

BEREA CITY COUNCIL

City of Berea, Ohio

ORDINANCE NO. 2022-52

By: Councilman Leon R. Dozier, Sr. Sponsor: Mayor Cyril M. Kleem

AN ORDINANCE

**AMENDING THE PURCHASE AGREEMENT WITH DMARK DEVELOPMENT, LLC, APPROVED
IN ORDINANCE NO. 2021-62, FOR THE SALE OF PERMANENT PARCEL NUMBERS
362-02-003, 362-02-009, 362-02-011, 362-02-012, 362-02-014, 362-03-002, 362-03-013,
and 362-03-014, WHICH ARE NO LONGER NEEDED FOR MUNICIPAL PURPOSES, FOR THE
SUM OF THREE HUNDRED THOUSAND DOLLARS (\$300,000.00) AND AUTHORIZING THE
EXECUTION OF ALL DOCUMENTS NECESSARY TO EFFECTUATE THE SAME,
AND DECLARING AN EMERGENCY.**

WHEREAS, in Ordinance No. 2021-62, the Council of the City of Berea authorized the Mayor to enter into a Purchase Agreement with DMark Development, LLC for the sale of Permanent Parcel Numbers 362-02-003, 362-02-009, 362-02-011, 362-02-012, 362-02-014, 362-03-002, 362-03-013 and 362-03-014, which were no longer needed for municipal purposes, for the sum of Three Hundred Thousand Dollars (\$300,000.00) and authorized the execution of all documents necessary to effectuate the sale; and

WHEREAS, in accordance with the Purchase Agreement, the developer and the subsequent end-purchaser began the process required for Planned Use Development zoning, and received the unanimous support of the Municipal Planning Commission for Phase I of the PUD process; and the unanimous support of the Municipal Planning Commission in Phase II of the PUD process; and

WHEREAS, during the pendency of the PUD process, some members of Berea City Council and residents have expressed concerns about various issues related to the residential townhouse project; and

WHEREAS, in response to those concerns, the Mayor, in concert with the developer and subsequent end-purchaser (Triban Investments, LLC, an affiliate of Knez Homes), have determined that it is in the best interests of the City to place the project on-hold in order to fully address the concerns of City Council and the public; and

WHEREAS, in order to address those concerns, it is prudent for City officials to do the following during the period of extension:

- Complete the post-construction testing of the now-completed Northend Sewer Project; and

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- Assess the impact of the Northend flow connection project, scheduled for Spring 2023; and
- Determine whether the future development at the Williams' Ford site should include a requirement that the project's sanitary sewer be tied into the Front Street sewer; and
- Consider whether the construction of a new storm sewer from the Williams' Ford site to the Riveredge Parkway trunk via North Rocky River Drive is either feasible or necessary; and
- Discuss whether future development should include an analysis of detention basins from an outside engineering firm, selected by City Council, for the purpose of aiding the City Engineer in making the various approvals required for the development; and
- To inquire whether Tax Increment Financing could be applicable to overall development; and assuming it is both possible and feasible, whether it could possibly assist by providing future tax revenue that could be used, in part, for repairs to private property; and
- Investigate sources of grant funding, from the Regional Sewer District and other government entities, that could be used for the purpose of making sewer improvements on private property; and
- Examine ways to address concerns of existing businesses, especially as it relates to noise; and

WHEREAS, in order to fully address the concerns raised by some members of Berea City Council and the public, it is necessary to extend the terms of the Purchase Agreement, which was approved in Ordinance No. 2021-62 for a period of one year (365 days); and

WHEREAS, the parties to the amended Purchase Agreement acknowledge and agree that upon fully addressing the concerns of the parties, the project will require that the project be subject to the entire Planned Unit Development process as set forth in Chapter 210 of the Zoning Code of the City of Berea, and that the project will require that the developer, end-purchase and/or builder begin the process at Phase I; and

WHEREAS, by enacting the extension as stated herein, Berea City Council and the Municipal Planning Commission will be provided with several opportunities to provide input relating to design and site development, including infrastructure; and

WHEREAS, due to the delay in the project, the end-purchaser cannot guarantee that K. Hovnanian will be in a position to serve as the builder of the townhouses, so it is necessary to also amend the Purchase Agreement to allow Triban Investment, LLC and Knez Homes to select another builder, with the understanding that the design and other considerations will be subject to the required approvals of the Municipal Planning Commission and Berea City Council.

