

AGREEMENT FOR ROAD USE, REPAIR, AND IMPROVEMENTS

This AGREEMENT FOR ROAD USE, REPAIR, AND IMPROVEMENTS ("Agreement") is made and entered into this ____ day of _____, 2019 by the TOWN OF GUILFORD (the "Town"), a municipal corporation with offices at 223 Marble Road, Guilford, NY 13780 and _____ with a mailing address _____ ("Developer"). The Town and Developer are sometimes referred to herein individually as a "Party" and collectively as the "Parties."

RECITALS

1. The Town has adopted Local Law No. 4 of the Year 2019 (the "Local Road Use and Preservation Law").
2. Developer intends to undertake construction activity which is subject to the requirements of the Local Road Use and Preservation Law (the "Project").
3. The Town is responsible for the maintenance and repair of certain roads and highways within the Town.
4. In connection with the Project, it may be necessary for Developer and its contractors, subcontractors or designees to: (a) frequently travel upon or transport heavy equipment and materials over certain roads and highways in the Town which may in certain cases be in excess of the design limits of such roads; (b) transport certain materials, such as concrete and gravel, on roads within the Town; and (c) widen certain roads and make certain modifications and upgrades (both temporary and permanent) to such roads to permit equipment and materials to pass.
5. The Parties wish to enter into this Agreement to set forth the terms and conditions for the use, improvement, and repair of Town roads by Developer in connection with the Project.

NOW THEREFORE, in consideration of mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

ARTICLE I

USE OF HAUL ROUTES BY DEVELOPER

Section 1.1 Use of Designated Roads by Developer. In connection with the Project, the Town hereby acknowledges and agrees that Developer, its contractors and subcontractors and each of their respective agents, officers, employees, representatives, and assigns (collectively, the "Developer Parties") may use the portions of the roads and highways located in and maintained by the Town identified as haul routes by Developer on Appendix A attached hereto (the "Haul Routes") subject to the terms and conditions of this Agreement and in accordance with the most recent version of the Delta Road Protection Program Manual (the "Program Manual") which are on file and available at the Town's offices. Developer and the Developer Parties may not use any other Town roads or highways (roads not included as Haul Routes) in connection with the Project.

Section 1.2 Responsibilities of Engineer and Developer's Duty to Pay for Town's Reasonable Expenses. The Town shall retain an engineer (the "Engineer") to undertake surveys of the Haul Routes, to conduct pre-use testing and post-use testing of the Haul Routes, to prepare estimates of the cost of upgrades or improvements to Haul Routes necessary to accommodate Project traffic and repairs for any damage to Haul Routes caused by Project traffic, and to perform such other tasks that the Town may designate to implement the Road Use and Preservation Law. Developer shall pay for all of the Town's reasonable costs and expenses in implementing this Agreement including, without limitation, the fees of the Engineer and related legal expenses in connection with the work to be performed pursuant to this Agreement. The Town shall provide Developer with an estimate of such costs and expenses, and Developer shall place funds in escrow with the Town in an amount sufficient to cover such costs and expenses before the Town incurs any such costs and expenses.

Section 1.3 Evaluation and Pre-Use Testing of Haul Routes. Developer shall submit to the Town Highway Superintendent a Haul Route Declaration on a form supplied by the Town. The Haul Route Declaration shall identify the Project location and the routes that all material and equipment required for the Project shall be carried over to reach the Project. The Town shall undertake a public safety evaluation, and the Engineer shall perform a structural evaluation and a geometric evaluation of each segment of the proposed Haul Route as provided in the Program Manual. The Engineer shall also pre-test each segment of the proposed Haul Routes as provided

in the Program Manual. The Engineer shall also conduct a capacity analysis as provided in the Program Manual. If Developer decides to revise any Haul Routes, whether on the basis of the Engineer's evaluation of the Haul Routes or otherwise, Developer shall submit a revised Haul Route Declaration, and the Engineer shall evaluate the revised Haul Routes and the Town may undertake a public safety evaluation as provided herein.

