

## IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAN RYAN BUILDERS WEST VIRGINIA, LLC,  
A West Virginia limited liability company,

Plaintiff(s),

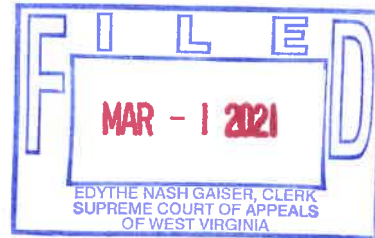
Berkeley County Circuit Court  
Civil Action No. 2020-C-110

vs.

OVERLAY I, LLC,  
A Virginia limited liability company,

Defendant(s).

**TO: THE HONORABLE CHIEF JUSTICE**



**JUDICIAL MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, the Honorable Bridget M. Cohee respectfully requests the above-styled case be referred to the Business Court Division.

In regard to additional related actions:

There are no known related actions.

The following related actions could be the subject of consolidation, and are

now pending

or

may be filed in the future. (Please list case style, number, and Court if any)

This action involves: (Please check all that apply)

✓ Breach of Contract;

Sale or Purchase of Commercial Entity;

✓ Sale or Purchase of Commercial Real Estate;

Sale or Purchase of Commercial Products Covered by the Uniform Commercial Code;

Terms of a Commercial Lease;

Commercial Non-consumer debts;

Internal Affairs of a Commercial Entity;

Trade Secrets and Trademark Infringement;

Non-compete Agreements;

Intellectual Property, Securities, Technology Disputes;

Commercial Torts;

Insurance Coverage Disputes in Commercial Insurance Policies;

Professional Liability Claims in Connection with the Rendering of

Professional Services to a Commercial Entity;  
Anti-trust Actions between Commercial Entities;  
✓ Injunctive and Declaratory Relief Between Commercial Entities;  
Liability of Shareholders, Directors, Officers, Partners, etc.;  
Mergers, Consolidations, Sale of Assets, Issuance of Debt, Equity and Like Interest;

Shareholders Derivative Claims;  
Commercial Bank Transactions;  
Franchisees/Franchisors;  
Internet, Electronic Commerce and Biotechnology  
✓ Disputes involving Commercial Entities; or  
Other (Describe) **Residential land developer and residential builder contract dispute**

In support of this motion, this matter contains issues significant to businesses, and presents novel and/or complex commercial or technological issues for which specialized treatment will be helpful, as more fully described here: **Contract dispute involving bulk purchase of 319 lots with amendments; allegations of breach, default, failure, and refusals to cure and otherwise perform and resulting damages and fees.**

In further support of this Motion, please find attached hereto an accurate copy of the operative complaint(s), ~~the operative answer(s)~~, the docket sheet, and the following other documents:

**Motion to Dismiss.**

In regard to expedited review, this Court:

~~— DOES NOT request an expedited review under W.Va. Trial Court Rule 29.06(a)(4), and gives notice that all affected parties may file a memorandum stating their position, in accordance with W.Va. Trial Court Rule 29.~~

hereby REQUESTS that the Chief Justice grant this Motion to Refer without responses, pursuant to W.Va. Trial Court Rule 29.06(a)(4), and contends that the following constitutes good cause to do so: **The case was filed on May 6, 2020. Motion to Dismiss was filed on August 31, 2020. Scheduling Order is attached. Jury Trial is set for March 31, 2022. The parties will benefit from expedited review of the case in Business Court.**

**WHEREFORE**, the undersigned Judge hereby MOVES, pursuant to W.Va. Trial Court Rule 29, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted, this 26 day of February, 2021,



BRIDGET M. COHEE, Circuit Judge

Bridget M. Cohee  
Berkeley County Judicial Center  
380 W. South Street, Suite 4401  
Martinsburg, WV 25401  
304-596-2140-Telephone

CERTIFICATE OF SERVICE

I, Bridget M. Cohee, do hereby certify that on this 26 day of February, 2021. I have served the foregoing "Judicial Motion to Refer Case to Business Court Division," with attachments via CourtsPlus e-file system to George E. Kennedy at [gkenedy@fandpnet.com](mailto:gkenedy@fandpnet.com); Charles F. Printz, Jr., at [cprintz@bowlesrice.com](mailto:cprintz@bowlesrice.com); Shannon Paige Combs at [scombs@bowlesrice.com](mailto:scombs@bowlesrice.com); and William Frank Gibson, II [wgibson@shulmanrogers.com](mailto:wgibson@shulmanrogers.com), the Berkeley County Circuit Clerk's Office; and the Business Court Division Central Office, Berkeley County Judicial Center, 380 West South Street, Suite 2100, Martinsburg, WV 25401.

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Sender Signature

Bridget M. Cohee





# Case Docket Entries

CC-02-2020-C-110

Court: **Circuit** County: **02 - Berkeley** Created Date: **5/6/2020** Security Level: **Public**  
 Judge: **Bridget Cohee** Case Type: **Civil** Case Sub-Type: **Other** Status: **Open**

## Related Cases:

Style: **Dan Ryan Builders West Virginia, LLC, a West Virginia limited liability company v. Overlay I, LLC, a Virginia limited liability company**

|    | <u>Entered Date</u>  | <u>Event</u>  | <u>Ref. Code</u> | <u>Description</u>  |
|----|----------------------|---|------------------|---|
| 1  | 5/6/2020 1:48:38 PM  | E-Filed   |                  | Complaint   |
|    | 1-1 5/6/2020         | Civil Case Information Statement  |                  |   |
|    | 1-2 5/6/2020         | Complaint - Complaint   |                  |   |
|    | 1-3 5/6/2020         | Supporting Document - Exhibit   |                  |   |
|    | 1-4 5/6/2020         | Transmittal   |                  |   |
|    | 1-5 5/6/2020         | Summons   |                  |   |
| 2  | 5/6/2020 1:48:38 PM  | Judge Assigned  | J-02010          | Bridget Cohee   |
| 3  | 5/6/2020 1:48:38 PM  | Party Added   | P-001            | Dan Ryan Builders West Virginia, LLC, a West Virginia limited liability company     |
| 4  | 5/6/2020 1:48:38 PM  | Party Added   | D-001            | Overlay I, LLC, a Virginia limited liability company                                |
| 5  | 5/6/2020 1:48:38 PM  | Attorney Listed   | P-001            | A-2985 - Charles F. Printz, Jr.   |
| 6  | 5/6/2020 1:48:38 PM  | Attorney Listed   | P-001            | A-11255 - William Frank Gibson, II  |
| 7  | 5/6/2020 1:48:38 PM  | Attorney Listed   | P-001            | A-13601 - Shannon Paige Combs   |
| 8  | 5/6/2020 1:48:38 PM  | Service Requested   | D-001            | Plaintiff - Private Process Server  |
| 9  | 5/15/2020 8:29:12 AM | E-Filed   |                  | Service Return - Service Return   |
|    | 9-1 5/15/2020        | Service Return - Service Return   |                  |   |
|    | 9-2 5/15/2020        | Transmittal   |                  |   |
| 10 | 5/20/2020 1:15:14 PM | E-Filed   |                  | Reissue/Additional Summons - Reissue/Summons Complaint                              |
|    | 10-1 5/20/2020       | Supporting Document - Complaint   |                  |   |
|    | 10-2 5/20/2020       | Transmittal   |                  |   |
|    | 10-3 5/20/2020       | Summons   |                  |   |
| 11 | 5/20/2020 1:15:14 PM | Service Requested   | D-001            | Secretary of State - Certified - Including Copy Fee                                 |
| 12 | 6/1/2020 10:03:07 AM | E-Docketed  |                  | Supporting Documents - Summons Iss & Mailed CMRR                                    |
|    | 12-1 6/1/2020        | Supporting Document - Summons Iss & Mailed CMRR to WV Secretary of State 5/21/2020 (Overlay 1, LLC) |                  |   |
|    | 12-2 6/1/2020        | Transmittal   |                  |   |
| 13 | 6/4/2020 1:08:25 PM  | E-Docketed  |                  | Supporting Documents - Letter from WV SOS Accepting Service - 1 Summons 1 Complaint |
|    | 13-1 6/4/2020        | Supporting Document - Letter from WV SOS Accepting Service - 1 Summons 1 Complaint                  |                  |   |
|    | 13-2 6/4/2020        | Transmittal   |                  |   |
| 14 | 6/8/2020 1:30:59 PM  | E-Docketed  |                  | Supporting Documents - Green Card Returned by SOS - Signed by R. Kushner            |
|    | 14-1 6/8/2020        | Supporting Document - Green Card Returned by SOS - Signed by R. Kushner                             |                  |   |
|    | 14-2 6/8/2020        | Transmittal   |                  |   |
| 15 | 7/1/2020 1:17:57 PM  | E-Docketed  |                  | Supporting Documents - SOS Invoice# 527026 paid in May Month End Closing            |
|    | 15-1 7/1/2020        | Supporting Document - SOS Invoice# 527026 paid in May Month End Closing                             |                  |   |
|    | 15-2 7/1/2020        | Transmittal   |                  |   |
| 16 | 8/31/2020 3:19:14 PM | E-Filed   |                  | Notice of Appearance - Notice of Appearance   |
|    | 16-1 8/31/2020       | Notice of Appearance - Notice of Appearance   |                  |   |
|    | 16-2 8/31/2020       | Transmittal   |                  |   |
| 17 | 8/31/2020 3:19:14 PM | Attorney Listed   | D-001            | A-8730 - Gregory E. Kennedy   |
| 18 | 8/31/2020 3:21:56 PM | E-Filed   |                  | Motion - Motion to Dismiss  |
|    | 18-1 8/31/2020       | Motion - Defendant Overlay I, LLC's Motion to Dismiss Plaintiff's Bill of Complaint                 |                  |   |
|    | 18-2 8/31/2020       | Transmittal   |                  |   |

# Case Docket Entries

CC-02-2020-C-110

| Entered Date             | Event  | Ref. Code | Description  |
|--------------------------|--|-----------|--|
| 19 8/31/2020 4:06:53 PM  | E-Filed  |           | Letter to Judge - MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT OVERLAY I, LLC'S MOTION TO DISMISS PLAINTIFF'S BILL OF COMPLAINT   |
| 19-1 8/31/2020           | Letter - MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT OVERLAY I, LLC'S MOTION TO DISMISS PLAINTIFF'S BILL OF COMPLAINT                                    |           |  |
| 19-2 8/31/2020           | Transmittal  |           |  |
| 20 8/31/2020 6:11:44 PM  | E-Filed  |           | Order - Case - RULE 22 SCHEDULING ORDER cc: Charles Printz Jr. via e-mail, Shannon Combs via e-mail, William Gibson II. via e-mail, Gregory Kennedy via e-mail               |
| 20-1 8/31/2020           | Order - RULE 22 SCHEDULING ORDER   |           |  |
| 20-2 8/31/2020           | Transmittal  |           |  |
| 21 9/24/2020 5:29:44 PM  | E-Filed  |           | Order - Case - AMENDED TCR RULE 22 SCHEDULING ORDER - cc: Charles Printz Jr. via e-mail, Shannon Combs via e-mail, William Gibson II. via e-mail, Gregory Kennedy via e-mail |
| 21-1 9/24/2020           | Order - AMENDED TCR RULE 22 SCHEDULING ORDER   |           |  |
| 21-2 9/24/2020           | Transmittal  |           |  |
| 22 10/28/2020 1:49:01 PM | E-Filed  |           | Motion Response - Other  |
| 22-1 10/28/2020          | Motion Response - Opposition to Motion to Dismiss and Request Hearing  |           |  |
| 22-2 10/28/2020          | Supporting Document - Exhibit  |           |  |
| 22-3 10/28/2020          | Transmittal  |           |  |
| 23 11/9/2020 2:34:27 PM  | -----  |           | Reason for Deletion: Incorrect Document - Not for this File  |
| 23-1 9/7/1993            | ----- - Reason for Deletion: Incorrect Document - Not for this File  |           |  |
| 24 11/11/2020 2:46:44 PM | E-Filed  |           | Supporting Documents - Defendant Overlay I, LLC's Reply to Plaintiff's Opposition to Motion to Dismiss Plaintiff's Bill of Complaint   |
| 24-1 11/11/2020          | Other - Defendant Overlay I, LLC's Reply to Plaintiff's Opposition to Motion to Dismiss Plaintiff's Bill of Complaint                                  |           |  |
| 24-2 11/11/2020          | Transmittal  |           |  |
| 25 11/11/2020 2:49:07 PM | E-Filed  |           | Supporting Documents - Proposed Order Granting Defendants' Motion to Dismiss Plaintiffs' Bill of Complaint   |
| 25-1 11/11/2020          | Other - Proposed Order Granting Defendants' Motion to Dismiss Plaintiffs' Bill of Complaint  |           |  |
| 25-2 11/11/2020          | Transmittal  |           |  |
| 26 1/29/2021 2:23:28 PM  | E-Filed  |           | Order - Case - ORDER SETTING HEARING ON FEBRUARY 25, 2021 cc: Charles Printz Jr., Shannon Combs, William Gibson II., Gregory Kennedy Via E-File                              |
| 26-1 1/29/2021           | Order - ORDER SETTING HEARING ON FEBRUARY 25, 2021   |           |  |
| 26-2 1/29/2021           | Transmittal  |           |  |
| 27 2/19/2021 12:51:44 PM | E-Filed  |           | Motion - Other   |
| 27-1 2/19/2021           | Motion - Defendant Overlay I, LLC's Motion to Expunge Plaintiffs Memorandum of Lis Pendens   |           |  |
| 27-2 2/19/2021           | Transmittal  |           |  |
| 28 2/19/2021 12:55:00 PM | E-Filed  |           | Supporting Documents - Memorandum of Law in Support of Defendant Overlay I, LLC's Motion to Expunge Plaintiff's Memorandum of Lis Pendens with Exhibits                      |
| 28-1 2/19/2021           | Supporting Document - Memorandum of Law in Support of Defendant Overlay I, LLC's Motion to Expunge Plaintiff's Memorandum of Lis Pendens with Exhibits |           |  |
| 28-2 2/19/2021           | Transmittal  |           |  |
| 29 2/25/2021 4:58:11 PM  | E-Filed  |           | Order - Case - SCHEDULING ORDER cc: Charles Printz Jr., Shannon Combs, William Gibson II., Gregory Kennedy Via E-File  |
| 29-1 2/25/2021           | Order - SCHEDULING ORDER   |           |  |
| 29-2 2/25/2021           | Transmittal  |           |  |

**In the Circuit Court of Berkeley County, West Virginia**

**Dan Ryan Builders West Virginia, LLC, a )  
West Virginia limited liability company, )  
Plaintiff, )**

vs.) )

**Overlay I, LLC, a Virginia limited liability )  
company, )  
Defendant )**

Case No. CC-02-2020-C-110

**SCHEDULING ORDER**

This matter came before the Court on February 25, 2021. At the outset of the hearing, counsel for the Defendant raised an objection to substantive participation by counsel for the Plaintiff who was present to argue motions but who had not entered an appearance in the case and was not admitted Pro Hac Vice. The Court granted a short recess for counsel to consider having counsel of record to argue the pending motions, and ultimately the parties agreed and the Court continued the substantive Motions Hearing for thirty days to permit counsel to submit their Application for Admission to Practice Pro Hac Vice to the West Virginia State Bar.

The parties shall appear for the Motions Hearing on **Wednesday, March 31, 2021 at 2:00 p.m.**

Given that local counsel properly admitted were present on behalf of the Plaintiff, the Court proceeded to set the following Scheduling Order in this matter:

1. Jury Trial **Wednesday, March 30, 2022, at 9:00 am.**
2. Pretrial Conference **March 14, 2022, at 1:00 pm.**
3. The Parties shall mediate this matter in good faith on or before **November 22, 2021.**
4. Expert Disclosures:

- a. Plaintiff on or before **August 23, 2021**.
- b. Defendants on or before **September 20, 2021**.
- 5. Discovery Completion Date on or before **October 25, 2021**. All Discovery shall be served thirty days prior to completion date. Objections and Motions to Compel shall be filed on or before **November 8, 2021**.
- 6. Dispositive Motions on or before **December 6, 2021**. Responses on or before **December 20, 2021**. Replies on or before **January 10, 2022**.
- 7. Pretrial Disclosures, Voir Dire, Jury Instructions, Witness List, Verdict Form and Motions in Limine on or before **February 28, 2022**. Responses and Objections on or before **March 7, 2022**.
- 8. Joint Pretrial Statement on or before **March 7, 2021**.
  - a. Brief statement by Plaintiff as to essential elements of the claim, itemized list of damages, and supporting legal authority.
  - b. Brief statement by Defendant as to contested issues of fact and law, list of pending motions.
  - c. Stipulation of Facts.
  - d. Last Settlement demand by Plaintiff.
  - e. Last Settlement offer by Defendants.

Finally, the Court inquired whether the parties had considered submitting this matter to the Business Court. Neither party requested the same within the time frame. The Court will make the referral, however, in the interim, pending the Business Court referral, the parties shall abide by the above scheduling order. In the event the referral is denied, the scheduling order will govern proceedings before this court.

The clerk is directed to transmit a copy of this Order to all counsel of record and unrepresented parties.

**/s/ Bridget Cohee**  
Circuit Court Judge  
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit [www.courtswv.gov/e-file/](http://www.courtswv.gov/e-file/) for more details.



**IN THE CIRCUIT COURT FOR BERKELEY COUNTY, WEST VIRGINIA**

DAN RYAN BUILDERS WEST VIRGINIA, LLC, )  
a West Virginia limited liability company )  
64 Thomas Johnson Drive, Suite 110 )  
Frederick, MD 21702, )

Plaintiff, )

v. )

Case No. \_\_\_\_\_

OVERLAY I, LLC, )  
a Virginia limited liability company )  
38616 Stonewall Farm Lane )  
Middleburg, VA 20117, )

SERVE: )

Stephen Polachek )  
38616 Stonewall Farm Lane )  
Middleburg, VA 20117, )

Defendant. )

**BILL OF COMPLAINT**

Plaintiff Dan Ryan Builders West Virginia, LLC, a West Virginia limited liability company (“**DRB**”) hereby sues Defendant, Overlay I, LLC, a Virginia limited liability company (“**Overlay**” or “**Seller**”), and for a cause of action states:

**Facts Applicable to All Counts**

1. DRB is a limited liability company organized under the laws of West Virginia and qualified to do business in West Virginia. DRB is a homebuilder in the business of, amongst other things, acquiring finished building lots for the construction of residential real estate improvements for sale as new homes to consumer purchasers.

2. Defendant Overlay is a residential land developer and the fee simple and record title holder of the real estate that is the subject of this litigation, which is located in this County, a





legal description of which is attached hereto as **Exhibit A**. Stephen Polachek is Overlay's designated agent for service of process, who has a listed address of 38616 Stonewall Farm Lane, Middleburg, VA 20117.

3. On 5/14/18, DRB, as Contract Buyer, and Overlay I, LLC, as Seller, entered into a Lot Purchase Agreement ("**Contract**" or "**LPA**") for the purchase and sale of existing, fully developed (a.k.a. "**Finished**") building lots and certain to-be-developed building lots ("**Undeveloped Lots**") – all, over time, for agreed prices and subject to certain conditions precedent for closings on the said lots – including but not limited to that the lots be fully approved/subdivided and that they be fully developed into finished home building sites. Pursuant to the LPA, DRB posted a \$100,000 (US) deposit (the "**Deposit**") and recorded a deed of trust ("**DOT**") securing compliant repayment of same and/or credits to lot prices for same at future closings, as called for in the LPA.<sup>1</sup> Under the terms of the LPA, once the DOT was recorded, the \$100,000 (US) was released to Seller for use in developing the Property, but also entitled DRB to *pro rata* credits against certain future Undeveloped Lot purchase prices in future lot closings which, as explained herein, have not occurred due to the Seller's default.

4. As expressly permitted in the LPA, DRB assigned of portion of its lot purchase and other rights and obligations under the Contract to DR Acquisitions, LLC ("**DRA**"). That contractually permitted partial assignment/assumption (to and by DRA) also expressly acted to release DRB and to substitute DRA as the novated and exclusive "Buyer" in regard to the limited lot purchaser rights and obligations assigned to DRA. All of the lot acquisition rights assigned

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1 / Note: this action is filed without prejudice to DRB's rights and remedies under the Deposit Note and recorded Deed of Trust, whether to foreclose or otherwise.



by DRB to DRA were exercised by DRA in the hereinafter described June 2018 Bulk Closing and purchase (by DRB and DRA, respectively) of their respective portions of the finished lots at that Bulk Closing.

5. After entering into the original LPA, on 6/1/18 DRB and Seller entered into an initial amendment to the LPA (the “**First Amendment**”), revising certain terms by mutual agreement. The 14 duplex lots, to be purchased as “buy as sold” lots under the original LPA (*i.e.*, to be purchased if and when DRB entered into contracts with consumer for the construction and sale of homes on those lots, on a lot-by-lot basis), were agreed in the First Amendment to be purchased as part of the Bulk Closing. The First Amendment also reduced the proposed lot count from 320 to 319. Under the terms of the LPA as amended by the First Amendment, DRB had a contractual exclusive with respect to the real estate on which the as-promised 319 lots were either at that time recorded and/or entitled for future Seller recordation.

6. Thereafter, DRA and DRB acquired their respective portions of the already Finished lots (pursuant to the LPA as amended) at a so-called “Bulk Purchase” closing (the initial closing under the LPA as amended) prior to June 15, 2018, as was called for under the LPA as amended. Pursuant to the LPA as amended, Seller was paid a bulk price of \$2,788,000 by DRA and DRB, respectively, for the 91 so-called Finished Lots – comprised of 69 single family lots, 8 townhouse lots and 14 duplexes – leaving a net balance of 228 Undeveloped Lots, comprised of 54 single family lots (75’), 56 single family lots (65’) and 118 townhouse lots under contract to DRB pursuant to the LPA as amended (hereinafter, the said existing Undeveloped Lots and future Undeveloped lots to be purchased by DRB, the “**Property**,” *see* legal description at **Exhibit A**).

7. Thereafter, Overlay/Seller failed to keep pace with the requirements for finishing and tendering the remaining Lots (out of the Undeveloped Lots) to DRB for closing under the LPA as amended, including but not limited to the Seller's obligation to fully develop and tender the next set of Finished townhouse lots to DRB by December 2018. In response to DRB's remonstrations, Seller initially delayed and tried to make excuses, but ultimately conceded to DRB that Seller did not have the funds to complete its development obligations in regard to the going-forward Undeveloped Lot development and other lot closing conditions and otherwise failed to borrow those needed funds and/or to bring in investors to fund those remaining development and timely tender of closing obligations, and remained unwilling to move forward with that required entitlement and development work as promised under the LPA as amended. All of the Undeveloped Lots on which the Deposit credits were to be applied are amongst Undeveloped Lots Seller has failed/refused to develop as promised under the LPA as amended and the \$100,000 (US) Deposit remains secured by at least some of the subject Property. *Compare **Exhibit A**.* Therefore, on 4/1/19 DRB notified Seller that – pursuant to the terms of the LPA as amended – Seller was in Default, and also accorded Seller 15 days to cure as provided under the LPA as amended.

8. The parties then entered into expedient compromise negotiations to try and resolve the brewing dispute concerning Overlay's Default, and those negotiations culminated in the Second Amendment to Lot Purchase Agreement ("**Second Amendment**") dated 7/31/19. In it, Seller concedes it is in Default under the LPA, as amended and as claimed in DRB's 4/1/19 notice of default. Pursuant to the Second Amendment, the so-called "Phase 3 Closing," as defined in the Second Amendment – if and when completed in the future – was agreed to by the

parties as a prospective/expedient way to cure Seller's admitted/acknowledged default (hereinafter, the "**Contingent Resolution Terms**").

9. Pursuant to the Contingent Resolution Terms of the Second Amendment, DRB was given through the outside date of the concurrently running no-fault kick-out/feasibility study period provisions of the LPA as amended to (at DRB's election) piecemeal terminate the Second Amendment and return the parties to their *status quo ante*, before the 7/31/19 Second Amendment had been entered into (including a renewed 60-day, expedient cure period for the original, 4/1/19 Default notice).

10. The Second Amendment, at paragraph 2(ii), contains a typo in referring to "termination of the amended agreement." The parties mutually intended (in real time) that the said feasibility study period-based termination option language in that context be addressed as a permissible termination by DRB of the Contingent Resolution Terms of the Second Amendment. Indeed, and immediately following the aforesaid "termination of the amended agreement" language in Second Amendment ¶2(ii), the Second Amendment expressly provides that following any such piecemeal termination (*i.e.*, of just the Second Amendment Contingent Resolution Terms), the parties will be returned to their respective *status quo ante*, prior to the effective date of the Second Amendment – express language which only makes rational sense if the preceding "termination of the amended agreement" is properly read to state "termination of the Contingent Resolution Terms under the Second Amendment."

11. Consistent with this real-time meeting of the minds and required reconciliation of the subject Contract/LPA language in the Second Amendment, DRB gave notice of termination of the Second Amendment Contingent Resolution Terms to Seller (pursuant to the notice

provisions of the LPA as amended) on October 1, 2019. Pursuant to section 2 of the Second Amendment, DRB also gave Seller notice of the commencement of the agreed/renewed 60-day cure period with respect to the Buyer's original default notice, April 1, 2019 – all as required by and consistent with the language in the Second Amendment at paragraph 2 (ii):

...then the Seller and Buyer shall be returned to their respective positions as they existed prior to the Amendment effective date, except that as of such date of termination of the Second Amendment, Buyer shall be deemed to have served additional notice of breach of the Agreement on Seller giving Seller 60 additional days to cure such breach.

12. The no-fault/termination/feasibility study period applicable to DRB's Second Amendment termination rights was originally agreed to expire 30 days after the Second Amendment effective date, but was thereafter extended by mutual agreement (in the 8/30/19 Third Amendment, the 9/13/19 Fourth Amendment and the September 2019 Fifth Amendment to the LPA) to 10/1/19. On 10/1/19 DRB timely gave Overlay written notice of termination of the Contingent Resolution Terms under the Second Amendment and started the agreed 60-day cure period for DRB's revived 4/1/19 Default notice pursuant to the Second Amendment. *Accord*, Second Amendment post-termination terms (which govern in the event of a timely termination of the resolution terms of the Second Amendment).

13. Only a portion of the Undeveloped Lots were subdivided by Seller via record plat, so a portion of the Undeveloped Lots remain in a pre-subdivided state. See **Exhibit A**. So too, those unrecorded lots remain raw and undeveloped as compared to the as-promised and condition-compliant Finished building lots promised to DRB under the LPA as amended. Also, due to Seller's refusal/failures to perform as alleged herein, the recorded portion of the remaining Property (*compare* **Exhibit A**) also remains in various states of incompleteness in comparison to

the conditions for DRB's closing on those lots under the LPA as amended. With respect to the still pre-subdivided portion of the Property (the would-be 48 townhouse lots in so-called "Phase 2;" the remaining 180 Undeveloped lots covered by the LPA as amended are recorded and in so-called "Phase 3"), in order to lawfully create them the lots will have to, as a practical matter, entitled, subdivided, bonded for and infrastructure installed for more than just those 48 presently unrecorded townhouse lots, and much of that unavoidable mitigation cost will unjustly enrich the defaulting Seller and its remaining residue land in Phase 2 (and similarly, with respect to the recorded lots in Phase 3, any development work/infrastructure to be installed that benefits more than those recorded lots). DRB, as a matter of equity, should be accorded equitable offsets-to-price for the Property, both for the cost to entitle and develop them as promised, but also to account for those ancillary and undeserved financial benefit redounding to Seller's benefit, whether in regard to the lots located in Phase 2 or Phase 3.<sup>2</sup>

14. Defendant Seller failed to timely cure its earlier default under the required 60-day cure period and this lawsuit is timely filed (and the corresponding Memorandum of *Lis Pendens* recorded) pursuant to Section 11(b) of the LPA as amended. Upon information and belief, the

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2 In order to perform that required entitlement and development work, DRB will necessarily be required to enter and perform work upon Seller's real property other than the specific real property which is the subject of the parties' agreement, as well as to be assured access to the real property to which it is entitled over any of Seller's residual real property necessary for that purpose. Thus, as part of the relief requested herein DRB should be entitled to any rights required for that necessary/implied and/or contractually-required access and improvement undertakings, whether for purposes of development work (e.g., mass earthwork and grading, sanitary sewer mains and laterals, storm drain piping and structures, water main and service laterals, inclusive of meter vaults and fire hydrants, dry utility work, road and sidewalk work, including but not limited to sub-base, curb and gutter and surface paving, installation of street trees and street lights, cut and fill work, public dedications, etc.), public road access, or otherwise, all to at least the same degree (at a minimum) as was required to be performed by the defaulting Seller under the LPA as amended.

Seller has also violated its ongoing obligations to pay the real estate taxes on the Property, and some or all of the subject Property may have gone to tax sale, subject to timely redemption. Seller's failure to stay current on the real property taxes constitutes clear breach of Seller's representations, warranties and other obligations under the LPA as amended. To the extent the non-defaulting DRB is forced to mitigate the risk of losing the subject Property to tax sale by stepping up and redeeming the property from tax sale, those proximately-caused breach and reasonable mitigation damages should be further offset against and act to further reduce any residual purchase price found due to Seller.

15. With the Contingent Resolution Terms under the Second Amendment timely and properly terminated, both the Seller's obligations and the Buyer's rights and remedies – both to enforce the LPA as amended, and with respect to Seller's default – are now governed by the post-termination terms of the otherwise terminated Second Amendment and under the original LPA as amended, as it existed prior to the Second Amendment (*i.e.*, as amended by the First Amendment).

16. Plaintiff has complied with all conditions precedent to the filing of this action, if any.

17. Seller's breach/default and continuing failures/refusals to cure and/or otherwise perform as required under the LPA as amended leaves the subject Property at various stages of subdivision and development into Finished Lots as required under the LPA as amended, forcing the non-defaulting DRB to substitute its own performance of same, including ancillary benefit redounding to the defaulting Seller if DRB is made to "finish" those lots as was required of Seller under the LPA as amended. The same is true with regard to any monies DRB decides to



expend to redeem the Property from tax sale resulting from Seller's material breach in failing to pay same. As a matter of equity, DRB is respectfully requesting that credits be made to its as-adjusted purchase prices, which is required by the equitable adjustments and setoffs against those prices and needed to fashion a complete equitable remedy simulating the performance due and owed by the parties under the LPA as amended. Only by doing so can any unfair windfalls to the defaulting Seller, and as needed as a result of its breach and from DRB's mitigation efforts regarding same, be properly addressed. Indeed, and as part of that necessary equitable relief, DRB also requests as part of its lost benefit of the bargain those damages resulting from the difference between the deal it entered into with the Seller (*i.e.*, all the lots contracted for under the LPA as amended) and what the Seller has provided (only the lots sold at the June 2018 Bulk Closing), DRB's preparations and other activities related to the Property tailored to the deal as agreed, and not what Seller has provided to date.

### **COUNT 1**

#### **(Declaratory Judgment/Specific Performance/Injunctive Relief)**

18. Plaintiff incorporates by reference the substance of all the foregoing factual allegations.

19. Pursuant to WV Code § 55-13-1, *et seq.*, this Court has the power to make declaratory judgments in regard to genuine controversies relating to contract interpretation and enforcement.

20. An actual controversy exists between the parties regarding their respective rights and obligations under the LPA as amended. To resolve the controversy between the parties in regard to the enforceable contract provisions under the terms of the LPA as amended, and to

declare and enforce the Buyer's rights and entitlements in regard to same, Plaintiff respectfully requests declaratory judgment of its rights and entitlements under the Agreement as amended, and the entry of an order and decree of specific performance to enforce those rights and entitlements as set forth herein.

21. Seller failed to timely tender fully developed lots and otherwise perform as required under the original LPA as amended and is subject to all of the non-defaulting Buyer remedies under the terms of the LPA as amended, including but not limited to for specific performance and the ancillary equitable relief needed to compel and/or reasonably substitute for Seller's in-kind, specific performance of its executory obligations to the non-defaulting DRB under the LPA as amended.

22. Buyer has performed and Seller is in default, refusing to perform. Plaintiff Buyer is in compliance with its contract obligations and is without any adequate remedy at law. Thus, Plaintiff DRB is entitled to an order of specific performance, whether (i) ordering and enjoining Seller to perform its conveyance and other in-kind, executory obligations under the LPA as amended (based on the LPA as amended terms, as reconciled by this Court in this action) and/or (ii) ordering and according to the non-defaulting DRB, as a matter of equity, appropriate setoff against any otherwise agreed LPA Finished Lot purchase prices for the as-promised/as-Finished, Undeveloped Lots – to financially account for Purchaser's mitigation costs to conform the Seller's non-performance to the performance promised DRB under the LPA as amended. In the absence of an arguably impractical mandatory injunction (involving judicial enforcement and oversight), Plaintiff DRB would be unfairly prejudiced by having to purchase the subject Property/Undeveloped Lots in their current, partially unrecorded/undeveloped condition. By

contrast, if the subject lot prices for the Property/Undeveloped Lots were reduced to cover the remaining cost to approve/record and Finish the subject Lots and to clear title (as promised in the LPA as amended), that more equitable outcome would help to approximate, *albeit* imperfectly (in the absence of Seller's performance in fact), the in-kind benefit of the bargain promised DRB under the LPA as amended. In either event, Plaintiff requests that this Honorable Court appoint a special commissioner or trustee to convey title to DRB pursuant to the Court's order and disburse any net proceeds otherwise due Seller, after offsetting for any cost to conform and breach mitigation reductions to Seller's net price to cover for Seller's non-conforming tender and breach, and to clear title of any liens or encumbrances (including any intervening tax sale in need of expedient redemption), as called for the LPA as amended, consistent with Seller's at-closing obligations under the LPA as amended.

23. Seller has clearly failed to perform with respect to the remaining Undeveloped Lots that are the subject of this specific performance lawsuit. Even so, courts typically do not find it practical to order in-kind performance of executory contract obligations via mandatory injunctive relief. Instead, courts typically invoke their inherent equitable jurisdiction to fashion a more just remedy, commensurate with the unperformed executory obligations of the defaulting Seller, using "cost-to-conform" price offsets to credit executory/conditional payment obligations otherwise owed to Seller – here to cover DRB's projected/required cost to develop those lots itself and other costs (*e.g.*, to clear title, redeem the Property from tax sale, etc.) that are needed to cover the defaulting Seller's breached contract obligations regarding the Undeveloped Lots at issue. Therefore, and to the extent DRB has to complete Seller's obligations in order to conform the subject Property to the as-promised Finished Lots, with marketable/insurable title, and as

otherwise required under the LPA as amended (in order to conform them to the conditions required to trigger a closing obligation), DRB should be granted ancillary monetary relief to offset those costs and as a setoff/reduction to any Finished Lot prices otherwise owed Seller, had the subject Property (and Undeveloped Lots on that real estate and/or to be recorded there) been developed as required and timely tendered for purchase in the required Finished Lot condition. To the extent that required equitable setoff acts to negate the conditional purchase price and result in costs to mitigate and conform the Property exceeds the purchase price, DRB is respectfully requesting title and a net money judgment to effect true specific performance and simulate the non-defaulting DRB's benefit of the bargain. As well, and so that DRB is afforded the required access to Seller's residual property in order to perform any entitlement and development work needed to conform the Property to its as-promised condition, and otherwise going forward for access to the Property (*i.e.*, via access to public roads), DRB is entitled to a decree that DRB is entitled to enter upon the Seller's residual property for those purposes.

24. The LPA as amended envisioned acquisitions upon completion of conditions by Seller over time, but in this single adjudication DRB must obtain its complete remedy in a single award/judgment. Therefore, this suit necessarily contemplates an acceleration of DRB's purchase of the subject Property in bulk, not only entitling DRB to (i) offsets to price to cover the agreed Deposit and price credits and cost of conforming the lots to their as-promised, Finished and condition-compliant state, but also (ii) a further price reduction, reducing any such (net of offsets) purchase monies (otherwise due Seller) to present value, as of the date of trial.

