

# BEREA CITY COUNCIL

*City of Berea, Ohio*

## ORDINANCE NO. 2025-17

By: Councilman Gene Zacharyasz Sponsor: Mayor Cyril M. Kleem

### AN ORDINANCE

**AUTHORIZING THE MAYOR TO ENTER INTO AN AGREEMENT WITH BEREA MIXED USE PROJECT, LLC, OR AN AFFILIATE, TO PROVIDE FOR THE DEVELOPMENT AND SALE OF REAL PROPERTIES OWNED BY THE CITY OF BEREA, WHICH ARE NO LONGER NEEDED FOR ANY MUNICIPAL PURPOSES, TO PROVIDE FOR TAX INCREMENT FINANCING AND OTHER INCENTIVES RELATED TO THE PROJECT, AND TO EXECUTE ANY AND ALL DOCUMENTS RELATED THERETO, AND DECLARING AN EMERGENCY.**

**WHEREAS**, the City has been presented with a proposal from Berea Mixed Use Project LLC (the “Developer”) for the development of a multi-purpose community field, hotel, sports medicine facility, multifamily apartments, restaurants, a parking garage and other mixed uses (the “Project”); and

**WHEREAS**, the City, while engaged in urban redevelopment, acquired or will acquire certain parcels of land located within the City that are necessary for the Project (the “Site”); and

**WHEREAS**, this Council has determined the Project will promote the welfare of the people of the City, stabilize the economy, provide employment and assist in the development of commercial, recreational, residential, health care and other mixed use activities to the benefit of the people of the City, and preserve, maintain or provide additional opportunities for their gainful employment; and

**WHEREAS**, this Council has determined the Site is no longer needed for any municipal purposes and the conveyance of the Site to the Developer or an affiliate to enable the Project and the redevelopment of the Site is consistent with the City’s desire to promote economic, commercial, recreational, residential, health care and other mixed-use development in the City; and

**WHEREAS**, an emergency exists in the usual daily operations of the City, that emergency being related to the need to pass this Ordinance as quickly as possible, which will result in the redevelopment of the Site and creation and retention of jobs, all of which improve the health, safety and welfare of the residents of the City;

**NOW, THEREFORE, BE IT ORDAINED** by the Council of the City of Berea, County of Cuyahoga, State of Ohio, that:

# BEREA CITY COUNCIL

City of Berea, Ohio

## ORDINANCE NO. 2025-17

**Section 1. Authorization of Development Agreement.** This Council hereby determines that the Project is in the best interest of the City, in that the Project furthers the health, safety and welfare of its residents. The Mayor is hereby authorized, for and in the name of the City and on its behalf, to execute and deliver the Development Agreement, as set forth in Exhibit "A", which is attached hereto and incorporated herein by reference, and which shall be and read substantially in the form on file with this Council, with such changes therein as are not inconsistent with this Ordinance and not substantially adverse to the City and that are approved by the Mayor. The approval of such changes, and that such changes are not inconsistent with this ordinance and not substantially adverse to the City, shall be conclusively evidenced by the execution of the Development Agreement by the Mayor.

**Section 2. Conveyance of the Site.** The conveyance of the Site in connection with the Project and consistent with and pursuant to the Development Agreement is hereby approved.

**Section 3. Further Authorizations.** This Council hereby authorizes and directs the Mayor, the Law Director, the Director of Finance, Director of Economic Development or other appropriate officers of the City to prepare and sign all agreements and instruments and to take any other actions as may be appropriate to implement this Ordinance.

**Section 4. Open Meetings.** This Council finds and determines that all formal actions of this Council and any of its committees concerning and relating to the passage of this Ordinance were taken in an open meeting of this Council or any of its committees, and that all deliberations of this Council and any of its committees that resulted in those formal actions were in meetings open to the public, all in compliance with the law including ORC 121.22.

**Section 5. Declaration of Emergency; Effective Date.** This Ordinance is declared to be an emergency measure necessary for the immediate preservation of the public peace, property, health, safety and welfare of the City, and for the further reason that this Ordinance is required to be immediately effective in order to enable the timely development of the Project, wherefore, this Ordinance shall be in full force and effect immediately upon its passage and approval by the Mayor.

PASSED: March 24, 2025

ATTEST: [Signature]  
Clerk of Council

APPROVED: March 24, 2025  
[Signature]  
Mayor

APPROVED AS TO FORM:

[Signature]  
Director of Law

## **DEVELOPMENT AGREEMENT**

THIS **DEVELOPMENT AGREEMENT** (this “**Agreement**”) is made as of \_\_\_\_\_, 2025 (the “**Effective Date**”) by and among the **CITY OF BEREА, OHIO**, an Ohio municipal corporation (“**City**”), and **BEREA MIXED USE PROJECT LLC**, a Delaware limited liability company (“**Developer**”). The City and Developer are sometimes referred to herein collectively as the “**Parties**”.

