

**PINECREST DEVELOPMENT AGREEMENT**

This Development Agreement (“*Agreement*”) is entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2014, between Orange Village, a chartered municipal corporation (the “*Village*”), 4600 Lander Road, Orange Village, Ohio 44022, and Lewanski Development, LLC, an Ohio limited liability company (“*Developer*”), 159 Crocker Park Blvd., Suite #400, Westlake, Ohio 44145.

RECITALS

WHEREAS, Developer desires to develop real property in the Village described in the attached **Exhibit A** (the “*Property*”) for a commercial and residential mixed-use development commonly referred to as Pinecrest (the “*Project*”); and

WHEREAS, the Village owns real property (the “*Village Property*”), as same is identified and described on **Exhibit B**, which Developer desires to use for the Project; and

WHEREAS, the Project may require the use of some or all of the Village Property for stormwater detention or retention purposes; and

WHEREAS, the Project may require the vacation of certain streets; and

WHEREAS, in conjunction with the Project, Developer submitted a preliminary development plan for the Project to the Village, which such plan was approved by the Village on July 3, 2013 (as so approved being the “*PDP*”);

WHEREAS, in conjunction with the Project, on May 1, 2013, Developer submitted to the Village an application (the “*Application*”) to rezone portions of the Property consisting of certain parcels of real property that front on Pinecrest Drive, Walnut Hills Avenue, Orange Place, and Harvard Road; and

WHEREAS, the Village amended the Application to include the entirety of the Property; and

WHEREAS, on July 31, 2013, the Village enacted Ordinance No. 2013-11, entitled “An Ordinance Enacting the Pinecrest Planned Development District (PPDD) Regulations and Rezoning Certain Parcels of Land From Class U-1 to PPDD, Amending the Village Zoning Map and Map Designations, Submitting the Proposed District and Zoning Change to the Voters of Orange Village and Declaring an Emergency,” which, subject to approval by both (i) a majority of the electors of the Village and (ii) a majority of the electors of the precinct in which the Property is located voting thereon (collectively, “*Voter Approval*”), enacted Chapter 1175, Pinecrest Planned Development District, as attached hereto as **Exhibit G** (the “*PPDD Regulations*”), and provided for the amendment of the Village’s Zoning Map; and

WHEREAS, Voter Approval has been obtained; and

WHEREAS, Developer has represented and agrees, and the Village support for the Project is predicated on the understanding that, the Project will comply with the terms and provision of this Agreement and the PDP, and further that:

A. The Project will be of the highest quality reasonably feasible when compared to other similar sized and larger retail developments in the northeast Ohio region, as provided in the PPDD Regulations and as further provided herein, including, without limitation, such factors as:

1. Existence of a distinctive character through features and attributes resulting in an aesthetic, functional, sustainable, economically beneficial and socially significant project;
2. The Project's design as reflected in the PDP, which describes the building architectural design and materials; site development defining landscaping and "street furniture;" signs; public spaces, and supplemental project amenities such as open space, plaza, pedestrian ways and the arrangement of parking fields into zones and areas to reduce the visual impact of cars;
3. Development standards demonstrating a high quality design through the use of building elements providing an articulate architectural vocabulary using materials, details and forms to provide a scale and relationship for a varied and refined pedestrian experience;
4. A tenant quality level and mix that Developer will use good faith efforts to achieve by seeking to lease to retailers found in "upscale" or "high end" lifestyle centers by actively marketing its lease to such retailers and with tenant improvements and finishes including fully finished interiors with carpeted, wood, special treated or ceramic flooring; interior wall finish treatments and surfaces; varied ceilings with multiple levels, merchandise displays and fixtures found in upscale establishments; segregated fitting rooms; ambient and accent lighting consistent with refined retail design, and by limiting or excluding retailers found in typical, open-air, strip shopping centers that may include but are not limited to: value retailers, bargain stores, discounters, mass merchandisers, consignment retailers (except such retailers primarily selling art and/or jewelry), or Outlet Stores as defined in the PPDD Regulations;
5. The quality of the tenant mix which will be derived from seeking a unique aggregation of retailers, shops, businesses, restaurants and establishments currently not in the Northeast Ohio market to satisfy the unmet demand

represented by Developer in the report prepared by Goodman and Company, dated February 20, 2013.

B. Developer believes that sufficient market potential exists in the region to attract retailers to the Project that are not currently in Northeast Ohio; and

WHEREAS, the Village desires to protect the values of neighboring properties; and

WHEREAS, the parties desire to enter into this Agreement to set forth certain of the respective rights, agreements, and obligations of the parties as more specifically provided herein.

NOW, THEREFORE, in consideration of the mutual benefits derived by the parties and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

## **I. INCORPORATION OF RECITALS**

The recitals and “Whereas” clauses set forth above are fully incorporated in this Agreement and specifically made a part hereof, as if fully restated here and same are deemed to be fully effective and a reflection of the agreements and understandings of the parties.