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Berea, State of Ohio:

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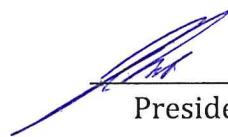
SECTION 1. That the Mayor is authorized to enter into an amended Purchase Agreement with DMark Development, LLC for the sale of Permanent Parcel Numbers 362-02-003; 362-02-009; 362-02-011; 362-02-012; 362-02-014; 362-03-002; 362-03-013; and 362-03-014, as further described in Exhibit A, for the price of Three Hundred Thousand Dollars (\$300,000), in substantial conformance with the Amended Purchase Agreement, attached hereto as Exhibit A and incorporated herein by reference.

SECTION 2. That the Mayor and any other city administrator, as necessary, is hereby authorized to prepare and/or execute any and all documents necessary to effectuate the purposes of this ordinance;

SECTION 3. That it is found and determined that all formal actions of this Council concerning and relating to the adoption of this Ordinance were adopted in an open meeting of this Council and that all deliberations of this Council and of any of its committees that resulted in such formal actions were in meetings open to the public, in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

SECTION 4. That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, property, health, safety and welfare, or providing for the usual daily operation of a municipal department, and for the further reason that it is in the best interest of the City and public to return these long-vacant parcels to the tax duplicate as quickly as possible and to provide an anchor upon which future development could build. Therefore, provided this Ordinance receives the affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, from and after the earliest period allowed by law.

PASSED: *October 17, 2022*



President of Council

ATTEST:



Clerk of Council

APPROVED:



Mayor

APPROVED AS TO FORM:



Director of Law

PURCHASE AND SALE AGREEMENT

This Purchase and Sale Agreement ("Agreement") is made and entered into between DMark Development LLC, an Ohio limited liability company, ("Purchaser"), and the City of Berea, a municipal corporation and political subdivision duly organized and existing under the laws of the State of Ohio ("Seller").

ARTICLE 1 PROPERTY

Seller agrees to sell and Purchaser agrees to buy Cuyahoga County permanent parcels 362-02-003; 362-02-009; 362-02-011; 362-02-012; 362-02-014; 362-03-002; 362-03-013; and 362-03-014 located in the City of Berea, Ohio ("Property") as outlined on Exhibit 1, attached hereto and incorporated herein by reference, together with all of the improvements, appurtenances, rights, privileges, licenses, and easements belonging thereunto.

ARTICLE 2 PURCHASE PRICE AND EARNEST MONEY

- A. The total purchase price for the Property ("Purchase Price") shall be Three Hundred Thousand Dollars (\$300,000.00) payable in cash on the Closing Date ("Closing Date").
- B. Within three (3) business days of the full execution of this Agreement by Purchaser and Seller, Purchaser shall deposit Five Thousand Dollars (\$5,000) into an escrow account with Northstar Title Services, LLC ("Escrow Agent" and "Title Company"), as Earnest Money ("Earnest Money"), to be credited against the Purchase Price at Closing. The Earnest Money shall be deposited into a federally insured interest-bearing account, with all interest accruing to Purchaser unless otherwise provided herein.

ARTICLE 3 CONTRACT LIMITATIONS AND CONTINGENCIES

- A. The Parties acknowledge that the sole purpose of this Agreement is to facilitate the development of a residential townhouse project, by selling the Property to DMark Development LLC, who shall then sell to Triban Investment, LLC., an affiliate company of Knez Homes, or any of their principals, agents or affiliates to build the residential townhouse project and ultimately sell the townhouses to individual residential purchasers.
- B. This Purchase Agreement is contingent upon evidence provided to the Seller no later than 30 days after execution, of a binding agreement between DMark Development LLC and Triban Investment, LLC., an affiliate company of Knez Homes or any of their principals, agents or affiliates, to build the residential townhouse project.

ARTICLE 4 RESPONSIBILITIES OF THE PARTIES UPON EXECUTION OF THIS AGREEMENT.

