

# **Attachment G**

## **Park Improvement and Maintenance Agreement Between City of Benton Harbor and Harbor Shores Community Redevelopment, Inc.**

## PARK IMPROVEMENTS AND MAINTENANCE AGREEMENT

This Park Improvements and Maintenance Agreement (this "**Agreement**") is entered into by and between the City of Benton Harbor, a Michigan municipal corporation, whose principal business address is 200 East Wall Street, Post Office Box 648, Benton Harbor, Michigan 49023-0648, and Harbor Shores Community Redevelopment Inc. ("**Harbor Shores**"), a Michigan non-profit corporation, whose principal business address is 400 Riverview Drive, Suite 420, Benton Harbor, Michigan 49022. In this Agreement, the Parties (as hereinafter defined) hereby amend and restate the terms and conditions on which the City of Benton Harbor and Harbor Shores will provide for the expansion of, improvement to, operation of, and maintenance of Jean Klock Park (as defined below), portions of property contiguous to Jean Klock Park commonly known as Parcel 8A (as defined below), and the Park Expansion Property (as defined below), in conjunction with the Lease (as defined below) and the Harbor Shores Project (as defined in Section 1.01(n) below). The City of Benton Harbor and Harbor Shores shall be collectively referred to in this Agreement as the "**Parties**."

### Recitals

On November 3, 2005, the City of Benton Harbor and Harbor Shores entered into a Development Cooperation Agreement ("**Act 425 Agreement**") by and among the City of Benton Harbor, St. Joseph, and Harbor Shores. The subject of the Act 425 Agreement is an economic development Project (as defined in Section 1.01(n) below) to be located in the City of Benton Harbor, Benton Township, and St. Joseph, Michigan. Also, on April 13, 2006, the City of Benton Harbor and Harbor Shores entered into a Memorandum of Understanding, as amended, regarding the Project ("**Memorandum of Understanding**"). The Memorandum of Understanding provides for sale of certain City of Benton Harbor-owned land (not including any portion of Jean Klock Park) for the Project and sets forth additional terms regarding community benefits, parks and recreation, and zoning. Additionally, Harbor Shores and the City of Benton Harbor entered into a Rezoning Agreement relating to the Project ("**Rezoning Agreement**").

Pursuant to the foregoing agreements, the City of Benton Harbor and Harbor Shores entered into the Harbor Shores Golf Course Agreement, dated effective January 22, 2007 ("**Prior Agreement**") to expand and improve Jean Klock Park as part of the Project, to provide for the maintenance and operation of Jean Klock Park, Parcel 8A and the Park Expansion Property (as defined in the Prior Agreement) and to lease certain interior portions of Jean Klock Park and Parcel 8A to Harbor Shores for construction and operation of three (3) holes of a public golf course, contingent upon approval by the Michigan Department of Natural Resources ("**MDNR**"), Michigan Natural Resources Trust Fund ("**MNRTF**") Board, and National Park Service ("**NPS**"), and based on the terms and conditions set forth in the Prior Agreement.

Based upon comments from the NPS and MDNR, and pursuant to Section 7.27 of the Prior Agreement, which requires the Parties to execute any additional documents reasonably requested by the other party to carry out the intent of the Prior Agreement, the Parties have agreed to separate the Prior Agreement by entering into this Agreement and the Lease (as defined below), to modify the terms of the Prior Agreement to the extent necessary to satisfy the requirements of the NPS and MDNR. The Parties agree that this Agreement and the Lease shall

replace and supersede the Prior Agreement in its entirety and upon the effective date of this Agreement and the Lease, the Prior Agreement shall automatically and immediately terminate. In the event of any conflict or inconsistency between the terms and conditions of this Agreement and the terms and conditions of the Lease, the terms and conditions of the Lease shall control.

### Terms and Conditions

The City of Benton Harbor and Harbor Shores agree as follows:

#### Article I

**Section 1.01. Definitions.** In addition to terms defined elsewhere in this Agreement, terms used in this Agreement shall have the following meanings:

- (a) "**City Commission**" means the City Commission of Benton Harbor, its legislative body.
- (b) "**City Manager**" means the City Manager of Benton Harbor and his/her designee.
- (c) "**Day**" means a calendar day.
- (d) "**Golf Course Improvements**" has the meaning provided in the Lease.
- (e) "**Jean Klock Park**" has the meaning provided in the Lease.
- (f) "**Jean Klock Park Improvements**" means the improvements to be constructed within Jean Klock Park and Parcel 8A by Harbor Shores as set forth in **Exhibit A** to this Agreement, including, without limitation, sidewalks, volleyball courts, trees, benches, grills, and tables. Except as otherwise provided in this Agreement, the Jean Klock Park Improvements shall be constructed by Harbor Shores, at its expense, on Jean Klock Park and Parcel 8A within five (5) years after the Effective Date of this Agreement.
- (g) "**Lease**" means the Harbor Shores Lease Agreement entered into at the same time as this Agreement regarding the lease of approximately 30.16 acres of land, including approximately 22.11 acres of Jean Klock Park and 8.05 acres of Parcel 8A to Harbor Shores, for the purposes set forth in such agreement.
- (h) "**Leased Premises**" has the meaning provided in the Lease.
- (i) "**Parcel 8A**" has the meaning provided in the Lease.
- (j) "**Park Expansion Property**" means the real property that is collectively depicted and legally described in **Exhibit B** to this Agreement. All of the Park Expansion Property (i) has been deeded to the City of Benton Harbor under the terms and conditions of the Prior Agreement; or (ii) will be deeded to the City of Benton Harbor under the terms and conditions of this Agreement.

(k) "**Park Expansion Improvements**" means the Trail Improvements (as defined below) and the improvements to be constructed within the Park Expansion Property by Harbor Shores as set forth in **Exhibit C** to this Agreement, including, without limitation, trails, boardwalks, viewing platforms and a boat launch. Except as otherwise provided in this Agreement, the Park Expansion Improvements shall be constructed by Harbor Shores within five (5) years after the Effective Date of this Agreement, such construction shall begin within thirty (30) days of execution of this Agreement.

(l) "**Permitted Use**" has the meaning as provided in the Lease.

(m) "**Person**" has the meaning as provided in the Lease.