## **II. ADDITIONAL RESTRICTIONS ON PROJECT**

- A. In addition to the use regulations contained in Section 1175.05 of the PPDD Regulations, Developer agrees that until the fifth (5<sup>th</sup>) anniversary of the date upon which at least seventy-five (75%) percent of the aggregate leasable first floor area of all of the PD-1, PD-2, PD-3 and PD-4 Sub-Districts (collectively the “*First Floor Area*”), are leased and occupied (the “*Significant Initial Occupancy Date*”), no less than sixty-five (65%) percent of the total First Floor Area will be leased and occupied by business establishments that do not have an existing business location within a driving distance of 20-miles from the Property.
- B. The owner of that portion of the Property designated as the PD-6 Sub-District (the “*PD-6 Property*”), shall at all times own a majority of the aggregate acreage of real property comprising the PD-1, PD-2, PD-3, and PD-4 Sub-Districts, collectively. Developer shall cause such owner of the PD-6 Property to sign a Declaration of Restrictions substantially in the form attached as **Exhibit C** (the “*Declaration*”) (provided that, absent an amendment in accordance with the terms of the Declaration, the form of the Declaration shall not be altered to diminish the obligations of the Declarant thereunder or to reduce the rights of the those who under its terms have the right to enforce it, including, without limitation, the “*Owners*” as that term is defined in the Declaration) and to file such Declaration

with the Cuyahoga County Recorder before any construction activities on the Property in conjunction with the Project occurs, which Declaration shall have priority over any and all mortgages or other monetary encumbrances on the Property. The PD-6 Property shall at all times have only one owner.

- C. Developer shall cause sound barriers to be installed for all HVAC, outdoor refrigeration systems, trash compactors and other similar or related improvements located in Sub-District PD-1 and the Project shall be designed and constructed so that upon occupancy of any portion of the Project, the ambient (i.e., background) noise level on Waterford Court measured using the “A-weighted” decibel scale shall not increase in a manner perceptible by the average human ear as determined by a sound professional comparing sound studies that document the pre- and post-construction sound levels using a variety of sound level descriptors.
  
- D. Developer shall cause each restaurant and other commercial occupant that generates persistent odors in Sub-District PD-1 to install and operate odor abatement system equipment and shall require each commercial tenant in any other Sub-District to install such equipment as is reasonably necessary so that such tenant’s use of its premises will not cause persistent odors that are detectible to the residents of Waterford Court (collectively, the “*Waterford Residents*” and individually, a “*Waterford Resident*”).
  
- E. As a condition to the issuance of any permits for construction of any site improvements, grading, paving, lighting, below ground utilities or landscape improvements in Sub-Districts PD-1 through PD-5 (the “*Project Site Improvements*”), the Project civil engineer shall certify to a reasonable degree of engineering certainty to the Village that, after completion of construction and as designed and approved by all applicable governmental entities: (1) the proposed buildings and roof-top mechanical units in Sub-Districts PD-1 through PD-5 (the “*Project Building Improvements*”) and Project Site Improvements (collectively, the “*Project Improvements*”) will not be able to be seen by persons standing on the first or second floor of a dwelling on Waterford Court; (2) the Project Site Improvements after being constructed, will not cause the ambient (i.e., background) noise level on Waterford Court as measured using the “A-weighted” decibel scale, to increase in a manner perceptible by the average human ear as determined by a sound professional comparing sound studies that document the pre- and post-construction sound levels using a variety of sound level descriptors;

and (3) the Project Site Improvements will not cause persistent odors that are detectible to the Waterford Residents.

- F. Promptly following its delivery to the Village, Developer shall deliver to the Waterford Residents a copy of the certification required under Section 1175.07(c) of the PPDD Regulations.

### III. IMPROVEMENTS, SECURITY, AND MAINTENANCE

#### A. REQUIRED IMPROVEMENTS AND EASEMENTS

- 1. **Public Improvements.** The parties agree that certain improvements to public streets and to other public lands that are or may be related to the Project's development will be made prior to or concurrently with construction of the Project, as follows:
  - a. **Traffic Improvements.** Developer, at its cost, shall install or construct all traffic signals, control devices, signs, road improvements, traffic regulating flow facilities, and lane markings for public streets listed, and according to, the schedule in **Exhibit D** (the "***Traffic Improvements***"). Furthermore, Developer acknowledges and agrees that all such traffic signals, control devices and signage shall be consistent with the Village's existing sign schematic and style and shall otherwise be reasonably acceptable to the Village. Developer shall submit all engineering plans for Traffic Improvements to the Village for the Village's approval, which approval shall not be unreasonably withheld, conditioned, or delayed. Developer shall perform all work required under this Section in a good and workmanlike manner, using qualified labor and quality materials. Developer shall coordinate and schedule all such work with the Village. The Village may inspect such work to assure conformance to the Village's standards. After approval and acceptance by the Village of Traffic Improvements to standards approved by the Village, the appropriate governmental entity shall be responsible for maintaining the Traffic Improvements. In addition, eighteen (18) months after the Significant Initial Occupancy Date, Developer