- A. Upon the execution of this Agreement, the Seller shall not:
 1. Permit any third party to adversely affect Seller's title to the Property; or
 2. Enter into any contracts or agreements pertaining to the Property that are not cancelable upon thirty (30) days-notice.

- B. The Parties acknowledge that the Seller has provided the Purchaser with copies of the most recent environment reports and assessment, including any UST reports and any other environmental or hazardous materials reports, and a copy of the City's Title Insurance Policy; and any engineering reports, soil reports and any drainage, wetlands and other physical inspection reports related to the Properties in possession of the Seller at the time of Execution.

ARTICLE 5 RESPONSIBILITIES OF THE PARTIES DURING THE STUDY PERIOD

- A. The Study Period is the time period for the Purchaser to take all necessary steps to conduct investigations, inspections, examinations, tests, borings and surveys and to investigate and evaluate the potential and suitability of the Property for residential townhouse development as contemplated in Article 3.

The Study Period shall commence on the effective date Ordinance _____, and shall terminate no later than 150 days thereafter.

- B. Seller shall arrange access to all areas of the Property to enable Purchaser and its agents to enter the Property and to conduct investigations, inspections, examinations, tests, borings, and surveys.

The Purchaser shall, at its own cost, promptly repair any damage to the Property caused by the Purchaser's investigations, inspections, examinations, tests, borings and surveys.

- C. The Purchaser hereby indemnifies and holds the Seller harmless from and against any and all claims, losses, costs, damages, liabilities, including reasonable attorney fees and expenses caused by or arising out of the Purchaser's entry on the Property or the performance of such investigations, inspections, examinations, tests, borings or surveys.

- D. Within thirty (30) days after the effective date of Ordinance _____, the Purchaser or its designee shall obtain a Commitment issued by the Escrow Agent for an ALTA Owner's Title Insurance Policy Form 2006, in an amount equal to the purchase price showing title to the Property in Seller's name and designating the Purchaser as the proposed insured.

1. The Commitment shall be accompanied by copies of any documents or exceptions listed as affecting title to the Property.

2. The Purchaser may obtain an ATLA survey prior to the expiration of the Study Period, showing the location of the Property and all easements, rights of way and other matters listed as exceptions to the Commitment that are capable of being shown on the survey.

- E. Within thirty (30) days of receipt of the Commitment, the Purchaser shall have the right to object, in writing, to any matters disclosed in the Commitment or Survey.

- Upon receipt of Objections, the Seller shall have thirty (30) days to resolve such Objections and shall undertake to do so in good faith. However, the Seller shall not be required to resolve such Objections, except for the discharge of any liens at Closing.

2. If the Seller does not resolve such objections in thirty (30) days, the Purchaser, in its sole discretion and within fifteen (15) days of receipt of notice that the Seller failed to resolve such objections, may either:

- a. Terminate this Agreement. The Earnest Money and any accrued interest shall be paid to the Purchaser. The Seller shall pay any escrow and/or title charges actually incurred. Thereupon both parties shall be relieved of all further obligations contained in this Agreement, except those obligations that expressly survive the termination of this Agreement; or
 - b. Waive the objection and accept title at Closing without any reduction in the Purchase Price.

A failure by the Purchaser to affirmatively terminate this Agreement or affirmatively waive the Objection(s), in accordance with E(2)(a) or (b) shall be construed as a Waiver of the Objection by the Purchaser.

3. The Purchaser shall not be required to provide a notice to cure or remove any mortgage lien, security interest, judgment, personal property tax, mechanics or other Lien capable of cure by payment of a liquidated sum (liens), as the Purchaser shall be deemed to have objected to such Liens, and the Seller shall cause such Lien to be released on or before the Closing Date, at its expense, but only in the event such Liens in the aggregate are less than the net Purchase Price due the Seller.