Section 1.4 Upgrades to Haul Routes. If the Engineer determines that any structural, geometric, or roadbed upgrades are necessary to accommodate Project traffic, as documented on a Haul Route Evaluation Form, Developer shall have the option of either revising the Haul Route or ensuring that such necessary upgrades are completed at Developer's expense. The design, review, approval, and construction of any upgrades agreed to by Developer shall be completed as provided in the Program Manual and made in accordance with the provisions of Section 2.4 hereof.

Section 1.5 Use of Haul Routes. Upon the completion of the capacity evaluation and any necessary upgrades to the Haul Routes, Developer and Developer Parties shall be permitted to use the Haul Routes for Project traffic as provided in the Program Manual. If the Engineer determines that Project traffic is likely to damage any segment of the Haul Routes, Developer shall be required to post security to cover the estimated cost of repairing such damage in an amount to be determined by the Engineer and approved by the Town Board. If Project traffic will travel over one or more Town highways that are unpaved or prone to seasonal deterioration, or likely to suffer sudden failure that would impair the safe travel and usage of such highways, the Town Highway Superintendent may require, upon the Engineer's recommendation, that such Town highways be subject to weekly monitoring and that any damage be repaired within five (5) days at the Developer's expense. Developer shall be responsible for keeping, at its sole cost and expense, the Haul Routes clean and free from rubbish and debris resulting from Project traffic or Developer's use of the Haul Routes. Materials and equipment of Developer or the Developer Parties, if any, shall be timely removed from the Haul Routes when they are no longer reasonably necessary for the Project. Developer will also take reasonable steps to minimize fugitive dust and to mitigate or minimize the transport of such materials as mud or dirt to public streets.

Section 1.6 Post-Use Testing and Damage Assessment. At the completion of the Project, the Engineer shall conduct post-use testing of all segments of the Haul Route as provided in the Program Manual. Using the pre-use testing and post-use testing data, the Engineer will make a determination of damages to Haul Route segments (and any related appurtenances and

improvements), if any, as a result of Project traffic as provided in the Program Manual. The Engineer will make recommendations for repair alternatives and estimated costs of repairs. If any segments of Haul Routes are shared with other developers subject to a separate road use agreement with the Town, the Engineer shall also provide an allocation analysis of the damage caused by the Developer and such other developers. The Town Highway Superintendent shall review the Engineer's recommendations and select an appropriate repair alternative.

Section 1.7 Haul Route Repair. If Developer is found to be responsible for any damage to any segment of a Haul Route, Developer shall be responsible for repairing such damage at its own expense or paying the Town for the cost of such repairs. Such repairs shall be made in accordance with the provisions of Section 2.4 hereof.

ARTICLE II

GENERAL TERMS AND CONDITIONS

Section 2.1 Designees. Either Party may at any time provide written notice to the other Party with the name and contact information of a person who shall serve as that Party's primary point of contact between the Parties. A Party may change its designee at any time by providing the other Party with written notice of the change and the effective date of such change.

Section 2.2 Cooperation in Good Faith; Resolution of Disputes. The Parties shall communicate expeditiously and cooperate and negotiate in good faith with respect to all matters that must be agreed upon after the execution of this Agreement. If Developer disagrees with any decision by the Town Board, the Town Highway Superintendent, or the Engineer, including without limitation the extent or method of a proposed highway upgrade or repair, any cost imposed upon Developer, or an estimate of the amount of security to be held by the Town, and the Parties are unable to resolve their dispute through negotiation, Developer may make a written request to the Town Board appealing such decision and requesting a public hearing at which Developer shall have the right to appear and be heard. The Town Board shall hold such public hearing not fewer than five (5) days nor more than thirty (30) days after such request. The Town Board may reverse, modify, or affirm, wholly or partly, the decision appealed from and shall make such decision as in its opinion ought to have been made in the matter. The Town Board shall issue a determination on Developer's request within fifteen (15) days of the public hearing. In view of the Town's obligation

to provide its residents with safely and properly maintained highways, the Town Board's determination shall be final.