shall, at Developer's expense, engage TMS Engineers, Inc. or another experienced traffic engineer selected by Developer and reasonably acceptable to the Village, to conduct a traffic impact study to determine whether additional public traffic improvements are necessary as a result of any underestimation of traffic needs and impact during the Project planning stages and shall, at Developer's expense, implement such traffic improvements, subject to the Village's reasonable discretion and approval. The foregoing described Traffic Improvements specifically do not include and the Village shall have no obligation or liability to maintain, any private roadways or other improvements constructed within the Project and deemed or designated as non-public roadways and areas, as may be otherwise and approved by the Village in the Final Development Plan.

- b. **Safety Force Mini-Station.** In Phase 1 of the Project (as that phase is shown in the Phasing Plan included with the PDP, as such PDP may be amended and being referred to herein as "***Phase I***"), Developer shall construct, at its cost and for the Village's permanent use, a facility for police and fire services necessary to service the Project and the immediate surrounding area, such facility to have a floor area of no less than 2,800 SF and no greater than 3,000 SF, including vehicle bays and offices (the "***Mini-Station***"), which Mini-Station shall be in the location and of a design included in the Final Development Plan approved for Phase 1 in accordance with Section 1175.03(d) of the PPDD Regulations. In all events such Mini-Station shall be completed and ready for occupancy no later than the date upon which at least ten (10%) percent of the First Floor Area is occupied. The Mini-Station will be constructed to provide a heated and air conditioned space, with lighting and toilets, and entry doors pursuant to applicable code requirements. In addition, the Mini-Station shall include and provide for, overhead doors, fire protection systems and exhaust, as well as painted interiors, vinyl tile flooring and finished ceilings. Interior space for emergency vehicles, an officer workroom and adequate storage space shall also comprise a portion of the Mini-Station.
- c. **Access Easement.** Pursuant to an easement agreement, mutually acceptable to the Village and Developer, Developer shall grant access easements to the Village to assure perpetual safe and

convenient access to the Project for the public and emergency vehicles, via the main access drives within the Project, at the locations shown in **Exhibit E**.

- d. **Public Roadway and Stormwater Management.** In order to afford safe and convenient access to the Project for the public and for emergency vehicles, subject to the provision in subparagraph III.A.1.d.iii below, the Village shall establish a public roadway on an area of the Village Property at the approximate location shown in **Exhibit E**, which public roadway shall require construction of stormwater management facilities on another area of the Village Property. Developer shall construct and maintain such public roadway and stormwater management facilities, and other improvements on the Village Property, pursuant to Village standards, and otherwise as follows:
- i. The Village and Developer shall, by no later than \_\_\_\_\_, enter into an easement agreement substantially in the form attached as **Exhibit F** (the “*Easement*”) requiring Developer, at its cost, to install and construct upon the Village Property such public roadway and storm water management facilities, together with related and reasonably necessary traffic signals, control devices, signage, and landscaping thereon (the “*Public Improvements*”).
  - ii. Upon, and as a condition of execution of the Easement, the Village shall provide Developer with a policy of title insurance (the “*Title Policy*”) insuring that the Village is the true and lawful owner of the Village Property, and is well seized of the same in fee simple, and has good right and full power to convey the easement set forth in the Easement and that no third parties have any interest in the Village Property that would prevent or interfere with Developer’s construction or maintenance of the Public Improvements, or the use of the Village Property for the Public Improvements.
  - iii. Developer shall submit all engineering plans for the Public Improvements to the Village for its approval, which approval shall not be unreasonably withheld, conditioned, or delayed. Developer shall perform all work on the Village Property in a good and workmanlike manner, using qualified labor and quality materials. Developer shall coordinate and schedule all

such work with the Village. The Village shall inspect such work to assure conformance to the Village's standards. After approval and acceptance by the Village of the Public Improvements to standards approved by the Village, Developer shall be responsible, at its sole cost, for maintaining all Public Improvements. For purposes of clarity, the Village and Developer acknowledge and agree that (i) the Traffic Improvements reflected on **Exhibit E**, upon Village approval and acceptance thereof by the Village of Traffic Improvements to standards approved by the Village, shall be maintained by the Village or other appropriate governmental entity; and (ii) the Public Improvements reflected on **Exhibit F** shall be maintained by Developer, at its sole cost.