WHEREFORE, Plaintiff DRB demands judgment against Overlay for Declaratory Judgment, Injunctive Relief, Monetary Reconciliation and Specific Performance, compelling

Overlay to perform in fact, or – if deemed impractical for judicial oversight – to appoint a special commissioner or trustee to deed over marketable/insurable title to the subject real estate (Exhibit A) to DRB, free and clear of all liens and encumbrances (and providing for payment of same from the net proceeds), for a net amount (if any) remaining (after offsetting for what Plaintiff will need to spend in order to roughly substitute for the defaulting Seller's failure to perform as required and to account for the unjust financial benefit devolving to the defaulting Seller as a result of DRB's mitigation and substitution for the defaulting Seller's performance), together with costs and prejudgment interest as applicable. To the extent those equitable offsets for DRB's mitigation costs and cost to conform the lots to their as-promised condition exceeds those conditional lot prices, DRB also requests a net monetary judgment for those net ancillary damages evidenced to this Court's equitable jurisdiction in the context of specific performance. DRB also requests the entry of a decree securing DRB's right to enter upon the Seller's real property other than the specific real property which is the subject of the parties' agreement in order to not only provide DRB with needed access to perform any work needed to conform the Property to its as-promised condition (entitlement and infrastructure install inclusive but not exclusive, and at a minimum to the extent of what was required of the Seller under the LPA as amended), but also to provide DRB access to the real property to which it is entitled under the parties' agreement. Plaintiff also seeks attorneys' fees to the extent allowed by the LPA as amended and/or applicable law.

**COUNT 2**

**(Breach of Contract Money Damages)**

**(In the Alternative)**

25. Plaintiff incorporates by reference the substance of all the foregoing factual allegations.

26. If, for whatever reason, the specific performance remedies requested in Count 1 are not awarded by the Court or not found justified under these circumstances, DRB would then have suffered compensable breach of contract money damages. In that event, Plaintiff seeks breach of contract money damages proximately caused by the Seller defaults timely noticed in DRB's 4/1/19 Default Notice after DRB gave timely Notice of DRB's termination of the Contingent Resolution Terms of the Second Amendment, including the additional 60-day cure period for same, as extended under the Second Amendment.

27. Seller failed to cure the said default, whether timely or otherwise, and as a direct and proximate result of the Defendant Seller's breach, Buyer DRB has suffered compensatory breach of contract money damages in the form of, *inter alia*, costs and expenses incurred in reliance on the Seller's failed promises of executory performance (including, but not limited to payment of DRB's Deposit monies which are secured by the referenced DOT covering some of the subject Property), and was also deprived of the contractual benefit of its bargain with respect to the lot prices and other terms defined in the LPA as amended. Indeed, DRB would never have entered into the LPA as amended for just the Finished Lots purchased at the June 2018 Bulk Closing and Seller's failure/refusal to perform and to develop the remaining Undeveloped Lots has caused DRB substantial damages, both direct (*e.g.*, benefit of the bargain) and consequential.

including but not limited to substantial lost profit. DRB's lost benefit of the bargain contract damage remedies are preserved in the LPA as amended, notwithstanding the parties' limited waiver of "lost profit" damages devolving from the foregone sale of finished homes to be constructed on the Undeveloped Lots that were to be developed and sold to DRB by Overlay/Seller under the LPA as amended.

WHEREFORE, Plaintiff DRB demands judgment against Overlay in an amount to be proved at trial, but not less than \$1,340,000, together with prejudgment interest from the date of liquidation, costs and interest from the date of judgment. Plaintiff also seeks attorneys' fees to the extent allowed by the LPA as amended and/or applicable law.

### **COUNT 3**

#### **(Establishment and Enforcement of Vendee's Lien)**

#### **(In the Alternative)**

28. Plaintiff incorporates by reference the substance of all the foregoing factual allegations.

29. As the non-defaulting Purchaser under the LPA as amended, and pursuant to applicable law, if the non-defaulting Plaintiff is, for whatever reason, denied specific performance as requested herein, DRB will have suffered compensatory damages under the LPA as amended and entitled to its money damage remedies under the LPA as amended, including but not limited to the return of the money deposit. Thus, the Plaintiff is entitled to a joint, several and blanket vendee's lien on the Property described in **Exhibit A** to the extent of (and from the date of) any monies paid to the defaulting Seller by DRB and due to be refunded Plaintiff based on Seller's defaults under the LPA as amended, including but not limited to the \$100,000 (US)

deposit due to DRB from the defaulting Seller in the absence of (and in the alternative for) specific performance as requested herein.

WHEREFORE, Plaintiff DRB demands judgment against Overlay and for equitable relief prays that this Honorable Court enter a decree establishing a vendee's lien against the Property described at **Exhibit A**, effective (for purposes of priority, *vis-à-vis* other competing liens) retroactive to the date any such payment obligations by the Seller Defendant first became and/or becomes due and owing to Plaintiff in the amounts claimed and determined justified by this Court under the circumstances of this case and allowing Plaintiff to enforce the said lien against the referenced Property by all lawful means, including but not limited to appropriate judicial sale, together with all prejudgment interest at the legal rate, costs and interest, from the date of judgment. Plaintiff also seeks attorneys' fees to the extent allowed by the LPA as amended and/or applicable law.

Respectfully submitted,  
DAN RYAN WEST VIRGINIA  
BUILDERS, LLC, a West Virginia LLC

By: /s/ William F. Gibson II  
William F. Gibson II (WVSB No.11255)  
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and

/s/ Charles F. Printz, Jr.

Charles F. Printz, Jr. (WVSB No. 2985)

Shannon P. Combs (WVSB No.13601)

BOWLES RICE LLP

101 South Queen Street

Martinsburg, WV 25401

(304) 263-0836 (phone)

(304) 267-3822 (fax)

Counsel for Plaintiff



# EXHIBIT

# A

## **EXHIBIT A**

The following described parcels of real estate, situate, lying and being in Martinsburg District, Berkeley County, West Virginia, being more particularly described as follows:

### **PARCEL ONE:**

Lots 439-476, 478-596, 621-643, as shown on that plat entitled, "Final Plat Phase 3 Martinsburg Ventures LLC", prepared by Eastern States Engineering, dated September 7, 2006, and recorded in the Office of the Clerk of the County Council of Berkeley County, West Virginia, in Plat Cabinet 14, at Slides 21-24.

*And Being* a part of the same property conveyed by a deed to Overlay I, LLC, from Martinsburg Ventures, LLC, a Virginia limited liability company, dated March 31, 2017, and recorded in the aforesaid Clerk's Office in Deed Book 1166, at Page 62.<sup>1</sup>

### **PARCEL TWO:**<sup>2</sup>

That certain lot or parcel of real estate, with the improvements and appurtenances thereunto belonging, situate in the Martinsburg (formerly in Arden) District, Berkeley County, West Virginia, and more particularly described as follows:

---

<sup>1</sup> The foregoing described property represents the 180 already-recorded lots portion of the 228 "Undeveloped Lots" and related real property (*see fn. 2*) that is the subject of this litigation.

<sup>2</sup> Except as set forth herein, the hereinafter-described Parcel Two and Parcel Three have not been further subdivided, the result being that some of the property encumbered by the real estate sale contract which is the subject of the lawsuit for which this description is provided (specifically, the 48 unrecorded townhouse lot portion of the "Undeveloped Lots" and related real property that is the subject of this litigation) is not defined by reference to a plat, a metes and bounds description or other more specific legal description. Rather, that unrecorded portion of the Undeveloped Lots can only be projected onto the source parcels of which that still-unrecorded portion, as a matter of record, remains a part. Thus, the description of that would-be 48 lot portion of the Undeveloped Lots can only be as the entirety of Parcel Two and Parcel Three, with the exceptions noted. Thus, the whole of those parcels must be encumbered so as to properly preserve the claimant's rights in regard to those lots. A conceptual site plan –showing the approximate anticipated location of the unrecorded 48 lots to which claimant asserts a right in the referenced lawsuit (as well as the 180 already-recorded lots to which claimant asserts a right) – is attached. If the Court permits and Seller is willing, a more specific would-be boundary can be submitted as soon as it is certain what portion(s) is/are needed to create the said 48 still unrecorded/Undeveloped Lots.

As well, the hereinafter-described Parcel Two and Parcel Three also encompass real property needed for the development of the property encumbered by the real estate sale contract which is the subject of the lawsuit (*e.g.*, for stormwater management facilities, roads, etc. – in any event not less than what was required under the real estate sale contract which is the subject of the lawsuit), whether for purposes of needed/required access and/or to provide areas upon which infrastructure improvements will be constructed. Properly preserving the claimant's rights in that regard, and for access to the property encumbered by the real estate sale contract which is the subject of the lawsuit going forward, is yet another reason why the whole of these parcels (Parcel Two and Parcel Three) must be encumbered.

TRACT I:

Known as Lot No. 6, in the division of the lands of John Kilmer, deceased, which was assigned to Harriett A. Seibert, the plat and division being recorded in Deed Book No. 70, Page 345, et seq. of the land recorded of Berkeley County, West Virginia, in the Office of the Clerk of the County Commission, said Lot No. 6 consists of 128  $\frac{1}{2}$  acres. There is to be deducted, however, from this a tract of land containing one acre conveyed by Harriett A. Seibert, in her life time to Chas L. Butts by deed dated December 21, 1901, which deed is recorded in the aforesaid Clerk's Office in Deed Book No. 102, Page 143; and less another tract of 1  $\frac{1}{4}$  acres, being the same tract of land that was conveyed by Chas L. Seibert, et al., heirs at law of Harriett A. Seibert, deceased to the Tuscarora Orchard Company, by deed dated March 22, 1911, and recorded in the Office of the Clerk of the County Commission of Berkeley County, West Virginia, in Deed Book No. 126, Page 439, the entire amount of land being 126  $\frac{1}{4}$  acres.

TRACT II:

All of that certain piece of land aggregating about one acre, more or less, adjoining the lands of the Export Apple Company on the south and west and J.W.S. Boyd on the north and the public road on the east, located on the west side of the county road running from the Tuscarora Grade opposite what is known as Showers Lane south to a point where it intersects with the Arden Road, southwest of Henry J. Seiberts's farm; said land being a short distance along said road south of where J.W.S. Boyd now reside.

TRACT III:

Beginning at the intersection of a stone fence (1) corner to George Noll; thence with his line in part and finally with J.W. Stewart's S. 56  $\frac{1}{4}$  E. 106 poles to a locust post (2); thence S. 69  $\frac{1}{4}$  E. 105 poles to (3); thence S. 48 E. 9 poles to (4); thence S. 24 W. 22 poles to (5); thence S. 56  $\frac{1}{4}$  E. 8.2 poles to (6) a stake corner to said Stewarts and in Flagg's line; thence with said line S. 29 W. 130 poles to a stake (14) in his line and corner to Lot No. (6); thence with lines of said Lot No. (6), N. 53  $\frac{3}{4}$  W. 32 poles to a stake (13); thence N. 29 E. 70 poles to a stake and stones in a field at (12) thence N. 54  $\frac{3}{4}$  poles to a stake (11), corner to said lot and in Noll's line; thence with said line N. 18  $\frac{3}{4}$  E. 60 poles to the beginning, containing 105 acres, one rood and designated as Lot No. 5 on the plat of partition of the lands of the late John W. Kilmer among his children, which said plat is of record in the office of the Clerk of the County Commission of Berkeley County, West Virginia.

AND BEING the same property conveyed to Martinsburg Ventures, LLC, a Virginia limited liability company, by a deed from Theodore K. Oates, II, and Mary Elizabeth Oates, by Max O. Oates, Jr., their Attorney-in-Fact, and Max O. Oates, Jr. in his own right, all trading and doing business as Oates Partnership, dated September 28, 2005 and recorded in the aforesaid Clerk's Office in Deed Book 812, at Page 7.

**PARCEL THREE:**

All of the following lot or parcel of real estate with the improvements thereon and the appurtenances thereunto belonging, situate, lying and being in Martinsburg (formerly Arden) District, Berkeley County, West Virginia, and being more particularly described as follows:

Being all that parcel of land located along the westerly side of Delmar Orchard Road in the City of Martinsburg, being more particularly bounded and described on a plat entitled "Addition Plat, Dorothy E. Leavitt to Martinsburg Ventures, L.L.C." dated August 4, 2005, said plat being simultaneously recorded herewith in the Office of the Clerk of the County Commission of Berkeley County, West Virginia, in Plat Book 810, at Page 268, containing 1.50 acres (65,451 square feet), more or less.

AND BEING the same property conveyed to Martinsburg Ventures, LLC, a Virginia limited liability company, by a deed from Dorothy E. Leavitt, dated August 4, 2005 and recorded in the aforesaid Clerk's Office in Deed Book 810, at Page 270.

**SAVING AND EXCEPTING FROM THE FOREGOING  
PARCEL TWO AND PARCEL THREE:**

1. All of the lots described in and as "PARCEL ONE" above; and
2. All of those certain lots or parcels of land, with the improvements thereon and the appurtenances thereunto belonging, situate, lying and being in the Martinsburg District, Berkeley County, West Virginia, and more particularly described as follows:

Lots 1-4, 6, 8-10, 15, 16, 20, 23, 26-31, 33-37, 39, 42-48, 55-56, 59-84, 89-91, 95-101, 103-105, 108-116, 118, 119, 123-126, 131-142, 147-161, 164, 165, 173 and 188-213, as shown on a plat entitled "Final Plat, Phase 1, Martinsburg Ventures LLLC", prepared by Eastern States Engineering, dated March 10, 2006, and recorded in the Office of the Clerk of the County Commissioner of Berkeley County, West Virginia, in Plat Cabinet 12, at Slides 96, 97, 98 and 99.

All of those certain lots or parcels of land, with the improvements thereon and the appurtenances thereunto belonging, situate, lying and being in the Martinsburg District, Berkeley County, West Virginia, and more particularly described as follows:

Lots 173A, 174A and 176A, as shown on a plat entitled "Final Plat, Boundary Line Adjustment, Phase 1, Martinsburg Ventures LLC", prepared by Eastern States Engineering, dated October 20, 2006 and recorded in the

Office of the Clerk of the County Commission of Berkeley County, West Virginia, in Plat Cabinet 13, at Slide 25.

All of that certain lot or parcel of land, with the improvements thereon and the appurtenances thereunto belonging, situate, lying and being in the Martinsburg District, Berkeley County, West Virginia, and more particularly described as follows:

Lot 130A, as shown on a plat entitled "Final Plat, Boundary Line Adjustment, Phase 1, Martinsburg Ventures LLC", prepared by Eastern States Engineering, dated February 27, 2007 and recorded in the Office of the Clerk of the County Commission of Berkeley County, West Virginia, in Plat Cabinet 13, at Slide 103.

All of those certain lots or parcels of land, with the improvements thereon and the appurtenances thereunto belonging, situate, lying and being in the Martinsburg District, Berkeley County, West Virginia, and more particularly described as follows:

Lots 644-650 and 659-666, as shown on a plat entitled "Final Plat, Phase 3, Martinsburg Ventures LLC", prepared by Eastern States Engineering, dated September 7, 2006 and recorded in the Office of the Clerk of the County Commission of Berkeley County, West Virginia, in Plat Cabinet 14, at Slides 21, 22, 23 and 24.

Parcels One, Two and Three being that same real estate conveyed to Overlay I, LLC, a Virginia limited liability company, from Martinsburg Ventures, LLC, a Virginia limited liability company, by Deed dated March 31, 2017, recorded in Deed Book 1166, at Page 62.

3. All of those certain lots or parcels of land, with the improvements thereon and the appurtenances thereunto belonging, situate, lying and being in the Martinsburg District, Berkeley County, West Virginia, and more particularly described as follows:

Lots 5, 7, 11, 12, 13, 14, 17, 18, 19, 21, 22, 24, 25, 32, 38, 40, 41, 49, 50, 51, 52, 53, 54, 57, 58, 85, 86, 87, 88, 93, 94, 102, 106, 107, 117, 120, 121, 122, 143, 144, 145, 146, 162, 163, 166, 167, 168, 169, 170, 171 and 172, as shown on that plat entitled, "Final Plat Phase 1 Martinsburg Ventures LLC", prepared by Eastern States Engineering, dated March 10, 2006, and recorded in the Office of the Clerk of the County Council of Berkeley County, West Virginia, in Plat Cabinet 12, at Slides 96-99.

Lots 127A, 128A and 129A, as shown on that plat entitled, "Final Plat Boundary Line Adjustment Phase 1 - Lots 127-130 Martinsburg Ventures LLC", prepared by Eastern States Engineering, dated February 27, 2007,

and recorded in the Office of the Clerk of the County Council of Berkeley County, West Virginia, in Plat Cabinet 13, at Slide 103.

Lots 175A, 177A, 178A, 179A, 180A, 181A, 182A, 183A, 184A, and 187A, as shown on that plat entitled, "Final Plat Boundary Line Adjustment Phase 1 Martinsburg Ventures LLC", prepared by Eastern States Engineering, dated October 20, 2006, and recorded in the Office of the Clerk of the County Council of Berkeley County, West Virginia, in Plat Cabinet 13, at Slide 25.

Lots 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 668, and 669, as shown on that plat entitled, "Final Plat Phase 3 Martinsburg Ventures LLC", prepared by Eastern States Engineering, dated September 7, 2006, and recorded in the Office of the Clerk of the County Council of Berkeley County, West Virginia, in Plat Cabinet 14, at Slides 21-24.

And Being the same property conveyed to the DR Acquisitions, LLC, from Overlay I, LLC, a Virginia limited liability company, by deed dated June 14, 2018, and recorded in the aforesaid Clerk's Office in Deed Book 1214, at Page 528.

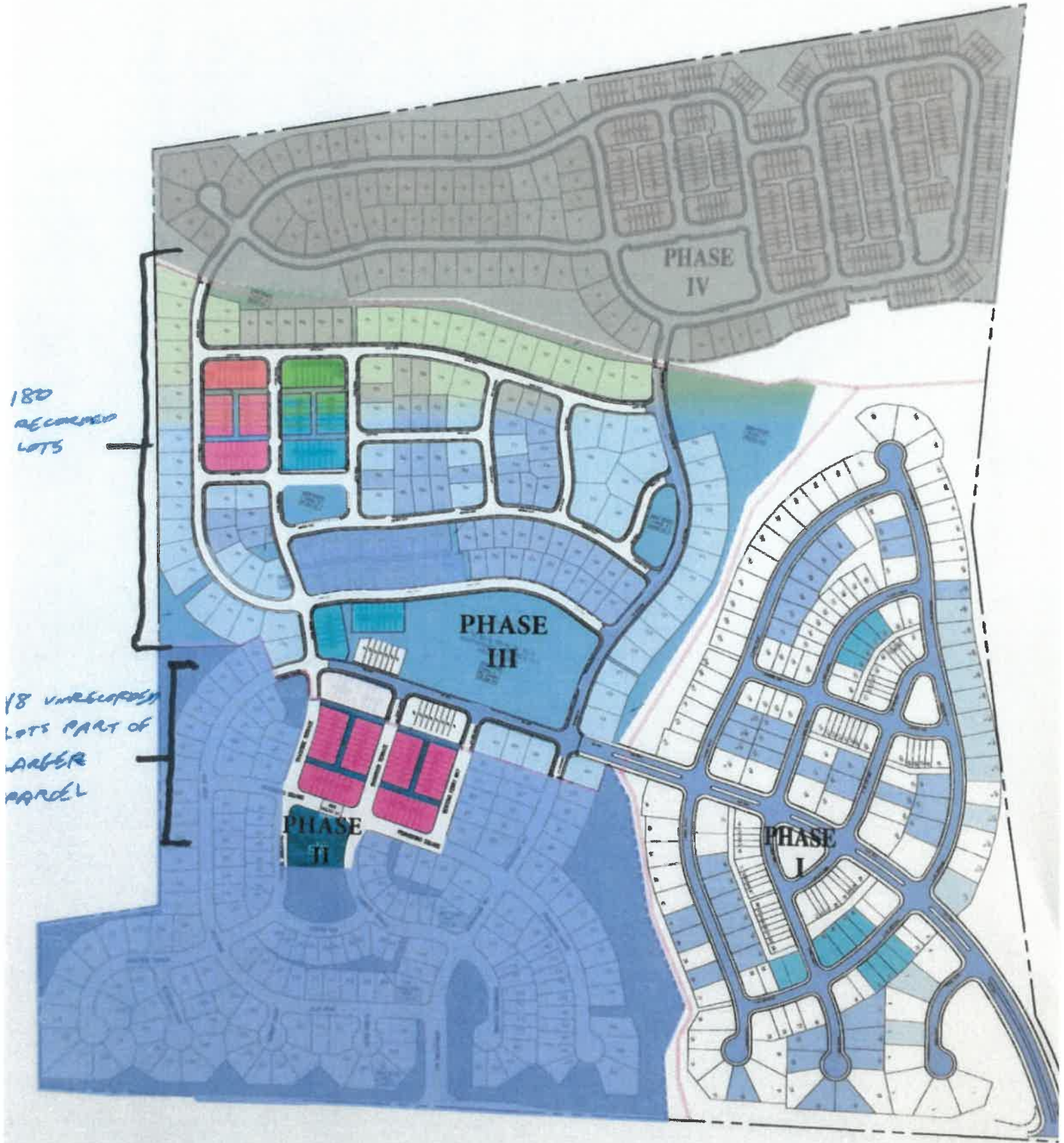
4. All of those certain lots or parcels of land, with the improvements thereon and the appurtenances thereunto belonging, situate, lying and being in the Martinsburg District, Berkeley County, West Virginia, and more particularly described as follows:

Lot 92, as shown on that plat entitled, "Final Plat Phase 1 Martinsburg Ventures LLC", prepared by Eastern States Engineering, dated March 10, 2006, and recorded in the Office of the Clerk of the County Council of Berkeley County, West Virginia, in Plat Cabinet 12, at Slides 96-99.

Lots 667 and 651, 652, 653, 654, 655, 656, 657 and 658 as shown on that plat entitled, "Final Plat Phase 3 Martinsburg Ventures LLC", prepared by Eastern States Engineering, dated September 7, 2006, and recorded in the Office of the Clerk of the County Council of Berkeley County, West Virginia, in Plat Cabinet 14, at Slides 21-24.

And Being the same property conveyed to Dan Ryan Builders West Virginia, LLC, a Maryland Limited Liability Company from Overlay I, LLC, a Virginia limited liability company, by deed dated June 14, 2018, and recorded in the aforesaid Clerk's Office in Deed Book 1214, at Page 526.







IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

**DAN RYAN BUILDERS WEST VIRGINIA, LLC,**  
a West Virginia limited liability company,

**Plaintiff,**

**v.**

**Civil Action No.: 20-C-110**  
**Judge Bridget Cohee**

**OVERLAY I, LLC,**  
a Virginia limited liability company,

**Defendant.**

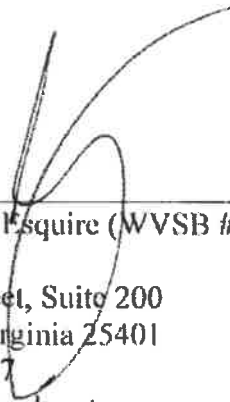
**DEFENDANT OVERLAY I, LLC'S MOTION TO DISMISS**  
**PLAINTIFF'S BILL OF COMPLAINT**

COMES NOW, Defendant, Overlay I, LLC ("Overlay"), by and through its counsel, Gregory E. Kennedy, Esquire, and the law firm of Franklin & Prokopik, and moves this Honorable Court pursuant to West Virginia Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff's Bill of Complaint, with prejudice, against Overlay for failing to state a claim upon which relief can be granted.

The Court must dismiss Plaintiff's Bill of Complaint because it fails to state a claim against Overlay upon which relief can be granted. In support of its Motion to Dismiss Plaintiff's Bill of Complaint, Overlay submits its Memorandum of Law in Support, which is filed contemporaneously herewith.

Respectfully submitted this 31<sup>st</sup> day of August, 2020.

**OVERLAY I, LLC,**  
By Counsel,



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Gregory E. Kennedy, Esquire (WVSB #8730)  
Franklin & Prokopik  
100 South Queen Street, Suite 200  
Martinsburg, West Virginia 25401  
Phone: (304) 596-2277  
E-mail: [gkennedy@fandpnet.com](mailto:gkennedy@fandpnet.com)

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

DAN RYAN BUILDERS WEST VIRGINIA, LLC,  
a West Virginia limited liability company,

Plaintiff,

v.

Civil Action No.: 20-C-110  
Judge Bridget Cohee

OVERLAY I, LLC,  
a Virginia limited liability company,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31<sup>st</sup> day of August, 2020, I electronically filed the *DEFENDANT OVERLAY I, LLC'S MOTION TO DISMISS PLAINTIFF'S BILL OF COMPLAINT* with the Circuit Clerk of Berkeley County, West Virginia using the West Virginia E-Filing system which will send notification of such filing to the following counsel of record.

William F. Gibson, Esquire

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*Counsel for Plaintiff Dan Ryan Builders West Virginia, LLC*

/s/Gregory E. Kennedy  
Gregory E. Kennedy, Esquire (WVSB #8730)



**IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA**

**DAN RYAN BUILDERS WEST VIRGINIA, LLC,**  
a West Virginia limited liability company,

**Plaintiff,**

**v.**

**Civil Action No.: 20-C-110**  
**Judge Bridget Cohee**

**OVERLAY I, LLC,**  
a Virginia limited liability company,

**Defendant.**

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT OVERLAY I, LLC'S**  
**MOTION TO DISMISS PLAINTIFF'S BILL OF COMPLAINT**

Pursuant to West Virginia Rule of Civil Procedure 12(b)(6), Plaintiff's Bill of Complaint ("Complaint") fails to state a claim upon which relief can be granted against Defendant Overlay I, LLC ("Overlay"). As such, Overlay respectfully requests that this Court dismiss the Complaint, with prejudice, for the reasons discussed herein.

**INTRODUCTION**

As the Court is aware, the Plaintiff Dan Ryan Builders West Virginia, LLC ("Plaintiff") commenced this civil action with the filing of its Complaint. The Complaint paints a cursory one-sided overview of a transaction pertaining to real property in Berkeley County, and seeks the extraordinary remedies of specific performance, breach of contract money damages, and the establishment and enforcement of a vendee's lien. Simply stated, the Plaintiff's allegations and requested relief are far in excess of those allowed or reserved to the Plaintiff under the clear and unambiguous language of the Agreement (defined below). In fact, the Complaint fails to attach the Agreement as an exhibit; rather, the Complaint details several portions of the Agreement and

subsequent addendum that are not germane to the actual issue of specific performance. Finally, the Complaint is further void of any details and description of the Plaintiff's acts under the Agreement that can very easily be viewed as dilatory, capricious, and predatory.

### STATEMENT OF PERTINENT FACTS

1. On or about May 14, 2018, Plaintiff and Overlay executed that certain Lot Purchase Agreement which detailed terms and conditions for the sale and purchase of real property situate in the City of Martinsburg, Berkeley County, West Virginia, identified as District 6, Tax Map 35, in the subdivision known as Martinsburg Station ("Agreement") (A copy of the Agreement is attached hereto as Exhibit "A").

2. Paragraph 2 Purchase Price, Deposit and Payment. of the Agreement entitled (b) First Deposit. states as follows:

Within ten (10) days after the Study Period Expiration Date (as defined herein), Buyer shall deliver to Bowles Rice, LLP (the "Escrow Agent"), in escrow, a cash deposit in the amount of **One Hundred Thousand Dollars (\$100,000.00)** (the "Initial Deposit"), in accordance with the attached Exhibit B. Upon receipt of the Note and Deed of Trust described below, the Escrow Agent shall release the Deposit to Seller.

3. Paragraph 11 Default. of the Agreement entitled (b) Default by Seller. states as follows:

If all conditions and other events precedent to the Seller's obligations to consummate the transactions contemplated by this Agreement have been satisfied or waived, but the Seller fails, refuses or is unable to consummate the purchase and sale contemplated by this Agreement, or to perform any other obligation required by this Agreement, and such failure or refusal continues for a period of ten (10) business days after written notice thereof from Buyer to Seller, and if Seller's failure or refusal has not been waived by Buyer, then Buyer shall choose, as its sole and exclusive remedy hereunder, either to (i) terminate this Agreement by written notice to Seller, in which event the Deposit shall be immediately returned to Buyer; (ii) pursue an action to recover Buyer's Actual Damages, as hereinafter defined and described, or (iii) seek specific performance from Seller of Seller's obligation to convey the Lots pursuant to this Agreement. As a



condition precedent to Buyer exercising any right it may have to bring an action for specific performance as the result of Seller's failure or refusal to perform its obligations hereunder, Buyer must commence such an action within one hundred eighty (180) days after the failure of Seller to cure such default. Buyer agrees that its failure to timely commence such an action for specific performance within such one hundred eighty (180) day period shall be deemed a waiver by it of its right to commence such an action. In the event that Buyer elects to pursue an action for damages, then Buyer shall be entitled to be reimbursed by Seller for its actual, provable, out-of-pocket costs incurred to third parties in connection with the transaction described in this Agreement ("Actual Damages"), and in no event shall Buyer be entitled to pursue punitive or consequential damages, including without limitation any so-called "lost profit" damages, against Seller. If Buyer elects to so terminate this Agreement, then this Agreement shall be terminated and neither party shall have any further rights, obligations or liabilities hereunder, except for any obligations which expressly survive this Agreement, or as to Lots already closed or as otherwise expressly provided herein, and except that Buyer shall be entitled to a return of any portion of the Deposit not credited to a prior Closing or posted as a Damage Deposit and the damages described in the preceding sentence provided Buyer is not otherwise in default hereunder. Notwithstanding anything to the contrary herein, if Seller's failure or refusal to perform its obligations under this Agreement is a result of any action of, or failure to act by, Buyer or any of its employees, agents, representatives or others acting by or on behalf of Buyer, Buyer shall not be relieved of its obligations under this Agreement and Buyer shall not be entitled to any right or remedy provided in this subparagraph or elsewhere in this Agreement. (Emphasis added).

4. Paragraph 11 Default, of the Agreement entitled (c) Notice, states as follows:

**Notwithstanding any other term or provision hereof**, neither party shall be deemed to be in default hereunder, unless and until, it shall have been sent Notice of such default by the other party, and **shall have failed to cure the default within fifteen (15) days of the date of such notice**. (Emphasis added).

5. On or about June 1, 2018, Plaintiff and Overlay executed that certain Amendment to Lot Purchase Agreement ("First Amendment") (Plaintiff's Complaint ¶ 5).

6. On or about June 15, 2018, a closing occurred whereupon Overlay delivered and sold ninety-one (91) lots to Plaintiff ("Closing") (Plaintiff's Complaint ¶ 6).

7. At the Closing, Overlay delivered the Note and Deed of Trust to Plaintiff.

8. On or about April 1, 2019, Plaintiff provided Overlay with a written notice of default, which provided in accordance with Paragraph 11(c) of the Agreement fifteen days to cure the alleged default (Plaintiff's Complaint ¶ 6).

9. On or about July 31, 2019, Plaintiff and Overlay executed that certain Second Amendment to Lot Purchase Agreement ("Second Amendment") (Plaintiff's Complaint ¶ 8).

10. The Second Amendment clearly and unambiguously identified in Paragraph 3(f) that the Initial Deposit had not been delivered to Overlay as required by the Agreement.

11. On or about August 30, 2019, Plaintiff and Overlay executed that certain Third Amendment to Lot Purchase Agreement ("Third Amendment") (Plaintiff's Complaint ¶ 12).

12. On or about September 13, 2019, Plaintiff and Overlay executed that certain Fourth Amendment to Lot Purchase Agreement ("Fourth Amendment") (Plaintiff's Complaint ¶ 12).

13. On or about September 30, 2019, Plaintiff and Overlay executed that certain Fifth Amendment to Lot Purchase Agreement ("Fifth Amendment") (Plaintiff's Complaint ¶ 12).

14. On or about October 1, 2019, Plaintiff provided Overlay with a written notice of default ("Notice of Default") (Plaintiff's Complaint ¶¶ 11, 12).

15. Plaintiff's Notice of Default stated as follows:

Pursuant to Section 5(b) of the Agreement, Buyer hereby elects to terminate the Agreement prior to the expiration of the Study Period. Pursuant to Section 2 of the second amendment to the Agreement dated July 31, 2019, this letter also serves as the commencement of your 60-day cure period.

16. Section 5(b) of the Agreement states in part as follows:

In the event that Buyer shall terminate this Agreement pursuant to the provisions of this Paragraph 5(b), **neither party shall have any further liability to the other.** (Emphasis added).

17. Plaintiff's Notice of Default and Complaint detail that Plaintiff further relied upon Section 2 of the Second Amendment. (Plaintiff's Complaint ¶¶ 11, 12).

18. Section 2 of the Second Amendment states in part as follows:

In the event that Seller fails to satisfy all of its obligations under this Second Amendment as and when required hereunder, Seller shall be deemed to have failed to cure any default as and when required under this Agreement, and Buyer shall have the right to exercise all of its rights and remedies at law or in equity in accordance with Paragraph 11(b), of the Agreement (Emphasis added).

19. As of October 1, 2019, Plaintiff's Notice of Default terminated the Agreement with neither party having any further liability to the other.

20. In contravention of the foregoing, Plaintiff filed its Complaint in the instant civil action on or about May 6, 2020, alleging that Overlay had breached the applicable contract by and between the parties, and that Plaintiff was entitled to the extraordinary remedy of specific performance, as well as breach of contract money damages and the establishment and enforcement of a vendee's lien.

21. Plaintiff's filing of its Complaint is barred by the plain and unambiguous terms of the Agreement because the Plaintiff's filing date of May 6, 2020, is two hundred and eighteen (218) days after the Notice of Default; which exceeds the required period of one hundred and eighty days as detailed in Paragraph 11(b) of the Agreement.

Overlay posits that the foregoing statement of pertinent facts coupled with the facts as alleged in Plaintiff's Complaint fail to establish a claim against Overlay upon which relief could be granted in favor of the Plaintiff.<sup>12</sup>

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<sup>1</sup> Overlay notes that Plaintiff's Complaint has only one attachment; namely, Exhibit A, which details the legal description of the real property that is subject to the Agreement despite the fact that Plaintiff's Complaint details the Agreement and subsequent amendments without providing the same to the Court. The more troubling issue associated with Plaintiff's omission of the Agreement and subsequent amendments is the fact that Plaintiff has included several portions of the same in its Facts Applicable to All Counts arguing that there are typos and contrived

## STANDARD OF REVIEW

West Virginia Rule of Civil Procedure 12(b)(6) allows a defendant to seek dismissal of a plaintiff's complaint for failure to state a claim upon which relief can be granted. The Supreme Court of Appeals of West Virginia has explained that the purpose of a motion made pursuant to subsection (b)(6) of West Virginia Rule of Civil Procedure 12 is to test the formal sufficiency of the plaintiff's complaint. *J.F. Allen Corp. v. Sanitary Bd. Of City of Charleston*, 237 W.Va. 77, 785 S.E.2d 627 (2016). Moreover, the Supreme Court of Appeals of West Virginia has held that the singular purpose of a motion under subsection (b)(6) is to seek determination of whether the plaintiff is entitled to offer evidence to support the claims made in the complaint. *Dimon v. Mansy*, 198 W. Va. 40, 479 S.E.2d 339 (1996). Thus, West Virginia Rule of Civil Procedure 12(b)(6) enables a trial court to weed out unfounded suits. *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104 (1996). Moreover, the effect of a motion to dismiss for failure to state a claim is to prevent a question of law which may be considered and reviewed upon certificate. *Kisner v. Fiori*, 151 W.Va. 850, 157 S.E.2d 238 (1967).

The analogous Federal Rules of Civil Procedure have been interpreted by the Supreme Court of the United States, which has held that a motion to dismiss for failure to state a claim should be granted if the complaint does not allege enough facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Additionally,

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mutual intent of the parties, all of which are clearly outside of the four corners of the documents. Finally, Overlay's Exhibit A, attached hereto and incorporated herein, contains the Agreement, First Amendment, Second Amendment, Third Amendment, Fourth Amendment, and Fifth Amendment.