### **RECITALS**

A. The City is the owner of certain parcels of land located in the City of Berea, Ohio, as more fully described in **Exhibit A-1** attached hereto and incorporated herein by reference (the “**City Owned Site**”) and is currently in the process of acquiring certain parcels of land owned by the Berea Land Reutilization Corporation and located in the City of Berea, Ohio as more fully described in **Exhibit A-2** attached hereto and incorporated herein by reference (the “**BLRC Owned Site**”) and together with the City Owned Site, the “**Site**”).

B. In accordance with Ohio Revised Code, the City has the authority to convey real property and interests in real property owned by the City and determined: (1) not to be required by the City for its purposes, and (2) that the conveyance will promote the welfare of the people of the City, stabilize the economy, provide employment and assist in the development of commercial, recreational, residential, health care and other mixed use activities to the benefit of the people of the City, and preserve, maintain or provide additional opportunities for their gainful employment.

C. In furtherance of its goals, the City desires to convey the Site to the Developer for the purpose of causing redevelopment of the Site in accordance with this Agreement and consistent with the City’s desire to promote economic, commercial, recreational, residential, health care and other mixed use development in the City.

D. This Agreement was presented to the City Council and approved by City Ordinance No. \_\_\_\_\_ on \_\_\_\_\_ 2025, which authorized the Mayor to enter into this Agreement on behalf of the City.

**NOW, THEREFORE**, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

### **ARTICLE 1**

#### **GENERAL**

1.1 **Defined Terms**. In addition to other terms defined herein, as used in this Agreement, the following terms shall have the meanings indicated below.

“**Affiliate**” shall mean a person or entity that controls, is controlled by, or is under common control with or has common membership interests in, a person or entity, whether by ownership of equity interests or voting power and their successors and assigns.

**“Agreement”** shall have the meaning set forth in the preamble hereof.

**“Applicable Laws”** shall mean all applicable local, state and federal laws, codes, rules and regulations, including, but not limited to, the Zoning Code.

**“City”** shall have the meaning set forth in the preamble of this Agreement.

**“City Council”** shall mean City Council of the City of Berea, Ohio.

**“City Default”** shall have the meaning set forth in Section 10.3 below.

**“City Review Bodies”** shall mean all boards, commissions, committees and subcommittees of the City having authority with respect to the Project under Applicable Laws, including the City’s Planning Commission.

**“Closing”** shall have the meaning set forth in Section 5.1 below.

**“Customary Closing Documents”** shall have the meaning set forth in Section 5.2 below.

**“Deed”** shall have the meaning set forth in Section 5.2 below.

**“Developer”** shall have the meaning set forth in the preamble of this Agreement.

**“Developer Default”** shall have the meaning set forth in Section 10.1 below.

**“Development Rights”** shall have the meaning set forth in Section 6.1 below.

**“Effective Date”** shall have the meaning set forth in the preamble of this Agreement.

**“Escrow Agent”** shall have the meaning set forth in Section 5.1 below.

**“Force Majeure”** shall have the meaning set forth in Section 12.13 below.

**“Mayor”** shall mean the Mayor of the City.

**“Memorandum”** shall mean the memorandum of this Agreement as mutually agreed upon and executed by the Parties.

**“Parties”** shall have the meaning set forth in the preamble of this Agreement.

**“Party”** shall mean either the City or Developer, individually.

**“Phase I of the Project”** shall mean the development of the Site and other parcels owned and/or leased by Developer and located in the City of Berea for a multi-purpose community field, hotel, sports medicine facility, multifamily apartments, restaurants, parking garage and other mixed-uses.

**“Phase II of the Project”** shall mean the development of the Site and other parcels owned and/or leased by Developer and located in the City of Berea for a possible recreation complex or other mixed-uses.

**“Project”** shall mean the development of the Site and other parcels owned and/or leased by Developer and located in the City of Berea for a multi-purpose community field, hotel, sports medicine facility, multifamily apartments, restaurants, parking garage and other mixed-uses.

**“Project Development Plan”** shall mean the overall proposed development plan for the Project, which preliminary plan is attached hereto as **Exhibit B**, as may be revised, amended or otherwise modified.

**“PUD”** shall have the meaning set forth in Section 4.1 below.

**“Recorder’s Office”** shall mean the Fiscal Officer’s Office of Cuyahoga County, Ohio.

**“Site”** shall have the meaning set forth in Recital A above.

**“Term”** shall have the meaning set forth in Section 2.4 below.

**“TIF”** shall have the meaning set forth in Section 8.2 below.

**“Transfer Amount”** shall have the meaning set forth in Section 3.1 below.

**“Zoning Code”** shall mean the City’s Zoning Code.

1.2 Interpretation. As the context of this Agreement may require, terms in the singular shall include the plural (and vice versa) and the use of feminine, masculine or neuter genders shall include each other. Wherever the word “including” or any variation thereof is used herein, it shall mean “including, without limitation,” and shall be construed as a term of illustration, not a term of limitation. Wherever the word “or” is used herein, it shall mean “and/or”.

