms of this type) from the project architect for such Tenant Improvements, not including any Subtenant build-out or any Subtenant Improvements; (iii) a certification from the project architect that all punch list items remaining after substantial completion have been completed; and (iv) As-Built Drawings for such Tenant Improvements.

(b) with respect to any WMATA Replacement Facilities, the final completion

and operational readiness thereof, including: : (i) all State, county and municipal inspections have been successfully completed; (ii) the delivery to WMATA of a certificate of occupancy, elevator permits and all other applicable permits and approvals by the governmental authority that issues the same in the jurisdiction in which the Leased Premises are located; (iii) the delivery to WMATA of a certificate of substantial completion on the then-current form promulgated by the American Institute of Architects (or such other professional organization that may succeed to its role of promulgating industry-standard forms of this type) from the project architect or engineer for such WMATA Replacement Facilities; (iv) the delivery to WMATA of a certification from the project architect or engineer that all punch list items remaining after substantial completion have been completed; (v) the delivery to WMATA of two (2) hard copy sets and one (1) electronic copy in PDF format and AutoCAD format (or such formats as may hereafter replace the same) of the As-Built Drawings; (vi) the delivery to WMATA of an assignment to WMATA of all non-WMATA-generated design documents, specification and shop drawings; (vii) the delivery to WMATA of a survey complying with the then-current standards of the American Land Title Association and the National Society of Professional Surveyors (or such professional organizations as may replace them from time to time to set standards for land surveys); (viii) the delivery to WMATA of a safety and security certification as required by **Article 12**; (ix) the delivery to WMATA of all operating and maintenance manuals for systems and equipment to the extent the manufacturer, supplier or dealer therein issues the same, all keys, all spare parts, all warranties (and, to the extent necessary or appropriate, an assignment to WMATA of the same); (x) the delivery to WMATA of a consent of any surety to the final release of retainage; (xi) the delivery to WMATA of an unconditional waiver of liens by Tenant's general contractor; (xii) operating and maintenance training for the WMATA Replacement Facilities has been provided to and completed by WMATA personnel in accordance with then-applicable WMATA standards; (xiii) the clearing of the appropriate area of all equipment, materials, tools and rubbish; (xiv) the delivery to WMATA of a waiver by Tenant, in form and substance reasonably acceptable to WMATA, of all claims against WMATA other than those of which Notice was previously given to WMATA and that remain unsettled; and (xv) the issuance by WMATA of a certificate of final completion by WMATA, the issuance of which is a WMATA Unconditional Approval Matter.

**FTA** - The Federal Transit Administration of the United States Department of Transportation and any successor agency or authority.

**Gross Income** – Defined in **Section 4.03.B**.

**Ground Lease** – This Ground Lease and any new lease entered into pursuant to **Article 17.02.C**, as this Ground Lease or any replacement new lease may be amended, supplemented or otherwise modified from time to time.

**Hazardous Materials** -- Any and all materials, substances and wastes that are or become regulated by any governmental authority or pose a material threat to human health, safety or the environment, including (a) any materials, substances or wastes defined as a "hazardous waste", "hazardous material", "hazardous substance", "extremely hazardous waste," "restricted hazardous waste," "toxic substance" or "toxic waste" under any applicable laws, (b) petroleum products and by-products, (c) asbestos in any form or condition, (d) polychlorinated biphenyls or substances containing polychlorinated biphenyls , or (e) radioactive materials.

**Impositions** -- All real estate taxes, assessments, business improvement district levies, fees and charges, personal property taxes, adequate public facilities levies, fees and charges and other comparable levies, fees and charges for infrastructure, sewer rents, water meter and water charges, vault and public space charges, excise taxes, levies, license and permit fees, charges for electricity and other utilities and all other assessments, charges or taxes of whatsoever kind and nature, general or special, ordinary or extraordinary, foreseen or unforeseen, levied or assessed with respect to the Leased Premises and/or the Tenant Improvements.

**Institutional Lender** -- Any of the following persons or entities with assets in its own name and/or under management or advisement equal to at least Five Hundred Million Dollars (\$500,000,000), increased as of each anniversary date of the Effective Date by the percentage rate of increase in the Consumer Price Index last published before such anniversary date, that is not an Affiliate of Tenant, Developer or a guarantor or surety of any of their obligations: (i) any Federally-chartered or State-chartered bank, savings institution, trust company or national banking association, or any wholly-owned subsidiary thereof, acting for its own account or in a fiduciary capacity; (ii) any charitable foundation as declared by the United States Internal Revenue Service or any successor agency; (iii) any insurance company that is regulated by or supervised by an agency of the Federal or any State government; (iv) any pension, retirement or profit-sharing trust or fund for which any bank, trust company, national banking association or investment advisor registered under the Investment Advisers Act of 1940, as amended from time to time, is acting as trustee or agent; (v) any investment company, as defined in the Investment Company Act of 1940, as amended from time to time; (vi) any not-for-profit four-year college or university located in the United States or Canada; (vii) any government or public employees' pension or retirement system; (viii) any Federal or State government agency supervising the investment of public funds; (ix) any investment fund operated by any labor union organized in the United States; (x) any real estate investment trust that is regulated by the United States Securities and Exchange Commission; (xi) any mortgage company or holder of any commercial mortgage-backed securities if such mortgage company or holder of commercial mortgage-backed securities is regularly engaged in the making or administration of commercial mortgage or Mezzanine Loans on real estate assets comparable in use and size to the Leased Premises and the Tenant Improvements; and (xii) any combination of the foregoing Institutional Lenders or of persons or entities controlled by any, or any combination of, the foregoing Institutional Lenders.

**Joint Development Agreement** – Defined in the Recitals.

**Landlord** – On the Effective Date, WMATA, and should WMATA thereafter sell or assign the Leased Premises, “Landlord” shall mean any successor landlord to WMATA pursuant to the terms of this Ground Lease. (See **Section 31.07** for the distinction between “WMATA” and “Landlord.”)

**Leased Premises** – Defined in **Exhibits 2.01-1** and **2.01-2**.

**Leasehold Mortgage** - A mortgage, deed of trust or similar security agreement securing or benefitting an Institutional Lender and encumbering any interest of Tenant in or arising from this Ground Lease, the Leased Premises and/or the Tenant Improvements. The term “Leasehold Mortgage” shall also include any instruments required in connection with a sale-leaseback transaction, shall include a trust indenture under which this Ground Lease shall have been mortgaged, and shall include mortgages of less than all of the leasehold. A Leasehold Mortgage shall be subject and subordinate to this Ground Lease **and**

the CC&Rs. A Leasehold Mortgage may not cross-collateralize or cross-default Tenant's interest under this Ground Lease, the Leased Premises and/or the Tenant Improvements with any other property interest, leasehold or fee estate held by Tenant; provided, however, the inclusion of a Leasehold Mortgage in a securitized pool of mortgages or similarly structured transaction shall not be deemed to violate the foregoing prohibition. Any purported Leasehold Mortgage that causes the principal amount secured by all Leasehold Mortgages to exceed the total of the required equity pursuant to **Section 17.04** and the then-estimated cost to Finally Complete the Project (for any Leasehold Mortgage granted before Final Completion) or the then-fair market value of the Tenant Improvements (for any other Leasehold Mortgage), as such fair market value is determined by the appraisal used to underwrite that particular Leasehold Mortgage, shall be null and void. To protect Landlord against unfounded claims of Leasehold Mortgagee status, to be effective as a Leasehold Mortgage for purposes of this Ground Lease Tenant must give Landlord prompt Notice of the Leasehold Mortgage and furnish Landlord with a date-stamped true copy of the Leasehold Mortgage bearing the recording reference from the land records office of the jurisdiction in which the Leasehold Mortgage is recorded, together with the name and address of the Leasehold Mortgagee. The Leasehold Mortgage shall lose its status as such at such time as all obligations under it have been discharged in full, even if the Leasehold Mortgage has not been released of record.

**Leasehold Mortgagee** - The Institutional Lender who is the mortgagee, beneficiary or party secured under any Leasehold Mortgage and the successors or assigns of such mortgagee or other party.

**Leasehold Mortgage Assignment** – An Assignment to a Leasehold Mortgagee or its designee or other third party upon foreclosure, a deed-in-lieu of foreclosure, or other means of succeeding to Tenant's right, title and interest in this Ground Lease pursuant to the exercise of remedies under a Leasehold Mortgage upon the occurrence of a default thereunder, and/or, if such Assignment is to a Leasehold Mortgagee, then also including the next-following Assignment by that Leasehold Mortgagee to a third party.

**Letter of Credit** – Defined in **Section 3.01.B**.

**Local Jurisdictional Plans** – Defined in **Section 10.02**.

**Metro Station** – The rail transit station in [City, County, State] currently named the \_\_\_\_\_ Metrorail Station and all facilities ancillary thereto. The Metro Station is one of the WMATA Facilities.

**Mezzanine Lender** – Defined in **Section 17.02.F**.

**Mezzanine Loan** – Defined in **Section 17.02.F**.

**Net Development Value** – Defined in **Section 4.02.B**.

**Net Proceeds** – Upon the occurrence of a Capital Event, the Net Proceeds are the full (gross) transaction revenues to Tenant and any Affiliate receiving transaction revenues from such Capital Event, including the face amount of any promissory note or other payment obligation and the fair market value of any non-monetary property received by Tenant and any such Affiliate, (a) less any reasonable and customary transactional costs incurred by Tenant or its Affiliate, as applicable, in connection with that Capital Event and documented on a settlement statement for that Capital Event, including real estate taxes,

special assessments and other similar governmental charges customarily payable at such a Capital Event, transfer and recording taxes or similar documentary stamp taxes, charges for recording documents in the land records, title and survey costs, reasonable legal fees payable to outside counsel for both the borrower and the lender, and financing commissions and fees, but not including any costs attributable to tax credit proceeds, and (b) less repayment of Tenant's unamortized principal Project debt secured by a Leasehold Mortgage to the extent such repayment is actually made. Landlord has the right to audit all revenues, expenses, and other payments associated with such Capital Event.

**Notice** – As defined in **Section 24.01**. "Notify" and other words similar to "Notice" shall have similar meanings.

**Partial Taking** – Defined in **Section 21.02**.

**Participating Rent** -- Defined in **Section 4.03**.

**Project** -- The improvements to be constructed by Tenant, including any WMATA Replacement Facilities to be built by Tenant and the Tenant Improvements.

**Project Schedule** – Defined in **Section 11.04.C**.

**Overall Site** – Defined in the Recitals.

**Recognition Agreement** – Defined in **Section 17.04.C**.

**Rent** – Defined in **Section 4.01**.

**Security Deposit** – Defined in **Section 3.01**.

**Senior Leasehold Mortgagee** – The Leasehold Mortgagee whose Leasehold Mortgage has priority over all other Leasehold Mortgages by agreement between the Leasehold Mortgagees if Landlord is given Notice of such agreement or, if there is no such agreement or if there is such an agreement but Landlord is not given Notice of it, then the Leasehold Mortgagee whose Leasehold Mortgage is first by order of recording in the land records of the jurisdiction in which the Leased Premises are located.

**Sublease** – Any sublease, space lease, occupancy agreement, use permit or license, and any other agreement of any sort entitling a third party to occupy or use all or any part of the Leased Premises and/or the Tenant Improvements without thereby affecting Landlord's fee interest. All Subleases shall be subject and subordinate to this Ground Lease and the CC&Rs.

**Submission** -- Every application, written request, filing or other document prepared and submitted by Tenant or any other person on behalf of Tenant to Landlord or WMATA for Entitlements, the Tenant Improvements or the WMATA Replacement Facilities.

**Subtenant** – Any subtenant, space lessee, occupant, permittee, licensee or other third party to a Sublease.

**Taking** - The act of condemnation, exercise of the power of eminent domain or sale in lieu thereof involving any governmental authority, including WMATA should WMATA ever be the condemning authority. "Taking" does not include any exactions, dedications, fees, proffers, use restrictions, or other concessions associated with the Entitlements or other aspects of the Project.

**Tenant** - On the Effective Date, the party so named in the preamble. Thereafter, "Tenant" shall mean Tenant under this Ground Lease in accordance with any Assignment pursuant to the terms of this Ground Lease or by virtue of any Leasehold Mortgagee who succeeds to Tenant's interest in this Ground Lease as a result of a foreclosure (or a conveyance in lieu thereof) conducted pursuant to a Leasehold Mortgage.

**Tenant Disqualifying Circumstance** -- The existence of an Event of Default or circumstance that could, with the giving of Notice and/or the passage of time, constitute an Event of Default, or a receiver has been appointed for the Leased Premises or for Tenant in any proceeding involving a Leasehold Mortgage.

**Tenant Improvements** - All buildings, portions of buildings, site amenities, infrastructure and parking existing or to be constructed by Tenant on the Leased Premises and owned by Tenant in accordance with this Ground Lease, and all Alterations of the same, together with all utility lines installed by or at the request of or for (or largely for) the benefit of Tenant, even if installed by a utility and even if installed in whole or in part outside the Leased Premises. WMATA Facilities, being owned by WMATA and not by Tenant, are not Tenant Improvements even if physically incorporated therein.

**Tenant Improvements Plans and Specifications** - The complete set of working drawings and specifications for the design and construction of the relevant Tenant Improvements. These drawings shall also include the site plan as well as relevant architectural, structural, electrical, mechanical, sheeting and shoring, excavation and utility drawings.

**Term** -- Defined in **Section 1.02**. Should the Term as originally stated ever be extended or renewed, "Term" shall include any such extension or renewal of the originally stated Term.

**Total Taking** -- Defined in **Section 21.01**.

**Transit-Oriented Development** -- As applicable to design and construction on the Leased Premises and the subsequent maintenance and operation thereof: (i) the Tenant Improvements' design enhances the effectiveness of a mass transit project and is physically or functionally related to the mass transit project; (ii) the Tenant Improvements create new or enhanced coordination between mass transit and other forms of transportation; (iii) the Tenant Improvements provide or facilitate convenient pedestrian and vehicular access to a mass transit project; (iv) the Tenant Improvements incorporate non-vehicular capital improvements that are designed to result in increased mass transit usage in corridors supporting fixed guideway systems; (v) the Tenant Improvements enhance urban economic development or incorporate private investments including office, commercial, retail, hospitality, or residential development; and (vi) the Tenant Improvements comply with any then-current FTA regulations, policies or guidelines applicable to joint development. Without limiting the foregoing, Transit-Oriented Development emphasizes a mix of uses, safe and convenient pedestrian and bicycle connectivity, attractive streetscapes and "placemaking," and a de-emphasis on automobile travel and parking other than surface parking on streets.



**Unavoidable Delay(s)** - Delays due to strikes, labor disputes, acts of God, floods, fires, governmental restrictions, enemy action, civil commotion, unavoidable casualty, sabotage, restraint by court or public authority, and other similar matters outside of the control of Tenant. General economic conditions, an Event of Default and/or lack of funds (except a lack of funds on the part of WMATA), bankruptcy or insolvency (except a bankruptcy or insolvency on the part of Landlord or WMATA), and weather-related conditions not rising to the level of acts of God, shall not give rise to Unavoidable Delay. Any delay resulting from such Unavoidable Delays shall extend the time on a day-for-day basis for completion and performance dates hereunder and Tenant shall not be liable for loss or damage or deemed to be in default hereof due to such delay; provided, however, Tenant is obligated to use Commercially Reasonable Business Efforts to avoid the occurrence of the delay or to minimize the impact of the delay on the progress of the Project; provided, further, that Unavoidable Delay shall not constitute grounds for voiding or delaying any payment due to Landlord (unless the payment due date is tied to an event the occurrence of which is itself extended as a result of the Unavoidable Delay, such as, for example, a closing). Tenant shall Notify Landlord of Unavoidable Delays within three (3) Business Days of happening with reasonable detail as to the nature of the claimed Unavoidable Delay and again within three (3) Business Days after the cessation of the claimed Unavoidable Delay; failure of Tenant to timely Notify Landlord shall negate that claim of Unavoidable Delay.

**WMATA** - The Washington Metropolitan Area Transit Authority and any governmental authority that succeeds to its assets and/or responsibilities. (See **Section 31.07** for the distinction between “WMATA” and “Landlord.”)

**WMATA Compact** -- The organizational document governing WMATA, Public Law 89-774, 80 Stat. 1324, Maryland Acts of General Assembly, Chapter 869-1965, Virginia Acts of Assembly, Chapter 2-1966, and Resolution of D.C. Board of Commissioners adopted November 15, 1966, codified in District of Columbia Code Section 9-1107.1, Section 10-204 of the Transportation Article of the Annotated Code of Maryland, and Virginia Code Sections 56-529 and 56-530 and the “Compacts’ volume, each as it may have been or may hereafter be amended, supplemented, replaced or otherwise amended.

**WMATA Design and Construction Standards** -- The WMATA Adjacent Construction Project Manual, the WMATA Station Area Planning Guide, the WMATA Manual of Design Criteria, the WMATA 2016 CAD Standards, the WMATA survey datum for the Overall Site, the WMATA Standard Specifications, Standard Drawings and Design Directive Drawings, the WMATA Construction Safety and Environmental Manual, the WMATA ADA Accessibility Checklist, and the WMATA Sign and Graphics Manual, as any of the foregoing may be amended, supplemented, modified or replaced from time to time. All references in this Agreement to WMATA Design and Construction Standards or words of similar effect refer to the standard or specification in effect on the date design of the particular improvement begins, as established by a written Notice from Developer or Tenant to WMATA to that effect; provided, however, that if construction of the applicable improvement does not begin within three (3) years after design of that improvement begins, then WMATA may require that the improvement be redesigned to meet more current WMATA Design and Construction Standards.

**WMATA Facilities** - The WMATA Reserved Areas and the adjoining tracks and Metro Station, entrances/exits, passageways (surface and subsurface), ramps, retaining walls, and other facilities for the Metro Station, including all improvements, infrastructure components, tangible property, structures and supports, access, curbing, guttering, drains, storm water facilities, utilities, parking (including lots, garages, spaces, meters, gates and revenue-collection facilities) located on the WMATA Reserved Areas; and all

improvements, facilities, equipment, structures and other tangible property used in the operation, access to and from, maintenance, repair, servicing, removal and/or replacement of WMATA's train, bus or other transit operations, wherever located, including all WMATA Replacement Facilities, rail stations, rails, tunnels, tracks, bus bays, bus lay-over bays, bus transfer areas, supervisor kiosks, employee bathrooms, electric substations, conduits and lines, pedestrian walkways, waiting and shelter areas, facilities serving persons with disabilities, cooling towers, chiller plants, vent and fan shafts, bicycle rack and locker areas, Bike & Ride facilities, parking lots and parking garages, Kiss & Ride facilities, storage and maintenance yards and facilities, and all other associated facilities notwithstanding that some of the facilities may have been constructed by or at the expense of Developer, Tenant or another third party. WMATA reserves all rights relating thereto, including making additions or other alterations, demolishing all or any part of them, changing the nature of their use, changing the name of Metro Stations, and determining the use (or non-use) thereof, all in WMATA's sole and absolute discretion.

**WMATA Replacement Facilities** - Those improvements being designed and/or constructed by Tenant for WMATA. At substantial completion of a WMATA Replacement Facility it will be turned over to WMATA and will thereafter be part of the WMATA Facilities.

**WMATA Replacement Facilities Plans and Specifications** - The complete set of working drawings and specifications for the design and construction of any WMATA Replacement Facilities to be constructed by Tenant. These drawings shall also include the site plan as well as relevant architectural, structural, electrical, mechanical, sheeting and shoring, excavation and utility drawings. The WMATA Replacement Facilities Plans and Specifications must comply with the WMATA Design and Construction Standards.

**WMATA Reserved Areas** – Defined in **Section 2.02.A**.

**WMATA Unconditional Approval Matters** – Anything WMATA has the right to approve or disapprove in WMATA's sole, absolute, and subjective discretion. Notwithstanding the foregoing, the implied covenant of good faith and fair dealing shall apply to the extent necessary to not make this Ground Lease (or the provisions relating to WMATA Unconditional Approval Matters) unenforceable.

**WMATA Zone of Influence** -- As defined in the WMATA Adjacent Construction Project Manual.

**IN WITNESS WHEREOF**, the parties hereto have caused this Ground Lease to be executed under seal as of the date first above written.

ATTEST/WITNESS:

TENANT:

\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_(Seal)

Name:

Title:

WITNESS:

\_\_\_\_\_

LANDLORD:

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY**

By: \_\_\_\_\_(Seal)

Name:

Title:

**EXHIBIT 2.01-1**

**SURVEY OF LEASED PREMISES**

**EXHIBIT 2.01-2**

**METES AND BOUNDS DESCRIPTION OF LEASED PREMISES**

**EXHIBIT 2.02**

**WMATA RESERVED AREAS**

**EXHIBIT 3.01.B**

**APPROVED FORM OF LETTER OF CREDIT**

[NAME AND ADDRESS OF ISSUING BANK]  
NOTE: ADDRESS MUST BE IN THE WASHINGTON, D.C. METROPOLITAN AREA]

STANDBY IRREVOCABLE LETTER OF CREDIT

[Date]

[Reference Number]

**Washington Metropolitan Area Transit Authority**  
600 Fifth Street, N.W.  
Washington, D.C. 20001  
Attn: Vice President, Office of Real Estate and Parking

Gentlemen:

By the order of \_\_\_\_\_ (the "Applicant"), we hereby open in your favor our irrevocable letter of credit for the amount of \_\_\_\_\_ Dollars (U.S.) (U.S. \$ \_\_\_\_\_), available by your draft(s) at sight drawn on us at the above address and accompanied by a statement purportedly signed by an authorized signer on your behalf substantially in the form of Exhibit A attached hereto. All drafts drawn in compliance with the terms of this instrument will be duly honored upon presentation. Drafts need not be endorsed on this letter of credit itself and the original of this letter of credit need not accompany any presentment. Presentation may be made in person, by messenger or by overnight courier service, or by mail. Presentation shall be made to us at the following address:

\_\_\_\_\_.

This initial term of this letter of credit expires on \_\_\_\_\_, 20\_\_ and shall automatically be renewed from year-to-year thereafter, without amendment or notice to you or to the Applicant, unless we give you actual written notice of nonrenewal at least two (2) months prior to any annual expiration date. Such notice of nonrenewal shall be given by Registered Mail or by overnight courier to your address as stated above or to such other address as you give us notice of, as stated below. Upon your receipt of such notice, you may draw on us prior to the then-relevant expiration date for the unused balance of this letter of credit. If an expiration date is a Saturday, Sunday, legal holiday or other day on which we are not open for business for the presentment of letters of credit, the expiration date shall automatically be extended to our next business day.

We agree to deliver payment in full of each draft made on this instrument, without any processing, check, renegotiation or other fees whatsoever, to your offices set forth above, or to such account as you may give us wiring instructions, within thirty-six (36) hours (not including Saturdays, Sundays or legal



holidays) after the time of presentment.

We will accept any and all presentations and statements delivered pursuant to this instrument as conclusive, binding and correct. We have no duty to investigate, and shall not investigate or be responsible for, the accuracy, truthfulness, correctness or validity of any such presentment or statement, notwithstanding the claim of any person to the contrary.

Partial drawings are permitted. Draws under this letter of credit will be honored in the order received, as determined by us (any such determination to be conclusive), and to the extent that there remains an amount available to satisfy the most recent draw.

You may change your address for receipt of notices under this letter of credit by giving us notice of your changed address.

Notwithstanding Article 38D of the UCP (as defined below), this letter of credit is transferable, without any transfer fee, and may be transferred successively by subsequent transferees. Transfers shall be effective upon presentation of the original of this letter of credit and any amendments hereto, accompanied by our transfer form appropriately completed.

Except to the extent inconsistent with the express terms of this letter of credit, this letter of credit shall be governed by the Uniform Customs and Practices for Documentary Credits (2007 Rev.), International Chamber of Commerce Publication No. 600 (the "UCP") and, to the extent not so governed, by the statutes and case law of the District of Columbia.

Very truly yours,

[NAME OF ISSUING BANK]

By: \_\_\_\_\_  
Name:  
Title:

Exhibit A to  
Letter of Credit

[Date]

[NAME OF ISSUING BANK]  
[ADDRESS OF ISSUING BANK]

Attn: \_\_\_\_\_

Subject:       Your letter of credit number \_\_\_\_\_  
                  dated \_\_\_\_\_, 20\_\_ (the "Letter of Credit")

Gentlemen:

The undersigned hereby certifies that it is entitled to draw on the Letter of Credit under the terms of either (i) that certain Ground Lease dated as of \_\_\_\_\_, 20\_\_ between the Washington Metropolitan Area Transit Authority, as landlord, and \_\_\_\_\_, as tenant, as it may have been amended, supplemented, assigned or otherwise modified to date, or (ii) the Letter of Credit itself, as it may have been amended, supplemented, assigned or otherwise modified to date.

The undersigned hereby presents the Letter of Credit for payment in the amount of \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

Very truly yours,

[NAME OF THEN-CURRENT BENEFICIARY]

By: \_\_\_\_\_  
    Name:  
    Title:

## **EXHIBIT 8.01**

### **INSURANCE REQUIREMENTS FOR TENANTS**

#### **General Requirement to Maintain Insurance**

Tenant shall, at its cost and expense, procure and maintain, or cause to be procured and maintained and shall require its general contractors and subcontractors to procure and maintain, at no cost to Landlord, the insurance set forth in this Exhibit. Tenant may modify these requirements as applied to its general contractors and subcontractors but doing so does not relieve Tenant from its own liability to maintain such insurance or from liability to Landlord. No activity may be undertaken on the Leased Premises or any WMATA Reserved Area until the obligations of this Exhibit are complied with and Landlord may require Tenant to cease work if at any time the obligations of this Exhibit are not complied with.

The insurance required below sets a minimum level. Compliance with the requirements of this Exhibit does not cap or otherwise affect Tenant's liability to Landlord if that liability exceeds the requirements stated in this Exhibit. Tenant may carry or may require its general contractors and subcontractors to carry additional insurance.

Tenant shall deliver to WMATA an original insurance policy for railroad protective liability insurance or participate in WMATA's blanket railroad protective liability program as more fully set forth below (if railroad protective liability insurance is required), and, for all other insurance, deliver to Landlord, a current certificate of insurance (COI) and all applicable endorsements for the insurance required hereunder upon execution of this Ground Lease and within ten (10) days of each policy renewal. In addition to the foregoing, within ten (10) days following a written request by Landlord, Tenant shall provide Landlord with copies of the requested insurance policies required by this Exhibit.

#### **General Standards for Insurance**

All insurance prescribed by this Exhibit will:

- (i) be in such form and with such provisions as are generally considered standard provisions for the type of insurance involved, except when this Exhibit may expressly require otherwise;
- (ii) be written on an "occurrence" (not a "claims made") basis, except as may be expressly permitted by this Exhibit.
- (iii) except for Professional Liability insurance, contain a waiver of subrogation on the part of the insurer in compliance with the terms of **Article 8** of this Ground Lease.

Insurance required may be satisfied by blanket or umbrella policies.

Insurance companies shall be rated by A.M. Best and shall carry at least an "A-" rating and

“Financial Size Category” of at least “VII” or better. If A.M. Best is no longer providing such ratings or changes its rating system at any time, it and/or they shall be replaced with a comparable rating agency and/or comparable ratings as Landlord may approve in its reasonable discretion.

The insurance policies required by this Exhibit shall not be cancelled, terminated, or modified (except to expand coverage) without thirty (30) days prior written Notice from the insurer to Landlord or, in the case of railroad protective liability insurance, to WMATA. If a required insurance policy is not reinstated or replaced within such thirty (30) day period, irrespective of any other Notice, default, discussion or cure provisions or procedures in this Ground Lease, then such failure to reinstate or replace shall constitute a default under the Ground Lease without any further cure period being afforded.

Landlord, its directors, partners, members, other principals, officers, employees, contractors, agents and representatives, by endorsements, shall be named as additional insureds for liability arising out of the activities of Tenant in connection with this Ground Lease (except on workers’ compensation insurance and professional liability insurance). Coverage provided to additional insureds shall be for claims arising out of both ongoing operations and products/completed operations. Coverage available to additional insureds is not limited to the minimum limits of coverage outlined in this Exhibit.

Tenant’s insurance coverage, except workers’ compensation, shall be primary and non-contributory insurance with respect to Landlord, its directors, partners, members, other principals, officers, employees, contractors, agents, and representatives. Any insurance or self-insurance maintained by Landlord and its directors, partners, members, other principals, officers, employees, contractors, agents and representatives shall not contribute to Tenant’s insurance or benefit Tenant in any way.

No acceptance, review or approval of any certificate of insurance, insurance agreement or endorsement by Landlord shall relieve or release, or be construed to relieve or release, Tenant from any liability, duty, or obligation assumed by, or imposed upon it by the provisions of this Ground Lease or impose any obligation upon Landlord.

### **Certificates of Insurance**

Landlord shall be provided with a certificate of insurance (COI) as evidence that the insurance requirements of this Exhibit have been satisfied. (The original insurance policy for railroad protective liability must also be provided to WMATA (if applicable and Tenant provides the railroad protective liability insurance.) COIs shall be e-mailed to Landlord or, in the case of railroad protective liability insurance, to WMATA. Failure to provide COI(s) may result in Tenant and its contractors being denied access to work locations on or adjacent to Landlord’s or WMATA’s property.

Unless and until Tenant is notified otherwise by Landlord, the Certificate Holder shall read:

Washington Metropolitan Area Transit Authority  
Office of Insurance, 8F  
600 Fifth Street, N.W.  
Washington, D.C. 20001

In addition, the COI(s) shall provide:

- reference to the specific project in the “Description of Operations” box.
- if applicable, a notation indicating whether or not the excess/umbrella policy(ies) is “follow form.”
- detail relating to self-insured retentions or deductibles.

### **Required Coverage**

All insurance policies required to be maintained by Tenant must have the scope and limits set forth below.

If the required minimum limits can only be met when applying an umbrella or excess liability policy, the umbrella or excess liability policy must follow the form of the underlying policy and be extended to “drop down” to become primary in the event the primary limits are reduced or the aggregate limits are exhausted.

#### Commercial General Liability Insurance

Throughout the term of this Ground Lease, Tenant shall carry commercial general liability insurance. Such coverage must include personal and bodily injury, broad form property damage, premises operations liability, contractor’s protective liability for subcontractors, fire and legal liability, products and completed operations, terrorism, and contractual liability. The definition of “insured contract” shall be expanded to include coverage near a railroad, if applicable. Failure to carry contractual liability insurance covering an indemnification obligation shall not relieve the indemnification obligation. XCU coverage (explosion, collapse and underground hazards) shall be included if any of the work involves excavation or blasting.

This insurance shall be carried in ISO Occurrence Form CG0001 (12/04) or its equivalent.

Defense coverage shall be provided for additional insureds outside of the policy limits. The coverage must include ongoing operations as well as products and completed operations.

#### Builder’s Risk Insurance

Tenant shall carry builder’s risk insurance from the start of construction (Including, but not limited to, fencing, grading, and site preparation) and cover the WMATA Replacement Facilities through Final Completion and Tenant Improvements through Substantial Completion; builder’s risk insurance is not required during any other period, including the period between construction projects on the Leased Premises. Coverage shall be for the improvements being constructed on the Leased Premises, including

but not limited to WMATA Replacement Facilities to be constructed by Tenant. This insurance must have limits equal to the replacement cost of the Tenant Improvements and any WMATA Replacement Facilities being constructed by Tenant on a “completed value” (non-reporting full coverage) basis in an amount sufficient to prevent co-insurance. Any deductibles or sublimits shall be subject to Landlord’s and WMATA’s prior review and approval. WMATA shall be a loss payee and a named insured on this policy with respect to any WMATA Facilities.

#### Property Insurance

Throughout the term of this Ground Lease, except during any period in which builder’s risk insurance is in place (and then only with respect to any construction work covered by that builder’s risk insurance), Tenant shall maintain property insurance covering the Tenant Improvements now or hereafter located on the Leased Premises and any personal property therein owned by Tenant against all risks, including fire as well as explosion of boilers and other pressurized equipment. This insurance shall also cover acts of terrorism. Debris removal and increases in costs incurred as a result of changes in applicable laws shall also be covered. If the Leased Premises are located in a flood plain, Tenant shall also carry flood insurance. [The policy(ies) maintained under this paragraph shall name the senior mortgagee or, in the absence of a mortgagee, Landlord, as the loss payee.]

Such policy shall have limits equal to one hundred percent (100%) of the full replacement cost of the Tenant Improvements and personal property therein owned by Tenant. (As used in this paragraph, “full replacement cost” means the actual replacement cost of such Tenant Improvements and covered personal property, including the cost of demolition and debris removal and without deduction for depreciation, but excluding the cost of excavation, foundations and footers.)

#### Workers’ Compensation and Employer’s Liability Insurance

During any period in which builder’s risk insurance is required (see above), Tenant shall carry workers’ compensation insurance meeting the statutory requirements of the jurisdiction in which the work will be performed and employer’s liability insurance. In the event work will be undertaken within five hundred (500) feet of a navigable waterway, the policy shall be endorsed to cover Longshore and Harbor Workers’ Compensation Act liability.

#### Business Automobile Liability Insurance

During any period in which builder’s risk insurance is required (see above), Tenant shall carry business automobile liability insurance against claims for bodily injury and property damage arising out of the ownership, lease, maintenance or use of any owned, hired or non-owned motor vehicle.

Business automobile insurance shall be written on ISO business auto coverage form CA 00 01 03 06 or its equivalent.

An MCS-90 endorsement for work involving the transportation or disposal of any hazardous material or waste, minimum auto liability limits of Five Million Dollars (\$5,000,000) combined single limit and a non-owned disposal site (NODS) endorsement providing coverage for Tenant’s or its contractors’ liability for pollution conditions at the designated non-owned disposal site are also required.

### Pollution Liability Insurance

For any activity engaged in by Tenant which involves the use, generation, release, removal, storage, transport, disposal and/or other handling of any Hazardous Materials, contaminated soil and/or asbestos abatement, the applicable person or entity shall carry pollution liability insurance. The policy must include coverage for bodily injury and loss of or damage to property arising directly or indirectly out of the discharge, dispersal, release or escape of Hazardous Materials, whether it be gradual, sudden or accidental.

This insurance may be written on a "claims made" basis or an "occurrence" basis but if written on a "claims made" basis must provide coverage for at least a three (3) year extended reporting period.

### Railroad Protective Liability Insurance

If any work is to be performed by or on behalf of Tenant within fifty (50) feet of (on, above, under or adjacent to) WMATA's tracks or within a Metro Station, then Tenant shall procure and maintain railroad protective liability insurance covering any bodily injury, death and/or damage to WMATA property, equipment and facilities arising from or caused by such work. WMATA (regardless of who Landlord may then be) shall be the named insured.

The insurer must be acceptable to WMATA and the insurance policy must be on a policy form that is acceptable to WMATA.

The original railroad protective liability policy must be delivered to WMATA.

If railroad protective liability insurance is required, the Tenant work activities may be eligible for coverage under WMATA's blanket railroad protective liability program. If so requested by Tenant, WMATA will provide Tenant with an railroad protective liability application. The application must be completed, signed and returned to WMATA's Office of Insurance for review by WMATA's railroad protective liability insurer. If the application is accepted, WMATA shall prepare and send an invoice to Tenant with the requisite premium due. No work will be permitted until payment under WMATA's railroad protective liability insurance policy, or a compliant original railroad protective liability insurance policy obtained by Tenant, has been received by WMATA's Office of Insurance.

### Rental Value Insurance

During the term of this Ground Lease, Tenant shall carry rental value insurance covering the rent, all operating expenses and any other additional rent reasonably anticipated under this Ground Lease.

The limit of such policy shall be in an amount equal to eighteen (18) months of Base Rent. The policy shall also contain an extended period of indemnity endorsement providing that after any physical damage or loss has been repaired, restored or replaced, any continued loss of income will be insured until the end of the eighteen (18)-month period or income returns to the same level (adjusted by any increase in the Consumer Price Index for All Urban Consumers for the region including Washington, D.C.

or any comparable successor index selected by Landlord from time to time) it was at prior to the loss occurring, whichever comes first.

#### Professional Liability Insurance

Tenant shall ensure that each design or engineering professional who provides design services in connection with the construction of the initial Tenant Improvements and/or any WMATA Replacement Facilities carries professional liability insurance to pay all costs Tenant or that design or engineering professional becomes legally obligated to pay as damages for any claim caused by or arising from any negligent act, error or omission of the design professional in connection with such work. This insurance shall include tail coverage for a period of time equal to the statute of repose (but not less than ten (10) years following completion of construction) and such coverage should be evidenced on the COI.

This insurance may be maintained on either a “claims made” or “occurrence” basis.