Section 2.3 Emergency Action by the Town. If the Town determines that in the interest of public health, safety or welfare that an emergency condition exists that has been caused by Developer or Developer Parties and that a repair to a Town highway must be made sooner than Developer is willing to agree to, the Town may make such repairs and invoice Developer for the costs incurred by the Town in connection with the repair, provided the Town has given Developer twenty-four (24) hours advance written notice of the Town's intent to make such repairs, or such advance written or oral notice as may be appropriate based upon the nature of the emergency. Developer shall pay such invoiced amounts for repairs undertaken by the Town within thirty (30) days following receipt of the invoice; provided, however, that if Developer disputes the invoice for such repairs, such dispute shall be resolved in accordance with the provisions of Section 2.2 hereof.

Section 2.4 Terms and Conditions of Repairs and Upgrades of Haul Routes. If the Engineer determines that any repairs or upgrades to segment of Haul Routes are necessary because of Project traffic, Developer shall have the option of making such repair or upgrade on its own subject to the terms set forth herein. Developer shall be permitted to undertake such work only if the Town Highway Superintendent determines that Developer, or a contractor hired by Developer, has the capability and experience to make the necessary repairs or upgrades. All work shall be performed pursuant to an addendum to this Agreement that shall specify the scope of work to be performed and which shall require Developer or its contractor to (i) complete the work in a timely fashion (ii) provide security for performance and/or payment in a form reasonably satisfactory to the Town and in amounts deemed sufficient by the Town, (iii) indemnify the Town against all liability stemming from the work, and (iv) provide the Town with satisfactory evidence of insurance as provided in Article V hereof. All repairs or upgrades shall be made in accordance with the specifications established by the Town Highway Superintendent and must be approved by the Town Highway Superintendent. In addition, Developer shall comply with all applicable laws and regulations, and all work performed on Town highways or Town property shall be subject to the prevailing wage requirements of New York Labor Law. Developer or its contractor shall obtain all governmental permits and approvals and obtain any private land rights that are necessary to make any required repairs or upgrades. If Developer does not wish to make such repairs or

upgrades, or is determined by the Town Highway Superintendent not to have the necessary capability to make such repairs or upgrades, then Developer shall agree in an addendum to this Agreement to pay the Town for the cost of such repairs or upgrades and shall post security in a form reasonably satisfactory to the Town and in amounts deemed sufficient by the Town. If Developer fails to timely complete or pay for any repairs required hereunder, such failure shall be deemed an Event of Default as set forth in Article VI hereof and the Town shall have such remedies as are set forth therein.

Section 2.5 Expiration of this Agreement. After the completion of the Project, and upon the Town Highway Superintendent's determination that all repairs or upgrades have been satisfactorily completed, this Agreement shall expire and Developer shall be released from all obligations herein except for those that expressly survive the expiration or termination of this Agreement.

ARTICLE III

COVENANTS OF PARTIES

The Parties' engineering responsibilities shall be carried out in accordance with generally accepted engineering practices, and construction responsibility shall be carried out in accordance with sound construction practices. The Parties shall require from their respective construction contractors and subcontractors no less a standard of engineering and construction practice. The Parties shall perform and complete all repairs, upgrades, modifications, and improvements hereunder in a good and workmanlike manner.

ARTICLE IV

INDEMNIFICATION; LIMITATION OF LIABILITY

Section 4.1 Indemnification.

(a) Except to the extent caused by the (i) gross negligence or (ii) illegal or willful misconduct of or by the Town or its officers, agents, employees or subcontractors, Developer agrees that it will defend, indemnify, and hold harmless the Town, its officers and employees, and its engineering consultant (the "Indemnified Parties") from and against any and all liability, actions, administrative proceedings, damages, claims, demands, judgments, losses, cost,

expenses and fees, including reasonable attorney's fees (collectively, "Losses"), resulting from (A) injury or death of persons or damage to property arising directly or indirectly from any acts, errors or omissions of Developer or its officers, agents, employees or subcontractors in connection with the Project, the use of Town highways, or the performance of any upgrades or repairs to Town highways or Town property; or (B) breach or default of this Agreement by Developer. In the event a claim, action, demand, suit or proceeding to which the Indemnified Parties are entitled to be indemnified hereunder is instituted by any third party, the Town shall promptly notify Developer in writing and provide Developer with a copy of the written documents presented by such third party.