(n) "**Project**" means the planning, development, construction, financing, ownership and sale of the "Harbor Shores Development Project," which is a mixed use development project that may consist of commercial and retail buildings, residential homes, hotel(s), a public golf course, marina(s) and other recreational uses to be located in the City of Benton Harbor, Benton Township, and St. Joseph, Michigan.

(o) "**Southwest Park Corridor**" means the real property located within Jean Klock Park as depicted and outlined in bold in **Exhibit D** to this Agreement for the purpose of providing access for the public to Jean Klock Park. The public's use of the Southwest Park Corridor shall be dominant to Harbor Shores' subordinate use of such area.

(p) "**State**" means the State of Michigan.

(q) "**Trail Improvements**" means the improvements to be constructed as detailed in the City of Benton Harbor's Conversion Proposal, which was resubmitted to the NPS on \_\_\_\_\_, 2008, such improvements include, without limitation, proposed nature walks, proposed non-motorized paths, existing non-motorized paths and trails by Harbor Shores, trash receptacles, boardwalks, benches, lighting, signs and bridges.

**Section 1.02. Exhibits.** All Exhibits attached to this Agreement shall be operative parts of this Agreement and incorporated by reference where mentioned in this Agreement, except that in the event of any conflict between any Exhibit and the terms and conditions of this Agreement, the terms and conditions of this Agreement shall control. Capitalized terms in the Exhibits to this Agreement shall be given the same meaning as in this Agreement, unless otherwise indicated. In the event of any conflict or inconsistency between the terms and condition of this Agreement and the terms and conditions of the Lease, the terms and conditions of the Lease shall control. From and after the Effective Date, this Agreement and the Lease shall amend and restate the Prior Agreement in its entirety. Reference to supplemental agreements, approvals, certificates, consents, notices, requests and the like means that such shall be in writing whether or not a writing is specifically mentioned.

**Section 1.03. Contingencies.** This Agreement shall not be executed by the Parties until they receive prior written approval of it from the NPS. This Agreement is contingent upon the

execution of the Lease. In the event that this contingency is not satisfied, this Agreement shall terminate upon written notice from a party to this Agreement to the other party to this Agreement, and neither party to this Agreement shall have any further liability to the other party.

## **Article II**

**Section 2.01. Term.** The term of this Agreement shall be the same as set forth in the Lease, including all terms and conditions set forth therein regarding the term.

**Section 2.02. Consideration.** The Consideration for entering into this Agreement is as provided under the Lease.

**Section 2.03. Approval by the MDNR, the MNRTF Board and the NPS.** The Parties acknowledge that Jean Klock Park is subject to the following agreements ("**Grant Agreements**") previously entered into by the City of Benton Harbor: (a) Development Project Agreement - Land and Water Conservation Fund, Project Number 26-00568; (b) Development Project Agreement - Michigan Natural Resources Trust Fund, Project Number 89-114; (c) Development Project Agreement - Michigan Department of Natural Resources Recreation Bond Program, Project Number BF 92-327; and (d) Development Project Agreement - Clean Michigan Initiative Recreation Bond Program, Project Number CM99-203. The Parties further acknowledge that the Parties have sought and obtained approval of the Project from the MDNR, MNRTF Board, and the NPS. The MNRTF Board approval is subject to the conditions as detailed in its final approval, including, without limitation, a review of this Agreement. The Parties shall use their best efforts to assist and cooperate fully with each other with regard to meeting any conditions imposed by the MDNR, MNRTF Board, the NPS and any other appropriate and/or required governmental bodies necessarily required for the performance of this Agreement by the Parties. Application and approval costs, including reasonable attorneys' fees, appraisal expenses, environmental reports, and mitigation sites, shall be borne by Harbor Shores.

## **Article III**

**Section 3.01. Park Jurisdiction.** The City of Benton Harbor, as fee simple owner of Jean Klock Park, Parcel 8A and the Park Expansion Property, through its representatives, shall remain in charge of the operation and maintenance of all portions of Jean Klock Park, Parcel 8A and the Park Expansion Property not encompassed by the Leased Premises, consistent with the City of Benton Harbor's obligation to provide for and administer to the general welfare of the public and consistent with Sections 3.03 and 3.04 below.

**Section 3.02. Improvements.** Attached as **Exhibit A** is a detailed list of the Jean Klock Park Improvements which shall be completed by Harbor Shores under this Agreement. Attached as **Exhibit C** is a detailed list of the Park Expansion Improvements which shall be completed by Harbor Shores under this Agreement. The Trail Improvements include, but are not limited to, the current plans for park improvements, including action items, connection and access points for all park properties and park trails as detailed in the City of Benton Harbor's Conversion Proposal, which was resubmitted to the NPS on \_\_\_\_\_, 2008. The Parties acknowledge that Harbor Shores intends to complete at least One Million and no/100 Dollars (\$1,000,000.00)

in capital improvements for the Jean Klock Park Improvements as detailed in **Exhibit A** and at least Five Hundred Thousand Eight Hundred Fifty and no/100 Dollars (\$500,850.00) in capital improvements for the Park Expansion Improvements as detailed in **Exhibit C**.

Harbor Shores guarantees and warrants all work performed by or for it in the construction and installation of the Park Expansion Improvements and Jean Klock Park Improvements against defective workmanship and materials for a period of one (1) year after completion of installation of such improvements. If the City of Benton Harbor gives Harbor Shores written notice of alleged defects in workmanship or materials in any of the Park Expansion Improvements or Jean Klock Park Improvements and requests inspection of them within one (1) year after the date of installation of such improvements, Harbor Shores will inspect improvements. Where such inspection reveals defects in workmanship or materials in any of the Park Expansion Improvements or Jean Klock Park Improvements, then Harbor Shores will make reasonable repairs to cure such defects without cost to the City of Benton Harbor. Harbor Shores does not warrant, however, against alleged defects which are the result of characteristics common to the materials used, such as (but not limited to) typical warping or deflection of wood; fading chalking or checking of paint due to sunlight; drying, shrinking or cracking of caulking and weatherstripping; heaving of cement; or initial settlement of the Park Expansion Improvements or Jean Klock Park Improvements or material shrinkage commonly associated with new construction. Harbor Shores will assign to and for the benefit of the City of Benton Harbor all assignable warranties made to Harbor Shores by contractors, materialmen and suppliers relative to services, materials and equipment incorporated in the Park Expansion Improvements or Jean Klock Park Improvements.