<sup>2</sup> Overlay notes that its inclusion of the aforesaid materials do not convert this motion to dismiss to a motion for summary judgment because it has been recognized that, in ruling on a motion to dismiss, a court may consider, in addition to the pleadings, documents annexed to it, and other materials fairly incorporated within it. In fact, the Supreme Court of Appeals of West Virginia has approved a similar practice of trial courts utilizing extrinsic documents when ruling upon a Rule 12(b)(6) motion to dismiss. See Syl. Pt. 1, *Forshey v. Jackson*, 222 W. Va. 743, 671 S.E.2d 748 (2008) (Holding that a circuit court ruling on a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure may properly consider exhibits attached to the complaint without converting the motion to a Rule 56 motion for summary judgment).

although Rule 8's pleading standard "does not require detailed factual allegations, it demands more than an unadorned, the – defendant – unlawfully – harmed me accusation."<sup>3</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009) (citing *Twombly*, 550 U.S. at 555). Thus, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertions' devoid of further 'factual enhancements.'" *Id.* (quoting *Twombly*, 550 U.S. at 555, 557). Only allegations of fact are entitled to the presumption of truth. *Id.* at 678-79. Finally, although the plaintiff enjoys the benefit of all inferences that can plausibly be drawn from the pleadings, a party's legal conclusions, opinions, or unsupported averments of fact will not be deemed admitted. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

The trial court, in appraising the sufficiency of a complaint on a motion to dismiss, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief. *R.K. v. St. Mary's Medical Center, Inc.*, 229 W. Va. 712, 735 S.E.2d 715 (2012). However, a pleader is still required to set forth sufficient information to outline elements of his or her claim or to permit inferences to be drawn that those elements exist. *Mandolidis v. Elkins Industries, Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978). Applying the foregoing standard and based on the

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<sup>3</sup> The Supreme Court of Appeals of West Virginia has stated that "[b]ecause the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, we give substantial weight to federal cases, especially those of the United States Supreme Court, in determining the meaning and scope of [the West Virginia Rules of Civil Procedure]." *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758, fn. 6 (1994) (citing *Burns v. Cities Serv. Co.*, 158 W.Va. 1059, 217 S.E.2d 56 (1975) and *Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)). See, e.g., *State v. Sutphin*, 195 W.Va. 551, 563, 466 S.E.2d 402, 414 (1995) ("The West Virginia Rules of Evidence are patterned upon the Federal Rules of Evidence, ... and we have repeatedly recognized that when codified procedural rules or rules of evidence of West Virginia are patterned after the corresponding federal rules, federal decisions interpreting those rules are persuasive guides in the interpretation of our rules." (emphasis added) (citations omitted)). Thus, it is proper to use case law from the Supreme Court of the United States in interpreting West Virginia Rules of Civil Procedure.

argument below, the Court should grant Overlay's Motion to Dismiss because the Complaint fails to state a claim against Overlay upon which relief can be granted in favor of Plaintiff.

### ARGUMENT

#### **THE COURT SHALL DISMISS THE COMPLAINT BECAUSE THE PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

The Court shall dismiss the Complaint because the Plaintiff has failed to state a claim upon which relief can be granted. Specifically, the Plaintiff is barred from seeking the relief sought in its Complaint because of the applicable plain and unambiguous language contained in the Agreement and the subsequent amendments. As such, dismissal of the Plaintiff's Complaint for failure to state a claim is required by this Court.

As the Court is aware, the gravamen of the Plaintiff's allegations in this civil action emanate from the Agreement executed by and among the parties. As a general matter, West Virginia courts eschew the proposition of interpreting contracts that have been negotiated between parties that are not repugnant to public policy or law. *See generally*, Syl. Pt. 1, *Sanders v. Roselawn Mem'l Gardens, Inc.*, 152 W.Va. 91, 159 S.E.2d 784 (1968). In regard to written agreements, it has long been held that "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. Pt. 1, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962). Moreover, "[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syl. pt. 1, *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W.Va. 252, 162 S.E.2d 189 (1968). Justice Cleckley has further articulated in the context of

contract construction that the court's role is "to ascertain the meaning of the agreement as manifested by its language. Our task is not to rewrite the terms of contract between the parties; instead, we are to enforce it as written." *Fraternal Order of Police v. City of Fairmont*, 196 W. Va. 97, 468 S.E.2d 712 (1996). Finally, the Supreme Court of Appeals of West Virginia has held that "[i]t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962).

The foregoing principles resonate here. The Plaintiff, as evidenced by the allegations contained in its Complaint, seeks to obtain and enforce the right of specific performance by arguing that the Agreement, and subsequent amendments, is ambiguous and requires the interpretation of this Court. The Court cannot countenance such an argument, and must dismiss the Plaintiff's Complaint because the plain and unambiguous language of the Agreement establishes that the Plaintiff has failed to state a claim upon which relief can be granted.

In support of its position, Overlay argues that the Agreement constitutes a valid written agreement between the parties using plain and unambiguous language, and the Agreement should be enforced according to its intent and should not be construed or interpreted. As detailed in the foregoing Statement of Pertinent Facts, the Agreement provides in Paragraph 11(b), that in the event of a default by Overlay that has not been cured within a period of ten (10) business days after written notice from Plaintiff, then:

**" ... Buyer shall choose, as its sole and exclusive remedy hereunder, either to (i) terminate this Agreement by written notice to Seller, in which event the Deposit shall be immediately returned to Buyer; (ii) pursue an action to recover Buyer's Actual Damages, as hereinafter defined and described, or (iii) seek**

specific performance from Seller of Seller's obligation to convey the Lots pursuant to this Agreement. **As a condition precedent to Buyer exercising any right it may have to bring an action for specific performance as the result of Seller's failure or refusal to perform its obligations hereunder, Buyer must commence such an action within one hundred eighty (180) days after the failure of Seller to cure such default.** Buyer agrees that its failure to timely commence such an action for specific performance within such one hundred eighty (180) day period shall be deemed a waiver by it of its right to commence such an action. ..." (Emphasis added).

The clear and unambiguous language contained in Paragraph 11(b) establishes that in the event of a default by Overlay, Plaintiff has three separate and distinct remedies that are not cumulative; rather, Plaintiff must choose one remedy to the exclusion of the others, as the language is not conjunctive but is disjunctive. Therefore, the plain and unambiguous language provides that Plaintiff's sole and exclusive remedy is to terminate the Agreement; pursue an action to recover Buyer's Actual Damages; or seek specific performance.

As an aside, it is apparent that Plaintiff's Notice of Default clearly establishes that the Plaintiff sought, as its sole and exclusive remedy, to terminate the Agreement by written notice to Overlay. Specifically, the Notice of Default states that "[p]ursuant to Section 5(b) of the Agreement, Buyer hereby elects to terminate the Agreement prior to the expiration of the Study Period." Finally, Plaintiff has successfully terminated the Agreement, and the Court shall dismiss the Plaintiff's Complaint because the Plaintiff has failed to state a claim upon which relief can be granted.

Additionally, the Agreement provides that the Plaintiff can seek, as its sole and exclusive remedy, specific performance; however, as a condition precedent to Plaintiff exercising its right to bring such action, the Plaintiff:

**" ... must commence such an action within one hundred eighty (180) days after the failure of Seller to cure such default. Buyer agrees that its failure to timely commence such an action for specific performance within such one**



**hundred eighty (180) day period shall be deemed a waiver by it of its right to commence such an action. ...” (Emphasis added).**

Moreover, Paragraph 11(c) further provides that in terms of a notice of default that:

**“Notwithstanding any other term or provision hereof, neither party shall be deemed to be in default hereunder, unless and until, it shall have been sent Notice of such default by the other party, and shall have failed to cure the default within fifteen (15) days of the date of such notice. (Emphasis added).**

Turning to the Plaintiff's Notice of Default, it is undisputed that the same was provided to Overlay on October 1, 2019. (Plaintiff's Complaint ¶ 11). Subsequently, Paragraph 11(c) of the Agreement dictates that in the event that Overlay did not cure the default within fifteen (15) days of the notice, which is alleged by the Plaintiff, then Overlay would be deemed in default. Therefore, October 16, 2019, constitutes the date upon which Plaintiff's condition precedent for specific performance requires that the same be brought within one hundred eighty (180) days therefrom.<sup>4</sup> To that end, a review of the calendar establishes that Plaintiff, assuming termination was not effective pursuant to Section 5(b), shall bring any action for specific performance under the Agreement on or before April 13, 2020, or the Plaintiff shall be deemed to have waived such right. As the Court docket establishes in this civil action, Plaintiff filed its Complaint on May 6, 2020, which fails to comply with the terms of the Agreement, and as such, the Plaintiff is barred from prosecuting the same and dismissal of the Plaintiff's Complaint for failure to state a claim is required of this Court.

Finally, the Agreement provides that the Plaintiff can seek, as its sole and exclusive remedy, an action to recover “Buyer's Actual Damages, as hereinafter defined and described.”

In defining such an action, the Agreement provides as follows:

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<sup>4</sup> Overlay notes that this argument does not impair or waive any argument that it may have that the condition precedent date may have occurred earlier than this date based on the prior notice of default and the Agreement and subsequent amendments.

**“In the event that Buyer elects to pursue an action for damages, then Buyer shall be entitled to be reimbursed by Seller for its actual, provable, out-of-pocket costs incurred to third parties in connection with the transaction described in this Agreement (“Actual Damages”), and in no event shall Buyer be entitled to pursue punitive or consequential damages, including without limitation any so-called “lost profit” damages, against Seller.” (Emphasis added.)**

The plain and unambiguous language of the Agreement clearly establishes the sole damages available to the Plaintiff in connection with the transaction are described in the Agreement; namely the “Actual Damages,” should the Plaintiff select this as its sole and exclusive remedy, and the Agreement further clearly establishes that in no event shall Plaintiff be entitled to pursue punitive or consequential damages, including without limitation any so-called “lost profit” damages against Overlay. Despite this clear and unambiguous language, the Complaint advances a cause of action in Count 2 that is repugnant to the agreed upon limitation of Buyer’s Actual Damages, in that it requests those damages that are clearly and unambiguously excluded. Plaintiff’s artifice and sleight of hand is precariously pled under the auspices of should the Court not award specific performance then Plaintiff has suffered contractual damages in excess of those permitted by the Agreement. The Plaintiff cannot have its cake and eat it too. The remedies available are disjunctive, and as established hereinabove, Plaintiff has terminated the Agreement pursuant to Section 5(b), and the Plaintiff has failed to bring any action for specific performance under the time requirement established by the Agreement, and as such, has waived its right to the same. Therefore, Count 2 of the Complaint fails to establish a proper cause of action because the Agreement has been previously terminated and the allegations are barred by the terms established by the plain and unambiguous language of the Agreement. Therefore, dismissal of the Complaint for failure to state a claim is required of this Court.

Lastly, the Complaint advances a Count 3 entitled Establishment and Enforcement of Vendee's Lien. This Count fails to state a claim upon which relief can be granted, and it seeks equitable relief that cannot be granted by this Court. To begin, Plaintiff's Count 3 states that Plaintiff is entitled to a "joint, several and blanket vendee's lien of the Property to the extent of any monies paid as a deposit." This Count must also fail.

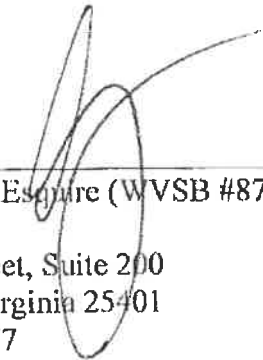
Specifically, as detailed hereinabove, the plain and unambiguous language of the Agreement provides that Plaintiff's sole and exclusive remedy is to either terminate the Agreement; pursue an action to recover Buyer's Actual Damages; or seek specific performance. Noticeably absent from the sole and exclusive remedies available to Plaintiff is the right to seek a joint, several and blanket vendee's lien of the Property. In addition to being barred by the plain and unambiguous language of the Agreement, the Count is not supported by statute or case law in the State of West Virginia.

### **CONCLUSION**

WHEREFORE, Defendant, Overlay I, LLC, respectfully requests that this Court grant its Motion to Dismiss, enter an order dismissing the Complaint against Defendant with prejudice for the reasons stated hereinabove, and grant any other such relief that this Court deems just and proper.

Respectfully submitted this 31<sup>st</sup> day of August, 2020.

**OVERLAY I, LLC,**  
By Counsel,



\_\_\_\_\_  
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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

DAN RYAN BUILDERS WEST VIRGINIA, LLC,  
a West Virginia limited liability company,

Plaintiff,

v.

Civil Action No.: 20-C-110  
Judge Bridget Cohec

OVERLAY I, LLC,  
a Virginia limited liability company,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31<sup>st</sup> day of August, 2020, I electronically filed the *MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT OVERLAY I, LLC'S MOTION TO DISMISS PLAINTIFF'S BILL OF COMPLAINT* with the Circuit Clerk of Berkeley County, West Virginia using the West Virginia E-Filing system which will send notification of such filing to the following counsel of record.

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*Co-Counsel for Plaintiff Dan Ryan Builders West Virginia, LLC*

/s/Gregory E. Kennedy  
Gregory E. Kennedy, Esquire (WVSB #8730)

## LOT PURCHASE AGREEMENT

THIS LOT PURCHASE AGREEMENT (this "Agreement") is made as of the Effective Date, as defined in Paragraph 21, by and between OVERLAY I, LLC, a Virginia limited liability company (hereinafter referred to as "Seller"), and DAN RYAN BUILDERS WEST VIRGINIA, LLC, a Maryland limited liability company, or its assigns (hereinafter referred to as "Buyer").

## EXPLANATORY STATEMENT

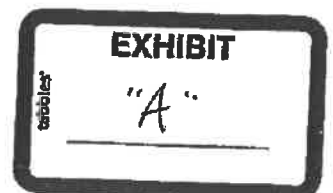
A. Seller is the owner in fee simple of that certain parcel of land situate and lying in the City of Martinsburg, Berkeley County, West Virginia, identified as District 6, Tax Map 35 (the "Property") in the subdivision known as Martinsburg Station (the "Subdivision"). The Subdivision includes a total of approximately three hundred twenty (320) lots comprised of a mixture of single-family lots, townhome lots, and duplex lots in various stages of development (the "Lots"). The Lots include sixty-nine (69) fully developed single-family lots (the "Finished SF Lots"), fourteen (14) fully developed duplex lots (the "Finished Duplex Lots"), eight (8) fully developed twenty-foot (20') wide townhome lots (the "Finished TH Lots"), approximately fifty-seven (57) to-be-developed seventy-five foot (75') wide single-family lots (the "75' SF Lots"), approximately fifty (54) to be developed sixty-five foot (65') wide single-family lots (the "65' SF Lots") and approximately one hundred eighteen (118) to be developed twenty foot (20') wide townhouse lots (the "20' TH Lots"). The Finished SF Lots, Finished Duplex Lots and Finished TH Lots may collectively be referred to as the "Finished Lots." The 75' SF Lots, 65' SF Lots and 20' TH Lots may collectively be referred to as the "To Be Developed Lots." The 75' SF Lots and the 65' SF Lots may collectively also be referred to as the "SF Lots." The Lots are shown on the site plan(s) attached hereto as Exhibit A and are more fully described in the summary attached hereto as Exhibit A-1.

B. Seller desires to sell to Buyer and Buyer desires to purchase from Seller, approximately three hundred twenty (320) Lots, upon the terms and conditions herein contained.

NOW, THEREFORE, that in consideration of the Explanatory Statement, which is incorporated by reference herein, and the mutual promises contained herein and other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged by each party hereto, the parties agree as follows:

1. Sale and Purchase. Seller does hereby agree to bargain and sell unto Buyer and Buyer does hereby agree to purchase from Seller, pursuant to the terms and conditions of this Agreement, all of Seller's right, title and interest in approximately three hundred twenty (320) Lots of the Subdivision as outlined and illustrated within EXHIBIT A, and the improvements thereon, both existing and to be developed by Seller all in accordance with this Agreement, together with the easements, rights, privileges and appurtenances belonging to the Lots.

2. Purchase Price, Deposit and Payment.



(a) Purchase Price. The "Purchase Price" for the Lots shall be as follows:

(i) Finished Lots Purchase Price.

a. Finished SF Lots and Finished TH Lots. The Purchase Price for all of the Lots purchased by Buyer at the First Bulk Closing (defined below), consisting of the Finished SF Lots and the Finished TH Lots, shall be Two Million Five Hundred Thousand Dollars (\$2,500,000.00).

b. Finished Duplex Lots. The Purchase Price for each of the individual Finished Duplex Lots shall be Thirty Three Thousand Dollars (\$33,000.00) per Lot.

(ii) To Be Developed Lots Purchase Price.

a. 20' TH Lots. The Purchase Price for the 20' TH Lots shall be Thirty Two Thousand Eight Hundred Dollars (\$32,800.00) per Lot.

b. 65' SF Lots. The Purchase Price for the 65' SF Lots shall be Forty Nine Thousand Two Hundred Dollars (\$49,200.00) per Lot.

c. 75' SF Lots. The Purchase Price for the 75' SF Lots shall be Fifty Two Thousand Six Hundred Dollars (\$52,600.00) per Lot.

d. Purchase Price Escalator for the To Be Developed Lots. The Purchase Price for each of the To Be Developed Lots shall increase by the simple rate of three percent (3%) per year beginning on the first anniversary of the initial Closing of each of the respective product types (20' TH Lots, 65' SF Lots and 75' SF Lots). Each year thereafter, such increase shall be applied to the Purchase Price prevailing immediately prior to such adjustment.

e. Bulk Purchase Option(s) for the To Be Developed Lots. In the event that Buyer exercises a Bulk Purchase Option for any of the remaining To Be Developed Lots in accordance with Paragraph 3(d)(iv), Buyer shall receive a discount off of the then-current (as adjusted pursuant to the preceding subparagraph, as applicable) Purchase Price equal to the appropriate amount described on the attached EXHIBIT A-2.

The Purchase Price shall be payable as follows:

(b) First Deposit. Within ten (10) days after the Study Period Expiration Date (as defined herein), Buyer shall deliver to Bowles Rice, LLP (the "Escrow Agent"), in escrow, a cash deposit in the amount of One Hundred Thousand Dollars (\$100,000.00) (the "Initial Deposit"), in accordance with the attached Exhibit B. Upon receipt of the Note and Deed of Trust described below, the Escrow Agent shall release the Deposit to Seller. As a condition of the delivery of any portion of the Deposit to Seller, Seller shall deliver to Buyer: (i) a promissory note payable to the order of Buyer in the amount of the Deposit (the "Note"); and (ii) a "Deed of Trust" on the Property which shall secure the Note and shall be subordinate only to a lien of a commercial bank or other financial institution for a loan to finance only the purchase of and development of the Property in a total amount not greater than Sixty Five Percent (65%) of the

current market value of the Property (the "Permitted Financing"). The terms of repayment or forgiveness of the Note shall be as follows: (A) the Note shall become null and void and the Deed of Trust shall be released of record in the event Buyer defaults hereunder and fails to cure the default within any applicable grace period; (B) the Note shall become immediately due and payable upon any default by Seller hereunder, which is not cured within any applicable grace or notice period, or if Buyer elects to terminate this Agreement and Buyer is not then in default; and (C) the principal balance of the Note shall not bear interest until the Note becomes due under clause (B) above, after which time the outstanding principal balance shall bear interest at the rate of ten percent (10%) per annum. The Note and the Deed of Trust shall each be in a commercially reasonable form prepared by counsel for Buyer. Any recording fees required to be paid in connection with the recording or release of the Deed of Trust shall be paid by Seller. The Deposit shall be credited *pro rata* towards the Purchase Price of the forty-two (42) Lots in the first phase of townhome Lots purchased by Buyer; the Note shall be deemed partially paid as to principal on the same basis, and the Deed of Trust shall be released as to each such Lot conveyed by Seller to Buyer at the Closing of each such sale.

(c) Additional Deposit(s). Buyer shall be required to deliver an additional deposit in the form of cash or a letter of credit to the Escrow Agent equal to five percent (5%) of the total Purchase Price for the Lots that will be developed by Seller in each subsequent phase of the Subdivision following the first phase of approximately forty-two (42) To Be Developed Lots as set forth in Paragraph 3(g) below (the "Additional Deposits" and collectively with the Initial Deposit, the "Deposit"). The exact number of Lots to be developed in each phase shall be determined by Buyer and Seller at least sixty (60) days prior to the commencement of development for each such phase (each, a "Phase Determination"). Buyer shall deliver the additional deposit(s) to the Escrow Agent at least thirty (30) days prior to Seller's commencement of development for each such phase. Notwithstanding the foregoing, Seller shall have the right to have any additional cash deposit(s) released to Seller by providing Buyer with a promissory note in the amount of any such additional deposit(s) and a deed of trust that shall secure any such note(s) and shall not be subordinate to a lien of any commercial bank or other financial institution. Upon each Phase Determination, the parties shall memorialize, through an amendment to this Agreement, the lot types, lot yield, additional deposit amount and structure of any such additional deposit(s), and lot delivery timeframes for the Lots to be developed in the next phase of the Subdivision.

(d) Payment. The Purchase Price, subject to any adjustments contained in this Agreement, shall be payable by Buyer to Seller in cash, certified check, title company check, or wire transfer at the time of Closing (as defined in Paragraph 3 below) and conveyance of good and marketable title on each of such Lots.

3. Closing Schedule. Buyer shall purchase the Lots as follows:

(a) Bulk Closing. The first closing (the "Bulk Closing"), at which time the parties shall settle on all of the Finished SF Lots and all of the Finished TH Lots, shall occur on or, at Buyer's option, before June 15, 2018.

(b) Finished Duplex Lot Closings. For a period of eighteen (18) months following the Study Period Expiration Date, Buyer shall have the exclusive right to settle on the

Finished Duplex Lots (i) at Buyer's option, (ii) at Buyer's request, and/or (iii) on a "Buy As Sold" basis for a period of eighteen (18) months following the Study Period Expiration Date, whereby Buyer shall settle on a Finished Duplex Lot after Buyer has entered into a fully ratified, non-contingent purchase agreement with a third-party home buyer for the purchase of a home on said Lot (each, a "Finished Duplex Lot Closing"). Buyer's right to purchase the Finished Duplex Lots shall be exclusive during said eighteen (18) month time period so long as Buyer undertakes and continues commercially reasonable good faith efforts to market and sell duplex product in the Subdivision on the Finished Duplex Lots, including but not limited to informing and training Buyer's sales personnel about the particulars thereof, showing floor plans, elevations, and features of such duplex residences in any sales trailer or office dedicated to promoting sales in the Subdivision, and generally offering them for sale in a manner similar to that in which Buyer offers its other products for sale. At the conclusion of said period, or in the event that Buyer ceases or fails to undertake its efforts to sell such product, Buyer's exclusive rights to purchase the Finished Duplex Lots shall be extinguished and Seller shall thereafter be free to sell such Finished Duplex Lots to other prospective buyers.

(c) 20' TH Lots Closings.

(i) First TH Lots Closing. The first closing of 20' TH Lots (the "First TH Closing"), at which time Buyer shall settle on at least one (1) townhome building parcel as specifically described in the takedown schedule attached hereto as Exhibit A-1 consisting of no more than eight (8) 20' TH Lots, shall occur within thirty (30) days after the satisfaction of the conditions precedent for such Lots, but in no event shall the First TH Closing occur more than six (6) months after the date of the Bulk Closing as long as the conditions precedent to such Closing are satisfied.

(ii) Subsequent TH Lots Closings. Each subsequent 20' TH Lots Closing, at which time Buyer shall settle on at least one (1) townhome building parcel as specifically described in the takedown schedule attached hereto as Exhibit A-1 consisting of no more than eight (8) 20' TH Lots, shall occur within three (3) months after the last date on which the previous TH Lots Closing could have occurred (the First TH Closing and each subsequent closing of 20' TH Lots may each be referred to as a "TH Lots Closing" and collectively as the "TH Lots Closings").

(d) SF Lots Closings. Buyer shall begin to purchase SF Lots after Seller finishes and develops the same in accordance with this Agreement, at the time or times, and for the Purchase Price, set forth herein. Seller shall have six (6) months to finish the SF Lots after Seller gives notice to Buyer that Seller wishes to proceed with Seller's development. Buyer shall provide Seller written notice to proceed with the development of the SF Lots at such time as Buyer shall, in its sole discretion, choose within thirty (30) months after the Bulk Closing, and if Buyer shall not have actually given such notice to Seller by such date, then Buyer shall for all purposes be deemed to have given such notice to Seller on that date which is thirty (30) months after the Bulk Closing, such that Seller may have up to thirty-six (36) months after the date of the Bulk Closing to complete all conditions precedent to the sale of SF Lots in the First SF Lots Closing as described in Paragraph 4(b).



(i) First SF Lots Closing. After Buyer gives or is deemed to have given written notice to Seller to proceed with Seller's development, the first closing of SF Lots, at which time Buyer shall settle on at least two (2) 65' SF Lots and two (2) 75' SF Lots, shall occur within thirty (30) days after the satisfaction of the conditions precedent in Paragraph 4(b) for such Lots (the "First SF Lots Closing").

(ii) Second through Fifth SF Lots Closings. The second, third, fourth and fifth closings of SF Lots, at which time Buyer shall settle on at least four (4) SF Lots at each of said Closings, shall occur within three (3) months of the last date on which the previous SF Lots Closing could have occurred provided that all conditions precedent in Paragraph 4(b) have been satisfied with respect to such SF Lots.

(iii) Subsequent SF Lots Closings. Each subsequent SF Lots Closing, at which time Buyer shall settle on at least five (5) SF Lots, shall occur within three (3) months of the last date on which the previous SF Lots Closing could have occurred (the First SF Lots Closing and each subsequent closing of SF Lots may each be referred to as a SF Lots Closing and collectively as the "SF Lots Closings") provided that all conditions precedent in Paragraph 4(b) have been satisfied with respect to such SF Lots.

(iv) Bulk Purchase Option. Upon Seller's completion of development of each new phase of the Subdivision, Seller shall provide Buyer with written notice of Buyer's right to exercise an option (the "Bulk Purchase Option") to purchase all or a portion of not less than twenty (20) of the Lots within the applicable phase of development in a bulk closing rather than upon the takedown schedule set forth in this subparagraph's 3(d)(i-iii) above. Upon receipt of such written notice from Seller, Buyer shall have fifteen (15) days in which to exercise the Bulk Purchase Option by providing written notice thereof to Seller. In the event that Buyer exercises the Bulk Purchase Option, Buyer shall settle on all of the Lots set forth in the Bulk Purchase Option within thirty (30) days after exercising the Bulk Purchase Option (each, a "Bulk Option Closing"). In the event that Buyer elects to not exercise the Bulk Purchase Option, Buyer shall settle on the Lots identified in the Bulk Purchase Option in accordance with the terms of subparagraph's 3(d)(i-iii) above.

(e) The Bulk Closing, Finished Duplex Lots Closings, TH Lots Closings, SF Lots Closings, and Bulk Option Closing may each be individually referred to as a "Closing" and together they may be referred to as "Closings."

(f) With reference to the To Be Developed lots, should the parties settle on more than the required number of Lots at a Closing (the Lots in excess of the amount required referred to as the "Additional Lots"), Buyer shall receive a credit against the requirement at the next Closing (or Closings) equal to the number of Additional Lots purchased (until such number of Additional Lots is exhausted or fully credited). Each Closing shall be contingent upon the satisfaction of the conditions precedent described in Paragraph 4(b) herein. Each Closing shall occur on a date and time and at such place or places designated by Buyer in a written notice to Seller no later than five (5) days prior to the date selected by Buyer; provided, however, that the parties shall have the right to conduct Closing by mail for any Closing that is to occur under this Agreement if the parties agree in writing to such mail-away Closing. In such a case, the parties shall review the settlement documents at least twenty-four (24) hours prior to the date of Closing.

to ensure the accuracy thereof and shall provide written notice to the settlement agent ("Settlement Agent") of any changes that may be required. On the date of any mail-away Closing, Seller and Buyer shall each execute and distribute to the Settlement Agent each of the required settlement documents for such Closing no later than 1:00 P.M. Closing shall be deemed to have occurred upon notice from the Settlement Agent to Seller and Buyer that all documents were received and properly executed, and all funds due at Closing have been transferred to the appropriate party.

(g) Phased Development. Notwithstanding any other provision of this Agreement to the contrary, the parties agree that the To Be Developed Lots shall be constructed and developed in phases. The first (1<sup>st</sup>) phase of the To Be Developed Lots shall be comprised of a minimum of forty-two (42) 20' TH Lots developed for front load garages on each Lot. Upon or prior to Buyer's purchase of the twentieth (20<sup>th</sup>) Lot within the first (1<sup>st</sup>) phase of the To Be Developed Lots, Seller and Buyer shall mutually agree, in writing, as to both the number of Lots to be contained in the second (2<sup>nd</sup>) phase as well as whether the Lots in the second (2<sup>nd</sup>) phase of the subdivision shall be all SF Lots, all TH Lots, or a combination thereof. Upon the parties' mutual written agreement as to the number and type(s) of Lots to be contained in the second (2<sup>nd</sup>) phase, Seller shall then have one hundred twenty (120) calendar days from the date of said written agreement within which to construct and develop the second (2<sup>nd</sup>) phase and to satisfy the conditions precedent contained in Paragraph (4)(b) of this Agreement for the Lots therein. Upon Buyer's purchase of fifty percent (50%) or more of the Lots within the second (2<sup>nd</sup>) phase of the Subdivision and each subsequent phase of the Subdivision thereafter, Seller and Buyer shall, in writing, mutually agree, as to both the number of Lots to be contained in the next subsequent phase as well as whether the Lots in the next subsequent phase of the subdivision shall be all SF Lots, all TH Lots, or a combination thereof. Upon the parties' mutual written agreement as to both the number and type(s) of Lots to be contained in each subsequent phase of the Subdivision, Seller shall then have one hundred twenty (120) calendar days from the date of said written agreement within which to construct and develop the next subsequent phase of the Subdivision and to satisfy the conditions precedent contained in Paragraph (4)(b) of this Agreement for the Lots therein.

#### 4. Seller's Deliveries at Closing and Conditions Precedent to Buyer's Obligations.

(a) In addition to other conditions precedent set forth elsewhere in this Agreement, Seller shall execute and deliver to Buyer at Closing, and upon request by Buyer, shall circulate to Buyer for its review prior to Closing, all of the following, the delivery of which shall be a condition to Buyer's obligation to consummate the purchase of the Lots:

(i) Warranty Deed. A special warranty deed with Seller's covenant for further assurances in recordable form, signed by all parties necessary or required by the Title Commitment (as hereinafter defined), free and clear from all liens and encumbrances except for the Permitted Exceptions (as listed in Exhibit C), which shall not unreasonably interfere with the construction of single-family residences.

(ii) Consents. All consents that may be required from any third person or entity in connection with the sale of any Lot, as well as a certified copy of the resolutions of

Seller authorizing and approving this Agreement and the transactions contemplated herein and the execution of the Agreement and the closing documents, if applicable.

(iii) Releases. Lien releases, affidavits and other documents reasonably satisfactory for Buyer, indemnifying Buyer from all liability and expense, including attorneys' fees, that Buyer may incur in connection with unfilled mechanics' or materialman's liens in the event of any work being completed or performed, or material being furnished, at, on, or about any of the Lots prior to the date of Closing by anyone employed by, through or under Seller.

(iv) FIRPTA. A Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA") certification in conformance with the requirements of FIRPTA, except that Seller shall only be required to provide a FIRPTA certification at the First Closing.

(v) Additional Documents. Such additional customary documents or instruments as may be reasonably requested by Buyer or Buyer's title company to consummate the transactions contemplated by this Agreement and to cause the title company to issue and deliver its title policy subject only the Permitted Exceptions and such other exceptions to which Buyer consents.

(b) Buyer's obligation hereunder to complete Closing shall be conditioned upon satisfaction of each of the following conditions:

(i) Each of Seller's representations and warranties as set forth in Paragraph 7 being true as of the date of each Closing. Notwithstanding that certain of Seller's representations and warranties may be limited to the extent of Seller's knowledge of the facts stated therein, the condition precedent to Buyer's obligation to settle hereunder set forth in this Paragraph 4(b) shall not be so limited, and the satisfaction of said conditions shall depend upon the actual correctness as of the time of settlement of the facts stated in all such representations and warranties.

(ii) Seller shall have obtained, at its expense, final subdivision approval, with all appeal periods having expired, for the development of the Subdivision, including at least three hundred twenty (320) Lots, without additional restrictions, substantially as shown on the site plans shown in Exhibit A. Seller also shall have recorded the final plat for the Lots to be purchased at the applicable Closing.

(iii) With respect to the To Be Developed Lots only, Seller shall have performed, to the reasonable satisfaction of Buyer as evidenced by a Lot Inspection Report, those items which are a prerequisite for the issuance by Seller of a Certificate of Readiness pursuant to the provisions of Paragraph 2 of Exhibit D to this Agreement for all Lots to be settled, there shall be no moratorium or condition in place which would delay or prevent Buyer from obtaining a building permit, proceeding with construction, obtaining a certificate of occupancy, or otherwise fulfilling its obligations to Seller.

(iv) Seller shall have completed its obligations under Section 4 of Exhibit D.

(v) The Lots then being settled shall be vacant, free from survey defects and/or boundary disputes, and title shall be in the condition set forth in Paragraph 6 hereof.

(vi) Seller shall have delivered to Buyer the Phase I environmental site assessment (ESA) for the Property from a certified and registered environmental engineer which Seller has in Seller's possession.

(c) Except as otherwise specifically set forth in Paragraph 4(b), Buyer alone shall have the benefit of the satisfaction of the conditions precedent set forth in the provisions of Paragraph 4(b), and shall be entitled to waive Buyer's rights thereto (and any such waiver shall also be deemed a satisfaction of the waived condition for all purposes). In the event that the conditions precedent to the first Closing have not been satisfied on or before the Study Period Expiration Date or in the event that the conditions precedent to any subsequent Closing have not been satisfied on or before thirty (30) days before the date by which that Closing must occur, then Buyer shall have the right to either (i) terminate this Agreement by written notice to Seller, in which event the parties shall be relieved of all obligations hereunder, (ii) extend the time for the satisfaction of the condition by up to one (1) additional year by written notice to Seller, which notice shall set forth the length of the extension, (iii) waive the condition(s) and proceed to Closing, or (iv) declare Seller in default and exercise Buyer's remedies for default under Paragraph 11 hereof. In the event that Buyer elects to extend the time for the satisfaction of the condition, and the condition has not been satisfied by the conclusion of the extension, then at such time, Buyer may exercise options (i), (ii), (iii) or (iv) above.

Except as otherwise specifically set forth herein, Buyer's purchase of Lots does not relieve Seller of any obligations as described in this Agreement or shown on the exhibits with respect to Lots purchased, and other or future Lots or portions of the Subdivision still owned by Seller.

**5. Inspections; Study Period; Marketing; Construction Activities; and Architectural Approval.**

(a) Buyer, its employees, agents, architects, engineers, invitees and/or designees, at their risk and expense, shall have the full right from and after the Effective Date to enter upon the Property at any reasonable time, and from time to time, for purposes of conducting studies, environmental audits, investigations and the like with respect to the Property, including such boring, engineering, water, sanitary and storm sewer, traffic, utilities, topographic and/or other tests, market studies and/or other studies Buyer may determine to be made. Prior to Buyer entering the Property as aforesaid, Buyer shall give Seller at least forty-eight (48) hours' advance email notice with details as to person or entity entering Property and purpose of visit.

(b) Buyer shall have the right to terminate this Agreement, by written notice to Seller delivered on or before thirty (30) days after the Effective Date (the "Study Period Expiration Date"), in its sole and absolute discretion, (i) if Buyer is dissatisfied with the results of any inspections, studies or due diligence conducted with respect to the Property or (ii) if Buyer is dissatisfied with any materials furnished to it pursuant to the terms of this Agreement. The Period from the Effective Date through the Study Period Expiration Date shall be the "Study

Period." In the event that Buyer shall terminate this Agreement pursuant to the provisions of this Paragraph 5(b), neither party shall have any further liability to the other. The failure of the Buyer to give Seller written notice of termination on or before the Study Period Expiration Date shall constitute a waiver of this contingency by Buyer. Buyer's right to terminate this Agreement pursuant to the terms of this Paragraph 5(b) is in addition to such other rights set forth elsewhere herein, and this Paragraph 5(b) and any election hereunder shall not be deemed a waiver or election against any such other rights.

(c) The following provisions apply to Buyer's marketing activities:

(i) Seller agrees that, from and after the Study Period Expiration Date, at Buyer's sole expense Buyer shall have the right to place signs and a sales trailer on the Property and to conduct marketing activities thereon, all in accordance with the requirements of any applicable governmental authority after receiving Seller's written approval of any signage or the exact location, size, orientation, and landscaping of any trailer, and in areas previously approved by Seller, such approval not to be unreasonably withheld or delayed. Additionally, prior to Closing, Seller agrees to designate Seller's permitted areas for the location of Buyer's construction trailer(s), storage of equipment and materials, a concrete wash out station, and/or for a paint wash out station, which Buyer or its contractors may from time to time reasonably require, and the exact locations of which shall be reasonably convenient to Buyer and not unreasonably inconvenience Buyer or its invitees. Such spaces shall be made available at no cost to Buyer, and Buyer and its invitees shall use only such designated areas for such purposes. Buyer shall maintain the said areas in a clean and orderly manner and in accordance with all federal, state and local laws and regulations. At Seller's sole option, exercisable by Seller only until ten (10) days prior to the Study Period Expiration Date, Seller may require that instead of Buyer occupying a sales trailer, Seller may make available to Buyer comparable sales office and showroom or display space in the existing community clubhouse amenity building in the Subdivision, and in such event, Seller (for and on behalf of the homeowners' association) shall charge Buyer an amount of rent mutually agreed upon by Buyer and Seller, plus utilities, cleaning, and other like charges, all at actual rates. Should Seller for any reason decide to terminate such arrangement, Seller shall give Buyer at least ninety (90) days prior written notice to allow Buyer adequate and reasonable time to obtain, place, landscape, furnish, and occupy a sales trailer.