1.3 Incorporation by Reference. All exhibits, schedules or other attachments referenced in this Agreement are hereby incorporated into this Agreement by such reference and shall be considered a part of this Agreement as if fully rewritten or set forth herein.

1.4 Calculation of Time. Unless otherwise stated, all references to “day” or “days” shall mean calendar days and any reference to “business days” means any day that is not a Saturday, Sunday or holiday observed by the State of Ohio.

## ARTICLE 2

### GENERAL AGREEMENT; TERM

2.1 Public-Private Partnership. The Parties agree that the purpose of the collaborative relationships contemplated by this Agreement is to (a) create the opportunity for the redevelopment of the Site into a vibrant mixed-use development furthering the goals and objectives of the City consistent with the City’s master plan, including those goals and objectives set forth in the recitals,

which are hereby incorporated by reference, and (b) provide the economic framework for Developer to invest the necessary capital to cause development of the Site and receive, in return for such investment, the exclusive right to develop and purchase the Site consistent with the terms of this Agreement.

2.2 Relationship of the Parties. Notwithstanding any term or condition of this Agreement to the contrary, nothing in this Agreement shall be deemed to create the relationship of principal and agent or to create any joint venture or partnership of any kind by or among the Parties.

2.3 Compliance With Applicable Law. Developer will comply with Applicable Laws in connection with its performance under this Agreement.

2.4 Term. The term of this Agreement shall be the period beginning on the Effective Date and ending on the date that the Parties have completed all of their respective obligations hereunder or as earlier terminated as provided herein (“**Term**”). The Parties agree that the Term shall be extended as a result of Force Majeure.

2.5 Lease. The Parties acknowledge that they are Parties to that certain lease agreement dated September 17, 2024 with respect to the City and the Berea Land Reutilization Corporation, as lessors, and Developer, as lessee, leasing the majority of the Site from City to Developer.

### ARTICLE 3

#### TRANSFER OF THE SITE

3.1 Transfer of the Site. At the Closing, the City will transfer the Site to Developer or Developer’s Affiliate for the sum of One Million and 00/100 Dollars (\$1,000,000.00) (the “**Transfer Amount**”).

3.2 Consolidation of Site. Prior to Closing, City shall consolidate all of the parcels of land comprising the Site into parcel configurations reasonably acceptable to Developer and consistent with the Project. Developer shall be provided a reasonable opportunity to approve all consolidation plats prior to recording and approval by the necessary agencies or departments.

3.3 Cash Payments. All payments to be made by Developer to the City under this Agreement shall be paid to the City by wire transfer or immediately-available funds.

### ARTICLE 4

#### PROJECT PUD APPROVALS

4.1 Project Development Plan. Developer has provided the City with the proposed preliminary Project Development Plan. The preliminary Project Development Plan will be utilized in connection with seeking City approval of a Planned Unit Development as contemplated by Chapter 210 the City’s Zoning Code (“**PUD**”) for the Project. The Parties acknowledge and agree that the preliminary Project Development Plan may be modified, revised and amended at the

discretion of the Developer so long as the final Project Development Plan is generally based upon the preliminary Project Development Plan.

#### 4.2 PUD Approvals.

4.2.1 The Parties anticipate that the PUD is required to accomplish the Project described in the Project Development Plan.

4.2.2 Developer shall submit an application for the creation of a PUD applicable to the Project to the appropriate City Review Bodies. The Developer and the City recognize the importance of timely approvals and communications in relation to the success of the Project and agree to take all reasonable actions and steps as soon as possible, in accordance with Applicable Laws, to accomplish the approval or disapproval of the PUD.

4.3 Efforts With City Review Bodies. The Parties agree to work cooperatively and to coordinate with each other during the course of preparation and review of the PUD, with the objective that such PUD can be approved by the City Review Bodies at the earliest feasible time. Additionally, the City Review Bodies, City and Developer will continue to work cooperatively and coordinate on all future steps in the municipal entitlement and permitting process associated with the Project. These steps may include, but are not limited to, changes to the PUD that may from time to time be required, zoning variances that may arise out of mutually agreed upon changes in the Project Development Plan, and various City approvals required for the planned modifications to the public rights-of-way and utilities required as part implementing the Project Development Plan.

