

## **DEVELOPER'S AGREEMENT**

**THIS AGREEMENT** entered into this       day of       , 2017

### **BETWEEN**

BOROUGH OF RED BANK  
90 Monmouth Street  
Red Bank, New Jersey 07701

(hereinafter referred to as the "Borough")

### **AND**

YELLOWBROOK PROPERTY COMPANY, LLC  
247 Bridge Street  
Red Bank, NJ 07701

(hereinafter referred to as "Developer")

affects all, or a portion of, real estate known as:

**Block 75.03, Lots 46, 47, 48.01, 53, 54.01 and 56, within the Borough of Red Bank**

**WHEREAS**, by Resolution No. 2017-29 (the "Resolution") the Board of Adjustment of the Borough of Red Bank ("Board") granted Developer's application for major site plan approval with Use (D) and Bulk (C) variances and waivers, subject to certain conditions of approval (collectively, the "Approvals"), to construct twenty-two multi-family dwelling units, consisting of twenty (20) townhomes and two (2) apartments, and other associated improvements on premises located on Catherine and River Street, Red Bank, New Jersey; and

**WHEREAS**, the Approvals call for certain improvements and the Developer has agreed to construct these improvements as shown on the submissions and records comprising the Developer's approved application all of which are made a part of this Agreement by reference hereto as though fully set forth at length (the "Site Plan"),

**NOW, THEREFORE**, the parties to this Agreement for and in consideration of the mutual promises and covenants to each other and for other good and valuable consideration, including the major site plan and variance approval granted by the Board, hereby agree for themselves, their successors and assigns, as follows:

1. Application of Agreement: The terms and conditions of this Agreement shall be applicable only to this project by this Developer, subject to the provisions of Section 13.
2. Developer Bound: The Developer agrees to be bound by the testimony, representations, commitments, matters of fact and matters of law which constitute the file and record of the Board in this matter and it will faithfully discharge all of the obligations and commitments thereof.
3. Construction Subject to Ordinance: The Developer shall construct in accordance with the specifications of the ordinances of the Borough of Red Bank, as amended to date, in a manner satisfactory to the Borough's Engineer and in accordance with the site plan improvements as set forth on the "Site Plan" including but not limited to, the installation of any items specifically set forth in the above-referenced Resolution of the Board. Developer shall perform all work in full compliance and observation of all ordinances of the Borough of Red Bank. The Developer shall be responsible for securing all permits required by law including road opening permits and others required by the ordinances of the Borough of Red Bank and to pay the requisite fees called for under the appropriate fee schedules.
4. Performance Guarantees: Developer shall post with the Borough performance guarantees with adequate surety to ensure the faithful completion of the Improvements in the manner and amounts required by the Borough's Engineer, subject to the approval of the Borough Attorney. Any partial reduction granted in the performance guarantees pursuant to N.J.S.A. 40:55D-53 shall be applied to any cash deposit in the same proportion as any original cash deposit bears to the full amount of the performance guarantee. In addition, all taxes, assessments, escrows and fees for the property must be paid prior to the release of all performance guarantees. As used herein, "Improvements" shall be defined as: Curb, Hardscape and Pavement, Traffic Signs, Storm Drainage System, Hydrants, Landscaping, Street Trees and Street Lighting.

5. Performance Guarantee Replacement: In the event that any insurance company, financial institution or other entity issuing a performance guarantee hereunder shall be subject to a reorganization, rehabilitation or other action whereby a State or Federal agency has taken over management of the entity or, if in the reasonable opinion of the Governing Body, the circumstances and condition of the entity results in the Borough declaring it feels its interests are jeopardized, the Developer, within 60 days of such written notification sent by the Borough, shall replace the performance guarantees. If requested by the Developer, the Borough shall adopt a resolution conditionally releasing the jeopardized performance guarantees subject to the posting of satisfactory substitute guarantees.

6. Lapsed Performance Guarantee: In the event any performance guarantee shall lapse, be cancelled or withdrawn or otherwise not remain in full force and effect, the Developer, until a replacement guarantee has been deposited with and approved by the Borough, will cease and desist any and all work on the project or development except for relatively minor work for safety authorized in writing by the Borough's Construction Official. In the event any occupancy takes place in any Improvements of the development or project, said occupancy shall be illegal and the Developer shall forthwith cause it to cease and desist.

7. Engineering Escrows: The Developer shall maintain an engineering escrow in the manner and amount required by the Borough. If this escrow should be exhausted, the Developers shall pay such additional funds as determined by the Borough.

8. Legal Fee Escrow: The Borough Attorney has waived any legal fee escrow, costs, or expenses in connection with the negotiation, preparation and review of this agreement, any ordinances or other legal instruments related to this project, and all bonds, letters of credit, deeds, resolutions, as well as fees or document preparation associated with the aforementioned materials, up until the date of execution of this Agreement by all parties.