- iv. Developer shall pay all costs and expenses incurred and to be incurred by the Village in conjunction with the Easement (including, without limitation, all reasonable costs and expenses incurred by the Village to acquire or extinguish interests that would otherwise prevent the Village from providing the Title Policy).
- v. In the event that the Village and Developer mutually determine that public improvements other than and/or in addition to the Public Improvements described herein, are necessary or appropriate in conjunction with the Project for the safety and/or convenience of the Village, the Village shall, at Developer's cost, acquire such property as may be required for such public improvements, Developer shall construct and maintain such public improvements at its cost, and the Easement shall be amended to address such additional property and additional public improvements.

- B. **SECURITY.** At least one security person, hired and paid for by Developer, shall be at the commercial portion of the Project during the hours from 10:00 A.M to 11:00 P.M. Such security person shall be certified by the Ohio Police Officer Training Academy, shall hold such valid and active licenses, in good standing, as Developer and the Village deem appropriate for a person in such position. Developer and the Village shall cooperate to make certain that such security person is reasonably qualified to undertake and exercise the powers of such position.

#### IV. **CONSTRUCTION SEQUENCING**

Before any construction on the Property in conjunction with the Project occurs, Developer shall cause to be recorded the Declaration. Developer represents and warrants that the Declaration will have priority over any and all mortgages or other encumbrances. The sequencing of construction of the Project (including (without limitation) open space/conservation, commercial and residential portions of the Project) shall be in accordance with the Phasing Plan included in the PDP, as may be amended in conjunction with approval of the Final Development Plan or otherwise. In addition, and notwithstanding anything contained herein to the contrary, at such time that construction commences on the Property in conjunction with the Project occurs, such construction shall proceed as follows:

- A. All homes, together with all septic tanks, wells and other utilities, that are currently on portions of Pinecrest Drive and Walnut Hills that comprise the Project shall be demolished and removed in accordance with applicable local ordinance and regulation, prior to a building permit being issued for any portion of the Project.
- B. Thereafter, the mound and wall to be located within and upon the PD-6 Property, shall be constructed and landscaped substantially in accordance with the Declaration, including (without limitation) the landscape plan by Cawrse & Associates, Inc. attached thereto (the “**Mound, Wall and Landscaping**”). Any grading and installation of underground improvements, as well as utility work elsewhere upon the Property (collectively the “**Simultaneous Work**”), may be performed simultaneously with the construction and other work relating to the Mound, Wall and Landscaping. Until the Mound, Wall and Landscaping is substantially complete, construction and related work upon the Mound, Wall and Landscaping and the Simultaneous Work, shall only be performed between the hours of 7:30 a.m. and 5:30 p.m., Monday through Friday, provided that, should construction of the Mound, Wall and Landscaping fall behind Developer’s established construction schedule therefor, Developer shall be permitted to perform and conduct construction and related work in connection with the Mound Wall and Landscaping, on no more than one (1) Saturday per calendar month between the hours of 8:00 a.m. and 5:30 p.m.

Upon substantial completion of the Mound, Wall and Landscaping, as determined by the Village inspectors, all Simultaneous Work, to the extent then not completed, as well as any and all other construction activities upon or about the Property, may proceed and be performed at such times as are permitted pursuant to Village ordinance.

All work performed pursuant to this subsection shall be performed utilizing generally accepted commercial construction practices and procedures; provided, however, that if there exists more than one generally accepted commercial

construction practice and procedure to perform any such work that Developer reasonably determines to be of comparable cost, such work shall be performed using the practice and procedure that will cause less interference or disruption to the Waterford Residents. Prior to the construction of any Project Improvements on the Property (including, without limitation grading of any portion of the Property), Developer shall (1) at the request of any Waterford Resident whose property abuts the Property in the PD-6 Sub-District (an “*Abutting Waterford Resident*”), install a six-foot tall temporary fence, with fabric wind-screening along the eastern property line of said PD-6 Sub-District where same abuts such Abutting Waterford Resident’s property, which temporary fence shall remain in place during and through completion of construction of the Mound, Wall and Landscaping, and (2) arrange for, secure, obtain and provide a payment and performance bond, standby letter of credit that is irrevocable without the Village’s agreement, or other financial guarantee acceptable to, and in favor of, the Village, in an amount determined by the Village to be sufficient to construct and pay for the Mound, Wall and Landscaping, in full, in accordance with the Declaration, including (without limitation) the landscape plan by Cawrse & Associates, Inc. If as a result of construction of the Mound, Wall or Landscaping, debris, dust or dirt travels onto the grounds of an Abutting Waterford Resident’s property or windows of such Abutting Waterford Resident’s home, Developer shall, at its expense, upon the reasonable request of such Abutting Waterford Resident, remove such debris, dust or dirt and undertake reasonable and appropriate repairs to the extent such debris, dust or dirt cause tangible damage to such Abutting Waterford Resident’s property.