(b) Developer will have the right to control the defense of any such actions or claims and will have the right to settle such actions or claims on such terms as Developer may deem reasonable so long as such defense and/or settlement (i) provides for the release or indemnification of the Indemnified Parties and (ii) does not create any financial or other obligation on the part of the Indemnified Parties that is not paid or reimbursed in full by Developer. The Indemnified Parties shall have the right to retain, at Developer's expense, separate legal counsel from Developer's legal counsel, subject to Developer's approval of such legal counsel, the scope of services contemplated to be provided by the Indemnified Parties' legal counsel, and the billing rates of and charged for services by the Indemnified Parties' legal counsel. If Developer is not named as a party in any action or proceeding instituted against an Indemnified Party, and Developer requests the right to intervene as a party, the Town hereby consents thereto.

(c) Without limiting the foregoing, Developer agrees to defend, indemnify, and hold harmless the Indemnified Parties for Losses in connection with any litigation commenced against the Indemnified Parties by reason of the Town's entering into this Agreement, including but not limited to any litigation commenced against the Town by any entity relating to the payments to be made by Developer to the Town hereunder. In the event a claim, action, demand, suit or proceeding is instituted against an Indemnified Party by any third party challenging the exercise of the Town's municipal powers or obligations in connection with the Project, pursuant to which such Indemnified Party is entitled to be indemnified hereunder, the Town shall promptly notify Developer in writing and provide Developer with a copy of such written documents presented by such third party, and the provisions of Section 4.1 (b) hereof shall apply.

Section 4.2 Limitation of Liability. The Developer waives all claims against the Town for any consequential, incidental, indirect, special, exemplary, or punitive damages (including, without limitation, loss of actual or anticipated profits, revenues, or product loss by reason of shutdown or non-operation; increased expense of operation, borrowing, or financing; loss of use or productivity; or increased cost of capital); and, regardless of whether any such claim arises out of breach of contract or warranty, tort, product liability, indemnity (including the indemnity set forth in this Article IV), contribution, strict liability, or other legal theory.

Section 4.3 Survival. The provisions of this Article IV shall survive the expiration or earlier termination of this Agreement and continue until the later of (i) the date that is six (6) months after the expiration of the applicable statute of limitations of any claim, action, demand, suit, or proceeding to which the Indemnified Parties are entitled to be indemnified hereunder or (ii) in the event that a claim, action, demand, suit, or proceeding is brought against an Indemnified Party, the date that a final judicial or administrative determination or settlement of such claim, action, demand, suit, or proceeding becomes binding on the parties thereto and is not subject to appeal.

ARTICLE V

INSURANCE

Section 5.1 Required Insurance. If Developer or Developer Parties perform any upgrades or repairs to Town highways or Town property, the party performing such work shall at all times while performing such work maintain in full force and effect such insurance as will protect Developer or Developer Parties from claims set forth below that arise out of or as a result of Developer's or Developer Parties' operations or completed operations and for which Developer or Developer Parties may be legally liable, whether such operations be by the Developer or Developer Parties or by a subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- (a) claims under worker's compensation, disability benefit, and other similar employee benefit acts that are applicable to the work to be performed;
- (b) claims for damages because of bodily injury or death of any person;
- (c) claims for damages insured by usual personal injury liability coverage;

(d) claims for damages because of injury to or destruction of tangible personal property, including loss of use therefrom;

(e) claims for bodily injury, death of a person, or property damage arising out of ownership, maintenance, or use of a motor vehicle;

(t) claims for bodily injury or property damage arising out of completed operations;

(g) claims involving contractual liability insurance applicable to Developer's indemnification obligations in this Agreement; and

(h) claims for remedial costs, bodily injury, and property damage arising out of the presence or discharge of pollutants, which in turn arises out of Developer's or Developer Parties' operations and completed operations hereunder.