### ARTICLE 5

#### CONVEYANCE OF SITE

5.1 Conveyance of Site to Developer. Subject to the provisions of this Agreement, the City shall convey the Site to Developer or to Developer's Affiliate. Closing of the transaction to convey the Site to Developer or Developer's Affiliate, as applicable (the "**Closing**"), shall occur within thirty (30) days after the later of (a) the City's acquisition of the BLRC Owned Site, and (b) the issuance of the final approval of the PUD by the City Review Bodies and passage of all other ordinances or agreements contemplated by this Agreement, or upon such other date as shall be agreed to by the City and Developer. City shall use its best efforts to acquire the BLRC Owned Site within forty five (45) days from the Effective Date. Additionally, in the event of a delay in the City's acquisition of the BLRC Owned Site, the City, upon written notice from Developer, shall convey the City Owned Site to Developer in accordance with the terms hereof while City finalizes the acquisition of the BLRC Owned Site and City shall effectuate the transfer of the BLRC Owned Site to Developer in accordance with the terms hereof on a date mutually agreeable to the Parties. The Closing shall occur in escrow with a title company serving as escrow agent to be mutually agreed upon by the Parties (the "**Escrow Agent**"). At the Closing, the following shall occur:

5.1.1 The City shall deliver to Developer or Developer's Affiliate a duly executed and acknowledged Deed from each such Party conveying fee simple title to the Site to Developer or Developer's Affiliate, as applicable, and the Customary Closing Documents, as applicable.

5.1.2 Developer shall obtain, at its expense, an owner's fee title insurance policy from a mutually agreeable title company (the "**Title Company**"), insuring fee simple title to the Site to Developer upon recording of each Deed.

5.1.3 Developer shall pay to the City the Transfer Amount.

5.1.4 The City and Developer or Developer's Affiliate, as applicable, shall execute and deliver a settlement statement prepared by the Escrow Agent and approved by the City and Developer, reflecting terms consistent with this Agreement.

5.1.5 The City and Developer shall deliver such other documents and instruments as may be reasonably necessary to effectuate the intent of this Agreement.

5.1.6 The Parties acknowledge and agree that the separate Amendment to Lease dated \_\_\_\_\_, 2025, between the City and Cleveland Browns Football Company LLC, is considered by the City to be further inducement to and consideration for entering into this Agreement.

5.2 As-Is Conveyance. Developer hereby acknowledges and agrees that the conveyance of all or any portion of the Site to Developer or Developer's Affiliate, as applicable, shall be "as-is", "where-is" without representation or warranty of any kind or nature. Such conveyance shall be via quitclaim deeds in form and substance reasonably satisfactory to the City and Developer (the "**Deed**"). Additionally, the City agrees to execute and effectuate any and all reasonable title or owner affidavits and any other reasonably required documents, releases, terminations or affidavits required by the Title Company in connection with the issuance of any owner's or loan title insurance policies associated with the transfer of the Site (the "**Customary Closing Documents**").

## ARTICLE 6

### DEVELOPMENT RIGHTS

6.1 Development Rights. Until such time as the City transfers the Site to Developer pursuant to the Deed, Developer shall be entitled to the following rights (collectively, the "**Development Rights**"):

6.1.1 Developer shall have the exclusive right to market, enter into joint venture agreements pertaining to the Project and otherwise develop all or any portion of the Site, subject to and in accordance with Applicable Laws and this Agreement;

6.1.2 Developer shall have the exclusive right to retain, hire and terminate its own brokers, contractors, engineers, architects, accountants, lawyers, consultants and any other service providers in connection with the development of the Site or the Project; and

6.1.3 Developer shall have the right to engage in and conduct any and all necessary activities in order to develop all or any portion of the Site in accordance with this Agreement, subject to Applicable Laws.

6.2 Nature of Development Rights. Until such time as the City transfers the Site to Developer pursuant to the Deed, Developer acknowledges and agrees that Developer shall have no right to assign or transfer the Development Rights hereunder (other than to Developer's Affiliate) without the prior written consent of the City.

## ARTICLE 7

### GENERAL OBLIGATIONS

7.1 Responsibility for the Site. As of the Effective Date and until the Site is conveyed to Developer, the City will continue to be responsible for the Site, including maintenance and repair and insurance.

7.2 Project Improvements. The Project shall create, to the extent commercially feasible, high end commercial, recreational, health care, residential and other mixed-use development materially consistent with: (a) the Project Development Plan, as may be amended or revised pursuant to the ordinances relating to the PUD, (b) Applicable Laws and (c) the City's goal of creating a development that improves the vibrancy of the surrounding area.

## ARTICLE 8

### COOPERATION; COLLABORATION; DEVELOPMENT INCENTIVES

8.1 City Cooperation. The City intends to work collaboratively and use reasonable, good faith efforts with Developer to expeditiously assist Developer in connection with the compliance, issuance and review of the City's PUD zoning, permitting and design review and approval process, including amendments or modifications to the Zoning Code pertaining to the Site and Project. The City will cap all City permit and review fees associated with the Project and development of the Site to an amount not to exceed One Million and 00/100 Dollars (\$1,000,000.00). The City will cooperate and use reasonable, good faith efforts with Developer in connection with the vacation of existing streets, dedication of new streets, re-platting of the Site, reconfiguration of the Site, and execution of reciprocal easement agreements or similar instruments with respect to the Project that are reasonably necessary to facilitate ingress, egress, access to utilities and access to other public improvements. Developer may apply for and receive any and all other awards available and applicable to the Project from any and all federal, state and local governmental authorities. The City will cooperate and use reasonable, good faith efforts with Developer in any efforts to obtain eligible funding, grants, subsidies or other incentives available for the Project.