### **Section 3.03. Maintenance.**

#### **(a) Jean Klock Park, Parcel 8A and the Park Expansion Property.**

Harbor Shores shall provide the following maintenance during the term of this Agreement for Jean Klock Park and Parcel 8A (but not including the Leased Premises), the Park Expansion Property and public trails to be constructed as detailed in the City of Benton Harbor's Conversion Proposal, which was resubmitted to the NPS on \_\_\_\_\_, 2008: sand and dune maintenance; trash removal; cleaning of public restrooms; grass mowing and related landscaping trimming and maintenance; and other customary park maintenance items. Notwithstanding the foregoing, Harbor Shores' maintenance obligations under this Subsection (a) do not include maintenance as the result of special events or public road maintenance or repair or replacement of any of the non-golf course related infrastructure located within Jean Klock Park, Parcel 8A or the Park Expansion Property. Further, with regard to the maintenance required to be completed by Harbor Shores under this Subsection (a), Harbor Shores shall perform and pay for or cause to be performed and paid for all such required maintenance promptly or, alternatively, within seven (7) days after receipt of written notice from the City of Benton Harbor demanding such action or within such reasonably longer period if such maintenance, repair or replacement cannot be completed within such 7-day period.

**(b) The City of Benton Harbor Responsibilities.** Subject to the maintenance obligations of Harbor Shores detailed in Subsection (a) above and Section 3.02 above, the City of Benton Harbor shall, at its cost, perform and pay for or cause to be performed

and paid for all maintenance, repair and replacement necessary to keep the Jean Klock Park Improvements, Jean Klock Park and Parcel 8A (except for the Leased Premises and Golf Course Improvements), any portions of the Park Expansion Property and related Park Expansion Improvements that are owned by the City of Benton Harbor during the term of this Agreement, clean, sanitary, presentable and safe and in good order, condition and repair, consistent with a first-class public park and in compliance with all applicable laws, ordinances, rules and regulations during the term of this Agreement. Notwithstanding the foregoing, the City of Benton Harbor shall not be responsible for any maintenance, repair and replacement of the Leased Premises or Golf Course Improvements. The City of Benton Harbor shall perform all such maintenance, repair and replacement as needed and, in any event, within seven (7) days after receipt of written notice from Harbor Shores or such reasonably longer period if such maintenance, repair or replacement cannot be completed within such 7-day period.

**Section 3.04. Operations.** The City of Benton Harbor shall be responsible for the operation of the Jean Klock Park Improvements, Jean Klock Park and Parcel 8A (except for the Leased Premises and Golf Course Improvements), and any portions of the Park Expansion Property and related Park Expansion Improvements that are owned by the City of Benton Harbor during the term of this Agreement.

**Section 3.05. Access to Trail Improvements.** Upon completion of the construction and installation of the Park Expansion Improvements, the public will have the right to use the portions of the Trail Improvements that are located on Harbor Shores owned real property at no charge. Harbor Shores may implement reasonable rules and regulations regarding such use with the prior written approval of the City of Benton Harbor, which approval shall not be unreasonably withheld, delayed or conditioned.

**Section 3.06. Park Access.** The City of Benton Harbor hereby grants to Harbor Shores reasonable access over and across Jean Klock Park, Parcel 8A and the Park Expansion Property for the purpose of allowing the construction and installation of the Jean Klock Park Improvements, for the purpose of allowing the construction and installation of the Park Expansion Improvements, and for the purpose of its maintenance obligations as detailed in **Section 3.03** above and **Section 3.02** above ("**Park Access Rights**"). The Park Access Rights shall be for the use of Harbor Shores and its agents. Notwithstanding the foregoing, Harbor Shores shall not have access under this Agreement to any portion of the Lake Michigan beach or any portion of the dunes within Jean Klock Park that are to the west of the western boundary of the Leased Premises, except for the purposes of the construction and installation of the Jean Klock Park Improvements and for the purpose of complying with its maintenance obligations as detailed in **Section 3.03(a)** above and **Section 3.02** above. Notwithstanding anything to the contrary herein, in all instances, the public's right to use all areas of Jean Klock Park and Parcel 8A (other than the Leased Premises), and the Park Expansion Property shall be dominant compared to Harbor Shores' subordinate use of all such areas under this Agreement; and, the City of Benton Harbor shall, as may be required from time to time, with input from Harbor Shores and MDNR staff, make and adopt reasonable rules and regulations regarding Jean Klock Park uses by Harbor Shores consistent with the terms of this Agreement to minimize and resolve any conflicts between Harbor Shores' use and all other uses in such a way that promotes the public's use of Jean Klock Park. The City of Benton Harbor is responsible for future repair and

future replacement of the Jean Klock Park Improvements, with the exception of Harbor Shores' obligations under **Section 3.02** above and Harbor Shores' retention of financial responsibility to make any future repairs and future replacements of the Jean Klock Park Improvements necessitated by actions or inaction of Harbor Shores that adversely impacts the Jean Klock Park Improvements. Likewise, Harbor Shores shall retain financial responsibility to make any future repairs to Jean Klock Park, Parcel 8A and the Park Expansion Property necessitated by actions or inaction of Harbor Shores that adversely impacts Jean Klock Park, Parcel 8A and the Park Expansion Property. Harbor Shores acknowledges that Jean Klock Park and Parcel 8A have state-listed threatened plants species and that Harbor Shores shall reasonably comply with necessary and appropriate design and construction measures so that such threatened plants species are not threatened or adversely impacted.

**Section 3.07. Termination of Marina Easement.** Pursuant to the Prior Agreement, Cornerstone Alliance, the City of Benton Harbor and the City of St. Joseph entered into the Easement Agreement, dated April 19, 2007, recorded April 27, 2007, in Liber 2788 Page 297 of the Berrien County Register of Deeds records ("**Marina Easement**"). The Parties agree to use their best efforts to terminate the Marina Easement within thirty (30) days of the Effective Date of this Agreement.

**Section 3.08. Termination of Access Easement.** Harbor Shores, Harbor Shores BHBT Land Development, LLC and the City of Benton Harbor entered into the Access Easement Agreement, dated April 19, 2007, recorded April 27, 2007, in Liber 2788 Page 421 of the Berrien County Register of Deeds records ("**Access Easement**"). The Parties agree to use their best efforts to terminate the Access Easement within thirty (30) days of the Effective Date of this Agreement.