9. Water and Sewer Fees: The Developer agrees to pay to the Borough of Red Bank, based on the approved plan, the following fees in full prior to the issuance of the Construction Permit for the premises:

- a. Sewer connection fees: \$71,412.00 (22 units x \$3,246.00/unit)
- b. Water connection fees: \$30,426.00 (22 units x \$1,383.00/unit)
- c. Water Vulnerability fee - \$7,040.00 (22 units x 1 EDU unit x \$320/EDU)

Total Water, Sewer and Water Vulnerability Fee - \$108,878.00

10. Withholding Permits/Certificates of Occupancy: Developer understands and agrees in the event it is in violation of any of the terms of this Agreement, the Borough may, in its discretion, withhold the issuance of any further building permit(s) and/or certificate(s) of occupancy until the violation has been corrected. Developer understands and acknowledges that all conditions contained in the record of proceedings in this matter, including any agreements made by the Developer, were essential to the Board's decision to grant the approval set forth herein. A breach of any such condition or a failure by the Developer to adhere to the material terms of any agreement within the time required shall result in the automatic revocation of the approval and shall terminate the right of the Developer to obtain construction permits, certificates of occupancy or any other governmental authorizations necessary in order to continue development of this project.

11. Completion of Improvements: The Improvements contemplated in this Agreement and in the Approvals shall be performed within a period of four (4) years from the date hereof or such additional periods of time as may be granted by the Borough in accordance with N.J.S.A. 40:55D-52, and prior to the issuance of a certificate of occupancy. The failure of the Borough to declare the Developer in default upon the expiration of the four (4) years and/or the willingness of the Borough to allow Developer additional time to complete the Improvements shall not be deemed a waiver of any of the Borough's rights under this Agreement. The issuance of a certificate of occupancy by the Borough within the four (4) year period shall not be deemed a waiver for defects ascertained during said period or subsequent thereto.

12. Payment(s) as Condition(s) Precedent: Any payments, posting of bonds or other financial obligation required to be performed by the Developer in this Agreement, unless specifically set forth otherwise, shall be done and/or performed prior to the issuance of any building permits to the Developer.

13. Assignment/Sale of Premises: In the event the property is sold or otherwise conveyed by the Developer prior to the installation of all Improvements, the Developer shall have the right to assign both the performance guarantees and this Developer's Agreement to a subsequent qualified Developer provided this subsequent Developer shall remain primarily liable for the obligations created thereunder and provided further that any subsequent Developer assumes same in writing in a form which is acceptable to the Borough Attorney. In the event a subsequent Developer tenders new guarantees to the Borough, they shall be reviewed by the Borough Attorney as to form and content prior to acceptance and release of this subsequent Developer's performance guarantees.

14. Record Drawings: The Developer shall provide to the Borough, by filing with the Borough's Engineer, record drawings of all Improvements and utilities, including water, sanitary sewer and storm drainage as constructed by the Developer both within its development site and off-tract, if required. Said record drawings shall be in conformance with applicable Borough standards and shall be both in hard copy and on disc. A final survey of the site must be submitted at the time of request for a Certificate of Occupancy.

15. Maintenance of Project: During the course of construction and until the time of final acceptance of Improvements, the Developer shall: (1) keep the site free of dirt, stone, mud and other debris; (2) maintain and keep all storm drainage within the site free from accumulation of debris and leaves; and (3) shall utilize a snow fence to protect those areas which will remain undisturbed throughout the construction. "Final Acceptance" of Improvements for the purpose of this provision is deemed to be the date upon which the Improvements are accepted by the Borough and the final maintenance guarantees for the same are posted with the Borough and a resolution of acceptances adopted by the governing body of the Borough. Said maintenance guarantees shall be posted with the Borough for a period of not less than two (2) years in an amount not less than fifteen (15%) percent of the cost of the Improvements.

16. Public Roadways to be Maintained: Developer shall be responsible for the cleaning and sweeping of the public roadways at the point of entrance to and exit from the Developer's project to avoid the accumulation of debris and to maintain the public roadways in a clean and safe condition. In the event that the Developer fails to maintain the roadways in accordance with the foregoing standard, the Borough may cause same to be done and the Superintendent of the Department of Public Works, or his designee, shall certify the Borough's expense in connection herewith to, the Borough CFO and the Borough Tax Collector. Said amount shall constitute a lien upon the premises and permission is hereby given that such lien may be shown on municipal Certificates of Lien issued for the subject property by officials and/or employees of the Borough.