(ii) Effective after the Study Period Expiration Date if this Agreement remains in force thereafter, Seller hereby grants Buyer a non-exclusive, non-assignable, limited license, without the right to sublicense to any other legal or natural person, to use while Buyer is actively selling homes in the Subdivision, the Subdivision trademarks and logos listed in Exhibit K, (the "Licensed Marks") and as amended and updated from time to time by Seller, in Buyer's signage, advertisements, marketing or promotional material of any kind, including but not limited to print, internet, social media pages or e-mail materials, on the following terms and conditions.

(iii) Except for such limited rights, Buyer shall not have any other right to use the Licensed Marks, nor any portion thereof, nor any confusingly similar marks or foreign language equivalents, alone or in combination, as a trademark or otherwise, including without limitation to identify the goods or services of Buyer.

(iv) Except as otherwise provided herein, use of the Licensed Marks or any derivative thereof is prohibited without the prior written approval of Seller.

(v) Any use by Buyer of the Licensed Marks shall comply in all respects with the Seller's guidelines applicable generally to the Subdivision and all builders building therein, which are subject to update and modification from time to time.

(vi) Buyer hereby acknowledges Seller's ownership of all right, title and interest in and to the Licensed Marks and any registrations or applications that have been or may hereafter be filed or issued thereon or relating thereto, and Buyer shall not at any time do or cause to be done any act or thing contesting or in any way impairing or tending to impair any part of such right, title and interest. Buyer shall not in any manner represent that it has any ownership rights in and to the Licensed Marks, and Buyer acknowledges that use of and the goodwill associated with the Licensed Marks shall inure exclusively to the benefit of Seller. Whenever Buyer uses the Licensed Marks in connection with approved signage, marketing and promotional materials, Buyer shall place an encircled R ("®") next to the Licensed Mark and place the following notice beneath or near, as directed by Seller, the Licensed Mark as follows: "Martinsburg Station® is a registered trademark of Overlay I, LLC." If Seller has a commercially reasonable objection to any Buyer signage, marketing or promotional materials (including but not limited to e-mail, social network pages, websites or other internet based communications) produced or controlled by the Buyer to promote homes, products, activities or events in the Subdivision, any of which make specific reference to the Subdivision, Seller shall notify the Buyer of the same in writing, with reasonably sufficient detail for Buyer to understand Seller's concern, and Buyer shall promptly meet with and cooperate with Seller to mutually agree on corrective action.

(vii) In the event of the termination of the Buyer's relationship with Seller, which shall be the earlier of: (i) a default under, with resulting termination of, this Agreement, or (ii) the sale of Buyer's last home within the Subdivision, Buyer's license shall terminate and Buyer shall immediately discontinue the use of the Licensed Marks as well as all signage, advertisements, marketing or promotional materials to the extent any of them use or refer to any of the Licensed Marks. If Buyer fails to immediately discontinue the use of the Licensed Marks, then Seller may, in its sole discretion, take any and all actions it deems appropriate to protect its rights, including without limitation all those rights afforded to Seller in this Agreement. Notwithstanding the foregoing, in the case of termination by either party, Buyer shall retain the right to market and/or advertise on all unsold Lots that were previously purchased under this contract until all Lots have been sold.

(viii) Buyer shall maintain approved signage in a manner satisfactory to Seller and the location, number, and content of such signs shall further be subject to Seller's prior written approval as described herein.

(ix) Seller may remove, at Buyer's expense, any unapproved signage erected by Buyer after having been requested to do so by Seller.

(x) Any marketing or directional signs for Buyer's homes shall conform to the signage requirements of the City.

(xi) Marketing signs of cardboard, plastic or similar material, banners, balloons, and/or flags identifying Buyer's homes within the Subdivision shall not be permitted in the Subdivision or in any location outside of the Subdivision under any circumstances without Seller's prior written approval which may be granted or denied in Seller's sole discretion.

(xii) Buyer shall not undertake any direct action that could reasonably be anticipated to in any way harm, diminish or adversely affect the positive relationship that currently exists between Seller and the general real estate brokerage community, and Buyer shall cooperate fully with unrelated real estate brokers or agents at market rates which are reasonable and customary for new homes builders and sellers in the area of the Subdivision.

(xiii) Except as otherwise specifically provided herein, Buyer must obtain prior written approval from Seller to use any clubhouse or amenity areas within the Subdivision for individual marketing activities or events.

(xiv) Neither Buyer nor Buyer's agents shall conduct any sales activities on Lots or within the Subdivision except sales activities related to prospective homebuyers in the Subdivision. Activities prohibited by this covenant include, by way of example, but shall not be limited to:

(aa) soliciting the listing or sale of homes for resale; and

(bb) distributing brochures for lots or homes in developments or projects other than the Subdivision.

(xv) This paragraph 5(c) shall survive any Closing and any termination of this Agreement.

(d) If Buyer enters the Property prior to Closing, Buyer shall: (i) keep the Property free and clear of any and all liens or claims resulting therefrom; and (ii) agree not to damage or harm the Property.

(e) Seller shall continue to apply for and diligently pursue all governmental approvals necessary for the final subdivision approval of the Property (collectively the "Approvals"). Prior to submitting any application, petition, plat, plan or other submission to a governmental authority (a "Submission") in connection with the Approvals, Seller shall provide Buyer a copy of the Submission, and Buyer shall have a period of five (5) days to provide Seller with any comments to the Submission. Seller shall endeavor to incorporate Buyer's comments into the Submission prior to filing with the governmental authority, and in the event that Seller reasonably determines that Buyer's comments are unduly burdensome or impractical, Seller shall so notify Buyer with sufficient detail about Seller's objections to allow Buyer to reasonably respond and discuss with Seller, all with a view toward reaching an agreement thereon which is mutually satisfactory.

(f) During the Study Period, and prior to commencement of construction on any Lot which is purchased by Buyer, Buyer shall submit to Seller copies of all of Buyer's proposed exterior designs and elevations for the Lots. Seller shall promptly review the same, considering size, scale, type, design, color, texture, and features and details, all with a view



toward reasonably enhancing and complementing existing design elements of the Subdivision, and promptly approve or reject the same. If Seller has any objection to anything submitted by Buyer, Seller shall promptly inform Buyer of the same, with sufficient detail to allow Buyer to react as Buyer deems reasonably appropriate. Seller must be reasonable in considering and approving or denying the same, and may not unreasonably delay, condition or withhold its approval or comments. If, despite reasonable best efforts to agree, the parties cannot agree on the same during the Study Period, either the Buyer or Seller shall have the right to terminate this Agreement, and mutual agreement and Seller approval thereof shall be a condition precedent and condition to any Closing hereunder. Buyer agrees to build homes strictly in accordance with approved and agreed plans, and to submit for advance Seller approval any proposed material change therein, which advance approval Seller shall not unreasonably withhold or deny. This provision shall survive any Closing.

(g) In addition to all other Buyer obligations and commitments contained herein and in the Exhibits hereto, Buyer shall be responsible for the payment to the appropriate governmental authority of all house construction plan fees and costs that are payable thereto in connection with the house construction plans for the Property and processing thereof including, for example, but not limited to, fees for soils tests and county review and inspection fees as required. Buyer shall also be responsible for the payment of any and all "water tap fees" and "sanitary sewer tap fees," including, without limitation, any availability or like fees that are customarily associated with home building or building permit issuance to the appropriate governmental authority. Should Seller have paid all or a part of the water tap fee or sanitary sewer tap or availability fee or such similar fee as may be charged by the appropriate Governmental Authority to connect a dwelling located on a Lot to the public sanitary sewer and water system, Buyer shall reimburse said payment at Closing, provided Seller delivers acceptable written evidence of payment of same. Lateral installation costs from one (1) foot inside the lot line to house location and connection thereto shall be at Buyer's sole cost and expense as further set forth in Exhibit F attached hereto and made a part hereof.

(h) Buyer's construction on the Lots shall be subject to the final subdivision/site plan for the Property (the "Final Subdivision/Site Plan") and the final approved Subdivision Plat (collectively, the "Plans"), subsurface investigation and geotechnical reports that have been prepared for Seller with respect to the Property, and will be provided to Buyer, wetlands requirements and other applicable development conditions and permits. Buyer shall be solely responsible at its sole expense for complying with the Plans, proffers and the development conditions as they apply to home construction on the Lots.

(i) Seller shall post and maintain all bonds and escrows required under the Final Subdivision/Site Plan, including any associated agreements as may be required by the appropriate governmental authority for development of the Lots and the drainage facilities contemplated by this Agreement (the "Bonds and Escrows"). In the event that Seller incurs costs, expenses or losses pertaining to bonded improvements due to the acts or failure to the act of Buyer, its agents, employees, contractors or invitees, or any occurrence or circumstance relating to the Lots other than an occurrence or circumstance caused by Seller, its agents, employees, contractors or invitees, Buyer shall upon demand reimburse Seller for any such cost, expense or loss. Seller shall be entitled to exercise all rights with respect to the Bonds and Escrows posted



by Seller, including, without limitation, replacing, reducing and causing the release of such Bonds and Escrows.

(j) Buyer shall be responsible for all other items listed as Buyer's responsibility on Exhibit F attached hereto and incorporated by reference herein.

(k) All improvements constructed by Buyer on the Property shall conform to all applicable laws, codes, ordinances, and regulations, and shall also comply with the construction plans, and all development conditions applicable to the Property, and shall be completed in a good and workmanlike manner.

**6. Title, Title Insurance and Further Encumbrances.** At each Closing contemplated by this Agreement, title for the Lots containing covenants of special warranty and further assurances shall be executed by Seller, which shall convey good and marketable title to the Lots to Buyer, in fee simple. Title to the Lots shall be of good record and fact, insurable at standard rates, free and clear of all liens, encumbrances, encroachments, covenants, conditions, restrictions, easements or limitations other than those restrictions acceptable to Buyer (the "Permitted Exceptions" as listed in Exhibit C).

Buyer may, at Buyer's expense, promptly after executing this Agreement, seek a commitment (the "Title Commitment") from a title insurance company of Buyer's choice that is licensed to do business in the state of West Virginia for an owner's title insurance policy on the most recent Standard ALTA Policy form. If the Title Commitment shows exceptions that are unacceptable to Buyer, then Buyer shall give Seller notice on or before the Study Period Expiration Date ("Title Exception Notice"). Upon such Title Exception Notice, Seller shall have the right, within five (5) days after receiving the Title Exception Notice, to elect (i) to cure the title defect at Seller's sole cost and expense; or (ii) not to cure such defect. Seller's failure to notify Buyer within the stated time frame shall be deemed Seller's election not to cure. If Seller elects to cure, Seller shall do so prior to the First Closing or any subsequent Closing as the case may be. If Seller elects not to cure or is deemed to elect not to cure, then Buyer shall be entitled to terminate this Agreement not later than the later of ten (10) days after Seller's election or deemed election not to cure or the expiration of the Study Period and upon such termination, Buyer shall be entitled to the immediate refund of the Deposit. If Seller elects to cure, but fails to cure prior to the First Closing, then Buyer shall be entitled to terminate this Agreement prior to the First Closing and Buyer shall be entitled to the immediate refund of the Deposit from Seller. Notwithstanding the foregoing, Buyer shall have the right, in its sole discretion, to update the Title Commitment prior to each Closing to ensure that no new liens, encumbrances, encroachments, covenants, conditions, restrictions, easements or limitations have been placed on the Property. In such an event, Buyer shall deliver a Title Exception Notice to Seller, and thereafter Seller and Buyer shall follow the same steps as set forth above.

Any monetary lien or encumbrance, including any existing mortgage, deed of trust, judgment lien or similar lien against the Lots which can be discharged by the payment of money, shall be discharged by the Seller at or prior to Closing.

**7. Covenants, Representations and Warranties of Seller.** In order to induce Buyer to enter into this Agreement and to purchase the Lots, and in addition to the warranties and

representations contained elsewhere in this Agreement, Seller makes the following representations, warranties and covenants, each of which is material and is relied upon by the Buyer, and each of which shall be true as of the date hereof and as of the date of each Closing:

(a) Marketable Title. Seller owns the Property and shall convey to Buyer good, marketable and insurable title to the Lots, free and clear of all mortgages, liens, encumbrances, leases, tenancies, security interests, covenants, conditions, restrictions, rights-of-way, easements, or reservations of any kind whatsoever, excepting only the Permitted Exceptions.

(b) Validity; Authority; No Consents Necessary. Seller is a duly organized and validly existing Virginia limited liability company which has been issued a certificate of authority to transact business in the state of West Virginia. Seller has the legal right, power and is duly authorized to enter into and perform its obligations under this Agreement. Seller has duly and validly executed this Agreement, and has obtained all necessary company consents. The person executing this Agreement on behalf of the Seller and any other document which Seller is required to execute pursuant to the terms hereof has been duly and properly authorized to do so.

(c) No Pending Proceedings. No actions, suits or other legal proceedings have been instituted or threatened against or affecting the Seller or the Property at law or in equity or before any Federal, State, municipal or local governmental authority, department, commission, board, bureau, agency or instrumentality thereof, and Seller has no actual knowledge that any such notices are forthcoming.

(d) Further Encumbrances. Seller intends to finance the Seller's costs to complete the subdivision of the Property or the development of the Property in accordance with Exhibit D hereto within the times required under Paragraph 4(b) of this Agreement using debt, and engage in secured financing transactions to accomplish the same. Seller will not further encumber or voluntarily create or cause or permit a lien or encumbrance to attach to the Property between the Effective Date and Closing without the prior written consent of Buyer, which consent shall not be unreasonably withheld, conditioned, or delayed, after Buyer reasonably determines that Seller's intended financing is reasonable in amount, limited to purposes reasonably related and required to accomplish the Seller's purposes hereunder, and under terms and conditions which facilitate the development and sale of the Property in accordance herewith, including draw provisions and Lot release provisions.

(e) No Violations. Seller has not received notice of violation of any building, zoning, health or other ordinances, resolutions, statutes or regulations of any government or governmental agencies, with respect to the use, occupation, maintenance, condition or operation of the Property or any part thereof which has not been cured, and Seller has no actual knowledge that any such conditions or violations are forthcoming.

(f) No Third Party Rights. No tenant or other third party has any agreement, option, or right of first refusal, to purchase the Lots to be purchased by Buyer or any part thereof, nor does any other party have any occupancy rights with respect to the Lots to be purchased by Buyer.

(g) No Mechanics' Liens. All bills and claims for labor performed or services and materials furnished to or for the benefit of the Property or any part thereof have been paid in full or will be paid in full as of the date of each Closing, and there are no mechanic's or materialman's liens on or affecting the Property or any part thereof.

(h) No Assessments and Impact Fees. There are no public or private improvements which have been ordered to be made and/or which have not heretofore been assessed, and there are no impact fees or no special, general, or other assessments pending, or to Seller's knowledge, threatened against or affecting the Property, except for those assessments and fees that Seller is responsible for paying as otherwise set forth in this Agreement.

(i) Material Facts. To Seller's actual knowledge, none of the materials which have been provided to Buyer pursuant to the terms of Paragraph 9 hereof are untrue or incomplete in any material adverse respect as of the date they were prepared, and to Seller's actual knowledge, none of the materials, documents and financial information which have been provided to Buyer prior to execution of this Agreement are untrue or incomplete in any material adverse respect as of the date they were prepared. Seller shall continue to provide Buyer with copies of all material documents of the nature described in Paragraph 9 hereof, which Seller shall receive prior to Closing.

(j) No Other Agreements. Neither the execution of this Agreement nor the consummation of the transactions contemplated hereby will: (i) conflict with, or result in a breach of, the terms, conditions or provisions of, or constitute a default under, any agreement or instrument to which the Seller is a party; (ii) violate any law, rule, regulation or restriction relating to the Property or to which Seller is subject to; or (iii) conflict with or violate Seller's Articles of Organization or Operating Agreement.

(k) No Hazardous Materials. To Seller's actual knowledge without independent investigation or inquiry, except as may be set forth in any environmental site assessment delivered to Buyer as required, (i) Seller, its agents, tenants or licensees have not placed on the Property, and the Property (including the land, surface water, ground water, and any improvements) is free of, any material amounts of waste or debris, and (ii) Seller, its agents, employees, members and managers have not placed on the Property, and the Property is free of all contamination, including the following (the "Hazardous Materials"): (i) any "Hazardous Waste" as defined by the Resource Conservation and Recovery Act of 1976, as amended from time to time, and regulations promulgated thereunder; (ii) any "hazardous substance" as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended from time to time, and regulations promulgated thereunder; (iii) any substance the presence of which on the Property is prohibited by any other federal, state, or local law applicable to the Property; and (iv) underground storage tanks. To Seller's actual knowledge no waste or garbage landfill has occurred or been operated on the Property and no debris has been buried or placed on the Property.

(l) No Flood Plains and Wetlands. To Seller's actual knowledge, no portion of the Lots is located in any flood zone, flood hazard area, flood plain or similarly designated zone on the applicable FEMA maps or in a "wetlands" area as defined by any governmental authority.

(m) No Historic Designation or Historic Use. To Seller's actual knowledge, there is no actual or pending designation of all or any portion of the Property, or of the area or district in which the Property is located, as a historic district, site, building, battlefield, structure, object or other resource on the National Register of Historic Places or any other similar list or survey maintained by any governmental authorities such that the Property or any portion thereof is or may become subject to development restrictions or prohibitions, nor does Seller have any knowledge that any such designation is contemplated. To Seller's actual knowledge, the Property has not been designated and is not an historical preservation site, nor does it contain any aboriginal or Native American burial grounds, or items or remains of historical or anthropological interest, which would delay or prevent the construction of dwellings thereon or materially add to the construction costs of the same.

(n) No Cemeteries. To Seller's actual knowledge, the Property does not contain any cemeteries or graveyards, and the Property is not subject to any easements for access to any cemeteries or graveyards.

(o) No Encroachments. To Seller's actual knowledge, there are no encroachments onto the Property of any improvements on any adjoining real estate, and there are no encroachments onto any real estate of any improvements on the Property.

(p) No Prohibitions. To Seller's actual knowledge, there are no facts or circumstances that would prohibit or inhibit Buyer from utilizing the Lots for their intended use as a development of single-family residences, duplex residences and/or townhome residences, as the case may be, or the issuance of occupancy permits upon completion of construction ("Intended Use").

(q) No Bankruptcy. Seller is not bankrupt or insolvent under any applicable federal or state standard, nor has filed for protection or relief under any applicable bankruptcy or creditor protection statute nor has any such party been threatened by creditors with an involuntary application of any applicable bankruptcy or creditor protection statute. Seller is not entering into the transactions described in this Agreement with intent to defraud any creditor or to prefer the rights of one creditor over any other. Seller and Buyer have negotiated this Agreement at arms-length and the consideration to be paid represents fair value for the assets to be transferred.

(r) Current Mortgages and Taxes. Seller will, during the term of this Agreement, keep any existing mortgage(s) against the Property current and not in default and pay taxes and other public charges against the Property so as to avoid forfeiture of Buyer's rights under this Agreement.

(s) Current Zoning. To Seller's actual knowledge, the Property is currently zoned to allow the use of the Property for the construction of at least three hundred twenty (320) dwelling units in the Subdivision, no petition, application or proceeding is pending or threatened to alter the zoning of the Property, and except for the Permitted Exceptions, Seller has made no commitments relative to the Property, whether verbally or in writing, to any governmental authority or any neighboring property owner, which would be binding on Buyer after the Closing.

(t) No Threatened Condemnation. To Seller's actual knowledge, there is not now pending or threatened eminent domain or condemnation proceedings which would affect the Property or any part thereof.

(u) No Moratoriums. To Seller's actual knowledge, there is no pending moratorium on, or other impediment to, immediate public sewer and water availability which is applicable to any portion of the Property.

(v) No Mining. To Seller's actual knowledge, the Property has not been used for purposes of mining or explorations for mineral, chemicals or other natural resources.

(w) No Wildlife Protection. To Seller's actual knowledge, the Property does not contain any wildlife protection areas, nor does it contain or constitute an environment for any endangered species of plant or animal life as the same might be defined or designated pursuant to the Endangered Species Act or any similar law or regulation.

(x) Lender's Non-Disturbance. Prior to the end of the Study Period, Seller shall use all commercially reasonable efforts to obtain from its acquisition and/or development lender(s) (each a "Current Lender") a recognition or non-disturbance agreement reasonably acceptable to Buyer to the effect that, despite any default by Seller under its acquisition and/or development loan, the Current Lender(s) will recognize Buyer's rights to acquire Lots pursuant to the terms and conditions of this Agreement. If Seller obtains financing through a different acquisition and/or development lender (the "New Lender"), Seller shall require and within ten (10) days after closing on its new loan, obtain a recognition or non-disturbance agreement from its New Lender reasonably acceptable to Buyer to the effect that, despite any default by Seller under its acquisition and/or development loan, the New Lender will recognize Buyer's rights to acquire Lots pursuant to the terms and conditions of this Agreement.

(y) Right of Ingress and Egress. The right of ingress to and egress from the Property, through direct access to a dedicated public road or to a dedicated private road with direct access to a dedicated public road, is or will be immediately available to the applicable Lot(s) at Closing.

(z) Condition of Finished Lots. To the best of Seller's knowledge, the Finished Lots (not the To Be Developed Lots) are in a finished condition, all development work has been completed in a good and workmanlike manner and in conformity with all applicable codes, ordinances, and regulations and in compliance with the Plans (defined in Exhibit D) and with development conditions applicable to the Property. The development work that is completed includes, but is not limited to, the following:

(i) All utilities, including water, sewer, electricity, cable television, telephone, and gas, if applicable, have been installed at each Lot line in accordance with the Plans and clearly marked.

(ii) All stormwater management and erosion controls within the Subdivision have been installed as required by the Plans and have been maintained in good

repair. Buyer shall be responsible for any on-Lot erosion controls necessitated by Buyer's homebuilding activities.

(iii) All required paved roads and curbs have been installed according to the Plans. All sidewalks required by the Plans to be constructed on common area within the Subdivision have been installed, provided, however, that Buyer shall be responsible for installing required sidewalk on the Lots that it acquires and in common area (including private streets) abutting such Lots.

(iv) All common areas have been improved in accordance with the Plans and are and shall be maintained by the applicable homeowners association. Except as otherwise specifically provided herein, Buyer shall have no responsibility for maintaining any common area within the Subdivision.

(v) All subdivision fees, impact fees, and other fees not related to obtaining a building permit for and/or home construction are paid in full. Buyer shall be responsible only for fees related to home construction, such as building permit fees, water and sewer connection fees, and inspection fees. Seller covenants that all payment and performance bonds, sureties, or letters of credit attributable to any remaining infrastructure or development work that directly affect or could affect the Lots have been posted and shall be maintained through the duration of this Agreement.

(vii) Any and all development work that is required so as not to hinder or delay the issuance of any building permit for Buyer's dwelling units is complete.

(viii) All fill placed on any Finished Lots and all building pads for each Finished Lot is suitable for normal residential construction, normal concrete floors on-grade, standard drainage systems, and without the necessity of pierings or special footings. In the event that Buyer discovers any subgrade conditions or expansive soils that require extraordinary costs (over \$3,500) when digging or constructing a foundation on any Finished Lot, or in the event that Buyer discovers unknown buried trash or debris or other unsuitable materials (each, a "Finished Lot Subgrade Issue"), Buyer shall immediately notify Seller in writing. Seller and Buyer shall agree to one of two alternatives for such Finished Lot: either (i) Buyer and Seller shall remedy the Finished Lot Subgrade Issue in accordance with recommendations from a licensed engineer, with Seller responsible for all costs in excess of Five Thousand Dollars (\$5,000.00) related to such remediation (including the engineer's recommendations); or (ii) Seller may repurchase the Finished Lot from Buyer within thirty (30) days for the Purchase Price paid by Buyer. In the event of a repurchase hereunder, Paragraph 12 of the Agreement shall govern the payment of settlement costs and apportionment of taxes. The provisions of this Paragraph 7(z) shall specifically survive each Closing and any termination of this Agreement.

(ix) EXCEPT AS OTHERWISE SPECIFICALLY STATED HEREIN TO THE CONTRARY, BUYER ACKNOWLEDGES AND AGREES THAT IN CONSIDERATION OF THE AGREEMENTS OF SELLER HEREIN, THE FINISHED LOTS SHALL BE CONVEYED TO BUYER ON AN "AS IS, WHERE IS" BASIS WITHOUT ANY SURVIVING REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR

IMPLIED, EITHER ORAL OR WRITTEN, MADE BY SELLER OR ANY AGENT OR REPRESENTATIVE OF SELLER, INCLUDING WITH RESPECT TO THE PHYSICAL OR STRUCTURAL CONDITION OF THE FINISHED LOTS, ANY FINISHED LOT'S COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT, OR WITH RESPECT TO THE EXISTENCE OR ABSENCE OF TOXIC OR HAZARDOUS MATERIALS, SUBSTANCES OR WASTES OR STORAGE TANKS IN, ON, UNDER OR AFFECTING ANY FINISHED LOT. SELLER HAS MADE AND HEREBY MAKES NO WARRANTY OR REPRESENTATION OTHER THAN AS SPECIFICALLY STATED HEREIN AND HEREBY DISCLAIMS ANY IMPLIED WARRANTY REGARDING THE FITNESS FOR PARTICULAR PURPOSE, QUALITY OR MERCHANTABILITY OF ANY FINISHED LOT, OR ANY PORTION THEREOF.

(aa) Further Actions. Seller will not take or cause to be taken any action, or fail to perform any obligation, which would cause any of the foregoing representations or warranties to be untrue as of the Closing. The Seller shall immediately notify the Buyer, in writing, of any event or condition known to Seller which occurs prior to Closing hereunder, which causes a change in the facts relating to, or the truth of, any of the above representations or warranties.

(bb) Further Remedies and Survival. In addition to, but not in limitation of, other default remedies herein elsewhere stated, in the event that any of the aforesaid covenants, representations and/or warranties are not true, shall not have been complied with or shall not have transpired now or at the time of Closing, Buyer, at any time prior to or at Closing, may (i) declare this entire Agreement null and void and of no further effect, in which event the Deposit shall be immediately returned to Buyer by Seller, or (ii) terminate this Agreement with respect to only those Lots affected, at which time the Deposit shall be immediately returned to Buyer by Seller, and the Agreement shall remain in full force and effect for the remaining Lots. Except as otherwise specifically set forth in this Agreement, all covenants and warranties contained in this Paragraph 7 shall survive each Closing for eighteen (18) months. acceptance of possession of the Lots by Buyer at Closing shall not be deemed a waiver of Seller's obligation to deliver the Lots in the conditions set forth herein, and except for those for which legal action has been filed within the eighteen (18) month period alleging breach of the same, all claims thereunder shall thereafter be forever barred.

(cc) Buyer has previously reviewed, considered, and investigated, or will review, consider, and investigate, the nature of this transaction and the Property and all aspects thereof. Buyer acknowledges that other than those specified in this Agreement, Seller is making no representation or warranty, oral or written, regarding the Property, including, but not limited to, those concerning (i) the nature and condition of the Property for any and all activities and uses which Buyer may elect to conduct thereon, (ii) other than as required in connection with completion of Seller's development work, the manner, construction, condition and state of repair or lack of repair of any improvements located on the Property, (iii) the compliance of the Property with any laws, rules, ordinances or regulations of any governing body, (iv) the condition of the title to the Property, or (v) the nature and extent of any servitudes, rights-of-way, liens, encumbrances, licenses, reservations, conditions or otherwise and that Buyer has agreed that any decision to purchase the Property will be based solely upon its inspection of the Property and the representations contained in this Agreement. Buyer will make such inspection and



investigation of the Property as Buyer deems reasonable, including, without limitation, surveys and title investigations, an inspection and investigation of the Property's soil, engineering, environmental and other conditions and requirements, whether there are any eminent domain and other public or quasi-public takings of the Property contemplated, whether the property is located within a special taxing district and the effect thereof, whether there are cemeteries on the Property, and all zoning and regulatory matters pertinent to the Property and to the present use or occupancy of the Property. Buyer acknowledges that Buyer is purchasing the Property based solely on Buyer's own independent investigations and findings and not in reliance on any information provided by Seller or Seller's agents or contractors. Any engineering data, soil reports or other information that Seller or any other party may have delivered to Buyer is furnished without any representation or warranty whatsoever.

(dd) As used in this Agreement, the phrase "Seller's actual knowledge" or words of similar import shall be deemed to be limited to the actual knowledge of Stephen J. Polachek, Manager.

#### **8. Buyer's Representations.**

(a) Validity; Authority; No Consents Necessary. Buyer is a duly organized and validly existing Maryland limited liability company which has been issued a certificate of authority to transact business in the state of West Virginia. Buyer has the legal right, power and is duly authorized to enter into and perform its obligations under this Agreement. Buyer has duly and validly executed this Agreement, and has obtained all necessary company consents. The person executing this Agreement on behalf of Buyer and any other document which Buyer is required to execute pursuant to the terms hereof has been duly and properly authorized to do so.

(b) No Other Agreements. Neither the execution of this Agreement nor the consummation of the transactions contemplated hereby will: (i) conflict with, or result in a breach of, the terms, conditions or provisions of, or constitute a default under, any agreement or instrument to which the Buyer is a party; (ii) violate any law, rule, regulation or restriction relating to the Property or to which Buyer is subject to; or (iii) conflict with or violate Buyer's Articles of Organization or Operating Agreement.

(c) Further Actions. Buyer will not take or cause to be taken any action, or fail to perform any obligation, which would cause any of the foregoing representations or warranties to be untrue as of the Closing. Buyer shall immediately notify the Seller, in writing, of any event or condition known to Buyer which occurs prior to Closing hereunder, which causes a change in the facts relating to, or the truth of, any of the above representations or warranties.

(d) Survival. In the event that any of the aforesaid covenants, representations and/or warranties are not true, shall not have been complied with or shall not have transpired now or at the time of Closing, Seller, at any time prior to or at Closing, may declare this entire Agreement null and void and of no further effect. Each of Buyer's representations contained in this Agreement shall survive each Closing for eighteen (18) months.

9. Delivery of Certain Materials to Buyer. Promptly, but in no event later than five (5) days following the Effective Date, Seller shall deliver to Buyer the following, all of which



are delivered as-is and with no express or implied warranty or guaranty whatsoever except as is otherwise specifically set forth in this Agreement:

(a) A true and complete copy of all owner's policies of title insurance, if any, previously obtained by or in the possession of Seller with respect to the Property.

(b) All surveys, engineering, geotechnical, environmental or similar reports in Seller's possession relating to the Property. Seller consents to Buyer, at its option and expense, directly contacting each of the persons or firms that prepared each of the survey(s), engineering report(s), geotechnical report(s) or environmental report(s) referred to above to request written confirmation that Buyer may rely on each such respective report as if each such report was prepared directly for Buyer.

(c) Copies of all notices of any violation relating to the Property which is uncorrected, if any.

(d) Copies of documents related to work done or to be done on the Property by Seller, its agents or contractors.

(e) Copies of real property tax assessments.

(f) Copies of all documents related to the subdivision of the Property.

(g) Information necessary for reporting the sale to tax authorities, if applicable.

#### 10. Possession; Risk of Loss.

(a) Possession. Possession of the Lots shall be given to Buyer as of the date of Closing, free and clear of (i) the possessory interests of any parties, and (ii) all material trash and debris (including by way of example and not of limitation such things as tires, stumps, appliances, autos or vehicles, and other than windblown trash or trash discarded by passersby over which Seller has no reasonable control).

(b) Risk of Loss. The risk of loss or damage to the Property is assumed by Seller until Closing or possession by Buyer.

#### 11. Default.

(a) Default by Buyer. In the event that Buyer defaults on any obligation under this Agreement, Seller's sole remedy shall be to retain the outstanding portion of the Deposit as full and complete liquidated damages. Seller and Buyer have negotiated and hereby expressly agree and acknowledge that the actual damages suffered by Seller would be difficult, if not impossible, to measure, and the parties have agreed that said Deposit is a fair estimation of the damages. The parties have further agreed that this is a sole and only remedy of Seller against Buyer in the event of Buyer's default, and Seller shall have no other remedy against Buyer whatsoever, including any right to specific performance, injunction or damages beyond the forfeiture of such Deposit as liquidated damages. Should Buyer default on any obligation under

this Agreement, Seller shall send Buyer written notice, at which time Buyer shall have the right to cure the default in the time period set forth in subparagraph (c) below. In the event that Buyer fails to cure the default within the time period set forth in subparagraph (c) below, Seller shall provide the Escrow Agent and Buyer written notice of the default, which notice shall demand the release of the Deposit. Upon receipt of demand for the Deposit from Seller, Escrow Agent shall disburse the funds constituting the Deposit to Seller unless Buyer provides Escrow Agent an affidavit that it is not in default within ten (10) days of Seller's written notice to Buyer and Escrow Agent. In the event that Buyer provides an affidavit to Escrow Agent that it is not in default, Escrow Agent shall comply with the terms of the Escrow Agreement attached hereto as Exhibit B. Upon delivery of the Deposit to Seller pursuant to this Paragraph 11(a), neither party to this Agreement shall have any further liability to the other and this Agreement shall be and become null and void and of no further force and effect, either at law or in equity.

(b) Default by Seller. If all conditions and other events precedent to the Seller's obligations to consummate the transactions contemplated by this Agreement have been satisfied or waived, but the Seller fails, refuses or is unable to consummate the purchase and sale contemplated by this Agreement, or to perform any other obligation required by this Agreement, and such failure or refusal continues for a period of ten (10) business days after written notice thereof from Buyer to Seller, and if Seller's failure or refusal has not been waived by Buyer, then Buyer shall choose, as its sole and exclusive remedy hereunder, either to (i) terminate this Agreement by written notice to Seller, in which event the Deposit shall be immediately returned to Buyer; (ii) pursue an action to recover Buyer's Actual Damages, as hereinafter defined and described, or (iii) seek specific performance from Seller of Seller's obligation to convey the Lots pursuant to this Agreement. As a condition precedent to Buyer exercising any right it may have to bring an action for specific performance as the result of Seller's failure or refusal to perform its obligations hereunder, Buyer must commence such an action within one hundred eighty (180) days after the failure of Seller to cure such default. Buyer agrees that its failure to timely commence such an action for specific performance within such one hundred eighty (180) day period shall be deemed a waiver by it of its right to commence such an action. In the event that Buyer elects to pursue an action for damages, then Buyer shall be entitled to be reimbursed by Seller for its actual, provable, out-of-pocket costs incurred to third parties in connection with the transaction described in this Agreement ("Actual Damages"), and in no event shall Buyer be entitled to pursue punitive or consequential damages, including without limitation any so-called "lost profit" damages, against Seller. If Buyer elects to so terminate this Agreement, then this Agreement shall be terminated and neither party shall have any further rights, obligations or liabilities hereunder, except for any obligations which expressly survive this Agreement, or as to Lots already closed or as otherwise expressly provided herein, and except that Buyer shall be entitled to a return of any portion of the Deposit not credited to a prior Closing or posted as a Damage Deposit and the damages described in the preceding sentence provided Buyer is not otherwise in default hereunder. Notwithstanding anything to the contrary herein, if Seller's failure or refusal to perform its obligations under this Agreement is a result of any action of, or failure to act by, Buyer or any of its employees, agents, representatives or others acting by or on behalf of Buyer, Buyer shall not be relieved of its obligations under this Agreement and Buyer shall not be entitled to any right or remedy provided in this subparagraph or elsewhere in this Agreement.

(c) Notice. Notwithstanding any other term or provision hereof, neither party shall be deemed to be in default hereunder, unless and until, it shall have been sent Notice of such default by the other party, and shall have failed to cure the default within fifteen (15) days of the date of such notice.