### 8.2 Tax Increment Financing.

8.2.1 The City shall establish an urban redevelopment tax increment financing program pursuant to Ohio Revised Code Section 5709.41 with respect to the Project (the "TIF"). The proposed TIF shall run for not less than 30 years and provide a 100% exemption on the increase in assessed value of the Project subsequent to the acquisition of the Project by the City as part of its urban renewal efforts and in accordance with the requirements of Ohio Revised Code Section 5709.41, subject to a school compensation agreement with the Board of Education of

Berea City School District (the “**School District**”), which will provide for compensation to the School District solely from statutory service payments in lieu of taxes with respect to the Project. The remaining portion of the TIF statutory service payments (after (i) payments to the Polaris Career Center, which shall be at the same rate and under the same terms as the School District in accordance with Section 5709.41, and (ii) any reasonable expenses incurred by the City in connection with this Agreement, the TIF or any separate but related TIF Agreement in an amount not to exceed Fifty Thousand and 00/100 Dollars (\$50,000.00)) shall be paid to the Developer and its Affiliates to pay or reimburse Developer’s and its Affiliates’ eligible costs of the Project and public infrastructure improvements, or for the payment of debt service on any securities or loans in connection with the Project, all as further described in a separate TIF or similar cooperative agreement between the City and the Developer. City shall use reasonable, good faith efforts to cooperate with Developer and School District in connection with any agreements or other approvals required by such parties to effectuate a TIF. City intends to submit to City Council for its consideration the legislation establishing the TIF (the “**TIF Ordinance**”) no later than forty-five (45) days after the Effective Date of this Agreement.

### 8.3 Other Incentives.

8.3.1 Admissions Tax. Within sixty (60) days of receipt, the City shall pay the Developer or its Affiliates 100% of all admission taxes charged and collected under Chapter 193 of the City’s Codified Ordinances (or any comparable successor provision or ordinance) with respect to the Project and events held at the Project and use reasonable, good faith efforts in assisting the Developer or its Affiliates in obtaining a certificate of registration or other qualification or permit to collect admission taxes. The City shall submit legislation for City Council approval and/or enter into all agreements and arrangements necessary to effectuate the purposes of this Section. The City shall not reduce the admission tax charged and collected at the Project without the prior written consent of the Developer. The City intends to submit for City Council approval the legislation establishing the forgoing relating to admissions taxes no later than forty-five (45) days after the Effective Date.

8.3.2 Bed Tax. Within sixty (60) days of receipt, the City shall pay the Developer or its Affiliates 100% of all excise taxes on lodging transactions charges and collected under Chapter 196 of the City’s Codified Ordinances (or any comparable successor provision or ordinance) with respect to the Project. The City shall submit legislation for City Council approval and/or enter into all agreements and arrangements necessary to effectuate the purposes of this Section. The City shall not reduce the excise tax on lodging transactions charged and collected at the Project without the prior written consent of the Developer. The City intends to submit for City Council approval the legislation establishing the forgoing relating to bed taxes no later than forty-five (45) days after the Effective Date.

8.3.3 Payroll/Income Tax. Within sixty (60) days of receipt, and after any income tax sharing payments to the School District or the Polaris Career Center pursuant to the Ohio Revised Code, including without limitation Section 5709.82, the City shall pay the Developer or its Affiliates 100% of all remaining revenues received on income, qualifying wages, salaries, commissions and other compensation and on net profits and any other money eligible for taxation as described and collected under Chapter 191 of the City’s Codified Ordinances (or any comparable successor provision or ordinance) with respect to the Project, including but not limited

to, any City and non-City residents' work done, services performed or rendered or activities conducted within the area of the Project, but excluding that on: (i) City residents domiciled within the Project but employed outside of the Project; and (ii) employees of the Cleveland Browns Football Company LLC ("CBFC"), working at the Project pursuant to the terms of that certain Amendment to Lease dated as of August \_\_, 2019 by and between the City and CBFC. The City shall submit legislation for City Council approval and/or enter into all agreements and arrangements necessary to effectuate the purposes of this Section. The City shall not reduce the municipal tax rate or further exempt any income currently subject to its municipal income tax collected at the Project without the prior written consent of the Developer. The City intends to submit for City Council approval the legislation establishing the forgoing relating to payroll taxes no later than forty-five (45) days after the Effective Date.

8.3.4 Terms. The City's obligation to make payments under Sections 8.3.1 and 8.3.2 shall terminate on December 31 of the year that is: (i) thirty (30) years from January 31, 2028 with respect to Phase I of the Project and (ii) thirty (30) years from January 31, 2030 with respect to Phase II of the Project. The City's obligation to make payments under Section 8.3.3. shall terminate on December 31 of the year that is: (i) fifteen (15) years from January 31, 2028 with respect to Phase I of the Project and (ii) fifteen (15) years from January 31, 2030 with respect to Phase II of the Project.