**Section 3.09. Parcels H1 and H2.** Pursuant to the Prior Agreement, Cornerstone Alliance, a Michigan nonprofit corporation, executed and recorded a Covenant Deed, dated April 20, 2007, recorded April 27, 2007, in Liber 2788, Page 388 of the Berrien County Register of Deeds records, which conveyed certain real property to the City of Benton Harbor ("**Prior Deed**"). The real property being conveyed under the Prior Deed included, but was not limited to, the real property legally described and depicted on **Exhibit E** attached hereto ("**Parcels H1 and H2**"). The City of Benton Harbor hereby agrees to use its best efforts to convey title to and transfer Parcels H1 and H2 to Cornerstone Alliance pursuant a covenant deed within thirty (30) days of the Effective Date of this Agreement.

**Section 3.10. Changes to Park Mitigation Parcels.** Pursuant to the Prior Agreement, Harbor Shores BHBT Land Development, LLC, a Michigan limited liability company ("**BHBT**"), executed and recorded a Covenant Deed, dated April 20, 2007, recorded April 27, 2007, in Liber 2788, Page 376, of the Berrien County Register of Deeds records which conveyed certain real property commonly known as Park Mitigation Parcel C to the City of Benton Harbor ("**Parcel C Deed**"). Also, pursuant to the Prior Agreement, BHBT executed and recorded a Covenant Deed, dated April 20, 2007, recorded April 27, 2007, in Liber 2788, Page 380, of the Berrien County Register of Deeds records, which conveyed certain real property commonly known as Park Mitigation Parcel D to the City of Benton Harbor ("**Parcel D Deed**"). Additionally, pursuant to the Prior Agreement, BHBT executed and recorded a Covenant Deed,

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dated April 20, 2007, recorded April 27, 2007, in Liber 2788, Page 385, of the Berrien County Register of Deeds records which conveyed certain real property commonly known as Park Mitigation Parcel F to the City of Benton Harbor ("**Parcel F Deed**"). Because portions of the Golf Course Improvements, as currently designed, encroach on the property covered by the Parcel C Deed, Parcel D Deed and Parcel F Deed, the City of Benton Harbor shall use its best efforts to convey title to and transfer the real property legally described on **Exhibit F** attached hereto ("**Encroachment Area**") to BHBT within thirty (30) days of execution of this Agreement. Additionally, Harbor Shores shall use its best efforts to convey title to and transfer the real property legally described on **Exhibit G** attached hereto ("**Addition to Park Mitigation Parcel C**") to the City of Benton Harbor within thirty (30) days of execution of this Agreement. Also, Harbor Shores shall use its best efforts to convey title to and transfer the real property legally described on **Exhibit J** attached hereto ("**Addition to Park Mitigation Parcel D**") to the City of Benton Harbor within thirty (30) days of execution of this Agreement.

**Section 3.11. Underground Anchor and Tieback Agreement.** The City of Benton Harbor and Harbor Shores shall enter into an Underground Anchor and Tieback Agreement ("**Underground Anchor and Tieback Agreement**") for the construction, installation, use, maintenance, repair, restoration, replacement and service of underground anchors and tieback rods, across, under and through the real property as depicted on **Exhibit H** attached hereto burdening that portion of the real property described as Mitigation Parcel H Appraisal on **Exhibit B** attached hereto ("**Mitigation Parcel H**") for the sole purpose of providing support to the marina walls to be constructed on and for the benefit of the real property as legally described on **Exhibit I** hereto ("**Marina Parcel**"). Harbor Shores shall complete the initial construction and installation of the anchors and tiebacks under the Underground Anchor and Tieback Agreement prior to the completion or installation of the Park Expansion Improvements to be located on Mitigation Parcel H. Harbor Shores shall keep and maintain the anchors and tiebacks in a manner that does not pose a risk to the public and in a manner that prevents the anchors and tiebacks from being visible from the surface of Mitigation Parcel H. Harbor Shores shall restore, at its sole cost and expense, any damage caused by it to Mitigation Parcel H relating to the Underground Anchor and Tieback Agreement. The Parties agree to use their best efforts to enter into the Underground Anchor and Tieback Agreement within thirty (30) days of the Effective Date of this Agreement.

**Section 3.12. Community Benefits.** The Parties agree to consider the use of locally owned and operated businesses in the design and construction of the Project. Further, Harbor Shores commits to use its best efforts in selecting a certain number of locally owned and operated businesses in the design and construction of the Project where appropriate and reasonable. Harbor Shores also agrees that at least forty percent (40%) of the employees that will maintain Jean Klock Park and the golf course shall be City of Benton Harbor residents. Additionally, Harbor Shores agrees to use a good faith effort in hiring the City of Benton Harbor residents in an amount of at least ten percent (10%) of the employees for construction of the golf course, including, but not limited to, demolition and site clearing work. Finally, Harbor Shores agrees to provide funding for the City of Benton Harbor to contribute to a community benefits program as detailed and described in the Lease.

#### Article IV

**Section 4.01. Harbor Shores' Representations.** Harbor Shores represents and warrants that:

(a) It is a Michigan nonprofit corporation duly organized, validly existing, and qualified to do business in the State, with the right, power, and authority to enter into, execute, deliver, and perform this Agreement;

(b) The entry, execution, delivery, and performance by Harbor Shores of this Agreement has been duly authorized by all necessary action, and does not and will not violate its Articles of Incorporation and Bylaws, both as amended and supplemented, any material applicable provision of law, or constitute a material breach of, material default under, or require any consent under any other material agreement or instrument to which Harbor Shores is now a party or by which it may become bound, other than ongoing compliance with the Consent Judgment and subject to any approval process required by applicable law;

(c) There are no actions or proceedings by or before any court, governmental body, board, or any administrative agency pending or, to the best of its knowledge, threatened that would materially impair its ability to perform under this Agreement; and

(d) To the best of its knowledge, after due inquiry, there is no default by Harbor Shores or any other party under any material agreement, contract, instrument, lease, option, or commitment to which it is a party or by which it or its properties is bound and which would have a material adverse impact upon Harbor Shores' ability to perform under this Agreement.