#### **Adjustments in Required Coverage**

Landlord has the right to review and adjust, not more frequently than once every five (5) years, the types of coverage and policy limits outlined in this Exhibit, provided that the coverages are of a type and with limits similar to those carried by other reputable owners and ground lessees of comparable properties located in the Washington, D.C. metropolitan area. Tenant shall make or cause to be made any requested adjustments in such limits or in types of coverage so long as the same are commercially available.

If Tenant receives written notice of any reduction in the coverage required by this Exhibit, Tenant shall provide Notice to Landlord and/or WMATA, as applicable, within ten (10) days thereafter.

#### **WMATA’s Right to Obtain Insurance for Tenant**

If Tenant fails to maintain any insurance required by this Ground Lease, Landlord (or, in the case of railroad protective liability insurance, WMATA) may, upon fifteen (15) days prior written Notice to Tenant, procure and maintain such insurance at the expense of Tenant. Landlord (or WMATA) shall Notify Tenant of the date, purposes, and amounts of any such payments made or committed by Landlord (or WMATA). Any amounts of money paid or committed to be paid by Landlord (or WMATA) prior to Tenant obtaining the requisite insurance and providing evidence thereof to Landlord (or WMATA) shall be repaid to Landlord (or WMATA) within three (3) days after written demand with interest thereon at the Default Rate from the date paid by Landlord (or WMATA) to the date of payment by Tenant plus an administrative fee of ten percent (10%).

#### **Obligation to Collect Proceeds**

Whenever any event occurs that could trigger a recovery under any insurance policy required by this Agreement, Tenant shall promptly file a proof of loss and shall endeavor to collect all valid claims within as short a timeframe as possible.



## Rights of Leasehold Mortgagees

The provisions of this Exhibit are subject to the rights and any conflicting requirements of all holders of or beneficiaries of any Leasehold Mortgages encumbering the Leased Premises or the Tenant Improvements thereon so long as the amount and timing of the insurance coverages and proceeds to which Landlord (or, in the case of railroad protective liability insurance, WMATA) is entitled remain unaffected.

### Required Coverages as of the date hereof

<u>INSURANCE TYPE</u>	<u>LIMITS</u>	<u>BASIS</u>
<u>Workers' Compensation</u>	<u>Statutory</u>	
<u>Employers' Liability</u>	<u>\$1,000,000</u>	<u>Each Accident</u>
	<u>\$1,000,000</u>	<u>Disease Policy Limit</u>
	<u>\$1,000,000</u>	<u>Disease Each Employee</u>
<u>Commercial General Liability</u>		
<u>Owner/ground lessee: Not during construction activities</u>	<u>\$x,xxx,xxx</u>	<u>Each Occurrence Limit</u>
<u>Owner/ground lessee: Not during construction activities</u>	<u>\$x,xxx,xxx</u>	<u>General Aggregate Limit</u>
<u>Owner/ground lessee: Not during construction</u>	<u>\$x,xxx,xxx</u>	<u>Products and completed operations limit</u>
<u>Owner/ground lessee: During construction activities</u>	<u>\$x,xxx,xxx</u>	<u>Each Occurrence Limit</u>
<u>Owner/ground lessee: During construction activities</u>	<u>\$x,xxx,xxx</u>	<u>General Aggregate Limit</u>
<u>Builder's Risk</u>	<u>See narrative above</u>	
<u>Property</u>	<u>See narrative above</u>	

<b><u>Rental Value</u></b>	<u>See narrative above</u>	
<b><u>Business Auto Liability</u></b>	<u>\$x,xxx,xxx</u>	<u>Combined Single Limit</u>
<b><u>Railroad Protective Liability Insurance (RRP)</u></b>	<u>\$x,xxx,xxx</u>	<u>Each Occurrence Limit</u>
<b><u>Railroad Protective Liability Insurance)</u></b>	<u>\$x,xxx,xxx</u>	<u>Aggregate Limit</u>
<b><u>Professional Liability</u></b>	<u>\$x,xxx,xxx</u>	<u>Each Occurrence Limit</u>
<b><u>Pollution Liability</u></b>	<u>\$x,xxx,xxx</u>	<u>Aggregate Limit</u>
<b><u>Technology Errors &amp; Omissions Liability</u></b>	<u>\$x,xxx,xxx</u>	<u>Each Claim</u>

**EXHIBIT 10.01**

**APPROVED USES AND DENSITIES**

**EXHIBIT 11.04.C**

**PROJECT SCHEDULE**

**EXHIBIT 12.08.B-1**

**PAYMENT BOND**

**EXHIBIT 12.08.B-2**

**PERFORMANCE BOND**

**EXHIBIT 17.01.A**

**COMPOSITION OF TENANT AND  
TENANT'S DEVELOPMENT TEAM ON EFFECTIVE DATE**

**COMPOSITION OF TENANT**

The names and percentages of ownership of the holders of ownership interests in Tenant are:

**NAME**

**OWNERSHIP INTEREST**

**TENANT'S DEVELOPMENT TEAM**

The names, organizations and skillsets of Tenant's development team are:

**NAME**

**COMPANY/ORGANIZATION**

**EXPERTISE**

**EXHIBIT 17.01.C**

**ASSIGNEE'S CERTIFICATIONS**

The undersigned hereby certifies to the best of its knowledge and belief to the Washington Metropolitan Area Transit Authority ("**WMATA**") that the undersigned and any of its principals:

1. Is/are not presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from an award of contracts by any governmental entity.

2. Has/have not within the past ten (10) years been convicted of or had a civil judgment rendered against it for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a contract or subcontract with any governmental entity; violation of antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating criminal tax laws, or receiving stolen property.

3. Is/are not presently indicted for or otherwise criminally or civilly charged by a governmental entity with commission of any of the offenses enumerated in the previous paragraph.

4. Is/are not in arrears or default of payment of any money or obligation of a value greater than Three Thousand Dollars (\$3,000) to a governmental entity.

5. Has/have no adjudicated violations nor has/have paid penalties during the past ten (10) years relating to the housing and building laws, regulations, codes and ordinances of any governmental entity.

6. During the past ten (10) years has/have not had a license revoked that was issued in accordance with the housing, building or professional licensing laws, regulations, codes and ordinances of any governmental entity.

"Principal" means a partner, member, shareholder, officer, director, manager or other person with management or supervisory responsibilities or who is otherwise in a position to control or significantly influence the undersigned's activities or finances.

The undersigned further certifies:

a. It has not employed or retained any company or persons (other than a full-time, bona fide employee working solely for it) to solicit or secure a ground lease or fee conveyance from WMATA; and

b. It has not paid or agreed to pay, and shall not pay or give, any company or person (other than a full-time, bona fide employee working solely for it) any fee, commission, percentage, or brokerage fee contingent upon or resulting from the award of a ground lease or fee conveyance from WMATA; and

c. No person or entity currently employed by or under contract with WMATA, or employed (directly or as a contractor, advisor or consultant) by WMATA within the past twelve (12) months, or with



material input into the matters covered by the proposed ground lease or fee conveyance and employed by or under contract with WMATA at any time in the past: is affiliated with or employed by it or has any financial interest in it; provided any assistance to it or its parent, subsidiary or affiliates with respect to the proposed assignment or other conveyance to it of a ground lease interest; or will benefit financially from the assignment or conveyance of such ground lease interest or the development contemplated by the ground lease; and

d. Neither the undersigned nor any of its employees, representatives or agents have offered or given gratuities or will offer or give gratuities (in the form of entertainment, gifts or otherwise) to any director, officer or employee of WMATA with the view toward securing favorable treatment with respect to the proposed assignment or other conveyance to it of a ground lease or fee interest or in the negotiation, amendment or performance of the Ground Lease or any agreement relating thereto; and

e. It agrees to furnish information relating to the above as requested by WMATA.

If the undersigned is unable to certify to the foregoing in whole or in part, the undersigned has attached an explanation to this certification.

The undersigned further certifies that:

i. It is aware of and accepts all of the terms of the Ground Lease dated \_\_\_\_\_, 20\_\_ between WMATA and \_\_\_\_\_, as it may have been amended to date; and

ii. It has the power and authority to be an assignee of the foregoing Ground Lease and all final documentation as required by WMATA without the consent or joinder of any other party or authority (except as envisioned by the Ground Lease).

These certifications are a material representation of fact upon which reliance will be placed by WMATA. The undersigned shall provide immediate written notice to WMATA if at any time it learns that its certification was erroneous when submitted or has become erroneous since that time. If it is later determined that the undersigned knowingly rendered an erroneous certification or failed to notify WMATA if and when the undersigned gained knowledge that its certification was erroneous when submitted or has become erroneous since that time and the Ground Lease is or has been assigned to the undersigned, then, in addition to any other remedies available to WMATA, WMATA may in its sole and absolute discretion terminate the Ground Lease.

**[NAME OF PROPOSED ASSIGNEE]**

By: \_\_\_\_\_  
Name:  
Title:

Date: \_\_\_\_\_, 20\_\_

**EXHIBIT 31.08**

**MEMORANDUM OF GROUND LEASE**

Please record and return to:


*[If applicable, add the following or something similar:]*

*Note to recording clerk: The Washington Metropolitan Area Transit Authority is a body corporate and politic exempt from taxes pursuant to the WMATA Compact, codified in [District of Columbia Code Section 9-1107.1] [Section 10-204 of the Transportation Article of the Annotated Code of Maryland] [Virginia Code Sections 56-529 and 56-530 and the "Compacts" volume]. Accordingly, this Memorandum of Ground Lease is exempt from [grantor's][recording][transfer] taxes otherwise applicable to the grantor or landlord pursuant to Section \_\_\_\_\_ of the [insert name of Code here].*

### **MEMORANDUM OF GROUND LEASE**

THIS MEMORANDUM OF GROUND LEASE (this "**Memorandum**") is made as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_ by and between the Washington Metropolitan Area Transit Authority ("**Landlord**"), an interstate compact agency of the State of Maryland, the District of Columbia and the Commonwealth of Virginia, and

\_\_\_\_\_, a  
\_\_\_\_\_, ("**Tenant**").

#### **RECITALS:**

WHEREAS, Landlord, as landlord, and Tenant, as tenant, are parties to that certain Ground Lease of even or proximate date herewith (as it may hereafter be amended, supplemented or modified from time to time, the "**Ground Lease**");

WHEREAS, the Ground Lease pertains to property located in [the District of Columbia][the City/County of \_\_\_\_\_ in the State of Maryland][the City/County of \_\_\_\_\_ in the Commonwealth of Virginia], such property being more fully described on Exhibit A attached hereto (the "**Leased Premises**");

WHEREAS, Landlord and Tenant desire to provide record notice of the Ground Lease and certain of its terms and conditions, as more fully set forth below.

NOW, THEREFORE, in consideration of the foregoing, One Dollar (\$1.00), the terms set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Landlord and Tenant declare as follows:

1. Public Notice of Ground Lease. This Memorandum is intended to be recorded in the land records of the jurisdiction references in the foregoing Recitals for the purpose of providing public notice of the Ground Lease and certain of its terms and conditions.

2. Property Affected. The property that is subject to the Ground Lease is the Leased Premises. Landlord retains fee ownership of the Leased Premises; Tenant's interest in the Leased Premises is a leasehold estate. Subject to Landlord's right of reversion as set forth in the Ground Lease and to Landlord's fee ownership of certain facilities that may be constructed by it or for its benefit on the Leased Premises, Tenant owns fee title to certain improvements now or hereafter constructed by it on the Leased Premises.

3. Term of Ground Lease. Subject to earlier termination in accordance with its terms, the term of the Ground Lease commences on \_\_\_\_\_, 20\_\_ and expires on \_\_\_\_\_, \_\_\_\_\_. [The term of the Ground Lease is not subject to any renewal or extension options.] OR [The term of the Ground Lease is subject to renewal or extension options as stated therein, but in no event shall the term of the Ground Lease extend beyond \_\_\_\_\_, \_\_\_\_\_.]

4. CC&Rs. The Ground Lease is subject and subordinate to that certain Declaration of Covenants, Conditions, Easements and Operating Agreement made by Landlord dated as of \_\_\_\_\_, 20\_\_ [and intended to be recorded immediately prior to or simultaneously with this Memorandum][, as recorded on \_\_\_\_\_, 20\_\_ [as Instrument Number \_\_\_\_\_] in the land records of the jurisdiction referenced in the foregoing Recitals [in Deed Book \_\_\_\_\_ at Page \_\_\_\_\_], as the same may be amended, supplemented or otherwise modified from time to time.

5. Mortgages. Under terms and conditions more fully set forth in the Ground Lease, Landlord has the right to mortgage or otherwise encumber its fee interest and Tenant has the right to mortgage or otherwise encumber its leasehold estate in the Leased Premises and its ownership interest in certain improvements it constructs on the Leased Premises. Landlord does not have the right to mortgage or otherwise encumber Tenant's leasehold estate or ownership interest in such improvements, and Tenant does not have the right to mortgage or encumber Landlord's fee interest.

6. Termination of Ground Lease and this Memorandum. The Ground Lease provides, among other things, that upon the expiration or earlier termination of its term, Tenant shall execute, deliver and record any documents reasonably requested by Landlord to evidence such expiration or termination and the vesting of fee title in Landlord to any improvements on the Leased Premises to which Tenant has fee title. The Ground Lease further provides that if Tenant fails to do so after request from Landlord, Landlord may do so unilaterally on Tenant's behalf, for which purpose Landlord is appointed Tenant's attorney-in-fact, which appointment is vested with an interest and irrevocable, to do so.

7. Conflicts and Inconsistencies. In the event of any conflict or inconsistency between the term of the Ground Lease and the terms of this Memorandum, the terms of the

Ground Lease shall govern.

IN WITNESS WHEREOF, this Memorandum has been duly executed and delivered by Landlord and Tenant as of the date first set forth above.

WITNESS:

LANDLORD:

**WASHINGTON METROPOLITAN AREA  
TRANSIT AUTHORITY**

\_\_\_\_\_

By:

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

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

DISTRICT OF COLUMBIA ) ss:

I HEREBY CERTIFY that on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me, the undersigned, a Notary Public in the jurisdiction aforesaid, personally appeared \_\_\_\_\_, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and who acknowledged himself/herself to be the \_\_\_\_\_ of the Washington Metropolitan Area Transit Authority, party to the foregoing Memorandum, and that, in such capacity and being so authorized to do, he/she executed said instrument on behalf of said entity as its free act and deed for the uses and purposes therein contained.

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

[Notarial Seal]

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

*[Continued on Next Page]*

WITNESS:

TENANT:

\_\_\_\_\_

By:

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

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

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

I HEREBY CERTIFY that on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me, the undersigned, a Notary Public in the jurisdiction aforesaid, personally appeared \_\_\_\_\_, known to me or satisfactorily proven to be the person whose name is subscribed to the foregoing Memorandum and who acknowledged himself to be the \_\_\_\_\_ of \_\_\_\_\_, a party to the foregoing Memorandum, and that, in such capacity and being so authorized to do, he/she executed said instrument on behalf of said entity as its free act and deed for the uses and purposes therein contained.

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

[Notarial Seal]

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

*[in Maryland add:]*  
**CERTIFICATION**

THE UNDERSIGNED hereby certifies that the above instrument was prepared by an attorney admitted to practice before the Court of Appeals of Maryland, or under the supervision of an attorney admitted to practice before the Court of Appeals of Maryland, or by one of the parties named in the instrument.

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

**List of Exhibits**

A      --      Leased Premises

Exhibit A to Memorandum of Ground Lease

Description of the Leased Premises



# Model Agreement A-5: Purchase & Sale Agreement Template

## **AGREEMENT OF PURCHASE AND SALE**

THIS AGREEMENT OF PURCHASE AND SALE (this "**Agreement**") is made as of this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ (the "**Effective Date**"), by and between the **WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY**, a regional body corporate and politic (hereinafter referred to as "**WMATA**"), organized pursuant to Public Law 89-774, 80 Stat. 1324; Maryland Acts of General Assembly, Chapter 869-1965; Virginia Acts of Assembly, Chapter 2-1966; and Resolution of the District of Columbia Board of Commissioners adopted November 15, 1966 (as they may have been and may hereafter be amended, supplemented, replaced or otherwise modified, the "**WMATA Compact**"), and \_\_\_\_\_, a \_\_\_\_\_ ("**Purchaser**").

### **RECITALS:**

A. WMATA is the owner of certain real property located in *[If applicable: City/Town,]* *[if applicable: County,]* *[Commonwealth of Virginia]* *[District of Columbia]* *[State of Maryland]*, as more fully described on **EXHIBIT A** attached hereto and made a part hereof (the "**Land**") *[if applicable, add: located [adjacent to] [above] [near] WMATA's \_\_\_\_\_ Metro Station (the "**Metro Station**")].*

B. The Land is not currently in use by WMATA.

C. *[If being sold via public offering or bid, add: Purchaser was the winning offeror for the Land selected by WMATA pursuant to \_\_\_\_\_.]* *[If being sold pursuant to the "adjacent property owner exception" in the Joint Development Policies and Guidelines, add: The Land is bounded on its \_\_\_\_\_ side(s) by land owned by Purchaser or persons or entities controlled by, under the control of, or under common control with Purchaser and on its \_\_\_\_\_ side(s) by public or WMATA-owned streets, Purchaser is the owner of the only privately-owned property abutting the Land, and Purchaser is therefore the only adjacent property owner.]* *[Other]*

D. WMATA desires to sell and Purchaser desires to purchase the Property (as hereinafter defined) on the terms and conditions hereinafter stated.

NOW, THEREFORE, in consideration of One Dollar (\$1.00) in hand paid, the terms, conditions, agreements and covenants herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, WMATA and Purchaser agree as follows:

1. **Agreement to Sell and Purchase.** WMATA agrees to sell and convey the Property, and Purchaser agrees to purchase the Property, on the terms and conditions herein provided.

2. **The Property.**

2.1 **Defined.** The property (the “**Property**”) which is the subject of this Agreement is:

2.1.1 the Land; *[and]*

2.1.2 subject to any rights or property retained by WMATA as set forth in this Agreement, all improvements, rights, privileges, and easements appurtenant to the Land including, without limitation, all water rights, rights-of-way, roadways, utility facilities and other appurtenances used or to be used in connection with the beneficial use of the Land[.];

*[if applicable, e.g. if the Land has improvements that are not WMATA facilities and therefore that are being conveyed, add some or all of:*

2.1.3 all licenses, permits, authorizations, and certificates of occupancy which are transferable relating to the ownership, use, maintenance, occupancy or operation of the Land and any improvements thereon, but excluding any of the foregoing that relate to the operation, maintenance, repair and replacement of WMATA’s own facilities;

2.1.4 all leases, occupancy agreements, licenses and other permissions to occupy any portion of the Land and any improvements thereon, together with all security deposits held by WMATA in connection therewith;

2.1.5 all service contracts, equipment leases, maintenance contracts and other contracts or agreements that are in force and apply to the Land and any improvements thereon, but excluding any of the foregoing that relate to the operation, maintenance, repair and replacement of WMATA’s own facilities; and

2.1.6 all plans, specifications and drawings relating to the Land and any improvements thereon, but excluding any of the foregoing that relate to the operation, maintenance, repair and replacement of WMATA’s own facilities].

*[If appropriate, add: The Property does not include WMATA's Metrorail right-of-way, the Metro Station, bus shelters and canopies, parking meters and pay stations, chiller plants, traction power substations, conduits, and any other facilities operated by WMATA [above] [on] [in a tunnel beneath] the Land and areas [above and] adjacent to such Metrorail right-of-way, including [aboveground] [surface] [below ground] easements for or relating to the construction, operation, maintenance, repair, replacement, removal and relocation of said Metrorail right-of-way, the Metro Station and any other WMATA-owned facilities above, on or under the Land, all of which shall be further addressed in the CC&Rs (as hereinafter defined). No mortgage, deed of trust, security agreement or other lien granted by Purchaser may encumber such excluded property.]*

- 2.2 **WMATA's Rights to Use the Property Until Closing.** Until Closing (as hereinafter defined), WMATA shall have the unrestricted right, but not the obligation, to use the Property and perform any work on the Land and with respect to the Property desired by WMATA in connection with WMATA's ongoing operations.

### 3. **Compensation; Posting the Deposit.**

- 3.1 **Purchase Price.** The "**Purchase Price**" for the Property shall be \_\_\_\_\_ Dollars (\$\_\_\_\_\_), payable to WMATA at Closing (as hereinafter defined) and subject to adjustments provided for elsewhere in this Agreement.

3.2 **Posting the Deposit.**

- 3.2.1 Within two (2) business days following execution of this Agreement, Purchaser shall deliver to WMATA a security deposit in the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) (said amount, together with any interest accruing thereon, the "**Deposit**"). The Deposit shall serve as security for Purchaser's performance under this Agreement and shall be delivered to or credited to Purchaser or Seller, as the case may be, in accordance with the terms set forth elsewhere in this Agreement.

- 3.2.2 Purchaser may post the Deposit either by wire transfer, by bank check or by certified check, or in the form of an irrevocable automatically self-renewing clean letter of credit payable at sight in the form attached hereto as **EXHIBIT B** issued by such commercial bank(s) as WMATA may approve.

Any such letter of credit must name WMATA as the sole beneficiary. Any such letter of credit must have an expiration date no earlier than one (1) month after the last possible date of Closing under this Agreement and must be extended by Purchaser and the issuing bank promptly by amendment or endorsement delivered to WMATA as and when the outside date for Closing may be extended or postponed. If the Deposit is posted as a letter of credit and there is at any time less than one (1) month until the expiration of the letter of credit, WMATA shall be entitled to present the letter of credit for payment, regardless of the existence of any Default (as hereinafter defined) or other claim by or of entitlement of WMATA to ownership of the proceeds, and WMATA shall thereafter hold the proceeds of the letter of credit as a cash Deposit unless and until Purchaser delivers a substitute letter of credit meeting the requirements of this Section.

3.2.3 Failure to deliver the Deposit on a timely basis shall give WMATA the right to terminate this Agreement by Notice (as hereinafter defined) to Purchaser at any time before the Deposit is delivered to WMATA. If WMATA timely gives such Notice of termination, this Agreement shall terminate upon the giving of such Notice, Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**.

3.2.4 The Deposit shall be held by WMATA. If the Deposit is held in cash, WMATA will not be obligated to invest the Deposit in an interest-bearing account but, if the Deposit is so invested, all interest earned thereon shall become part of the Deposit and be remitted to the party entitled to the Deposit.

3.3 *[If part of the business deal, add:]* **Deferred Compensation to WMATA.** If, during the fifteen (15) years following the date of Closing, the Land is benefitted by any governmental permit, approval, variance, special exception, rezoning, master or sector plan, or other entitlement (the “**Additional Entitlement**”) allowing an increase in the gross square footage that can be built on the Land compared to the gross square footage that can be built on the Land as of the Effective Date under existing entitlements *[add if applicable: or, if the Land is to be developed*

for residential purposes, the Additional Entitlement allows an increase in the number of residential units that can be developed on the Land without an increase in square footage, or if the Additional Entitlement waives or reduces any affordable housing requirement or contribution], the then-owner of the Land shall pay additional compensation to WMATA as follows:

3.3.1 The then-owner of the Land shall give Notice to WMATA of the issuance of the Additional Entitlement within ten (10) days after its issuance.

3.3.2 The then-owner of the Land shall owe, and shall pay, WMATA additional compensation ("**Additional Entitlement Compensation**") equal to the Fair Market Value As Re-entitled (as hereinafter defined) of the Land, less the Purchase Price, at the last to occur of (i) Closing, (ii) sixty (60) days after the issuance of the Additional Entitlement and the Additional Entitlement no longer being appealable, and (iii) thirty (30) days after the determination of the dollar amount of the Additional Entitlement Compensation.

3.3.3 The parties shall negotiate the amount of the Additional Entitlement Compensation in good faith. If the parties agree on the Additional Entitlement Compensation, the amount so agreed upon shall be the Additional Entitlement Compensation for all purposes. If the parties are not able to agree on the amount of the Additional Entitlement Compensation within thirty (30) days after the issuance of the Additional Entitlement, either party may invoke the appraisal procedure set forth below (the "**Appraisal Procedure**");<sup>1</sup> the invocation of the Appraisal Procedure shall not preclude the parties from agreeing on the Additional Entitlement Compensation between themselves thereafter and terminating the Appraisal Procedure.

3.3.4 The Appraisal Procedure shall be as follows:

3.3.4.1 The party invoking the Appraisal Procedure shall give Notice of such invocation to the other party. Such Notice shall include the

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<sup>1</sup> This Agreement utilizes a three-appraiser method. There is no requirement that a three-appraiser method be used (or that any particular appraisal method be used). It may be easier to use and write a one-appraiser method where the parties jointly pick an appraiser who meets the requirements set forth in Section 3.3.4.3. This template offers a sample of a more complicated three-appraiser method for no reason other than it is more complicated to draft in a hurry should it be needed.

name of an Appraiser (as defined below) to implement the Appraisal Procedure.

- 3.3.4.2 Within twenty-one (21) days after the giving of the Notice of invocation of the Appraisal Procedure, the second party shall give Notice to the invoking party notifying the invoking party of an Appraiser to implement the Appraisal Process. A failure of the second party to timely respond or appoint an Appraiser shall be deemed a waiver of the right to participate in the Appraisal Procedure and the Appraiser appointed by the invoking party shall proceed unilaterally to determine the Fair Market Value as Re-entitled.
- 3.3.4.3 To be an “**Appraiser,**” the person so appointed shall be (i) independent of and disinterested in either party and its Principals (as hereinafter defined) and in the amount of the Additional Entitlement Compensation, (ii) on WMATA’s list of approved appraisers at that time, (iii) regularly engaged in the business of rendering real estate appraisals of properties similar to the Land as subject to the Additional Entitlement, and (iv) licensed as an appraiser by the jurisdiction in which the Land is located.
- 3.3.4.4 Each party shall give its Appraiser a copy of this **Section 3.3**, which shall constitute the instructions to the Appraisers. Within sixty (60) days after being retained, each Appraiser shall deliver to the party engaging it a full appraisal report stating the proposed fair market value of the Land as if the Land was unimproved and subject to the Additional Entitlement (the “**Fair Market Value As Re-entitled**”). If the Land is part of an assemblage with other land under (or to be put under) common ownership, then the Appraisers shall value the entire assemblage as one parcel and allocate a Fair Market Value As Re-entitled to the Land by applying to the assemblage’s Fair Market Value as Re-entitled a fraction, the numerator of which is the square footage of the Land and the denominator of which is the square footage of the assemblage, regardless of what improvements may exist or be planned for different parts of the assemblage.
- 3.3.4.5 The party who engaged the Appraiser submitting its appraisal report shall give Notice to the other party that the appraisal has

been completed. Upon completion of both appraisals or the aforesaid sixty (60) day period, whichever is earlier, the parties or their Appraisers shall exchange complete copies of their appraisals. If a party or its Appraiser fails to circulate an appraisal within the stated time, then that party shall be deemed to have waived the right to participate in determining the Additional Entitlement Compensation and the Fair Market Value As Re-entitled determined by the other party's Appraiser shall be used to conclusively determine the Additional Entitlement Compensation.

- 3.3.4.6 If the two appraisals agree on the Fair Market Value As Re-entitled, the amount so agreed upon shall conclusively be used to determine the Additional Entitlement Compensation.
- 3.3.4.7 If the two appraisals do not agree on the Fair Market Value As Re-entitled but the lower of the two Fair Market Values As Re-entitled is within ten percent (10%) of the higher of the two Fair Market Values As Re-entitled, then the Fair Market Value As Re-entitled shall conclusively be the average of the two proposed Fair Market Values As Re-entitled.
- 3.3.4.8 If the two appraisals do not agree on the Fair Market Value As Re-entitled and the lower of the two Fair Market Values As Re-entitled is not within ten percent (10%) of the higher of the two Fair Market Values As Re-entitled, then the two Appraisers shall be given thirty (30) days from the date the Appraisals are exchanged in which to agree between themselves on the Fair Market Value As Re-entitled. Any such agreement by the Appraisers shall be the Fair Market Value As Re-entitled.
- 3.3.4.9 If the two Appraisers do not agree on a Fair Market Value As Re-entitled within the time period stated in the preceding subsection, then at the end of that time period the two Appraisers shall jointly appoint a third Appraiser for such purpose. The first two Appraisers shall give the third Appraiser a copy of this **Section 3.3**, which shall constitute the instructions to the third Appraiser. The first two Appraisers shall not inform the third Appraiser of their own Fair Market Values As Re-entitled or otherwise attempt to bias the third Appraiser. The two



Appraisers shall give Notice of such appointment to the parties of the third Appraiser. If the two Appraisers do not timely select a third Appraiser, then WMATA shall place the name of all eligible Appraisers on separate pieces of paper in a hat and pick the third Appraiser by blindly drawing one name from the hat. If the third Appraiser is so selected by WMATA, WMATA shall give Notice to the then-owner of the Land and the first two Appraisers of the designation of the third Appraiser.

3.3.4.10 The third Appraiser shall determine a Fair Market Value As Re-entitled in accordance with **Section 3.3.4.4** for the Land *ab initio*, without knowledge of the Fair Market Values As Re-entitled of the first two Appraisers. The third Appraiser shall be given ninety (90) days from its appointment for that purpose. If the third Appraiser determines a Fair Market Value As Re-entitled which is equal to or higher than the higher of the first two Fair Market Values As Re-entitled, then the Fair Market Value As Re-entitled shall be the higher of the first two Fair Market Values As Re-entitled. If the third Appraiser determines a Fair Market Value As Re-entitled which is equal to or lower than the lower of the first two Fair Market Values As Re-entitled, then the Fair Market Value As Re-entitled shall be the lower of the first two Fair Market Values As Re-entitled. If the third Appraiser determines an Fair Market Value As Re-entitled which is between the first two Fair Market Values As Re-entitled, then the Fair Market Value As Re-entitled shall be the average of the third Appraiser's Fair Market Value As Re-entitled and whichever of the first two Fair Market Values As Re-entitled is closer to the third Appraiser's Fair Market Value As Re-entitled.

3.3.4.11 Neither party shall have any direct or indirect *ex parte* communication with any Appraiser except to appoint its Appraiser and to give it a copy of this **Section 3.3**. None of the Appraisers shall have any direct or indirect *ex parte* communications with each other except as set forth in **Sections 3.3.4.4, 3.3.4.5, 3.3.4.8 and 3.3.4.9**.

3.3.4.12 Subject to the preceding subsection, the parties agree to fully cooperate in all respects in expediting appraisals and implementing the provisions of this **Section 3.3**.

3.3.4.13 Each party shall bear the costs and expenses of the Appraiser engaged by it. The costs and expenses of any third Appraiser shall be shared equally by WMATA and the then-owner of the Land.]

3.4 *[If part of the business deal, add:]* **WMATA's Participation in Revenue and/or Capital Events.** *[Insert whatever "the deal" is. The Template Ground Lease in the LAND Database/AAA-Joint Development folder has sample language for both Participating Rent, a participation in revenue, and Capital Rent, a participation in the proceeds of sales, financings, etc.]*

#### **4. Study Period.**

Purchaser acknowledges that it is familiar to its satisfaction with the Property. No study period or other opportunity to perform any site investigation work, studies, tests, examinations, analyses, inspections or other investigations of the Property is granted by this Agreement (including, without limitation, environmental studies, feasibility studies, engineering studies, drainage and flood plain analyses, and soils tests). Purchaser's obligation to proceed to Closing is not subject to any contingency or conditions that the Property be in any particular condition as of the date of Closing.

OR

##### **4.1 Duration and Scope.**

4.1.1 **Grant.** Purchaser is granted a period of \_\_\_\_\_ (\_\_) days after the Effective Date (the "**Study Period**") to evaluate the Property and the feasibility of Purchaser's ownership and use thereof. During the Study Period, Purchaser may conduct such studies, tests, examinations, analyses, inspections or investigations concerning the Property without entering upon the Land or any improvements thereof as Purchaser deems appropriate.

4.1.2 **Entry Onto the Land.** Any entry onto the Land or any improvements thereon to conduct non-invasive studies, tests, examinations, analyses, inspections or investigations, such as the Survey (as hereinafter defined) and visual inspections, shall be subject to the terms of the Right of Entry Agreement attached hereto as **EXHIBIT E** as if the same was signed and incorporated herein by the signing of this Agreement. Physically invasive studies, tests, examinations, analyses, inspections or investigations, such

as soil borings, test pits, and environmental samplings, are not permitted by this Agreement; to conduct any invasive studies, tests, examinations, analyses, inspections or investigations, Purchaser must apply for and obtain a Real Estate Permit in the form then-published on WMATA's website (www.wmata.com), which Real Estate Permit WMATA covenants to issue in accordance with WMATA's standard procedures if Purchaser properly applies therefor.

4.2 **Notice of Termination.** Should Purchaser decide to not go forward with the purchase of the Property at or before the end of the Study Period because of the results of the studies, tests, examinations, analyses, inspections or investigations of the Property undertaken by or on behalf of Purchaser pursuant to **Section 4.1** or for any other reason or for no reason, in Purchaser's sole and absolute discretion, Purchaser shall have the right to terminate this Agreement by giving Notice of termination to WMATA no later than 3:00 p.m. Eastern time on the final day of the Study Period. If Purchaser timely gives such Notice of termination, this Agreement shall terminate upon the giving of such Notice, Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, and thereupon WMATA shall return the Deposit (less any portion previously drawn by WMATA) to Purchaser, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**. If Purchaser fails to provide WMATA with timely Notice of termination under this Section, Purchaser shall be automatically deemed to have waived the right of termination under this Section and this Agreement shall remain in full force and effect.

4.3 **Option Fee to WMATA.** In consideration of WMATA granting the Study Period rights to Purchaser, Purchaser shall pay WMATA the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) (the "**Option Fee**") within two (2) business days after the Effective Date.<sup>2</sup> Purchaser may pay the Option Fee by wire transfer, by bank check or by certified check. The Option Fee

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<sup>2</sup> Charging an Option Fee is not customary in the Washington metropolitan area although charging one does have the advantage of providing a seller with "consideration" for the granting of a study period, which is a unilateral option on the purchaser's part. Otherwise, the "consideration" is really only the promise to deliver copies of due diligence materials. The purpose of the Option Fee really being to establish that consideration so this Agreement is legally binding, the Option Fee can be a nominal amount (what law students call a "peppercorn"), e.g. \$100.

is not refundable, is earned by WMATA upon the execution of this Agreement, and is not part of and is in addition to the Deposit and the Purchase Price. *[Alternative to the preceding sentence: The Option Fee is not refundable, is earned by WMATA upon the execution of this Agreement, and is not part of and is in addition to the Deposit but shall be applied to the Purchase Price at Closing.]* Failure to pay the Option Fee on a timely basis shall give WMATA the right to terminate this Agreement by Notice to Purchaser at any time before the Option Fee is paid to WMATA. If WMATA timely gives such Notice of termination, this Agreement shall terminate upon the giving of such Notice, Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, and thereupon WMATA shall return the Deposit (less any portion previously drawn by WMATA) to Purchaser, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**.

**5. Title to Property.**

5.1 **Conveyance at Closing.** At Closing, WMATA shall convey fee simple title to the Property, free and clear of any and all liens, encumbrances or defects except for the Permitted Title Exceptions (as hereinafter defined).

5.2 **Addressing Title and Survey Exceptions.**

5.2.1 Not later than [twenty-one (21) days before the expiration of the Study Period] [\_\_\_\_\_ (\_\_) days after the Effective Date], Purchaser shall deliver to WMATA (i) a commitment for a title insurance policy ("**Title Commitment**") from a reputable nationally recognized title insurance company or agent thereof ("**Title Insurer**"), (ii) a survey for the Land (the "**Survey**") from a reputable surveyor licensed as such in the jurisdiction in which the Land is located showing the boundaries of the Land, the location of all visible improvements on the Land, the location of all easements, rights-of-way, flood plains and other encumbrances of record to the extent the same can be platted, the locations of any encroachments or potential encroachments that are visible, and the rights-of-way of all adjacent public streets, all compliant with current ALTA/ACSM-NSPS standards for land surveys and certified to WMATA (and to Title Insurer and, at Purchaser's option, to Purchaser and any third parties desired by Purchaser) for purposes of reliance, (iii) copies of all matters of record listed in the Title Commitment, (iv) a metes and bounds description of the Land coinciding

with the boundaries as shown on the Survey, and (v) written Notice (“**Title/Survey Exception Notice**”) of all title exceptions and matters shown in the Title Commitment or on the Survey as to which Purchaser objects. Subject to **Section 5.2.7**, Purchaser’s failure to timely provide a Title/Survey Exception Notice shall be a waiver of Purchaser’s right to object to any matters affecting the state of title, all of which shall be Permitted Title Exceptions (as hereinafter defined).

