

MITIGATING RISK - TREADMARK

James G. Keefe
Co-founder & Principal

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insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

~~§ 11.3.6 Intentionally Deleted.~~

§ 11.3.7 WAIVERS OF SUBROGATION

The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged. Notwithstanding anything to the contrary herein contained, in the event that either Owner or Contractor ("First Party") incurs a loss by fire or other casualty, which fire or other casualty shall have been caused in whole or in part by the negligence or acts or omissions of the other party or the other party's agents, contractors, employees or servants, then, to the extent that the First Party is compensated by the Builder's Risk Insurance Coverage or any other property insurance of the First Party applicable to the Project, then the First Party (for itself and its successors and assigns) hereby waives and releases any claim that it might have against the other party and no party shall have any rights against either Owner or Contractor by reason of any fire or casualty damage, either by subrogation or assignment.

§ 11.3.8 A loss insured under the Owner's property insurance shall be adjusted by the Owner and made payable to the Owner, subject to requirements of any applicable mortgagee clause. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

cause its employees and the employees of any subcontractor to comply with the Owner's rules and regulations for the property where the Work is being performed provided the Owner has advised the Contractor of such rules and regulations.

§ 3.5 WARRANTY

§ 3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements shall be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 3.5.2 Contractor will assign to Owner or Owner's representative manufacturers', suppliers' and subcontractors' warranties on materials, equipment and fixtures and labor incorporated in the Work required by the Contract Documents or that it otherwise obtains. Contractor's delivery to Owner of all warranty-guarantees required by the Specifications is required as prerequisite to the final payment.

§ 3.5.3 Contractor shall not waive or take any action to prejudice or void any warranties as to materials or component parts used in the Work or as to any Subcontractor's Work.

§ 3.5.4 In addition to and without limiting the foregoing stipulations, the Contractor shall comply with all other warranties referred to in any portions of the Contract Documents or otherwise provided by law or in equity, and where warranties overlap, the requirement more favorable to Owner shall govern.

§ 3.5.5 The Contractor shall warrant its work and provide sixteen (16) hour call back service for mechanical equipment and materials and forty-eight (48) hours for all other equipment and materials provided by him for a period of a minimum of one (1) year after final completion and acceptance of the Work. Equipment or building systems/components may be warranted for a period in excess of one (1) year by the manufacturer, as provided by the plans and specifications. Heating equipment shall be warranted for one year after Final Completion and Owner acceptance.

3.3 Borrower Loan in Balance.

3.3.1 The Borrower Loan is "in balance" whenever the amount of the undisbursed Loan Proceeds plus any Other Borrower Moneys as shown in the Cost Breakdown most recently approved by Funding Lender, are sufficient in the reasonable judgment of Funding Lender to pay, through completion of the Project, all of the following sums: (i) all remaining costs of construction, rehabilitation, marketing, ownership, maintenance and leasing of the Project; and (ii) all remaining interest and all other remaining sums which may accrue or be payable under the Borrower Loan Documents or the Related Documents. Notwithstanding the foregoing, if, at any time, Funding Lender determines, in Funding Lender's reasonable discretion, that it is unlikely that Borrower will receive all or a portion of the Other Borrower Moneys, Funding Lender can exclude such amount from its determination of whether the Borrower Loan is "in balance." Funding Lender may not exclude from such calculation Loan Proceeds which are otherwise properly payable under the Cost Breakdown. The Borrower Loan is "out of balance" if and when Funding Lender in its reasonable judgment determines that there are insufficient funds (including all undisbursed Loan Proceeds and any Other Borrower Moneys provided or to be provided by Borrower) to pay for all such remaining costs and sums payable under the Borrower Loan Documents and Related Documents.

3.3.2 Borrower acknowledges that the Borrower Loan may become "out of balance" in numerous ways, not all of which may now be foreseen. Borrower further acknowledges that the Borrower Loan may become "out of balance" from a shortage of funds in any single line item or category of the Cost Breakdown, even if there are undisbursed Loan Proceeds or Other Borrower Moneys in other line items or categories. Undisbursed Loan Proceeds or Other Borrower Moneys in one category or line item (e.g., site work costs) may not be applied to another category or line item unless either (i) the Cost Breakdown (as most recently approved by Funding Lender) allows such use (and only to the extent specifically allowed), (ii) the Construction Consultant has determined that the work related to the line item or category for which there are undisbursed funds has been satisfactorily completed with all applicable lien releases having been obtained, (iii) Funding Lender consents in writing to such use in each instance, or (iv) reallocation of such funds is permitted under this Agreement.