F. Termination of This Agreement During the Study Period

1. If during the Study Period, the Purchaser determines that for any reason, except for the reason stated in Article 5(F)(2) below, that the Property is not suitable for a residential townhouse project, the Purchaser may, in its sole discretion, terminate this Agreement and thereupon, this Agreement shall be null and void and neither party shall have any further rights or obligations, except for those rights and obligations that, by their terms, survive any such termination. The Earnest money and any accrued interest shall be paid to the Purchaser. The Purchaser shall be responsible for any escrow /or title charges accrued to the date of termination.
 2. If by the end of the Study Period, the Purchaser is unable to secure a binding Agreement between DMark Development LLC and Triban Investment, LLC., an affiliate company of Knez Homes, or any of their principals, agents or affiliates to build a residential townhouse project on the Property, this Agreement shall terminate, and the Earnest Money and any accrued interest shall be forfeited by the Purchaser. Upon deducting accrued Title or Escrow costs, the remaining balance of the Ernest Money and accrued interest shall be payable to the Seller.

ARTICLE 6

RESPONSIBILITIES OF THE PARTIES DURING THE APPROVAL PERIOD

- A. The Approval Period is the 150-day period following the completion of the Study Period, unless extended in writing by the Seller.
 - B. During the Approval Period, the Purchaser and/or representatives or affiliates of Triban Investment, LLC., an affiliate company of Knez Homes, are required to obtain approvals for any zoning issues related to the use of the property and approval of the Planned Unit Development by Berea City Council and the Berea Municipal Planning Commission and other necessary project-related approvals.

- C. Upon receipt of necessary zoning approvals, the Purchaser shall have the right to post a development sign on the Property, provided such sign is in compliance with all applicable laws and agrees to promptly remove the sign should Closing not occur.

ARTICLE 7

CLOSING AND ESCROW CHARGES

- A. Closing shall occur no later than **365** days from the effective date of Ordinance _____.

- B. Title to Premises

Seller shall convey insurable and marketable title to the Property to the Purchaser by General Warranty Deed, warranting title to be free and clear of all liens and encumbrances, except matters of public record.

- C. Taxes and Assessments

Real estate taxes for the Property shall be prorated as of 12:01 a.m. on the Closing Date and based on the most recent tax bill as designated by the Cuyahoga County Fiscal Officer. The Seller shall pay taxes attributable to the Property until the Closing Date, and the Purchaser shall pay all taxes incurred on or after the closing date.

- D. Seller's Responsibilities at Closing

No later than three (3) days prior to the Closing Date, the Seller shall deliver to the Escrow Agent the following:

1. A General Warranty Deed in a form acceptable to the Purchaser, duly executed and acknowledged by the Seller, conveying title to the Property by the Purchaser; and
2. Such other documents as may be required by the Purchaser, Escrow Agent or Title Company, including but not limited to, a customary form of an owner's/ seller's affidavit, "gap" indemnity (and any other affidavits or agreements reasonably requested by the Title Company in connection to the Closing and issuance of the title policy, settlement statement, a Resolution or Ordinance passed by the Council of the City of Berea authorizing the sale of the Property and any other such documents contemplated under a contemporaneous closing by the Seller.

- E. Purchaser's Responsibilities at Closing

By one (1)
No later than **three (3)** days prior to the Closing Date, the Purchaser shall deliver to the Escrow Agent the following:

1. The Purchase Price, less the Earnest Money, plus or minus all net prorations, closing costs and other funds required to be paid by the Purchaser in accordance with this Agreement; and
2. Such other documents as may be reasonably required by the Seller, Escrow Agent or Title Company.

F. Escrow and Costs

At such time as the Escrow Agent has in its possession all funds representing the Purchase Price and all documents required from the Purchaser and the Seller, the Escrow Agent shall cause the Deed to be recorded at the Cuyahoga County Recorder's Office. The escrow shall be subject to the Escrow Agent's standard conditions of acceptance, except if there is any conflict or inconsistency between the Escrow Agent's standard conditions and the terms and provisions of this Agreement, the terms and provisions of this Agreement shall govern.

Except as otherwise stated herein, the Purchaser shall be responsible for all costs and fees, including but not limited to the cost of recording the deed, costs associated with any mortgage loan obtained by the Purchaser, escrow fees, cost of the title exam and the issuance of the Commitment and cost to obtain the Title Policy and any transfer tax or conveyance fee.

The Seller shall be responsible for any amounts that are required to satisfy outstanding Liens.

ARTICLE 8 BROKER

Purchaser and Seller warrant and represent each to the other that neither has dealt with any real estate broker or finder in connection with this transaction.