- 5.2.2 If Purchaser has timely given a Title/Survey Exception Notice, WMATA shall give Notice to Purchaser of its willingness to remove any matters referenced in the Title/Survey Exception Notice or to cause them to be insured over by Title Insurer (“**WMATA Title Cure Notice**”) [not later than seven (7) days before the expiration of the Study Period] [within \_\_\_\_\_ (\_\_) days after the date of Purchaser’s Title/Survey Exception Notice].
- 5.2.3 Subject to **Section 5.2.7**, the failure of WMATA to timely give a WMATA Title Cure Notice shall be deemed an election by WMATA not to remedy any such exceptions.
- 5.2.4 Subject to **Section 5.2.7**, WMATA’s failure to include in the WMATA Cure Notice a particular exception among those WMATA will cause to be remedied shall be deemed an election by WMATA not to remedy those objections that are omitted in the WMATA Title Cure Notice.
- 5.2.5 If WMATA shall decline or be unwilling or shall be deemed to decline to remove or insure over any matters affecting title as to which Purchaser objected in the Title/Survey Exception Notice, Purchaser may, but shall not be required to, elect to terminate this Agreement by giving Notice to WMATA expressly declaring this Agreement to be terminated, such Notice to be given not later than [the expiration of the Study Period] [\_\_\_\_\_ (\_\_) days after (i) the date of the WMATA Title Cure Notice, or (ii) the date WMATA was required to give the WMATA Cure Notice as provided above if WMATA did not deliver a WMATA Title Cure Notice]. If Purchaser timely gives such Notice of termination, this Agreement shall terminate upon the giving of such Notice, Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, and thereupon WMATA shall return the Deposit (less any portion

previously drawn by WMATA) to Purchaser, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**.

- 5.2.6 If Purchaser does not timely give such Notice to WMATA of its election to terminate this Agreement, Purchaser shall be deemed to have waived any objection to title or survey existing as of the date of the later of the Title Commitment and the Survey, except the Title Exceptions to be Cured (as hereinafter defined).
- 5.2.7 The following shall be **"Title Exceptions to be Cured,"** even if not included in any Title/Survey Exception Notice: (i) those matters giving rise to title objections that WMATA has expressly undertaken to remove in the WMATA Title Cure Notice; (ii) liens, encumbrances or security interests securing debt incurred by WMATA; (iii) mechanics' liens and materialmen's liens on the Land arising from work done for or on behalf of anyone other than Purchaser; and (iv) judgment liens against WMATA. WMATA shall either remove of record any Title Exception to be Cured or cause the Title Insurer to insure over the same.
- 5.2.8 All matters, objections and exceptions that are not Title Exceptions to be Cured shall be **"Permitted Title Exceptions"** In addition to the matters stated above, "Permitted Title Exceptions" also shall include (i) all matters arising from the actions (or failures to act) of Purchaser or anyone acting on behalf of Purchaser and (ii) other liens, encumbrances and defects in title arising from zoning, subdivision, building or land use ordinances, laws, regulations, restrictions or orders of any legal authority now or hereafter having or acquiring jurisdiction over the Property or over the use and improvement thereof. Anything to the contrary herein notwithstanding, WMATA is not obligated to address any Permitted Title Exception and Purchaser shall not have any right to object to, or to terminate this Agreement on account of, any Permitted Title Exception.
- 5.2.9 If an updated survey or title search reveals any liens, encumbrances or title defects not existing as of the date of the initial Title Commitment (**"Post-Title Commitment Exception"**), Purchaser shall give Notice to WMATA of the Post-Title Commitment Exception and a copy of the document or matter to which Purchaser objects not later than the first to occur of the date set forth for Closing pursuant to **Section 10** or seven (7) days after Purchaser obtains knowledge of the Post-Title Commitment Exception

(“**Post-Title Commitment Title/Survey Exception Notice**”). The parties shall thereafter proceed under **Sections 5.2.1 – 5.2.8** as if the Post-Title Commitment Title/Survey Exception Notice was a Title/Survey Exception Notice, except that no Notice period shall extend beyond the date set for Closing and the Closing date shall not be postponed unless the parties so agree in their sole and absolute discretions.

6. **WMATA’s Representations and Warranties.** WMATA represents and warrants to Purchaser as of the Effective Date as follows:

- 6.1 **Organization.** WMATA is a regional body, corporate and politic, organized pursuant to the WMATA Compact.
- 6.2 **Power and Authority.** Subject to *[if applicable, add: the approval of WMATA’s Board of Directors and]* the provision of Notice to and concurrence by the Federal Transit Administration (“FTA”) as required under **Section 9.8** below, WMATA has the power and authority to sell and convey the Property and to execute this Agreement and has taken the actions required for the execution and delivery of this Agreement.
- 6.3 **No Joinder Required.** Subject to the concurrence by the FTA as provided in **Section 9.8**, the joinder of no person or entity other than WMATA is necessary in order to convey the Property to Purchaser at Closing in accordance with the terms and conditions of this Agreement.
- 6.4 **No Challenges.** To WMATA’s Knowledge, there is not pending any litigation or governmental proceeding preventing the consummation of the sale of the Property by WMATA to Purchaser, or any threatened litigation or governmental proceeding that, if determined adversely, would declare illegal, invalid or non-binding any of the material covenants or obligations of WMATA set forth in this Agreement. The representation and warranty above made to the knowledge of WMATA shall not be deemed to imply any duty of inquiry. **“To WMATA’s Knowledge”** shall mean and refer to only the actual knowledge of the undersigned representative of WMATA, and shall not be construed to refer to the knowledge of any other officer, director, agent, employee or representative of WMATA, or any affiliate of WMATA, or to impose upon the undersigned any duty to investigate the matter to which such actual knowledge or the absence thereof pertains, or to impose upon the undersigned any individual personal liability.
- 6.5 **No Violation.** The execution, delivery and performance of this Agreement does

not, and the consummation of the transactions contemplated hereby will not, violate any provision of any agreement, instrument, order, judgment or decree or, To WMATA's Knowledge, any applicable law or regulation to which either WMATA is a party or by which it or any of its assets is bound.

- 6.6 **Not Foreign Person.** WMATA is not a "foreign person" within the meaning of the Internal Revenue Code.
- 6.7 *[If pressed by Purchaser, add: **Parties in Possession.***<sup>3</sup> To WMATA's Knowledge, (i) there are no tenants or other occupants of the Land in possession by claim under WMATA *[list any known exceptions: except \_\_\_\_\_]*, and (ii) there are no adverse parties in possession of the Land except as may be shown in the land records of the jurisdiction in which the Land is located and/or as might be shown on a Survey.]
- 6.8 *[If pressed by Purchaser, add: **Contracts.*** To WMATA's Knowledge, there are no oral or unrecorded written contracts, agreements, licenses or concessions for the provision of services, supplies, management, maintenance, ownership, use, possession or operation of the Property which will not terminate or expire, or be terminated, at or before Closing except for \_\_\_\_\_ and any that may relate solely to WMATA's facilities and will remain solely WMATA's responsibility.]
- 6.9 *[If pressed by Purchaser, add: **No Violations of Law or Insurance Requirements.*** To WMATA's Knowledge, WMATA has not received any written notice from any governmental authority having jurisdiction over the Property alleging any violation of applicable law that remains pending and uncured, or from any insurance company of any violation by the Property of applicable insurance requirements that remains pending and uncured, and, in either case, that might affect Purchaser and/or the Property post-Closing.]<sup>4</sup>

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<sup>3</sup> WMATA should not give any representation and warranty regarding title itself in this Agreement because WMATA is not a title insurer. (The only exception to that is that WMATA will warrant title "specially" in the Deed, but only at Closing.) The state of title at the outset is a matter for due diligence and back-and-forth between the parties per Section 5. Aside from the special warranty in the Deed, Purchaser must rely on a title insurance commitment and the Survey before Closing and the Deed, a title insurance policy and the Survey after Closing occurs.

<sup>4</sup> Generally speaking, WMATA should not make affirmative representations of legal compliance (which is a subject generally beyond WMATA's, or anyone's, knowledge, should not make representations and warranties about zoning or historic preservation status (both of which are extrinsically determinable by



- 6.10 *[If pressed by Purchaser, add: **Litigation; Condemnation.** To WMATA's Knowledge, there are no actions, proceedings, litigation, governmental investigations or condemnation actions either pending or threatened against the Property.]*

Except for the above representations and warranties, and except for any faults, defects and other conditions on or affecting the Property which WMATA is required to remedy, cure or address under this Agreement, the Property will be purchased and sold "**AS IS,**" "**WHERE IS,**" and "**WITH ALL FAULTS AND LATENT DEFECTS.**" All warranties of marketability or merchantability, habitability, fitness for a particular purpose, and any other warranties are expressly disclaimed.

**7. Purchaser's Representations and Warranties.** Purchaser represents and warrants to WMATA as of the Effective Date as follows:

- 7.1 **Organization.** Purchaser is a \_\_\_\_\_, duly formed, validly existing and in good standing under the laws of the \_\_\_\_\_.  
*[If Purchaser is not formed in the jurisdiction in which the Land is located, add: Purchaser is qualified to do business in the jurisdiction in which the Land is located.]*
- 7.2 **Power and Authority.** Purchaser has the power and authority to purchase the Property and to execute and perform its obligations under this Agreement and has taken the actions required for the execution and delivery of this Agreement; and no consent of Purchaser's officers, partner or members is required to so empower or authorize Purchaser.
- 7.3 **No Joinder Required.** The joinder of no person or entity other than Purchaser is necessary for Purchaser to purchase the Property in accordance with the terms and conditions of this Agreement or for Purchaser to fulfill Purchaser's other obligations subject to and in conformity with the terms and conditions of this Agreement.
- 7.4 **No Challenges.** There is no litigation or proceeding of any type pending or to the knowledge of Purchaser, threatened against, or relating to Purchaser's ability to

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Purchaser), and should avoid making representations and warranties about the size, condition, quality, etc. of the Land or any improvements and any of the contractual Property (see Sections 2.1.3 – 2.1.6) unless the same are heavily qualified (e.g. "To WMATA's Knowledge") or narrowly phrased.

purchase the Property, or that would declare illegal, invalid or non-binding any of Purchaser's obligations or covenants to WMATA.

- 7.5 **No Violation.** The execution, delivery and performance of this Agreement does not, and the consummation of the transactions contemplated hereby will not, violate any provision of any agreement, instrument, order, judgment or decree or, to Purchaser's knowledge, any applicable law or regulation to which Purchaser is a party or by which it or any of its assets is bound.
- 7.6 **WMATA-Specific Representations and Warranties.** Neither Purchaser nor any partner, member, shareholder, officer, director, manager or other person with management or supervisory responsibilities or who is otherwise in a position to control or significantly influence Purchaser's activities or finances (each a "**Principal**"):
- 7.6.1 Is/are not presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from an award of contracts by any governmental entity.
- 7.6.2 Has/have not within the past ten (10) years been convicted of or had a civil judgment rendered against it for: commission of fraud; a criminal offense in connection with obtaining, attempting to obtain, or performing a contract or subcontract with any governmental entity; violation of antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating criminal tax laws, or receiving stolen property.
- 7.6.3 Is/are not presently indicted for or otherwise criminally or civilly charged by a governmental entity with commission of any of the offenses enumerated in the previous paragraph.
- 7.6.4 Is/are not in arrears or default of payment of any money or obligation of a value greater than Three Thousand Dollars (\$3,000) to a governmental entity.
- 7.6.5 Has/have no adjudicated violations nor has paid penalties during the past ten (10) years relating to the housing and building laws, regulations, codes and ordinances of any governmental entity.

- 7.6.7 During the past ten (10) years has/have not had a license revoked that was issued in accordance with the housing, building or professional licensing laws, regulations, codes and ordinances of any governmental entity.
- 7.6.8 Has/have not employed or retained any company or persons (other than a full-time, bona fide employee working solely for it) to solicit or secure a ground lease or fee conveyance of the Property from WMATA.
- 7.6.9 Has/have not paid or agreed to pay, and shall not pay or give, any company or person (other than a full-time, bona fide employee working solely for it) any fee, commission, percentage, or brokerage fee contingent upon or resulting from the award of a ground lease or fee conveyance of the Property from WMATA.
- 7.6.10 To Purchaser's knowledge, has/have employed or been affiliated with any person or entity currently employed by WMATA, or employed by WMATA within the past twelve (12) months, or with material input into the matters covered by the proposed fee conveyance of the Property and employed by WMATA at any time in the past, who has provided any information to it/them that was not also available to all other persons who responded to any Request for Proposals, Joint Development Solicitation, Invitation for Bids or similar public offering that led to the proposed fee conveyance, nor does such a person have any financial interest in Purchaser, nor has such a person provided any assistance to Purchaser or its Principals it or any parent, subsidiary or affiliated entities in responding to said Request for Proposals, Joint Development Solicitation, Invitation for Bids or similar public offering, nor will such a person benefit financially from the any appreciation in land value or development contemplated by this fee conveyance.
- 7.6.11. Has/have offered or given gratuities or will offer or give gratuities (in the form of entertainment, gifts or otherwise) to any director, officer or employee of WMATA with the view toward securing favorable treatment in the approval of Purchaser as a contract purchaser or in the negotiation, amendment or performance of any purchase contract or similar document.
- 7.7 *[If the Land is being acquired as part of an assemblage and it is a requirement that Purchaser be the owner of the remainder of the assemblage at Closing, e.g. under the "adjacent landowner" exception to public bidding in the Joint Development*

*Policies and Guidelines, add: **Adjacent Land.** Purchaser or entities controlled by, under common control with, or in control of Purchaser are the owners of the land adjacent to the Land and known as \_\_\_\_\_ (the “Adjacent Land”).]*

Purchaser agrees to furnish information relating to the provisions of this Section as requested by WMATA.

8. **Purchaser’s Conditions Precedent to Closing.**<sup>5</sup> The obligation of Purchaser to purchase the Property at Closing pursuant to the terms of this Agreement shall be conditioned only upon and subject to the satisfaction, or written waiver by Purchaser, of each of the following conditions:

8.1 **No Previous Termination.** This Agreement shall not have been previously terminated by WMATA or Purchaser as provided in this Agreement.

8.2 **Representations and Warranties.** All representations and warranties of WMATA as set forth in **Section 6** hereof shall be true and correct in all material respects as of the date of Closing.<sup>6</sup>

8.3 **Material Performance.** WMATA shall have performed and complied in all material respects with all of the covenants and conditions required by this Agreement to be performed or complied with at or prior to Closing.

8.4 **Title.** Title to the Property at Closing shall be in the condition required by **Section 5**.

8.5 **No Challenges.** There shall not be any pending litigation or governmental proceedings against or involving WMATA (other than any initiated by or for the benefit of Purchaser) preventing the consummation of the sale of the Property by WMATA to Purchaser, or any threatened litigation or governmental proceedings that, if determined adversely, would declare illegal, invalid or non-binding any of the material covenants or obligations of WMATA set forth in this Agreement.

8.6 *[If applicable, add a condition precedent for rezoning or obtaining building permits or*

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<sup>5</sup> Obviously, the fewer conditions precedent to Purchaser’s obligation to close, the better for WMATA.

<sup>6</sup> The fewer and narrower the representations and warranties made by WMATA, the better it is for WMATA not only in terms of liability for misrepresentation but also the better it is for WMATA in giving Purchaser less wiggle room to not close.

*other entitlements. Be very specific as to what the condition precedent is, e.g. what is to be obtained. Do not create conditions precedent for vaguely stated entitlements. Any such condition precedent should (i) require Purchaser to apply for the same by a stated deadline, (ii) require Purchaser to diligently pursue the same at its sole cost and expense, (iii) require Purchaser to promptly provide WMATA with Notice of all applications, supplements, amendments and related materials, including complete copies, and to keep WMATA informed on a regular (monthly?) basis as to status, (iv) not require WMATA to do anything other than sign such materials where required in its capacity as owner of the Land, but clearly stating either in this Agreement or, preferably, also in the application for that entitlement that any obligation undertaken pursuant to the granting of such entitlement is solely Purchaser's obligation (maybe conditioned upon Closing occurring?) and not an undertaking or obligation of WMATA's, (iv) provide for what happens if the condition is not satisfied by the agreed-upon deadline (and, if termination is an outcome, provide for the assignment by Purchaser to WMATA of all materials and rights relating to the application as a condition to termination, surviving termination, and to return of the Deposit, and (v) state that WMATA has made no representation or warranty with respect to the likelihood of obtaining that entitlement or of the time and cost of obtaining it. Also consider whether a higher Option Fee should be charged up front or if extension fees should be charged at stated intervals if this process exceeds a certain length of time.]]*

If any of the foregoing conditions are not fully satisfied as of the date hereafter set for Closing, Purchaser may, at its option, by giving Notice to WMATA no later than the date set for Closing either: (i) waive such unsatisfied condition precedent in writing and proceed to Closing; (ii) terminate this Agreement, in which event this Agreement shall terminate upon the giving of such Notice, Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, and thereupon WMATA shall return the Deposit (less any portion previously drawn by WMATA) to Purchaser, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**; or (iii) extend the date of Closing one or more times for up to an aggregate of \_\_\_\_\_ (\_\_) days. *[Consider whether an extension fee is appropriate and, if so, what that the dollar amount of that fee should be and when it should be paid. When setting a payment date, be sure that the extension fee is payable sufficiently far in advance so that if it is not timely paid WMATA has enough time to get ready for closing and tender performance so that Purchaser will be in default if Purchaser does not close. Note that failure to pay an extension fee is usually not a "default" because the payment is optional with Purchaser; the consequence of not paying the extension fee is there isn't any extension. So if notice and a cure period are requested by Purchaser, an extension-specific notice and cure period must be provided; be reminded that the cure period must end sufficiently before the non-extended closing date so WMATA can tender performance on a timely basis.]* If Purchaser chooses

**option (iii)** above and all conditions precedent to Purchaser's obligations are not satisfied to Purchaser's satisfaction, or waived by Purchaser, within such additional period, Purchaser shall have the option, by giving Notice to WMATA, to (A) waive such unsatisfied condition(s) precedent and proceed to Closing, or (B) terminate this Agreement, in which event this Agreement shall terminate upon the giving of such Notice, Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, and thereupon WMATA shall return the Deposit (less any portion previously drawn by WMATA) to Purchaser, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**.

9. **WMATA's Conditions Precedent to Closing.** The obligation of WMATA to sell the Property pursuant to the terms of the Agreement shall be conditioned only upon and subject to the satisfaction, or waiver by WMATA, of each of the following conditions:

- 9.1 **No Previous Termination.** This Agreement shall not have been previously terminated by Purchaser or WMATA as provided in this Agreement.
- 9.2 **Representations and Warranties.** All representations and warranties of Purchaser as set forth in **Section 7** hereof shall be true and correct in all material respects as of the date of Closing.
- 9.3 **Payments.** Purchaser shall have made payment of the Deposit, the Option Fee and the Purchase Price in accordance with the terms and conditions of this Agreement.
- 9.4 **Material Performance.** Purchaser shall have performed and complied in all material respects with all of the covenants and conditions required by this Agreement to be performed or complied with at or prior to Closing.
- 9.5 **No Default.** There shall not exist any Default (as hereinafter defined) by Purchaser or circumstances which, with Notice or the lapse of time, could constitute a Default by Purchaser as of the time of Closing.
- 9.6 **No Challenges.** There shall not be any pending litigation or governmental proceedings against or involving Purchaser (other than any initiated by or for the benefit of WMATA) preventing the consummation of the sale of the Property by WMATA to Purchaser, or any threatened litigation or governmental proceedings that, if determined adversely, would declare illegal, invalid or non-binding any of

the material covenants or obligations of Purchaser set forth in this Agreement.

- 9.7 **No Assignment.** No assignment of this Agreement shall have occurred other than in accordance with this Agreement.
- 9.8 **FTA Concurrence** *[if applicable, add: , Board Approval]*. WMATA has obtained the concurrence of the FTA *[and the approval of the WMATA Board of Directors]* to this transaction.
- 9.9 *[If applicable, e.g. in an “adjacent landowner” sale:* **Adjacent Land.** Purchaser, or an entity controlled by Purchaser, under common control with Purchaser, or in control of Purchaser is the owner of the Adjacent Land.]
- 9.10 *[If applicable:* **Covenants, Conditions and Restrictions.** The parties agree on a declaration of covenants, conditions and restrictions (“**CC&Rs**”) to be executed and recorded at Closing in the land records of the jurisdiction in which the Land is located. The CC&Rs shall run with and bind the Land *[if applicable, add: and any additional portion of the TOD Site (as hereinafter defined)]*. All mortgages, deeds of trust, security agreements and other liens shall be subject to and subordinate to the CC&Rs. The CC&Rs shall run with and bind the Land *[if applicable, add: and any additional portion of the TOD Site.]* The CC&Rs shall contain provisions implementing the following and such other terms and conditions as the parties may agree:
- WMATA shall be granted subsurface, surface and/or aerial easements for its benefit protecting WMATA’s continued operation, maintenance, repair, replacement, removal and relocation of its facilities on, over, under and adjacent to the Land.
  - Neither the construction nor the operation of the improvements to be developed on the Land may interfere or cause any interference with (i) any of WMATA’s operations or (ii) the free flow of vehicular or pedestrian traffic to and from *[if applicable, add: the Metro Station or]* any WMATA facilities. The foregoing does not prohibit individual buildings on the Land from being secured against entry.
  - All construction activities on the Land shall be in compliance with WMATA’s Adjacent Construction Project Manual, as it is amended, supplemented, replaced or otherwise modified from time to time, insofar as the construction activities affect WMATA facilities or operations. The

foregoing includes, without limitation, an obligation to pay such fees and costs as are levied thereunder for WMATA's inspection of plans and specifications and construction activity.

- All improvements constructed by Purchaser on the Land must comply with the Americans with Disabilities Act ("**ADA**") and any regulations promulgated thereunder, as they are amended or supplemented from time to time. If any ADA-related improvement to any WMATA facility is made necessary as a result of any improvement, or any subsequent alteration, addition or modification of any improvement, by Purchaser, Purchaser shall be responsible at its sole cost and expense for such ADA-related improvements to WMATA facilities and shall pay such costs or reimburse WMATA for such costs on demand.
- All signage that in any way relates to, refers to or provides directions to *[if applicable, add: the Metro Station or]* WMATA facilities shall be subject to WMATA's approval in WMATA's sole and absolute discretion as to its content, font, size, color, materials, location, construction and similar matters.
- Purchaser shall not cause or permit Hazardous Materials (as hereinafter defined) to be used, generated, stored or disposed of on, about, from or adjacent to the Land, except in compliance with applicable law.
- Purchaser's use of the Land *[and the land adjacent to the Land known as \_\_\_\_\_ (collectively with the Land, the "**TOD Site**")]* must be within the parameters of a "Transit-Oriented Development" and be maintained with a "Continuing Transit Orientation" in accordance with FTA regulations and guidelines. Without limiting the foregoing, *[the Land]* *[the TOD Site]*, will be designed and constructed to constitute a mixed-use real estate development project containing approximately \_\_\_\_\_ (\_\_\_\_\_) square feet of multifamily use, \_\_\_\_\_ (\_\_\_\_\_) square feet of office use, \_\_\_\_\_ (\_\_\_\_\_) square feet of retail use, and/or \_\_\_\_\_ (\_\_\_\_\_) square feet of hotel use.
- All buildings developed on *[the Land]* *[the TOD Site]* must be certified as LEED Silver or better by the US Green Building Council under its LEED for New Construction, LEED for Core and Shell, LEED for Homes or some equivalent for the type of development, or the equivalent of LEED Silver in



that category by another comparable rating organization approved by WMATA in its reasonable discretion.

- If [the Land] [the TOD Site] is to be developed with two or more buildings, the overall development must be certified as LEED Silver by the US Green Building Council under its LEED for Neighborhood Development rating or by another comparable rating organization having a comparable rating and approved by WMATA in its reasonable discretion.
- All owners of [the Land] [the TOD Site] and their respective tenants, occupants, and other third parties claiming by or through them waive all claims against WMATA arising from or relating to noise, vibration, light and/or stray electrical current emanating from WMATA's facilities and operations.
- Purchaser and its contractors must maintain at Purchaser's or its contractors' sole cost and expense insurance acceptable to WMATA in accordance with WMATA's standard insurance requirements to protect WMATA, WMATA's facilities and WMATA's employees, agents, contractors and patrons against personal injury or death, physical damage, and economic loss arising from or related to any act (or omission to act) of Purchaser or its employees, agents, contractors, tenants, licensees and invitees.
- Purchaser will indemnify, defend and hold harmless WMATA for all damages and expenses that may arise in connection with any personal injury or property damage arising from the acts or omissions of, otherwise caused by, Purchaser, its employees, agents and contractors.
- The provisions of **Section 20** ("WMATA-Specific Provisions") below.
- The FTA requires that Purchaser comply with: Title VI of the Civil Rights Act of 1964, 42 USCA 200d, et seq., prohibition against discrimination based on race, color, national origin or sex; all non-discrimination provisions set forth in 49 C.F.R. including, without limitation, those set forth in part 27 thereof, such as 49 C.F.R. 27.7 and 27.9(b); prohibition against discrimination based on disability and compliance with the Americans with Disabilities Act and the regulations adopted thereunder; and provisions in the applicable FTA Master Agreement relating to conflicts of interest and debarment. The FTA may require Purchaser's compliance

with certain laws, regulations and other requirements of the FTA imposed upon WMATA.

- Purchaser shall comply with all applicable state, local and federal laws, rules, regulations, ordinances, judicial or administrative decrees, orders, decisions, authorizations and permits in connection with all work performed in connection with this Agreement.
- [The payment of Additional Entitlement Compensation to WMATA.]
- [The payment of additional compensation to WMATA pursuant to **Section 3.4.**]

If any of the foregoing conditions are not fully satisfied as of the date hereafter set for Closing, WMATA may, at its option by Notice to Purchaser given no later than the date set for Closing, either: (i) waive such unsatisfied condition precedent in writing and proceed to Closing; (ii) terminate this Agreement, in which event this Agreement shall terminate upon the giving of such Notice, Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, and thereupon WMATA shall return the Deposit (less any portion previously drawn by WMATA) to Purchaser, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**; or (iii) extend the date of Closing one or more times for up to an aggregate of \_\_\_\_\_ (\_\_) days. If WMATA chooses **option (iii)** above and all conditions precedent to WMATA's obligations are not satisfied to WMATA's satisfaction, or waived by WMATA, within such extension period, WMATA shall have the option by Notice to Purchaser given no later than the date scheduled for the postponed Closing to (A) waive such unsatisfied condition(s) precedent and proceed to Closing, or (B) terminate this Agreement, in which event this Agreement shall terminate upon the giving of such Notice, Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, and thereupon WMATA shall return the Deposit (less any portion previously drawn by WMATA) to Purchaser, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**.

**10. Closing Date and Location.**

**10.1 Closing Date.** Closing under this Agreement (the “**Closing**”) shall be held within \_\_\_\_\_ (\_\_) days after [the last to occur of (i)] the expiration of the Study Period [and (iii) the FTA concurs in this transaction as required by **Section 9.8** below *[if applicable, add any other conditions precedent, such as rezoning]*, but in no event shall Closing occur more than \_\_\_\_\_ (\_\_) [days] [month(s)] [year(s)] after the Effective Date. Subject to the foregoing, Purchaser may choose the date of Closing by Notice to WMATA given at least \_\_\_\_\_ (\_\_) days before the proposed date of Closing.

**10.2 Location.** Closing will take place at a location within the Washington Beltway to be determined by Purchaser by Notice to WMATA. A party may participate in the Closing without personally appearing by submitting its documents (and, in the case of Purchaser, the Purchase Price and any other sums then payable) to the settlement agent. Title Insurer shall act as the settlement agent unless the parties agree otherwise is in their sole and absolute discretions.

**11. Actions at Closing.** The following shall occur at Closing:

**11.1 Payment of Purchase Price.** At Closing, Purchaser shall pay the Purchase Price to WMATA, subject to adjustments as set forth below. If the Deposit is held in cash, the Deposit in its then-current amount will be credited to the Purchase Price at Closing and WMATA shall be entitled to take direct and exclusive possession of the Deposit. *[If applicable, add: If any security deposits held as cash under any leases or occupancy agreements are to be transferred to Purchaser, then the amount of such security deposits held by WMATA shall be credited to the Purchase Price at Closing and WMATA shall retain the security deposits it is holding in cash as its own property. Such credit shall satisfy the provisions of **Section 11.3.5** below regarding assigning those security deposits to Purchaser.] [If Section 4.3 states that the Option Fee is to be applied to the Purchase Price, add: The Option Fee shall be applied to the Purchase Price.]* The Purchase Price (as so adjusted) shall be delivered to WMATA at the conclusion of Closing by, at WMATA’s option, wire transfer, Title Insurer’s check, bank check, or certified check. Payment to WMATA shall not be conditioned upon or wait for the recordation of the Deed or any action other than Closing to occur.

**11.2 Documents to be Exchanged.**

**11.2.1** *[If applicable:* WMATA and, if necessary, Purchaser shall execute and

deliver the CC&Rs. The CC&Rs shall be recorded in the land records of the jurisdiction in which the Land is located before the Deed (as hereinafter defined) is recorded and, regardless of the order in which the CC&Rs and Deed are recorded, the Land and the Deed shall be subject and subordinate to the CC&Rs.]

11.2.2 WMATA shall execute and deliver a special warranty deed substantially in the form attached hereto as **EXHIBIT C** (the “**Deed**”) conveying good and marketable fee simple title to the Property subject to the Permitted Title Exceptions *[if applicable, add: and the CC&Rs]*.

11.2.3 *[If applicable, add:]* WMATA and Purchaser shall execute and deliver an assignment and assumption agreement with respect to the Property defined in **Sections 2.1.3 – 2.1.6** whereby WMATA assigns such Property to Purchaser and Purchaser assumes all obligations first arising or accruing from and after the Closing date with respect thereto.<sup>7</sup>

11.2.4 WMATA shall execute and deliver an affidavit stating that WMATA is not a “foreign person” as that term is defined under Section 1445 of the Internal Revenue Code of 1954, as amended; provided, however, that such affidavit shall not include any indemnification obligation.

11.2.5 WMATA shall execute and/or deliver such documents as may be necessary to convey title, or to enable Title Insurer to insure title, to the Land free of the Title Exceptions to be Cured.

11.2.6 WMATA shall execute and deliver an owner’s affidavit for the benefit of Title Insurer in commercially customary form except that such affidavit shall not include any indemnification obligation.

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<sup>7</sup> If there are third-party leases, service contracts, etc. applicable to the Property, there may be a lot more closing documents that are necessary or appropriate: assignments of letters of credit held as security deposits (which may require collaboration with the issuing bank and are a long-lead item), tenant estoppel certificates (and, in rare cases, consents to the sale), notices to tenants or service providers of the sale, physical delivery of all files and keys, evidence of termination of any leases or service contracts that are to be terminated as of closing, updated rent rolls, statements of yet-unpaid tenant improvement allowances and not-yet-completed build-outs that were WMATA’s responsibility, and outstanding brokerage commissions, etc. For purposes of this template, it is assumed that there will rarely, if ever, be those complications on property being sold by WMATA so those issues are not addressed.

11.2.7 Each party shall execute (which execution may be in counterparts) and deliver a settlement statement reflecting adjustments pursuant to **Sections 11.1 and 11.3.**

11.2.8 Each party shall execute and deliver any form required by the local jurisdiction in order to record any document, including any form applicable to establishing any grantor's, stamp, documentary, recordation or transfer tax due.

11.2.9 Each party shall execute and deliver such other documents and instruments as may be reasonably required to consummate the transaction contemplated by this Agreement; provided, however, that WMATA shall not be required to execute or deliver any document or instrument that obligates it to indemnify Purchaser, Title Insurer or any other person or entity.

### **11.3 Allocation of Fees and Costs.**

11.3.1 WMATA shall pay any cost to clear title of the Title Exceptions to be Cured.

11.3.2 Purchaser will pay all stamp, documentary, grantor's, transfer and recordation taxes applicable to the Property. WMATA shall claim an exemption from and shall not pay any stamp, documentary, grantor's, transfer or recordation taxes.

11.3.3 Real estate taxes, ad valorem taxes, special taxing district taxes, arena and ballpark taxes, fees and charges, business improvement district taxes, fees and charges, and other taxes, assessments and charges levied by any governmental authority and applicable to the Land shall be assumed by Purchaser as of midnight before the date of Closing. WMATA's tax-exempt status will be taken into account with respect to all of the foregoing such that WMATA will not be required to pay any portion of the foregoing and Purchaser will be responsible for the entire portion of the foregoing that are owed and/or payable with respect to the period following the Closing.

11.3.4 Expenses (other than those adjusted as set forth in the preceding subsection) of the Property shall be apportioned as of midnight before the date of Closing, with WMATA being responsible for those expenses, actual or accrued, applicable to the period before such date and time and

Purchaser being responsible for those expenses, actual or accruing, applicable to the period after such date and time. This subsection includes, without limitation, adjustments with respect to charges for water, sewer, gas, electric, trash removal and all other utilities, which adjustments shall be based on meter readings or invoices, as appropriate, where such are available, and on a *per diem* basis otherwise.

11.3.5 *[If there is income from the Property, add:* Income from the Property shall be apportioned as of midnight before the date of Closing, with WMATA being entitled to the income, actual or accrued, applicable to the period before such date and time and Purchaser being entitled to the income, actual or accruing, applicable to the period after such date and time.<sup>8</sup> Security deposits applicable to any tenants or other occupants of the Property shall be assigned to Purchaser at Closing, except that WMATA may retain any such security deposits to the extent entitled to do so under the terms of such tenants' or other occupants' leases or occupancy agreements. *[If any rents or other charges payable by tenants or other occupants of the Property are in arrears at Closing, the delinquent rents or other charges shall be allocated as follows: insert "the business deal" here.]]*

11.3.6 WMATA shall pay its own attorneys' and advisors' fees.

11.3.7 Purchaser shall pay its own attorneys' and advisors' fees, any title insurance premiums, all other costs of title examination and other title company charges, all surveyor's fees and expenses, any settlement or closing fee or other charge levied by the settlement agent, any recording charges levied by the recording clerk (except for those incident to clearing title as set forth above), and any and all other miscellaneous fees, charges and other costs and expenses incident to the Closing and the transactions contemplated herein.

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<sup>8</sup> This is a very simplistic allocation because it assumes that all tenants are current on their rent. A more sophisticated approach would deal with tenants who are in arrears: how do the parties allocate what has been collected and what is still outstanding? What do the parties do about percentage rent, operating expense and real estate tax pass-throughs and other payments, whether collected, due but not collected, or not yet due, that apply to periods (quarters, years, etc.) not tied only to the month in which closing occurs?

**12. Casualty and Condemnation.**

12.1 **Casualty.**<sup>9</sup> The risk of loss or damage to the Property by fire or other casualty shall remain with WMATA until the Deed is delivered at Closing. Purchaser shall have no right to terminate this Agreement on account of any loss or damage to the Property by fire or other casualty. WMATA shall not, in any event, be obligated to effect any repair, replacement or restoration, but may do so at its option.]

12.2 **Eminent Domain.** If, prior to Closing, all or any material part of the Property shall be condemned by governmental or other lawful authority (including without limitation, any notice of intention to condemn or to exercise a power of eminent domain) or there is any deed-in-lieu thereof for a material part of the Property (each a “**Taking**”), Purchaser, at its option to be exercised by Notice to WMATA given no later than the first to occur of (i) the Closing Date or (ii) thirty (30) days after WMATA shall have Notified Purchaser of such Taking, shall either: (a) proceed to Closing, in which event Purchaser shall close hereunder and, with regard to awards on account of the Taking, if the award shall have been paid to WMATA prior to the Closing then at Closing such award shall be credited against the Purchase Price, or, if such award has not been received by WMATA by Closing, at Closing WMATA shall assign its claim for such award to Purchaser; or (b) terminate this Agreement by Notice to WMATA, in which event this Agreement shall terminate upon the giving of such Notice, Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, and thereupon WMATA shall return the Deposit (less any portion previously drawn by WMATA) to Purchaser, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**. Any actual or threatened Taking for less than a material part of the Property shall have no effect on this Agreement and this Agreement shall remain in full force and effect regardless thereof. *[If appropriate, try to define what “a material part of the Land” is, for example: A “material part of the Land” shall be \_\_\_\_\_ (\_\_\_%) of the area of the Land.]*

**13. Assignment.** This Agreement may not be assigned by either party without the other party’s prior written consent, which consent may be withheld in the requested party’s

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<sup>9</sup> This provision is pretty rudimentary. It assumes that the Land is unimproved or that there is nothing valuable to Purchaser on it. If the Land is improved, customize a provision by addressing the materiality of the casualty loss.

sole and absolute discretion. A change in control of Purchaser and/or a merger, consolidation or division of Purchaser shall be deemed an assignment for purposes of this Section. Notwithstanding the foregoing, at Closing Purchaser shall be permitted to assign its rights and obligations under this Agreement without the prior written consent of WMATA to an entity that is under the control of, under common control with, or in control of Purchaser provided that (i) the assignee is not a foreign government, the United Nations, or any agency, department, bureau, ministry or subdivision of any of them or any person, natural or legal, having sovereign immunity, and (ii) Purchaser gives Notice of the assignment to WMATA and such Notice (a) identifies the specific affiliate relationship and (b) includes the certification attached hereto as **EXHIBIT D** signed by the purported assignee. Any assignment made in violation of this Section shall be null and void.