(d) Lot Remedies Related to Hazardous Materials. If, following Closing on any Lot, during excavation and prior to the foundation walls being completed on such Lot, Buyer should encounter Hazardous Materials (as defined in Paragraph 7(k)) on such Lot, then Seller shall be required with Buyer's consent, which consent shall not be unreasonably withheld, to either: (i) remediate such Hazardous Materials in accordance with all applicable laws and regulations, or (ii) repurchase such affected Lot(s) for the Purchase Price paid for the affected Lot(s), plus the costs of such transaction, plus Buyer's out-of-pocket costs for excavation and non-vertical construction costs expended within the building pad, it being understood that detection of Hazardous Materials will occur during excavation for house construction, and Seller shall not be responsible for the vertical costs associated with construction of the house. It is the Buyer's responsibility to carefully investigate and discover any such Hazardous Materials during excavation, and once the foundation walls are completed on a Lot, the Buyer shall no longer have any remedy described herein, and Seller shall no longer be required to perform and/or pay for either items (i) or (ii) above as to such Lot.

## **12. Adjustments, Prorations and Closing Costs, Post Closing.**

(a) Any taxes, general or special, and all other public or governmental charges or assessments against the Lots which are, or may be, payable on an annual basis (including benefit charges, assessments, liens or encumbrances for sewer, water, drainage or other public improvements, completed or commenced, on or prior to the date hereof, or subsequent thereto), shall be adjusted and apportioned as of the date of Closing and are to be assumed and paid thereafter by Buyer, said adjustment apportionment to be on the basis of the fiscal year for which assessed, whether or not such assessments had been levied as of the date of Closing.

(b) All other charges, if any, and fees customarily pro-rated and adjusted in similar transactions shall be pro-rated at Closing and thereafter assumed by the Buyer. All taxes, charges and assessments shall be based upon the most recent available bill as of the Closing. In the event that accurate prorations and other adjustments cannot be made at Closing because current bills or statements are not obtainable, the parties shall pro-rate on the best available information, subject to adjustment upon receipt of the final bill or statement.

(c) Seller and Buyer shall be responsible for each paying one-half (1/2) of all documentary stamps, recordation taxes, and transfer taxes, except that Buyer shall solely pay any of such costs related to any Buyer financing. Buyer shall be solely responsible for its title examination and insurance costs and the costs of any settlement or closing agent conducting any Closing, except that Seller shall pay a reasonable charge for services rendered especially or solely to Seller. Seller shall solely pay all costs related to the release of any encumbrance required to be released by Seller. Each party shall be responsible for the fees of its respective legal counsel.

(d) Seller shall pay at Closing, without any contribution from Buyer, any agricultural land use, rezoning, recapture or roll-back tax due in connection with the conveyance or deed for the Lots being settled under any law, regulation or ordinance (or any similar tax or assessment).

(e) Buyer shall protect the Subdivision property after any Closing, as follows:

(i) Buyer shall comply with all legal requirements related to its construction upon the Lots, including, without limitation, all applicable sediment control requirements, shall maintain its construction site in an orderly, neat, and safe condition, and shall keep the Subdivision streets free from mud, dirt, and silt generated by its construction activities. During the course of its construction on the Lots, Buyer shall take reasonable and customary measures to avoid or minimize damage to ditchlines and culverts and/or curb and gutter, paving of streets, other off-Lot improvements, turf, lawns, planting beds, trees, curbs, gutters, and all other portions of the Subdivision constructed by Seller. Buyer shall at all times comply with the reasonable and customary standards and regulations applicable to all builders active in the Subdivision generally, as such standards and regulations are published or amended by Seller in writing from time to time. Without limiting the generality of the preceding sentences, Buyer shall not park or store any equipment, building materials, construction vehicles, trailers or the like upon streets or other portions of the Subdivision, shall obey the Seller's reasonable designation and limitation of construction entrances and ways in order to protect and enhance the Subdivision and its residents, shall not travel upon the streets with other than rubber-tired vehicles, and shall otherwise operate as required by this Agreement. Buyer, at its own expense, shall be responsible for correcting all damage to streets, other off-Lot improvements, and other portions of the Subdivision caused by Buyer or Buyer's agents. Upon Buyer's completion of construction on any substantial group of adjacent Lots and in all events upon the earlier of the time that Seller is ready to obtain release of its bonds or Buyer has completed construction of the final home upon any of the Lots, Seller and Buyer, within three (3) business days after written request by Seller or Buyer, shall jointly inspect streets and other off-Lot improvements adjoining the applicable Lots or located elsewhere within the Subdivision adjacent to any Lots ("Inspection"). The parties shall then promptly jointly prepare a punch list setting forth all items of damage to the streets and other off-Lot improvements ("Post Construction Report") in accordance with Exhibit I. Failure of either party to join the other party for any Inspection within five (5) business days after receiving written request shall be deemed to constitute such failing party's acceptance of an Post Construction Report prepared by the other party. Any damage to improvements noted on any Post Construction Report shall be deemed to have been caused by Buyer or Buyer's agents and shall be Buyer's responsibility to correct, unless Buyer shows with reasonable certainty that Seller or Seller's agents or contractors caused the damage. The damage shall be repaired by the responsible party, at its sole expense, to the other party's reasonable satisfaction, within thirty (30) days after the Inspection, subject only to *force majeure* delay.

(ii) If any damage occurs which is Buyer's responsibility to correct or repair and Buyer fails to repair the damage to Seller's reasonable satisfaction within the thirty (30) days provided for it (subject to extension, however, for *force majeure*) after the Inspection at which the damage was noted, Seller shall have the right (but not the obligation) to repair the damage or cure the default, as the case may be. In the event, however, that bona fide emergency, business necessity, unsafe condition, or citation by any governmental authority requires more

immediate action than is provided for in the preceding sentence, Seller may exercise its right of self-help immediately, giving only such notice to Buyer (which may be oral) as may be practicable under the circumstances. If Seller repairs the damage or cures the default, Buyer shall pay to Seller the provable direct and reasonable out-of-pocket costs incurred by Seller to effect the repair or cure, plus fifteen percent (15%) of the aggregate amount of such costs as an administrative and overhead fee ("Cure Costs"). Such payment of the Cure Costs shall be due within thirty (30) days after written demand by Seller, accompanied by reasonable documentation supporting the Cure Costs. Without limiting the generality of the foregoing, Seller may, upon not less than three (3) business days' notice to Buyer, cause the cleaning of the streets within the Subdivision if Seller determines, in its reasonable discretion, that it is necessary for Seller to take such action. If Seller undertakes such action, Seller shall be entitled to recover Cure Costs from Buyer for the same.

(iii) To secure, but not in any way limit, Buyer's obligations under this paragraph 12(e) of this Agreement (including without limitation the obligation to reimburse Seller costs of removing unapproved signs), Buyer, at the time of Closing, shall deliver to the Escrow Agent, the sum of five hundred dollars (\$500.00) per Lot for each Lot acquired as a fund which Seller may utilize for the payment of Cure Costs ("Damage Fund"). The Damage Fund may be funded by Buyer in cash, or at Buyer's option, in the form of an irrevocable commercial bank letter of credit in usual and customary form reasonably acceptable to Seller and Seller's counsel. The Damage Fund shall be in addition to the Purchase Price and to all other sums which Buyer is obligated to pay to Seller in connection with the Lots. If funded in cash, the Escrow Agent shall hold the Damage Fund in a separate interest-bearing account in a federally insured bank or savings institution reasonably acceptable to Seller and Buyer, and all interest earned thereon shall become a part of the Damage Fund for all purposes hereunder. If Buyer fails to pay any Cure Costs to Seller when required in accordance with the provisions of this Agreement, Seller may draw upon the Damage Fund, to the extent available, to pay or reimburse the Cure Costs incurred by Seller and shall deliver notice thereof to Buyer, stating that (i) Seller is exercising its rights of self-help as provided in this Agreement, (ii) Seller has incurred Cure Costs in the amount set forth in the request, (iii) Seller has drawn upon the Damage Fund for such Cure Costs. Within ten (10) business days after any such draw upon the Damage Fund, Buyer shall replenish the Damage Fund so that it is restored to the full amount which existed immediately prior to the draw. The Damage Fund shall be not deemed to be a limitation upon Buyer's liability for damage to streets or other off-Lot improvements, for sediment control violations, or for any default by Buyer in its obligations under this paragraph 12(e) or otherwise under this Agreement, and if the Damage Fund is insufficient to satisfy Buyer's liability, Seller shall be entitled to recover any deficiency from Buyer.

(iv) The Damage Fund, or so much thereof as remains, shall be released to Buyer as follows: If, after Inspection, either there are no punchlist items as described in Paragraph 12(e)(i) above listed in a Post Construction Report, or, if any such issues were noted in a Post Construction Report, and the same have been satisfactorily corrected as certified in writing by Buyer's licensed architect or engineer at Buyer's sole cost, written notice of the same shall be delivered by Buyer to Seller (along with a true copy of any such certification, as applicable) and Seller shall have ten (10) business days to perform its own inspection of any required repairs at Seller's sole cost. If Seller reasonably determines that any damages or

punchlist items have been satisfactorily corrected by Buyer, then Seller shall promptly instruct the Escrow Agent to release to Buyer such *pro rata* portion of the Damage Fund as relates to the Lots which were subject to the Inspection and any subsequent satisfactory repair.

(v) This paragraph 12(e) shall survive any Closing and any termination of this Agreement.

13. Governmental Moratorium. Notwithstanding anything in this Agreement to the contrary, if at the time scheduled for Closing, there is any law, ordinance, regulation or moratorium ("Moratorium") imposed, enacted or proposed by the federal, state, county or city government, or any agency or subdivision thereof, the effect of which would either: (a) impair the Buyer's ability to obtain any approvals, building permits necessary for the construction or installation of any improvements on the Lots necessary to develop it for its Intended Use; (b) impair the connection of the improvements to the public utilities necessary for the development of the Property for its Intended Use; or (c) require additional contributions from Buyer as a condition of development of the Property for its Intended Use; then in that event, Buyer shall have the right, at its sole option, to: (i) notify Seller that this Agreement, and all time periods set forth herein, are extended until thirty (30) days after termination of such Moratorium, and any escalation of the Purchase Price shall be suspended (i.e., the Purchase Price shall not escalate during any such period); or (ii) waive its rights under this Paragraph 13 and settle in accordance with the terms of this Agreement. In any event, if such delay caused by a moratorium extends for a period of one (1) year, either party may terminate this Agreement by written notice of same to the other, in which event the Seller shall immediately return the Deposit to Buyer, and Seller and Buyer shall be relieved of further obligations under this Agreement, except for indemnification obligations hereunder.

14. Agency. Buyer represents that it has not used the services of any real estate broker, agent or finder in connection with this Agreement. Seller shall be responsible for the payment of any real estate commissions and/or fees that may be due and payable in connection with the purchase and sale of Lots contemplated herein, including any such commissions and/or fees that may be due to Mark Anstine with ARA Newmark, 1410 Spring Hill Road, Suite 600, McLean, VA 22102. The provisions of this Paragraph 14 shall survive each Closing and the delivery of the deed to the Lots.

15. Indemnification. Seller agrees to defend, indemnify and hold Buyer harmless from any and all claims, losses, damages, and causes of action, including all third-party and counterparty claims and losses, arising out of, or directly or indirectly related to: (i) Seller's construction activities in the Subdivision, and the activities of Seller's employees, agents and subcontractors, including, without limitation, claims or liens by mechanics, materialmen or any other third-party individuals or entities; (ii) claims by any third party arising out of the misrepresentation or the failure to disclose information by Seller or Seller's agents; and (iii) the breach by Seller of its representations and warranties set forth in Paragraph 7 above. Seller's indemnity of Buyer shall include reasonable attorney's fees, court costs, and all other costs, expenses and liabilities incurred by Buyer from the date Buyer first received notice of any actual or anticipated claim or demand.

Buyer agrees to defend, indemnify and hold Seller harmless from any and all claims, losses, damages, and causes of action arising out of, or directly or indirectly related to: (i) Buyer's construction activities on the Lots; (ii) claims by any third-party arising out of the misrepresentation or the failure to disclose information by Buyer or Buyer's agents, except for any such claims, losses, damages, and causes of action that Seller is otherwise required to defend, indemnify or hold Buyer harmless; and (iii) the breach by Buyer of its representations set forth in Paragraph 8 above. Buyer's indemnity of Seller shall include reasonable attorney's fees, court costs, and all other costs, expenses and liabilities incurred by Seller from the date Seller first received notice of any actual or anticipated claim or demand.

16. Notices. Any notice or demand under this Agreement shall be in writing and sent by registered or certified mail, return receipt requested, postage prepaid, or by recognized overnight courier service such as Federal Express, or by electronic mail as follows:

|                     |   |
|---------------------|---|
| If to Seller:       | Overlay I, LLC<br>Attention: Stephen Polachek<br>38616 Stonewall Farm Lane<br>Middleburg, VA 20117<br>Email: stephen@overlaygroup.com                   |
| With a copy to:     | Ralph R. Polachek, Esq<br>25588 Poland Road<br>Chantilly, Virginia 20152-1922<br>Email: ralph@polachek.us   |
| If to Buyer:        | Dan Ryan Builders<br>Attention: Ronny Salameh<br>64 Thomas Johnson Drive, Suite 110<br>Frederick, MD 21702<br>Email: rsalameh@danryanbuilders.com       |
| With a copy to:     | Dan Ryan Builders<br>Attention: Dan Ebersole, Esq.<br>64 Thomas Johnson Drive, Suite 110<br>Frederick, MD 21702<br>Email: debersole@danryanbuilders.com |
| If to Escrow Agent: | Bowles Rice, LLP<br>Attention: Steve Mathias<br>101 S. Queen Street<br>Martinsburg, WV 25401<br>Email: smathias@bowlesrice.com                          |

Any such notice or demand shall be deemed given three (3) days after same has been deposited in the United States mail as aforesaid, or the next business day after deposited with a recognized overnight courier, or if sent by electronic mail, the same day if sent at or before 5:00 PM local time on a business day or the next business day if sent on a weekend or holiday. Either party by notice to the other in accordance with the above, may designate a substitute address for such notice or demand and thereafter such substitute address shall be used for the giving of notice or demand.

17. Miscellaneous.

(a) Binding Nature/Assignment. This Agreement shall inure to the benefit of and be binding upon Seller and Buyer and their respective heirs, personal representatives, successors and assigns. Buyer specifically reserves the right at any time prior to or at Closing to assign this Agreement in whole or in part to any person or entity selected by it, in its sole and absolute discretion, in which event such assignee shall be entitled to all benefits of and be subject to all obligations of Buyer hereunder, and Buyer shall be relieved of all of its obligations under this Agreement. This Agreement may not be assigned by Seller without the prior written consent of Buyer, which consent shall not be unreasonably withheld. In the event of such an assignment by Seller under this Agreement, Seller shall not be released from any of its obligations under this Agreement.

(b) Entire Agreement. This Agreement, together with the Exhibits attached hereto, contains the final and entire agreement between the parties hereto and supersedes all prior oral representations, negotiations and agreements, and neither the parties, nor their agents, shall be bound by any terms, conditions and representations not herein written. This Agreement may not be modified or changed orally, but only by agreement in writing signed by the party against whom enforcement of any such change is sought.

(c) Governing Laws. The interpretation, construction and performance of this Agreement shall be governed by the laws of the state of West Virginia.

(d) Titles. The titles of the paragraphs are inserted as a matter of convenience and for reference and in no way define, limit or describe the scope of this Agreement or the intent of any provision thereof.

(e) Drafting Party. This Agreement is the result of the combined draftsmanship and/or review of Seller and Buyer and/or their respective agents, accordingly, there shall be no presumption or interpretation of this Agreement based on its having been drafted by one or the other.

(f) Non-Merger. Subject to the limitation on survival of representations and warranties pursuant to Paragraph 7 and Paragraph 8 hereof, all provisions of this Agreement that contemplate or provide for performance by either party after any applicable Closing (the "Surviving Obligations") shall survive such Closing hereunder and shall not be deemed to have merged into the deed to be executed and delivered by Seller at any such Closing. Despite any contrary provision of this Agreement, if Buyer acquires a portion of the Property but this Agreement terminates without Buyer having acquired all of the Property, all of the terms and



provisions of this Agreement shall remain in full force and effect as they pertain to the portion of the Property acquired by Buyer.

(g) Reasonable Cooperation. Each party shall reasonably cooperate with the other in connection the satisfaction of any condition or obligation which must be satisfied by Closing pursuant to the terms of this Agreement, and in connection therewith each party agrees to execute any document contemplated by the terms of this Agreement, which may be reasonably requested by the other party.

(h) Execution of Agreement. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

(i) Time is of the Essence. Time shall be of the essence of each and every provision of this Agreement.

(j) Waiver by Writing. Buyer and Seller each reserve the right to waive any of the terms and conditions of this Agreement which benefit the party waiving same and to purchase or sell the Property in accordance with the terms and conditions of this Agreement which have not been so waived. No party hereto shall be deemed to have waived the exercise of any right which it holds hereunder unless such waiver is made expressly and in writing (and no delay or omission by any party hereto in exercising any such right shall be deemed a waiver of its future exercise), except for any term of this Agreement in which the passage of time specifically waives such right. No such waiver made as to any instance involving the exercise of any such right shall be deemed a waiver as to any other such instance, or any other such right. Failure by either party to require performance of a term of this Agreement by the other party or a waiver by either party of a breach by the other party shall not prevent subsequent enforcement of such provision or be deemed a waiver of any subsequent breach thereof.

(k) Time Periods. Any and all references in this Agreement to time periods which are specified by reference to a certain number of days refer to calendar days, unless "business days" is otherwise expressly provided. Therefore, if (i) the last date by which a Closing is permitted to occur hereunder; or (ii) any date by which either party is required to provide the other party with notice hereunder, occurs on a Saturday or Sunday or a banking holiday in the jurisdiction where the Lots are located, then and in any of such events, such applicable dates shall be deemed to occur, for all purposes of this Agreement, on that calendar day which is the next, succeeding day, which is not a Saturday, Sunday or banking holiday.

(l) Invalid Provisions. No determination by any court, governmental or administrative entity or otherwise that any provision of this Agreement or any amendment hereof is invalid or unenforceable in any instance shall affect the validity or enforceability of (i) any other such provision, or (ii) such provision in any circumstance not controlled by such determination. Each such provision shall be valid and enforceable to the fullest extent allowed by, and shall be construed wherever possible as being consistent with, applicable law.

(m) No Partnership. Nothing in the provisions of this Agreement shall be deemed in any way to create between the parties hereto any relationship of partnership, joint

venture or association, and the parties hereto hereby disclaim the existence of any such relationship.

18. Rule Against Perpetuities. So as not to violate the rule against perpetuities, all Closings under this Agreement must occur, if at all, within twenty (20) years after the Effective Date.

19. Exclusivity; No More Favorable Terms. Provided that this Agreement is in full force and effect, Seller shall not offer to another builder any Lot contemplated by this Agreement. In the event that there are lots in the Subdivision that are not made part of this Agreement, Seller shall not sell any other lot in any Phase of the Subdivision in which any Lot is located which is of a similar size and of similar characteristics as the Lots for less than the Purchase Price set forth in this Agreement. In the event that Seller sells such a lot in violation of the foregoing, the Purchase Price for Buyer shall be reduced to the lowest purchase price at which Seller sold such a lot to such other party during the Term of this Agreement.

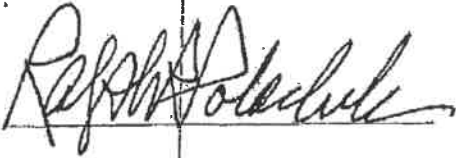
20. Recording of Agreement. This Agreement shall not be recorded by either party, provided, however, Buyer shall have the right to record a memorandum setting forth the terms of this Agreement (the "Memorandum") as set forth in Exhibit E. Seller shall sign and notarize said Memorandum at Buyer's request.

21. Effective Date. The "Effective Date" of this Agreement shall be the date upon which both Buyer and Seller agree to all of the terms and conditions set forth herein, as evidenced by the latest date set forth next to the parties' signatures below.


[SEE SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, intending to be bound, each of the parties hereto have set their hands and seals on the respective day and year below shown next to each of their respective signatures.

ATTEST/WITNESS:

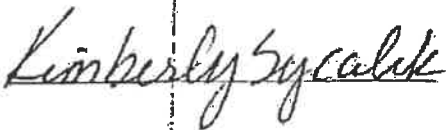


SELLER:  
OVERLAY I, LLC

By:  (SEAL)  
Stephen J. Polachek, Manager


Date 5-11-18

ATTEST/WITNESS



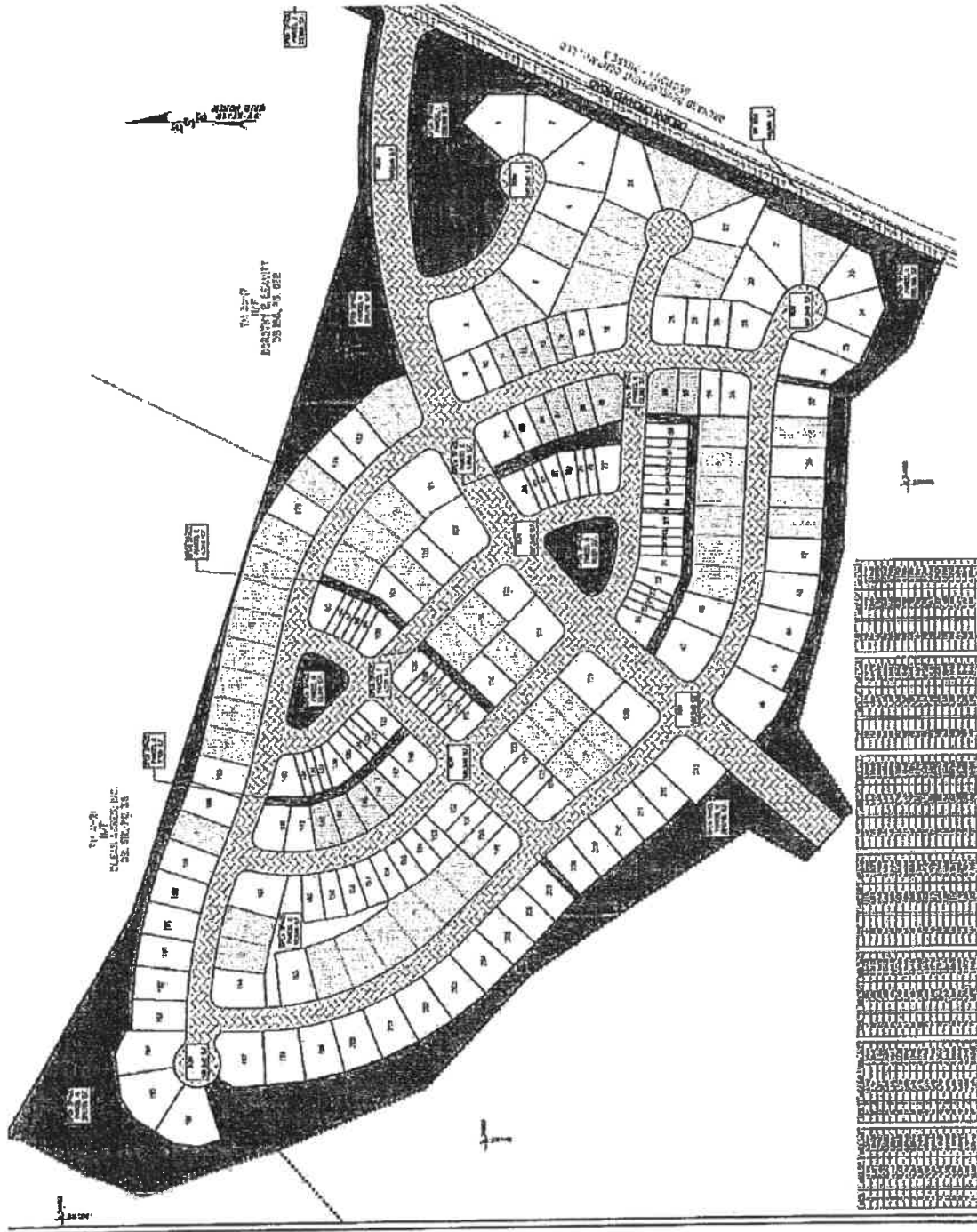
BUYER:  
DAN RYAN BUILDERS WEST VIRGINIA,  
LLC

By:  (SEAL)  
~~Ronny S. S. S. S.~~, Senior Vice President

  
Date 5/14/18

## EXHIBIT A

Site Plan(s) Showing the Lots to be Purchased under this Agreement





| PRODUCT        | PHASE 1 |              | PHASE 2 |              | PHASE 3 |              | PHASE 4 |              |
|----------------|---------|--------------|---------|--------------|---------|--------------|---------|--------------|
|                | LOTS    | LEFT TO SELL | LOTS    | LEFT TO SELL | LOTS    | LEFT TO SELL | LOTS    | LEFT TO SELL |
| EXECUTIVE LOTS | 24      | 13           | 0       | 0            | 1       | 75           | 23      | 23           |
| FAIRWAY LOTS   | 24      | 20           | 0       | 0            | 1       | 54           | 23      | 23           |
| DUPLEX LOTS    | 10      | 14           | 0       | 0            | 1       | 34           | 18      | 18           |
| 20' TOWNS (FL) | 25      | 8            | 48      | 13           | 1       | 70           | 20      | 20           |
| 20' TOWNS (RL) | 10      | 0            | 0       | 0            | 1       | 0            | 10      | 10           |
| 16' TOWNS (FL) | 10      | 0            | 0       | 0            | 1       | 0            | 10      | 10           |
| 16' TOWNS (RL) | 10      | 0            | 0       | 0            | 1       | 0            | 10      | 10           |
| 16' TOWNS (FL) | 10      | 0            | 0       | 0            | 1       | 0            | 10      | 10           |
| 16' TOWNS (RL) | 10      | 0            | 0       | 0            | 1       | 0            | 10      | 10           |
| PHASE TOTALS   | 158     | 73           | 48      | 13           | 1       | 199          | 135     | 135          |



CURRENT PAVED ROADS

NOTE:  
THIS PLAN IS FOR ILLUSTRATIVE PURPOSES ONLY AND  
IS SUBJECT TO CHANGE.

EXECUTIVE LOT

FAIRWAY LOT

DUPLEX LOT

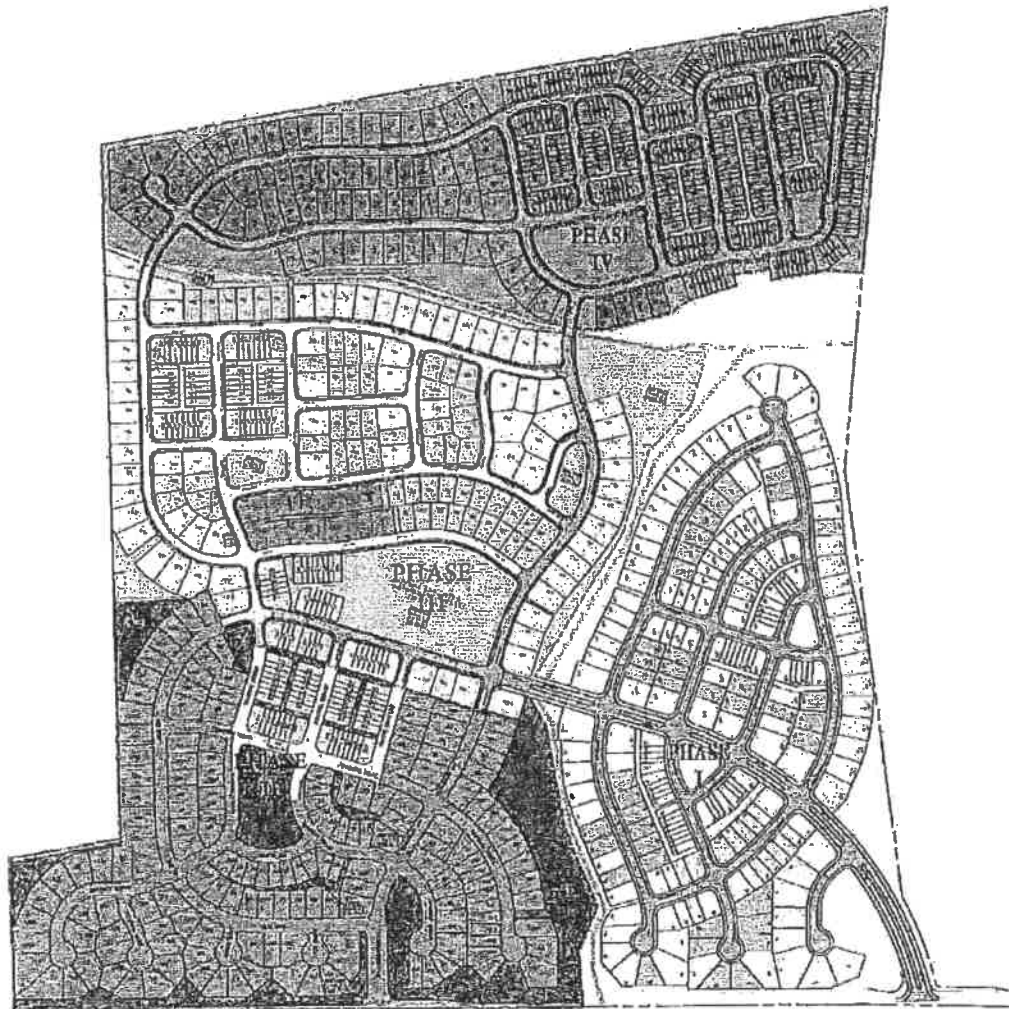
20' TOWNSHIPS (FRONT LOAN)  
ON 20' FRONT LOT

20' TOWNSHIPS (FRONT LOAN)  
ON 20' FRONT LOT

20' TOWNSHIPS (FRONT LOAN)  
ON 20' FRONT LOT

20' TOWNSHIPS (FRONT LOAN)  
ON 20' FRONT LOT

SOLD LOT



**ESE** Land Planning  
Engineering  
Land Surveying

For more info, see  
10000 Martinsburg Station  
Berkeley County, WV 25801  
Tel: 301.341.4100  
Fax: 301.341.4100

**MARTINSBURG STATION**  
CITY OF MARTINSBURG -- BERKELEY COUNTY, WEST VIRGINIA  
**AVAILABLE LOTS**

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SHEET  
1  
OF  
1

# EXHIBIT A-1

## Summary of the Lots

| INITIAL BULK PURCHASE LOTS                             |            |                      |             | BUY-AS-SOLD LOTS |
|--|------------|----------------------|-------------|------------------|
| SFD PH 1   | SFD PH 3   | TH (20' FL SFA) PH 1 | DUPLEX PH 1 |                  |
| LOT #'S  | LOT #'S    | LOT #'S              | LOT #'S     |                  |
| 5  | 120        | 424                  | 650         | 11               |
| 7  | 121        | 425                  | 651         | 12               |
| 17   | 122        | 426                  | 652         | 13               |
| 18   | 127-A      | 427                  | 653         | 14               |
| 19   | 128-A      | 428                  | 654         | 57               |
| 21   | 129-A      | 429                  | 655         | 58               |
| 22   | 162        | 430                  | 656         | 85               |
| 24   | 163        | 431                  | 657         | 86               |
| 25   | 166        | 432                  | TOTAL       | 87               |
| 32   | 167        | 433                  | 8           | 88               |
| 38   | 168        | 434                  |             | 143              |
| 40   | 169        | 435                  |             | 144              |
| 41   | 170        | 436                  |             | 145              |
| 49   | 171        | 437                  |             | 146              |
| 50   | 172        | 438                  |             | TOTAL            |
| 51   | 175-A      | 667                  |             | 14               |
| 52   | 177-A      | 668                  |             |                  |
| 53   | 178-A      | 669                  |             |                  |
| 54   | 179-A      | TOTAL                |             |                  |
| 92   | 180-A      | 18                   |             |                  |
| 93   | 181-A      |                      |             |                  |
| 94   | 182-A      |                      |             |                  |
| 102  | 183-A      |                      |             |                  |
| 106  | 184-A      |                      |             |                  |
| 107  | 187-A      |                      |             |                  |
| 117  |            |                      |             |                  |
| TOTAL  |            |                      |             |                  |
| 51   |            |                      |             |                  |
| TAKEDOWN LOTS SUMMARY                                  |            |                      |             |                  |
| 75' SFD FL   | 65' SFD FL | 20' FL TH            |             |                  |
| YIELD  | YIELD      | YIELD                |             |                  |
| 54   | 68         | 98                   |             |                  |
| DEVELOPMENT & PURCHASE PHASING                         |            |                      |             |                  |
| Initial Bulk Purchase Includes:                        |            |                      |             |                  |
| SFD Ph 1 Lots  | 51         | LOTS                 |             |                  |
| SFD Ph 3 Lots  | 18         | LOTS                 |             |                  |
| Total Lots   | 69         | LOTS                 |             |                  |
| Buy "As Sold" Lots (18 month Exclusion Period):        |            |                      |             |                  |
| DUPLEX LOTS - PH 1                                     | 14         | LOTS                 |             |                  |
| First Phase, To-Be-Developed (Takedown Lots):          |            |                      |             |                  |
| 20' FL TH  | 50         | LOTS                 |             |                  |
| Subsequent Phases, To-Be-Developed (Takedown Lots):    |            |                      |             |                  |
| Yield and Lot Type Mutually Agreed Upon Prior to Start |            |                      |             |                  |

**EXHIBIT A-2**  
(attached)



**2.(a)(ii)e. Bulk Purchase Option for To Be Developed Lots**

| Takedown | 75' SF Lots | 65' SF Lots | 20' TH Lots |
|----------|-------------|-------------|-------------|
| Price    | \$52,600    | \$49,200    | \$32,800    |

**Discounted price based on # of lots purchased in bulk\*\***

| # of Lots | 75' SF Lots | 65' SF Lots | 20' TH Lots | % Discount |
|-----------|-------------|-------------|-------------|------------|
| 3         | \$52,074    | \$48,708    | \$32,472    | 1%         |
| 6         | \$51,548    | \$48,216    | \$32,144    | 2%         |
| 9         | \$51,022    | \$47,724    | \$31,816    | 3%         |
| 12        | \$50,496    | \$47,232    | \$31,488    | 4%         |
| 15        | \$49,970    | \$46,740    | \$31,160    | 5%         |
| 18        | \$49,444    | \$46,248    | \$30,832    | 6%         |
| 21        | \$48,918    | \$45,756    | \$30,504    | 7%         |
| 24        | \$48,392    | \$45,264    | \$30,176    | 8%         |
| 27        | \$47,866    | \$44,772    | \$29,848    | 9%         |
| 30        | \$47,340    | \$44,280    | \$29,520    | 10%        |
| 33        | \$46,814    | \$43,788    | \$29,192    | 11%        |
| 36        | \$46,288    | \$43,296    | \$28,864    | 12%        |
| 39        | \$45,762    | \$42,804    | \$28,536    | 13%        |
| 42        | \$45,236    | \$42,312    | \$28,208    | 14%        |
| 45        | \$44,710    | \$41,820    | \$27,880    | 15%        |
| 48        | \$44,184    | \$41,328    | \$27,552    | 16%        |
| 51        | \$43,658    | \$40,836    | \$27,224    | 17%        |
| 54        | \$43,132    | \$40,344    | \$26,896    | 18%        |
| 57        | \$42,606    | \$39,852    | \$26,568    | 19%        |
| 60        | \$42,080    | \$39,360    | \$26,240    | 20%        |

**\*\* Bulk Purchase discounted pricing only applies to lots purchased in bulk that are purchased in addition to the takedown lots each quarter. Bulk Purchase Lots will be credited against the number of lots Buyer is required to purchase in future takedowns. Discount for Bulk Purchase Option is capped @ 20%.**

| # of Lots | 75' SF Lots | 65' SF Lots | 20' TH Lots | % Discount |
|-----------|-------------|-------------|-------------|------------|
| 3         | \$50,495    | \$47,232    | \$31,488    | 4.00%      |
| 6         | \$49,970    | \$46,740    | \$31,160    | 5.00%      |
| 9         | \$49,444    | \$46,248    | \$30,832    | 6.00%      |
| 12        | \$48,918    | \$45,756    | \$30,504    | 7.00%      |
| 15        | \$48,392    | \$45,264    | \$30,176    | 8.00%      |
| 18        | \$47,866    | \$44,772    | \$29,848    | 9.00%      |
| 21        | \$47,340    | \$44,280    | \$29,520    | 10.00%     |
| 24        | \$46,814    | \$43,788    | \$29,192    | 11.00%     |
| 27        | \$46,288    | \$43,296    | \$28,864    | 12.00%     |
| 30        | \$45,762    | \$42,804    | \$28,536    | 13.00%     |
| 33        | \$45,236    | \$42,312    | \$28,208    | 14.00%     |
| 36        | \$44,710    | \$41,820    | \$27,880    | 15.00%     |
| 39        | \$44,184    | \$41,328    | \$27,552    | 16.00%     |
| 42        | \$43,658    | \$40,836    | \$27,224    | 17.00%     |
| 45        | \$43,132    | \$40,344    | \$26,896    | 18.00%     |
| 48        | \$42,606    | \$39,852    | \$26,568    | 19.00%     |
| 51        | \$42,080    | \$39,360    | \$26,240    | 20.00%     |
| 54        | \$41,554    | \$38,868    | \$25,912    | 21.00%     |
| 57        | \$41,028    | \$38,376    | \$25,584    | 22.00%     |
| 60        | \$40,502    | \$37,884    | \$25,256    | 23.00%     |

**Potential discounted price taking into account not paying 31r escalator @ 3% through early bulk purchase**

## **EXHIBIT B**

### **ESCROW AGREEMENT**

WHEREAS, DAN RYAN BUILDERS WEST VIRGINIA, LLC, a West Virginia limited liability company and OVERLAY I, LLC, a Virginia limited liability company, have caused or will cause certain funds to be deposited in escrow with BOWLES RICE, LLP, the "Escrow Agent" as set forth in Paragraph 2(a) of the Lot Purchase Agreement attached hereto, on the terms and conditions more particularly described herein.