**Section 4.02. The City of Benton Harbor Representations.** The City of Benton Harbor represents and warrants that:

(a) It is a municipal corporation under the laws of the State with the power and authority to enter into, execute, deliver, and perform this Agreement;

(b) The entry, execution, delivery, and performance by the City of Benton Harbor of this Agreement has been duly authorized by all necessary action, and does not and will not violate its city charter, both as amended and supplemented, any material applicable provision of law, or constitute a material breach of, material default under, or require any consent under any other material agreement or instrument to which the City of Benton Harbor is now a party or by which it may become bound, other than ongoing compliance with the Consent Judgment, and subject to any approval process required by applicable law;

(c) There are no actions or proceedings by or before any court, governmental body, board, or any administrative agency pending or, to the best of its knowledge, threatened that would impair its ability to perform under this Agreement; and

(d) To the best of its knowledge, after due inquiry, there is no default by the City of Benton Harbor or any other party under any material agreement, contract, instrument, lease, option, or commitment to which it is a party or by which it or its properties is bound and which

would have a material adverse impact upon the City of Benton Harbor's ability to perform under this Agreement.

**Section 4.03. Survival of Representations and Warranties.** All representations and warranties set forth in this Agreement shall be true, accurate, and complete at the time of the Effective Date (as defined below) of this Agreement and remain in effect until termination of this Agreement unless specifically provided otherwise in this Agreement.

## **Article V**

**Section 5.01. Harbor Shores' Covenants.** Harbor Shores agrees and covenants as follows:

(a) All actions of the Board of Trustees of Harbor Shores required to be taken to authorize execution and performance of this Agreement shall be validly and duly taken and a representative shall be duly authorized to execute this Agreement for and on behalf of Harbor Shores; and

(b) Harbor Shores shall not enter into any transaction that would materially and adversely affect its ability to perform its obligations under this Agreement. Harbor Shores shall immediately notify the City of Benton Harbor of any event or action which may materially affect the ability of Harbor Shores to perform its obligations under this Agreement.

**Section 5.02. The City of Benton Harbor's Covenants.** The City of Benton Harbor agrees and covenants as follows:

(a) Except as otherwise provided in the Lease and this Agreement, and except for the Leased Premises and Golf Course Improvements, the City of Benton Harbor shall pay all costs and expenses incurred in operating, maintaining, and repairing Jean Klock Park, Parcel 8A, the Park Expansion Property, the Park Expansion Improvements (after such improvements are initially completed by Harbor Shores) and the Jean Klock Park Improvements (after such improvements are initially completed by Harbor Shores);

(b) All actions of the City Commission required to be taken to authorize execution of this Agreement shall be validly and duly taken and the Mayor of the City of Benton Harbor, City Manager, City Clerk of the City of Benton Harbor, or the City of Benton Harbor counsel shall be duly authorized to execute this Agreement for and on behalf of the City of Benton Harbor; and

(c) The City of Benton Harbor shall not enter into any contractual transaction that would materially and adversely affect its ability to perform its obligations under this Agreement. The City of Benton Harbor shall immediately notify Harbor Shores of any event or action which may materially affect the ability of the City of Benton Harbor to perform its obligations under this Agreement.

## **Article VI**

**Section 6.01. Indemnification by Harbor Shores.** Harbor Shores agrees that during the term of this Agreement and all extension periods of this Agreement, Harbor Shores shall defend, indemnify and hold the City of Benton Harbor, its officers, commissioners, employees, agents, invitees or licensees ("**the City of Benton Harbor Indemnified Parties**") harmless from and against any actions, causes of action, claims, costs, damages, liabilities, suits, settlements, judgments and expenses (including, without limitation, reasonable attorney fees) incurred by the City of Benton Harbor Indemnified Parties arising from or in connection with (a) the use of the Leased Premises by Harbor Shores, its invitees, agents, employees or contractors; (b) the use of the Southwest Park Corridor by Harbor Shores, its invitees, agents, employees, or contractors; (c) the development, construction, use and work performed by Harbor Shores, its agents, employees, or contractors related to the Leased Premises or Jean Klock Park Improvements or under this Agreement; (d) a material misrepresentation of Harbor Shores in this Agreement or in any information Harbor Shores is required to provide to the City of Benton Harbor pursuant to this Agreement; (e) the failure of Harbor Shores to promptly cure or otherwise correct any material misrepresentations or omissions of Harbor Shores in this Agreement or any other agreement related to this Agreement; or (f) any Environmental Violation (as defined below) resulting from Harbor Shores' or its invitees', agents', employees' or contractors', use of and actions on the Leased Premises, Jean Klock Park, Parcel 8A, Park Expansion Property or any portion of these properties. Notwithstanding the foregoing, such obligations to defend, indemnify and hold the City of Benton Harbor harmless by Harbor Shores shall not include those which shall result, in whole or in part, directly or indirectly, from the default, negligence, or willful misconduct of the City of Benton Harbor Indemnified Parties.

An "**Environmental Violation**" under this Agreement means any condition or situation that (a) constitutes a violation of any federal or State environmental law, regulation, or ordinance; (b) forms the basis of any public or private claim or cause of action for the cleanup or remediation as a result of the release, threatened release, migration, or the existence of any contaminants, pollutants, petroleum and petroleum byproducts, crude oil, chemicals, wastes, or other substance (including, without limitation, regulated substances, hazardous wastes, and hazardous substances as terms are commonly used and understood within the framework of existing federal and State laws); or (c) constitutes a release or a threatened release of hazardous wastes or hazardous substances under applicable law.