#### **14. Indemnification.**

**14.1 Generally.** Purchaser shall indemnify, defend and hold harmless WMATA and its directors, officers, employees, agents and contractors (collectively the “**Indemnified Parties**”) from and against any and all claims, actions, proceedings, judgments, awards, losses, damages, penalties, costs and expenses (including, without limitation, reasonable attorneys’ fees and court costs), whether or not suit is brought, that may arise under or in connection with the acts (or omissions to act) of Purchaser or its employees, agents and contractors with respect to the Property and/or any WMATA facilities thereon or thereunder. The foregoing includes, without limitation, an obligation to repair any damage and/or restore to the Land and/or any WMATA facilities caused by or arising from the acts (or omissions to act) of Purchaser or its employees, agents and contractors so that the Land and/or WMATA facilities are in the same condition as on the Effective Date.

**14.2 Environmental Matters.**<sup>10</sup> Notwithstanding **Section 14.1**, responsibility for environmental matters shall be allocated as set forth in this Section. Purchaser agrees, to the fullest extent permitted by law, to indemnify, defend and hold the Indemnified Parties harmless from and against any and all any and all claims, actions, proceedings, judgments, awards, losses, damages, penalties, costs and expenses (including, without limitation, reasonable attorneys’ fees and court costs), whether or not suit is brought, which may be imposed upon, or incurred by, or asserted against any Indemnified Party in connection with the installation,

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<sup>10</sup> Note that under this Agreement as written, Purchaser is buying the Property “as is” but Purchaser is not affirmatively indemnifying WMATA against pre-Closing HazMats (unless, of course, Purchaser is the cause of them). If that isn’t “the deal,” rewrite this Section as appropriate.



use, generation, removal, treatment, disposal, storage or presence of any Hazardous Materials (as hereinafter defined) which (i) Purchaser or Purchaser's employees, agents or contractors place on, in, or under the Property prior to Closing and/or (ii) any person or entity other than WMATA and its employees, agents or contractors place on the Property after Closing. The foregoing applies whether such claims, actions, proceedings, judgments, awards, losses, damages, penalties, costs and expenses (including, without limitation, reasonable attorneys' fees and court costs) are incurred by an Indemnified Party as a result of a claim asserted or instigated by WMATA or by any third party. The term "**Hazardous Materials**" shall mean any materials, substances or wastes that are (a) defined pursuant to, listed in, subject to or regulated under any Environmental Law; or (b) petroleum, crude oil or any fraction thereof; or (c) asbestos in any form or any condition; or (d) any radioactive material, including any source, special nuclear or byproduct material as defined in 42 U.S.C. §2011 et seq., or (e) polychlorinated biphenyls or substances or compounds containing polychlorinated biphenyls. The term "**Environmental Law**" means any federal, state or local laws, ordinances or regulations relating to or addressing the protection of the air, the land, the water or the environment or public health or safety, including but not limited to the Clean Air Act, 42 U.S.C. §§ 7401 et seq.; the Clean Water Act, 33 U.S.C. §§ 1251 et seq.; the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq.; the Emergency Planning and Community Right to Know Act, 42 U.S.C. §§ 11001 et seq.; the Occupational Safety and Health Act, 29 U.S.C. §§ 651 et seq.; the Oil Pollution Act, 33 U.S.C. §§ 2701 et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq.; the Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq.; the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq.; and any similar state or local laws, ordinances, or regulations.

14.3 **Survival.** The provisions of this **Section 14** shall survive Closing and/or the termination of this Agreement.

15. **Notices.** All Notices, demands and communications permitted or required to be given hereunder ("**Notices**") shall be in writing and sent by (i) registered or certified United States mail, return receipt requested, first class postage prepaid, in which case the Notice shall be deemed given on the date of actual receipt, or (ii) hand-delivery, in which case the Notice shall be given on the date of actual receipt, or (iii) nationally-recognized overnight courier, properly addressed, and fully prepaid for next business day delivery, in which case the Notice shall be deemed given on the date that is one (1) business day after the same was deposited with the overnight courier, or (iv) if an e-mail or facsimile address is set forth below, by e-mail or facsimile, in which event the Notice shall be deemed given on the day sent if sent on a business day before 3:00 pm recipient's time or, otherwise,

on the next business day. Notices shall be addressed to WMATA or Purchaser, as the case may be, at the address shown below or to such other address as either party shall Notify the other in accordance with the provisions hereof. Refusal to accept delivery or inability to make delivery because the intended recipient has not provided a correct or current address shall constitute actual receipt as of the time of attempted delivery. Counsel may give Notices on behalf of a party.

Purchaser:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_  
E-mail: \_\_\_\_\_  
Fax: \_\_\_\_\_

With a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_  
E-mail: \_\_\_\_\_  
Fax: \_\_\_\_\_

WMATA:

Office of Real Estate and Parking  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, N.W.  
Washington, DC 20001  
Attn: Vice President  
E-mail: [realestate@wmata.com](mailto:realestate@wmata.com)

With a copy to:

Office of General Counsel  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, N.W.  
Washington, DC 20001  
Attn: General Counsel  
Fax: 202-962-2550

**16. Default.**

**16.1 By Purchaser Before or At Closing.**

**16.1.1 If prior to Closing:**

**16.1.1.1** Purchaser breaches the terms of **Section 13** (“Assignment”); or

**16.1.1.2** Purchaser makes any material misrepresentation in this Agreement or in any submission to WMATA relating to this Agreement; or

**16.1.1.3** Purchaser files a voluntary petition in bankruptcy or is adjudicated bankrupt or insolvent, makes an assignment for the benefit of creditors, or files any petition or answer seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future Federal or State law, or seeks, acquiesces in or consents to the appointment of any trustee, receiver or liquidator of Purchaser or all or any material part of its assets or of its interest in this Agreement; or

**16.1.1.4** any petition is filed against Purchaser with respect to any matter stated in the preceding subsection and Purchaser fails to have the proceedings initiated by such petition stayed or dismissed within sixty (60) days after the filing thereof; or

**16.1.1.5** Purchaser breaches or fails to comply with any requirement or obligation set forth in this Agreement for which a time period is stated elsewhere in this Agreement within the stated time; or

**16.1.1.6** Purchaser breaches or fails to comply with any other requirement or obligation set forth in this Agreement, other than the failure to proceed to Closing, and if WMATA gives Purchaser Notice of such noncompliance, and Purchaser fails to correct or cure such noncompliance within \_\_\_\_\_ (\_\_) days after WMATA has given Purchaser Notice of such noncompliance;

then a “**Default**” by Purchaser shall exist hereunder. Upon the occurrence of such a Default by Purchaser prior to Closing, WMATA shall be entitled

to either (i) apply some or all of the Deposit to remedy any such Default, including to pay any costs or expenses incurred by WMATA in connection therewith without thereby constituting liquidated damages or waiving the Default, and keeping this Agreement in effect, or (ii) terminate this Agreement by Notice to Purchaser, in which event this Agreement shall terminate upon the giving of such Notice, Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, and WMATA shall retain the Deposit as liquidated damages and (except for the return and delivery of due diligence material as aforesaid) WMATA's sole and exclusive remedy, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**.

16.1.2 If Purchaser fails to timely consummate Closing as required hereunder, WMATA's sole remedy shall be to terminate this Agreement by written Notice to Purchaser, in which event this Agreement shall terminate upon the giving of such Notice, Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, and WMATA shall retain the Deposit as liquidated damages and (except for the return and delivery of due diligence material as aforesaid) WMATA's sole and exclusive remedy, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**.

16.1.3 The parties agree that it would be impracticable and difficult to ascertain the actual damages suffered by WMATA as a result of a Default by Purchaser and that the liquidated damages provided for herein represent a reasonable estimate of such damages and are not intended to be a forfeiture or penalty. The provision for liquidated damages does not affect WMATA's contractual entitlement to indemnification under this Agreement.

16.1.4 Except as otherwise expressly stated in this Agreement, all remedies of WMATA under this Agreement and under applicable law are cumulative.

**16.2 By WMATA Before or At Closing.**

16.2.1 If WMATA breaches or fails to comply with any requirement or obligation set forth in this Agreement prior to or at Closing, then Purchaser may give WMATA Notice of such noncompliance and if WMATA fails to correct or cure such noncompliance within \_\_\_\_\_ (\_\_) days after Purchaser has given WMATA such Notice of such noncompliance, a **“Default”** by WMATA shall exist hereunder.

16.2.2 Upon the occurrence of a Default by WMATA prior to or at Closing, Purchaser shall be entitled to either (i) terminate this Agreement by Notice to WMATA, in which event this Agreement shall terminate upon the giving of such Notice, Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, and thereupon WMATA shall return the Deposit (less any portion previously drawn by WMATA) to Purchaser, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**, or (ii) seek specific performance of this Agreement. Purchaser waives its right to seek any monetary damages if there is a Default by WMATA prior to or at Closing; provided, however, that such waiver shall not apply, and Purchaser shall have all remedies available to it at law or in equity, if WMATA sells the Property to a third party or intentionally encumbers title to the Property in such a way to render specific performance of this Agreement impossible or impracticable.

16.3 **After Closing.** If either party shall fail to perform its obligations under this Agreement after Closing, the other party shall have any and all rights and remedies allowed at law or in equity.

**17. Relationship of the Parties.**

17.1 **Not Joint Venturers.** Notwithstanding any other provision of the Agreement, or any agreements, contracts or obligations which may derive herefrom, nothing herein shall be construed to make the parties partners or joint venturers, or to render either party liable for any of the debts or obligations of the other party, it being the intention of this Agreement to merely create the relationship of seller and purchaser with regard to the Property.

- 17.2 **No Third-Party Beneficiary.** Nothing in this Agreement creates or is intended to create any third party beneficiary. No third party may rely on any provision of this Agreement.
18. **No Commissions.**<sup>11</sup> Purchaser and WMATA each represents and warrants to the other that no real estate broker or other person is entitled to claim a commission by or through the representing party as a result of the execution and delivery of this Agreement.
19. **Governing Law.** This Agreement shall be construed in accordance with the laws of the jurisdiction in which the Land is located, without regard to its provisions on conflicts of laws, except to the extent that the laws of that jurisdiction conflict with the WMATA Compact, in which case WMATA shall be governed by the WMATA Compact. Jurisdiction and venue for any action against WMATA shall lie solely in the Federal District Court having jurisdiction.
20. **WMATA-Specific Provisions.**
- 20.1 **WMATA Compact.** At no time shall Purchaser assert for its own benefit, or attempt to claim or assert, an exemption or immunity available under the WMATA Compact.
- 20.2 **No Officials to Benefit.** Purchaser and WMATA each hereby covenants and agrees that: (i) no member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this Agreement if made with a corporation for its general benefit; and (ii) no member, officer or employee of WMATA or of a local public body during his/her tenure or one year thereafter shall have any interest, direct or indirect, in this Agreement or the proceeds thereof.
- 20.3 **No Gratuities.** The giving of or offering to give gratuities, in the form of entertainment, gifts or otherwise, by Purchaser, or any agent, representative or other person deemed to be acting on behalf of Purchaser or any supplier or subcontractor furnishing material to or performing work under this Agreement, or any agent, representative or other person deemed to be acting on behalf of such supplier or subcontractor, to any director, officer, employee or agent of WMATA,

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<sup>11</sup> Obviously, if there is a broker involved on either side, customize a provision to so state and address which party is responsible for the commission.

or to any director, officer, employee or agent of any of WMATA's agents, consultants or representatives, with a view toward securing an agreement or securing favorable treatment with respect to the awarding, amending, or the making of any determinations with respect to performance under this Agreement, is expressly forbidden. The terms of this Section shall be broadly construed and strictly enforced in the event of violation hereof.

20.4 **Anti-Deficiency Clause.** WMATA and Purchaser acknowledge and agree that any obligations of WMATA under this Agreement that directly or indirectly require the expenditure by WMATA of any of its funds are subject to the appropriation and availability of funding through WMATA's budgetary procedures. WMATA shall exercise its best efforts to accomplish all obligations under this Agreement that require the expenditure of funds by WMATA prior to Closing. In the event of non-appropriation or the unavailability of funds, WMATA shall give Notice thereof to Purchaser and either WMATA or Purchaser may elect to terminate this Agreement by Notice to the other given within \_\_\_\_\_ ( ) days of WMATA's Notice of non-appropriation or unavailability of funds. If either party timely gives such Notice of termination, this Agreement shall terminate upon the giving of such Notice, Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, and thereupon WMATA shall return the Deposit (less any portion previously drawn by WMATA) to Purchaser, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**.

20.5 **Uniform Relocation Act.** The parties acknowledge that the transaction contemplated by this Agreement is a voluntary acquisition under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

## 21. **Interpretation.**

21.1 **Section References.** The Section headings used in this Agreement are for reference and convenience only, and shall not enter into the interpretation of this Agreement. All references in this Agreement to Sections are references to Sections of this Agreement unless otherwise specified.

21.2 **Singular and Plural.** Wherever in this Agreement the singular number is used, the same shall include the plural and vice versa, as the context shall require.

- 21.3 **Exhibits Incorporated.** All exhibits to this Agreement shall be considered incorporated herein by reference and made a material part hereof.
- 21.4 **Including, Without Limitation.** Wherever the words “including,” “e.g.,” “such as,” or “for example” appear in this Agreement, they mean “without limitation.”
- 21.5 **No Construction Against Draftsman.** No provision of this Agreement shall be construed in favor of, or against, a party by reason of any presumption with respect to the drafting of this Agreement. Both parties to this Agreement have been, or have had the opportunity to be, represented by counsel of their choosing.

**22. Miscellaneous Provisions.**

- 22.1 **Entire Agreement.** This Agreement contains the entire agreement between the parties hereto and is intended to be an integration of all prior or contemporaneous agreements, conditions or undertakings between the parties. There are no promises, agreements, conditions, undertakings, warranties or representations, oral or written, express or implied, between and among the parties other than as herein set forth.
- 22.2 **Amendment.** No amendment, supplement, change or modification of this Agreement shall be valid unless the same is in writing and signed by WMATA and Purchaser.
- 22.3 **No Waiver.** No purported or alleged waiver of any of the provisions of this Agreement shall be valid or effective unless the same is in writing and signed by the party against whom it is sought to be enforced.
- 22.4 **Successors and Assigns.** This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective estates, legal representatives, and permitted successors and assigns.
- 22.5 **No Recordation.** This Agreement shall not be recorded, in any manner or form, by WMATA or Purchaser. If Purchaser causes this Agreement to be recorded, the same shall be a material default hereunder and, (i) without the giving of Notice or the opportunity to cure, WMATA is authorized in its own name or as Purchaser’s attorney-in fact and agent, such being coupled with an interest and irrevocable, to cause the release from the public records of this Agreement at Purchaser’s expense, and (ii) WMATA may terminate this Agreement by Notice to Purchaser, whereupon this Agreement shall terminate upon the giving of such Notice,



Purchaser shall return to WMATA any due diligence information or material provided by WMATA, Purchaser shall assign to WMATA (without recourse) and deliver to WMATA copies of all due diligence information about the Property generated by or for Purchaser, and thereupon WMATA shall return the Deposit (less any portion previously drawn by WMATA) to Purchaser, whereupon Purchaser and WMATA shall have no further rights or obligations under this Agreement except as may have accrued under **Section 14**.

- 22.6 **Days.** Wherever herein reference is made to “days,” the same shall mean “calendar days” unless otherwise expressly stated. Wherever in this Agreement a time period shall end on a day which is a Saturday, Sunday or legal holiday, said time period shall automatically extend to the next date which is not a Saturday, Sunday, or legal holiday.
- 22.7 **Severability.** If any provision of this Agreement or the application thereof to any person or circumstance shall be held violative of any applicable laws or unenforceable, for any reason, the invalidity or unenforceability of any such provision shall not invalidate or render unenforceable any other provision hereof, which shall remain in full force and effect.
- 22.8 **Time is of the Essence.** Time is of the essence of the parties’ performance under this Agreement.
- 22.9 **Counterparts.** This Agreement may be executed in counterparts, each of which together shall constitute one single Agreement.
- 22.10 **Copies.** This document may be signed and exchanged electronically, by PDF or by other means other than an original signature, each of which shall be valid and binding, and it shall not be necessary for any party to have an original signature to make this Agreement effective.
- 22.11 *[In D.C. add: ]***Soil Characteristics.** The characteristic of the soil on the Land, as described by the Soil Conservation Service of the U.S. Department of Agriculture in the Soil Survey of the District of Columbia and as shown on the Soil Maps therein, is urban land. For further information, Purchaser may contact a soil testing laboratory, the District of Columbia Department of Environmental Services, or the Soil Conservation Service of the U.S. Department of Agriculture.

*[If applicable, add: ]***23. Confidentiality.** Subject to WMATA’s obligations under its Public Access to Records Policy, as it may be amended, supplemented, replaced or otherwise modified

from time to time, the parties agree to keep the term and conditions of this Agreement, and Purchaser shall keep any due diligence information about the Property provided by WMATA, confidential to themselves and their affiliates and not disclose the same, except that the parties may make disclosure: (i) to their respective attorneys, accountants, investors and prospective investors, lenders and prospective lenders, agents, consultants and advisors in this transaction; (ii) to Title Insurer, surveyors, architects, engineers, appraisers and other professionals who are independent contractors who may be engaged to implement the transaction contemplated by this Agreement; (iii) of any information that was previously or is hereafter publicly disclosed (other than in violation of this Section); (iv) in the course of any dispute resolution proceeding between WMATA and Purchaser; and/or (v) to comply with any law, rule or regulation.

24. **Defined Terms.** The definitions of the following terms can be found in the places noted:

- a) Additional Entitlement – Section 3.3.
- b) Additional Entitlement Compensation – Section 3.3.
- c) Adjacent Land – Section 7.7.
- d) Agreement – Preamble.
- e) Appraisal Procedure – Section 3.3.
- f) Appraiser – Section 3.3.
- g) CC&Rs – Section 9.10.
- h) Closing – Section 10.1.
- i) Deed – Section 11.2.
- j) Default (by Purchaser) -- Section 16.1.
- k) Default (by WMATA) – Section 16.2.
- l) Deposit – Section 3.2.
- m) Fair Market Value As Re-entitled – Section 3.3.
- n) FTA – Section 6.2.
- o) Hazardous Materials – Section 14.2.
- p) Indemnified Parties – Section 14.1.
- q) Land – Recitals.
- r) Metro Station – Recitals.
- s) Notice – Section 15.
- t) Option Fee – Section 4.3.
- u) Permitted Title Exceptions – Section 5.2.
- v) Post-Title Commitment Exception – Section 5.2.
- w) Post-Title Commitment Title/Survey Exception Notice – Section 5.2.
- x) Property – Section 2.1.
- y) Purchase Price – Section 3.1.
- z) Purchaser – Preamble.
- aa) Study Period – Section 4.1.

- bb) Survey – Section 5.2.
- cc) Taking – Section 12.2.
- dd) Title Commitment – Section 5.2.
- ee) Title Insurer – Section 5.2.
- ff) Title/Survey Exception Notice – Section 5.2.
- gg) WMATA – Preamble.
- hh) WMATA Compact – Preamble.
- ii) WMATA Title Cure Notice – Section 5.2.
- jj) WMATA's Knowledge – Section 6.4.

[Signatures appear on the following page]

**IN WITNESS WHEREOF**, the parties hereto have executed and sealed this Agreement as of the Effective Date.

WITNESS:

WMATA:  
**WASHINGTON METROPOLITAN AREA  
TRANSIT AUTHORITY**

\_\_\_\_\_

By: \_\_\_\_\_ (SEAL)  
Name:  
Title:

Approved as to form and legal sufficiency:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
WMATA Office of General Counsel

WITNESS:

PURCHASER:  
\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_ (SEAL)  
Name:  
Title:

**EXHIBIT A**

**DESCRIPTION OF THE LAND**

**EXHIBIT 3.2.2**

**FORM OF LETTER OF CREDIT DEPOSIT**

[NAME AND ADDRESS OF ISSUING BANK]

NOTE: ADDRESS MUST BE IN THE WASHINGTON, D.C. METROPOLITAN AREA]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

ATTN: STANDBY LETTER OF CREDIT DEPARTMENT

IRREVOCABLE STANDBY LETTER OF CREDIT

[Date]

[Reference Number]

**Washington Metropolitan Area Transit Authority**

600 Fifth Street, N.W.

Washington, D.C. 20001

Attn: Director, Office of Real Estate and Parking

Gentlemen:

By the order of \_\_\_\_\_ (the "Applicant"), we hereby  
open in your favor our irrevocable standby letter of credit for the amount of

\_\_\_\_\_ Dollars (U.S.) (U.S. \$\_\_\_\_\_),

available for payment at sight upon demand by presentation on us at the address stated above of your  
statement substantially in the form of Exhibit A attached hereto signed by an authorized signatory on  
your behalf. All demands drawn in compliance with the terms of this instrument will be duly honored  
upon presentation. Demands need not be endorsed on this letter of credit itself and the original of this  
letter of credit need not accompany any presentation. Presentation may be made by messenger, by  
overnight courier service or by telefax. Presentation shall be made to us at the following address:

\_\_\_\_\_ or, if made  
by telefax, to the following telephone number: \_\_\_\_\_. Any presentation by telefax  
shall have a cover sheet marked 'URGENT. FAX PRESENTATION UNDER STANDBY LETTER OF CREDIT  
[REFERENCE NO.]', and the document(s) received and printed out by the undersigned shall be deemed  
to be original under ISP98 Rule 4.15 (Original, Copy, and Multiple Documents). You are requested to

telephone the undersigned at **[telephone number(s)]** and to identify this letter of credit and your presentation being telefaxed that same business day as a courtesy and not as a condition limiting the undersigned's obligations.

This initial term of this letter of credit expires at the close of business at our address above on \_\_\_\_\_, 20\_\_ and shall automatically be extended from year-to-year thereafter, without amendment or notice to you or to the Applicant, unless we give you actual written notice of non-extension at least thirty (30) days prior to any annual expiration date. Such notice of non-extension shall be given by overnight courier to your address as stated above or to such other address as you give us notice of, as stated below. Upon your receipt of such notice, you may draw on us prior to the then-relevant expiration date for the unused balance of this letter of credit. If an expiration date is a Saturday, Sunday or legal holiday, the expiration date shall automatically be extended to our next business day when such condition no longer exists. If on the last business day for presentation the place for presentation stated in this letter of credit is for any reason closed, other than such business day being a Saturday, Sunday or legal holiday, and you do not make timely presentation because of the closure, then the last day for presentation is automatically extended to the day occurring thirty (30) calendar days after that place for presentation re-opens for business or, if earlier, thirty (30) calendar days after the undersigned gives you a written notice in which the undersigned authorizes another reasonable place for presentation and that place is open for business on the last day for presentation and on each of the preceding fifteen (15) business days. The extensions of the term of this letter of credit shall not be subject to any limitation imposed or implied by the Uniform Commercial Code (including, without limitation, Section 5-106(d)) or other applicable law.

We agree to deliver payment in full of each demand made on this instrument without any processing, check, renegotiation or other fees whatsoever to your offices set forth above, or to such account as you may give us wiring instructions, within three (3) business days after the time of presentation. Payment shall be made by wire transfer or by check, as you instruct us in writing at the time of presentation. No fees shall be levied on you for any presentment or payment. Any such fees levied by the undersigned shall be for the account of the Applicant.

Partial drawings are permitted. Draws under this letter of credit will be honored in the order received, as determined by us (any such determination to be conclusive), and to the extent that there remains an amount available to satisfy the most recent draw. If a demand exceeds the amount available, but the presentation otherwise complies, the undersigned undertakes to pay the amount available.

You may change your address for receipt of notices under this letter of credit by giving us notice at our address stated above of your changed address.

This letter of credit is transferable, without any transfer fee payable by you, and may be transferred successively by subsequent transferees. Transfers shall be effectuated upon presentation of the original of this letter of credit and any amendments hereto, accompanied by our transfer form appropriately completed. Any transfer fee shall be for the account of the Applicant.

Except to the extent inconsistent with the express terms of this letter of credit, this letter of credit shall

be governed by the International Standby Practices 1998, International Chamber of Commerce Publication No. 590, and, to the extent not so governed, by the statutes and case law of the District of Columbia.

Very truly yours,

[NAME OF ISSUING BANK]

By:

\_\_\_\_\_

Name:

Title:



Exhibit A to  
Letter of Credit

[Date]

[NAME OF ISSUING BANK]  
[ADDRESS OF ISSUING BANK]

Attn: \_\_\_\_\_

Subject: Your letter of credit number \_\_\_\_\_  
dated \_\_\_\_\_, 20\_\_ (the "Letter of Credit")

Gentlemen:

The undersigned hereby certifies that it is entitled to draw on the Letter of Credit under the terms of either (i) that certain \_\_\_\_\_, dated \_\_\_\_\_, 202\_, as it may have been amended, supplemented, assigned or otherwise modified to date, or (ii) the Letter of Credit itself, as it may have been amended, supplemented, assigned or otherwise modified to date.

The undersigned hereby presents the Letter of Credit for payment in the amount of \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

Payment is to be made in accordance with the payment instructions attached.

Very truly yours,

[NAME OF THEN-CURRENT BENEFICIARY]

By: \_\_\_\_\_  
Name:  
Title:

INSTRUCTIONS FOR PAYMENT

**WIRE & ACH**  
**INSTRUCTIONS for**  
**WMATA**

Effective 02/18/12

***Routing Transit Number:***

**121000248**

***Bank Name:***

**Wells Fargo Bank, N.A.**

***Branch Address:***

**1753 Pinnacle Dr.  
3rd Floor, South Tower  
McLean, VA 22102**

***WMATA's Account #:***

**2000035167097**

***Account Name:***

**Washington Metro Area Transit  
Authority**

**Revenue Fund Account**

***Account Address:***

**600 Fifth St, NW  
Washington, DC 20001**

***Reference Information:***

**Invoice number,  
Customer/Vendor number,  
Reason for wire, Project name,  
WMATA's contact person, etc.**

**EXHIBIT 4.1.2**

**RIGHT OF ENTRY AGREEMENT**

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY  
RIGHT OF ENTRY AGREEMENT**

**THIS RIGHT OF ENTRY AGREEMENT (“Agreement”)** is made and entered into this day of \_\_\_\_\_, 20\_\_ by and between the **WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY**, a body corporate and politic, having a principal business address at 600 Fifth Street, NW, Washington, DC 20001 (**“WMATA”**) and \_\_\_\_\_, a \_\_\_\_\_ having a principal business address at \_\_\_\_\_ (**“Permittee”**).

**WITNESSETH:**

**WHEREAS**, WMATA owns the Premises (as defined below); and

**WHEREAS**, Permittee has requested and WMATA is willing to grant Permittee the non-exclusive right to enter the Premises for due diligence activities, subject to the terms and conditions set forth below.

**NOW, THEREFORE**, in consideration of the foregoing, One Dollar (\$1.00), and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **Incorporation of Recitals.** The Recitals set forth above are incorporated herein by this reference to the same extent and with the same force and effect as if fully hereinafter set forth.
2. **Description of Premises.** The property that is the subject of this Agreement is that certain tract of land, comprising approximately \_\_\_\_\_ square feet, known as \_\_\_\_\_, **located** in \_\_\_\_\_ (the **“Premises”**).
3. **Term of Agreement.** This Agreement commences on the date hereof and, subject to Paragraph 10 below, terminates on \_\_\_\_\_.

4. Use of Premises. WMATA grants unto Permittee, including, but not limited to, its officers, employees, contractors, subcontractors, guests, and agents, if any (hereinafter collectively and individually, “**Permitted Users**”), a non-exclusive license to enter onto the Premises for the sole purpose of conducting such non-invasive investigations, inspections, audits, analyses, surveys, tests, examinations, studies, and appraisals of the Premises as Permittee deems necessary or desirable, at Permittee's sole cost and expense, in order to determine whether the Premises are suitable for Permittee's purposes. Invasive testing, such as core drilling and soil sampling, is not permitted absent WMATA’s separate express written agreement. Permittee shall provide WMATA with copies of all work plans, sampling and analytical protocols, laboratory analysis results and reports, and surveys obtained in connection with this Agreement.
5. Coordination of Access. All access to the Premises shall be only Monday-Friday (except Federal holidays) during the hours of 9:00 am – 5:00 pm unless WMATA expressly grants Permittee written permission otherwise. Permittee shall coordinate with WMATA for entry on the Premises and the performance of any physical tests, investigations, analyses and/or studies of the Premises. Permittee shall give WMATA reasonable advance notice of any entry on the Premises prior to commencing any such physical tests, investigations, analyses and/or studies of the Premises. At WMATA's election, WMATA may designate a representative to accompany Permittee while on the Premises, in which event Permittee shall not enter onto the Premises unless so accompanied. Should a WMATA escort be necessary or appropriate, in WMATA’s sole and absolute discretion, Permittee shall pay the charges therefor, levied in accordance with WMATA’s standard rates, upon demand.
6. Non-Interference with WMATA Activities. Pursuant to the terms of this Agreement, Permittee may only use the Premises in such manner and at such times as herein described and shall not interfere with the use, construction, maintenance, repair and/or operations of WMATA or of any tenant. Permittee or other Permitted Users shall not contact any tenant directly. Permittee shall not permit any mechanics' liens to be filed against the Premises or any part thereof. The requirements of this Paragraph shall survive the expiration or any earlier termination of this Agreement.
7. Damage to WMATA Property. Permittee and other Permitted Users shall not materially alter or disturb the Premises. Permittee shall be responsible for, and must make good at its own expense, all damage to WMATA property caused by its acts or those of the Permitted Users and others acting on behalf of Permittee. Permittee shall carry out such repair, restoration, or replacement within fifteen (15) business days of Permittee’s receipt of notice from WMATA except in the case of any emergency as determined by WMATA in its sole discretion, in which event Permittee’s obligation of repair or replacement shall be immediate upon receipt of notice from WMATA. The requirements of this Paragraph shall

survive the expiration or any earlier termination of this Agreement.

8. Indemnification.

- a. Permittee shall, and shall require all of its contractors and subcontractors, to indemnify and save harmless WMATA, its directors, officers, employees and agents from all liens, liabilities, obligations, damages, penalties, claims, costs, charges and expenses (including reasonable attorney's fees and court costs), of whatsoever kind and nature, occurring in connection with, or in any way arising out of any activity carried out by Permittee or other Permitted Users pursuant to this Agreement.
- b. If any action or proceeding as described in this Paragraph is brought against WMATA, then upon written notice from WMATA to the indemnitor the indemnitor shall, at the indemnitor's expense, resist or defend such action or proceeding by counsel approved by WMATA in writing, such approval not to be unreasonably withheld, but no approval of counsel shall be required where the cause of action is resisted or defended by counsel of any insurance carrier obligated to resist or defend the same.
- c. Permittee understands and agrees that it is Permittee's responsibility to provide indemnification to WMATA pursuant to this Paragraph. The provision of insurance, while anticipated to provide a funding source for this indemnification, is in addition to any indemnification requirements and the failure of Permittee's insurance to fully fund any indemnification shall not relieve Permittee of any obligation assumed under this Agreement.
- d. The requirements of this Paragraph shall survive the expiration or any earlier termination of this Agreement.

9. Insurance.

- a. As may be required in any insurance policy carried by Permittee, this Agreement is understood and agreed to be a written contract or an insured contract between Permittee and WMATA. It is Permittee's responsibility to ensure adequate and complete coverage as contemplated in this Agreement. Permittee understands and agrees that WMATA is a self-insured governmental entity and that the insurance and indemnification provided by Permittee under the terms of this Agreement shall be primary. Permittee agrees that to the extent any endorsement contemplates issuance of a permit by a state or political subdivision,

WMATA shall be considered a state or political subdivision issuing a permit for the purposes of those policies and endorsements.

- b. Permittee shall, at its own cost and expense, provide, maintain, and keep in force at all times during the term of this Agreement and any renewal or extension hereof, the following types of insurance:

- i. Commercial General Liability Insurance. A Commercial General Liability Insurance policy issued to and covering the liability for all work and operations under or in connection with this Agreement and all obligations assumed by Permittee under this Agreement. The coverage under such an insurance policy shall have at least the following limits:

Bodily Injury and Property Damage Liability  
\$1,000,000 Each Occurrence; \$2,000,000 Aggregate

Premises Medical Payments	\$5,000
Fire Legal Liability (if applicable)	\$1,000,000
Personal Injury/Advertising	\$1,000,000 or Combined Single Limit not less than \$2,000,000

WMATA shall be named as an additional insured under the coverage for Commercial General Liability Insurance with respect to all activities under this Agreement.

- ii. Automobile Liability Insurance. A commercial auto insurance policy covering the use of all owned, non-owned, hired, rented or leased vehicles bearing valid license plates appropriate for the circumstances for which the vehicles are being used. These vehicles should bear license plates applicable to the state laws for which the vehicle(s) are registered. Liability for a contractor's mobile equipment is not subject to this coverage and therefore the aforementioned general liability insurance is required. The coverage under such an insurance policy or policies shall include mandatory Uninsured Motorist Coverage where applicable.

The coverage under such an insurance policy or policies shall have limits not less than \$2,000,000 Combined Single Limit for Bodily Injury and Property Damage Liability and not less than \$50,000 for Uninsured Motorist Coverage.

WMATA must be named as an additional insured under the auto liability insurance coverage with respect to activities related to this Agreement.

- iii. Insurance Companies. Insurance companies providing the aforesaid coverages must be rated by A.M. Best or a comparable rating company and carry at least an “A” rating. All insurance shall be procured from insurance or indemnity companies acceptable to WMATA and licensed and authorized to conduct business in the District of Columbia, the Commonwealth of Virginia and the State of Maryland.
10. Termination of Agreement. WMATA may revoke the license granted to Permittee herein at any time upon notice thereof to Permittee, in which event all rights of access granted to Permittee herein shall immediately terminate. Permittee's obligations pursuant to Paragraphs 6, 7 and 8 hereof shall survive any termination of this Agreement.
11. Non-Liability of WMATA. WMATA shall have no liability for the actions or negligence of Permittee or the Permitted Users. Neither the grant of this right of entry, nor any provision thereof, shall impose upon WMATA any new or additional duty or liability or enlarge any existing duty or liability of WMATA. Nothing in this Agreement shall be deemed to waive WMATA’s immunity as a sovereign entity.
12. WMATA Compact. Permittee understands and agrees that in no event shall Permittee assert for its own benefit, or attempt to claim or assert, an exemption or immunity available to WMATA under the Washington Metropolitan Area Transit Authority Compact, Public Law 89-774, 80 Stat. 1324, as same may be amended (the “**WMATA Compact**”).
13. Governing Law. This Agreement shall be governed by the laws of the District of Columbia, except that, to the extent that state law conflicts with the WMATA Compact, WMATA shall be governed by the WMATA Compact.
14. Jurisdiction and Venue. Jurisdiction and venue over any suit, action or proceeding arising under or relating to this Agreement shall lie solely in the jurisdiction in which the Premises are located.
15. Entire Agreement. This Agreement constitutes the entire agreement between the parties except to the extent that there is, or at any time during the term of this Agreement, shall be, a purchase and sale agreement between WMATA and Permittee; in that event, this Agreement shall be supplementary to any such purchase and sale agreement and, in the

event of any conflict or inconsistency between them regarding the subject matter of this Agreement, the terms of this Agreement shall govern. The parties acknowledge that no representations or warranties have been made except as set forth herein. This Agreement shall not be modified or amended in any manner except by an instrument in writing executed by the parties as an amendment to this Agreement.

15. Counterparts. This Agreement may be signed in counterparts, each of which together shall constitute one single agreement.

**IN WITNESS WHEREOF**, the parties have caused this Agreement to be executed in two counterparts as of the date and year first written above.