- C. Thereafter, Developer shall construct, install and maintain such temporary and as reasonably necessary, permanent traffic improvements in and around the Project Site, as reasonably determined by the Village, as may be necessary in anticipation of detours, rerouting, and long term traffic disruptions as may arise in conjunction with Project construction, including (without limitation) temporary roadways, signals, and signage, such traffic improvements shall be subject to the Village’s reasonable discretion and approval. Permanent road and traffic improvements set forth in **Exhibit D** may be implemented as necessary and as they arise, based on the overall Project construction schedule.
- D. Thereafter, such site improvements as are necessary for construction of the commercial portion of the Project may be constructed, including (without limitation) grading, installation of drainage and water quality facilities and underground utilities.
- E. Thereafter, construction of buildings for tenants, parking, landscape and amenities for Phase 1 of the Project may be constructed; provided, however, that any area

where work was performed pursuant to subsection (B) that is outside of an area where other improvements will be made pursuant to this subsection shall be seeded and graded and maintained in such condition until such area is used for other construction activities in conjunction with the Project.

- F. Notwithstanding the provisions in the foregoing subparagraph E, the land upon and within Sub-District PD-3 (the “*PD-3 Property*”), shall be graded, seeded and maintained in such condition until Developer has obtained fully executed leases (which may include but are not limited to, ground leases), with unrelated, independent third parties for commercial space in, on or over all or any portion of the PD-3 Property. Thereafter, construction of parking improvements and paving upon the PD-3 Property shall not commence until Developer is obligated, without reasonable condition or contingency pursuant to the terms of then applicable and effective leases for all or any portion of such PD-3 Property, to construct vertical improvements thereupon.

All construction of underground improvements and building shells shall be performed utilizing generally accepted commercial construction practices and procedures; provided, however, that if there exists more than one generally accepted commercial construction practice and procedure to perform any such work that Developer reasonably determines to be of comparable cost, such work shall be performed using the practice and procedure that will cause less interference or disruption to the Waterford Residents.

#### **V. THE VILLAGE’S OBLIGATIONS**

In conjunction with the Project, the Village shall take such steps as are necessary to vacate Pinecrest Drive and Walnut Hills Avenue, provided however Developer shall be liable for any and all necessary and applicable utility and easement relocations arising from the vacation of such public thoroughfares.

#### **VI. ASSESSMENT**

Upon request by the Village, Developer shall present a petition to the Village requesting construction of an all-purpose trail serving the Village and connecting to the Property at the northeast corner of Harvard Road and Orange Place (the “*Trail*”), provided that the principal cost of the Trail (exclusive of interest and other costs, fees and expenses), assessed to the Property shall not exceed \$5 Million, which cost shall be assessed and collected in twenty (20) equal annual installments.

#### **VII. CONSIDERATION PAID BY DEVELOPER**

Upon dedication of the public roadway to be constructed by Developer pursuant to III.A.1.d., and the Easement, Developer shall pay the Village, in addition to all other sums due

hereunder or under the Village's Ordinances, the sum of \$500,000.00 as consideration for the Easement and as compensation for all costs and expenses incurred or to be incurred by the Village in conjunction with the planning and construction of the Project.

## **VIII. ENFORCEMENT**

- A. The Village Building Inspector shall be responsible for determining and verifying Developer's compliance with the terms of this Agreement and the PPDD Regulations. In the event that the Village Building Inspector believes that Developer has violated any of the terms of this Agreement or the PPDD Regulations, the Village shall promptly give Developer notice of the violation. The Village shall not exercise any remedies for such default unless the Village shall have given Developer notice thereof (but Developer shall not be deemed in default if such default cannot reasonably be cured in thirty (30) days and Developer commences to remedy such default within said thirty (30) day period and proceeds thereafter with due diligence until completion, and completes such remedy within sixty (60) days of the initial notice thereof from the Village, or such additional period of time as the Village may reasonably approve); provided, however, if Developer's default has created an emergency situation requiring immediate corrective action to protect property or persons from damage or injury, the Village shall be permitted to take reasonable corrective action at Developer's expense prior to such notice provided the Village has used its best efforts to give Developer written notice thereof and Developer has not promptly responded. Notwithstanding anything to the contrary in this Agreement, Developer shall not be subjected to any liability hereunder where either the violation or failure to cure the same result from Force Majeure (as defined herein).
- B. Notwithstanding the foregoing, to the extent the Waterford Residents are intended third party beneficiaries of Sections III(B), (C), (D) and (E), and Sections V(A), (B) and the last paragraph of Section V of this Agreement (the "***Third-Party Benefitting Provisions***"), the Village shall have no obligation to act (but shall nevertheless retain the right to act), to enforce the Third-Party Benefitting Provisions, unless and until such other party or parties, having the right to enforce, obtains a court order so requiring Village action pursuant to, and subject to the conditions of, Section IX.K of this Agreement. Moreover, the right and obligation of the Village to enforce any and all obligations hereunder, shall be undertaken based upon such acts as are in the best interest of the Village, in its entirety. The foregoing, however, shall not limit the rights of any person under Section IX(K).