Section 5.2 Specific Insurance Requirements. The insurance required in Section 5.1 hereof shall in all cases be purchased from an insurer authorized to do business in New York State and bearing A.M. Best financial strength ratings of "A-" ("Excellent") or better. The commercial liability coverage (including without limitation all commercial general liability, pollution legal liability, and automobile liability) (i) shall have limits of not less than \$2 million per occurrence and in the aggregate; (ii) shall name the Town as additional insured, on a primary and non-contributing basis for claims arising in whole or in part from the Developer's or Developer Parties' operations and completed operations, whether or not the Town is itself actually or allegedly negligent and whether or not any such claim involves bodily injury to the employee of any other insured or additional insured under said policy; (iii) shall provide for the severability of interest; and (iv) shall state that the Town is entitled to recover for acts and omissions of Developer or Developer Parties even though the Town is named as an additional insured. Certificates of insurance acceptable to the Town, with all applicable additional insured endorsements attached, shall be filed with the Town prior to commencement of any work and thereafter upon renewal or replacement of each required policy of insurance. These certificates and the insurance policies required by this Article V shall contain a provision that coverages afforded under the policies will not be materially changed, canceled, or allowed to expire until at least 30 days' prior written notice has been given to the Town. In addition, if any insurance required hereunder is cancelled by the insurer, Developer hereby agrees to send Town a copy of the cancellation notice within two (2) business days of receipt. Upon reasonable notice, the Town shall have the right to examine any

policy of insurance required to be maintained hereunder. If Developer or Developer Parties should fail to purchase or maintain any of the insurance required under this Article V, the Town shall be entitled to recover all damages arising from such failure, in addition to all other rights and remedies, even if the Town has itself obtained insurance to cover the same risks.

ARTICLE VI

DEFAULT AND REMEDIES

Section 6.1 Events of Default. The occurrence and continuance beyond any applicable cure or grace period of any one or more of the following shall constitute an "Event of Default" hereunder:

(a) Developer shall fail to make any payment due under the terms of this Agreement and such failure shall continue for a period of fifteen (15) days beyond the due date; provided, however, that if Developer timely disputes any amounts due, such payment shall be deemed due as of thirty (30) days after the date that such dispute is finally resolved by (i) agreement of the Parties, (ii) a final determination by the Town Board in accordance with Section 2.2 hereof, or (iii) a final and binding determination by a court having jurisdiction; or

(b) Developer shall fail to increase the amount of, or replace, any security for the benefit of the Town, whether provided under the terms of any security agreement or otherwise, and such failure shall continue for a period of ten (10) days following written notice by the Town of such failure; or

(c) Developer fails to properly perform or complete any upgrade or repair it or Developer Parties have agreed to complete and such failure shall continue for fifteen (15) days following written notice by the Town of such failure. Anything to the contrary notwithstanding, the time for cure of (i) any Event of Default may be extended by written agreement of the Parties, and (ii) any non-monetary Event of Default shall be extended for a reasonable period so long as Developer has commenced efforts to cure within such the applicable cure period and pursued such efforts with due diligence.

Section 6.2 Town Remedies. If an Event of Default has occurred, upon notice and the expiration of any applicable cure or grace period provided in Section 6.1 hereof:

(a) with respect to any monetary Event of Default, the Town may draw upon any security provided therefor and any late payments shall accrue interest at the greater of 1.5% per month or the highest rate permitted by law; or

(b) with respect to any Event of Default involving the failure of Developer or Developer Parties to carry out any work, the Town may at its discretion either (i) draw or call upon any security for the completion of such work, or (ii) collect or complete such work on its own or through contractors hired by the Town and charge Developer for all costs and expenses in connection therewith; or

(c) the Town may commence an action at law or in equity seeking such remedy or relief as it deems appropriate or expedient; or

(d) the Town may issue a stop-work order or impose any penalties or fines available under applicable law.

No remedy conferred upon or reserved to the Town under this Agreement is intended to be exclusive of any other remedy under this Agreement or by law provided, but each shall be cumulative and shall be in addition to every other remedy given under this Agreement now or hereafter existing at law or in equity or by statute. No delay or omission of the Town to exercise any right or power accruing upon any Event of Default shall impair any right or power or shall be construed to be a waiver of any Event of Default or any acquiescence therein, and every power and remedy given to the Town under this Agreement may be exercised from time to time as often as may be deemed expedient by the Town.