NOW, THEREFORE, in consideration of the premises set forth herein, the parties hereby agree as follows:

1. **Establishment of Deposit.** The parties have caused or will cause to be deposited with the Escrow Agent a cash deposit in the amount of **One Hundred Thousand Dollars (\$100,000.00)** (the "Initial Deposit" as defined in the Lot Purchase Agreement). The parties will also cause to be deposited additional deposit(s) in an amount to be determined in accordance with the Lot Purchase Agreement (the "Additional Deposits"), which may be in the form of cash or a letter of credit. The Initial Deposit and the Additional Deposits may be referred to as the "Deposit" as set forth in the Lot Purchase Agreement.
2. **Treatment of Deposit.** The Deposit shall be held pursuant to the terms of this Escrow Agreement.
3. **Payment Instructions.** The Deposit shall be held and disbursed in accordance with the terms of the Lot Purchase Agreement and this Escrow Agreement.
4. **Termination.** This Escrow Agreement shall terminate upon the first to occur of any of the following events:
  - A. The disbursement of the funds constituting the Deposit in accordance with the provisions of Section 3 hereof.
  - B. Any termination of the Lot Purchase Agreement, in which case the Deposit shall be disbursed and/or returned in accordance with the provisions of Section 3 hereof.
5. **Limitation of Escrow Agent's Capacity.**
  - A. This Escrow Agreement expressly and exclusively sets forth the duties of Escrow Agent with respect to any and all matters pertinent hereto, and no implied duties or obligations shall be read into this Escrow Agreement against Escrow Agent. This Escrow Agreement constitutes the entire agreement between the Escrow Agent and the other parties hereto in connection with the subject matter of this escrow, and no other agreement entered into between the parties, or any of them, shall be considered as adopted or binding, in whole or in part, upon the Escrow Agent, notwithstanding that any such other agreement may be referred to herein or deposited with Escrow Agent or

the Escrow Agent may have knowledge thereof, and Escrow Agent's rights and responsibilities shall be governed solely by this Escrow Agreement.

- B. Escrow Agent acts hereunder as a depository only, and is not responsible or liable in any manner whatsoever for the sufficiency, correctness, genuineness or validity of the subject matter of this Escrow Agreement or any part thereof, or for the form of execution thereof, or for the identity or authority of any person executing or depositing such subject matter. Escrow Agent shall be under no duty to investigate or inquire as to the validity or accuracy of any document, agreement, instruction or request furnished to it hereunder believed by it to be genuine and Escrow Agent may rely and act upon, and shall not be liable for acting or not acting upon, any such document, agreement, instruction or request.

#### 6. Authority to Act.

- A. Escrow Agent is hereby authorized and directed by the parties hereto to deliver the subject matter of this Escrow Agreement only in accordance with the provisions of this Escrow Agreement.
- B. Escrow Agent shall be protected in acting upon any written notice, request, waiver, consent, certificate, receipt, authorization, power of attorney or other paper or document which Escrow Agent in good faith believes to be genuine and what it purports to be, including, but not limited to, items directing investment or non-investment of funds, items requesting or authorizing release, disbursement or retainage of the subject matter of this Escrow Agreement, and items amending the terms of this Escrow Agreement.
- C. Escrow Agent may consult with legal counsel at the joint and several cost and expense of the undersigned (other than Escrow Agent) in the event of any dispute or question as to the construction of any of the provisions hereof or its duties hereunder, and it shall incur no liability and shall be fully protected in acting in accordance with the advice of such counsel.
- D. In the event of any disagreement between any of the parties to this Escrow Agreement, or between any of them and any other person, resulting in adverse claims or demands being made in connection with the matters covered by this Escrow Agreement, or in the event that Escrow Agent, in good faith, is in doubt as to what action it should take hereunder, Escrow Agent may, at its option, refuse to comply with any claims or demands on it, or refuse to take any other action hereunder, so long as such disagreement continues or such doubt exists, and in any such event, Escrow Agent shall not be or become liable in any way or to any person for its failure or refusal to act, and Escrow Agent shall be entitled to continue to so refrain from acting until (i) the rights of all interested parties shall have been fully and finally adjudicated by a court of competent jurisdiction, or (ii) all differences shall have been adjudged and all doubt resolved by agreement among all of the interested parties, and Escrow Agent shall have been notified thereof in writing signed by all such parties. Escrow Agent is

hereby authorized, in its sole discretion, to comply with and obey any such orders, judgments, decrees or levies. The rights of Escrow Agent under this sub-paragraph are cumulative of all other rights which it may have by law or otherwise.

7. **Indemnification.** The parties to this Escrow Agreement (other than Escrow Agent) hereby jointly and severally agree to indemnify and hold Escrow Agent, its affiliates, officers, employees, successors, assigns, attorneys and agents (each an "Indemnified Party") harmless from all losses, costs, claims, demands, expenses, damages, penalties and attorney's fees suffered or incurred by any Indemnified Party or Escrow Agent as a result of anything which it may do or refrain from doing in connection with this Escrow Agreement or any litigation or cause of action arising from or in conjunction with this Escrow Agent or involving the subject matter hereof or the Deposit; provided that the foregoing indemnification shall not extend to the gross negligence or willful misconduct of Escrow Agent.
8. **Notice.** Any payment, notice, request or any other communication required or permitted in this Escrow Agreement shall be provided in the manner and to such persons set forth in the Lot Purchase Agreement.
9. **Miscellaneous.**
  - A. Escrow Agent shall make no disbursement, investment or other use of funds until and unless it has collected funds. Escrow Agent shall not be liable for collection items until the proceeds of the same in actual cash have been received by Escrow Agent.
  - B. Escrow Agent may resign at any time by giving at least five (5) days prior written notice to the parties hereto, whereupon the parties hereto will immediately appoint a successor Escrow Agent. Until a successor Escrow Agent has been named and accepts its appointment or until another disposition of the subject matter of this Escrow Agreement has been agreed upon by all parties hereto, Escrow Agent shall be discharged of all of its duties hereunder save to keep the subject matter whole.
  - C. This Escrow Agreement is being made in and is intended to be construed according to the laws of the State of West Virginia. This Escrow Agreement shall inure to and be binding upon the parties hereto and their respective successors, heirs and assigns.
  - D. The terms of this Escrow Agreement may be altered, amended, modified or revoked only by an instrument in writing signed by the parties hereto and the Escrow Agent.
  - E. Escrow Agent shall not be liable to the undersigned for any loss or damage arising out of any acts of God, strikes, war, terrorism, or any other act or circumstance beyond the reasonable control of Escrow Agent.
10. **Discharge of Escrow Agent.** Upon the delivery of all of the subject matter or monies pursuant to the terms of this Escrow Agreement, the duties of Escrow Agent shall terminate and Escrow Agent shall be discharged from any further obligation hereunder.

11. **Entire Agreement.** This Escrow Agreement contains the final and entire agreement between the parties hereto and supersedes all prior oral representations, negotiations and agreements, and neither the parties, nor their agents, shall be bound by any terms, conditions and representations not herein written.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals on the day and year below shown.

DAN RYAN BUILDERS WEST VIRGINIA,  
LLC

Date: 5/14/18

By: Paul J. Yeager  
Name: Paul J. Yeager  
Title: Senior VP & CEO

OVERLAY I, LLC

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

The undersigned hereby agrees to act as Escrow Agent in accordance with the terms and conditions of the foregoing Escrow Agreement, and hereby agrees to be bound thereby.

BOWLES RICE, LLP

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

11. **Entire Agreement.** This Escrow Agreement contains the final and entire agreement between the parties hereto and supersedes all prior oral representations, negotiations and agreements, and neither the parties, nor their agents, shall be bound by any terms, conditions and representations not herein written.

**IN WITNESS WHEREOF,** the parties hereto have set their hands and seals on the day and year below shown.

**DAN RYAN BUILDERS WEST VIRGINIA, LLC**

Date: \_\_\_\_\_


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

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

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

**OVERLAY I, LLC**

Date: 5-11-18

By:   
Name: Stephen J. Polachuk  
Title: Manager

The undersigned hereby agrees to act as Escrow Agent in accordance with the terms and conditions of the foregoing Escrow Agreement, and hereby agrees to be bound thereby.

**BOWLES RICE, LLP**

Date: \_\_\_\_\_

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

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

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



## **EXHIBIT C**

### **Permitted Exceptions**

1.

2.

3.

4.



## EXHIBIT D

### Development Obligations

1. WORK TO BE ACCOMPLISHED BY SELLER. Seller shall, at its sole cost and expense, finish each of the To Be Developed Lots in accordance with the terms and conditions set forth in this Paragraph 1 and as set forth in the Seller-Buyer Responsibility Checklist attached hereto as Exhibit F and incorporated by reference herein, in a good and workmanlike manner and in conformity with all applicable codes, ordinances and regulations, and in compliance with the Plans (as defined below) and development conditions applicable to the Property. In the event that there is a conflict between this Exhibit D and Exhibit F, the terms of this Exhibit D shall prevail. The provisions of this Exhibit D shall survive each Closing.

A. Seller shall complete all overlot clearing, grading, and padding of To be Developed Lots so that each Lot has a minimum padded buildable area pursuant to the standards outlined within EXHIBIT J. Each Lot shall balance taking into account Buyer's homebuilding excavation, including footing and basement spoils, without the import or export of materials. This work shall be done in accordance with the final development plans and specifications approved by the City of Martinsburg and/or Berkeley County, West Virginia ("Plans"), which define the development area ("Development Area"), if applicable, and the requirements of Exhibit J attached hereto. Each Lot, the Development Area, and the common areas shall be graded to meet minimum property standards of the local government or authority, the requirements of the approved Plans, to allow landscaping on the To Be Developed Lots without other than on lot fine grading. Upon completion of the grading and padding of To Be Developed Lots by Seller, Seller shall provide Buyer with an as-built survey of the Property that confirms the To Be Developed Lots were graded as set forth herein. Seller shall have all on lot placed and compacted fill, no matter the depth, inspected by a third party engineer, and Seller shall obtain and deliver to Buyer a compaction certification issued by a soils engineer registered in the state of West Virginia for all To Be Developed Lots in accordance with FHA, VA, FNMA and other governmental requirements and all necessary or appropriate soil tests. Seller shall not place more than twelve inches (12") of un-compacted fill on any Lot without the prior written consent of Buyer. All fill placed on any To Be Developed Lots and all building pads for each Lot shall be suitable for normal residential construction, normal concrete floors on-grade, standard drainage systems, and without the necessity of pierings or special footings. Seller shall have all building pad elevations on each Lot inspected by a third party engineer to verify compliance with the Plans, and Seller shall obtain and deliver to Buyer a certification issued by Seller's engineer for each Lot purchased by Buyer, which shall include a reliance letter issued to Buyer from said engineer that allows Buyer to rely on the certification issued. Buyer shall have the responsibility for on-lot fine grading of the To Be Developed Lots. In the event that Buyer discovers any subgrade conditions or expansive soils that require extraordinary costs when digging or constructing a foundation on any Lot ("Subgrade Issue"), Buyer shall immediately notify Seller. Seller and Buyer shall agree to one of two alternatives for such Lot: either (i) Buyer and Seller shall remedy the Subgrade Issue in accordance with recommendations from a licensed engineer, with Seller responsible for all costs related to such remediation (including the engineer's recommendations); or (ii) Seller may repurchase the Lot from Buyer within thirty (30)

days for the Purchase Price paid by Buyer. In the event of a repurchase hereunder, Paragraph 12 of the Agreement shall govern the payment of settlement costs and apportionment of taxes.

B. Seller shall install, or have installed by the appropriate authority, a complete and functional water and sewer system as shown on the approved Plans to serve the dwelling units from time to time selected by Buyer for construction on the To Be Developed Lots with all required authorizations and allocations with water and sewer lines to serve each Lot extended to the Lot property line and ready for immediate hookup. The laterals shall be clearly marked. The system will be constructed in accordance with all applicable codes and government requirements. All required tests and inspections will be made by the proper authorities before Buyer desires to utilize such system. Seller shall clearly mark and locate the sewer and water service for each Lot one (1) foot inside the lot line. Seller shall deliver a letter to Buyer from each utility company that indicates said sewer and water service has been approved and is ready for immediate hook-up. All sewer service laterals shall be gravity fed from the basement level, or lowest potential habitable level of the proposed house type without need for pumps or mechanical devices. In cases where this is not possible, Seller will reduce the Purchase Price for any applicable Lot by the amount equivalent to Buyer's cost of installing pumps or mechanical devices for a home constructed on said Lot(s). For SF Lots, all Lots must be developed to account for a nine (9') basement measured from Finish Floor Elevation on the Lots. For TH Lots, all Lots must be developed to allow the sewer lines to be gravity fed from the Finish Floor Elevation.

C. Seller shall make payment to the water or sewer district of any deficit contributions (including proffers, impact fees, payments-in-lieu, adequate public facilities ordinances, etc.) for the installation of the water and sewer to the To Be Developed Lots and all other water and sewer related fees.

D. Seller shall construct and complete all infrastructure, including but not limited to asphalt paved streets, curbs, gutters, ditch lines and common area sidewalks. The asphalt paved streets servicing the To Be Developed Lots shall be connected to existing public streets, all as required by the Plans submitted to the City of Martinsburg and/or Berkeley County. Base course asphalt paving shall be completed prior to Closing. Final paving shall be completed as and when required by Seller's bond and the requirements of the City of Martinsburg and/or Berkeley County therefore which shall be posted with the proper governmental authorities and so as not to hinder or delay the issuance of any building permit or use and occupancy permit for Buyer's dwelling units. Buyer shall have the responsibility for the installation of the driveways and lead walks on the To Be Developed Lots. Seller shall be responsible for any damage that occurs to any final paving that is completed prior to Buyer's completion of its construction activities in the Subdivision. Notwithstanding the foregoing, Seller shall complete all infrastructure repairs necessary within thirty (30) days of notification regarding such repairs from Buyer to maintain an aesthetically pleasing appearance to the community for the prospective homebuyer. Any infrastructure damaged by Buyer during construction of the homes shall be repaired at completion of the home and inspected by Seller prior to settlement of the home.

E. Seller shall cause the scheduling of installation by the appropriate public utility company of all such underground electric, gas (if available and required), cable lines and

telephone main lines as is necessary to service the residences, and street lights (if required), in a manner required by the local government, the utility company, or other appropriate authority so that said utilities shall be available by the date of settlement between Buyer and its third-party purchaser. Seller shall cause any necessary re-grading to be completed upon the completion of the installation of such utilities. For SF Lots, the secondary electric shall be stubbed out a minimum of ten feet (10') from the connecting transformer into the Lot. The secondary phone and cable shall be left pursuant to the utility's requirements. For TH Lots, the secondary electric services shall be run to each Lot in conduit from the connection transformer and terminated at the adjoining property lines. The secondary phone and cable shall be left pursuant to the utility's requirements. Seller shall be responsible for the payment of any fees required to perform its development work, including the installation of electric, sewer and water, and Buyer shall be responsible for the payment of any fees that are required to connect such services to the home constructed by Buyer, which shall be paid when Buyer applies for its building permit on each Lot.

F. Seller shall construct, complete and maintain all storm drainage facilities, stormwater structures, pipes, facilities, stormwater management systems, sedimentation and erosion controls as shown on and as required by the approved Plans, or required by all appropriate governmental authorities except for individual on-Lot silt control on the To Be Developed Lots during individual house construction thereon. Seller shall obtain, and shall have recorded, all proper instruments establishing easements and rights-of-way needed for off-site storm drainage and other utilities, the same to be unencumbered if so required by the appropriate governmental authority. Seller is responsible for the installation and maintenance of all stormwater structures, pipes and facilities per the Plans. After installation of such by Seller and Seller's completion of any incomplete or defective work as shown on the Lot Inspection Report, Buyer shall take responsibility for maintaining the silt control devices utilized by Buyer on the To Be Developed Lots. Seller shall continue to be solely responsible for Lot stormwater management systems and all other sedimentation and erosion control ponds. Seller shall be responsible for dedication and/or acceptance of the above-mentioned appurtenances by the applicable governmental authorities or HOA (as defined in Section 4 herein). Buyer shall have the right, in its sole discretion, to commence any work reasonably necessary by utilizing Seller's disturbance permits, if allowed by the City of Martinsburg and/or Berkeley County. Seller shall maintain an active and valid NPDES land disturbance permit at all times during development and home building operations until the last building has been constructed and all disturbed areas stabilized. Seller shall provide Buyer with its NPDES information prior to the Study Period Expiration Date and shall comply with all applicable NPDES regulations. Each Lot shall be fully stabilized by temporary or permanent seeding prior to any scheduled Lot Closing.

G. Seller shall complete all culverts, retaining walls, and screening walls as required by the Plans or as necessary to develop the Property for its Intended Use, and will post any bonds prior to the Bulk Closing required for the work by any government authority. In the event that a retaining wall is necessary on-Lot to accommodate Buyer's house construction, Seller shall have graded the Property so that any such retaining wall to be constructed by Buyer, if any, shall be eighteen inches (18") in height or less. Seller shall construct an entranceway to the Subdivision in accordance with the final development plan. Such construction shall be completed prior to the First Closing by Buyer and shall provide an entry monument, landscaping, lighting, and street

signage for the community, which shall each conform to Buyer's plans and specifications. Seller shall be responsible for all Subdivision snow and ice removal, and for all street cleaning within the Subdivision. Seller shall be responsible for sediment and erosion control and stormwater maintenance for the common area and for all final common area and right-of-way landscaping including grass, common area trees and shrubs, as shown on the approved site and landscaping plans. Each party shall be responsible for landscaping of all To Be Developed Lots that it owns. On both common areas and To Be Developed Lots, landscaping shall include, without limitation, mowing on a regular basis so that the height of vegetation is never greater than twelve inches (12"), provided, however, that the first thirty feet (30') away from any roadway as well as any median or grass strip next to a roadway shall be mowed so that the height of vegetation is never greater than six inches (6").

H. Seller shall complete a one-time installation of front and rear property markers, pinned and staked, for each Lot prior to each Closing.

I. Seller shall obtain, post and/or maintain street, site, grading, storm drain, maintenance and such other permits and surety bonds as may be required by the applicable governmental authorities for development of the Property and To Be Developed Lots and as may be necessary for Buyer to obtain the issuance of any building permit, use and occupancy permit, and all other permits, for Buyer's dwelling units. Seller shall authorize Buyer to utilize its grading permit and related bonds as required in order for Buyer to obtain building permits and use and occupancy permits and will execute such documents in connection therewith as shall be reasonably requested by Buyer.

J. Seller shall ensure the completion of all bonded improvements and satisfaction of all required development conditions necessary for Buyer to obtain building permits and certificates of occupancy for completed dwelling units on the To Be Developed Lots.

K. Seller shall make payment of all fees, offsite contribution charges, and grant of all dedications, imposed by City of Martinsburg and/or Berkeley County, and all other governmental authorities in connection with the subdivision of the Property and/or the development and finishing of the To Be Developed Lots as required of Seller and Buyer in fulfillment of their responsibilities under this Agreement and when the same become due and payable.

L. Seller shall perform and complete all other off-Lot and off-property site improvements and actions, as set forth on the Preliminary Plan, required by all appropriate governmental authorities having jurisdiction (including but not limited to FHA/VA), exclusive of house construction as a condition for the occupancy of residential dwellings constructed by Buyer.

M. Seller shall cause all public improvements (including storm drainage facilities) to be dedicated to public use and acceptance for maintenance by the applicable governmental authorities or HOA at the earliest practical date.

N. Seller shall obtain, post, maintain and pay all bonds, permits and fees required in connection with the obligations of Seller under the Agreement.

O. Seller shall complete and bond all work outlined above in accordance with all appropriate governmental requirements (including, but not limited to, those of City of Martinsburg and/or Berkeley County).

P. Seller shall make available to Buyer, at no charge, and without representation or warranty as to the correctness or accuracy thereof, copies of all bonds, documents, plats, reports and correspondence relating to the lot finishing process.

Q. The To Be Developed Lots shall be free of rubbish and debris at the time of delivery to Buyer.

R. Seller shall provide an onsite location for all footings and foundation spoils from Buyer's home construction within the Subdivision.

S. Seller shall furnish and install all cluster mailboxes for the Lots if required by the Postal Service. All cluster boxes shall be installed, ready for use, and keys for each box delivered to Buyer prior to any Lot Closing that would require the use of such boxes. Individual mailboxes shall be provided by Buyer.

2. **CERTIFICATE OF READINESS.** Upon the accomplishment of the items lettered A, B, C, D (with the exception of final surface paving), E, F, G, H, I, K, L, N, P, and Q in Paragraph 1 above as to the To Be Developed Lots and such other site development items listed above or in Exhibit F as are necessary to insure that the building permits, plumbing connections, use and occupancy permits, or other permits required for the erection of residence on the applicable To Be Developed Lots are available for immediate issuance upon application therefore by Buyer, Seller shall issue and deliver a "Certificate of Readiness" (shown in Exhibit G) as to such To Be Developed Lots certifying the accomplishment of the foregoing items. Seller also agrees to post performance and/or completion bonds as required by City of Martinsburg and/or Berkeley County authorities, or at Buyer's request, for any uncompleted site improvements to insure Buyer's ability to obtain building permits and certificates of occupancy for houses on the To Be Developed Lots. Seller shall have accomplished all of the foregoing items, including but not limited to final paving, so as not to hinder the issuance of a use and occupancy permit for any unit that Buyer has constructed and so as not to unreasonably delay any sale and settlement of To Be Developed Lots by Buyer to its homebuyers.

3. **COMPLETION OF TO BE DEVELOPED LOTS.** Seller agrees to diligently pursue the completion of all items necessary to satisfy the requirements of Paragraph 1 of this Exhibit D, and all other terms of this Agreement as and when required to insure that a sufficient number of To Be Developed Lots are finished at the time required for Closing under the Agreement. When the finishing and other work as described in this Exhibit D for or in connection with the To Be Developed Lots designated to be purchased by Buyer at a particular Closing, as required under Paragraph 2 of this Exhibit D, have been completed and the Certificate of Readiness delivered, the parties shall, through their agents, servants, or employees,

jointly inspect the improvements accomplished on those To Be Developed Lots designated to be purchased by Buyer at a particular Closing and sign a memorandum ("Lot Inspection Report," shown in Exhibit H), wherein are described the results of their joint inspection. Seller shall complete the items noted on the Lot Inspection Report and repair all deficiencies within thirty (30) days after the date thereof or if said items will not hinder, delay, or interfere with Buyer's development, upon conclusion of Buyer's dwelling unit construction within said section of To Be Developed Lots and in a timely manner to insure issuance of a use and occupancy permit, all as agreed upon by Seller and Buyer.

In the event that the parties shall be unable to agree upon the completion of the Lot finishing, or the defects in such completions, each of the parties shall select a licensed professional engineer, and the two (2) engineers thus selected shall select a third and the majority decision of such three (3) engineers respecting the completion or non-completion of Lot finish shall be binding upon the parties. Each party shall pay all costs and expenses associated with the engineer which that party selects. All costs and expenses associated with the third engineer, selected by the first two engineers, shall be paid one-half (1/2) by Seller and one-half (1/2) by Buyer.

Following said inspection of the To Be Developed Lots (and the improvements related thereto) (i) Buyer shall be responsible for and shall repair any damage to the To Be Developed Lots subsequent to Closing thereon by it unless said damage results from a "materials" or workmanship defect in the original construction, or shall have been caused by Seller or its agents, servants or employees, or otherwise continues to be Seller's responsibility as herein provided; and (ii) as to the related improvements, Buyer shall be responsible for and repair any subsequent damage caused by it, with the repairs to be performed to City of Martinsburg and/or Berkeley County specifications so as not to delay the release of Seller's bond. Upon completion of dwelling unit construction activity within any section of the To Be Developed Lots, Seller and Buyer shall meet to complete the Post Construction Report, and any associated repairs, in accordance with Paragraph 12(e).

#### **4. HOMEOWNERS' ASSOCIATION.**

##### **A. Seller shall, at Seller's expense:**

- i. cause to be established provisions for the maintenance, insurance, management, and ownership of the common areas, and the architectural integrity of the improvements to be constructed within the Subdivision through a homeowners' association (the "HOA");
- ii. serve as the "Declarant" and the architectural review committee under a declaration of covenants, conditions and restrictions (the "Declaration") covering the Subdivision and cause to be prepared and recorded or filed in the appropriate governmental records on or before the First Closing; however, Buyer, in its discretion, has the right to review and/or approve such Declaration by providing notice to Seller at least fifteen (15) days prior to the date of the First Closing; Seller, as the Declarant and the architectural review committee, shall review and

approve all of Buyer's anticipated house product offerings, inclusive of color schemes and elevations, during the Study Period;

- iii. take all steps necessary to cause the Finished Lots and the To Be Developed Lots, as well as all other property comprising the Subdivision, to be annexed as a part of the HOA and subjected to the benefits and burdens of the Declaration, and in the event that Lots are added to the HOA in phases, the Lots to be purchased at a Closing must be annexed before Buyer settles on such Lots;
- iv. take all steps necessary to provide access for the owners purchasing homes from Buyer to all recreational facilities, if any, serving any portion of the Subdivision on the same basis and at the same cost, if any, to which all other users thereof are subject; and
- v. cause to be administered the HOA, including establishment of an annual operating budget, so that monthly assessment information may be provided to Buyer's customers.

B. Seller agrees to process the necessary approvals through the appropriate authorities and Seller shall, at Seller's expense, take any additional actions necessary to cause the subdivision documents and/or the Property to be approved by the proper governmental authorities (including, if necessary, but not limited to, revising the HOA documents; posting any and all bonds for public or private improvements within the Property; creating and funding any and all escrows as may be required by any such authorities; and delivering an attorney's certification letter to such authorities). Buyer and Seller shall make reasonable efforts to cooperate in making any amendments that otherwise become necessary in connection with the development of the Property.

C. Seller shall cause the common areas to be deeded either to the HOA or to the appropriate governmental authority, when and as may be required by the HOA documents, or such governmental authority, or when requested by Buyer, with good and marketable fee simple title, free and clear of all agreements, easements, covenants, restrictions, liens and encumbrances of any kind, except for those expressly permitted by the HOA documents. Seller agrees to supply Buyer with all information regarding the HOA that is required by any governmental authority to be disclosed. Seller also agrees to promptly execute any and all documents and certificates in connection therewith as is reasonably requested by Buyer.

D. Buyer shall be exempt from paying assessments to the HOA for the remainder of 2018. Thereafter, Buyer shall assume payment for all HOA annual assessments for all Lots that have been purchased by Buyer that have not been conveyed to a third-party purchaser. Buyer shall be responsible for paying a one-time capital contribution in the amount of Five Hundred Dollars (\$500.00) per Lot at the time of Closing of each Lot. Seller shall be solely responsible for funding any deficit of the HOA.

E. Buyer shall include in its contracts with homebuyers all disclosures required by West Virginia law with respect to the HOA. Buyer hereby agrees to indemnify Seller from any liability or damage as a result of Buyer's failure to comply with this provision.

F. Seller shall ensure that the Declaration provides Buyer at least one (1) vote for each of the Lots owned by Buyer and shall add Buyer, at Buyer's discretion, as a member of the HOA Board of Directors.

G. Seller shall provide all HOA documents to Buyer during the Study Period and prior to the First Closing to include the Public Offering Statement, Declaration including Covenants and Restrictions and Annual Assessments or Capital Contributions, By-Laws, Architectural Guidelines, and Management.



## EXHIBIT E

### Memorandum of Agreement

**THIS MEMORANDUM OF AGREEMENT** (hereinafter referred to as the "Memorandum") made this \_\_\_\_\_ day of \_\_\_\_\_, 2018 by and between **OVERLAY I, LLC**, a Virginia limited liability company (hereinafter referred to as "Seller"), and **DAN RYAN BUILDERS WEST VIRGINIA, LLC**, a Maryland limited liability company, or its assigns (hereinafter referred to as "Buyer").

A. This Memorandum is prepared for purposes of recordation and to notify the public that Buyer and Seller have entered into an agreement for the purchase of the Property. This Memorandum shall not alter or affect in any manner the rights and obligations of the Seller or Buyer in the purchase of District 6, Tax Map 35 (the "Property"), including three hundred twenty (320) Lots as shown on the site plan(s) attached hereto as Exhibit 1, as set forth under the Lot Purchase Agreement dated \_\_\_\_\_ between Buyer and Seller (hereinafter "Agreement"). In the event of any conflict between this Memorandum and the terms of the Agreement, the terms of the Agreement shall prevail.

B. Pursuant to Paragraph 11(d) of the Agreement, in the event that Seller fails to complete the subdivision of the Property or the development of the Property in accordance with Exhibit D of the Agreement within the times required under Section 4(b) of the Agreement, and Buyer is not then in default under the terms and conditions of this Agreement beyond the expiration of any applicable grace or cure periods, then in addition to any other remedy provided for under the Agreement, Buyer shall have the right to take possession of the Property prior to Closing (as defined in the Agreement) and complete the development work at Seller's cost and risk.

C. This Memorandum shall remain in effect until all Lots are purchased under the Agreement, but shall not remain in effect beyond the date set forth in Paragraph 18 of the Agreement.

D. To facilitate execution, this Memorandum may be executed in duplicate, and it shall not be necessary that the signature of, or on behalf of, each party, or that the signatures of the persons required to bind any party, appear on more than one counterpart. All counterparts shall collectively, constitute a single Memorandum.

**IN WITNESS WHEREOF**, the parties have executed this Memorandum of Agreement as of the date first above written.

**[SEE SIGNATURES ON FOLLOWING PAGES]**

ATTEST/WITNESS:

1. *Rafael Old Clark*  
2. \_\_\_\_\_

SELLER:

OVERLAY I, LLC

By: *[Signature]* (SEAL)  
Its: *Stephen J. Polachek*  
*Manager*  
Date *5-11-18*

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

ON THIS \_\_\_\_\_ day of \_\_\_\_\_, 2018, before me, the undersigned, personally appeared \_\_\_\_\_, known to me (or satisfactorily proven) to be the person whose name is subscribed to within the instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

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

My Commission expires \_\_\_\_\_

ATTEST/WITNESS:

BUYER:

DAN RYAN BUILDERS WEST VIRGINIA,  
LLC

1. Kimberly Sykalik
2. K. D. Tucker

By: Paul J. Yeager (SEAL)  
~~Scotty Salouch~~, Senior Vice President  
Paul J. Yeager  
Date 5/14/18

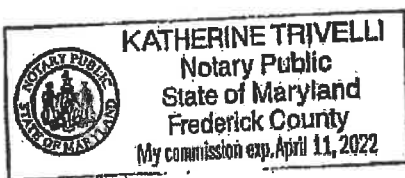
STATE OF MARYLAND  
COUNTY OF FREDERICK

ON THIS 14<sup>th</sup> day of MAY, 2018, before me, the undersigned, personally appeared PAUL J. YEAGER, known to me (or satisfactorily proven) to be the person whose name is subscribed to within the instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Katherine Trivelli  
Notary Public