ARTICLE 9 REPRESENTATIONS, WARRANTIES AND COVENANTS

A. As a material inducement for Purchaser to enter into this Agreement, Seller represents, warrants and covenants as follows:

1. Except as may be set forth in the Commitment, no other party has an interest in the Property. The Property shall be delivered at Closing free and clear of all tenancies and free and clear of all personal property located outside of any buildings on the Property; and
2. No legal actions or administrative proceedings of any type (including condemnation, eminent domain, or similar proceedings) are pending or contemplated against the Property; and
3. Seller has all necessary power and authority, subject to the approval of the Council of the City of Berea, to execute this Agreement and perform all of its obligations hereunder and convey the Property; and
4. Seller has no knowledge and has not received written notice of any violations of any law, statute, ordinance, or other governmental regulation by or affecting the Property which has not been cured; and
5. On the Closing Date, there will be no outstanding contracts made by Seller for any improvements to the Property that have not been fully paid for and Seller shall cause to be discharged all mechanics or materialmen's liens arising from any labor or materials furnished to the Property on behalf of Seller prior to the Closing Date; and
6. The Property does not contain any asbestos, environmental contamination, or environmentally hazardous waste which has not been remediated in compliance with all applicable laws relating to residential uses; and

7. The representations and warranties set forth in Article 7.A. are true and correct on the Effective Date, shall be true and correct on the Closing Date, and shall survive the Closing.

B. As a material inducement for Seller to enter into this Agreement, Purchaser represents and warrants that:

 1. Purchaser has all necessary power and authority and no consent of any third party is required for Purchaser to execute this Agreement, perform all of its obligations hereunder and purchase the Property and
 2. Purchaser and Purchaser's principals or partners are not affiliates of Seller or Seller's principals.

ARTICLE 10 REMEDIES

- A. Except where a remedy is otherwise specified herein, if Seller breaches any of its covenants, agreements, representations, or warranties, and if such breach has not been cured within thirty (30) days after written notice thereof, the Purchaser may:
 - 1. Terminate the Agreement. The Seller shall pay all title and escrow charges incurred and the Earnest Money shall be returned to Purchaser and thereafter each party shall be released of all further liability hereunder; or
 - 2. Enforce specific performance of the Seller's obligations, including monetary damages in an amount not to exceed Purchaser's actual out-of-pocket expenses exclusive of Purchaser's Earnest Money, which shall be returned to Purchaser.
 - B. Except where a remedy is otherwise specified herein, if the Purchaser defaults in its obligations and if such default has not been cured within thirty (30) days after written notice thereof, then this Agreement shall terminate. The Purchaser shall pay all title and escrow charges incurred. The Earnest Money and any accrued interest shall be paid to the Seller.

ARTICLE 11 ENTIRE AGREEMENT

This instrument constitutes the entire Agreement between the parties with respect to the transaction herein contemplated and supersedes the terms of the Memorandum of Understanding between the City of Berea and DMark Development LLC, executed on or about on or about December 21, 2021, as it relates to the sale and/or development of Permanent Parcel Nos. 362-02-003; 362-02-009; 362-02-011; 362-02-012; 362-02-014; 362-03-002; 362-03-013; and 362-03-014, and shall not be modified unless in writing and signed by all parties hereto, subject to the approval of Berea City Council.

ARTICLE 12 NOTICE

All notices, demands and requests which may be given or which are required to be given by either Party to the other, and any exercise of a right of termination provided by this Agreement, shall be in writing and addressed to the Party listed below. Notice shall be deemed effective upon personal service on the other Party or its legal counsel; or one business day after the Notice is sent for over-night delivery; or two business days after Notice is sent by Express Mail through the U.S. Postal Service; or on the date the Notice is sent by a confirmed email account. Notice to one Purchaser shall be deemed to have been served on the other Purchaser.

Notice to the Seller:

Matt Madzy
City of Berea, Ohio
11 Berea Commons
Berea, OH 44017
mmadzy@cityofberea.org

Notice to the Purchaser:

6A
DMark Development LLC
100 North Main St., Suite 125 ~~2890 Channah~~
~~Chagrin Falls, OH 44022~~ ~~Pepper Pike OH~~
davcerny@roadrunner.com
44124

OR

Mark J. Jablonski
DMark Development LLC
2572 Fenwick Rd.
University Heights, OH 44118
mark@centermarkdev.com

ARTICLE 13 **ASSIGNMENT**

This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their respective successors and permitted assigns. Purchaser may not assign its rights and obligations hereunder to any third party without the prior written consent of the Seller.