8.3.5 Additional Compensation. In consideration for the TIF and other incentives provided by the City described in this Section 8.3, and subject to the City's performance under this Agreement, Developer agrees to pay the City an aggregate amount of Four Million and 00/100 Dollars (\$4,000,000.00), payable in One Million and 00/100 Dollar (\$1,000,000.00) installments on or before December 1 of each of the years 2026, 2027, 2028 and 2029.

Notwithstanding anything in this Agreement to the contrary, should any payment described in this Section 8.3.5 not be made, and such nonpayment not be cured within twenty-one (21) days after written notice to Developer from the City, the City thereafter shall be relieved of the obligation to make payments under this Article 8 until and unless such time as the payment described in this Section 8.3.5 is made.

8.3.6 Additional Incentives. The Parties shall use reasonable, good faith efforts to cooperate in the exploration of and application for funding, grants, subsidies and other incentives.

## ARTICLE 9

### INDEMNIFICATION AND EXCULPATION

9.1 Indemnification. Developer hereby indemnifies and agrees to defend and hold harmless the City and its officials, officers, directors, members, representatives, agents and employees from and against any actions, suits, claims, losses, costs, demands, judgements, liabilities and damages asserted against the City or to the extent such actions, suits, claims, losses, costs, demands, judgements, liabilities or damages are a result of or arise from any of the following: (a) Developer's breach of this Agreement; or (b) the acts or omissions of Developer or any of its respective Affiliates, agents, employees, contractors, subcontractors, engineers, architects, consultants, licensees, invitees or anyone other person or party acting on Developer's behalf.

9.2 No Liability. In no event shall the City have any liability in connection with the development of the Site or Project as a result of or arising from any approvals relating thereto given or withheld (or the right to give or withhold such approvals) pursuant to this Agreement, or as a result of or arising from any other right or non-delegable governmental duty to review, comment on or evaluate any plans, drawings, specifications or other documents in connection with the Project. In no event shall any such review, approval, comment or evaluation by the City relieve Developer of (a) any liability or responsibility under this Agreement, it being understood and agreed that Developer is at all times ultimately relying on Developer's skill, knowledge and professional training and experience in preparing (or causing the preparation of) any plans, drawings, specifications or other documents or (b) the responsibility of Developer to comply with Applicable Laws. Notwithstanding anything in this Agreement to the contrary, the City's obligations under this Agreement are limited special obligations of the City and those obligations are not secured by an obligation or pledge of any money raised by taxation and do not represent or constitute a debt or pledge of the faith and credit or taxing power of the City, and neither the Developer nor any other person has any right to have taxes levied by the City for the payment of its obligations under this Agreement.

9.3 Sovereign Rights. Nothing contained in this Agreement shall be construed to be a waiver of the City's sovereign immunity, any immunity provided under Applicable Laws or any individual's qualified good faith or official immunities.

9.4 Waiver of Consequential Damages. In no event shall the City or Developer, their associated entities, Affiliates or any of their respective directors, members, officers, officials or employees be liable to the other Party or Parties, or anyone claiming by, through or any of them, for any special, incidental, indirect or consequential damages whatsoever arising out of, resulting from or in any way related to this Agreement.

## ARTICLE 10

### EVENTS OF DEFAULT; TERMINATION

10.1 Developer Default. "**Developer Default**" shall mean any of the following:

10.1.1 failure of Developer to comply with any payment obligation under this Agreement and such failure is not cured within twenty-one (21) days after written notice from either the City;

10.1.2 failure of Developer to comply with any non-monetary obligation under this Agreement and such failure is not cured within forty-five (45) days after written notice from the City; provided, however, if such failure cannot be cured within such forty-five (45)-day period, and Developer is expeditiously and continuously using best efforts to cure such failure, then Developer shall have such additional time as is necessary to cure such failure not to exceed a total of one hundred and twenty (120) days after Developer's receipt of the above written notice from the City; or

10.1.3 the filing by Developer of a petition for the appointment of a receiver or a trustee, and such petition is not dismissed within sixty (60) days, or the making by Developer of a general

assignment for the benefit of creditors, and such assignment is not dismissed within sixty (60) days; or the entry of an order for relief pursuant to any Chapter of Title 11 of the U.S. Code, as the same may be amended from time to time, with Developer as debtor, and such entry is not dismissed within sixty (60) days; or the filing by Developer of an insolvency proceeding with respect to Developer or any proceeding with respect to Developer for compromise, adjustment or other relief under the laws of any country or state relating to the relief of debtors, and such proceeding is not dismissed within sixty (60) days;

10.2 Remedies for Developer default. At any time as of which a Developer Default exists, the City may, but shall not be obligated to:

10.2.1 terminate this Agreement;

10.2.2 at the City's sole option, perform, or cause the performance of, any obligation of Developer under this Agreement and recover all direct and actual costs, expenses and fees incurred in connection with such performance from Developer;

10.2.3 recover from Developer any sums of money that are or become due and payable by Developer to or for the benefit of the City under this Agreement; or enforce, or avail themselves of, any other remedies available at law or in equity.