(B) “Late Delivery Adjustment” shall equal for calendar years 2017 and 2018 the product of:

- (1) ~~the amount~~, if any, by which \$370,561 and \$1,044,082, respectively, exceeds Actual Credits for such years; and
- (2) \$0

(C) “Upward Capital Adjustment” shall equal the product of:

- (1) Certified Credits for the Credit Period (excluding any Tax Credits resulting from an increase in qualified basis under Code Section 42(f)(3)), minus \$10,445,082; and
- (2) \$1.0825.

(D) “Early Delivery Adjustment” shall equal for calendar year 2017, the product of:

- (1) the amount, if any, by which Actual Credits for such year exceeds \$370,561; and
- (2) \$0.45.

(ii) Downward/Upward Capital Adjustment Calculation. Following determination of Certified Credits for the Credit Period, the Accountants shall calculate the Downward Capital Adjustment or Upward Capital Adjustment.

(iii) Late/Early Delivery Adjustment Calculation. Following the initial lease-up of the Project, the Accountants shall calculate the Late Delivery Adjustment or Early Delivery Adjustment. When calculating the Late/Early Delivery Adjustment pursuant to Section 5.01(g)(i), if there is also a Downward / Upward Capital Adjustment, then \$370,561 shall be adjusted by the same percentage by which the Certified Credits for the Credit Period vary from the Projected Credits for the Credit Period.

If any building in the Project does not achieve Qualified Occupancy by the first year of the Credit Period for such building and therefore the Tax Credits are allocated over 15 years, then the Late Delivery Adjustment shall be the sum of (1) the amount determined under Section 5.01(g)(i)(B) above, and (2) the amount, if any, that the

§ 3.5 "Final Completion" of the Work shall be deemed to have been achieved on the latest to occur of (x) the date upon which a permanent, unconditional Certificate of Occupancy shall have been issued for the Project, (y) the date upon which all punch-list items shall have been completed, and (z) the date upon which Contractor has delivered to Owner the documents listed in Section 9.10.2 of the General Conditions.

§ 3.6 LIQUIDATED DAMAGES

Contractor agrees that Contractor shall pay to Owner liquidated damages in the amount of \$50.00 per unit for each day that Substantial Completion is delayed by more than thirty (30) days beyond the date for Substantial Completion set forth in Section 3.3. The Owner may deduct liquidated damages described herein from any unpaid amounts then or thereafter due the Contractor under this Agreement. Any liquidated damages not so deducted from any unpaid amounts due the Contractor shall be payable to the Owner, at the demand of the Owner, together with interest from the date of the demand at a rate equal to the lower of (i) the prime rate of interest as published in *The Wall Street Journal*, plus two percent (2%) per annum, or (ii) the highest lawful rate of interest payable by the Contractor. The parties acknowledge that: (i) it would be impossible or impracticable to fix the actual damages suffered by Owner as a result of a delay in Substantial Completion; (ii) the amount of the liquidated damages represents a fair and reasonable compensation to Owner for such delays; and (iii) the liquidated damages set forth in this Section 3.6 do not constitute a penalty.

§ 3.7 Contractor acknowledges that the Project is being undertaken simultaneously with work being undertaken under an agreement between Trinity Ashmont Two Homeownership Limited Partnership and Contractor of even date herewith for construction of Upper Level of the Ashmont Two Redevelopment, Unit 2 of the Ashmont Two Primary Condominium, the performance of which is expressly dependent upon the Work being undertaken under this Contract, and agrees to work cooperatively with the work being undertaken under such other agreement. It is expressly understood and agreed that a default under such other agreement shall constitute a default under this Contract, as to which the parties shall have all rights and remedies set forth herein.

ARTICLE 4 CONTRACT SUM

§ 4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum shall be Nineteen Million Four Hundred Forty-One Thousand Eight Hundred Eighty-Six and 00/100 Dollars (\$ 19,441,886.00), subject to additions and deductions as provided in the Contract Documents.



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