ARTICLE 14 **MISCELLANEOUS**

- A. The Parties agree that time is of the essence and that the failure of a Party to perform any act on or before the date specified herein for shall be deemed cause for the termination of this Agreement the other Party, without prejudice to other remedies available for default hereunder, but subject to any express notice and cure provision set forth in this Agreement.
- B. Each term, covenant, and condition contained herein shall remain in full force and effect until the same has been fully performed.
- C. Seller and Purchaser agree to cooperate in furtherance of this transaction and to execute any and all documents reasonably required to complete this transaction. In the event of a dispute between the parties, the prevailing party shall be entitled to reimbursement for its costs, including reasonable attorney fees incurred as a result of such dispute. Seller hereby authorizes Purchaser to apply for any necessary governmental approval(s) required for Purchaser's intended use of the Property as a residential townhouse project, including zoning.
- D. This Agreement shall be construed in accordance with the laws of the State of Ohio. In case any one or more of the provisions contained in this Agreement shall be held to be invalid, illegal or unenforceable in any respect for any reason, such invalidity, illegality or unenforceability shall not affect any other provisions of this agreement.
- E. Risk of loss to any improvements located on the Property or to the Property shall remain with the Seller until transfer of possession to the Purchaser on the Closing Date. In the event of any damage to or destruction of the Property or any portion thereof prior to the Closing, Seller shall promptly give Purchaser written notice thereof. In the event of an insured loss prior to Closing, Purchaser shall have the option of:

1. Accepting the Property in its damaged condition as the result of such insured loss and receive the Seller's insurance proceeds together with Seller's insurance deductible at Closing; or
2. Terminating this Agreement. The Earnest Money and all accrued interest shall be returned to Purchaser and the Seller shall be responsible for payment of the costs of escrow incurred.

If prior to the Closing, any portion of the Property is subject to a bona fide written threat of condemnation by a body having the power of eminent domain or condemnation, the Purchaser may elect to terminate this Agreement. The Earnest Money and all accrued interest shall be returned to Purchaser and the Seller shall be responsible for payment of the costs of escrow.

- F. This Agreement may be executed in two or more counterparts, and it shall not be necessary that any one of the counterparts be executed by all of the parties. Each fully or partially executed counterpart shall be deemed an original, but all such counterparts taken together shall constitute but one and the same instrument.
- G. The captions in this Agreement are for convenience only and shall not be considered a part of or affect the construction or interpretation of any provision of this Agreement.

ARTICLE 15 COMPUTATION OF TIME

In the computation of any period of time provided for in this Agreement or by law, the day of the act or event from which any 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 day which is not a Saturday, Sunday or legal holiday. "Business day" shall mean any day other than Saturday, Sunday or other day that commercial banks in the State in which the Property is located are authorized or required to close under applicable law.

ARTICLE 16 ETHICS AND CONFLICT OF INTEREST

The Purchaser represents, warrants and certifies that it and its employees engaged in the administration or performance of this Agreement are knowledgeable of and understand the Ohio Ethics and Conflicts of Interest laws including by not limited to Chapter 102 and Sections 2921.42 and 2921.43 of the Ohio Revised Code. The Purchaser further represents, warrants, and certifies that neither the Purchaser nor any of its employees or agents will do any act that is inconsistent with such laws.

ARTICLE 17 NON-DISCRIMINATION AND COMPLIANCE WITH APPLICABLE LAWS

The Purchaser, as a term of the contract, shall comply with Civil Rights Act of 1964, any and all other statutes, rules and regulations pertaining to non-discrimination.

ARTICLE 18**EXECUTION**

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth below.

PURCHASER:

By: _____
David F. Cerny, Co-Manager

Date: _____

By: _____
Mark J. Jablonski, Co-Manager

Date: _____

SELLER:

By: _____
Mayor Cyril M. Kleem

Date: 10-18-00

APPROVED AS TO FORM:



Director of Law