**IX. MISCELLANEOUS**

A. **NOTICES.** Any notice of communication required or permitted to be given under this Agreement by either party to the other shall be deemed sufficiently given if personally or mailed by certified United States mail, postage prepaid, and address as follows:

1. To the Village: Mayor  
Orange Village  
4600 Lander Rd.  
Orange Village, Ohio 44022;

With copies to: Director of Law  
Orange Village  
4600 Lander Rd.  
Orange Village, Ohio 44022;

-and-

Clerk of Council  
Orange Village  
4600 Lander Rd.  
Orange Village, Ohio 44022;

2. To Developer: Lewanski Development, LLC  
159 Crocker Park Blvd., Suite #400  
Westlake, Ohio 44145;

With a copies to: Jordan Berns, Esq.  
Berns, Ockner & Greenberger, LLC  
3733 Park East Dr., Suite 200  
Beachwood, Ohio 44122;

-and-

Fairmount Properties LLC  
1138 West 9<sup>th</sup> Street, 2<sup>nd</sup> Floor  
Cleveland, OH 44113  
Attn: General Counsel

Either party may change its address for notice purposes by providing written notice of such change to the other party.

B. **AMENDMENT.**

1. Recognizing the likelihood of changing conditions (such as demand and supply factors; changes in tenants that are in (or likely to be in) the northeastern Ohio regional market area; and other needs and concerns of the Village and Developer), the parties agree to review and consider amendments to this Agreement, provided, however, that Sections II.B., C., D. and E., and Sections IV.A., B., and the last paragraph of Section IV of this Agreement may not be amended without the written approval of all fee owners of residences on Waterford Court. Further provided, that in the event either the Village or Developer requests further amendment and/or modification of this Agreement, the parties shall thereafter engage in reasonable good-faith discussion and negotiation, undertaking all reasonable efforts to resolve and address such issues as each of the parties may then raise in connection with this Agreement and such further amendment and modification thereof.

Notwithstanding the foregoing, the parties acknowledge and agree that this Agreement as initially executed is intended to broadly outline many of the goals and objectives of the Project and as between Developer and the Village, and governs the broad obligations of the parties. Nevertheless the parties recognize and agree that several additional issues which may be integral to the parties' relationship, construction of the Project and the overall development of the Property, may need to be further addressed, which shall be incorporated herein by amendment, including without limitation, demolition requirements, reporting requirements; and insurance and indemnification obligations.

2. Developer shall promptly request the Village Council to amend Section 1175.11(k) and (n) of the PPDD Regulations as set forth in **Exhibit H** hereto.

C. **SUCCESSORS-IN-INTEREST.** All rights and obligations contained herein shall be binding upon and inure to the benefit of each of the parties, as well as their respective successors, and assigns, provided however that until the Significant Initial Occupancy Date, the Village shall have the right to approve, consent to and confirm any Transfer (as defined below), of Developer's rights and obligations hereunder to any third party, which such approval shall not be unreasonably withheld, denied, conditioned or delayed, including any Transfer necessitated by Developer's sale, transfer or other conveyance of the Property and/or of a substantial interest in the ownership or control of Developer (collectively, a "**Transfer**"); provided, however, that a transfer or other conveyance of the Property to an entity which is either (a) controlled by Developer or David Lewanski, or of which Developer or David Lewanski owns or

controls the majority of ownership interest therein, or (b) controlled by Fairmount Properties LLC or of which Fairmount Properties LLC owns or controls the majority of ownership interest therein, or (c) jointly controlled by Developer or David Lewanski, on the one hand, and Fairmount Properties LLC, on the other hand or of which Developer or David Lewanski, on the one hand, and Fairmount Properties LLC, on the other hand, in the aggregate own or control the majority of ownership interest therein (any such transfer or other conveyance, a “**Related Party Transfer**”), shall not be deemed to be a Transfer hereunder. No such Related Party Transfer shall be subject to the Village’s approval, consent or confirmation hereunder. Developer shall notify each transferee of the obligations hereunder, and that the same are binding on such transferees, provided however, the Village reserves the right to require each and any such transferee to independently adopt, ratify and confirm all such rights and obligations hereunder, in writing. Upon any Transfer approved by the Village pursuant to the terms of this Section IX. C., other than a Related Party Transfer, the transferor shall have no further liability hereunder, for acts or omissions to act arising on and after the date such Transfer is effective, but transferor shall not be released from liability for acts or omissions to act arising prior to the date of such Transfer.