17. Deeds and Affidavits of Title: Developer shall provide to the Borough such documents, including but not limited to deeds, affidavits of title, corporate resolutions to convey, and a letter from the title insurance company which letter shall certify to the Borough that the Grantor is the fee owner of the property and has the ability to transfer the interest conveyed without encumbrances as are necessary to convey a valid, marketable and insurable easement(s) or fee title, as the case may be, for such dedications, if any, of property or easements as may be required by the Approvals.

18. Borough Observation, Access and Inspections: The Borough, its consultants, employees and agents, shall be given free access to observe construction of subject development, including but not limited to roadways, sanitary sewers, water mains, storm sewers, landscaping, buffer areas and appurtenances associated with the approved plan. The purpose of such observations shall be limited to providing the Borough with a greater degree of confidence that such Improvements will be constructed in accordance with the Developer's approved submittals. The Borough, or its representatives, consultants, employees or agents, shall not supervise, direct or have control over the Developer's work during such observations or as a result thereof, nor shall they have authority over or responsibility for the means, methods, techniques, sequences or procedures of construction selected by the Developer, for safety precautions and programs incident to the work of the Developer or for any failure of the Developer to comply with applicable laws, rules, regulations, ordinances, codes or orders. The Developer is not an agent or employee of the Borough.

19. Compliance with Applicable Laws: The Developer shall comply with all laws and regulations of the State of New Jersey, the County of Monmouth and the Borough of Red Bank. In addition, the Developer shall comply with all environmental laws and regulations of the federal and state governments. Failure to comply with these laws and any violations thereof shall be deemed to be a breach of this Agreement. To the extent the Borough must bring an action for compliance with this Agreement, defend or participate in any litigation with regard to said laws or regulations related to the Developer's development and/or actions whether purposeful or negligent, any such action shall be subject to the provisions set forth in the immediately following paragraph regarding indemnification and attorneys' fees. In addition, the Developer shall indemnify and hold the Borough harmless for such violations and shall reimburse the Borough for any and all fees, judgments or penalties entered against the Borough as a result of the purposeful or negligent acts of the Developer.

20. Indemnification and Attorney's Fees: Developer agrees to indemnify and hold the Borough, its officials, officers, consultants, agents, servants, representatives and employees, harmless from and against any and all claims, liability, cost or expense of every kind and nature arising from Developer's performance of the Developer's obligations pursuant to this Agreement, the failure by Developer to perform such obligations, any action or failure to act by the Developer with respect to the project to which this Agreement is applicable or in connection with any allegation of any of the foregoing. Such indemnification and/or hold harmless obligation shall extend not only to actual damages but shall also include reasonable costs and expenses of litigation, including but not limited to expenses and fees in connection with the engagement or utilization of any fact or expert witnesses as well as reasonable attorney fees. When requested by the Borough, the Developer agrees to aid and/or defend the Borough, its officials, officers, agents, servants, representatives and employees, in the event any or all of same are named as a defendant or defendants in any action relating to activities or obligations of the Developer arising under this Agreement or in connection with the project to which this Agreement applies.

21. Insurance: Because the construction activities proposed by the Developer will occur in areas adjacent to Borough owned properties and/or rights of way, the Developer shall name the Borough as an additional insured with respect to its property in all general liability, excess and umbrella policies it may obtain with respect to the construction activities on the Property. The policy limits should be no less than \$1 million per occurrence and \$3 million aggregate.

22. Preconstruction Meeting: The Developer shall provide three (3) business days' notice to the Borough's Engineer prior to any clearing, grading, construction or other work at the site pursuant to Red Bank Ordinance Section 490-74.B. In addition, there shall be a preconstruction meeting with the Borough's Engineer prior to the commencement of any construction affecting public improvements.

23. Reliance of Borough: The Developer further acknowledges and understands that all of the conditions contained in this Agreement and the record of the proceedings in this matter, including any agreements made by the Developer with the Board and incorporated in the Approvals, as well as the approved Site Plan, are hereby deemed to be essential to the Governing Body's decision to enter into this Agreement. A breach of any such conditions, the failure of the Developer to adhere to the terms of any agreement incorporated within the resolution, or this Agreement, or deviation from the approved map, shall result in a breach of this Agreement and shall terminate the right of the Developer to obtain additional construction permits, certificates of occupancy or any other governmental authorizations to continue developing the project until such time as such breach has been remedied.