Section 6.3 Attorney's Fees. In the event that the Town employs attorneys or incurs other expenses to enforce the terms of this Agreement, correct an Event of Default hereunder, or collect against any security posted by Developer, to the extent permitted by law. Developer shall pay all costs of the Town in obtaining any payments due from Developer, in performing any work required by Developer, or in collecting against such security, including reasonable attorneys' fees and expenses.

ARTICLE VII

FORCE MAJEURE EVENT

Section 7.1 Force Majeure Event Defined. A "Force Majeure Event" shall mean acts of God; strikes, lockouts, or other industrial disturbances; acts of a public enemy; war; terrorism;

insurrections; riots; civil disturbances; epidemics; fires; natural disasters of all kinds; floods; washouts; droughts or other weather-related events; arrest; restraining of government and people; explosions; partial or entire failure of utilities; shortages of labor, material, supplies or transportation; or any other similar or different cause not reasonably within the control of the Developer or Developer Parties.

Section 7.2 Applicability of Force Majeure Event. Developer will not be in breach or liable for any delay or failure in its performance under this Agreement to the extent such performance is prevented or delayed due to a Force Majeure Event, provided that:

(a) Developer gives the Town written notice within forty-eight (48) hours of the commencement of the Force Majeure Event, with details to be supplied within seven (7) calendar days after the commencement of the Force Majeure Event further describing the particulars of the occurrence of the Force Majeure Event;

(b) the delay in performance will be of no greater scope and of no longer duration than is directly caused by the Force Majeure Event;

(c) Developer proceeds with commercially reasonable efforts to overcome the events or circumstances preventing or delaying performance and provides a written report to the Town during the period that performance is delayed or prevented describing actions taken and to be taken to remedy the consequences of the Force Majeure Event, the schedule for such actions, and the expected date by which performance will no longer be affected by the Force Majeure Event; and

(d) when the performance of Developer is no longer being delayed or prevented, Developer gives to the Town written notice to that effect.

ARTICLE VIII

REPRESENTATIONS AND WARRANTIES

Section 8.1 Town Representations and Warranties.

(a) Existence and Good Standing. The Town validly exists as a political subdivision in good standing under the laws of the State of New York.

(b) Approval and Authorization. The Town has full power and authority to enter into this Agreement and to fully perform all of its duties and obligations hereunder. The

Town has duly authorized the execution and delivery of this Agreement and the Towns performance of all of its duties and obligations contained herein, and, to the extent permitted by applicable law, this Agreement constitutes a valid and legally binding obligation of the Town, enforceable in accordance with its terms.

(c) All Statements True. No statement, information, representation, or warranty of the Town contained in this Agreement or furnished by or on behalf of the Town in connection with the transactions contemplated herein contains any untrue statements of a material fact or omits to state a material fact necessary in order to make a statement contained herein not misleading.

Section 8.2 Developer Representations and Warranties.

(a) Existence and Good Standing. Developer is a _____ established and in good standing under the laws of the State of _____.

(b) Approval and Authorization. Developer has full power and authority to enter into this Agreement and to fully perform all of its duties and obligations hereunder. Developer is duly authorized to execute and deliver this Agreement and perform all of its duties and obligations contained herein, and, to the extent permitted by applicable law, this Agreement constitutes a valid and legally binding obligation of Developer, enforceable in accordance with its terms.

(c) All Statements True. No statement, information, representation, or warranty of Developer contained in this Agreement or furnished by or on behalf of Developer in connection with the transactions contemplated herein contains any untrue statements of a material fact or omits to state a material fact necessary in order to make a statement contained herein not misleading.

ARTICLE IX

MISCELLANEOUS PROVISIONS

Section 9.1 Governing Law. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of New York, without giving effect to the principles of conflict of laws thereof.

Section 9.2 Entire Agreement and Amendments. All Appendices attached to this Agreement are incorporated into and form a part of this Agreement. This Agreement (including all Appendices and the referenced Program Manual) shall constitute the complete and entire agreement between the Parties and supersedes all prior and contemporaneous agreements and

understandings, oral or written, with respect to the subject matter hereof. This Agreement may be amended only by a written agreement signed by all of the Parties.