10.3 City Default. "**City Default**" shall mean failure by the City in the due and punctual payment, performance or observance of any obligation of the City under this Agreement and such failure is not cured by the City within forty-five (45) days after written notice from Developer; provided, however, if such failure cannot be cured within such forty-five (45)-day period, and the City is expeditiously and continuously using best efforts to cure such failure, then the City shall such additional time as is necessary to cure such failure not to exceed a total of ninety (90) days after the City's receipt of the above written notice from Developer.

10.4 Remedies for City Default. At any time as of which a City Default exists, Developer, at Developer's option, may, but shall not be obligated to:

10.4.1 by written notice to the City, terminate this Agreement; or

10.4.2 enforce, or avail itself of, any other remedies available to it at law or in equity.

## ARTICLE 11

### DISPUTE RESOLUTION

11.1 Mediation. The Parties shall attempt to negotiate a resolution of any dispute arising out of this Agreement; provided, however that at any point, any of the Parties may submit any such dispute to non-binding mediation. Except as otherwise set forth in this Agreement, costs and expenses of the mediation shall be shared equally by the Parties. The Parties agree that all records or other information marked as "confidential" and submitted to any mediator(s) or other parties to any mediation proceeding concerning any and all disputes arising hereunder shall be deemed "mediation communications" for purposes of Ohio Revised Code Section 149.43(A)(1). IN the

event of a dispute hereunder, mediation is mandatory and shall be a condition precedent to the institution of legal or equitable proceedings hereunder by the Parties.

11.2 Litigation. If the Parties are unable to reach a settlement of any dispute arising out of or relating to this Agreement through non-binding mediation within a reasonable time, but in any event no later than sixty (60) days after first notice of the dispute, then the dispute shall be resolved by litigation filed and maintained in any State or Federal Court located in Cuyahoga County, Ohio or the Northern District of Ohio, Eastern Division.

## ARTICLE 12

### MISCELLANEOUS

12.1 Governing Law. This Agreement shall be governed exclusively by and construed in accordance with the laws of the State of Ohio, without regard to its conflict of law provisions that would cause the application of the laws of another jurisdiction.

12.2 Entire Agreement. This Agreement represents the entire and integrated agreement among the Parties concerning the Project and supersedes all prior negotiations, representations or agreements, either written or oral.

12.3 Assignment; Mortgagee Protection. No Party shall have the right to assign all or any of this Agreement, to any other person or party without the prior written consent of the other Parties, which may not be unreasonably withheld; provided, however Developer shall have the right to assign this Agreement to an Affiliate or any other third party that agrees to assume Developer's rights and obligations hereunder and thereafter, Developer shall be released from all obligations and liabilities hereunder. The City acknowledges and agrees that this Agreement neither prevents nor limits Developer or Developer's Affiliate, as applicable, from encumbering all or any portion of the Site or improvements thereon by any mortgage or other security device securing financing with respect to the Project or assigning or transferring their rights to receive any payments hereunder. The City shall execute all reasonably requested estoppels or other agreements reasonably acceptable to the City and reasonably required by a mortgagee pertaining to the terms and conditions of this Agreement.

12.4 No Individual Liability. No official, officer, director, member, representative, agent or employee of the City shall be personally liable to Developer or any successor in interest, in the event of any default or breach by the City or for any amount which may become due to Developer or successor or on any obligation under the terms of this Agreement. No officer, director, member, representative, agent or employee of the Developer shall be personally liable to the City or any successor in interest, in the event of any default or breach by the Developer or for any amount which may become due to the City or successor or on any obligation under the terms of this Agreement.

12.5 Amendments; Waiver. Except as otherwise provided herein, no amendment to this Agreement shall be valid unless executed by an instrument in writing by the Parties hereto with the same formality as this Agreement. Whenever the Mayor is entitled to act under this Agreement (e.g. delivery of notices, written waivers or consents), such action shall be deemed authorized by

the City Council provided such action is taken in accordance with this Agreement. All waivers of the provisions of this Agreement shall be in writing and signed by the Mayor and a representative of the Developer.

12.6 Consent in Writing. Unless otherwise specifically provided herein, no consent or approval by a Party permitted or required under the terms of this Agreement shall be valid unless the same shall be in writing, signed by the Party by or on whose behalf such consent is given.

12.7 Captions. The captions contained in this Agreement are for convenience and reference only and in no way define, describe, extend or limit the scope or intent of this Agreement or the intent of any provision contained herein.

12.8 Public Announcements. The Parties agree that they will use reasonable, good faith efforts to jointly coordinate any public announcements or press releases relating to terms and conditions of this Agreement.

12.9 Notices. Any notice, demand, offer or other written instrument required or permitted to be given pursuant to this Agreement shall be in writing signed by the Party giving such notice and shall be sent by overnight courier or registered letter, to the other Party at the address set forth below.