**Section 6.02. Indemnification by the City of Benton Harbor.** Only to the extent permitted by applicable law, the City of Benton Harbor agrees that during the term of this Agreement and all extension periods of this Agreement, the City of Benton Harbor shall defend, indemnify and hold Harbor Shores, its officers, directors, trustees, invitees, licensees, employees or agents ("**Harbor Shores Indemnified Parties**") harmless from and against any actions, causes of action, claims, costs, damages, liabilities, suits, settlements, judgments and expenses (including, without limitation, reasonable attorney fees) incurred by the Harbor Shores Indemnified Parties arising from or in connection with (a) the use and operation of portions of Jean Klock Park and Parcel 8A that do not include the Leased Premises, or the Park Expansion Property by those other than the Harbor Shores Indemnified Parties; (b) a material misrepresentation of the City of Benton Harbor in this Agreement or in any information the City of Benton Harbor is required to provide to Harbor Shores pursuant to this Agreement; (c) the failure of the City of Benton Harbor to promptly cure or otherwise correct any material

misrepresentations or omissions of the City of Benton Harbor in this Agreement or in any information the City of Benton Harbor is required to provide to Harbor Shores pursuant to this Agreement; or (d) any Environmental Violation resulting from the City of Benton Harbor's use of and actions on Jean Klock Park, Parcel 8A or the Park Expansion Property after the Effective Date (as defined below) of this Agreement. Notwithstanding the foregoing, such obligations to defend, indemnify and hold Harbor Shores harmless by the City of Benton Harbor shall not include those which shall result, in whole or in part, directly or indirectly, from the default, negligence, or willful misconduct of the Harbor Shores Indemnified Parties.

**Section 6.03. Indemnification for Private Roads.** Harbor Shores shall be responsible for design and construction defects as well as expenses of construction, repair, maintenance, operation, snow plowing and all other private road expenses and liabilities for private roads within the Project. Such expenses and liabilities will be paid for by the owners of the property served by such private road, including Harbor Shores if and to the extent it owns property served by one or more private roads ("**Private Road Owners**," which includes Harbor Shores to the extent set forth above and below and as further defined in the Rezoning Agreement signed by the Parties). With regard to private roads, the Private Road Owners (and Harbor Shores, as to its interests as defined) will agree to defend and indemnify the City of Benton Harbor for all causes of action, claims, costs, damages, liabilities, demands, lawsuits, settlements, judgments and expenses, including reasonable attorney fees (collectively, "**Claims**") relating to private roads and/or arising from any use of said private roads, except to the extent such Claims are the result of the City of Benton Harbor's negligence or wrongful acts, including the duty to pay the City of Benton Harbor's investigation expenses, reasonable attorney fees, expert fees, litigation costs and related expenses incurred in connection with any such claim, demand, lawsuit, settlement and judgment. The responsibilities set forth above shall be set forth into a restrictive covenant in accordance with the Rezoning Agreement binding all property served by a private road in the Project. Notwithstanding the foregoing, as Harbor Shores sells pieces of property located along the private roads to the Private Road Owners, the Private Road Owners will assume the duties to defend and indemnify the City of Benton Harbor and Harbor Shores will be released from the duties to defend and indemnify the City of Benton Harbor. The Parties to this Agreement acknowledge that the roads within Jean Klock Park are and will remain public.

## Article VII

**Section 7.01. Termination.** This Agreement will terminate at the end of the term identified above in Section 2.01, upon the exercise of any termination right contained herein, or upon the termination of the Lease. Notwithstanding the foregoing or anything to the contrary contained herein, during the twelve (12) months after the Effective Date of this Agreement, Harbor Shores may terminate this Agreement upon sixty (60) days prior written notice to the City of Benton Harbor in the event that Harbor Shores does not commence or complete construction of the portions of the public golf course within the Leased Premises or abandons the public golf course portion of the Project without any further liability under this Agreement ("**Termination Right**"). Notwithstanding anything to the contrary herein, in the event that this Agreement is terminated under the Termination Right in this Section, the following shall be the only termination penalties of Harbor Shores to the City of Benton Harbor under this Agreement: (a) the already completed conveyance of the Park Expansion Property to the City of Benton

Harbor; provided, however, the City of Benton Harbor shall have the option to convey any of the Park Expansion Property to Harbor Shores within ninety (90) days of such termination of this Lease; and (b) Harbor Shores shall deliver the Leased Premises to the City of Benton Harbor in substantially the same condition as existed as of the date of execution of this Agreement.

**Section 7.02. The City of Benton Harbor Default and Harbor Shores' Remedies.**

The City of Benton Harbor shall be deemed to be in default under this Agreement if the City of Benton Harbor shall fail to perform any of its obligations required under this Agreement or the Lease within one hundred twenty (120) days after receipt of written notice to perform the same when required hereunder.

In the event the City of Benton Harbor shall be in default hereunder and shall not cure the same within any period allowed therefore by the terms of this Agreement, Harbor Shores shall have the right to: (a) bring an action for specific performance or damages and/or cure the same for and on behalf of the City of Benton Harbor, at the City of Benton Harbor's expense; or (b) in the event of a failure to perform any material obligation, after providing the City of Benton Harbor with an additional notice of its default and a sixty (60) day period in which to cure such default and after following the Dispute Resolution Process under Section 7.11, terminate this Agreement. In connection with the exercise of Harbor Shores rights under this Section, the City of Benton Harbor shall reimburse Harbor Shores for any expenditures made by Harbor Shores in connection therewith plus interest thereon at the Prime Rate (as defined below) less two percent (2%) per year or the highest rate permitted by any applicable laws, whichever is lower ("**Interest Rate**"), within thirty (30) days after Harbor Shores' demand, or at Harbor Shores' option, Harbor Shores may deduct its charges from any amounts due to the City of Benton Harbor under this Agreement for its expenses incurred. In no event shall such deduction be the basis of forfeiture of this Agreement nor constitute a default in the provision of any consideration due hereunder by Harbor Shores unless Harbor Shores shall fail to pay the amount of such deduction within thirty (30) days after a final adjudication that such amount is owing to the City of Benton Harbor. For purposes of the Agreement, the term "**Prime Rate**" shall mean a rate of interest, per annum, equal to the prime rate of interest as published from time to time by the *Wall Street Journal*.