My Commission expires 4/11/2022



**EXHIBIT 1 to Memorandum of Agreement**

**LEGAL DESCRIPTION OF THE LOTS TO BE PURCHASED BY BUYER**

**EXHIBIT F**  
**SELLER-BUYER RESPONSIBILITY CHECKLIST**

| <b>A.</b> | <b>Designs and Plans</b>  | <b>SELLER</b> | <b>BUYER</b> | <b>N/A</b> |
|-----------|---|---------------|--------------|------------|
| 1         | Boundary Survey   | x             |              |            |
| 2         | Topographic Survey  | x             |              |            |
| 3         | Preliminary Plan(s)   | x             |              |            |
| 4         | Zoning Approvals  | x             |              |            |
| 5         | Wetlands Study  | x             |              |            |
| 7         | Flood Plain Certification   | x             |              |            |
| 8         | Sediment Control Design Plans   | x             |              |            |
| 9         | Water and Sewer Design Plans  | x             |              |            |
| 10        | Pavement Design Plans   | x             |              |            |
| 11        | Individual House Siting Plans   |               | x            |            |
| 12        | Entry Features and Monument Plans   | x             |              |            |
| 13        | Landscape Plans – ROW and Common Areas in vicinity of roads (including collector roads, if any) shown on the Final Subdivision Plat | x             |              |            |
| 14        | Landscape Plans – On Lot  |               | x            |            |
| 15        | Driveway Centerline Plans   |               | x            |            |
| 16        | Storm Drainage Design Plans   | x             |              |            |
| 17        | Storm Water Management Plans  | x             |              |            |
| 18        | Mass Grading Plans, including any agreed upon Hold Downs  | x             |              |            |
| 19        | Lot Grading Plans – Hold Down Plan  | x             |              |            |
| 20        | Lot Grading Plans – Final Grading after Home Construction   |               | x            |            |
| 21        | Retaining Wall Plans – Off Lot or On Lot - if required by the Plans or necessary to develop the Property for its Intended Use       | x             |              |            |
| 22        | Retaining Wall Plans – On Lot - if necessary specifically to accommodate Buyer's house construction                                 |               | x            |            |
| 23        | Common Areas Amenities Design Plans   | x             |              |            |
| 24        |   |               |              |            |

| <b>B.</b> | <b>Platting and Legal Documents</b>          | <b>SELLER</b> | <b>BUYER</b> | <b>N/A</b> |
|-----------|--|---------------|--------------|------------|
| 1         | Record Subdivision Plats/Final Plats         | x             |              |            |
| 2         | Homeowner's Association Documents            | x             |              |            |
| 3         | Homeowner's Association Disclosure Statement |               | x            |            |
| 4         | ROW Easements                                | x             |              |            |
| 5         | Utility Easements – On-Site                  | x             |              |            |
| 6         | Utility Easements – Off-Site                 | x             |              |            |
| 7         | Public Works Agreements                      | x             |              |            |
| 8         |  |               |              |            |

| <b>C.</b> | <b>Permits, Bonds and Fees</b>  | <b>SELLER</b> | <b>BUYER</b> | <b>N/A</b> |
|-----------|---|---------------|--------------|------------|
| 1         | Maintenance Bonds   | x             |              |            |
| 2         | Subdivision Bonds   | x             |              |            |
| 3         | Sediment Control Bonds – Site, if any   | x             |              |            |
| 4         | Development Bonds and Permit Fees – Site  | x             |              |            |
| 5         | HOA Assessment Fees – Lots, if any  | x             |              |            |
| 6         | Primary Electric Connection Fees  | x             |              |            |
| 7         | Secondary Electric Connection Fees  |               | x            |            |
| 8         | Site Development Plan – Bonds and Fees  | x             |              |            |
| 9         | Sewer and Water Reservation Fees  | x             |              |            |
| 10        | Sewer and Water Impact Fees   | x             |              |            |
| 11        | Building Permit Fees  |               | x            |            |
| 12        | Plumbing Permit Fees  |               | x            |            |
| 13        | Water or Sewer Connection/Tap Fees  |               | x            |            |
| 14        | Impact Fees – associated with Plat recordation prior to application for Building Permit, if any | x             |              |            |
| 15        | Entry Monument Permits, Bonds and Fees  | x             |              |            |
| 16        | HOA Capital Contributions - Lots, if any  | x             |              |            |
| 17        |   |               |              |            |

| <b>D.</b> | <b>Computations, Controls and Stakeout</b>                                 | <b>SELLER</b> | <b>BUYER</b> | <b>N/A</b> |
|-----------|--|---------------|--------------|------------|
| 1         | Clearing Stakeout  | x             |              |            |
| 2         | Clearing Stakeout – Lots   | x             |              |            |
| 3         | Lot Stakeout Controls (one time only)                                      | x             |              |            |
| 4         | Excavation Stakeout – Mass Grading   | x             |              |            |
| 5         | Excavation Stakeout for On-Lot Grading – Hold Down                         | x             |              |            |
| 6         | Excavation Stakeout for On-Lot Grading – Final Grading (Home Construction) |               | x            |            |
| 7         | Water and Sewer Main Stakeout  | x             |              |            |
| 8         | Storm Drainage Stakeout  | x             |              |            |
| 9         | Curb and Gutter/Pavement Stakeout  | x             |              |            |
| 10        | Primary Electric and Telephone Stakeout including Street Crossings         | x             |              |            |
| 11        | Secondary Electric, Gas and Telephone Stakeout                             |               | x            |            |
| 12        | House Corner Stakeout  |               | x            |            |
| 13        | Front Lot Corners (one time)   | x             |              |            |
| 14        | Rear Lot Corners (one time)  | x             |              |            |
| 15        | Traverse Controls for House Stakeout                                       |               | x            |            |
| 16        | Final Lot/House Survey   |               | x            |            |
| 17        | Wall Check Surveys   |               | x            |            |
| 18        | Earthwork Computations – Lots  | x             |              |            |
| 19        | Earthwork Computations – ROW   | x             |              |            |
| 20        | SWM, Utility, and Roadway As-Builts  | x             |              |            |

| <b>E.</b> | <b>Development Work</b>   | <b>SELLER</b> | <b>BUYER</b> | <b>N/A</b> |
|-----------|---|---------------|--------------|------------|
| 1         | Clearing ROW and Common Areas   | x             |              |            |
| 2         | Clearing Lots – per Mass Grading Plan   | x             |              |            |
| 3         | Grade Establishment – ROW, Common Areas, On-lot Hold Down   | x             |              |            |
| 4         | Final Grade On Established Lots (after Home Construction only)  |               | x            |            |
| 5         | On-Lot fill placed on building pad as shown on Approved Plans and Compaction and Engineer's Certification of such fill. | x             |              |            |
| 6         | Pad Elevation Certifications  | x             |              |            |
| 7         | Erosion and Sediment Control Initial Installation Per Approved Plans (Site E & S Plan)                                  | x             |              |            |
| 8         | Water and Sewer Main Installation   | x             |              |            |
| 9         | Storm Drain and Management Areas Installation   | x             |              |            |
| 10        | Curb and Gutter Installation  | x             |              |            |
| 11        | Base Course and Final Pavement Installation   | x             |              |            |
| 12        | Installation of Primary Electric and Telephone to Property Line of Each Lot   | x             |              |            |
| 13        | Grade Establishment for Installation of Primary Electric and Telephone to Property Line of Each Lot                     | x             |              |            |
| 14        | Blasting for building pads, if necessary  | x             |              |            |

| F. | Amenities, Common Area  | SELLER | BUYER | N/A |
|----|---|--------|-------|-----|
| 1  | Sewer and Water Laterals Clearly Marked at Each Lot Line  | x      |       |     |
| 2  | Initial Seeding and Stabilization of Lots   | x      |       |     |
| 3  | Street Lights shown on Plans  | x      |       |     |
| 4  | Street Signs  | x      |       |     |
| 5  | Sidewalks – within the ROW abutting the front yards of Lots acquired by Buyer   |        | x     |     |
| 6  | Sidewalks – within or adjacent to any public right-of-way adjacent to or serving the Property and any side yard.                              | x      |       |     |
| 7  | Lead Walks – On-Lots (lead walks from public sidewalk/driveway to house)  |        | x     |     |
| 8  | Retaining Walls – Off Lots or On Lots - if required by the Plans or necessary to develop the Property for its Intended use                    | x      |       |     |
| 9  | Retaining Walls – On Lots - if necessary to specifically accommodate Buyer's house construction   |        | x     |     |
| 10 | Driveway Aprons to Property Line, if any  |        | x     |     |
| 11 | Driveway Culverts, if any   |        | x     |     |
| 12 | Landscape Installation – ROW and Common Areas and in vicinity of roads (including collector roads, if any) shown on Final Subdivision Plat    | x      |       |     |
| 13 | Landscape Installation – On-Lots  |        | x     |     |
| 14 | Street Trees Installation – ROW and Common Areas and in vicinity of roads (including collector roads, if any) shown on Final Subdivision Plat | x      |       |     |
| 15 | Street Trees Installation – On-Lots   |        | x     |     |
| 16 | Short-term and Long-term maintenance of Street Trees  |        | x     |     |
| 17 | Entry Monument Construction   | x      |       |     |
| 18 | Entry Monument Landscape Installation   | x      |       |     |
| 19 | Black Plastic Mailboxes on wooden posts - acquisition and installation – individual curbside, if any  |        | x     |     |
| 20 | Mailboxes - installation of concrete pads and cluster boxes for mailbox pedestals, if jurisdiction requires clusters                          | x      |       |     |
| 21 | Mailboxes – approval by USPS and local authorities for all mail facilities, including site work, required parking and shelters, if necessary. | x      |       |     |
| 22 | Trash Receptacles   | x      |       |     |
| 23 | Tot Lots – design, if any   | x      |       |     |
| 24 | Tot Lots – Construction, if any   | x      |       |     |
| 25 | Trash Pad   | x      |       |     |
| 26 | Trash Pad Fencing   | x      |       |     |
| 27 | Common Area/ROW Fencing, if any   | x      |       |     |
| 28 | Storm Water Management Area Fencing, if required  | x      |       |     |



## EXHIBIT G

### Certificate of Readiness

In accordance with the Lot Purchase Agreement dated \_\_\_\_\_, 2018, by and between Overlay I, LLC ("Seller") and Dan Ryan Builders West Virginia, LLC ("Buyer"), Seller certifies that it has completed all work prerequisite to Closing on Lots numbered:

\_\_\_\_\_.

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

\_\_\_\_\_, Overlay I, LLC  
(title)

## Lot Inspection Report

[illegible]

| Lot | Remarks (attach additional sheets if necessary) |
|-----|---|
|-----|---|

Representative, Dan Ryan Builders West Virginia, LLC

Representative, Overlay I, LLC

## Post Construction Report

[illegible][illegible]

**Representative, Dan Ryan Builders West Virginia, LLC**

**EXHIBIT J**

### Lot Grading Criteria – To-Be-Developed Lots

The follow grading criteria shall apply to all lots:

- 1) All grading completed in accordance with approved grading plans (which grading plans shall note all finished floor and basement elevations for each Lot and delineate drainage flows, necessary to create the building pad, with the pad certified by a civil engineer licensed in good standing in the State with respect to elevation, and with the following requirements satisfied:

- a) an elevation tolerance to within 6" inches accuracy vertically and 6" inches accuracy horizontally for single family lots and to within 3" vertically and 6" horizontally for all single family and townhome lots of the proposed subgrade elevation set forth within the hold down detail herein, as applicable, at the tops and toes of slopes, and by a soils engineer with respect to compaction, each of which shall be licensed and in good standing in the State.

#### 2) TOWNHOME LOTS:

- i) Townhome Lots shall be graded to pad sizes stated. All lots shall be designed to accommodate a slab on grade condition that has a positive drainage away from the house.

(1) 20' TH Lot Pad Size = 20' wide x 52' deep (End unit pads shall be 5' wider)

- ii) The following lot conditions shall be acceptable based on product type:

(1) 20' TH Lots

(a) Slab-on-grade

- iii) Townhomes shall only step in elevation between units a maximum of twenty-four (24") inches

- iv) Townhome buildings shall only be designed in packs of Four (4) units in width. Six (6) packs may be acceptable on limited basis.

- v) with all driveways having positive drainage away from the home with a maximum Uphill drive grade of 10% (reverse driveways are not permitted). Driveways shall be a minimum of twenty-five (25') feet measured from back of curb.

- vi) Front and Rear yards shall have positive fall away from the building pad extending a minimum of 10' feet at a maximum slope not to exceed 6%.

- vii) Positive drainage shall be maintained on all finished pads to eliminate ponding or standing water with maximum grade tolerance +/- 0.20 feet from any corner to corner of building pad,

- viii) with respect to any fill placement, proper preparation of placement area, testing of fill material for compatibility (including confirmation that fill has appropriate density, is free of organics, and is free of rock greater than 6" in the top 3' of the BFE),

**3) SINGLE FAMILY LOTS (76' AND 65' TYPICALS):**

- i) Single Family Lots shall be graded to pad sizes within c.i.(1) & c.i.(2) All lots shall be designed to accommodate an eight (8') basement condition that can either be in-ground or walk-out.
  - (1) 76' Typical Lot shall have a pad size of 62' wide x 70' deep
  - (2) 65' Typical Lot shall have a pad size of 50' wide x 70' deep
- ii) Full Basement Lots shall be left five (5') above proposed Basement Floor Elevations (BFE) and shall fall at a minimum of 2% to max of 8% away from the house to the front and to the rear for a minimum distance of twenty-five (25') feet in the front and twenty (20') feet in the rear.
- iii) Walk-out Lots shall be left Six (6') feet above proposed Basement Floor Elevation (BFE) at the front BRL to top of Basement Floor Elevation (BFE) at rear of building pad and shall fall at a minimum of 2% to max of 8% away from the house to the front and to the rear for a minimum distance of twenty-five (25') feet in the front and twenty (20') feet in the rear.
- iv) High-side or buried rears shall not be acceptable lot types.
- v) Single family lots shall be pre-blasted to the pad sizes herein prior to purchase.
- b) with all driveways having positive drainage away from the home with a maximum Uphill drive grade of 8% (reverse driveways are not permitted). Driveways shall be twenty-five (25') feet measured from back of curb (if no sidewalk), or back of sidewalk.
- c) maximum grade of rear yard being 20 feet outside building envelope of 30%,
- d) positive drainage on all finished pads with maximum grade tolerance +/- 0.20 feet from any corner to corner of building pad.
- e) with respect to any fill placement, proper preparation of placement area, testing of fill material for compatibility (including confirmation that fill has appropriate density, is free of organics, and is free of rock greater than 3" in the top 3' of the BFE),

## AMENDMENT TO LOT PURCHASE AGREEMENT

AND NOW, this 1st day of June 2018, this Amendment to Lot Purchase Agreement ("Amendment") is hereby entered by and between OVERLAY I, LLC, a Virginia limited liability company ("Seller"), and DAN RYAN BUILDERS MID-ATLANTIC, LLC, a Maryland limited liability company, or its assigns ("Buyer").

### WITNESSETH:

WHEREAS, Seller and Buyer entered into a Lot Purchase Agreement dated May 14, 2018 (the "Agreement"), involving certain real property situate and lying in the City of Martinsburg, Berkeley County, West Virginia, in the subdivision known as **Martinsburg Station**, and

WHEREAS, Seller and Buyer desire to amend the terms of the Agreement, and

NOW, THEREFORE, in consideration of the covenants and undertakings provided for herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each party, the parties hereto agree as follows:

1. The above recitals are hereby incorporated herein by reference thereto.
2. Seller and Buyer hereby agree to amend the Agreement by deleting any and all references to "three hundred twenty (320)" lots and Lots and replacing said references with "three hundred nineteen (319)" lots and Lots, respectively.
3. Seller and Buyer hereby agree to amend the Agreement by deleting any and all references to "approximately fifty-seven (57) to-be-developed seventy-five foot (75') wide single-family lots" and replacing said references with "approximately fifty-four (54) to-be-developed seventy-five foot (75') wide single-family lots".
4. Seller and Buyer hereby agree to amend the Agreement by deleting any and all references to "approximately fifty (54) to-be-developed sixty-five foot (65') wide single-family lots" and replacing said references with "approximately fifty-six (56) to-be-developed sixty-five foot (65') wide single-family lots".
5. Seller and Buyer hereby agree to amend the Agreement by deleting Paragraph 2(a)(i) in its entirety and replacing it with the following:
  - (i) Finished Lots Purchase Price. The Purchase Price for all of the Lots purchased by Buyer at the Bulk Closing (defined below), consisting of the Finished Lots, shall be **Two Million Seven Hundred Eighty-Eight Thousand Four Hundred Dollars (\$2,788,400.00)**.
6. Seller and Buyer hereby agree to amend the Agreement by deleting Paragraph 2(a)(ii)(a) in its entirety and replacing it with the following:
  - a. 20' TH Lots. The Purchase Price for the 20' TH Lots shall be as follows:

1. The Purchase Price for the first twenty-two (22) 20' TH Lots purchased by Buyer shall be Twenty Eight Thousand Eight Hundred Dollars (\$28,800.00) per Lot. The Purchase Price for these Lots shall be a fixed price with no escalator.
2. The Purchase Price for the twenty-third through forty-second (23<sup>rd</sup>-42<sup>nd</sup>) 20' TH Lots purchased by Buyer shall be Thirty Thousand Eight Hundred Dollars (\$30,800.00) per Lot. The Purchase Price for these Lots shall be a fixed price with no escalator.
3. The Purchase Price for the remaining 20' TH Lots purchased by Buyer shall be Thirty Two Thousand Eight Hundred Dollars (\$32,800.00) per Lot. The Purchase Price for each of these Lots shall increase by the simple rate of three percent (3%) per year beginning one (1) year after Buyer purchases the forty-third (43<sup>rd</sup>) 20' TH Lot in accordance with the terms of this Agreement.

7. Seller and Buyer hereby agree to amend the Agreement by deleting Paragraph 3(a) in its entirety and replacing it with the following:

- (a) Bulk Closing. The bulk closing (the "Bulk Closing"), at which time the parties shall settle on all of the Finished Lots, shall occur on or, at Buyer's option, before June 15, 2018.

8. Seller and Buyer hereby agree to amend the Agreement by deleting Paragraph 3(b) in its entirety.

9. Seller and Buyer hereby agree to amend the Agreement by deleting any and all references to the "Finished Duplex Lots Closings" in their entirety.

10. Seller and Buyer hereby agree to amend the Agreement by deleting any and all references to the "First Closing" and replacing said references with "first Closing".

11. Seller and Buyer hereby agree to amend Paragraph 3(d)(iv) of the Agreement to delete the first sentence in its entirety and replace it with the following:

"Upon Seller's completion of development of each new phase of the Subdivision, Seller shall provide Buyer with written notice of Buyer's right to exercise an option (the "Bulk Purchase Option") to purchase all or a portion of the Lots within the applicable phase of the Subdivision, in accordance with the attached Exhibit A-2, in a bulk closing rather than upon the takedown schedule set forth in this subparagraph's 2(d)(i-iii) above."

12. Seller and Buyer hereby agree to delete the first sentence of Paragraph 11(a) in its entirety and replace it with the following:

"In the event that Buyer defaults on any obligation under this Agreement, Seller's sole remedy shall be to retain the outstanding portion of the Deposit that has been already delivered by Buyer in accordance with the terms of this Agreement as full and complete liquidated damages."

13. Seller and Buyer hereby agree to amend the Agreement by deleting the "Summary of the Lots" attached to the Agreement as Exhibit A-1 and replacing it with the Exhibit A-1 attached to this Amendment.

14. All other terms and conditions set forth in the Agreement shall be applicable and shall remain in full force and effect. To the extent that any provision of this Amendment is inconsistent with or in conflict with the terms and conditions as set forth in the Agreement, the terms and conditions in this Amendment shall govern and control.

15. The individuals executing this Amendment represent and warrant that they have authority to execute this Amendment and bind their respective parties.

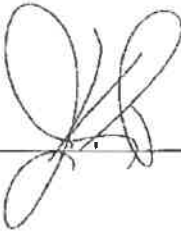
16. This Amendment may be executed in counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument. In the event that any signature is delivered by facsimile or e-mail delivery, such signature shall create a valid and binding obligation of the party executing it with the same force and effect as if such signature page were an original thereof.

[SIGNATURES OF FOLLOWING PAGE]



**IN WITNESS WHEREOF**, the parties hereto intending to be legally bound hereby, have executed this Amendment on the date indicated above.

**ATTEST/WITNESS:**

  
\_\_\_\_\_

**SELLER:**

**OVERLAY I, LLC**

By:  (SEAL)  
Stephen J. Polachek, Manager

**ATTEST/WITNESS**

\_\_\_\_\_

**BUYER:**

**DAN RYAN BUILDERS WEST VIRGINIA,  
LLC**

By: \_\_\_\_\_ (SEAL)  
Ronny Salameh, Senior Vice President

# EXHIBIT A-1

## SUMMARY OF THE LOTS

| INITIAL BULK PURCHASE LOTS - (91) LOTS |          |                      |             |
|--|----------|----------------------|-------------|
| SFD PH 1                               | SFD PH 3 | TH (20' FL SFA) PH 3 | DUPLEX PH 1 |
| LOT #'S                                | LOT #'S  | LOT #'S              | LOT #'S     |
| 5                                      | 120      | 424                  | 651         |
| 7                                      | 121      | 425                  | 652         |
| 17                                     | 122      | 426                  | 653         |
| 18                                     | 123A     | 427                  | 654         |
| 19                                     | 125A     | 428                  | 655         |
| 21                                     | 126A     | 429                  | 656         |
| 22                                     | 162      | 430                  | 657         |
| 24                                     | 163      | 421                  | 658         |
| 26                                     | 166      | 462                  | TOTAL       |
| 32                                     | 167      | 452                  | 8           |
| 38                                     | 168      | 434                  | 143         |
| 40                                     | 169      | 435                  | 144         |
| 41                                     | 170      | 436                  | 145         |
| 49                                     | 171      | 437                  | 146         |
| 50                                     | 172      | 438                  | TOTAL       |
| 51                                     | 175A     | 657                  | 14          |
| 52                                     | 177A     | 658                  |             |
| 53                                     | 178A     | 659                  |             |
| 54                                     | 179A     | TOTAL                |             |
| 55                                     | 180A     | 18                   |             |
| 56                                     | 181A     |                      |             |
| 57                                     | 182A     |                      |             |
| 100                                    | 183A     |                      |             |
| 106                                    | 184A     |                      |             |
| 107                                    | 187A     |                      |             |
| 117                                    |          |                      |             |
| TOTAL                                  |          |                      | 51          |

| TO BE DEVELOPED TH (20' FL SFA) LOTS |                      |     |       |
|--------------------------------------|----------------------|-----|-------|
| TH (20' FL SFA) PH 2                 | TH (20' FL SFA) PH 3 |     |       |
| LOT #'S                              | LOT #'S              |     |       |
| 319                                  | 344                  | 488 | 514   |
| 319                                  | 345                  | 489 | 515   |
| 320                                  | 346                  | 490 | 516   |
| 321                                  | 347                  | 491 | 517   |
| 322                                  | 348                  | 492 | 518   |
| 323                                  | 349                  | 493 | 519   |
| 324                                  | 350                  | 494 | 520   |
| 325                                  | 351                  | 495 | 521   |
| 326                                  | 352                  | 496 | 522   |
| 327                                  | 353                  | 497 | 523   |
| 319                                  | 354                  | 498 | 524   |
| 328                                  | 355                  | 499 | 525   |
| 329                                  | 356                  | 500 | 526   |
| 330                                  | 357                  | 501 | 527   |
| 331                                  | 358                  | 502 | 528   |
| 332                                  | 359                  | 503 | 529   |
| 333                                  | 360                  | 504 | 530   |
| 334                                  | 361                  | 505 | 531   |
| 335                                  | 362                  | 506 | 532   |
| 336                                  | 363                  | 507 | 533   |
| 337                                  | 364                  | 508 | 534   |
| 338                                  | 365                  | 509 | 535   |
| 340                                  |                      | 510 | 536   |
| 341                                  |                      | 511 | 537   |
| 342                                  |                      | 512 | 538   |
| 343                                  |                      | 513 | 539   |
| TOTAL                                |                      |     | 70    |
|                                      |                      |     | TOTAL |
|                                      |                      |     | 118   |

| Y8D TH (20' FL SFA) TAKEDOWN SCHEDULE |          |           |
|---------------------------------------|----------|-----------|
| Year                                  | Takedown | Unit      |
| 1                                     | 1        | 612-643   |
| 2                                     | 2        | 644-675   |
| 3                                     | 3        | 676-707   |
| 4                                     | 4        | 708-739   |
| 5                                     | 5        | 740-771   |
| 6                                     | 6        | 772-803   |
| 7                                     | 7        | 804-835   |
| 8                                     | 8        | 836-867   |
| 9                                     | 9        | 868-899   |
| 10                                    | 10       | 900-931   |
| 11                                    | 11       | 932-963   |
| 12                                    | 12       | 964-995   |
| 13                                    | 13       | 996-1027  |
| 14                                    | 14       | 1028-1059 |
| 15                                    | 15       | 1060-1091 |
| 16                                    | 16       | 1092-1123 |
| 17                                    | 17       | 1124-1155 |
| 18                                    | 18       | 1156-1187 |
| 19                                    | 19       | 1188-1219 |
| 20                                    | 20       | 1220-1251 |
| 21                                    | 21       | 1252-1283 |
| 22                                    | 22       | 1284-1315 |
| 23                                    | 23       | 1316-1347 |
| 24                                    | 24       | 1348-1379 |
| 25                                    | 25       | 1380-1411 |
| 26                                    | 26       | 1412-1443 |
| 27                                    | 27       | 1444-1475 |
| 28                                    | 28       | 1476-1507 |
| 29                                    | 29       | 1508-1539 |
| 30                                    | 30       | 1540-1571 |
| 31                                    | 31       | 1572-1603 |
| 32                                    | 32       | 1604-1635 |
| 33                                    | 33       | 1636-1667 |
| 34                                    | 34       | 1668-1699 |
| 35                                    | 35       | 1700-1731 |
| 36                                    | 36       | 1732-1763 |
| 37                                    | 37       | 1764-1795 |
| 38                                    | 38       | 1796-1827 |
| 39                                    | 39       | 1828-1859 |
| 40                                    | 40       | 1860-1891 |
| 41                                    | 41       | 1892-1923 |
| 42                                    | 42       | 1924-1955 |
| 43                                    | 43       | 1956-1987 |
| 44                                    | 44       | 1988-2019 |
| 45                                    | 45       | 2020-2051 |
| 46                                    | 46       | 2052-2083 |
| 47                                    | 47       | 2084-2115 |
| 48                                    | 48       | 2116-2147 |
| 49                                    | 49       | 2148-2179 |
| 50                                    | 50       | 2180-2211 |
| 51                                    | 51       | 2212-2243 |
| 52                                    | 52       | 2244-2275 |
| 53                                    | 53       | 2276-2307 |
| 54                                    | 54       | 2308-2339 |
| 55                                    | 55       | 2340-2371 |
| 56                                    | 56       | 2372-2403 |
| 57                                    | 57       | 2404-2435 |
| 58                                    | 58       | 2436-2467 |
| 59                                    | 59       | 2468-2499 |
| 60                                    | 60       | 2500-2531 |
| 61                                    | 61       | 2532-2563 |
| 62                                    | 62       | 2564-2595 |
| 63                                    | 63       | 2596-2627 |
| 64                                    | 64       | 2628-2659 |
| 65                                    | 65       | 2660-2691 |
| 66                                    | 66       | 2692-2723 |
| 67                                    | 67       | 2724-2755 |
| 68                                    | 68       | 2756-2787 |
| 69                                    | 69       | 2788-2819 |
| 70                                    | 70       | 2820-2851 |
| 71                                    | 71       | 2852-2883 |
| 72                                    | 72       | 2884-2915 |
| 73                                    | 73       | 2916-2947 |
| 74                                    | 74       | 2948-2979 |
| 75                                    | 75       | 2980-3011 |
| 76                                    | 76       | 3012-3043 |
| 77                                    | 77       | 3044-3075 |
| 78                                    | 78       | 3076-3107 |
| 79                                    | 79       | 3108-3139 |
| 80                                    | 80       | 3140-3171 |
| 81                                    | 81       | 3172-3203 |
| 82                                    | 82       | 3204-3235 |
| 83                                    | 83       | 3236-3267 |
| 84                                    | 84       | 3268-3299 |
| 85                                    | 85       | 3300-3331 |
| 86                                    | 86       | 3332-3363 |
| 87                                    | 87       | 3364-3395 |
| 88                                    | 88       | 3396-3427 |
| 89                                    | 89       | 3428-3459 |
| 90                                    | 90       | 3460-3491 |
| 91                                    | 91       | 3492-3523 |
| 92                                    | 92       | 3524-3555 |
| 93                                    | 93       | 3556-3587 |
| 94                                    | 94       | 3588-3619 |
| 95                                    | 95       | 3620-3651 |
| 96                                    | 96       | 3652-3683 |
| 97                                    | 97       | 3684-3715 |
| 98                                    | 98       | 3716-3747 |
| 99                                    | 99       | 3748-3779 |
| 100                                   | 100      | 3780-3811 |
| 101                                   | 101      | 3812-3843 |
| 102                                   | 102      | 3844-3875 |
| 103                                   | 103      | 3876-3907 |
| 104                                   | 104      | 3908-3939 |
| 105                                   | 105      | 3940-3971 |
| 106                                   | 106      | 3972-4003 |
| 107                                   | 107      | 4004-4035 |
| 108                                   | 108      | 4036-4067 |
| 109                                   | 109      | 4068-4099 |
| 110                                   | 110      | 4100-4131 |
| 111                                   | 111      | 4132-4163 |
| 112                                   | 112      | 4164-4195 |
| 113                                   | 113      | 4196-4227 |
| 114                                   | 114      | 4228-4259 |
| 115                                   | 115      | 4260-4291 |
| 116                                   | 116      | 4292-4323 |
| 117                                   | 117      | 4324-4355 |
| 118                                   | 118      | 4356-4387 |
| 119                                   | 119      | 4388-4419 |
| 120                                   | 120      | 4420-4451 |
| 121                                   | 121      | 4452-4483 |
| 122                                   | 122      | 4484-4515 |
| 123                                   | 123      | 4516-4547 |
| 124                                   | 124      | 4548-4579 |
| 125                                   | 125      | 4580-4611 |
| 126                                   | 126      | 4612-4643 |
| 127                                   | 127      | 4644-4675 |
| 128                                   | 128      | 4676-4707 |
| 129                                   | 129      | 4708-4739 |
| 130                                   | 130      | 4740-4771 |
| 131                                   | 131      | 4772-4803 |
| 132                                   | 132      | 4804-4835 |
| 133                                   | 133      | 4836-4867 |
| 134                                   | 134      | 4868-4899 |
| 135                                   | 135      | 4900-4931 |
| 136                                   | 136      | 4932-4963 |
| 137                                   | 137      | 4964-4995 |
| 138                                   | 138      | 4996-5027 |
| 139                                   | 139      | 5028-5059 |
| 140                                   | 140      | 5060-5091 |
| 141                                   | 141      | 5092-5123 |
| 142                                   | 142      | 5124-5155 |
| 143                                   | 143      | 5156-5187 |
| 144                                   | 144      | 5188-5219 |
| 145                                   | 145      | 5220-5251 |
| 146                                   | 146      | 5252-5283 |
| 147                                   | 147      | 5284-5315 |
| 148                                   | 148      | 5316-5347 |
| 149                                   | 149      | 5348-5379 |
| 150                                   | 150      | 5380-5411 |
| 151                                   | 151      | 5412-5443 |
| 152                                   | 152      | 5444-5475 |
| 153                                   | 153      | 5476-5507 |
| 154                                   | 154      | 5508-5539 |
| 155                                   | 155      | 5540-5571 |
| 156                                   | 156      | 5572-5603 |
| 157                                   | 157      | 5604-5635 |
| 158                                   | 158      | 5636-5667 |
| 159                                   | 159      | 5668-5699 |
| 160                                   | 160      | 5700-5731 |
| 161                                   | 161      | 5732-5763 |
| 162                                   | 162      | 5764-5795 |
| 163                                   | 163      | 5796-5827 |
| 164                                   | 164      | 5828-5859 |
| 165                                   | 165      | 5860-5891 |
| 166                                   | 166      | 5892-5923 |
| 167                                   | 167      | 5924-5955 |
| 168                                   | 168      | 5956-5987 |
| 169                                   | 169      | 5988-6019 |
| 170                                   | 170      | 6020-6051 |
| 171                                   | 171      | 6052-6083 |
| 172                                   | 172      | 6084-6115 |
| 173                                   | 173      | 6116-6147 |
| 174                                   | 174      | 6148-6179 |
| 175                                   | 175      | 6180-6211 |
| 176                                   | 176      | 6212-6243 |
| 177                                   | 177      | 6244-6275 |
| 178                                   | 178      | 6276-6307 |
| 179                                   | 179      | 6308-6339 |
| 180                                   | 180      | 6340-6371 |
| 181                                   | 181      | 6372-6403 |
| 182                                   | 182      | 6404-6435 |
| 183                                   | 183      | 6436-6467 |
| 184                                   | 184      | 6468-6499 |
| 185                                   | 185      | 6500-6531 |
| 186                                   | 186      | 6532-6563 |
| 187                                   | 187      | 6564-6595 |
| 188                                   | 188      | 6596-6627 |
| 189                                   | 189      | 6628-6659 |
| 190                                   | 190      | 6660-6691 |
| 191                                   | 191      | 6692-6723 |
| 192                                   | 192      | 6724-6755 |
| 193                                   | 193      | 6756-6787 |
| 194                                   | 194      | 6788-6819 |
| 195                                   | 195      | 6820-6851 |
| 196                                   | 196      | 6852-6883 |
| 197                                   | 197      | 6884-6915 |
| 198                                   | 198      | 6916-6947 |
| 199                                   | 199      | 6948-6979 |
| 200                                   | 200      | 6980-7011 |
| 201                                   | 201      | 7012-7043 |
| 202                                   | 202      | 7044-7075 |
| 203                                   | 203      | 7076-7107 |
| 204                                   | 204      | 7108-7139 |
| 205                                   | 205      | 7140-7171 |
| 206                                   | 206      | 7172-7203 |
| 207                                   | 207      | 7204-7235 |
| 208                                   | 208      | 7236-7267 |
| 209                                   | 209      | 7268-7299 |
| 210                                   | 210      | 7300-7331 |
| 211                                   | 211      | 7332-7363 |
| 212                                   | 212      | 7364-7395 |
| 213                                   | 213      | 7396-7427 |
| 214                                   | 214      | 7428-7459 |
| 215                                   | 215      | 7460-7491 |
| 216                                   | 216      | 7492-7523 |
| 217                                   | 217      | 7524-7555 |
| 218                                   | 218      | 7556-7587 |
| 219                                   | 219      | 7588-7619 |
| 220                                   | 220      | 7620-7651 |
| 221                                   | 221      | 7652-7683 |
| 222                                   | 222      | 7684-7715 |
| 223                                   | 223      | 7716-7747 |
| 224                                   | 224      | 7748-7779 |
| 225                                   | 225      | 7780-7811 |
| 226                                   | 226      | 7812-7843 |
| 227                                   | 227      | 7844-7875 |
| 228                                   | 228      | 7876-7907 |
| 229                                   | 229      | 7908-7939 |
| 230                                   | 230      | 7940-7971 |
| 231                                   | 231      | 7972-8003 |
| 232                                   | 232      | 8004-8035 |
| 233                                   | 233      | 8036-8067 |
| 234                                   | 234      | 8068-8099 |
| 235                                   | 235      | 8100-8131 |
| 236                                   | 236      | 8132-8163 |
| 237                                   | 237      | 8164-8195 |
| 238                                   | 238      | 8196-8227 |
| 239                                   | 239      | 8228-8259 |
| 240                                   | 240      | 8260-8291 |
| 241                                   | 241      | 8292-8323 |
| 242                                   | 242      | 8324-8355 |
| 243                                   | 243      | 8356-8387 |
| 244                                   | 244      | 8388-8419 |
| 245                                   | 245      | 8420-8451 |
| 246                                   | 246      | 8452-8483 |
| 247                                   | 247      | 8484-8515 |
| 248                                   | 248      | 8516-8547 |
| 249                                   | 249      | 8548-8579 |
| 250                                   | 250      | 8580-8611 |
| 251                                   | 251      | 8612-8643 |
| 252                                   | 252      | 8644-8675 |
| 253                                   | 253      | 8676-8707 |
| 254                                   | 254      | 8708-8739 |
| 255                                   | 255      | 8740-8771 |
| 256                                   | 256      | 8772-8803 |
| 257                                   | 257      | 8804-8835 |
| 258                                   | 258      | 8836-8867 |
| 259                                   | 259      | 8868-8899 |
| 260                                   | 260      | 8900-8931 |
| 261                                   | 261      | 8932-8963 |
| 262                                   | 262      | 8964-8995 |
| 263                                   | 263      | 8996-9027 |
| 264                                   | 264      | 9028-9059 |
| 265                                   | 265      | 9060-9091 |
| 266                                   | 266      | 9092-9123 |
| 267                                   | 267      | 9124-9155 |
| 268                                   | 268      | 9156-9187 |
| 269                                   | 269      | 9188-9219 |
| 270                                   | 270      | 9220-9251 |
| 271                                   | 271      | 9252-9283 |
| 272                                   | 272      | 9284-9315 |
| 273                                   | 273      | 9316-9347 |
| 274                                   | 274      | 9348-9379 |
| 275                                   | 275      | 9380-9411 |
| 276                                   | 276      | 9412-9443 |
| 277                                   | 277      | 9444-9475 |
| 278                                   | 278      | 9476-9507 |
| 279                                   | 279      | 9508-9539 |
| 280                                   | 280      | 9540-9571 |
| 281                                   | 281      | 9572-9603 |
| 282                                   | 282      | 9604-9635 |
| 283                                   | 283      | 9636-9667 |
| 284                                   | 284      | 9668-9699 |
| 285                                   | 285      | 9700-9731 |
| 286                                   | 286      | 9732-9763 |
| 287                                   | 287      | 9764-9795 |
| 288                                   | 288      | 9796-9827 |
| 289                                   | 289      | 9828-     |