**WITNESS:**

\_\_\_\_\_

**WASHINGTON METROPOLITAN AREA TRANSIT  
AUTHORITY**

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

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

Title: Contracting Officer

**WITNESS:**

\_\_\_\_\_

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

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

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

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



EXHIBIT 11.2.2

**SPECIAL WARRANTY DEED**

Please record and return to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Note to recording clerk: The grantor under this deed is the Washington Metropolitan Area Transit Authority. The Washington Metropolitan Area Transit Authority is a body corporate and politic and is exempt from taxation under the laws of [the Commonwealth of Virginia pursuant to \_\_\_\_\_] [the District of Columbia pursuant to \_\_\_\_\_] [the State of Maryland pursuant to Section 10-204, Article XVI, Section 78 of the Transportation Article of the Annotated Code of Maryland and, accordingly, this deed is exempt from transfer taxes pursuant to Section 13-207(a) of the Tax-Property Article of the Annotated Code of Maryland<sup>12</sup>].*

THIS SPECIAL WARRANTY DEED (this “Deed”) is made as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_ by the Washington Metropolitan Area Transit Authority, a body corporate and politic (“Grantor”) and \_\_\_\_\_, a \_\_\_\_\_ (“Grantee”).

WITNESSETH:

That for and in consideration of the sum of [*in D.C. and Virginia: One Dollar (\$1.00)*] [*in Maryland insert actual dollar consideration: \_\_\_\_\_*] Dollars (\$\_\_\_\_\_) in hand paid and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Grantor does hereby grant, bargain, sell and convey to Grantee and its successors and assigns, in fee simple, all of that certain property defined on Exhibit A attached hereto and made a part hereof (the “Land”), together with all improvements, rights, privileges, and easements appurtenant to the Land including, without

<sup>12</sup> WMATA is also exempt from recordation tax under Section 12-108(a) of the Tax-Property Article of the Annotated Code of Maryland when WMATA buys real property. However, in this Agreement WMATA is the seller, not the buyer, so only the exemption from transfer tax seems applicable.

limitation, all water rights, rights of way, roadways, utility facilities and other appurtenances used or to be used in connection with the beneficial use of the Land, subject to the stated exceptions and reservations, if any, below.

*[If there are to be CC&Rs or other easements or restrictions recorded contemporaneously and intended to be superior to the Deed, add: This Deed is made subject and subordinate to the terms and conditions of that certain \_\_\_\_\_ of even or approximate date herewith intended to be recorded in the land records immediately prior to the recordation of this Deed.]*

This conveyance is made subject to all restrictions, conditions, reservations, limitations, covenants, easements and other matters of record.

Grantor shall warrant specially the Land and shall execute such further assurances of the same as may be requisite.

IN WITNESS WHEREOF, Grantor has executed this Deed as of the date first set forth above.

WASHINGTON METROPOLITAN AREA  
TRANSIT AUTHORITY

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Approved as to form and legal sufficiency:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
WMATA Office of General Counsel

DISTRICT OF COLUMBIA ) ss:

I, a notary public in and for the jurisdiction aforesaid, do hereby certify that  
\_\_\_\_\_, the \_\_\_\_\_ of the

Washington Metropolitan Area Transit Authority, known to me to be the person who signed the foregoing Special Warranty Deed bearing date of \_\_\_\_\_, 20\_\_, personally appeared before me and by virtue of the power vested in him/her in the capacity stated, acknowledged the same to be the act of the Washington Metropolitan Area Transit Authority.

Given under my hand and seal this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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

[Notarial Seal]

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

*[In Maryland, add:*

This is to certify that this instrument was prepared by or under the supervision of the undersigned, an attorney duly admitted to practice before the Court of Appeals of Maryland.

\_\_\_\_\_/   
Attorney

EXHIBIT A TO SPECIAL WARRANTY DEED

LEGAL DESCRIPTION OF THE LAND

## EXHIBIT 13

### ASSIGNEE'S CERTIFICATIONS

The undersigned hereby certifies to the Washington Metropolitan Area Transit Authority (“WMATA”) that the undersigned and any of its principals:

1. Is/are not presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from an award of contracts by any governmental entity.

2. Has/have not within the past ten (10) years been convicted of or had a civil judgment rendered against it for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a contract or subcontract with any governmental entity; violation of antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating criminal tax laws, or receiving stolen property.

3. Is/are not presently indicted for or otherwise criminally or civilly charged by a governmental entity with commission of any of the offenses enumerated in the previous paragraph.

4. Is/are not in arrears or default of payment of any money or obligation of a value greater than Three Thousand Dollars (\$3,000) to a governmental entity.

5. Has/have no adjudicated violations nor has paid penalties during the past ten (10) years relating to the housing and building laws, regulations, codes and ordinances of any governmental entity.

6. During the past ten (10) years has/have not had a license revoked that was issued in accordance with the housing, building or professional licensing laws, regulations, codes and ordinances of any governmental entity.

“Principal” means a partner, member, shareholder, officer, director, manager or other person with management or supervisory responsibilities or who is otherwise in a position to control or significantly influence the undersigned’s activities or finances.

The undersigned further certifies:

a. It has not employed or retained any company or persons (other than a full-time,

bona fide employee working solely for it) to solicit or secure a ground lease or fee conveyance from WMATA; and

b. It has not paid or agreed to pay, and shall not pay or give, any company or person (other than a full-time, bona fide employee working solely for it) any fee, commission, percentage, or brokerage fee contingent upon or resulting from the award of a ground lease or fee conveyance from WMATA; and

c. To its actual knowledge, no person or entity currently employed by WMATA, or employed by WMATA within the past twelve (12) months, or with material input into the matters covered by the proposed ground lease or fee conveyance and employed by WMATA at any time in the past: has provided any information to it that was not also available to all other persons who responded to any Request for Proposals, Joint Development Solicitation, Invitation for Bids or similar public offering that led to the proposed ground lease or fee conveyance; is affiliated with or employed by it or has any financial interest in it; provided any assistance to it or its parent, subsidiary or affiliated entities in responding to said Request for Proposals, Joint Development Solicitation, Invitation for Bids or similar public offering; or will benefit financially from the development contemplated by the ground lease or fee conveyance; and

d. Neither the undersigned nor any of its employees, representatives or agents have offered or given gratuities or will offer or give gratuities (in the form of entertainment, gifts or otherwise) to any director, officer, employee or agent of WMATA with the view toward securing favorable treatment in the approval of the undersigned as a contract purchaser or in the negotiation, amendment or performance of any purchase contract or similar document; and

e. It agrees to furnish information relating to the above as requested by WMATA.

f. It has the power and authority to enter into the proposed ground lease or fee conveyance and all final documentation as required by WMATA without the consent or joinder of any other party or authority.

If the undersigned is unable to certify to the foregoing in whole or in part, the undersigned has attached an explanation to this certification.

These certifications are a material representation of fact upon which reliance will be placed by WMATA. The undersigned shall provide immediate written notice to WMATA if at any time it learns that its certification was erroneous when submitted or has become erroneous since that time.

**[NAME OF ASSIGNEE]**

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

Name:

Title:

Date: \_\_\_\_\_, 20\_\_

# Model Agreement A-6: Covenants, Conditions, & Restrictions Template



Please record in the land records and return to:

Washington Metropolitan Area Transit Authority  
600 Fifth Street, N.W.  
Washington, D.C. 20001  
Attn: Office of Real Estate and Parking

**DECLARATION OF COVENANTS, CONDITIONS AND RESERVATIONS**  
*[name of project site]*

**by the**

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY**

**Dated \_\_\_\_\_, 202\_**

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## **EXHIBITS**

- A     The WMATA Joint Development Site**
- B     Vent Shaft Surface Easements**
- C     Vent Shaft Underground Easement Areas**
- D     Surface and Air Rights Elevator Easement Area**
- E     Subsurface Elevator Easement Area**
- F     Surface and Air Rights Station Entrance Area**
- G     Subsurface Station Entrance Area**
- H     Surface and Air Rights Utility Easement Area**
- I     Subsurface Utility Easement Area**
- J     Public Access Easement Area**
- K     Insurance**

## **DECLARATION OF COVENANTS, CONDITIONS AND RESERVATIONS**

THIS DECLARATION OF COVENANTS, CONDITIONS AND RESERVATIONS (as amended, supplemented or restated from time to time, this “**Declaration**”) is made and entered into as of \_\_\_\_\_, 202\_ (“**Effective Date**”), by the WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, an interstate compact agency of the Commonwealth of Virginia, the District of Columbia and the State of Maryland (together with its successors and assigns, “**WMATA**”).

### **RECITALS:**

- A. WMATA is the owner of the WMATA Joint Development Site.
- B. WMATA operates and intends to operate a mass transit system, which includes the Metro Station, a bus loop, a Kiss & Ride area, a surface Park & Ride area, [an underground tunnel(s),] stairs, escalators and elevators, [vent shafts,] various other infrastructure, and ingress and egress thereto on the WMATA Joint Development Site.
- C. Each owner and ground lessee of the WMATA Joint Development Site other than WMATA intends to build, or cause to have built, the Project on the WMATA Joint Development Site.
- D. WMATA desires to reserve certain easement rights, certain rights to require and approve the development of the WMATA Joint Development Site, certain rights to protect WMATA’s operations on, above, under and near the WMATA Joint Development Site, and various other protections, all as more fully set forth in this Declaration, and to record this Declaration in the Land Records to subject the WMATA Joint Development Site to the foregoing so that title to the WMATA Joint Development Site will be subject and subordinate to this Declaration.
- E. WMATA intends that the covenants, easements, charges and liens established by this Declaration shall be covenants running with the land and shall extend to, inure to the benefit of, and be binding upon WMATA and each other owner and ground lessee of the WMATA Joint Development Site and their legal representatives, heirs, successors and assigns [*, unless and to the extent expressly set forth to the contrary herein*].

**NOW, THEREFORE**, in consideration of the foregoing Recitals, One Dollar (\$1.00) in hand paid, the terms hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, WMATA declares that the WMATA Joint Development Site is, and shall be, owned, leased, mortgaged, conveyed, transferred, sold, developed, improved, demolished, occupied and used subject to the terms and conditions hereinafter set forth.

**ARTICLE I**  
**WMATA'S PERMANENT EASEMENTS**

**Section 1.1 Grant of Vent Shaft Surface Easements to WMATA**

WMATA hereby reserves to itself perpetual, irrevocable, assignable and exclusive easements and rights-of-way (the “**Vent Shaft Surface Easements**”) in, upon, over and across an area on the surface of the WMATA Joint Development Site more particularly described in **Exhibit B**. The easements and rights-of-way described in this Section shall be for access to and from and for the location, operation, repair, Maintenance, construction, reconstruction, replacement and modification of the existing Metrorail transit vent shaft and related facilities (collectively, the “**Vent Shaft Facilities**”), and any service facilities serving the Vent Shaft Facilities. The Vent Shaft Surface Easements include, without limitation, the perpetual right to the free and unrestricted flow of air in and out of the openings of the Vent Shaft Facilities. No Person other than WMATA shall build in or on, or otherwise interfere with, WMATA’s use and enjoyment of the Vent Shaft Surface Easements. Notwithstanding WMATA’s exclusive rights with respect to the Vent Shaft Surface Easements, the surface level of such easement area may be traversed from time to time by pedestrians, but not by any motorized or non-motorized vehicles or machinery unless the vehicle or machinery is operated by WMATA or required to be allowed in the Vent Shaft Surface Easement area by the Americans With Disabilities Act or any comparable Federal, State or local law now or hereafter in effect.

**Section 1.2 Grant of Vent Shaft Underground Easements to WMATA**

WMATA hereby reserves to itself perpetual, irrevocable, assignable and exclusive easements and rights-of-way under and through an area beneath the surface of the WMATA Joint Development Site as more particularly described in **Exhibit C** for access to and from and for the location, operation, Maintenance, repair, construction, reconstruction, replacement and modification of the Vent Shaft Facilities.

**Section 1.3 Grant of Surface and Air Rights Elevator Easements to WMATA**

WMATA hereby reserves to itself perpetual, irrevocable, assignable and exclusive easements and rights-of-way in, upon, over and across an area on the surface of the WMATA Joint Development Site as more particularly described in **Exhibit D** for access to and from and for the location, operation, repair, Maintenance, construction, reconstruction, replacement and modification of the existing Metrorail transit elevator(s) and related facilities (collectively, the “**Elevator Facilities**”) and any service facilities serving the Elevator Facilities.

**Section 1.4 Grant of Subsurface Elevator Easements to WMATA**

WMATA hereby reserves to itself perpetual, irrevocable, assignable and exclusive easements and rights-of-way under and through an area beneath the surface of the WMATA Joint Development Site as more particularly described in **Exhibit E** for access to and from and for the location, operation, Maintenance, repair, construction, reconstruction, replacement and modification of the Elevator Facilities.

### **Section 1.5 Grant of Surface and Air Rights Entrance Easements to WMATA**

WMATA hereby reserves to itself perpetual, irrevocable, assignable and exclusive easements and rights-of-way in, upon, across, over and above an area at and above the surface of that portion of the WMATA Joint Development Site as more particularly described in **Exhibit F**. The easements and rights-of-way described in this Section shall be for ingress and egress to and from and for the location, operation, Maintenance, repair, construction, reconstruction, replacement and modification of the existing Metro Station entrance *[if the Metro Station has more than one entrance, specify which entrance is meant]* and any service facilities serving said entrance (“**Metro Station Entrance**”). The foregoing includes, without limitation, the parking of vehicles and the temporary storage of supplies and equipment incident to the foregoing purposes.

### **Section 1.6 Grant of Subsurface Entrance Easements to WMATA**

WMATA hereby reserves to itself perpetual, irrevocable, assignable and exclusive easements and rights-of-way in, under and through an area beneath the surface of the WMATA Joint Development Site, as more particularly described in **Exhibit G** for ingress and egress to and from and for the location, operation, Maintenance, repair, construction, reconstruction, replacement and modification of the Metro Station Entrance and any service facilities serving the Metro Station Entrance beneath the surface of the WMATA Joint Development Site.

### **Section 1.7 Grant of Surface and Air Rights Utility Easements to WMATA**

WMATA hereby reserves to itself perpetual, irrevocable, assignable and exclusive easements and rights-of-way in, upon, across, over and above an area at and above the surface of that portion of the WMATA Joint Development Site as more particularly described in **Exhibit H**. The easements and rights-of-way described in this Section shall be for ingress and egress to and from and for the location, operation, Maintenance, repair, construction, reconstruction, replacement and modification of any utilities now or hereafter serving the Metro Station (including, without limitation, water, gas, street lights or other illuminating devices) and related facilities now or hereafter owned or operated by WMATA, whether such utilities are provided by third-party public or private providers or by WMATA itself.

### **Section 1.8 Grant of Subsurface Utility Easements to WMATA**

WMATA hereby reserves to itself perpetual, irrevocable, assignable and exclusive easements and rights-of-way in, under and through an area beneath the surface of the WMATA Joint Development Site as more particularly described in **Exhibit I**. The easements and rights-of-way described in this Section shall be for ingress and egress to and from and for the location, operation, Maintenance, repair, construction, reconstruction, replacement and modification of any utilities now or hereafter serving the Metro Station (including, without limitation, water, gas, street lights or other illuminating devices) and related facilities now or hereafter owned or operated by WMATA, whether such utilities are provided by third-party public or private providers or by WMATA itself.



### **Section 1.9 Grant of Public Access Easements to WMATA**

To the extent not dedicated as public sidewalk or public roads, WMATA hereby reserves to itself for WMATA's use and the use of the general public and emergency service personnel, perpetual, assignable and non-exclusive easements to *[that portion of]* the WMATA Joint Development Site described in **Exhibit J** for the purpose of emergency service and vehicular and pedestrian ingress/egress to and from the Metro Station.

### **Section 1.10 Lateral and Subjacent Support**

WMATA hereby reserves to itself the right to lateral and subjacent support for any WMATA Facilities now located above, on or under the WMATA Joint Development Site, and agrees to grant, upon WMATA's written request describing in reasonable detail the location, extent and nature of same, the right to lateral and subjacent support for future WMATA Facilities to be located above, on or under the WMATA Joint Development Site.

### **Section 1.11 Revision of Easement Grants**

Within ninety (90) days after substantial completion of *[its portion of]* the Project, each owner and ground lessee of the WMATA Joint Development Site other than WMATA shall deliver to WMATA as-built surveys and legal descriptions depicting and describing the WMATA Easement Areas based on the as-built locations of the Metro Station and the Project. It is the intention of WMATA that WMATA shall retain such easement rights, by location, size and nature, so as to allow WMATA, in its reasonable discretion, good and sufficient property rights to exclusively control, possess and operate the Metro Station and all WMATA Facilities. If WMATA determines that updated legal descriptions of the easements granted herein are necessary or appropriate, an appropriate amendment to, or restatement of, this Declaration shall be executed by WMATA without the joinder of any other Person being necessary and recorded in the Land Records to provide notice of the locations of all permanent easements granted herein.

## **ARTICLE II** **DEVELOPMENT COVENANTS**

### **Section 2.1 Development of the Project**

(a) Permitted Use. Except for the WMATA Facilities, the WMATA Joint Development Site shall be designed, constructed, operated and used for the Project, subject to such changes as may otherwise be permitted by the terms of this Declaration *[for a period a \_\_\_\_\_ (\_\_\_\_) years from and after the Effective Date]* and for no other purpose.

(b) Responsibility for Completion.

(i) Direct responsibility for the construction of the WMATA Replacement Facilities is borne by each owner and ground lessee of the WMATA Joint Development Site other than WMATA. Each owner and ground lessee of the WMATA Joint Development Site other than WMATA shall Finally Complete any WMATA Replacement Facilities appurtenant to or made necessary by the construction of Non-WMATA Improvements on that owner's or

ground lessee's part of the WMATA Joint Development Site. The failure of an owner or ground lessee of the WMATA Joint Development Site other than WMATA to do so (after any notice and cure period afforded to it under its ground lease or its construction agreement) shall constitute a default under this Declaration without any further Notice or cure opportunity being afforded under this Declaration.

(ii) Each owner and ground lessee of the WMATA Joint Development Site other than WMATA shall be responsible for coordinating construction on the WMATA Joint Development Site, subject to **Sections 2.6-2.10** and any similar provisions elsewhere in this Declaration. The foregoing includes, without limitation, (A) determining the circulation and movement of vehicular and pedestrian traffic during different Phases, (B) identifying any overlap or conflicts between construction activity on different Phases and eliminating or mitigating the same, including determining the priority of different Phases (C) determining means and methods of construction access, staging and storage, and (D) identifying and resolving all issues arising from simultaneous construction activities on more than one Phase.

(iii) Regardless of whether a default occurs under the preceding clauses, construction of the applicable WMATA Replacement Facility must occur prior to or simultaneous with the construction of the Non-WMATA Improvements on the same owned or ground leased portion of the WMATA Joint Development Site or necessitated by or appurtenant to those Non-WMATA Improvements, and no Non-WMATA Improvements will be allowed to receive a certificate of occupancy (or any equivalent) or take occupancy or otherwise be placed in service unless and until all WMATA Replacement Facilities applicable to that Phase and any prior Phase have been Substantially Completed.

## **Section 2.2 Transit-Oriented Development**

The physical improvements constructed on the WMATA Joint Development Site and the use of the WMATA Joint Development Site must: (i) enhance the effectiveness of the Metro Station and be physically or functionally related to the Metro Station; (ii) create new or enhanced coordination between mass transit and other forms of transportation; (iii) provide or facilitate convenient pedestrian and vehicular access to a mass transit project; (iv) incorporate non-vehicular capital improvements that are designed to result in increased mass transit usage in corridors supporting fixed guideway systems; (v) enhance urban economic development or incorporate private investments including office, commercial, retail, hospitality, or residential development; (vi) emphasize a mix of uses, safe and convenient pedestrian and bicycle connectivity, attractive streetscapes and "placemaking" and deemphasize automobile travel and parking; and (vii) comply with any then-current regulations, policies or guidelines promulgated by the FTA applicable to joint development, including meeting the parameters of a "Transit-Oriented Development" and a "Continuing Transit Orientation" as defined in the FTA's "Guidance on Joint Development," FTA Circular C 7050.1 (Federal Register Volume 79, No. 164, Monday, August 25, 2014), as it may be amended, supplemented, or otherwise modified from time to time.

### **Section 2.3    Unbundled Parking Charges**

Parking charges for all tenants, unit owners and other occupants and users of any on-site parking shall be unbundled from the rent, common area maintenance charges and fees, regular monthly assessments or other fees and charges payable generally by tenants, unit owners and other occupants and users. This means that the tenants and unit owners and other occupants and users who use the parking facility will pay separately and directly for their parking as an additional fee so that tenants and unit owners and other occupants and users who do not use the parking facilities do not subsidize the cost of the parking through their rental payments, common area maintenance charges and fees, regular monthly assessments or other fees and charges.

### **Section 2.4    Sustainability**

Each non-WMATA owner or ground lessee of the WMATA Joint Development Site shall design and construct the applicable Non-WMATA Improvements on its Phase to achieve LEED Silver certification in a category appropriate to their use or to another a nationally recognized equivalent standard to the LEED rating system. Developer must design and oversee the development of the Project to achieve LEED-ND Silver certification or another nationally recognized equivalent standard. In each case, actual certification by Green Building Certification, Inc. (f/k/a Green Building Certification Institute) or a successor Person chosen for that purpose by the US Green Building Council, or an equivalent third party if an equivalent non-LEED standard is used, is required. In each case, WMATA shall determine whether a particular non-LEED standard is the equivalent of the LEED rating system. In the event the LEED rating system is ever discontinued or materially altered in such a way that WMATA does not believe it can be used to achieve the purposes anticipated by this Section, WMATA may substitute a different standard of sustainability applicable to buildings and improvements, provided that such standard must be recognized in the marketplace.

### **Section 2.5    Compliance with Laws**

No owner or ground lessee of the WMATA Joint Development Site shall exclude any Person or otherwise discriminate against any Person on the grounds of race, color, national origin, sex or disability in connection with the construction or operation of the WMATA Joint Development Site and shall comply with: Title VI of the Civil Rights Act of 1964, 42 USCA 200d, et seq., prohibition against discrimination based on race, color, national origin or sex; all non-discrimination provisions set forth in 49 C.F.R. including, without limitation, those set forth in part 27 thereof; the Americans with Disabilities Act, 42 U.S.C. Sec. 12101, et seq.; and the provisions in the applicable FTA Master Agreement relating to conflicts of interest and debarment, as any of the foregoing has been or may hereafter be amended, replaced or otherwise modified. If as a result of any Non-WMATA Improvements or any subsequent alteration, addition, replacement or modification thereof, improvements to the Metro Station or any other WMATA Facilities are required under the Americans with Disabilities Act or any Federal, State or local equivalent, each owner and ground lessee of the WMATA Joint Development Site other than WMATA shall be solely responsible for paying for all such improvements at its sole cost and expense and shall pay or reimburse WMATA for all such costs on demand. The FTA may require each owner and ground lessee of the WMATA Joint Development Site to comply with

certain laws, regulations and other requirements of the FTA imposed upon WMATA and each owner and ground lessee of the WMATA Joint Development Site shall comply with the same. Each owner and ground lessee of the WMATA Joint Development Site shall comply with all Laws in connection with all work performed on the WMATA Joint Development Site.

## **Section 2.6 Proposed and Approved Development Plans**

(a) Developing the Project. Subject to the terms and conditions set forth in this Declaration, each owner and ground lessee of the WMATA Joint Development Site shall cause the WMATA Joint Development Site to be planned for the Project and for no other development or use, subject to such changes as may otherwise be permitted by the terms of this Declaration.

(b) Proposed Development Plans.

(i) Not later than (i) \_\_\_\_\_ ( ) days after the Effective Date, Owner shall prepare and submit to WMATA a proposed development plan for the overall Project that is in accord with the terms of this Declaration and (ii) if portions of the WMATA Joint Development Site are to be purchased or ground leased in phases for development (each, a “Phase”), then at least six (6) months before the anticipated closing date for any Phase, the prospective owner or ground lessee of that Phase shall prepare and submit to WMATA a proposed development plan for that Phase. Each proposed development plan for the overall Project and for each Phase is referred to in this Declaration as a “**Proposed Development Plan.**”

(ii) Subject to WMATA’s right to approve the same as set forth in this Declaration, Owner shall amend or supplement the Proposed Development Plan for the overall Project as Owner determines concept site plans, massing plans, siting of WMATA Replacement Facilities, siting of public infrastructure, and any other matters which Owner anticipates presenting to the Local Jurisdiction in connection with obtaining any zoning or land use approvals or permits and building, excavation, sheeting and shoring, curb cut and other similar permits at that stage of the Project.

(iii) The Proposed Development Plan submitted for each Phase shall include preliminary subdivision plans, building envelopes, site plans, conceptual designs (including exterior treatments), conceptual streetscaping, locations for WMATA’s own directional signage, a proposed MOT Plan, and infrastructure consistent with and to the extent prepared as part of the information which the owner or ground lessee of the WMATA Joint Development Site anticipates presenting to the Local Jurisdiction in connection with obtaining any zoning or land use approvals or permits and building, excavation, sheeting and shoring, curb cut and other similar permits for that Phase and shall also specifically address the design, cost, financing and sequencing of the WMATA Replacement Facilities for that Phase.

(iv) Each Proposed Development Plan shall also comply with the WMATA Design and Construction Standards insofar as they are applicable to the Project under the terms of this Declaration.

(v) In each case, each owner and ground lessee of the WMATA Joint Development Site shall provide WMATA with any additional information in that owner's or ground lessee's possession or control that WMATA may reasonably request to assist WMATA in evaluating the Proposed Development Plans.

(c) Approval of Proposed Development Plans.

(i) WMATA will have the right to withhold its approval of any Proposed Development Plan (or any revisions thereto) if any aspect thereof in WMATA's sole and nonreviewable discretion: (A) affects the integrity, functionality, efficiency, safety, operation, maintenance, legal compliance, cost or profitability of WMATA's business, customers, operations or activities; (B) lies within the WMATA Zone of Influence or otherwise affects WMATA Facilities, WMATA Reserved Areas, ingress/egress to WMATA Facilities, and similar matters; (C) affects any of WMATA's adjacent property; (D) applicable to the WMATA Facilities is not in compliance with the WMATA Design and Construction Standards or applicable to Non-WMATA Improvements is not in compliance with the WMATA Adjacent Construction Project Manual; (E) affects an owner's or ground lessee's obligations as they relate to timing (changes in Project schedule) and/or performance (changes in what will be constructed, e.g., the product mix); and/or (F) affects the consideration payable to WMATA for the WMATA Joint Development Site. In addition, WMATA shall have the right to withhold its approval of any Proposed Development Plan (and any revisions thereof) if the exterior elements facing the WMATA Facilities are materially different than the exterior elements of any other façade of the same structure; WMATA's approval under this sentence shall not be unreasonably withheld, conditioned or delayed.

(ii) WMATA shall deliver notice of any disapproval of a Proposed Development Plan within thirty (30) Business Days after the owner or ground lessee responsible for the same delivers that Proposed Development Plan (including all additional information and documentation) to WMATA.

(iii) In the event that WMATA disapproves a Proposed Development Plan or approves a Proposed Development Plan subject to qualification, WMATA shall deliver Notice to the applicable owner or ground lessee of such disapproval or qualified approval, stating in as much detail as is reasonably practicable, given the state of completion of the Proposed Development Plan, the nature of WMATA's objections or qualifications, as the case may be. Each such owner or ground lessee shall use commercially reasonable business efforts to satisfy WMATA's objections and qualifications without materially decreasing the proposed density to be built and without altering the division between the WMATA Facilities and the portion of the WMATA Joint Development Site to be privately developed. Each owner and ground lessee shall have a period of ten (10) Business Days after delivery of such Notice from WMATA within which to revise and resubmit the applicable Proposed Development Plan to WMATA addressing each of the issues raised by WMATA; however, if such objections or qualifications cannot reasonably be addressed within (10) Business Days using commercially reasonable business efforts, the owner or ground lessee shall be allowed additional time (not to exceed an additional thirty (30) days) as is reasonably necessary to address the objections or qualifications. The above process shall be repeated until the Proposed Development Plan is approved by WMATA;

provided however that (A) if after the third (3<sup>rd</sup>) such submission of a Proposed Development Plan for the entire Project, WMATA disapproves the submission, either party may terminate the Project by Notice to the other party, and (B) if after the third (3<sup>rd</sup>) such submission with respect to the Proposed Development Plan for a Phase, WMATA disapproves the submission, either party may terminate the owner's or ground lessee's rights to develop that Phase by Notice to the other party. Each Proposed Development Plan as approved by WMATA is hereinafter referred to as the "**Approved Development Plan**" for the Project or for the applicable Phase.

(d) Changes to Approved Development Plan. After WMATA has approved an Approved Development Plan as set forth above, an owner or ground lessee may not make changes thereto with respect to any matters for which WMATA's approval is required. Any proposed changes shall be promptly submitted to WMATA for WMATA's approval in accordance with the procedures set forth in this Section.

(e) No Assumption of Liability or Waiver of Rights. WMATA accepts no liability and waives none of its rights under this Declaration solely by reason of its approval of any Proposed Development Plan, nor shall its approval be construed to be a warranty thereof, except that WMATA's approval of an Approved Development Plan shall constitute a waiver of any right by WMATA to object to any subsequent submission to the extent of the information disclosed in the applicable precursor Proposed Development Plan as so approved by WMATA.

(e) Consistency with Approved Development Plan Required. All actions undertaken by an owner or ground lessee shall be consistent with the Approved Development Plan.

## **Section 2.7 WMATA Approval of Plans and Specifications**

(a) WMATA Approval Rights. Each owner and ground lessee of the WMATA Joint Development Site shall submit plans and specifications for *[its Phase of]* the Project to WMATA for review and approval in accordance with the terms of this Section and shall not submit proposed plans and specifications to the Local Jurisdiction until WMATA has reviewed and approved (or is deemed to have approved) in accordance with this Section those plans and specifications that relate to any of the following:

(i) WMATA will have the right to approve in its sole and absolute discretion: (A) matters that affect the integrity, functionality, efficiency, safety, operation, maintenance, legal compliance, cost or profitability of WMATA's business, customers, operations or activities; (B) matters within the WMATA Zone of Influence or that otherwise affect WMATA Facilities, WMATA Reserved Areas, ingress/egress to WMATA Facilities, and similar matters; (C) matters that affect any of WMATA's adjacent property; (D) the design and construction of interim and permanent WMATA Replacement Facilities and of any Non-WMATA Improvements that may also be subject to the WMATA Design and Construction Standards and, in the case of Non-WMATA Improvements that are not subject to the WMATA Design and Construction Standards, that the design and construction thereof is in accordance with the WMATA Adjacent Construction Project Manual; (E) anything that affects an owner's or ground lessee's obligations as they relate to timing (changes in Project schedule) and/or performance

(changes in what will be constructed, e.g., the product mix); and/or (F) anything that affects the consideration payable to WMATA.

(ii) WMATA shall have the right to withhold its approval of any plans and specifications (or any revisions thereof) if the exterior elements thereof facing any WMATA Facilities (including, without limitation, finishes, materials, windows, mechanical, electrical and plumbing equipment, and loading docks and other building infrastructure) are materially different than the exterior elements thereof on any other façade. WMATA's approval under this clause shall not be unreasonably withheld, conditioned or delayed.

(b) WMATA Approval Process. Each owner and ground lessee of the WMATA Joint Development Site shall submit to WMATA all plans and specifications for the Project. WMATA shall review and approve or disapprove those of the proposed plans and specifications that are within its scope of review pursuant to this Section within thirty (30) Business Days after the owner or ground lessee delivers the proposed plans and specifications, including all required information and documentation set forth above, to WMATA.

(c) WMATA Disapproval. In the event that WMATA disapproves the proposed plans and specifications or approves the proposed plans and specifications subject to qualification, WMATA shall deliver Notice to the applicable owner or ground lessee of such disapproval or qualified approval, stating in as much detail as is reasonably practicable, given the state of completion of the proposed plans and specifications, the nature of WMATA's objections or qualifications, as the case may be. Each owner and ground lessee shall have a period of ten (10) Business Days after the giving of such Notice within which to revise and resubmit the proposed plans and specifications to WMATA addressing each of the issues raised by WMATA; however, if such objections or qualifications cannot reasonably be addressed within ten (10) Business Days using commercially reasonable business efforts, the applicable owner or ground lessee shall be allowed additional time (not to exceed thirty (30) days in the aggregate) as is reasonably necessary to address the objections or qualifications. Each owner and ground lessee of the WMATA Joint Development Site shall use commercially reasonable business efforts to satisfy WMATA's objections and qualifications.

(d) Repeat Process. The above process shall be repeated until the proposed plans and specifications are approved by WMATA. If a particular proposed plan or specification is not approved after its third (3<sup>rd</sup>) iteration is submitted to WMATA for approval, the parties shall meet and use commercially reasonable business efforts to determinate whether a mutually acceptable plan or specification can be agreed to. If no agreement is reached within thirty (30) Business Days after either party invokes the right and obligation to meet by Notice to the other, then either party may give Notice of intent to terminate the owner's or ground lessee's rights to the applicable portion of the WMATA Joint Development Site, including, if applicable, by reconveying good and marketable fee title, free and clear of any Mortgages, mechanics' or materialmen's liens or any similar encumbrance, to WMATA or by terminating the applicable ground lease, upon Notice to the other party given within thirty (30) days after such thirty (30) Business Day period expires. The parties shall then proceed promptly and in good faith to implement such termination and any corollary reconveyance. No such termination shall waive,

release or otherwise affect any obligation or liability accrued under this Declaration before the date of such termination Notice.

(e) No Changes after Approval. Once WMATA has approved the proposed plans and specifications, an owner or ground lessee shall not make changes to the approved plans and specifications that are subject to WMATA review and approval under this Section without WMATA's prior written approval, not to be unreasonably withheld, conditioned or delayed. Any proposed changes for which WMATA approval is required shall be promptly submitted to WMATA for WMATA's approval in accordance with the procedures set forth in this Section for re-submissions.

(f) Defects in WMATA's Own Standards. If an owner or ground lessee discovers a defect in the WMATA Design and Construction Standards or an inconsistency between the plans and specifications and the WMATA Design and Construction Standards, the defect or inconsistency should be brought to WMATA's attention as promptly as possible and the owner or ground lessee shall promptly send WMATA a request for information or clarification.

(g) WMATA Not Liable. WMATA accepts no liability and waives none of its rights under this Declaration solely by reason of its approval or deemed approval of any plans and specifications or of any construction schedule, nor shall its approval be construed to be a warranty regarding the quality or means of construction of any WMATA Facilities or Non-WMATA Improvements, except that:

(i) WMATA's approval of the plans and specifications shall constitute a waiver by WMATA of any right to damages or any other relief based upon a claim that any Non-WMATA Improvements adversely affect the operation, ingress to, egress from, safety or security of WMATA Facilities if such Non-WMATA Improvements are constructed in accordance with such plans and specifications (as they may be amended in accordance with this Declaration) and the WMATA Design and Construction Standards;

(ii) WMATA's approval thereof shall be a waiver of any right to object to any matter which WMATA approved, to the extent of the information disclosed therein;

(iii) No consent or approval (or deemed approval) by WMATA will be interpreted as a waiver by WMATA or assumption of performance or financial obligation or liability or risk by WMATA except to the extent expressly so agreed in WMATA's consent or approval;

(iv) WMATA's approval of the proposed plans and specifications shall constitute a waiver of any right by WMATA to object to any subsequent submission substantially consistent with the level of detail to the extent of the information disclosed in the approved plans and specifications (but shall not constitute a waiver of WMATA's approval rights hereunder). (Example: WMATA may have previously approved a building but if a subsequent submission shows the loading dock in a location which interferes with transit uses, WMATA has not waived any rights and may object.)



(h) Litigation. In no event shall WMATA be required to institute, defend against, or otherwise participate in litigation or any other dispute resolution process arising from or relating to the design and construction of the Project. The foregoing shall not preclude an owner or ground lessee of the WMATA Joint Development Site from initiating such litigation or other dispute resolution process in WMATA's name against a third party if and when WMATA is a required party to establish the legal sufficiency of the pleadings or filing, in which event WMATA shall cooperate with that owner or ground lessee in connection with such pleading or filing.

## **Section 2.8 Conditions Precedent to Construction**

(a) Construction Cost and Contract. Each owner and ground lessee of the WMATA Joint Development Site and WMATA must agree on a stipulated cost of any WMATA Replacement Facilities applicable to that owner's or ground lessee's property. That cost shall be determined on an open-book basis and with WMATA's participation in bidding conferences with prospective general contractors in conjunction with WMATA's approval (or deemed approval) of plans and specifications. Each owner and ground lessee of the WMATA Joint Development Site must enter into either a guaranteed maximum price or a fixed price construction contract for such WMATA Replacement Facilities from a general contractor reasonably acceptable to WMATA and at a cost not in excess of the agreed-upon cost.