**Section 7.03. Harbor Shores' Default and City's Remedies.** Harbor Shores shall be deemed to be in default under this Agreement if Harbor Shores fails to perform any of its obligations required under this Agreement or the Lease within one hundred twenty (120) days after receipt of written notice to perform the same when required hereunder;

In the event that Harbor Shores shall be in default hereunder and shall not cure the same within any period allowed therefore by the terms of this Agreement, the City of Benton Harbor shall have the right to: (a) bring an action for specific performance or damages and/or cure the same for and on behalf of Harbor Shores, at Harbor Shores' expense; or (b) in the event of a failure to perform any material obligation, after providing Harbor Shores with an additional notice of its default and a sixty (60) day period in which to cure such default and after following the Dispute Resolution Process under Section 7.11, terminate this Agreement. In connection with the exercise of the City of Benton Harbor's rights under this paragraph, Harbor Shores shall reimburse the City of Benton Harbor for any expenditures made by the City of Benton Harbor in connection therewith plus interest thereon at the Prime Rate (as defined below) less two percent

(2%) per year or the highest rate permitted by any applicable laws, whichever is lower ("**Interest Rate**"), within thirty (30) days after the City of Benton Harbor's demand, or at the City of Benton Harbor's option, the City of Benton Harbor may deduct its charges from any amounts due to Harbor Shores under this Agreement for its expenses incurred. In no event shall such deduction be the basis of forfeiture of this Agreement nor constitute a default in the provision of any consideration due hereunder by the City of Benton Harbor unless the City of Benton Harbor shall fail to pay the amount of such deduction within thirty (30) days after a final adjudication that such amount is owing to Harbor Shores. For purposes of the Agreement, the term "**Prime Rate**" shall mean a rate of interest, per annum, equal to the prime rate of interest as published from time to time by the *Wall Street Journal*.

**Section 7.04. Assignment Requirements.** This Agreement may not be assigned by Harbor Shores without the prior written consent of the City of Benton Harbor, which consent shall not be unreasonably withheld, delayed or conditioned. Harbor Shores shall provide the City of Benton Harbor with sixty (60) days prior written notice of the material details of such assignment and its request to consent to such assignment. In the event that the City of Benton Harbor does not respond in writing to such request during such sixty (60) day period, the City of Benton Harbor's consent shall be deemed given. Additionally, should Harbor Shores propose to assign, convey, sell or otherwise transfer a majority of its ownership and/or management interest in Harbor Shores, Harbor Shores must provide the City of Benton Harbor with written notice of the material details of Harbor Shores' proposal to assign said interest and the City of Benton Harbor shall have sixty (60) days to approve the proposal; provided, however that the City of Benton Harbor acknowledges that Harbor Shores intends to partner with one or more parties in connection with the Project and that those partnerships shall not constitute assignments even if one or more partner(s) assume overall responsibility for a particular aspect of the Project.

**Section 7.05. Time of Essence.** Time is of essence with respect to this Agreement. All dates and terms shall be strictly adhered to unless waived in writing by the parties.

**Section 7.06. Non-Discrimination and Affirmative Action.** Harbor Shores agrees not to discriminate against any employee or applicant for employment to be employed in the performance of services under this Agreement with respect to hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment, because of race, color, religion, national origin, age, sex, height, weight, handicap or marital status. Breach of this covenant may be regarded as a material breach of this Agreement as provided for in Act 453 of the Public Acts of Michigan of 1976, as amended, entitled "Michigan Civil Rights Act." Harbor Shores agrees to take affirmative action in hiring, training and promoting minority group persons and women to bring about reasonable representative integration of its employees. For purposes of this Agreement, a "minority" is a person who is a citizen or lawful resident of the United States who is:

- (a) **Black.** A person having origin in any of the black racial groups of Africa;
- (b) **Hispanic.** A person of Spanish or Portuguese culture, with origins in Mexico, Central America or the Caribbean Islands;

(c) **Asian American.** A person having origin in any of the original peoples of the Far East, Southeast Asia, the Indian sub-continent or the Pacific Islands; or

(d) **Native American.** A person having origin in any of the original peoples of North America.

Harbor Shores further agrees to review or examine with the City of Benton Harbor staff relevant employment data and other information pertaining to its hiring practices.

**Section 7.07. Binding Effect.** This Agreement, including all referenced Exhibits, shall bind the parties hereto and their successors and permitted assigns.

**Section 7.08. Rights and Remedies.** Except to the extent expressly limited herein, both of the Parties to this Agreement shall have the right to avail itself of any equitable or legal right or remedy to enforce the provisions of this Agreement.

**Section 7.09. Remedies Are Cumulative.** The remedies available to the Parties hereunder are cumulative and the exercise of any one or more of the remedies provided for herein shall not be construed as a waiver of the other remedies of such party unless specifically so provided herein.

**Section 7.10. Amendment.** Except as may otherwise be expressly permitted in this Agreement, this Agreement and the Exhibits attached hereto may not be amended except by way of a written document signed by the Parties after providing the Attorney General of the State of Michigan and the head of the Charitable Trust Section of the Attorney General of the State of Michigan with sixty (60) days advance written notice of any such amendment.

**Section 7.11. Dispute Resolution.** Any dispute, controversy or claim arising under or in connection with this Agreement ("**Dispute**") shall be settled exclusively as set forth in this Section (the "**Dispute Resolution Process**"). Initially, a Dispute shall be referred to the Parties to negotiate a resolution. If the Parties are unable to resolve, or do not anticipate resolving a Dispute within thirty (30) days after written notice of such Dispute provided from one party to this Agreement to the other party, then either party may submit the Dispute to non-binding facilitative mediation. If the Parties are unable to resolve, or do not anticipate resolving a Dispute within sixty (60) days after submission to non-binding facilitative mediation, if applicable, the Dispute may be submitted to arbitration upon the election and written consent of all the parties to such Dispute.

Such arbitration shall be conducted before one (1) arbitrator in a mutually convenient location, in accordance with the rules of the American Arbitration Association ("**Association**") then in effect. The arbitrator shall be selected in accordance with the rules of the Association. The decision of the arbitrator shall be final and binding upon the City of Benton Harbor and Harbor Shores and judgment thereon may be entered in any court having jurisdiction. Unless otherwise provided by the rules of the Association, the arbitrator shall, in his or her award, allocate between the City of Benton Harbor and Harbor Shores the costs of arbitration, which shall include reasonable attorney fees and expenses of the City of Benton Harbor and Harbor

Shores, as well as the arbitrator fees and expenses, in such proportions as the arbitrator determines is reasonably appropriate under the circumstances.

In the absence of election and written consent of the parties to submit the Dispute to arbitration as provided above, neither Harbor Shores nor the City of Benton Harbor shall be precluded from petitioning the courts to resolve a Dispute. During the Dispute Resolution Process, each Parties' representatives shall negotiate in good faith. Except as otherwise provided herein, each party to this Agreement agrees that it shall not commence litigation or such other remedies prior to the conclusion of the Dispute Resolution Process, unless a party to this Agreement may suffer irreparable harm due to such delay.