Section 9.3 Binding Effect. This Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and assigns.

Section 9.4 Notices. All notices, requests, demands, and other communication hereunder shall be in writing and shall be deemed to have been duly given as of (a) the date delivered by hand or fax (with appropriate acknowledgement of receipt); (b) three (3) business days after having been mailed by certified mail, postage prepaid, return receipt requested; or (c) the next business day after having been sent for delivery on the next business day, shipping prepaid, by a nationally recognized overnight courier, in each case to the receiving Party at the address set forth below or at such other address as any Party may specify by written notice to the other party sent in the manner set forth herein.

(a) If to Developer:

Tel.:

Fax:

With a copy to:

Tel.:

Fax:

(b) If to the Town:

Attn: Supervisor

Tel.:

Fax:

With a copy to:
[Town Attorney]

Tel.:

Fax:

Section 9.5 Exercise of Rights and Waiver. The failure of any Party to exercise any right under this Agreement, or to insist upon the strict performance of any term or condition thereof, shall not be construed to be a waiver or relinquishment thereof either at the time of such Party's failure to insist upon strict performance or any time in the future, and such terms and conditions shall remain in full force and effect.

Section 9.6 Independent Contractor; Relation of the Parties. The status of Developer under this Agreement shall be that of an independent contractor and not that of an agent. In accordance with such status, Developer and its officers, agents, employees, representatives, and servants shall at all times during the term of this Agreement conduct themselves in a manner consistent with such status and by reason of this Agreement shall neither hold themselves out as, nor claim to be acting in the capacity of, officers, employees, agents, representatives, or servants of the Town. As an independent contractor, Developer shall accept full responsibility for providing to its employees all statutory coverage for worker's compensation, unemployment, disability or other coverage required by law.

Section 9.7 Severability. In the event that any clause, provision or remedy in this Agreement shall, for any reason, be adjudged invalid or unenforceable by any court of competent jurisdiction, the remaining clauses and provisions shall not be affected, impaired, or invalidated and shall remain in full force and effect.

Section 9.8 Headings and Construction. The Article and Section headings in this Agreement are inserted for convenience of reference only and shall in no way effect, modify, define, limit, or be used in construing the text of the Agreement. Where the context requires, all singular words in the Agreement shall be construed to include their plural and all words of neuter gender shall be construed to include the masculine and feminine forms of such words. Notwithstanding the fact that this Agreement has been prepared by one of the Parties, all of the Parties confirm that they and their respective counsel have reviewed, negotiated, and adopted this Agreement as the joint agreement and understanding of the Parties. This Agreement is to be construed as a whole and any presumption that ambiguities are to be resolved against the primary drafting party shall not apply.

Section 9.9 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same Agreement.

Section 9.10 No Third Party Beneficiary. No provisions of this Agreement shall in any way inure to the benefit of any person or third party so as to constitute any such person or third party as a third-party beneficiary under this Agreement, or of any one or more of the terms of this Agreement or otherwise give rise to any cause of action in any person not a Party hereto.

Section 9.11 Ownership of Subject Matter of Agreement. Notwithstanding anything to the contrary contained herein, this Agreement does not create nor vest in Developer any easement or any ownership rights of any nature whatsoever in the Town's real property or public right-of-ways.

Section 9.12 Consents to be Reasonable. Any consent, permission, certification, judgment, satisfaction, determination, or approvals required from any Party or any Party's consultant or inspector under this Agreement shall not be unreasonably withheld, conditioned, or delayed, except as may be specifically provided otherwise in this Agreement.

Section 9.13 Safety. Developer and the Developer Parties shall perform the work hereunder in a safe manner and shall obey all safety requirements that may be established from time to time, and shall comply with all State and federal safety regulations applicable to the work being done. While work is being done on any of the public roads in the Town by or on behalf of Developer, Developer shall establish work zones with appropriate signage, warning the traveling public of the existence of the construction zone and providing adequate traffic control as to assure safe passage through said construction zone. Developer also agrees to provide traffic control on the Haul Routes when such highways are blocked during their use by Developer or the Developer Parties under this Agreement. All traffic control plans to be used on Town highways shall be approved by the Town Highway Superintendent.