(b) Completion, Payment and Performance Bonds.

(i) Before construction of any WMATA Replacement Facilities commences, the applicable owner or ground lessee of the affected land shall provide WMATA with (A) a completion bond naming WMATA as the sole obligee and (B) payment and performance bonds for the hard costs of the WMATA Replacement Facilities naming WMATA and the construction lender as co- or dual obligees; the payment and performance bond(s) may be provided to the applicable owner or ground lessee by its general contractor and then by the applicable owner or ground lessee to WMATA. The completion bond shall be in the amount of the total hard and soft costs of the WMATA Replacement Facilities. Each payment and performance bond shall be in the full amount of the hard costs of the applicable WMATA Replacement Facilities. All bonds shall be written on such bond forms as WMATA may accept in its reasonable discretion. WMATA need not accept a bond written on an AIA form or on a form acceptable to other governmental authorities. All bonds shall be issued by a surety qualified to write such bonds in the State, listed as an acceptable surety on the then-current list maintained by the U.S. Department of the Treasury (or such other Federal government department or agency that shall succeed to keeping such list in the future), and otherwise acceptable to WMATA in its reasonable discretion.

(ii) Before commencing construction of any Non-WMATA Improvements, each owner and ground lessee of the WMATA Joint Development Site shall provide WMATA with payment and performance bonds in the amount of the hard costs of the applicable Non-WMATA Improvements. Such bonds shall meet all of the requirements of the preceding subsection except that WMATA agrees that payment and performance bonds issued on the then-current American Institute of Architects forms (or such other organization as may then

promulgate industry-accepted bond forms in the manner of the American Institute of Architects on the Effective Date) will be satisfactory to it for the purposes of this subsection.

(c) Subordination of Development Fee. Before commencing construction of any WMATA Replacement Facilities or Non-WMATA Improvements on any portion of the WMATA Joint Development Site that includes WMATA Replacement Facilities, the owner or ground lessee of the affected land shall enter into an agreement with WMATA, satisfactory to WMATA in its reasonable discretion, subordinating and deferring the payment of any and all development and project management fees, howsoever called, that owner or ground lessee might be entitled to until such time as the WMATA Replacement Facilities on the affected land have been Finally Completed. Such subordination agreement shall provide, without limitation, that any such development or project management fee shall not be paid until Final Completion of the WMATA Replacement Facilities occurs.

(d) Shared Parking Garage. The process set forth in this Section shall also be used for the construction of any garage in which parking is to be shared between WMATA and an owner's or ground lessee's own tenants, employees, customers, licensees and invitees if WMATA hereafter agrees, in its sole and absolute discretion, to any such shared parking.

(e) Not a Release or Mitigation of Responsibility. Nothing in this Section releases, mitigates, waives or otherwise affects the obligation of an owner or ground lessee of the WMATA Joint Development Site (i) to Substantially Complete the Non-WMATA Improvements applicable to its portion of the WMATA Joint Development Site or (ii) to Finally Complete the WMATA Replacement Facilities applicable to its portion of the WMATA Joint Development Site.

## **Section 2.9 Protection of WMATA Operations and Facilities**

(a) Transit Operations Take Priority. WMATA's first priority is transit operations. WMATA does not enter into real estate development projects if there is any expectation or anticipation that the project could deleteriously affect WMATA Facilities or operations (except to the extent set forth in an MOT Plan).

(b) WMATA Right to Self-Protect.

(i) During construction (which term, as used in this Declaration, includes reconstruction or replacement construction, maintenance, repair and restoration) by an owner or ground lessee of any WMATA Replacement Facilities or any Non-WMATA Improvements next to WMATA Facilities, WMATA's inspectors shall have: (A) reasonable daily access to such Non-WMATA Improvements and WMATA Replacement Facilities for the purpose of determining whether such construction operations pose a safety risk to the public or to any WMATA Facilities, and to confirm that (x) the construction of the WMATA Replacement Facilities and any Non-WMATA Improvements to which the WMATA Design and Construction Standards are applicable conforms with the WMATA Design and Construction Standards and the approved working drawings and specifications for the design and construction of the WMATA Replacement Facilities or such Non-WMATA Improvements, and (y) the construction of any

Non-WMATA Improvements to which the WMATA Design and Construction Standards are not applicable comply with the WMATA Adjacent Construction Project Manual, in the case of both clauses (x) and (y) including relevant architectural, structural, electrical, mechanical, sheeting and shoring, excavation and utility drawings; and (B) uninterrupted access to WMATA Facilities.

(ii) An owner or ground lessee shall cause adequate space, and a phone jack and computer port for each desk, in its construction trailer to be provided to WMATA's construction representatives, including for such desks, chairs, file cabinets and furniture as WMATA may provide, all of which is to be segregated from the owner's or ground lessee's and its contractors' space by an internal wall with a lockable door for WMATA-only access. A handicapped-accessible restroom shall be available for the use of WMATA personnel.

(iii) Any nonconformity between the WMATA Replacement Facilities or the Non-WMATA Improvements and the approved working drawings and specifications shall be resolved in accordance with the procedures implemented by WMATA pursuant to the WMATA Design and Construction Standards or, in the case of Non-WMATA Improvements to which the WMATA Design and Construction Standards are not applicable, the WMATA Adjacent Construction Project Manual.

(iv) Each owner and ground lessee of the WMATA Joint Development Site shall promptly respond to reasonable requests of WMATA's inspector(s) if construction operations pose a safety risk to the public or to any WMATA Facilities or WMATA Replacement Facilities or to their operation; provided, however, that in the event of a conflict between a WMATA inspector and an authorized inspector of the Local Jurisdiction as to a matter of compliance with local code, the ruling of the Local Jurisdiction shall govern. WMATA inspectors shall have the right to issue, or, for matters also within the authority of the Local Jurisdiction, ask the applicable Local Jurisdiction to issue, a "stop work order" with respect to construction that poses a safety risk or that is not in compliance with the Approved Development Plan or the approved plans and specifications, and each owner and ground lessee of the WMATA Joint Development Site shall abide by that "stop work order." WMATA shall further have the right, anything in this Declaration to the contrary notwithstanding, to seek a court injunction, directive or similar relief in order to enforce an inspector's instructions under the terms of this subsection.

(c) All Other WMATA Rights Retained. Except as may be specifically provided in this Declaration, nothing in this Declaration limits or otherwise affects WMATA's right to operate WMATA Facilities and/or the WMATA Reserved Areas and to provide transportation services in such manner as it may determine from time to time, including at the Metro Station. The foregoing includes, without limitation, determining standards of operation, hours of operation, the types of equipment used, the frequency of service, and the ability to close or suspend the use of the Metro Station or any entrances or escalators and elevators therein.

## **Section 2.10 Non-Interference with WMATA Operations**

An owner and ground lessee of the WMATA Joint Development Site shall not interfere or permit any interference with any of the easements granted to or reserved by WMATA in **Article I** or with WMATA's operations or the free flow of pedestrian traffic to and from any WMATA Facilities. An owner or ground lessee of the WMATA Joint Development Site shall not conduct or permit any activities to be conducted that interfere with or diminish, or would reasonably be expected to interfere with or diminish, WMATA's ability to realize transit revenues. An owner or ground lessee of the WMATA Joint Development Site shall not commence or permit any construction or other activity, including but not limited to exerting any pressure or load or removing any vertical or horizontal support, which could adversely affect the WMATA Facilities or WMATA's operations generally. The foregoing includes, but is not limited to, (i) a prohibition against any non-WMATA Person taking any WMATA Facility out of operation before an interim or permanent replacement facility acceptable to WMATA in accordance with the terms of this Declaration is placed in service, (ii) a requirement that no Non-WMATA Improvements may be constructed within twenty-five (25) feet of any WMATA Facility, and (iii) a requirement that any balcony or operable window in any Non-WMATA Improvement must be located at least fifty (50) feet from the centerline of any WMATA tracks. WMATA will have the right to disapprove any activities that in WMATA's reasonable sole judgment could result in any injury to WMATA's Facilities or operations or expose WMATA to any liability. No consent by WMATA will be interpreted as a waiver by WMATA or assumption of liability or risk by WMATA.

## **Section 2.11 No Damages for Delay**

WMATA's failure or refusal to give any consent, approval or determination shall not give rise to any claim for, and each owner and ground lessee of any portion of the WMATA Joint Development Site shall not be entitled to any damages for, WMATA's failure or refusal to give such consent, approval or determination. In circumstances where WMATA's consent is not to be unreasonably withheld, condition or delayed, the only remedies for such failure or refusal are termination in accordance with **Sections 2.6 and 2.7**, deemed approval in accordance with **Section 2.16** and/or an action for specific performance or injunction. In circumstances where WMATA's may act in its sole and absolute discretion, no remedy shall be afforded for WMATA's exercise of its discretion.

## **Section 2.12 Waiver of Claims Relating to Noise, Light, Stray Electrical Current or Vibration**

Each owner and ground lessee of the WMATA Joint Development Site waives for itself and all other persons or entities claiming by or through it all right to make any claims against WMATA arising from noise, light, stray electrical current or vibration caused by or arising from WMATA's normal transportation-related operation of the WMATA Facilities. Each owner and ground lessee of the WMATA Joint Development Site other than WMATA shall include a provision to this effect in all sales agreements, condominium declarations and comparable documents for cooperatives, subleases, licenses, space occupancy agreements, and similar documents with respect to the WMATA Joint Development Site but the non-inclusion of such a

provision shall not waive, release, mitigate or otherwise affect the binding nature of the first sentence of this Section.

### **Section 2.13 Signage**

(a) Generally. Subject to **Section 2.13(b)**, any signage that is permitted by the Local Jurisdiction is permitted on any portion of the WMATA Joint Development Site.

(b) Signs Referring to WMATA Facilities. Notwithstanding the foregoing or anything else in this Declaration, all signs which refer to or are designed or intended to interface with or provide direction to the Metro Station or any other WMATA Facility must be approved in advance by WMATA for content, location, materials, color, font, and construction method. Any such sign shall comply with the WMATA Design and Construction Standards. WMATA shall determine such compliance in its sole and absolute discretion.

(c) WMATA's Own Signs. WMATA has the right to erect on the WMATA Joint Development Site suitable and reasonable directional signage to WMATA Facilities as long as such signage does not violate any Approved Development Plan.

### **Section 2.14 Quarterly Reports to WMATA**

During the process of obtaining any zoning or land use approvals or any building, excavation, sheeting and shoring, curb cut, environmental, wetlands, sewer or other permits or licenses applicable to the Project, each owner and ground lessee of the WMATA Joint Development Site shall provide WMATA with quarterly reports updating the status of that process and all other approvals applied for by that owner or ground lessee with respect to the WMATA Joint Development Site in order for WMATA to monitor the progress thereof. Upon the giving of Notice requesting the same, each owner or ground lessee of the WMATA Joint Development Site shall provide to WMATA any additional information related to the such permits, approvals or licenses within that owner's or ground lessee's possession or control, including copies of any notices that owner or ground lessee receives that the WMATA Joint Development Site may be rezoned or subjected to new zoning or land use changes, and such other information as WMATA may reasonably request.

### **Section 2.15 Indemnification of WMATA**

(a) Generally. Each owner and ground lessee of the WMATA Joint Development Site shall indemnify, defend (with attorneys reasonably acceptable to WMATA and retained at that owner's or ground lessee's expense) and hold WMATA harmless from any and all claims, damages, actions, losses, costs, expenses (including, without limitation any reasonable third party legal fees and expenses) and liabilities of whatsoever nature or kind that may arise in connection with any and all actions taken by that owner or ground lessee or its agents, consultants, contractors, engineers, surveyors, attorneys and employees in, on, about or in connection with the WMATA Joint Development Site, including claims for personal injury or death of any Person and for loss or damage to any property, and/or that arise out of WMATA's exercise of any of its rights under this Article, and/or that may arise from or in connection with

any claim brought by that owner or ground lessee or any Person claiming by or through it against WMATA allegedly arising from or relating to noise, light, stray electrical current or vibration from WMATA's transit operations.

(b) Hazardous Materials. Each owner and ground lessee of the WMATA Joint Development Site shall release, indemnify, defend (with attorneys reasonably acceptable to WMATA and retained at that owner's or ground lessee's expense) and hold harmless WMATA from any and all claims, damages, actions, losses, costs, expenses (including, by way of example and not limitation, legal fees and expenses) and liabilities of whatsoever nature that may arise in connection with the installation, use, generation, removal, treatment, disposal, storage or presence of any Hazardous Materials on, in, or under the WMATA Joint Development Site, whether such claims, liabilities, losses, demands, damages, penalties, fines, costs, charges and/or expenses are incurred by WMATA as a result of a claim asserted or instigated by WMATA or any third party.

### **Section 2.16 Deemed Approval**

If a party fails to timely respond within a specifically-stated period or, if no specific period is stated, within thirty (30) days, to any request for an approval or consent when approval or consent is not to be unreasonably withheld, conditioned or delayed, the requesting party may send the non-responding party a reminder Notice. The reminder Notice shall state in **bold type** and ALL CAPITALS "THIS NOTICE AFFECTS MATERIAL RIGHTS OF THE REQUESTING PARTY WITH RESPECT TO THE \_\_\_\_\_ JOINT DEVELOPMENT PROJECT" and the reminder Notice shall explain the nature of the approval or consent sought. If the non-responding party fails to respond to the reminder Notice within fifteen (15) days after the reminder Notice is given and such approval or consent is not to be unreasonably withheld, conditioned or delayed, then the non-responding party's approval or consent shall be deemed to have been given or obtained and shall be deemed to authorize the requesting party to proceed with the matter for which approval or request was sought. However, (i) the foregoing does not apply when WMATA's approval or consent may be withheld in WMATA's sole and absolute discretion, and (ii) nothing in this Section applies to any modification of an Approved Development Plan, to any modification of a ground lease or any other agreement between WMATA and an owner or ground lessee, or to any modification of this Declaration.

## **ARTICLE III**

### **ADDITIONAL COMPENSATION TO WMATA**

#### **Section 3.1 Participating Rent**

(a) Payable. Each owner and ground lessee of the WMATA Joint Development Site shall pay WMATA annually rent equal to percent ( %) of all receipts received by that owner or ground lessee from the operation of the Project, including current rents, forfeited tenant security deposits applied to current rents, receipts from tenants for services, and amounts received from tenants for reimbursement of operating expenses, pass throughs and in settlement

of their lease obligations (“**Participating Rent**”). Participating Rent shall be paid to WMATA annually no later than April 1 of each calendar year. The payment of Participating Rent shall be accompanied by a copy of the financial statement required by **Section 3.4**.

(b) Fair Market Rental Value. Each owner and ground lessee of the WMATA Joint Development Site and its management agent shall use commercially reasonable business efforts to lease all space at the Project available for rent at the then-current fair market value rate for similar properties and uses in the Local Jurisdiction. If an owner or ground lessee of the WMATA Joint Development Site fails to do so, any space that is not so leased shall be deemed to be leased at the then-current fair market value rent for purposes of calculating Participating Rent. Any space that an owner or ground lessee or its Affiliates may occupy shall not result in any reduction in Participating Rent payable; in the event an owner or ground lessee or its Affiliates shall occupy the WMATA Joint Development Site in whole or in part, they shall be treated as if they are paying fair market rent and Participating Rent shall be calculated accordingly.

### **Section 3.2 Capital Rent**

(a) Payment. Each owner and ground lessee of the WMATA Joint Development Site shall pay WMATA “**Capital Rent**” equal to fifteen percent (15%) of that owner’s or ground lessee’s share of the net proceeds of Capital Events. As used in this Declaration, the net proceeds are the full (gross) transaction revenues to an owner or ground lessee of the WMATA Joint Development Site (and any Affiliate receiving transaction revenues from such Capital Event) (i) less any reasonable and customary transactional costs incurred by that owner or ground lessee in connection with that Capital Event and documented on a settlement statement, including Impositions customarily payable at such a Capital Event, transfer and recording taxes or similar documentary stamp taxes, charges for recording documents in the land records, title and survey costs, reasonable legal fees payable to outside counsel, and refinancing commissions and fees (but excluding operating expenses and expenditures from any reserve fund funded by amounts included in operating expenses or for which any offset or deduction was previously taken), and (ii) less repayment of that owner’s or ground lessee’s remaining Project debt secured by a Mortgage to the extent such repayment is actually made. WMATA has the right to audit all revenues, expenses, and other payments associated with such Capital Event.

(b) Capital Event Notices. Each owner and ground lessee of the WMATA Joint Development Site shall deliver to WMATA Notice of an anticipated Capital Event promptly following the execution of a contract, loan commitment or other binding agreement in anticipation of such anticipated Capital Event and no less than thirty (30) days prior to the scheduled closing date of the anticipated Capital Event. The Notice shall set forth each owner’s or ground lessee’s preliminary estimate of the gross proceeds, net proceeds and Capital Rent anticipated therefrom. The Notice shall be for informational purposes only, and shall not create an expectation of, nor entitle WMATA to rely upon, the closing of such anticipated Capital Event or the amount of Capital Rent therefrom; WMATA shall be entitled to Capital Rent only upon the occurrence of a Capital Event and only in the amount based upon the actual net proceeds of such Capital Event.

### Section 3.3 Density Bonus

If, during the fifteen (15)-year period following the Effective Date, an owner or ground lessee of the WMATA Joint Development Site obtains new or modified zoning, land use or other approvals allowing the gross square feet of floor area in improvements entitled to be developed on the WMATA Joint Development Site to be increased over the amount approved as of the Effective Date (“**Additional Approvals**”), that owner or ground lessee shall pay WMATA the Additional Approvals Fair Market Value of each gross square foot of floor area added or approved (the “**Density Bonus**”), pursuant to the following:

(a) Give Notice. Each owner and ground lessee of the WMATA Joint Development Site shall deliver written Notice to WMATA of the granting of Additional Approvals within ten (10) days of receiving such Additional Approvals.

(b) Appraisal Process. The market unit value for the gross square feet of floor area of all improvements approved for the WMATA Joint Development Site by the Additional Approvals (the “**Additional Approvals Fair Market Value**”), expressed as dollars per square foot of floor area, shall be determined as set forth in this subsection.

(i) Within thirty (30) days after WMATA’s receipt of the Notice described in Section 3.3(a), WMATA and the applicable owner or ground lessee shall each retain, each at their own expense, an appraiser to determine the Additional Approvals Fair Market Value. Each of the appraisers selected shall be on WMATA’s list of approved appraisers, disinterested, independent and then certified by the State and regularly engaged in the business of rendering real estate appraisals of commercial properties in the metropolitan Washington, D.C. area. Each appraiser must be a member of the Appraisal Institute and have an "MAI" certification, or be a member of or have a comparable certification from any successor association or any association of comparable standing. By no later than the end of that thirty (30)-day period, WMATA and such owner or ground lessee of the WMATA Joint Development Site shall deliver to the other written notice setting forth the name of the appraiser selected by such party.

(ii) Within sixty (60) days after the end of the aforesaid thirty (30)-day period, each party’s appraiser shall deliver a full written appraisal report. Upon completion of its appraisal, each party will immediately provide a complete copy of its appraisal report to the other party in order to determine whether the reports agree upon the Additional Approvals Fair Market Value, or, failing that, whether the lower proposed Additional Approvals Fair Market Value is within ten percent (10%) of the higher proposed Additional Approvals Fair Market Value (the “**10% Range**”). If a party does not submit a full written appraisal report within the sixty (60)-day time period referenced above, then the appraisal that is timely submitted shall be the only appraisal report considered and such appraisal’s proposed Additional Approvals Fair Market Value shall be accepted by WMATA and such owner or ground lessee.

(iii) If the two parties’ appraisers’ proposed Additional Approvals Fair Market Values are within the 10% Range, then the Additional Approvals Fair Market Value shall be deemed to be the arithmetic mean of the respective proposed Additional Approvals Fair Market Values.



(iv) If the difference between the parties' appraisers' respective proposed Additional Approvals Fair Market Values is greater than the 10% Range and cannot be negotiated down by the two appraisers to be within the 10% Range within twenty-one (21) days after the end of the aforesaid sixty (60)-day period, then the two parties' appraisers shall jointly appoint a third appraiser to determine a proposed Additional Approvals Fair Market Value by notifying such appraiser and each of the parties of such appointment within ten (10) days after expiration of the negotiating period described above. The third appraiser shall be a neutral party who meets the criteria set forth in this Section. If the two parties' appraisers are not able to select the third appraiser within said ten (10) days, each party shall provide the names of two appraisers who meet the requirements of this Section and who are not the first two appraisers. The names shall be written on pieces of paper which shall then be folded so as to hide the writing and placed in a hat. The third appraiser shall then be selected by WMATA by a blind drawing of a single piece of paper from the hat.

(v) Neither party nor the two parties' appraisers shall, directly or indirectly, engage in any ex parte communications with the third appraiser after his or her selection. The third appraiser shall not be given and shall have no information concerning the two parties' appraiser's reports other than the comparables used by the two parties' appraisers. The third appraiser shall make a determination of a proposed Additional Approvals Fair Market Value within sixty (60) days after being so instructed.

(vii) If the third appraiser determines a proposed Additional Approvals Fair Market Value which is equal to or higher than the higher determination by one of the party's appraisers, then the Additional Approvals Fair Market Value shall be the higher determination made by that party's appraiser. If the third appraiser determines a proposed Additional Approvals Fair Market Value which is equal to or lower than the lower determination by one of the party's appraisers, then the Additional Approvals Fair Market Value shall be the lower determination made by that party's appraiser. If the proposed Additional Approvals Fair Market Value of the third appraiser is in between the first two appraisals, then the Additional Approvals Fair Market Value shall be the arithmetic mean of the proposed Additional Approvals Fair Market Value as determined by the third appraiser and the proposed Additional Approvals Fair Market Value as determined by that party-selected appraiser whose determination of a proposed Additional Approvals Fair Market Value is closer to that of the third appraiser.

(vii) The parties agree to fully cooperate in all respects in expediting appraisals to the end that the Additional Approvals Fair Market Value shall be determined by the appraisal procedure as speedily as possible with a minimum of expense.

(viii) The costs and expenses of the first two appraisals shall be borne by the party who selects or is required to select each such appraiser and the costs and expenses of the third appraisal, if one is required, shall be divided equally between WMATA and the owner or ground lessee.

(c) Payment Due. The Density Bonus shall be paid within sixty (60) days after the determination of Additional Approvals Fair Market Value.

### **Section 3.4    Recharacterizing Gross Income or Net Proceeds**

An owner or ground lessee of the WMATA Joint Development Site shall not take any action to recharacterize, or the effect of which is to recharacterize, rents, receipts, revenues, costs or expenses of the Project so as to result in a diminution in Participating Rent, Capital Rent, Density Bonus or any other sum payable under this Declaration to WMATA.

### **Section 3.5    Financial Reporting, Audits, Confidentiality.**

(a)    Annual Financial Reporting. Not later than each May 1, each owner and ground lessee of the WMATA Joint Development Site shall submit to WMATA an audited financial statement for such year prepared by that owner's or ground lessee's independent certified public accountant and reported on the same basis as that owner or ground lessee reports its federal income tax. Each such annual financial statement shall report in separate categories each type of revenue and expense related to the operation of the relevant portion of the WMATA Joint Development Site for that year, and also shall report all revenues, expenses, and other payments associated with any Participating Rent, Capital Event(s) and Density Bonus. The foregoing notwithstanding, the obligation to provide financial statements with respect to any portion of the WMATA Joint Development Site purchased for condominium purposes shall terminate upon the later to occur of (i) the closing of the final condominium unit sold within the applicable portion of the WMATA Joint Development Site to a bona fide, arm's-length purchaser or (ii) the cessation of the condominium declarant's or its affiliate's management or operation of a rental pool for the third-party condominium units.

(b)    Right to Inspect and Audit.

(i)    WMATA or its designated representative(s) may, during normal business hours and upon at least five (5) Business Days' Notice to an owner or ground lessee of the WMATA Joint Development Site, inspect, take extracts from, and make copies of the books and records of that owner or ground lessee (or its management company) for the purpose of verifying any financial statement submitted to WMATA pursuant to this Article and/or to conduct an independent audit of such books and records as are relevant to a determination as to the proper amount of Participating Rent, Capital Rent or Density Bonus that is payable. Copies of all leases between an owner or ground lessee of the WMATA Joint Development Site and any space tenant shall be available for inspection and copying by WMATA or its agent.

(ii)    Any such inspection or audit must be conducted within a period of five (5) years after a financial statement is submitted by that owner or ground lessee for the calendar year WMATA desires to inspect or audit. A failure to provide any financial statement to WMATA as required by this Article or to allow WMATA access to its books, records, and leases as required by this Section shall constitute a default by the applicable owner or ground lessee and shall toll the five (5) year period for inspection or audit of its books and records.

(iii)    Any such inspection or audit shall be at WMATA's sole cost and expense; provided, however, if the inspection or audit discloses the existence of a variance for any year of five percent (5%) or more in excess of the amount required to be paid to WMATA, such

inspection or audit shall be at the expense of the applicable owner or ground lessee. In addition, if WMATA's inspection or audit discloses that Participating Rent, Capital Rent or Density Bonus actually due to WMATA is in excess of the amount previously paid by that owner or ground lessee to WMATA with respect to any event or period, then the amount of such excess actually due to WMATA, plus interest at the Default Interest Rate on such excess amount, shall be paid within thirty (30) days following WMATA's Notice setting forth in reasonable detail the amount due and the calculations used in making the determination. If an owner or ground lessee disputes the calculations, it shall so Notify WMATA and, subject to any different dispute resolution procedure specified in any ground lease of that portion of the WMATA Joint Development Site to which that ground lessee is a party, the dispute shall be resolved by binding arbitration by and in accordance with the commercial disputes rules of the American Arbitration Association (or such successor as may then exist or, if no successor then exists, such other independent arbiter as the parties may then agree).

(c) Confidentiality. All information and/or materials provided by an owner or ground lessee pursuant to this Section shall be confidential and shall not be disclosed by WMATA other than (i) pursuant to a subpoena or court order, or (ii) in litigation, insolvency proceedings of any type, mediation, arbitration or other dispute resolution process with or involving that owner or ground lessee to which such information or materials are germane, or (iii) in accordance with WMATA's then-current Public Access To Records Policy (or any replacement thereof). Nothing in this subsection shall be deemed to limit any employees, officers, or directors of WMATA, or any auditors, attorneys, or other consultants hired by WMATA or their respective employees, from reviewing and analyzing the information and/or materials obtained, and discussing and sharing such information and/or materials among themselves and with an owner or ground lessee of the WMATA Joint Development Site or its or their representatives.

### **Section 3.6 Method of Payment**

Unless WMATA specifies otherwise, all payments to WMATA shall be made by electronic funds transfer to such account(s) as WMATA may direct from time to time. Nothing in this Section precludes WMATA from accepting payment by other means from time to time in its sole and absolute discretion, but no such acceptance by WMATA shall constitute a precedent, a waiver of this Section or a bar to WMATA's enforcement of this Section.

### **Section 3.7 Late Fees, Interest and Collection Costs**

(a) Late Fee. In the event that any Participating Rent, Capital Rent, Density Bonus or other sum due WMATA under this Declaration is not paid within five (5) days after its due date, a late fee of five percent (5%) of the overdue payment shall automatically be due and payable without any Notice or other demand being necessary. The payment of such a late fee shall not constitute a waiver on the part of WMATA of any rights or remedies arising out of a default for late payment.

(b) Late Interest. In the event that any Participating Rent, Capital Rent, Density Bonus or other sum due WMATA shall be overdue for a period of five (5) days or more from the specified due date, interest at the Default Interest Rate on the sum overdue shall immediately

begin to accrue and be payable to WMATA, without Notice or other demand being necessary, from the date the payment was first due until the date actually paid to WMATA. The payment of such late interest shall not constitute a waiver on the part of WMATA of any rights or remedies arising out of a default.

(c) Costs of Collection. If WMATA sends a default Notice for nonpayment of any sum due to it under this Declaration, undertakes collection efforts, or initiates any legal proceeding for any such sum, the owner or ground lessee of the applicable portion of the WMATA Joint Development Site shall pay any reasonable attorneys' fees, court costs and other collection costs WMATA may incur.

### **Section 3.8 Priority of Payment**

Notwithstanding anything contained to the contrary in any other provision of this Declaration, payments due under or arising from this Declaration shall have priority over any other obligation except obligations that have priority by application of law. Without limiting the foregoing, payments to WMATA are not subordinate to Mortgages.

## **ARTICLE IV**

### **TRANSFERS OF OWNERSHIP OR CONTROL**

#### **Section 4.1 Not Permitted; Exceptions**

(a) Non-Transferable. Except (i) at any time after any WMATA Replacement Facilities required on that portion of the WMATA Joint Development Site or required as part of the development of that portion of the WMATA Joint Development Site have been Finally Completed and Substantial Completion of the Non-WMATA Improvements to be constructed on that portion of the WMATA Joint Development Site has occurred, or (ii) if expressly approved in writing by WMATA, which approval may be withheld in WMATA's sole and absolute discretion, or (iii) as expressly permitted in this Section (A) no sale, assignment, conveyance, pledge, encumbrance or other transfer of any fee interest or ground lease of any portion of the WMATA Joint Development Site by any Person other than WMATA is permitted; and (B) no sale, conveyance, assignment or other transfer of any ownership interest in an owner or ground lessee of the WMATA Joint Development Site other than WMATA, whether directly or indirectly or at any tier of ownership, is permitted if the effect of such sale, conveyance, assignment or other transfer, individually or when aggregated with other sales, conveyances, assignments or other transfers, is to effect either a change in the operational control of that owner or ground lessee, whether by ownership, contract or otherwise, or a sale or conveyance of fifty percent (50%) or more of the ownership interests in that owner or ground lessee away from the members therein on the Effective Date or their affiliates or the persons in control thereof as of the date that owner or ground lessee acquired fee title or a leasehold estate in the WMATA Joint Development Site.

(b) Exemptions. The prohibitions in this Section shall not apply to any of the following sales, assignments, conveyances, pledges, encumbrances or other transfers:

(i) any borrowing by an owner or ground lessee from any *bona fide* third-party institutional lender solely for purposes of furthering the acquisition, development, construction, operation, tenancing, renovation or reconstruction of the Project, which may be secured by a Mortgage, pledge or assignment of the owner's or ground lessee's rights in and to the land or under the ground lease or of any pledge of all of the membership interests in the owner or ground lessee;

(ii) the admission of additional members, partners or other investors to the owner or ground lessee in exchange for equity contributions to that owner or ground lessee to permit the owner or ground lessee to perform its obligations under its ground lease or comparable contractual agreement in the event of a fee conveyance, which contributions may result in a dilution of the membership, partnership or other ownership interests in the owner or ground lessee and/or granting certain management rights as may be customary in the marketplace at the time to newly admitted members, partners or other investors upon the occurrence of certain events involving the owner's or ground lessee's failure to perform its obligations under the ground lease or comparable contractual agreement in the event of a fee conveyance or to otherwise diligently pursue the Project;

(iii) the exercise of rights by a lender to or equity investor in an owner or ground lessee if a default under this Declaration by that owner or ground lessee occurs, including, without limitation, a foreclosure sale, a deed in lieu of foreclosure, and/or a takeover of management by an equity investor, and the subsequent sale or conveyance of the owner's or ground lessee's fee interest or rights under the ground lease or the membership interests in the owner or ground lessee to a purchaser at foreclosure or a collateral sale by such lender, equity investor or their designees;

(iv) an assignment to a community association, if any, established under or pursuant to this Declaration of the rights to any portion of the WMATA Joint Development Site which is to be used for public or quasi-public purposes in accordance with the Approved Development Plan;

(v) the dedication of portions of the WMATA Joint Development Site to the public in accordance with the Approved Development Plan;

(vi) transfers of interests of members, partners, shareholders or other similar interests in an owner or ground lessee of the WMATA Joint Development Site due to death, disability, legal disqualification from owning property, corporate reorganization (that does not include consideration to the owner or ground lessee), merger (that does not include consideration to the owner or ground lessee) or the like;

(vii) transfers among or between then-existing members, partners, shareholders or other similar interests in an owner or ground lessee or any of its constituent members, partners, shareholders or each owner of other similar interests;

(viii) to the extent condominium development and ownership is permitted under this Declaration, arm's-length conveyances of title in fee to unrelated third party residential condominium unit purchasers in the ordinary course of business;

(ix) sales, transfers or other exchanges of ownership interests within a publicly-traded entity via a regulated stock exchange or other public exchange;

(x) mergers and acquisitions and sales of all or substantially all of the assets of the parent company of an owner or ground lessee that are not implemented for the purpose of evading the restrictions of this Article.

#### **Section 4.2 Implementing a Transfer**

(a) Advance Notice to WMATA. If and when any owner or ground lessee of the WMATA Joint Development Site, or any member, partner, shareholder or other owner of an equity interest at any tier in any such owner or ground lessee of the WMATA Joint Development Site, receives an offer to engage in any transaction referenced in this Article that it intends to accept and such transaction is not exempted under this Article, the owner or ground lessee will furnish a copy of the offer and any other relevant information to WMATA.

(b) Information About Transferee; Annual Report. If any transaction referenced in this Article closes, whether or not exempt from WMATA's approval, the owner or ground lessee shall notify WMATA of the transaction and provide the name of the buyer, assignee or other transferee, its address for Notices, and such information about it as WMATA may deem reasonable. In addition, each non-WMATA owner or ground lessee shall provide WMATA with an audited statement no later than May 1 of each calendar year providing complete information about any transaction covered by this Article during the prior calendar year, even if exempt from WMATA's approval, or certifying to the absence of any such transactions. WMATA shall maintain all information provided to it under this Article as confidential and proprietary except to the extent disclosure is required or appropriate (i) pursuant to a subpoena or court order, or (ii) in litigation, insolvency proceedings of any type, mediation, arbitration or other dispute resolution process with or involving an owner or ground lessee of any portion of the WMATA Joint Development Site concerning a dispute to which such information or material is germane, or (iii) in accordance with WMATA's then-current Public Access To Records Policy (or any replacement thereof). Nothing in this subsection shall be deemed to limit any employees, officers, or directors of WMATA, or any auditors, attorneys, or other consultants hired by WMATA or their respective employees, from reviewing and analyzing the information or material obtained, and discussing and sharing such information and material among themselves and with the applicable each owner or ground lessee or its or their representatives.

(c) WMATA Audit Right. WMATA reserves the right to audit any owner or ground lessee of the WMATA Joint Development Site to determine compliance with the provisions of this Article. Any such audit shall be at WMATA's own cost unless such audit determines that a material omission has occurred and/or that Capital Rent due to WMATA from any transaction has been understated by five percent (5%) or more, in which event the audit shall be at the expense of the applicable owner or ground lessee.

### **Section 4.3 Post-Transfer Liability**

A buyer, assignee or transferee under this Article shall assume all accrued and prospective rights and obligations of the seller, assignor or transferor for the remaining term of this Declaration. No transaction of the types referenced in this Article shall release the seller, assignor or transferor from any of its previously accrued obligations under this Declaration. The seller, assignor or transferor, on the one hand, and the buyer, assignee or transferee, on the other hand, shall be jointly and severally liable for all obligations accrued under this Declaration before the effective date of the sale, assignment or other transfer.

### **Section 4.4 Restriction on Transfer of Density**

No density or use rights of any nature whatsoever may be sold, assigned, pledged, Mortgaged, hypothecated, or otherwise transferred from the WMATA Joint Development Site to any Person or to any other property for use, or in support of development, at any other location.

### **Section 4.5 Violative Transfers Void**

Any transaction entered into in violation of this Article shall be null and void and shall also be a default.

## **ARTICLE V ENVIRONMENTAL MATTERS**

### **Section 5.1 Hazardous Materials**

Owners and ground lessees of the WMATA Joint Development Site shall not cause or permit Hazardous Materials to be used, generated, stored or disposed of on or from their respective portions of the WMATA Joint Development Site; provided, however, that the foregoing prohibition shall not apply to any materials which are used in the ordinary course of development of property and construction of improvements, or in the ordinary operation of the WMATA Joint Development Site or an owner's or ground lessee's business or the business conducted on its portion of the WMATA Joint Development Site, provided that the same are used, generated, stored and disposed of in accordance with all applicable Laws.

### **Section 5.2 Compliance with Applicable Law**

All work undertaken by each owner and ground lessee of the WMATA Joint Development Site must be in compliance with all applicable Laws. WMATA reserves the right to enter the WMATA Joint Development Site and to inspect any work undertaken by any owner or ground lessee for the purpose of determining that compliance. Notwithstanding having the right to inspect or any inspection it may conduct, WMATA shall not have any responsibility for noncompliance by any owner or ground lessee other than itself.