24. Conditions of Approval: The Developer shall also comply with the following terms and conditions:

- a. Compliance with all requirements of all ordinances of the Borough of Red Bank and all proper recommendations of the Borough Engineer;
- b. All recommendations, conditions and requirements of the Monmouth County Planning Board and/or the New Jersey Department of Transportation, if applicable, shall be complied with and the Developer shall pay all costs of Improvements, including the posting of any bonds, as may be required;

- c. Developer shall post satisfactory performance bonds to guarantee the installation of such Improvements as may be required by the Borough's Engineer;
- d. Compliance with the Freehold Soil Conservation District for a soil erosion and sediment control plan, if applicable;
- e. New Jersey Department of Environmental Protection approval of wetlands and buffer delineations, if applicable;
- f. Approval of the Two River Water Reclamation Authority for sewer service, if applicable;
- g. Compliance with all conditions set forth in Board Resolution No. 2017-29 which is attached hereto as Exhibit A and incorporated herein by reference.

25. Affordable Housing Obligation. Developer shall satisfy its affordable housing obligation in accordance with the Resolution by constructing two units (a one-bedroom unit and a three-bedroom unit) in the project as specified on the Site Plan.

- a. The two affordable rental units shall be deed restricted units for a minimum of thirty (30) years from the date of the initial lease/sale, at the Developer's option, of each unit as affordable and in accordance with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26 et. Seq. The Developer shall take any additional steps necessary to maintain the two units as creditable pursuant to guidelines promulgated by the Council on Affordable Housing or any successor entity carrying out such function.
- b. The Developer may choose to contract out the management or administration of the units or sell the units to a qualified entity that will manage the units in accordance with this Agreement.
- c. The affordable housing obligation set forth herein shall not be reduced or increased pursuant to any future change in law, even if the future change in law or regulation requires an affordable housing obligation generated by such development that is less or more than the obligation described herein, do not require any affordable housing obligation attributable to any particular development, or otherwise change municipal or developer obligations with respect to affordable housing.

- d. This Agreement describes all legal obligations that Developer shall have with regard to providing affordable housing connected to the Development. The Borough shall not otherwise impose any fee or other requirement regarding affordable housing on the Development beyond that memorialized in the Agreement.

26. Voluntary Agreement: Developer specifically and unequivocally states that the terms and conditions as agreed upon in this Agreement have not been forced upon it by undue influence, coercion and are not being undertaken under protest. The Developer reviewed all rationale for the agreements set forth herein and is undertaking them voluntarily.

27. Recording of this Agreement: Developer shall promptly record this Developer's Agreement in the Monmouth County Clerk's office where it shall remain on record until the Developer has complied with the obligations herein. At such time, the Governing Body shall adopt a Resolution authorizing the execution and delivery of a Release and Satisfaction of Developer's Agreement in recordable form at the Developer's cost and expense.

28. Severability: If any terms or conditions are determined invalid by a court of competent jurisdiction, the remainder shall remain in full force and effect.

29. Interpretation of Law: This Agreement shall be interpreted under and governed by the laws of the State of New Jersey.

30. Notices: All notices required or permitted under this Agreement shall be in writing by first-class mail to the addresses set forth herein or as otherwise designated by the parties in writing.

**IN WITNESS WHEREOF**, the Developer has hereunto caused these presents to be signed by its proper authorized parties and has caused its proper seals, if any, to be affixed hereto. The Borough of Red Bank has caused this instrument to be signed by its Mayor and attested by its Clerk and does cause its proper corporate seal to be affixed as of the date and year first above written.

**Yellowbrook Property Co, LLC**

**Borough of Red Bank**

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

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

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

**Pasquale Menna, Esq.**

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

**Mayor, Borough of Red Bank**

Witnessed: \_\_\_\_\_

Attest: \_\_\_\_\_

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

**Pamela Borghi**

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

**Clerk, Borough of Red Bank**

STATE OF NEW JERSEY

SS:

COUNTY OF MONMOUTH

I certify that on this \_\_\_\_ day of \_\_\_\_\_ 2017, before me personally came \_\_\_\_\_ of Yellowbrook Property Co, LLC, to me known and known to me to be the individual described in and who executed the foregoing instrument, and such person duly acknowledged to me understanding the meaning of the instrument and that he executed the same as his act and deed, and as the authorized representative of the entity named therein, and with full authority to act on its behalf, and that he is over the age of 18.

\_\_\_\_\_

STATE OF NEW JERSEY

SS:

COUNTY OF MONMOUTH

I certify that on this \_\_\_\_ day of \_\_\_\_\_ 2017, Pamela Borghi personally came before me and she acknowledged under oath to my satisfaction that (a) she is the Municipal Clerk of the Borough of Red Bank, the municipal corporation named in this document; (b) she is the attesting witness to the signing of this document by the proper municipal officer, who is PASQUALE MENNA, Mayor of the Borough of Red Bank, in the municipal corporation; (c) this document is signed and delivered by the Borough as its voluntary act duly authorized by proper Resolution of the Governing Body and (d) she knows the proper seal of the Borough was affixed to this document.

\_\_\_\_\_