Developer and the Village acknowledge and agree that the Village’s approval, consent and/or confirmation of any Transfer prior to the Significant Initial Occupancy Date, shall not be withheld, denied, conditioned or delayed if at the time of such contemplated Transfer, the intended transferee (the “**Transferee**”), including the entity retaining ownership and/or control over the Property and/or the affiliated individual or entity (including a parent entity) which owns or controls a majority of the ownership interest in such Transferee, (i) demonstrates to the Village’s reasonable satisfaction the availability of and reasonably unconditional access by Transferee to, the financial resources necessary to complete construction of the Project, (ii) reasonably demonstrates comprehensive knowledge and familiarity with large-scale, commercial retail projects in the northeast Ohio region area; and (iii) reasonably demonstrates significant experience and a successful track-record, of developing, construction, managing and/or operating “upscale” or “high end” retail developments. Developer and the Village acknowledge and agree that the foregoing are minimum qualifications which any Transferee shall be required to fulfill, provided however, the Village may, in its sole discretion, waive any or all of the foregoing requirements, as circumstance warrant.

- D. **EXHIBITS**. The Exhibits to this Agreement constitute an integral part of and are hereby incorporated by reference into this Agreement.
- E. **COUNTERPARTS**. This Agreement may be signed in one or more counterparts or duplicate signature pages with the same force and effect as if all required signatures were contained in a single original instrument anyone one or more such counterparts or duplicate signature pages may be removed from any one or more original copies of this Agreement and annexed to other counterparts or duplicate signature pages to form a completely executed original instrument.
- F. **SEVERABILITY**. The invalidity or unenforceability of any one or more phrases, sentences, clauses, or sections in this Agreement shall not affect the validity or enforceability of the remaining portions of this Agreement, or any part thereof, and this Agreement shall be deemed amended to the extent required to make the provisions hereof lawful, valid and enforceable, giving maximum effect to the intent of the parties as evidenced in this Agreement. The parties agree to enter into a written instrument to evidence any such amendment.
- G. **GOVERNING LAW**. This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.
- H. **CAPTIONS**. The captions of the Articles and Sections of this Agreement are inserted for convenience only and shall not be deemed to constitute a part of this Agreement or in any manner limit or define the terms of this Agreement.
- I. **FORCE MAJEURE**. Except as expressly provided herein or with respect to any monetary obligation, if either party is delayed or hindered in, or prevented from, the performance of any covenant or obligation hereunder, as a result of any cause or circumstance beyond the reasonable control of such party, including, but not limited to, strikes, lockouts, shortages of labor, fuel or materials, acts of God, enemy act, riot, insurrection or other civil commotion, fire or other casualty or any future valid orders of any other governmental agency, court, or tribunal with jurisdiction over the Project, Developer or the Village, then the time for performance of such covenant or obligation shall be extended by a reasonable

time to accommodate such delay or hindrance. The party seeking the benefit of the provisions of this section shall, within thirty (30) days after the beginning of any such delay, notify the other party thereof in writing, and the cause thereof, and provide information concerning the projected term of the delay.

J. **ENTIRE AGREEMENT.** This Agreement is intended to supersede all prior agreements and understandings concerning the subject matter of this Agreement, with the understanding of the parties that this Agreement and the applicable law provide for further reviews and the good faith efforts of the parties to reach subsequent agreements on issues related to the Project.

K. **THIRD PARTY BENEFICIARIES.**

1. Subject to the conditions set forth Section VIII(B) above and in Subsection IX(K)(2) below, the Waterford Residents are the sole intended third party beneficiaries of the Third-Party Benefiting Provisions and shall have the rights individually or collectively to enforce the provisions thereof. The Waterford Residents are not intended to be third party beneficiaries of any other provisions of this Agreement, and no persons or entities other than the Waterford Residents are intended to be third party beneficiaries of any provision of this Agreement.
2. No Waterford Resident shall be permitted to take action in court to enforce the Third-Party Benefiting Provisions unless the following has occurred:
  - i. Such Waterford Resident has provided the Village and Developer's notice in writing of purported violation of one or more the Third-Party Benefiting Provisions and within thirty (30) days after date of such notice, Developer has failed to cure such purported violation (or, if such purported violation cannot reasonably be cured within such thirty (30) day period, Developer has failed to commence to remedy such purported violation within the thirty (30) day period and proceed thereafter with due diligence until completion and completed the same within sixty (60) days of the date of such notice or such additional period of time as weather permits (such period, the "***Default Period***").
  - ii. Such Waterford Resident (the "***Notifying Waterford Resident***") has, after expiration of the Default Period, attempted in good faith