### **Section 5.3     Delivery of Studies to WMATA**

Each owner and ground lessee of the WMATA Joint Development Site shall promptly deliver copies of all Phase I and Phase II environmental site assessments (or such studies as may in the future be comparable to or a replacement for such assessments), all soil samplings and all supporting information and data (including tests and studies) to WMATA. WMATA shall have the right to confer directly with and obtain relevant information from the parties preparing such environmental site assessments or performing services in connection therewith at such owner's or ground lessee's expense.

### **Section 5.4     Deliver Violation Notices to WMATA**

Each owner and ground lessee of the WMATA Joint Development Site shall promptly deliver to WMATA copies of all notices (whether from a governmental authority or any other Person) received by it alleging that any release of a Hazardous Material(s) has occurred on or from the WMATA Joint Development Site.

### **Section 5.5     Remediation**

Each owner and ground lessee of the WMATA Joint Development Site shall perform any environmental remediation required for its portion of the WMATA Joint Development Site. No remediation shall be undertaken except in compliance with applicable Laws. WMATA shall have the right to approve all remediation plans, including the actions to be taken, disposal plans, the schedule, effect on WMATA Facilities and operations, and the identity of all contractors; WMATA's approval to the foregoing shall not be unreasonably withheld, conditioned or delayed.

## **ARTICLE VI**

### **REAL ESTATE TAXES AND COMMON AREA CHARGES**

#### **Section 6.1     Obligation to Pay Impositions**

Non-WMATA owners and ground lessees of the WMATA Joint Development Site shall pay all Impositions on or related to their portions of the WMATA Joint Development Site without contribution from WMATA.

#### **Section 6.2     WMATA's Tax Exemption**

Pursuant to Section 78 of the WMATA Compact, WMATA is not required to pay taxes or assessments upon any of the WMATA Joint Development Site acquired by it or under its jurisdiction, control, possession or supervision, or upon its activities in the operation and maintenance of any transit facilities, or upon any revenues therefrom, and the WMATA Joint Development Site and to the extent owned by it income derived therefrom are exempt from all federal, State, municipal and local taxation.



### **Section 6.3    Obligation to Pay Common Area Maintenance Charges**

Should there at any time be any common area maintenance charges, fees or other expenses, howsoever called, levied on the WMATA Joint Development Site, each owner or ground lessee of the WMATA Joint Development Site shall pay its share of the same without contribution from WMATA. For purposes of this Section, if the charge, fee or other expense is levied on a pro rata basis based on land area, any land owned by WMATA and not ground leased to another Person shall be excluded from the land area.

## **ARTICLE VII MAINTENANCE AND REPAIR**

### **Section 7.1    Maintenance Obligations**

Each non-WMATA owner and ground lessee of the WMATA Joint Development Site at its sole cost and expense shall Maintain its portion of the WMATA Joint Development Site and all improvements, other than WMATA Facilities and the WMATA Easement Areas, now or hereafter located on its portion of the WMATA Joint Development Site. WMATA, at its sole cost and expense, shall Maintain the WMATA Facilities and the WMATA Easement Areas except any WMATA Easement Areas that are granted under **Section 1.9**.

### **Section 7.2    Access for Maintenance**

If necessary to allow a party to Maintain its improvements when no grant of access rights is otherwise set forth in this Declaration, the other party agrees to cooperate and grant right of entry, on a case by case basis, but, in all cases when no grant of access rights is otherwise set forth in this Declaration, conditioned upon the following:

(a) entry shall be provided during regular business hours, upon not less than two (2) Business Days' Notice, except in the event of emergency when such Notice, if any, as is practical under the circumstances shall be provided; and

(b) entry shall not be made to secured areas of the other party except with escort and, in case of entry by a non-WMATA owner or ground lessee into the WMATA Easement Areas, pursuant to WMATA's safety and security rules and protocol and upon payment of such escort or other fees as WMATA may then levy upon such entries under its then-prevailing policies and practices.

## **ARTICLE VIII INSURANCE**

### **Section 8.1    Scope of Article**

Except as otherwise specifically set forth in this Article, the requirements of this Article shall apply to all improvements constructed on the WMATA Joint Development Site, including any WMATA Facilities constructed by or on behalf of an owner or ground lessee of the

WMATA Joint Development Site. Notwithstanding the foregoing, (i) except for **Section 8.3**, this Article does not apply to WMATA itself and (ii) this Article shall not apply if an owner or ground lessee and WMATA enter into a separate agreement governing the construction of any WMATA Facilities that covers the subject matter of this Article, in which case the terms of that separate agreement shall take precedence over this Declaration with respect to the WMATA Facilities that are the subject of that separate agreement.

## **Section 8.2 Insurance**

(a) Owner's and Ground Lessee's Insurance. Each owner and ground lessee of the WMATA Joint Development Site other than WMATA and their contractors and, as appropriate, subcontractors, shall maintain, at their own cost and expense, the insurance set forth on **Exhibit K** attached hereto.

(b) Interaction with WMATA's Insurance. WMATA is a self-insured government entity. Insurance and indemnification provided by non-WMATA owners and ground lessees are primary. To the extent any endorsement contemplates issuance of a permit by a state or local subdivision, WMATA shall be considered a state or local subdivision for such purposes.

## **Section 8.3 Mutual Waiver of Subrogation**

Each party hereby releases and discharges the other party and its directors, partners, members, other principals, officers, employees, contractors, agents, and business invitees from any claims and rights of recovery for damage or loss to any person, property or entity, including the improvements now or hereafter located on the WMATA Joint Development Site, caused by or resulting from any risks insured against under any insurance policies carried by such damaged or injured party and in force at the time of any such damage or loss, or required to be carried, regardless of the cause of the damage or loss (including the negligence of such party or its directors, partners, members, other principals, officers, employees, contractors, agents, and business invitees) to the extent of proceeds actually recovered or that would have been recovered had the required insurance been carried. Each party shall obtain at its sole cost and expense any special endorsements required by its insurer to evidence compliance with the aforementioned waiver. The foregoing shall not constitute a limitation or waiver of any maintenance obligations hereunder. The failure to insure shall not void this waiver.

# **ARTICLE IX**

## **DAMAGE AND CONDEMNATION**

## **Section 9.1 Damage**

In the event of damage to or destruction of any portion of the Non-WMATA Improvements that creates a condition which interferes with WMATA's use of the WMATA Easement Areas or with WMATA's transit operations, whether such damage or destruction be by fire or any other cause, similar or dissimilar, insured or uninsured, the owner or ground lessee which is the owner of the damaged or destroyed Non-WMATA Improvements will restore, repair, replace or rebuild, at a minimum, the portion of the Non-WMATA Improvements so

damaged at the cost of that owner or ground lessee to the extent necessary to remedy the interference with WMATA's use of the WMATA Easement Areas or with WMATA's transit operations. Each owner and ground lessee of the WMATA Joint Development Site understands that WMATA will suffer material damage if damage or destruction to the Non-WMATA Improvements interferes with WMATA's use of the WMATA Easement Areas or WMATA's transit operations and each such owner and ground lessee of the WMATA Joint Development Site agrees to remove any condition so interfering with WMATA's easement rights or operations as expeditiously as practical under the circumstances. Except in an emergency, when WMATA may remedy the situation without Notice to an owner or ground lessee and/or without giving the owner or ground lessee an opportunity to remedy, if such damage is not expeditiously corrected by the owner or ground lessee then WMATA may, upon reasonable Notice to that owner or ground lessee, undertake such restoration, repair, replacement or rebuilding of such damage as may be necessary to remedy the interference with WMATA's use of the WMATA Easement Areas or with WMATA's transit operations. Any such work shall be at the owner's or ground lessee's sole cost and expense and each owner and ground lessee will reimburse WMATA for the cost thereof plus interest at the Default Interest Rate from the date the cost was incurred by WMATA until the date payment is made to WMATA.

## **Section 9.2    Condemnation**

In the event of a total or partial taking of any portion of the WMATA Joint Development Site in condemnation proceedings or by any right of eminent domain (including a deed or other transfer in lieu of eminent domain), that portion of the total aggregate award for such taking, including severance damages, (i) attributable to the value of the WMATA Easement Areas and any areas owned by WMATA and not ground leased to a third party shall be payable to WMATA and (ii) attributable to the value of any portion of the WMATA Joint Development Site that is owned in fee by or ground leased by any third party, less the WMATA Easement Areas, shall be payable to the owner or ground lessee of that portion of the WMATA Joint Development Site. Notwithstanding the foregoing, this provision shall not prohibit either party with respect to their respective property interests from filing collateral claims with the condemning authority for recovery over and above the value of their property interest so taken to the extent of any damage suffered by that party; provided such claim or recovery does not reduce or diminish the amount of the award which the other party would otherwise receive.

## **ARTICLE X** **REMEDIES**

### **Section 10.1    Self-Help**

If an owner or ground lessee of any portion of the WMATA Joint Development Site fails to perform any of its duties or obligations provided under this Declaration (the **“Defaulting Party”**), any other owner or ground lessee of the WMATA Joint Development Site (the **“Non-Defaulting Party”**), may, at any time, give Notice to the Defaulting Party setting forth the specific failures to comply with this Declaration. If the failure(s) (i) is not corrected within thirty (30) days after the giving of the Notice, or (ii) is non-monetary and not capable of correction within thirty (30) days and such failure is not cured within such longer period of time as may be

necessary to effect such cure, provided the Defaulting Party commences to correct the failure within the initial thirty (30) days and thereafter continuously and diligently prosecutes it to completion, and in no event more than ninety (90) days after the giving of the Notice, or (iii) poses a risk to the health and safety of any natural persons or of physical damage to any improvements or is otherwise a failure to Maintain that materially adversely affects the WMATA Joint Development Site or the operations of the Non-Defaulting Party and the Non-Defaulting Party gives such Notice, if any, as under the circumstances may be appropriate, then in any such event the Non-Defaulting Party shall have the right to correct the failure(s), including the right to enter upon the Defaulting Party's property to correct the failure(s), and the Defaulting Party shall pay the costs thereof on demand. The Defaulting Party shall, within ten (10) days of written demand by the Non-Defaulting Party, reimburse the Non-Defaulting Party for all reasonable costs and expenses incurred pursuant to this Section, including reasonable attorneys' fees costs, and wages, benefits and overhead allocable to the time expended by any employee of the Non-Defaulting Party in taking such action, plus interest thereon at the Default Interest Rate.

### **Section 10.2 Other Remedies**

If at any time an owner or ground lessee of any portion of the WMATA Joint Development Site shall fail to perform any covenant or agreement required to be performed by it pursuant to this Declaration, or if such owner or ground lessee shall do or threaten to do anything in violation of this Declaration, then any other owner or ground lessee shall have, in addition to those remedies expressly set forth herein, all rights and remedies at law or in equity, including, but not limited to, the right to specific enforcement of such covenant or agreement or the right to enjoin such violation or threatened violation, and the right to obtain a judgment and enforce a judgment to the extent provided by law. Remedies at law may not be useful or appropriate to the requirements of this Declaration and equitable remedies are appropriate and within the contemplation of this Declaration. The remedies provided in this Section are in addition to any remedies available elsewhere in this Declaration or under applicable Laws. Exercise of one remedy shall not be deemed to preclude exercise of other remedies for the same default, and all remedies available to a party may be exercised cumulatively.

### **Section 10.3 No Punitive or Consequential Damages**

No party shall be liable for punitive or consequential damages because of any breach of this Declaration.

### **Section 10.4 No Personal Liability**

Notwithstanding any contrary provision contained in this Declaration, a party's obligations and liabilities under this Declaration shall not constitute personal obligations of a party's partners, members, shareholders, other principals, directors, officers, employees, agents, attorneys, or representatives. Nothing in this Section shall be deemed to limit (i) any injunctive or other available equitable relief or (ii) the recovery of monetary damages to the extent of available insurance proceeds.

### **Section 10.5 Lien Rights**

All sums owed by a non-WMATA Defaulting Party to a Non-Defaulting Party under this Article shall be a charge on such Defaulting Party's interests in the WMATA Joint Development

Site and shall be a continuing lien thereon. No lien is hereby created or allowed on any interest held by WMATA in real or personal property. The lien rights arising under this Section shall be subordinate to the lien of any first Mortgage.

#### **Section 10.6 No Waiver of Rights**

The failure of any party to enforce any right or remedy set forth in this Declaration shall not constitute a waiver of the right of such party to enforce such right or remedy in the future. All rights and remedies granted herein shall be deemed to be cumulative and the exercise of any one or more thereof shall not be deemed to constitute an election of remedies, nor shall a failure to enforce this Declaration in any one instance preclude the party exercising its rights from exercising such rights or remedies in any other instance, similar or dissimilar.

### **ARTICLE XI NOTICES**

#### **Section 11.1 Giving of Notice**

(a) All notices, demands or requests (“**Notices**”) given to an owner or ground lessee of the WMATA Joint Development Site must be in writing in hard copy to be effective. Oral and/or e-mailed notices, demands or requests shall not be effective except that e-mails that transmit hard copy attachments shall be effective as to the hard copy attachments.

(b) If at any time and from time to time any Person shall succeed to the interest or estate of any party, then (i) no Notice which purports to have been given by such Person shall be effective nor shall the party to whom such Notice is addressed have any obligation to recognize such Notice as having been given, unless the party to whom such notice is given shall previously or simultaneously therewith be given Notice of the change of ownership by which such Person shall have acquired such interest or estate, and (ii) such successor Person shall not be entitled to receive any Notice hereunder, and any notice given (or deemed to have been given) to the prior owner of such interest or estate shall be deemed to have been given to such successor Person, unless and until the party giving such Notice shall be given written notice of the change of ownership by which such Person shall have acquired such interest or estate.

#### **Section 11.2 Service Procedures**

All Notices shall be: (i) personally delivered; (ii) sent by registered or certified United States mail, postage prepaid, return receipt requested; (iii) sent by local hand-delivery for same-day or next-Business Day delivery or by a nationally recognized courier service for next-Business Day delivery; or (iv) subject to the caveat in the final clause of **Section 11.1(a)**, sent by e-mail. Notices shall be deemed to have been given on the earlier of actual receipt., or in the case of mailing by United States Mail, the third (3<sup>rd</sup>) Business Day after the date so mailed or, in the case of overnight courier, on the first Business Day after delivery to such courier, or, in the case of e-mail, on the first Business Day after being sent. Any Notice refused, or that is incapable of delivery due to an incorrect or out-of-date address provided by the intended recipient, shall be considered delivered on the earlier of the actual date of refusal or on the date provided in the previous sentence. A party may

change its address for Notices at any time and from time to time by giving Notice to the other parties of whom it has been given Notice. Notices may be given by attorneys on behalf of their client.

### **Section 11.3 Notice to Persons Other Than WMATA**

All Notices to an owner or ground lessee of the WMATA Joint Development Site other than WMATA shall be deemed to have been properly given if addressed to such address as such owner or ground lessee has given Notice of to WMATA and/or to each other such owner or ground lessee, with a copy to the holder or beneficiary of any Mortgage of the applicable portion of the WMATA Joint Development Site (other than the WMATA Facilities) of whom the Person giving the Notice has been given Notice; provided, however, that no owner or ground lessee (other than WMATA) shall at any time specify more than two addressees and/or addresses for the receipt of such Notice in addition to any such Mortgagee.

### **Section 11.4 Notice to WMATA**

All Notices to WMATA shall be deemed to have been properly given if addressed to WMATA as follows (or to such other address of which Notice is given as set forth in **Section 11.2**):

Prior to April 1, 2022:

Original to: Vice President  
Office of Real Estate and Parking  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, NW  
Washington, DC 20001  
E-mail: [realestate@wmata.com](mailto:realestate@wmata.com)

And

One copy to: General Counsel  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, NW  
Washington, DC 20001

And, if the Notice involves insurance, with one copy to:

Director of Risk, Insurance and Third-Party Claims  
Office of Insurance  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, NW  
Washington, DC 20001

From and after April 1, 2022:

Original to: Vice President  
Office of Real Estate and Parking  
Washington Metropolitan Area Transit Authority  
300 Seventh Street, SW  
Washington, DC 20024  
E-mail: [realestate@wmata.com](mailto:realestate@wmata.com)

And

One copy to: General Counsel  
Washington Metropolitan Area Transit Authority  
300 Seventh Street, SW  
Washington, DC 20024

And, if the Notice involves insurance, with one copy to:

Director of Risk, Insurance and Third-Party Claims  
Office of Insurance  
Washington Metropolitan Area Transit Authority  
300 Seventh Street, SW  
Washington, DC 20024

And, in any case, if the Notice relates to design or construction matters, with one copy to:

Program Manager  
Office of Joint Development and Adjacent Construction  
Washington Metropolitan Area Transit Authority  
Carmen Turner Facility  
Building C  
3500 Pennsy Drive  
Landover, Maryland 20785

And with a copy to the holder or beneficiary of any Mortgage of the WMATA Facilities of whom that Person has been given Notice.

WMATA may unilaterally execute and record in the Land Records an amendment of this Section establishing additional or different addresses for Notices to it.

## **ARTICLE XII**

### **ESTOPPEL CERTIFICATES**

#### **Section 12.1 Estoppel Certificate by WMATA**

WMATA agrees, upon not less than twenty (20) days prior Notice from an owner or ground lessee of any portion of the WMATA Joint Development Site or from any then-existing Mortgagee, to execute and furnish a written statement which: (1) certifies that this Declaration is unmodified and in full force and effect (or if modified that this Declaration is in full force and effect as modified and states the modifications); (2) states to the knowledge of WMATA whether that owner or ground lessee is in default in keeping, observing and performing any of the terms of this Declaration, and, if in default, specifies each such default of which WMATA may have knowledge; (3) certifies to the knowledge of WMATA as to the existence of any offsets, counterclaims or defenses to this Declaration on the part of WMATA; and (4) sets forth any other factual matters regarding this Declaration which reasonably may be requested except as to proprietary or confidential information. For purposes of such a certificate, the knowledge of WMATA shall be limited to the then-current actual knowledge of the signatory of such certificate and no knowledge shall be deemed or imputed to that individual. It is intended that any such statement delivered pursuant to this Section may be relied upon by an owner or ground lessee of the WMATA Joint Development Site, any prospective assignee of such an owner or ground lessee, any then-existing or prospective Mortgagee or any assignee of any Mortgagee. Reliance on such certificate may not extend to any default of such owner or ground lessee or to any other matter as to which WMATA shall have no actual knowledge.

#### **Section 12.2 Estoppel Certificate by Persons Other Than WMATA**

Each owner and ground lessee of the WMATA Joint Development Site other than WMATA agrees, upon not less than twenty (20) days prior Notice from WMATA or from any then-existing Mortgagee of the WMATA Reserved Areas or the WMATA Facilities, to execute and furnish a written statement which: (1) certifies that this Declaration is unmodified and in full force and effect (or if modified that this Declaration is in full force and effect as modified and states the modifications); (2) states to the knowledge of that owner or ground lessee whether WMATA is in default in keeping, observing and performing any of the terms of this Declaration, and, if in default, specifies each such default of which that owner or ground lessee may have knowledge; (3) certifies to the knowledge of that owner or ground lessee as to the existence of any offsets, counterclaims or defenses to this Declaration on the part of that owner or ground lessee; and (4) sets forth any other factual matters regarding this Declaration which reasonably may be requested except as to proprietary or confidential information. For purposes of such a certificate, the knowledge of that owner or ground lessee shall be limited to the then-current actual knowledge of the signatory of such certificate and no knowledge shall be deemed or imputed to that individual. It is intended that any such statement delivered pursuant to this Section may be relied upon by WMATA and any prospective purchaser or Mortgagee of its interest in the WMATA Joint Development Site. Reliance on such certificate may not extend to any default of WMATA or to any other matter as to which the applicable owner or ground lessee shall have no actual knowledge.



## **ARTICLE XIII**

### **WMATA-SPECIFIC CLAUSES**

#### **Section 13.1 No Waiver of Sovereign Immunity**

Except as may be expressly set forth in this Declaration or as provided in the WMATA Compact, nothing in this Declaration shall be deemed or construed to constitute a waiver of WMATA's sovereign immunity.

#### **Section 13.2 Anti-Deficiency Clause**

All obligations of WMATA under this Declaration that directly or indirectly require the expenditure by WMATA of any of its funds are subject to the appropriation and availability of funding through WMATA's budgetary procedures.

#### **Section 13.3 Officials Not to Benefit**

(a) WMATA Personnel. No officer, board member, or employee or agent of WMATA or any member of any such person's immediate family (which term "immediate family" shall, for purposes of this Section, mean the parent, spouse, sibling, child, grandparent, or grandchild of any of the foregoing persons), directly or through a third party, has or will have during his tenure with WMATA or within one (1) year thereafter any financial or other interest in, or in common with, any non-WMATA owner or ground lessee of any portion of the WMATA Joint Development Site or any of its Affiliates. Each such owner and ground lessee of the WMATA Joint Development Site will comply, and will contractually obligate each of its third-party contractors at any tier to comply, with the provisions of Executive Orders 12549 and 12689, "Debarment and Suspension," 31 USC §6101 note, and U.S. Department of Transportation regulations on Debarment and Suspension at 49 CFR Part 29, as they may be amended, supplemented, replaced or otherwise modified from time to time. Each owner and ground lessee of the WMATA Joint Development Site shall include the requirements of the preceding sentence in each sublease, license, or contract for work on the WMATA Joint Development Site, and shall require each sublessee, licensee, or contractor for work on the WMATA Joint Development Site to require compliance with those requirements and include them in any lower tier subcontract.

(b) Public Officials. No member (i.e., Representative or Senator) of or delegate to Congress, or any similar official, or any member of such person's family, shall be admitted to any share or part of this Declaration, or to any benefit that may arise therefrom, but this provision shall not apply if this Declaration is made with a corporation or other entity with which such official or family member has only a *de minimis* contractual or ownership interest. Each owner and ground lessee of the WMATA Joint Development Site warrants, represents, and agrees that as of the Effective Date no person described in this subsection, nor any affiliate of such person, had any such interest in them. Each owner and ground lessee of the WMATA Joint Development Site must forthwith deliver written Notice to WMATA of any breach of the

foregoing warranty, representation, and agreement, and must make reasonable inquiries from time to time to determine whether any such breach has occurred.

#### **Section 13.4 Gratuities**

In connection with this Declaration, or any amendments or modifications of this Declaration, the giving of, or offering to give, gratuities (in the form of entertainment, gifts or otherwise) by a non-WMATA owner or ground lessee of any portion of the WMATA Joint Development Site or any consultant, agent, representative, or other person deemed to be acting on behalf of such an owner or ground lessee or any consultant, agent, contractor, subcontractor or supplier furnishing material to or performing work under this Declaration, or any agent, representative, or other person deemed to be acting on behalf of such supplier or subcontractor, to any director, officer or employee of WMATA, or to any director, officer, employee or agent of any of WMATA's agents, consultants or representatives, with a view toward securing an agreement or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to performance under, this Declaration or any agreement that will be negotiated, is expressly forbidden. The terms of this Section will be broadly construed and strictly enforced. Any violation of this provision will constitute a default and will not be subject to cure.

#### **Section 13.5 No Use of WMATA Compact**

A non-WMATA owner or ground lessee may not assert for its own benefit, or attempt to assert, any exemption from liability under applicable laws, including the payment of Impositions or sales taxes or any immunity from claims, available to WMATA under the WMATA Compact.

#### **Section 13.6 No Right in Real Property Granted**

Nothing in this Declaration and no action or failure to act by WMATA shall constitute a grant by or acquiescence by WMATA to any Person regarding any legal or equitable estate in or to the WMATA Joint Development Site or any part thereof or any right, power, permit, license, interest, lien, charge or other encumbrance affecting the WMATA Joint Development Site or any WMATA Reserved Areas.

#### **Section 13.7 Termination by WMATA**

This Declaration may not be terminated without the prior written approval of WMATA or as set forth in this Section. WMATA shall have the unilateral right to terminate this Declaration in its entirety at any time before any portion of the WMATA Joint Development Site is sold or ground leased to any non-WMATA Person. In the event that any portion of the WMATA Joint Development Site is then owned by or ground leased by any Person other than WMATA but the entirety of the WMATA Joint Development Site is not sold or ground leased to any Person other than WMATA, WMATA shall have the unilateral right at any time and from time to time to terminate this Declaration with respect to any portion of the WMATA Joint Development Site that is not then so owned or ground leased by a non-WMATA Person. To implement the termination rights granted to it in this Section, WMATA may unilaterally execute

a document evidencing such termination in whole or in part. Upon the execution of such a document of termination by WMATA, this Declaration shall terminate as stated in such document but no third party without actual notice of such termination shall be bound thereby unless and until a document to that effect is recorded in the Land Records, which document may be unilaterally executed and recorded by WMATA.

## **ARTICLE XIV**

### **MISCELLANEOUS**

#### **Section 14.1 Severability of Invalid or Unenforceable Terms**

If any provision of this Declaration or the application thereof to any person or situation is held to be illegal, invalid or unenforceable under present or future Laws, such provision or application will be fully severable. This Declaration will be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this Declaration and the remaining provisions of this Declaration will remain in full force and effect and may not be affected by the illegal, invalid or unenforceable provision or by its severance from this Declaration.

#### **Section 14.2 Governing Law; Jurisdiction and Venue**

(a) Governing Law. The Laws of the State in which the WMATA Joint Development Site is located, without regard to its principles of conflicts of laws, govern the validity, interpretation, construction, and performance of this Declaration, except that the parties acknowledge that WMATA is bound by the WMATA Compact and that to the extent of any conflict between the Laws of such jurisdiction and the WMATA Compact, the WMATA Compact shall govern WMATA.

(b) Jurisdiction. Jurisdiction and venue for the resolution of any disputes arising out of this Declaration shall lie exclusively in the United States District Court having jurisdiction over the Local Jurisdiction in which the WMATA Joint Development Site is located, except that no provision of this Declaration shall constitute (i) a waiver of WMATA's immunity under the WMATA Compact except as set forth in **Section 13.1** or (ii) a consent to the jurisdiction of any tribunal except as provided in Section 81 of the WMATA Compact.

#### **Section 14.3 Successors and Assigns**

Whether or not specific reference is made to successors and assigns in each term or provision of this Declaration, all of the terms and provisions of this Declaration shall be binding upon and inure to the benefit of the permitted successors and assigns of the parties hereto.

#### **Section 14.4 Runs with the Land**

This Declaration and the rights of WMATA and each other owner and ground lessee of the WMATA Joint Development Site are made for the benefit of and shall burden the parties and

their respective permitted successors and assigns, and shall operate as covenants running with the WMATA Joint Development Site.

#### **Section 14.5 Amendments**

Except as set forth in **Sections 1.11, 11.4 and 13.7**, this Declaration may be amended, changed, modified or canceled only by a written agreement signed by each Person who is an owner or ground lessee of any portion of the WMATA Joint Development Site affected by the amendment, change, modification or cancellation and with the consent of any senior Mortgagee of any such affected property.

#### **Section 14.6 Multiple Counterparts**

This Declaration may be executed in a number of identical counterparts. If so executed, each of such counterparts is deemed an original for all purposes and all such counterparts will, collectively, constitute one document. In making proof of this Declaration, it is not necessary to produce or account for more than one such counterpart.

#### **Section 14.7 Third Party Beneficiaries**

Except as may expressly be stated in this Declaration, and then only in the situations so stated, this Declaration is not intended to give or confer any benefits, rights, privileges, claims or remedies to any person or entity as a third party beneficiary. Notwithstanding the foregoing, a Person who is an owner or ground lessee of any portion of the WMATA Joint Development Site may afford the benefit of this Declaration to such Person's lessees, space tenants, licensees, invitees, employees, agents and contractors but all of such benefits shall be derivative and shall not create any privity of estate or contract with any other party to this Declaration. Nothing in this Declaration shall be deemed to be a gift or dedication of any portion of the burdened property to the general public or for the general public, except for any easements granted herein for the benefit of the general public.

#### **Section 14.8 Appendices, Exhibits and Schedules**

All appendices, exhibits and schedules expressly referred to in this Declaration will be deemed to be attached to this Declaration, and all appendices, exhibits and schedules attached or deemed attached are incorporated by reference into this Declaration as if fully set forth in this Declaration. Each appendix, exhibit or schedule attached or deemed attached to this Declaration will be of significance equal to that of any text in the body of this Declaration.

#### **Section 14.9 Headings and Captions**

The headings, subheadings, captions, and arrangements used in this Declaration are for convenience and reference only, and do not in any way define, affect, limit, amplify, modify or describe the terms and provisions of this Declaration.

## **Section 14.10 Number and Gender of Words**

Whenever in this Declaration the singular number is used, the same will include the plural where appropriate, and *vice versa*, and words of any gender will include each other gender where appropriate.

## **Section 14.11 Interpretation and Construction**

(a) No Construction Against Draftsman. No provision of this Declaration will be construed in favor of, or against, any particular Person by reason of any presumption with respect to the drafting of this Declaration.

(b) Meaning of Short Forms. To the extent the context requires or permits, (i) any reference to the word "including" or "includes" means "including, without limitation;" (ii) any reference to the word "includes" means "includes, but is not limited to;" (iii) any reference to "may" means "may, but is not obligated to" or "may, at its option;" (iv) any reference to the phrase "may not" means "is prevented or prohibited from" or "is not required to;" (v) reference to the phrase "at any time" also means "from time to time;" (vi) references to sections, subsections, paragraphs, clauses and other subdivisions without reference to a document are references to the sections, subsections, paragraphs, clauses and other subdivisions of this Declaration; and (vii) the words "herein," "hereof," "hereunder" and words of similar import refer to this Declaration as a whole and not to any particular provision.

(c) Drafts. The submission of drafts, comments to drafts, and changes from drafts to this final Agreement shall not bind a Person nor shall they be considered in determining the meaning of this Declaration.

## **Section 14.12 Time of the Essence**

Time is of the essence with respect to the observance and performance of all obligations under this Declaration.

## **Section 14.13 Cumulative Remedies and Waiver**

Except as may otherwise be expressly provided, no remedy in this Declaration conferred or reserved is intended to be exclusive of any other available remedy or remedies, but each and every such remedy will be cumulative and will be in addition to every other remedy given under this Declaration or now or hereafter existing at law or in equity. No delay or omission to exercise any right or power accruing upon any default, omission or failure of performance hereunder will impair any right or power or be construed as a waiver thereof, but any such right and power may be exercised from time to time and as often as deemed expedient. No waiver, release or relinquishment of any rights or obligations under this Declaration may be established by conduct, custom or course of dealing. In order to be enforceable, any waiver, release or relinquishment must be in writing and signed by the party to be charged therewith.

#### **Section 14.14 Time Periods**

Should the last day of a time period or any due date fall on day that is not a Business Day, then the next Business Day thereafter shall be considered the end of the time period or due date.

#### **Section 14.15 Relationship of Parties**

This Declaration does not create the relationship of principal and agent, or mortgagee and mortgagor, or of partnership or joint venture, or of any association or agency between WMATA and any owner or ground lessee of any portion of the WMATA Joint Development Site.

#### **Section 14.16 Cost and Expenses of Project**

Except to the extent of any obligation for which this Declaration specifies otherwise, each party shall be deemed to be required to perform its obligations under this Declaration at its own cost and expense, and each party may only exercise its rights and privileges under this Declaration at its sole cost, risk and expense.

#### **Section 14.17 Disclaimers**

(a) No Representations or Warranties by WMATA. WMATA has not made and does not in this Declaration make any representation or warranty, including any regarding the WMATA Joint Development Site or any portion of it, the suitability of the WMATA Joint Development Site for development, the feasibility of any particular development proposed or undertaken by any third party, market conditions, the availability of financing, the physical or environmental condition of the WMATA Joint Development Site (including the presence or absence of Hazardous Materials), the value of the WMATA Joint Development Site, the compliance of the WMATA Joint Development Site with applicable Laws, or any other warranty of merchantability, suitability or fitness. Any such representation and warranty is expressly disclaimed.

(b) No Improvements by WMATA. Except as may be expressly provided in this Declaration, WMATA does not have any obligation to make any change, demolition or improvement of or to the WMATA Joint Development Site, including any necessary or appropriate to bring the WMATA Joint Development Site into compliance with applicable Laws.

#### **Section 14.18 Incorporation of Recitals by Reference**

The recitals first set forth above are hereby incorporated herein and made a part hereof as if fully set forth in this Declaration.

#### **Section 14.19 Waiver of Jury Trial**

WMATA AND EACH OWNER AND GROUND LESSEE OF THE WMATA JOINT DEVELOPMENT SITE WAIVES ANY RIGHT IT MAY HAVE TO TRIAL BY JURY IN

ANY ACTION, PROCEEDING, COUNTERCLAIM OR OTHER PROCEEDING BROUGHT BY ANY OF THEM AGAINST ANY OTHER OF THEM IN ANY MATTER RELATING TO, ARISING FROM OR IN CONNECTION WITH THIS DECLARATION AND THE RELATIONSHIP OF WMATA AND ANY SUCH OWNER'S OR GROUND LESSEE'S USE AND OCCUPANCY OF THE WMATA JOINT DEVELOPMENT SITE. THE PRECEDING WAIVER INCLUDES ANY CLAIM OF INJURY OR DAMAGE AND ANY PROCEEDING SEEKING INJUNCTIVE OR ANY OTHER EQUITABLE RELIEF.

#### **Section 14.20 Entire Agreement**

This Declaration, any appendices, schedules, and exhibits expressly referred to in any Section of this Declaration, the ground lease(s) and construction agreement(s) applicable to any Phase(s), and any other agreements expressly referred to in this Declaration as having been executed or approved by the parties, contain the entire agreement applicable to the matters set forth herein with respect to the WMATA Joint Development Site, and supersede all prior agreements and understandings between or among the parties, if any, relating to the WMATA Joint Development Site.

#### **Section 14.21 Further Assurances**

Each owner or ground lessee of any portion of the WMATA Joint Development Site shall, upon the request from time to time of any other party hereto or any Mortgagee, execute, deliver and record, at the sole cost and expense of the requesting party, among the Land Records such documents as may be reasonably necessary or appropriate to confirm all of the easements, covenants, and reservations and exceptions set forth in this Declaration.

#### **Section 14.22 Priority**

This Declaration and the easements and other rights granted to WMATA as well as the rights excepted and reserved by each owner and ground lessee of the WMATA Joint Development Site shall be superior to all leases, conveyances, transfers, assignments, contracts, Mortgages, and other encumbrances and documents recorded or entered into hereafter in any way affecting any part of the WMATA Joint Development Site. Any party foreclosing any such Mortgage, lien or encumbrance, and any party acquiring title to or any interest in any part of the WMATA Joint Development Site as a result thereof, shall acquire and hold such title or interest expressly subject to the provisions of this Declaration.

#### **Section 14.23 Breach Shall Not Permit Termination**

No breach of this Declaration shall entitle any person to cancel, rescind, or otherwise terminate this Declaration.

## **ARTICLE XV**

### **DEFINITIONS**

As used in this Declaration the following words and phrases shall have the meanings indicated:

**“Additional Approvals”** are defined in **Section 3.3**.

**“Additional Approvals Fair Market Value”** is defined in **Section 3.3**.

**“Agreement”** is defined in the preamble.

**“Approved Development Plan”** is defined in **Section 2.6**.

**“Business Day”** means a work day from Monday through Friday that is not a Federal, State of Maryland, Commonwealth of Virginia or District of Columbia holiday observed by WMATA. For purposes of the preceding sentence, “observed” shall mean that WMATA’s headquarters office is generally closed for business that day even if WMATA is operating transit service that day. All references to “days” that do not use the defined term “Business Day” mean a calendar day.

**“Capital Event”** means any assignment, sale, conveyance, exchange, pledge, hypothecation, Mortgage or other transfer of all or any portion of the WMATA Joint Development Site or any improvements (other than WMATA Facilities) thereon by any Person other than WMATA, any ground lease thereof, and/or any change in the composition of a non-WMATA owner or ground lessee of any portion of the WMATA Joint Development Site, other than (i) a *bona fide* Mortgage (and documents ancillary thereto) whose proceeds are to be used solely for the planning, design, and/or construction of the Project (but a Mortgagee who takes title to or possession of the WMATA Joint Development Site or any improvements thereon or who exercises effective control over the income generated thereby by foreclosure, deed-in-lieu of foreclosure, or other means pursuant to a Mortgage, and any third-party purchaser or other successor to title, possession or control shall be an assignee owner or ground lessee by deemed Capital Event), (ii) changes in the composition of an each owner or ground lessee due to death, disability, legal disqualification from owning property, corporate reorganization at a sub-owner or sub-ground lessee level that does not include consideration to that owner or ground lessee and whose purpose is not in whole or in part to evade the provisions of this Declaration governing Capital Events, or a merger at a sub-owner or sub-ground lessee level that does not include consideration to the owner or ground lessee and whose purpose is not in whole or in part to evade the provisions of this Declaration governing Capital Events, and (iii) space leases to unaffiliated third parties who will occupy all or a portion of the WMATA Joint Development Site or the improvements thereon to live or for the conduct of their business.