Section 9.14 Excess Material. Developer and the Developer Parties agree that in connection with any upgrades or repairs to be made hereunder, there may be certain materials removed that are no longer necessary (the "Excess Materials"). Developer agrees to remove such materials and stockpile them for use by the Town if requested by the Town Highway Superintendent. The Town Highway Superintendent shall designate the place on Town property on which the Excess Materials will be stored.

Section 9.15 Rights of Termination. Developer may terminate this agreement upon thirty (30) days notice to the Town if and only if: (a) Developer has fully completed the Project and (b) all obligations of Developer under this Agreement as of the date of such termination have been satisfactorily met.

Section 9.16 Transfer of Project.

(a) Except as provided in subsections 9.16(b), 9.16(c) and 9.16(d) below, no Party may assign, transfer, or encumber this Agreement or any or all of its rights, interests, or obligations under this Agreement without the prior written approval of the other Party.

(b) In the event that Developer proposes to sell, lease, assign, or otherwise transfer ownership to a third party (collectively, "Transferee") of the Project and this Agreement, no approval by the Town is required, provided:

(i) Developer shall be in compliance with all material terms of this Agreement, and no Event of Default shall have occurred and be continuing;

(ii) Developer shall notify the Town in writing, at least thirty (30) days prior to any sale, lease, assignment, or transfer, confirm to the Town in writing that the transferee has notice of, and acknowledges, this Agreement and the duties and obligations of Developer hereunder;

(iii) The Transferee shall agree in writing to abide by the terms of this Agreement and any other agreement between the Parties; and

(iv) The Transferee shall have placed funds in escrow with the Town as required under this Agreement.

(c) In the event of any such sale, lease, assignment, or transfer (collectively, "Assignment") of all of Developer's rights interest and obligations under this Agreement to a Transferee in accordance with subsection 9.16(b) hereof, Developer shall be released of all of its obligations hereunder from and after the effective date of any such Assignment.

(d) Developer may, without approval of the Town, pledge, mortgage, grant a security interest in, or otherwise collaterally assign this Agreement or any or all of its rights, interests and obligations under this Agreement to any party providing financing for the Project as security for Developer under the financing agreements (including a trustee or agent for the benefit of any financing parties) (a "Permitted Collateral Assignee"), provided that such pledge, mortgage, grant of a security interest, or other collateral assignment does not materially diminish or impair

the Town's rights pursuant to this Agreement and provided that Developer give five (5) days written notice to the Town. In connection with any such collateral assignment to a Permitted Collateral Assignee, the Town shall cooperate with Developer and the Permitted Collateral Assignee to execute and deliver a consent agreement or estoppel certificate as reasonably requested by Developer or the Permitted Collateral Assignee.

(e) Developer shall reimburse the Town for its reasonable costs incurred, including reasonable attorney's fees, in connection with the Town's review of any Assignment and the preparation, review, and negotiation of any related documents.

Section 9.17 Jurisdiction and Venue. Each Party hereby irrevocably consents that any legal action or proceeding against it, under, arising out of, or in any manner relating to this Agreement or any other agreement, document, or instrument arising out of or executed in connection with this Agreement shall be brought only in a state or federal court of competent jurisdiction in the State of New York and County of Chenango under the laws of New York State. Each Party, by the execution and delivery of this Agreement, expressly and irrevocably consents and submits to the personal jurisdiction of any such courts in any such action or proceeding. Each party expressly and irrevocably waives any claim or defense in any action or proceeding based on any alleged lack of personal jurisdiction, improper venue, forum non conveniens, or any similar basis.

Section 9.18 Applicability of Road Use and Preservation Law. Except as expressly set forth herein, no provision of this Agreement is intended or shall be construed to define or limit the applicability or enforceability of the Road Use and Preservation Law with respect to the Project or the Developer.

IN WITNESS WHEREOF, the Parties have caused their authorized representatives to execute this Agreement as of the date above written.

TOWN

By: _____
Name:
Title: Supervisor

DEVELOPER

By: _____
Name:
Title:

APPENDIX A

Haul Routes