to resolve any dispute, claim or controversy arising out of or relating to the purported violation of one or more the Third-Party Benefiting Provisions identified in the notice required hereunder by mediation before a mediator (and at a date, time and location in Cuyahoga County, Ohio) mutually agreed upon by the Notifying Waterford Resident and Developer or, if such Notifying Waterford Resident and Developer cannot so agree, before a mediator (and at a date, time and place in Cuyahoga County, Ohio) determined by the Village's Mayor; provided, however, that in no event shall such mediation take place more than thirty (30) days after the Default Period and, if such mediation does not occur within such thirty (30) day period, the parties shall be relieved of any requirement to mediate. The Notifying Waterford Resident shall notify the Village and all other Waterford Residents of such mediation and invite them to participate in such mediation. The Notifying Waterford Resident and Developer shall share equally the costs and expenses of the mediator (which shall not include, and each party shall bear, the expenses incurred by each party for its own legal representation in connection with any mediation). Such mediation shall constitute settlement negotiations, and, to the extent allowed by applicable law, all offers, promises, conduct and statements, whether oral or written, made in the course of such mediation by any of the parties or their agents shall be confidential and inadmissible in any other legal proceeding, provided, however, that evidence which is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.

Any Waterford Resident who, after complying with the provisions of Subsection K.2(a) and (b) above, initiates an action in court to enforce this Declaration or declare its terms shall, to the extent required by law, name as necessary parties thereto Developer (or if a transfer of Developer's entire interest has occurred, then, instead of Developer, the transferee of Developer's interest), all other Waterford Residents, and the Village. A Waterford Resident who initiates action in court to enforce the terms of the Third-Party Benefiting Provisions may seek injunctive relief or specific performance, but no Waterford Resident shall be entitled to seek or recover damages or attorneys fees from Developer or its successors or assigns or from the Village for any breach of the Third-Party Benefiting Provisions.

The Village and Developer acknowledge and agree that the foregoing Third-Party Benefiting Provisions are intended to clearly delineate certain specific enforcement rights of the Waterford Residents with respect to provisions within this Agreement which directly benefit said Waterford Residents. The delineation of such Third-Party Benefiting Provisions, neither diminishes nor derogates the rights of any other person to bring action against the Village, Developer or Property, as may be available pursuant to applicable law.

- L. **FURTHER ASSURANCES**. Developer shall take or cause to be taken any and all other or further actions necessary or required or reasonably requested of Developer in order to effectuate any of the terms and provisions herein.

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*Signature Page Follows*

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly on the date set forth above.

**LEWANSKI DEVELOPMENT, LLC**

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

David Lewanski, Managing Member

**ORANGE VILLAGE**

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

Kathy U. Mulcahy, Mayor

And approved as to form:

\_\_\_\_\_  
Director of Law

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*Notary Page Follows*

STATE OF OHIO )  
 )  
COUNTY OF CUYAHOGA )

BEFORE ME, a Notary Public in and for said County and State, on this \_\_\_\_ day of \_\_\_\_\_, 2014, did personally appear LEWANSKI DEVELOPMENT, LLC, an Ohio limited liability company, by DAVD LEWANSKI, its Managing Member, who stated that he did sign the foregoing instrument in his capacity as such Managing Member, and the same was his and the company's free act and deed.

\_\_\_\_\_  
Notary Public

STATE OF OHIO )  
 )  
COUNTY OF CUYAHOGA )

BEFORE ME, a Notary Public in and for said County and State, on this \_\_\_\_ day of \_\_\_\_\_, 2014, did personally appear ORANGE VILLAGE, an Ohio chartered municipal corporation by KATHY U. MULCAHY, its duly elected Mayor, who stated that she did sign the foregoing instrument in her capacity as Mayor, and the same was her and the Village's free act and deed.

\_\_\_\_\_  
Notary Public

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Exhibits Follow***

## **LIST OF EXHIBITS**

**Exhibit A** – Legal Description of the Property

**Exhibit B** – Legal Description of Village Property

**Exhibit C** – Declaration of Restrictions

**Exhibit D** – Traffic Improvements

**Exhibit E** – Illustration of Developer Easements in favor of Village

**Exhibit F** – Easement

**Exhibit G** –PPDD Regulations

**Exhibit H** – Proposed Amendments to PPDD Regulations

**EXHIBIT A**  
LEGAL DESCRIPTION OF THE PROPERTY

**EXHIBIT B**  
LEGAL DESCRIPTION OF VILLAGE PROPERTY

**EXHIBIT C**  
DECLARATION OF RESTRICTIONS

**EXHIBIT D**  
TRAFFIC IMPROVEMENTS

**EXHIBIT E**  
DEVELOPER EASEMENTS IN FAVOR OF VILLAGE

**EXHIBIT F**  
**EASEMENT**

**EXHIBIT G**  
PPDD REGULATIONS

**EXHIBIT H**  
PROPOSED AMENDMENTS TO PPDD REGULATIONS