**“Capital Rent”** is defined in **Section 3.2**.

**“Default Interest Rate”** means the lesser of: (i) five percent (5%) per annum in excess of the “Prime Rate,” and (ii) the highest lawful rate. The “Prime Rate” shall be the prime or reference rate of interest published in The Wall Street Journal or its successor publication. If



such rate is no longer published, or if The Wall Street Journal shall cease publication without a successor, then the “Prime Rate” shall be such equivalent rate as is charged from time to time by major money center banks as determined by WMATA in its reasonable discretion.

“**Defaulting Party**” is defined in **Section 10.1**.

“**Density Bonus**” is defined in **Section 3.3**.

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

“**Elevator Facilities**” are defined in **Section 1.3**.

“**Final Completion/Finally Complete**” means:

(i) with respect to any Non-WMATA Improvements, the applicable owner’s or ground lessee’s: (A) receipt and delivery to WMATA of a certificate of occupancy or equivalent by the Governmental Authority that issues the same in the Local Jurisdiction; (B) receipt and delivery to WMATA of a certificate of final completion on the then-current form promulgated by the American Institute of Architects (or such other professional organization that may succeed to its role of promulgating industry-standard forms of this type) from the independent project architect for such improvements, not including any tenant build-out of any improvements; (C) receipt and delivery to WMATA of as-built drawings for such improvements; and (D) clearing of the appropriate area of all equipment, materials, tools and rubbish.

(ii) with respect to any WMATA Facilities constructed by or on behalf of a non-WMATA owner or ground lessee of the WMATA Joint Development Site, all of the items specified in preceding **subsection (i)** plus the final completion and operational readiness thereof, including: (A) the completion of all punch list items; (B) all State, county and municipal inspections have been successfully completed; (C) the delivery to WMATA of two (2) hard copy sets and four (4) electronic copies in PDF format and AutoCAD format (or such formats as may hereafter replace the same as WMATA may determine from time to time) of the as-built drawings; (D) an assignment to WMATA of all non-WMATA-generated design documents, specifications and shop drawings; (E) the delivery to WMATA of a survey showing the WMATA Facilities and other improvements complying with the then-current standards of the American Land Title Association and the National Society of Professional Surveyors (or such professional organizations as may replace them from time to time to set standards for land surveys); (F) the delivery to WMATA of a safety and security certification; (G) the delivery to WMATA of a certificate of occupancy (or equivalent), elevator permits and all other permits by the Governmental Authority(ies) that issues the same in the Local Jurisdiction; (H) the delivery to WMATA of a final certificate of completion on the then-current form promulgated by the American Institute of Architects (or such other professional organization that may succeed to its role of promulgating industry-standard forms of this type) from the independent project architect for such WMATA Facilities constructed by the owner or ground lessee; (I) the delivery to WMATA of all operating and maintenance manuals for systems and equipment to the extent the manufacturer, supplier or dealer therein issues the same; (J) the delivery to WMATA of all keys, all spare parts and all warranties (and, to the extent necessary or appropriate, an assignment to

WMATA of the same) relating to the WMATA Facilities; (K) the delivery to WMATA of a consent of any surety to the final release of retainage; (L) the delivery to WMATA of an unconditional waiver of liens by the owner's or ground lessee's general contractor; (M) operating and maintenance training for the WMATA Facilities constructed by the owner or ground lessee has been provided by that owner or ground lessee to and completed by WMATA personnel in accordance with then-applicable WMATA standards; (N) the owner or ground lessee or its contractors have cleared the appropriate area of all equipment, materials, tools and rubbish; (O) the delivery to WMATA of a waiver by Phase Tenant, in form and substance reasonably acceptable to WMATA, of all claims against WMATA other than those of which Notice was previously given to WMATA and that remain unsettled; and (P) the issuance by WMATA of a certificate of final completion by WMATA, the issuance of which is within WMATA's sole and absolute discretion.

**"FTA"** means the U.S. Federal Transit Administration and any other Federal agency or authority having regulatory or funding oversight over WMATA.

**"Governmental Authorities"** means any board, bureau, commission, department or body of any municipal, county, State or Federal governmental unit, department, agency, authority or subdivision having or acquiring jurisdiction over the WMATA Joint Development Site or the use and improvement thereof.

**"Hazardous Materials"** means any and all materials, substances and wastes that are or become regulated by any governmental authority or pose a material threat to human health, safety or the environment, including (a) any materials, substances or wastes defined as a "hazardous waste", "hazardous material", "hazardous substance", "extremely hazardous waste" or "restricted hazardous waste" under any Laws, (b) petroleum, (c) asbestos, (d) polychlorinated biphenyls, or (e) radioactive materials.

**"Impositions"** means all real estate taxes, *ad valorem* assessments, payments in lieu of taxes, special assessments, sewer rents, water meter and water charges, vault charges, public space charges and fees, business improvement district charges and fees, school, water, fire, sewer and other special purpose district taxes, fees and charges, excise taxes, impervious area taxes, license and permit fees, charges for public utilities, business, professional and occupancy taxes, interest levied on taxes, charges and assessments that are paid in installments, and all other charges, assessments or taxes of whatsoever kind and nature levied or assessed with respect to real property or improvements thereon.

**"Land Records"** means the land records of the Local Jurisdiction.

**"Laws"** means all laws, statutes, ordinances, orders, rules, regulations and requirements of all Governmental Authorities applicable to the WMATA Joint Development Site.

**"LEED"** means Leadership in Environmental and Energy Design as promulgated from time to time by the US Green Building Council (USGBC) or its successors. The standard in effect at the time any particular improvement or site plan is registered with the USGBC shall be the applicable standard for those improvements or that plan.

**“Local Jurisdiction”** means the county or independent city in which the WMATA Joint Development Site is located or, if the WMATA Joint Development Site is located in the District of Columbia, “Local Jurisdiction” shall mean the District of Columbia.

**“Maintain” or “Maintaining”** means to clean, refurbish, repair, replace or rebuild, as the context may allow or require, to maintain landscaping and grading, and to keep in place the insurance required to be maintained in effect under the terms of this Declaration.

**“Maintenance”** means and includes cleaning, refurbishing, repairing (whether ordinary or extraordinary), and restoration or replacement, including, without limitation, as a result of design defects, construction defects, wear and tear (other than of a cosmetic nature), or damage by fire, casualty or condemnation, and the maintenance in effect of the insurance required pursuant to the terms of this Declaration.

**“Major Subcontractor”** shall mean any subcontractor whose original contract sum is five percent (5%) or more of the contract sum of the general contractor for that work.

**“Metro Station”** means WMATA’s [REDACTED] Metrorail station, including all WMATA Facilities in connection therewith.

**“Metro Station Entrance”** is defined in **Section 1.5**.

**“Mortgage”** means a mortgage, deed of trust or similar security agreement securing or benefitting a lender and encumbering any interest of an owner or ground lessee in the WMATA Joint Development Site or any improvements thereon. The term “Mortgage” shall also include any instruments required in connection with a sale-leaseback transaction, shall include a trust indenture under which the WMATA Joint Development Site shall be encumbered, and shall include mortgages of less than all of the WMATA Joint Development Site. A Mortgage shall be subject and subordinate to this Declaration. Each owner and ground lessee of the WMATA Joint Development Site must give WMATA prompt Notice of each Mortgage and furnish WMATA with a date-stamped true copy of the Mortgage bearing the recording reference from the Land Records, together with the name and address of the Mortgagee.

**“Mortgagee”** means the holder of the beneficial interest in a Mortgage.

**“MOT Plan”** means a maintenance of traffic plan that is prepared by an owner or ground lessee of a portion of the WMATA Joint Development Site and approved by WMATA in its sole and absolute discretion and, if necessary, the Local Jurisdiction and the State, providing for the continuing of pedestrian, bicycle, bus, shuttle, taxi, Kiss & Ride and Park & Ride and other vehicular access through, over and under the WMATA Joint Development Site.

**“Non-Defaulting Party”** is defined in **Section 10.1**.

**“Non-WMATA Improvements”** means any and all improvements made by or for the benefit of or owned by any non-WMATA owner or ground lessee, or any Person claiming by or

through them, of any portion of the WMATA Joint Development Site except any such improvements that are WMATA Facilities. For clarity, “Non-WMATA Improvements” includes all utility lines installed by the request of or for (or largely for) the benefit of any Person other than WMATA, even if installed by a utility itself.

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

“**Participating Rent**” is defined in **Section 3.1**.

“**Person**” means a natural person, an estate, a trust, a partnership, a limited liability company, a corporation and any other form of business or legal association or entity.

“**Phase**” is defined in **Section 2.6**.

“**Proposed Development Plan**” is defined in **Section 2.6**.

“**Project**” means a mixed-use real estate development project containing [approximately \_\_\_\_\_ (\_\_\_\_\_) square feet of residential multifamily use,] [approximately \_\_\_\_\_ (\_\_\_\_\_) square feet of residential condominium use,] [approximately \_\_\_\_\_ (\_\_\_\_\_) square feet of office use,] [approximately \_\_\_\_\_ (\_\_\_\_\_) square feet of retail use,] [a hotel of approximately \_\_\_\_\_ (\_\_\_\_\_) hotel rooms and ancillary facilities,] [*other, specify*] on the WMATA Joint Development Site and any modification, alteration, rebuilding or replacement thereof.

“**State**” means the [Commonwealth of Virginia] [District of Columbia] [State of Maryland].

“**10% Range**” is defined in **Section 3.3**.

“**Vent Shaft Facilities**” is defined in **Section 1.1**.

“**Vent Shaft Surface Easements**” is defined in **Section 1.1**.

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

“**WMATA Compact**” means the Washington Metropolitan Area Transit Authority WMATA Compact, Public Law 89-774, 80 Stat. 1324, as the same may have been or may hereafter be amended from time to time.

“**WMATA Design and Construction Standards**” -- The WMATA Adjacent Construction Project Manual, the WMATA Station Area Planning Guide, the WMATA 2016 CAD Standards, the WMATA Manual of Design Criteria, the WMATA survey datum for the WMATA Joint Development Site, the WMATA Standard Specifications, Standard Drawings and Design Directive Drawings, the WMATA Construction Safety and Environmental Manual, the WMATA ADA Accessibility Checklist, and the WMATA Sign and Graphics Manual, as any of the foregoing may be amended, supplemented, modified or replaced from time to time. All

references in this Declaration to WMATA Design and Construction Standards or words of similar effect refer to the standard or specification in effect on the date design of the particular improvement begins, as established by a written Notice from an owner or ground lessee of the applicable portion of the WMATA Joint Development Site to WMATA to that effect; provided, however, that if construction of the applicable improvement does not begin within three (3) years after design of that improvement begins, then WMATA may require that the improvement be redesigned to meet more current WMATA Design and Construction Standards.

**“WMATA Easement Areas”** means, collectively, those portions of the WMATA Joint Development Site in which WMATA retains or is granted easement rights by this Declaration.

**“WMATA Facilities”** means all real and personal property owned by WMATA on, above, under or adjacent to the WMATA Joint Development Site and the rail tracks, Metro Station, entrances/exits, passageways (surface and subsurface), ramps, retaining walls, and other facilities for the Metro Station and any nearby rail storage yard or other support facility, including all improvements, infrastructure components, tangible property, structures and supports, access, curbing, guttering, drains, storm water facilities, utilities, parking (including lots, garages, spaces, meters, gates and revenue-collection facilities) located on any property owned by WMATA; and all improvements, facilities, equipment, structures and other tangible property used in the operation, access to and from, maintenance, repair, servicing, removal and/or replacement of WMATA’s train, bus or other transit operations, wherever located, including all rail stations, rails, tunnels, tracks, bus bays, bus lay-over areas, bus transfer areas, supervisor kiosks, employee bathrooms, electric substations, conduits and lines, pedestrian walkways, waiting and shelter areas, facilities serving persons with disabilities, cooling towers, chiller plants, vent and fan shafts, bicycle rack and locker areas, Bike & Ride facilities, parking lots and parking garages, Kiss & Ride facilities, storage and maintenance yards and facilities, and all other associated facilities notwithstanding that some of the facilities may have been constructed by or at the expense of an owner, ground lessee or another third party. WMATA reserves all rights relating thereto, including making additions or other alterations, demolishing all or any part of them, changing the nature of their use, changing the name of the Metro Station, and determining the use (or non-use) thereof, all in WMATA’s sole and absolute discretion.

**“WMATA Joint Development Site”** means that certain real property defined on **Exhibit A**.

**“WMATA Replacement Facilities”** means those improvements being designed and/or constructed by an owner or ground lessee of any portion of the WMATA Joint Development Site for WMATA. WMATA Replacement Facilities can include, without limitation, pedestrian pathways, bicycle paths, bicycle storage and other facilities, bus bays, bus shelters and canopies, Kiss & Ride areas, and commuter parking. As each WMATA Replacement Facility achieves substantial completion, it will be turned over to WMATA and will thereafter be part of the WMATA Facilities. Notwithstanding that they are to be constructed by an owner or ground lessee, the WMATA Replacement Facilities shall be owned by WMATA and shall not be conveyed or leased to any other owner or ground lessee of the WMATA Joint Development Site except any successor or assign of WMATA.

**“WMATA Reserved Areas”** means the portion of the WMATA Joint Development Site used or to be used for purposes of the location, construction, reconstruction, maintenance, replacement and operation of WMATA Facilities. The WMATA Reserved Areas are owned by WMATA and shall not be conveyed or leased to any other owner or ground lessee of the WMATA Joint Development Site except successors and assigns of WMATA. Unless otherwise specifically stated, the WMATA Reserved Areas include all areas on which the WMATA Facilities are, or are hereafter, located. The floor area ratio and any other density-based development criteria for the Project shall not include the WMATA Reserved Areas.

**“WMATA Zone of Influence”** is defined in the WMATA Design and Construction Standards. WMATA shall determine the scope of the WMATA Zone of Influence if there is any ambiguity or vagueness in the WMATA Design and Construction Standards.

**IN WITNESS WHEREOF**, the parties have entered into this Declaration intending that it become effective on the Effective Date.

*[SIGNATURE PAGE FOLLOWS]*

**WMATA:  
WASHINGTON METROPOLITAN AREA  
TRANSIT AUTHORITY**

By: \_\_\_\_\_  
Name:  
Title:

\_\_\_\_\_  
\_\_\_\_\_

I, the undersigned, a Notary Public in and for the aforesaid jurisdiction, do hereby certify that \_\_\_\_\_, who is personally well known (or satisfactorily proven) to me to be the \_\_\_\_\_ of the Washington Metropolitan Area Transit Authority, and being authorized to do so, executed the foregoing instrument for the purposes contained therein.

Witness my hand and official seal this \_\_\_\_\_ day of \_\_\_\_\_, 202\_.

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

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

[Notarial Seal]

**EXHIBIT A**  
**THE WMATA JOINT DEVELOPMENT SITE**



**EXHIBIT B**  
**VENT SHAFT SURFACE EASEMENTS**

**EXHIBIT C**  
**VENT SHAFT UNDERGROUND EASEMENT AREAS**

**EXHIBIT D**  
**SURFACE AND AIR RIGHTS ELEVATOR EASEMENT AREA**

**EXHIBIT E**  
**SUBSURFACE ELEVATOR EASEMENT AREA**

**EXHIBIT F**  
**SURFACE AND AIR RIGHTS STATION ENTRANCE AREA**

**EXHIBIT G**  
**SUBSURFACE STATION ENTRANCE AREA**

**EXHIBIT H**  
**SURFACE AND AIR RIGHTS UTILITY EASEMENT AREA**

**EXHIBIT I**  
**SUBSURFACE UTILITY EASEMENT AREA**



**EXHIBIT J**  
**PUBLIC ACCESS EASEMENT AREA**

## **EXHIBIT K INSURANCE REQUIREMENTS**

The provisions of this Exhibit shall apply to all non-WMATA owners and ground lessees of any portion of the WMATA Joint Development Site.

### **General Requirement to Maintain Insurance**

Each owner and ground lessee of the WMATA Joint Development Site other than WMATA shall, at its cost and expense, procure and maintain, or cause to be procured and maintained and shall require its general contractors and subcontractors to procure and maintain, at their respective sole cost, the insurance set forth in this Exhibit. An owner or ground lessee may modify these requirements as applied to its general contractors and subcontractors, but doing so does not relieve the owner or ground lessee from its own liability to maintain such insurance or from liability to WMATA. No activity may be undertaken on WMATA property until the obligations of this Exhibit are complied with and WMATA may require an owner or ground lessee to cease work on WMATA property if at any time the obligations of this Exhibit are not complied with.

The insurance required below sets a minimum level. Compliance with the requirements of this Exhibit does not cap or otherwise affect an owner's or ground lessee's liability to WMATA if that liability exceeds the requirements stated in this Exhibit. Each owner and ground lessee of the WMATA Joint Development Site may carry or may require its general contractors and subcontractors to carry additional insurance.

Each owner and ground lessee of the WMATA Joint Development Site other than WMATA shall ensure that the original insurance policy for Railroad Protective Liability Insurance and a current certificate of insurance and all applicable endorsements for all other insurance are delivered to WMATA upon execution of this Declaration and within ten (10) days of each policy renewal. In addition to the foregoing, at any time within five (5) days following request by WMATA, each owner and ground lessee of the WMATA Joint Development Site other than WMATA shall provide WMATA with copies of all policies of insurance and/or current certificates of insurance and applicable endorsements required by this Exhibit.

The terms "insurance policy" and "insurance policies" as used in this Exhibit shall be deemed to include any extension or renewals of such insurance policies.

### **General Standards for Insurance**

This insurance must cover the interests of each owner and ground lessee of the WMATA Joint Development Site, its general contractor, subcontractors and WMATA.

All insurance prescribed by this Exhibit will:

(i) be in such form and with such provisions as are generally considered standard provisions for the type of insurance involved, except when this Exhibit may expressly require otherwise;

(ii) be written on an “occurrence” (not a “claims made”) basis, except as may be expressly permitted by this Exhibit.

(iii) except for Professional Liability insurance, contain a waiver of subrogation by the insurer waiving the insurer’s rights of recovery against WMATA and its directors, officers and employees. The waiver of subrogation shall be provided on an endorsement approved by WMATA.

Insurance required may be satisfied by blanket or umbrella policies if the blanket or umbrella policy provides the same or broader coverage than is required by this Exhibit.

Insurance companies shall be rated by A.M. Best and shall carry at least an “A-” rating and “Financial Size Category” of at least “VII” or better. If A.M. Best is no longer providing such ratings or changes its rating system at any time, it and/or they shall be replaced with a comparable rating agency and/or comparable ratings as WMATA may approve in its reasonable discretion.

The insurance policies required by this Exhibit shall not be cancelled, terminated, or modified (except to increase the amount of coverage) without thirty (30) days prior written Notice from the insurer to WMATA. Each owner and ground lessee of the WMATA Joint Development Site other than WMATA shall obtain their insurer’s agreement that the requisite insurance policies shall not be modified (except to increase the amount of coverage) without thirty (30) days’ prior written Notice to WMATA. If a required insurance policy is not reinstated or replaced within such thirty (30) day period, irrespective of any other Notice, default, discussion or cure provisions or procedures in this Declaration, then such failure to reinstate or replace shall constitute a default without any further cure period being afforded.

WMATA, its directors, partners, members, other principals, officers, employees, contractors, agents and representatives, by endorsements, shall be named as additional insureds in respect to liability arising out of the activities of each owner and ground lessee of the WMATA Joint Development Site other than WMATA in connection with this Declaration (except on workers’ compensation insurance). Year 2014 ISO additional insured endorsements or similar endorsements are not acceptable. Coverage provided to additional insureds shall be for claims arising out of both ongoing operations and products/completed operations. Coverage available to additional insureds under the products and completed operations coverage shall be limited only by the time of repose applicable in the jurisdiction in which the WMATA Joint Development Site is located. Coverage available to additional insureds is not limited to the minimum limits of coverage outlined in this Exhibit.

All insurance policies may contain a mortgagee and loss payee clause in favor of the owner or ground lessee of the WMATA Joint Development Site or its Mortgagees.

Each owner's and ground lessee's insurance coverage shall be primary and non-contributory insurance with respect to WMATA, its directors, partners, members, other principals, officers, employees, contractors, agents, and representatives. Any insurance or self-insurance maintained by WMATA and its directors, partners, members, other principals, officers, employees, contractors, agents and representatives shall not contribute to an owner's or ground lessee's insurance or benefit a non-WMATA owner or ground lessee in any way.

No acceptance, review or approval of any certificate of insurance, insurance agreement or endorsement by WMATA shall constitute acceptance or approval thereof or relieve or release, or be construed to relieve or release, an owner or ground lessee of the WMATA Joint Development Site other than WMATA from any liability, duty, or obligation assumed by, or imposed upon, it by the provisions of this Declaration or impose any obligation upon WMATA.

### **Certificates of Insurance**

WMATA shall be provided with an ACORD certificate of insurance as evidence that the insurance requirements of this Exhibit have been satisfied. (The original insurance policy for railroad protective liability must also be provided.) Certificates of insurance should be e-mailed to [COI@wmata.com](mailto:COI@wmata.com) or to such other address as WMATA may provide from time to time. Failure to provide certificates of insurance may result in an owner or ground lessee of the WMATA Joint Development Site and its contractors being denied access to work locations on or adjacent to WMATA property.

The certificate holder should read:

Washington Metropolitan Area Transit Authority  
Office of Insurance  
600 Fifth Street, N.W.  
Washington, D.C. 20001

The certificate of insurance shall also state:

- The name of the Metro Station or other procurement identification used by WMATA and the name of the primary contact at WMATA for the procurement.
- The names of all additional insureds on the applicable policy.
- That each additional insured is such on a primary and non-contributory basis.
- That each additional insured is such for ongoing operations, in addition to the products and completed operations coverage.
- That the coverage or endorsement providing a waiver of subrogation is in accordance with this Exhibit.
- That the issuing insurance company will Notify WMATA of cancellation, termination or modification, as stated above, at least thirty (30) days before the same is effective. Use of "will endeavor to" or similar wording is not acceptable.

## **Required Coverage**

All insurance policies required to be maintained by an owner or ground lessee of the WMATA Joint Development Site, its general contractors and its subcontractors must have the scope and limits set forth below (subject to adjustment as set forth in this Exhibit), except that general contractors and subcontractors are not required to carry property insurance, business interruption insurance, rental value insurance or (except for design professionals) professional liability insurance.

If the required minimum limits delineated below can only be met when applying an umbrella or excess liability policy, the umbrella or excess liability policy must follow the form of the underlying policy and be extended to “drop down” to become primary in the event the primary limits are reduced or the aggregate limits are exhausted.

Any insurance policy utilizing self-insured retentions and/or deductibles must be approved by WMATA in writing.

### **Commercial General Liability Insurance**

Each owner and ground lessee of the WMATA Joint Development Site other than WMATA and each of their general contractors and each subcontractor shall carry commercial general liability insurance. Such coverage must include personal and bodily injury, broad form property damage, premises operations liability, contractor’s protective liability for subcontractors, fire and legal liability, products and completed operations (with no limitation on when claims can be made), terrorism, and contractual liability (removing any exclusion for work to be performed within fifty (50) feet of railroad property and specifically including such work in its definition of “insured contract”). Failure to carry contractual liability insurance covering an indemnification obligation shall not relieve the indemnification obligation. XCU coverage (explosion, collapse and underground hazards) shall be included if any of the work involves excavation or blasting.

This insurance shall be carried in ISO Occurrence Form CG0001 (12/04) or its equivalent. Equivalency shall be determined by WMATA in its sole and absolute discretion. The policy shall be endorsed with ISO endorsement CG 25 03 03 97, Designated Construction Project(s) General Aggregate Limit, and designate “any and all construction projects” as the designated construction project. The policy shall be endorsed with ISO endorsement CG 25 04 03 97, Designated Location General Aggregate Limit, and designate “any and all locations” as the designated location.

Defense coverage must be provided for additional insureds. The coverage must include ongoing as well as products and completed operations, with no limit as to when claims can be made.

Defense costs (allocated loss adjustment expense) must be included and in excess of the policy limits for all primary and umbrella excess policies.

### Builder's Risk Insurance

Each owner and ground lessee of the WMATA Joint Development Site other than WMATA and each of their general contractors and each subcontractor shall carry builder's risk insurance on the improvements now or hereafter located on the WMATA Joint Development Site, WMATA Facilities to be constructed by that owner or ground lessee, materials, equipment and supplies (including, without limitation, scaffolding, fencing and office trailers) on or about the WMATA Joint Development Site and on the materials, tools, equipment, and supplies owned by them and stored off-site with an installation floater or equivalent. This insurance shall also cover damage to any existing buildings or structures that are in proximity to the work being conducted and that are not vacant. The policy shall provide coverage for all matters except those specifically excluded, similar to "causes of loss – special form" property insurance coverage. The following endorsements shall also be required: expediting expenses to speed up repairs; valuable papers to cover construction plans, specifications and other documents; pollution cleanup; preservation of property to relocate property; site preparation; landscaping; fire protection equipment; contract penalties; paved surfaces; soft costs (including any liquidated damages payable for failure to meet a delivery schedule as the result of an insured event); equipment breakdown; testing cost for any equipment and features related to the WMATA Facilities; and extra restoration expense by reason of subsequent changes of law. Foundations and underground utility lines shall be covered by this policy. This insurance must have limits equal to the replacement cost of the Non-WMATA Improvements now or hereafter located on the WMATA Joint Development Site and any WMATA Facilities to be constructed by a non-WMATA owner or ground lessee on a "completed value" (non-reporting full coverage) basis in an amount sufficient to prevent co-insurance. Any deductibles or sublimits shall be subject to WMATA's prior review and approval. Builder's risk insurance must be in place from the start of construction and cover the WMATA Facilities through Final Completion and the other improvements now or hereafter located on the WMATA Joint Development Site through substantial completion thereof. Each owner and ground lessee of the WMATA Joint Development Site other than WMATA, its general contractor and its subcontractors shall keep all "protective safeguards" in place during the policy period. WMATA shall be a loss payee and a named insured on this policy.

### Property Insurance

Effective on and after the substantial completion of each Non-WMATA Improvement, each owner and ground lessee of the WMATA Joint Development Site other than WMATA shall maintain property insurance covering the Non-WMATA Improvements now or hereafter located on the WMATA Joint Development Site and any personal property therein owned by that owner or ground lessee against all risks, including fire, other risks and losses covered by explosion of boilers and other pressurized equipment, insured under the then-customary "causes of loss – special form" of policy. This insurance shall not exclude losses caused by flood, mold, fungus or acts of terrorism (including bioterrorism). This insurance shall cover debris removal and increases in costs incurred as a result of changes in applicable Laws (including, without limitation, Ordinance or Law Coverage). This policy shall name the senior mortgagee or, in the absence of a mortgagee, WMATA, as the loss payee.

Such policy shall have limits equal to one hundred percent (100%) of the full replacement cost of the Non-WMATA Improvements now or hereafter located on the WMATA Joint Development Site and personal property therein owned by any non-WMATA owner or ground lessee. (As used in this paragraph, “full replacement cost” means the actual replacement cost of such improvements now or hereafter located on the WMATA Joint Development Site and covered personal property, including the cost of demolition and debris removal and without deduction for depreciation, but excluding the cost of excavation, foundations and footers.)

#### Workers’ Compensation and Employer’s Liability Insurance

Each owner and ground lessee of the WMATA Joint Development Site (other than WMATA) and their general contractors and each subcontractor shall carry workers’ compensation insurance meeting the statutory requirements of the State in which the work will be performed and employer’s liability insurance. The workers’ compensation insurance must be provided on an “All States” basis and, if the work is within five hundred (500) feet of a navigable waterway, be endorsed to cover both Jones Act liability and Longshore and Harbor Workers’ Compensation Act liability. The employer’s liability insurance shall have coverage of not less than One Million Dollars (\$1,000,000) per accident, disease or illness.

#### Business Automobile Liability Insurance

Each owner and ground lessee of the WMATA Joint Development Site (other than WMATA) and their general contractors and each subcontractor shall carry business automobile liability insurance against claims for bodily injury and property damage arising out of the ownership, lease, maintenance or use of any owned, hired or non-owned motor vehicle.

Business automobile insurance shall be written on ISO business auto coverage form CA 00 01 03 06 or its equivalent. Equivalency shall be determined by WMATA in its sole and absolute discretion.

If an MCS-90 endorsement is required for work involving the transportation or disposal of any hazardous material or waste is required, minimum auto liability limits of Five Million Dollars (\$5,000,000) per occurrence and a non-owned disposal site (NODS) endorsement providing coverage for the owner’s or ground lessee’s or its contractors’ liability for pollution conditions at the designated non-owned disposal site are also required.

#### Pollution Liability Insurance

For any activity engaged in by an owner or ground lessee of the WMATA Joint Development Site (other than WMATA) or their general contractors and any subcontractors which involves the use, generation, release, removal, storage, transport, disposal or other handling of any Hazardous Materials, contaminated soil and/or asbestos abatement, the applicable person or entity shall carry pollution liability insurance. The policy must include coverage for bodily injury and loss of or damage to property arising directly or indirectly out of

the discharge, dispersal, release or escape of Hazardous Materials, whether it be gradual, sudden or accidental.

This insurance may be written on a “claims made” basis or an “occurrence” basis but if written on a “claims made” basis must cover the WMATA Joint Development Site for at least a three (3) year extended reporting period.

This coverage may be written on “non-admitted” paper.

#### Railroad Protective Liability Insurance

Each owner and ground lessee of the WMATA Joint Development Site (other than WMATA) and their general contractors shall maintain railroad protective liability insurance covering any bodily injury, death and/or damage to property, equipment and facilities arising from or caused by work performed by them within fifty (50) feet of (on, above, under or adjacent to) WMATA’s tracks or within any Metro stations. WMATA shall be the named insured.

The insurer must be acceptable to WMATA and the insurance policy must be on a policy form that is acceptable to WMATA.

The original policy of railroad protective liability insurance must be delivered to WMATA as set forth above.

WMATA may offer to waive the requirement to obtain railroad protective liability insurance if the work qualifies for coverage under WMATA’s own blanket railroad protective liability program and if the owner or ground lessee prepays the waiver fee. The waiver fee shall be determined by the rate promulgated by WMATA’s insurer.

#### Rental Value Insurance

Each owner and ground lessee of the WMATA Joint Development Site other than WMATA shall carry rental value insurance covering Participating Rent, Capital Rent, the Density Bonus and all other payments to WMATA reasonably anticipated under this Declaration.

The insurable limit of such policy must be in the amount of the following twenty-four (24) months of payments. Such policy must cover the entire amount of payments originally insured notwithstanding that the policy may expire prior to the date of the final month’s coverage. Such policy must also contain an extended period of indemnity endorsement providing that after any physical damage or loss has been repaired, restored or replaced the continued loss of income will be insured until the first to occur of the end of the twenty-four (24) month period or income returns to the same level (adjusted by any increase in the Consumer Price Index for All Urban Consumers for the region including Washington, D.C. or any comparable successor index selected by WMATA from time to time) it was at prior to the loss occurring.



Not more than twice during each calendar year, WMATA may review an owner's or ground lessee's revenue projections and determine the total amount of payments expected to accrue during that calendar year and the following calendar year. Each owner and ground lessee of the WMATA Joint Development Site shall cooperate in any such review by WMATA as set forth in **Section 3.5** of this Declaration. The insurance policy must then be amended to reflect the amount expected to be payable for the following twenty-four (24) months.

#### Professional Liability Insurance

Each owner and ground lessee of the WMATA Joint Development Site and each design or engineering professional who provides design services (including, but not limited to, stamping, sealing or certifying blueprints or similar documents) shall carry professional liability insurance to pay all costs the owner or ground lessee or that design or engineering professional becomes legally obligated to pay as damages for any claim caused by or arising from any negligent act, error or omission of the design professional in connection with the improvements now or hereafter located on the WMATA Joint Development Site or the WMATA Facilities. This insurance shall be maintained via actual coverage or tail coverage for a period of time equal to the statute of repose and such coverage should be evidenced on the certificate of insurance.

This insurance may be maintained on either a "claims made" or "occurrence" basis.

This coverage may be written on "non-admitted" paper.

#### Technology Errors and Omissions Insurance

Each owner and ground lessee of the WMATA Joint Development Site shall carry technology errors and omissions insurance. This insurance must cover actual or alleged negligent acts, errors or omissions committed in the provision of information technology services relating to this Declaration, regardless of the type of damages sought.

This insurance may be provided on a "claims made" basis. If this insurance is provided on a "claims made" basis, the owner or ground lessee shall maintain continuous coverage during the term of this Declaration. This policy must allow for reporting of circumstances or incidents that might give rise to future claims and an extended reporting period of one (1) year must be purchased if ongoing insurance is not maintained.

The policy date must coincide with or precede the effective date of this Declaration.

#### **Adjustments in Required Coverage**

WMATA has the right to review and adjust, not more frequently than once every five (5) years, the types of coverage and policy limits outlined in this Exhibit, provided that the coverages are of a type and with limits similar to those carried by other reputable owners and ground lessees of comparable properties located in the Washington, D.C. metropolitan area.

Each owner and ground lessee shall make or cause to be made any necessary adjustments in such limits or in types of coverage.

If an owner or ground lessee becomes aware of any reduction in the coverage required by this Exhibit, or in the protection afforded WMATA thereunder, that owner or ground lessee shall provide Notice to WMATA within five (5) days.

### **WMATA's Right to Obtain Insurance for Owners and Ground Lessees**

If an owner or ground lessee fails to maintain any insurance required by this Declaration, WMATA may, upon at least fifteen (15) days prior written Notice to that owner or ground lessee, procure and maintain such insurance at the expense of that owner or ground lessee. WMATA shall Notify the owner or ground lessee of the date, purposes, and amounts of any such payments made or legally committed by WMATA. Any amounts of money paid or legally committed to be paid therefor by WMATA prior to the owner or ground lessee obtaining the requisite insurance and providing evidence thereof to WMATA shall be repaid to WMATA within three (3) days after written demand with interest thereon at the Default Interest Rate from the date paid by WMATA to the date of payment by the owner or ground lessee plus an administrative fee of ten percent (10%).

### **Obligation to Collect Proceeds**

Whenever any part of any improvements, other than WMATA Facilities, now or hereafter located on the WMATA Joint Development Site are damaged or destroyed, an owner or ground lessee shall promptly make proof of loss and shall proceed promptly to endeavor to collect all valid claims which may have arisen against insurers or others based upon any such damage or destruction.

### **Rights of Mortgagees**

The provisions of this Exhibit are subject to the rights and any conflicting requirements of all holders of or beneficiaries of any Mortgages encumbering the WMATA Joint Development Site or the improvements thereon so long as the amount and timing of the insurance coverages and proceeds to which WMATA is entitled remain unaffected.

### **Required Coverages as of the date hereof**

<b>INSURANCE TYPE</b>	<b>LIMITS</b>	<b>BASIS</b>
<b>Workers' Compensation</b>	Statutory	
<b>Employers' Liability</b>	\$500,000	Each Accident

	\$500,000	Disease Policy Limit
	\$500,000	Disease Each Employee

<b>Commercial General Liability</b>		
Owner/ground lessee: Non-construction activities	\$x,xxx,xxx	Each Occurrence Limit
	\$x,xxx,xxx	General Aggregate Limit
Owner/ground lessee: Construction Activities	\$x,xxx,xxx	Each Occurrence Limit
Owner/ground lessee: Construction Activities	\$x,xxx,xxx	General Aggregate Limit
General Contractor: Construction Activities	\$x,xxx,xxx	Each Occurrence and Products-Completed Operations Aggregate Limit
Subcontractors	\$x,xxx,xxx	Each Occurrence and Products—Completed Operations Aggregate Limit

<b>Builder's Risk</b>	See narrative above
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<b>Property</b>	See narrative above
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<b>Rental Value</b>	See narrative above
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<b>Business Auto Liability</b>	\$x,xxx,xxx	Combined Single Limit
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<b>Railroad Protective Liability Insurance (RRP)</b>		
	\$x,xxx,xxx	Each Occurrence Limit
	\$x,xxx,xxx	Aggregate Limit

<b>Professional Liability</b>	\$x,xxx,xxx	Each Claim
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<b>Pollution Liability</b>	\$x,xxx,xxx	Each Claim
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<b>Technology Errors &amp; Omissions Liability</b>	\$x,xxx,xxx	Each Claim
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