If Delivered to City:

11 Berea Commons  
Berea, Ohio 44017  
Attn: Mayor Cyril Kleem

With a copy to:

Director of Law  
City of Berea, Ohio  
11 Berea Commons  
Berea, Ohio 44017

And:

Michael L. Sharb, Esq.  
Squire Patton Boggs (US) LLP  
1000 Key Tower  
127 Public Square  
Cleveland, Ohio 44114

If delivered to Developer:

Berea Mixed Use Project LLC  
5720 East Schaaf Road  
Independence, Ohio 44131  
Attn: Kevin DiGeronimo

With a copy to:

Karla M. Rogers, Esq.  
Calfee, Halter & Griswold LLP  
1405 East Sixth Street  
Cleveland, OH 44114

And:

Ted Tywang, Esq.  
HSG Berea Development, LLC  
76 Lou Groza Boulevard  
Berea, OH 44017

Each party shall have the right to change the place to which notice shall be sent or delivered by sending a similar notice to the others in like manner. The effective date of any notice issued pursuant to this Agreement shall be as of the addressee's receipt of such notice.

12.10 Severability. If any clause or provision in this Agreement shall be held by final judgment of a court of competent jurisdiction to be invalid or unenforceable for any reason, such invalidity or lack of enforceability shall not affect the validity or enforceability of any other clause or provision of this Agreement.

12.11 Counterparts. This Agreement may be executed by the parties in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute but one and the same instrument. Delivery of an executed counterpart of this Agreement by facsimile or other electronic means shall be equally as effective as delivery of a manually executed original counterpart of this Agreement.

12.12 Contract Language. The language used in this Agreement shall be deemed to be the language chosen by the Parties hereto to express their mutual intent, and no rule of strict construction shall be applied against any Party. This Agreement has been negotiated at arm's length and between persons sophisticated and knowledgeable in the matters dealt with herein. In addition, each Party has been represented by experienced and knowledgeable legal counsel. Accordingly, this Agreement shall be interpreted to achieve the intents and purposes of the Parties, without any presumption against the Party responsible for drafting any part of this Agreement.

12.13 Recording. This Agreement will not be recorded; provided, however, the Parties agree to record the Memorandum.

12.14 Force Majeure. If any Party is delayed or hindered in, or prevented from the performance or completion of any obligation required under this Agreement by reason of earthquakes; landslides; strikes; lockouts; labor troubles; failure of power; riots; pandemics, endemics, governmental orders, insurrection; war; terrorism (international and domestic); acts of God; federal, state or local regulations, laws, rules or requirements; or other reason of the like nature not the fault of the Party delayed in performance of its obligation; unusually severe weather, epidemics, freight embargoes, unavailability of materials, strikes or delays of contractors,

subcontractors or materialmen due to any of such causes, but not including lack of financing or financial capacity by any Party hereto ("Force Majeure"), such Party is excused from such performance for the period of delay. The period for the performance of any such act will then be extended for the period of such delay. The Party claiming Force Majeure shall take commercially reasonable steps to remove the Force Majeure event, and shall promptly notify the other Parties, as applicable, within a period of thirty (30) days, when it first learns of the existence of a Force Majeure condition and will similarly notify the other Parties, as applicable, within a period seven (7) business days, when a Force Majeure is terminated. Notwithstanding anything herein to the contrary, if a Party fails to notify the other Parties, as applicable, within a period of thirty (30) days, after it first learns of the existence of an event of Force Majeure, then such Party shall be deemed to have waived its right to be excused from performance of its obligations by reason of such event of Force Majeure.

12.15 Good Faith. Whenever in this Agreement any Party is required or permitted to grant approval or consent, take any action or request any other Party to take any action, make decisions or otherwise exercise judgment as to a particular matter, arrangement or term, the Party granting such approval or consent, taking or requesting such action, making decisions or otherwise exercising judgment shall act reasonably and in good faith and, in the case of approvals or consents, shall act with all deliberate speed in making its determination of whether or not to approve or consent to any particular matter and shall not impose conditions on the granting of such approval or consent that the approving or consenting Party does not believe are necessary in connection with such approval or consent.

12.16 Further Assurances. The Parties shall take or cause to be taken any and all other further actions reasonably necessary, required or requested of the other Parties in order to effectuate the terms and conditions herein.

Remaining Balance of Page Intentionally Left Blank

**IN WITNESS WHEREOF**, the Parties sign this Agreement as of the Effective Date.

**CITY:**

**CITY OF BEREА, OHIO**, an Ohio  
municipal corporation

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

Name: Cyril Kleem

Title: Mayor

**DEVELOPER:**

**BEREA MIXED USE PROJECT LLC**,  
a Delaware limited liability company

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

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

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

Approved as to Form:

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

Name: Barbara L. Jones

Title: City of Berea, Law Director

Exhibit A

LEGAL DESCRIPTION OF SITE

Exhibit B

PROJECT DEVELOPMENT PLAN