**Section 7.12. No Other Agreements.** Except as may otherwise be expressly provided in this Agreement and the Exhibits to this Agreement, this Agreement and the accompanying Lease supersede all prior agreements, negotiations and discussions relative to the subject matter of this Agreement and the Lease, and represent the full understanding of the parties with respect to such subject matter. This Agreement and the Lease supersede the Prior Agreement in all respects. Notwithstanding the foregoing, the Parties acknowledge that they have entered into the Act 425 Agreement, Memorandum of Understanding and the Rezoning Agreement referenced above in the "Recitals" Section, and the Lease, which shall remain in full force and effect.

**Section 7.13. Governing Law.** This Agreement shall be construed in accordance with the laws of the State without regard to such State's conflict of laws principles and any action brought in law or equity arising out of its construction or enforcement shall be filed in the Circuit Court for the 2d Judicial District of Michigan (Berrien County Circuit Court) or in the United States District Court for the Western District of Michigan, Southern Division.

**Section 7.14. Notices.** All notices, requests, consents and other communications under this Agreement shall be in writing, shall be addressed to the receiving party's address set forth below or to any other address a party may designate by notice under this Agreement, and shall be either (i) delivered by hand, (ii) sent by facsimile or electronic mail, and mailed promptly by first class mail, (iii) sent by nationally recognized overnight courier, or (iv) sent by certified mail, return receipt requested, postage prepaid:

If to the City of Benton Harbor:

City of Benton Harbor  
City Hall  
200 East Wall Street  
Benton Harbor, Michigan 49023  
Attention: City Manager  
Facsimile: (269) 927-0270  
Email: [rmarsh@bhcity.org](mailto:rmarsh@bhcity.org) and [igill@bhcity.org](mailto:igill@bhcity.org)

If to the Developer:

Harbor Shores Community Redevelopment Inc.  
400 Riverview Drive  
Suite 420  
Benton Harbor, Michigan 49022  
Attention: Board of Trustees  
Facsimile: 269.926.8088  
Email: [mhesemann@evgnmanagement.com](mailto:mhesemann@evgnmanagement.com) and  
[D.Jeffrey.Noel@Whirlpool.com](mailto:D.Jeffrey.Noel@Whirlpool.com)

All notices, requests, consents and other communications under this Agreement shall be deemed to have been given either (i) if by hand, at the time of the delivery of the notice to the receiving party, (ii) if by facsimile or electronic mail, at the time that receipt of the facsimile or electronic mail has been acknowledged by electronic confirmation or otherwise, or if no confirmation is received, on the fifth (5<sup>th</sup>) day following the day a hard copy of the transmission is mailed by first-class mail, (iii) if by overnight courier, on the next business day following the day the notice is delivered to the courier service, or (iv) if by certified mail, on the fifth (5<sup>th</sup>) business day following the day of the mailing. Any party, by notice to the other parties to this Agreement, may designate additional or different addresses for subsequent notices or communications.

**Section 7.15. Counterparts.** This Agreement may be executed by the Parties hereto in one or more counterparts, each of which shall be an original and both of which, when taken together, shall constitute a single agreement. Faxed signatures, or scanned and electronically transmitted signatures, on this Agreement, shall be deemed to have the same legal effect as original signatures on this Agreement.

**Section 7.16. Successors and Assigns.** The terms, conditions, covenants and restrictions of this Agreement shall extend and apply to and bind the successors and permitted assigns of the City of Benton Harbor and Harbor Shores.

**Section 7.17. Consent Not Unreasonably Withheld.** Unless otherwise specifically provided in this Agreement, the Parties agree that under this Agreement, wherever there is a requirement for a party securing the consent of the other party, such consent shall not be unreasonably withheld, delayed or conditioned.

**Section 7.18. Severability.** The invalidity or enforceability of any provision, or part of any provision of this Agreement, including the Exhibits to this Agreement, shall not affect the other provisions or parts hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions or parts were omitted, provided, that the removal of such provisions or parts does not materially change the terms and provisions of this Agreement and the intent of the parties hereto.

**Section 7.19. Survival of Agreement.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating responsibility or liability between the parties, including, without limitation, the indemnity provisions, shall survive the termination

of this Agreement. No obligation which survives the term of this Agreement shall give Harbor Shores any possessory interest in Jean Klock Park nor have the effect of extending the term of this Agreement.

**Section 7.20. No Partnership or Joint Venture.** The City of Benton Harbor and Harbor Shores are not partners, fiduciaries or joint venturers, and nothing in this Agreement creates or will create the relation of partners, fiduciaries or joint venturers between them. Without limiting the generality of the foregoing, the Parties are each acting independently, are each obligated to separately account for their respective activities and they each expressly disclaim any fiduciary duty to the other.

**Section 7.21. No Third Party Beneficiaries.** The terms, conditions, obligations, and benefits of this Agreement are intended solely for the Parties and no other Person as a third party beneficiary or otherwise.

**Section 7.22. Additional Documents and Good Faith.** Each of the Parties hereto agrees to execute any additional documents reasonably requested by the other party to carry out the intent of this Agreement. Further, after the execution of this Agreement, each of the Parties hereto agrees to promptly work together in good faith to cure any discrepancies or errors in this Agreement and the attached Exhibits, to resolve issues that develop with regard to this Agreement and to cure any title defects or discrepancies with regard to the properties described in this Agreement. The City of Benton Harbor hereby appoints and authorizes, for and on its behalf, the City Manager and the City of Benton Harbor City Clerk and the City of Benton Harbor Mayor (per the City of the City of Benton Harbor Charter) to sign and deliver any other ancillary agreements, instruments, and documents with respect to this Agreement, all containing such terms and conditions that are necessary to comply with the provisions of this Section.

**Section 7.23. Construction.** In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties hereto and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

By signing this Agreement, the Parties hereto hereby agree to enter this Agreement effective as of \_\_\_\_\_, 2008 ("**Effective Date**").

**CITY OF BENTON HARBOR**

By: _____	_____
Richard Marsh	Wilce L. Cooke
Its: City Manager	Mayor
By: _____	_____
Char Pugh-Tall	Joyce Taylor
Its: City Attorney	City Clerk

[Signatures continued on next page]

**HARBOR SHORES COMMUNITY  
REDEVELOPMENT INC.**

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

Its: Trustee

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