| PHASE 1 LOTS |        |       |      | PHASE 3 LOTS |      |       |        |       |        |       |      |       |        |
|--------------|--------|-------|------|--------------|------|-------|--------|-------|--------|-------|------|-------|--------|
| LOT #        | TYPE   | LOT # | TYPE | LOT #        | TYPE | LOT # | TYPE   | LOT # | TYPE   | LOT # | TYPE | LOT # | TYPE   |
| 5            | 75'    | 162   | 65'  | 424          | 75'  | 470   | 75'    | 517   | 20' TH | 562   | 65'  |       |        |
| 7            | 75     | 163   | 65'  | 425          | 75'  | 471   | 75'    | 518   | 20' TH | 563   | 65'  |       |        |
| 11           | duplex | 166   | 65'  | 426          | 75'  | 472   | 75'    | 519   | 20' TH | 564   | 65'  |       |        |
| 12           | duplex | 167   | 65'  | 427          | 75'  | 473   | 75'    | 520   | 20' TH | 565   | 75'  |       |        |
| 13           | duplex | 168   | 65'  | 428          | 75'  | 474   | 75'    | 521   | 20' TH | 566   | 65'  |       |        |
| 14           | duplex | 169   | 65'  | 429          | 75'  | 475   | 75'    | 522   | 20' TH | 567   | 65'  |       |        |
| 17           | 65'    | 170   | 65'  | 430          | 75'  | 476   | 75'    | 523   | 20' TH | 568   | 65'  |       |        |
| 18           | 65'    | 171   | 65'  | 431          | 75'  | 478   | 75'    | 524   | 20' TH | 569   | 65'  |       |        |
| 19           | 65'    | 172   | 75'  | 432          | 75'  | 479   | 75'    | 525   | 20' TH | 570   | 65'  |       |        |
| 21           | 65'    | 175A  | 75'  | 433          | 75'  | 480   | 75'    | 526   | 20' TH | 571   | 75'  |       |        |
| 22           | 65'    | 177A  | 75'  | 434          | 75'  | 481   | 75'    | 527   | 20' TH | 572   | 65'  |       |        |
| 24           | 65'    | 178A  | 75'  | 435          | 75'  | 482   | 65'    | 528   | 20' TH | 573   | 65'  |       |        |
| 25           | 65'    | 179A  | 75'  | 436          | 75'  | 483   | 65'    | 529   | 20' TH | 574   | 65'  |       |        |
| 32           | 65'    | 180A  | 75'  | 437          | 75'  | 484   | 75'    | 530   | 20' TH | 575   | 65'  |       |        |
| 38           | 65'    | 181A  | 75'  | 438          | 75'  | 485   | 75'    | 531   | 20' TH | 576   | 65'  |       |        |
| 40           | 65'    | 182A  | 75'  | 439          | 75'  | 486   | 65'    | 532   | 20' TH | 577   | 65'  |       |        |
| 41           | 65'    | 183A  | 75'  | 440          | 75'  | 487   | 65'    | 533   | 20' TH | 578   | 65'  |       |        |
| 49           | 65'    | 184A  | 75'  | 441          | 75'  | 488   | 20' TH | 534   | 20' TH | 579   | 75'  |       |        |
| 50           | 65'    | 187A  | 65'  | 442          | 75'  | 489   | 20' TH | 535   | 20' TH | 580   | 75'  |       |        |
| 51           | 65'    |       |      | 443          | 75'  | 490   | 20' TH | 536   | 20' TH | 581   | 75'  |       |        |
| 52           | 65'    | TOTAL | 65   | 444          | 75'  | 491   | 20' TH | 537   | 20' TH | 582   | 75'  | 630   | 20' TH |
| 53           | 65'    |       |      | 445          | 75'  | 492   | 20' TH | 538   | 20' TH | 583   | 75'  | 631   | 20' TH |
| 54           | 65'    |       |      | 446          | 75'  | 493   | 20' TH | 539   | 20' TH | 584   | 75'  | 632   | 20' TH |
| 57           | duplex |       |      | 447          | 75'  | 494   | 20' TH | 540   | 20' TH | 585   | 75'  | 633   | 20' TH |
| 58           | duplex |       |      | 448          | 75'  | 495   | 20' TH | 541   | 20' TH | 586   | 75'  | 634   | 20' TH |
| 85           | duplex |       |      | 449          | 75'  | 496   | 20' TH | 542   | 20' TH | 587   | 65'  | 635   | 20' TH |
| 86           | duplex |       |      | 450          | 75'  | 497   | 20' TH | 543   | 20' TH | 588   | 65'  | 636   | 20' TH |
| 87           | duplex |       |      | 451          | 75'  | 498   | 20' TH | 544   | 75'    | 589   | 65'  | 637   | 20' TH |
| 88           | duplex |       |      | 452          | 65'  | 499   | 20' TH | 545   | 65'    | 590   | 65'  | 638   | 20' TH |
| 92           | 65'    |       |      | 453          | 65'  | 500   | 20' TH | 546   | 75'    | 591   | 65'  | 639   | 20' TH |
| 93           | 65'    |       |      | 454          | 65'  | 501   | 20' TH | 547   | 65'    | 592   | 65'  | 640   | 20' TH |
| 94           | 65'    |       |      | 455          | 65'  | 502   | 20' TH | 548   | 65'    | 593   | 65'  | 641   | 20' TH |
| 102          | 65'    |       |      | 456          | 65'  | 503   | 20' TH | 549   | 75'    | 594   | 65'  | 642   | 20' TH |
| 106          | 65'    |       |      | 457          | 65'  | 504   | 20' TH | 550   | 75'    | 595   | 65'  | 643   | 20' TH |
| 107          | 65'    |       |      | 458          | 75'  | 505   | 20' TH | 551   | 75'    | 596   | 65'  | 651   | 20' TH |
| 117          | 65'    |       |      | 459          | 75'  | 506   | 20' TH | 552   | 65'    | 621   | 65'  | 652   | 20' TH |
| 120          | 65'    |       |      | 460          | 75'  | 507   | 20' TH | 553   | 65'    | 622   | 65'  | 653   | 20' TH |
| 121          | 65'    |       |      | 461          | 75'  | 508   | 20' TH | 554   | 65'    | 623   | 65'  | 654   | 20' TH |
| 122          | 65'    |       |      | 462          | 75'  | 509   | 20' TH | 555   | 75'    | 624   | 65'  | 655   | 20' TH |
| 127A         | 65'    |       |      | 463          | 75'  | 510   | 20' TH | 556   | 65'    | 625   | 65'  | 656   | 20' TH |
| 128A         | 65'    |       |      | 464          | 75'  | 511   | 20' TH | 557   | 65'    | 626   | 65'  | 657   | 20' TH |
| 129A         | 65'    |       |      | 465          | 75'  | 512   | 20' TH | 558   | 65'    | 627   | 65'  | 658   | 20' TH |
| 143          | duplex |       |      | 466          | 75'  | 513   | 20' TH | 559   | 75'    | 628   | 65'  | 667   | 75'    |
| 144          | duplex |       |      | 467          | 75'  | 514   | 20' TH | 560   | 65'    | 629   | 65'  | 668   | 75'    |
| 145          | duplex |       |      | 468          | 75'  | 515   | 20' TH | 561   | 75'    |       |      | 669   | 75'    |
| 146          | duplex |       |      | 469          | 75'  | 516   | 20' TH |       |        |       |      | TOTAL | 206    |

| PHASE 2 LOTS |        |       |        |
|--------------|--------|-------|--------|
| LOT #        | TYPE   | LOT # | TYPE   |
| 318          | 20' TH | 346   | 20' TH |
| 319          | 20' TH | 347   | 20' TH |
| 320          | 20' TH | 348   | 20' TH |
| 321          | 20' TH | 349   | 20' TH |
| 322          | 20' TH | 350   | 20' TH |
| 323          | 20' TH | 351   | 20' TH |
| 324          | 20' TH | 352   | 20' TH |
| 325          | 20' TH | 353   | 20' TH |
| 326          | 20' TH | 354   | 20' TH |
| 327          | 20' TH | 355   | 20' TH |
| 328          | 20' TH | 356   | 20' TH |
| 329          | 20' TH | 357   | 20' TH |
| 330          | 20' TH | 358   | 20' TH |
| 331          | 20' TH | 359   | 20' TH |
| 332          | 20' TH | 360   | 20' TH |
| 333          | 20' TH | 361   | 20' TH |
| 334          | 20' TH | 362   | 20' TH |
| 335          | 20' TH | 363   | 20' TH |
| 336          | 20' TH | 364   | 20' TH |
| 337          | 20' TH | 365   | 20' TH |
| 338          | 20' TH |       |        |
| 339          | 20' TH | TOTAL | 48     |
| 340          | 20' TH |       |        |
| 341          | 20' TH |       |        |
| 342          | 20' TH |       |        |
| 343          | 20' TH |       |        |
| 344          | 20' TH |       |        |
| 345          | 20' TH |       |        |

| DRB CONTRACT LOTS |      |      |      |       |      |
|-------------------|------|------|------|-------|------|
|                   | Ph 1 | Ph 2 | Ph 3 | Total | Bulk |
| 20' TH Lots       | 0    | 48   | 78   | 126   | 8    |
| 75' SF Lots       | 12   | 0    | 74   | 86    | 30   |
| 65' SF Lots       | 39   | 0    | 54   | 93    | 99   |
| Duplex Lots       | 14   | 0    | 0    | 14    | 14   |
|                   | 65   | 48   | 206  | 319   | 91   |

## SECOND AMENDMENT TO LOT PURCHASE AGREEMENT

AND NOW, this 31<sup>st</sup> day of July, 2019 ("Amendment Effective Date"), this Second Amendment to Lot Purchase Agreement ("Second Amendment") is hereby entered into by and between OVERLAY I, LLC, a Virginia limited liability company ("Seller"), and DAN RYAN BUILDERS MID-ATLANTIC, LLC, a Maryland limited liability company, or its assigns ("Buyer").

### WITNESSETH:

WHEREAS, Seller and Buyer entered into a Lot Purchase Agreement dated May 14, 2018, as amended by Amendment to Lot Purchase Agreement dated June 1, 2018 (collectively, the "Agreement," and after the Amendment Effective Date, the Agreement amended by this Second Amendment shall collectively be referred to as the "Amended Agreement"), involving certain real property situate and lying in the City of Martinsburg, Berkeley County, West Virginia, in the subdivision known as Martinsburg Station, and

WHEREAS, Seller and Buyer desire to amend the terms of the Agreement.

NOW, THEREFORE, in consideration of the covenants and undertakings provided for herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each party, the parties hereto agree as follows:

1. The above recitals are hereby incorporated herein as substantive provisions by this reference thereto. All capitalized terms used, but not defined, in this Second Amendment shall have the meaning ascribed to them in the Agreement. This Second Amendment shall be effective as of the Amendment Effective Date and therefore nothing contained herein shall apply to or affect the Bulk Closing, the Finished Lots conveyed in the Bulk Closing, or the relationship of the parties with respect to the Finished Lots conveyed in the Bulk Closing under the Agreement. The Bulk Closing was and, only to the extent any provisions of the Agreement related to the Bulk Closing or the Finished Lots survived the Bulk Closing and still survive as of the Amendment Effective Date, after the Amendment Effective Date shall still be, governed solely by the Agreement.

2. Seller and Buyer hereby acknowledge and agree that Seller is currently in default under the Agreement with respect to post-Bulk Closing obligations. As of the completion of the Phase 3 Closing (as defined below), Seller shall be deemed for all purposes without further action on the part of either party to have cured its default, Buyer shall have released unto Seller all such default claims, and Buyer shall thereafter have no claim for any damages for any such Seller breach occurring prior to the Amendment Effective Date. Notwithstanding the foregoing, however, nothing contained herein shall be construed as releasing or relieving Seller from any obligation or liability which was imposed on Seller under the Agreement with respect to the Finished Lots and the Bulk Closing, which survived the Bulk Closing and which is still surviving as of the Amendment Effective Date, all in accordance with the Agreement. In the event that Seller fails to satisfy all of its obligations under this Second Amendment as and when required hereunder, Seller shall be deemed to have failed to cure any default as and when required under the Agreement, and Buyer shall have the right to exercise all of its rights and remedies at law or in equity in accordance with Paragraph 11(b) of the Agreement. In the event that Buyer either (i)

fails to satisfy all of its obligations under this Second Amendment as and when required hereunder (in which event Seller shall serve written notice of such breach upon Buyer which shall be deemed to give Buyer ten (10) days to cure such Buyer default, and in the event that Buyer does not cure such default within such time, this Second Amendment shall be deemed null and void for all purposes), or (ii) if Buyer shall timely deliver written notice of termination of the Amended Agreement under Paragraph 5(b), then the Seller and Buyer shall be returned to their respective positions as they existed prior to the Amendment Effective Date, except that as of such date of termination of this Second Amendment, Buyer shall be deemed to have served additional notice of breach of the Agreement on Seller giving Seller sixty (60) additional days to cure such breach. If Seller fails to cure such default within such time, Buyer shall have the right to exercise all of its rights and remedies at law or in equity in accordance with Paragraph 11(b) of the Agreement.

3. The Agreement is hereby amended as follows:

a. By deleting therefrom all references therein to Lots to be sold by Seller to Buyer in Closings subsequent to the Bulk Closing, and stating instead that subsequent to the Bulk Closing in accordance with the Amended Agreement Seller shall sell to Buyer and Buyer shall buy from Seller only all of the Lots in Phase 3 of the Subdivision (the "Phase 3 Lots") in accordance with the terms of the Amended Agreement. The Phase 3 Lots include two hundred five (205) total lots, including (i) one hundred eleven (111) single-family lots identified as Lots 439 through 487, inclusive; Lots 544 through 596, inclusive, and Lots 621 through 629, inclusive; (ii) seventy (70) townhouse lots identified as Lots 630 through 643, inclusive, and Lots 488 through 543, inclusive; and (iii) twenty-four (24) duplex lots identified as Lots 597 through 620, inclusive. See Exhibit A.

b. In addition to the Phase 3 Lots, for no additional Purchase Price to be paid by Buyer to Seller at the Phase 3 Closing, and solely in consideration for the Purchase Price and other consideration enumerated herein, at the Phase 3 Closing Seller shall also convey to Buyer by warranty bill of sale in customary form the infrastructure and construction materials ("Materials") specifically described as conveying to Buyer in Exhibit B. Additionally, while Pile #5 on Exhibit B remains within Phase 3 it shall be made available by Seller for Buyer's use during Buyer's construction, and any portion of Pile #5 remaining after Buyer's use shall be moved by Buyer at Buyer's expense onto Phase 2. Seller grants to Buyer and Buyer's contractors the right and license to enter the Phase 4 lands on which any conveyed Materials may be stored solely in order that Buyer may remove the Materials for its use, and to enter the Phase 2 lands solely in order that Buyer may move remaining Pile #5 Materials, if any, to Phase 2 as aforesaid. Buyer shall exercise reasonable care in such removal and shall cause its contractors to do likewise, Buyer being fully liable for the actions of Buyer's contractors and invitees, Buyer shall be solely responsible for and indemnify and hold Seller harmless from and against any damages related thereto, and Buyer shall keep Seller named on its liability insurance policies in order to provide adequate indemnification in the event of any such damage. Any damage to Seller's property caused by such Buyer activity shall be promptly restored at Buyer's sole cost, and Buyer shall be solely liable for all fines, costs, penalties, and violations related to or caused by Buyer's Materials removal activity.

c. Seller and Buyer hereby agree that Paragraph 2(a) of the Agreement is amended to delete all references to any Purchase Price to be paid for any Lots subsequent to the Bulk Closing, and to state that the Purchase Price for the Phase 3 Lots to be paid by Buyer to Seller at the Phase 3 Closing shall be **Two Million, Five Hundred Twenty-Five Thousand U.S. Dollars (\$2,525,000.00)**.

d. Seller and Buyer hereby agree that Paragraph 3 of the Agreement is amended by deleting therefrom subparagraphs (a) through (g) thereof, and by inserting in lieu thereof that Buyer shall purchase the Phase 3 Lots in a bulk purchase (the "Phase 3 Closing"), which shall occur within fifteen (15) days after the satisfaction of the conditions precedent to such Phase 3 Closing set forth herein, including without limitation Buyer's completion of the Study Period without terminating the Amended Agreement. The date of the Phase 3 Closing shall be the "Phase 3 Closing Date." Conditions precedent to the Phase 3 Closing include all obligations set forth in Paragraph 4(b)(i), (ii), (v), and (vi) of the Agreement (and to be clear, subparagraphs (iii) and (iv) thereof shall not apply as conditions precedent to the Phase 3 Closing) and any additional obligations set forth herein. Notwithstanding the previous sentence, Paragraph 4(b)(v) is amended to except from the vacancy condition the existence of the aggregate stockpile denominated as "Pile #2" on Exhibit B, as Seller discloses to Buyer that such pile is owned by Phillips Construction, LLC and that it rests within the Phase 3 Lots without written or other agreement as to rent, license, lease, access, or otherwise, and from and after the Study Period Expiration Date if Buyer does not cancel the Amended Agreement, Buyer accepts such condition without objection and will take title to the Phase 3 Lots subject to the existence of such pile in such location without assuming any liability of Seller to the owner with respect thereto.

e. Seller and Buyer hereby agree that except as otherwise specifically set forth herein, Paragraph 5 of the Agreement applies to the Buyer's purchase of the Phase 3 Lots as it has previously applied to the Buyer's purchase of the Property or Lots. The Agreement is hereby amended by making the Study Period Expiration Date that date which is thirty (30) days after the Amendment Effective Date, thereby causing the Study Period applicable to the Buyer's purchase of the Phase 3 Lots to be the period from the Amendment Effective Date through such Study Period Expiration Date. Buyer's delivery to Seller of its written notice to proceed prior to the Study Period Expiration Date is a condition precedent of the Phase 3 Closing.

f. Seller and Buyer hereby agree that the remaining portion of the Deposit, in the amount of One Hundred Thousand Dollars (\$100,000.00) as of the Amendment Effective Date, shall be delivered by the Escrow Agent to Seller and credited as a payment from Buyer to Seller toward the Purchase Price of the Phase 3 Lots at the Phase 3 Closing.

4. Seller and Buyer hereby acknowledge and agree that after the Phase 3 Closing Seller shall (a) be the Declarant under the Declaration as such position shall not be assigned to or assumed by Buyer; (b) maintain all non-Phase 3 Subdivision stormwater facilities and apply for and maintain any permits necessary for such stormwater facilities; (c) maintain full responsibility for the construction of the pool and clubhouse facilities and any other required Phase 3 (as required under the Plans as they exist on the Amendment Effective Date) and non-Phase 3 amenities; (d) remain responsible for any HOA operating deficit funding required of Declarant; and (e) remain responsible for any existing or future bonds or bonded work for Subdivision

Phases 1, 2, or 4, and portions of Phase 3 not specifically outlined in Exhibit C. In furtherance thereof:

a. Seller, as Declarant, or Seller's assignee should Seller convey the Subdivision stormwater management facilities to the HOA, shall maintain the Subdivision stormwater management facilities by receiving notices related thereto, performing such inspections as are required, repairing and maintaining the same, and paying the costs thereof. Buyer shall promptly upon receipt of written request accompanied by upon presentation of actual notices, bill, or invoices directly related thereto pay to Seller or Seller's assignee, as applicable, (i) the Buyer's *pro rata* portion of the cost of such maintenance and compliance (but not any portion of the capital costs of creation or expansion of any such facilities) not properly payable by the HOA, and (ii) the actual costs of any cleanup, remediation, repair, or correction (including fines or penalties imposed) directly related to any discharge from Phase 3 Lots which proximately causes such costs to be incurred. Buyer's *pro rata* share of such costs as described in clause (i) of the preceding sentence shall be determined by comparing Buyer's owned acreage in the Subdivision plus the acreage of the Phase 3 Roads to the total acreages in the Subdivision owned by Seller.

b. Seller, as Declarant, for so long as Seller is the Declarant, shall be solely responsible for all operating deficits of the HOA not funded by homeowner assessments (i.e., shortfalls determined by subtracting ordinary and necessary expenses for maintenance, repair, insurance, and operation of the HOA and its facilities from homeowner assessments and other revenues) as determined from the books and records of the HOA kept in accordance with generally accepted principles consistently applied, exclusive of capital charges, reserve accruals, and other like nonoperating accruals or charges which may appear on the HOA's books from time to time.

5. Notwithstanding any other term or provision of the Amended Agreement, at its cost, Buyer shall grade the open spaces within Phase 3 of the Subdivision and shall be responsible for seeding and mowing all such open spaces within the specific confines of Phase 3 lots and roads as outlined within Exhibit C as and when required. In addition, Buyer shall complete all planned and required landscaping shown on the approved Preliminary Plat for Phase 3 within the confines of the Phase 3 Lots and Roads as specifically outlined in Exhibit C. Buyer shall have no other obligation to construct anything on the open spaces within Phase 3 following Buyer's grading and seeding of such space. All other planned landscaping and improvements beyond the specific confines of the lots and roads being purchased by Buyer shall remain the sole responsibility of the Seller.

6. Notwithstanding any other term or provision of the Amended Agreement, Seller and Buyer hereby acknowledge and agree that Buyer is acquiring the Phase 3 Lots as-is (as they exist on the Amendment Effective Date) and that Buyer shall be required to complete the development work for the Phase 3 Lots that has not been previously completed by Seller, including the work more specifically outlined within Exhibit C, and that except for other obligations specifically placed on Seller in this Second Amendment, Exhibit C shall be the sole and exclusive determinant of the allocation of specific development duties between Seller and Buyer. Any dispute between the parties related to applicability of Exhibit C as opposed to any

other term or provision of the Amended Agreement shall be resolved under and in favor of the applicability of Exhibit C. In furtherance thereof:

a. Notwithstanding any other term or provision of the Amended Agreement, Seller's conveyance of the Phase 3 Lots to Buyer shall not include the Seller's conveyance to Buyer of title to the roads or rights-of-way within Phase 3 of the Subdivision ("Phase 3 Roads"). Seller shall remain in title to the Phase 3 Roads after the Phase 3 Closing. Notwithstanding the foregoing, Buyer shall be solely responsible, at its sole cost, for diligently and promptly pursuing the completion of construction of the sections of Phase 3 Roads, the extents of which are specifically outlined in Exhibit C, in strict accordance with all plans, specifications, bonding requirements, permits, and other governmental requirements applicable to Phase 3. Buyer shall protect, maintain and repair the same during construction activity, and Buyer shall clean, maintain and repair the same until the same are finally accepted as public roads. If Buyer proposes or makes any changes to the plans and specifications applicable to the section of Phase 3 Roads outlined within Exhibit C after the Lot 3 Closing, Buyer shall notify Seller of the same, promptly providing copies of all such proposals or applications and supporting materials to Seller.

b. Buyer shall be solely responsible, at its sole cost, for diligently and promptly pursuing the completion of construction of all Phase 3 Lots in strict accordance with all plans, specifications, bonding requirements, permits, and other governmental requirements applicable to Phase 3. Buyer shall protect, maintain and repair the same during construction activity, and Buyer shall clean, police, mow, insure, and maintain the same until the same are sold to homeowners. After the Phase 3 Closing, Buyer, at its sole option and expense, may modify, change, adjust or revise any Lot within Phase 3, change the boundary line of any Lot, or create or eliminate Lots within Phase 3, all without prior Seller approval, provided, however, that no such change shall materially adversely impact Seller's existing (under the Plans as they exist on the Amendment Effective Date) density yield in Phase 1, 2, or 4 of the Subdivision, or Seller's existing development plans for such other phases of the Subdivision, and Buyer shall be liable to Seller for any direct costs imposed on Seller by any governmental agency, utility, or other entity having the right to collect funds from Seller for development, utility, stormwater and environmental management, public safety, or other like enforcement matters. If Buyer proposes or makes any changes to the plats, plans and specifications applicable to the Phase 3 Lots after the Lot 3 Closing, Buyer shall notify Seller of the same, promptly providing copies of all such proposals or applications and supporting materials to Seller. Notwithstanding any other term or provision hereof, without Seller's prior written approval, which approval may be withheld, delayed, or granted in Seller's sole and absolute discretion for any reason or no reason at all, no change to the plats, plans, and specifications applicable to the Phase 3 Lots after the Lot 3 Closing shall either (i) increase the number of Lots in Phase 3 to a number in excess of two hundred ninety-four (294) Lots, inclusive of all existing lots (other than the Phase 3 Lots) located in Phase 3 and either owned by Buyer on the Amendment Effective Date, or previously owned by Buyer and sold to homebuyers (and Buyer increases not in excess of 294 Lots shall not require Seller's prior approval if any such increase will not cause Seller noncompliance as described in clause (ii) immediately following), or (ii) cause Seller to not be in compliance with Seller's zoning, density, or other entitlement restrictions in any portion of the Subdivision which is owned by Seller.



c. For no additional consideration, Seller grants to Buyer and Buyer's contractors a terminable right and license to enter the Phase 3 lands through an existing, permitted entrance into Phase 2 of the Subdivision off of Delmar Orchard Road (County Route 45/7). For so long as Seller chooses to allow Buyer such access, Buyer and Buyer's contractors and invitees engaged in hauling of bulk materials related to land development such as dirt, gravel, boulders, asphalt, culvert, pipes, conduit, or large heavy construction equipment related to such land development construction activity in Phase 3 shall be directed by Buyer to solely use, and shall solely use, a rip rap or gravel (at Buyer's option) access road from such entrance to Phase 3 (see Exhibit D) to be built, marked, maintained, and repaired by Buyer at Buyer's sole cost and expense. Buyer shall exercise reasonable care in such use and shall cause its contractors to do likewise, Buyer being liable to Seller for the actions of Buyer's contractors and invitees. Buyer shall be solely responsible for and indemnify and hold Seller harmless from and against any damages related thereto, and Buyer shall keep Seller named on its liability insurance policies in order to provide adequate indemnification in the event of any such damage. Any damage to Seller's property caused by such Buyer activity shall be promptly restored at Buyer's sole cost, and Buyer shall be solely liable for any governmental fines, costs, penalties, and violations related to or caused by Buyer's access activity. Buyer shall be solely responsible for policing and enforcing strict compliance with such exclusive use restriction for heavy construction access, shall promptly respond to all homeowner complaints related to violations, and shall promptly reimburse Seller for all costs and damages related to unauthorized Phase 3 construction traffic outside of the access road. Should Seller terminate such access across Phase 2, all such restrictions shall be lifted and Buyer and Buyer's contractors and invitees may use existing roads in the Subdivision. Such restrictions shall in no event apply to construction traffic related to homebuilding (vertical improvements) in Phase 3.

d. The performance of any requirement and cost of any improvement applicable to the development of Phase 3 Lots specifically enumerated in Exhibit C, construction of residences thereon, and sale thereof to homeowners shall be the responsibility of the Buyer.

7. Seller acknowledges and agrees that, as a condition precedent to the Phase 3 Closing, Seller shall promptly after the Amendment Effective Date provide Buyer with all of Seller's written documentation from the City of Martinsburg and Berkeley County that indicates that all entitlements are fully and finally approved and that there are no conditions or obligations that would prevent Buyer from obtaining building permit(s) immediately following the payment of all required fees for such permit(s) as Buyer has applied for and received such permits for its previous activities in Phase 3. Seller has previously provided Buyer full access to all Seller documentation related to such condition, and if Buyer shall not timely deliver written notice of termination of the Amended Agreement prior to the Study Period Expiration Date, then such condition shall be deemed to be waived and satisfied by Buyer.

8. Seller, as the Declarant and the architectural review committee under the Declaration, acknowledges and agrees that all of Buyer's architecture, including Buyer's house product offerings, color schemes and elevations previously submitted to Seller, have been approved for construction on the Phase 3 Lots.

9. At the Phase 3 Closing, Buyer shall pay to Martinsburg Station Community Association, a West Virginia nonstock corporation, a one-time HOA capital contribution of One Hundred Two Thousand, Five Hundred Dollars (\$102,500.00), which is Five Hundred Dollars (\$500.00) per Phase 3 Lot. Such payment shall be in full satisfaction of the one-time, per Lot capital contribution required by Paragraph 5.8 of the Declaration and neither Buyer nor any Buyer transferee shall be liable for payment of such initial capital contribution in the future.

10. Seller does hereby grant unto Buyer a limited right of first refusal to purchase any lots in Phase 4 of the Subdivision, which on the Amendment Effective Date includes two hundred twenty-seven (227) fully designed and entitled lots identified as lots 670 through 896, inclusive (the "ROFR Lots"), and the improvements thereon, together with easements, rights, privileges and appurtenances, belonging to the ROFR Lots. This right of first refusal shall pertain to any bona fide written offer for purchase from Seller of all or any portion of the ROFR Lots contained in either a letter of intent, a written offer to purchase, or an agreement of sale presented to Seller from a third party. In the event that Seller receives a *bona fide* written offer for purchase of the ROFR Lots or any part thereof from a third party before accepting such offer, Seller shall deliver to Buyer written notice of the same, together with an accurate and reasonably detailed description of the offer price and all pertinent terms and conditions thereof. Buyer shall have fifteen (15) days after the receipt of such notice from Seller of the written offer together with terms and conditions of the offer, to advise Seller that Buyer will purchase such ROFR Lots as are the subject of the offer upon the same terms and conditions as offered by the third party offeror. During such period for consideration of such offer, Buyer shall be strictly prohibited from directly or indirectly (itself or through any agent) contacting Seller's offeror with respect to the offer or discussing such offer with such offeror or its agents. If Buyer timely exercises its right of first refusal, Buyer and Seller shall enter into a purchase agreement within thirty (30) days after Buyer's notice of exercise to Seller on substantially the same terms as were contained in the offer of the third party. If Buyer does not exercise such right of first refusal, Seller shall be free to sell the ROFR Lots which are the subject of the offer to such offeror at the offered price or any higher price and on the offered and noticed terms and conditions, or to any other buyer at the offered price or any higher price and on the offered terms and conditions, as Buyer's right of first refusal shall be deemed to have been extinguished by Buyer's refusal to exercise with respect to any ROFR Lots which are or were the subject of the original third party offer. If Buyer declines to exercise its right of first refusal as to ROFR Lots and Seller receives an offer from another party and intends to sell such ROFR Lots at a lower price or on more favorable terms than those previously offered to Buyer as required herein, then Buyer's right of first refusal shall not be extinguished and Buyer shall be entitled to notice and a first right as otherwise described herein. Any sale of ROFR Lots to Buyer shall extinguish Buyer's right as to such Lots. Nothing contained herein shall prevent, limit, or prohibit Seller from marketing the ROFR Lots or any portion thereof at any time, or Buyer from offering to buy the ROFR Lots or any portion thereof at any time, or to require the disclosure of Buyer's right in any marketing materials. Neither party shall record this Second Amendment or any memorandum of the agreement contained in this Paragraph, and any sale of a ROFR Lot by Seller in violation of this Paragraph shall be void *ab initio*.

11. In the event that Seller fails to consummate the Phase 3 Closing as and when required hereunder, or in the event that either party otherwise defaults on its obligations under this Second Amendment, then this Second Amendment shall terminate and be deemed null and void and of no effect, in which event, except as otherwise specifically modified with respect to the default and termination provisions described in Paragraph 2 hereof, the Agreement shall remain in full force and effect.

12. Except as specifically modified by this Second Amendment, all terms and conditions set forth in the Agreement shall be applicable and shall remain in full force and effect. To the extent that any provision of this Second Amendment is inconsistent with or in conflict with the terms and conditions as set forth in the Agreement, the terms and conditions in this Second Amendment shall govern and control.

13. Notwithstanding any other term or provision hereof, this Second Amendment shall survive the Phase 3 Closing and shall not be merged in any deed conveying the Phase 3 Lots from Seller to Buyer. The preceding sentence shall not alter or amend any survival provisions contained in the Agreement (which, after the Amendment Effective Date, shall continue to apply to all provisions contained in the Amended Agreement except for the provisions of this Second Amendment), and no survival provision contained in the Agreement shall limit or alter the effect of the preceding sentence.

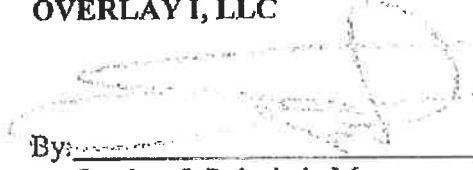
14. The individuals executing this Second Amendment represent and warrant that they have authority to execute this Second Amendment and bind their respective parties.

15. This Second Amendment may be executed in counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument. In the event that any signature is delivered by facsimile or e-mail delivery, such signature shall create a valid and binding obligation of the party executing it with the same force and effect as if such signature page were an original thereof.

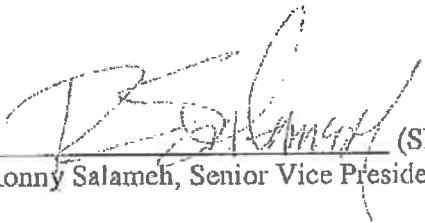
**[SIGNATURES ON FOLLOWING PAGE]**

**IN WITNESS WHEREOF**, the parties hereto, intending to be legally bound hereby, have executed this Amendment under seal on the date indicated above.

**SELLER:**  
**OVERLAY I, LLC**

By:  (SEAL)  
Stephen J. Polachek, Manager

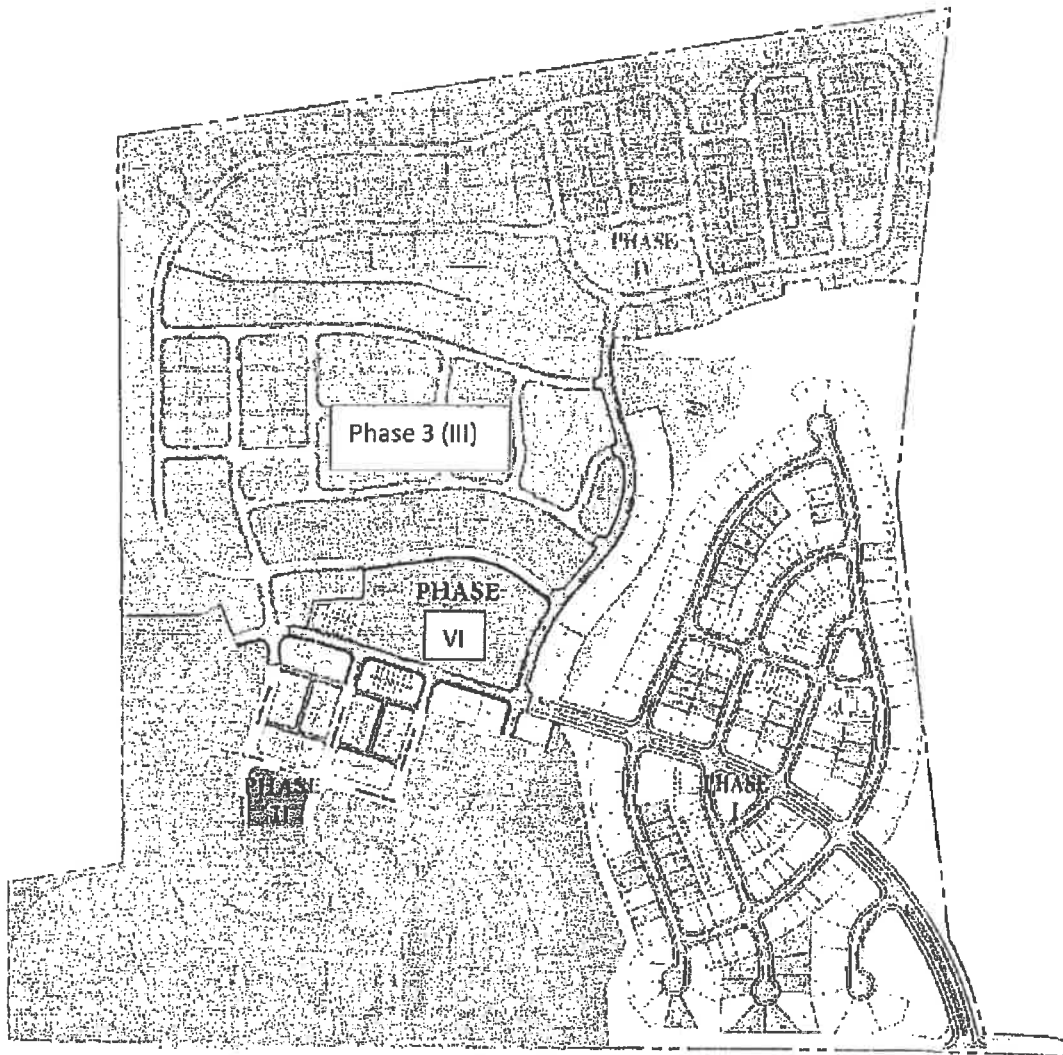
**BUYER:**  
**DAN RYAN BUILDERS WEST VIRGINIA, LLC**

By:  (SEAL)  
Ronny Salamch, Senior Vice President

## EXHIBIT A

### SUMMARY OF THE PHASE 3 LOTS

| Lot Type      | Yield | Lot Numbers                 |
|---------------|-------|-----------------------------|
| Single Family | 111   | 439-487, 544-596, & 621-629 |
| Duplex Lots   | 24    | 597-620                     |
| Townhome Lots | 70    | 488-543 & 630-643           |
| Total         | 205   |                             |



**EXHIBIT B**

**Materials:**

### **EXHIBIT C**

Buyer shall be responsible for all development work required to develop the Phase 3 Lots into homes for sale to customers in accordance with all approved plans and specifications, including specifically the remaining development work within the roadway stations outlined as follows:

| <b>Road Name</b>  | <b>Road Stations</b> | <b>Length (LF)</b> |
|-------------------|----------------------|--------------------|
| Klee Drive        | 40+00 to 42+25       | 225                |
| Trackside Terrace | 26+00 to 38+00       | 1200               |
| Husky Way         | 10+25 to 34+78       | 2453               |
| Montrose Place    | 10+00 to 23+50       | 1350               |
| Norton Square     | 10+00 to 15+97       | 597                |
| Tygart Lane       | 10+00 to 14+40       | 440                |
| Rugby Way         | 10+00 to 15+42       | 542                |
| Belpre Court      | 10+00 to 26+15       | 1615               |
| Cowen Lane        | 10+00 to 13+50       | 350                |
| Rinard Place      | 10+00 to 14+35       | 435                |
| Cresaptown Lane   | 10+00 to 14+86       | 486                |

Development work shall include and is limited to the confines of the roadway stations outlined herein and the Phase 3 Lots. The Buyer's work within roadway stations outlined herein specifically includes and is limited to:

1. Mass earthwork and grading to proposed finished elevations for roadways and residential building pads.
2. Sanitary sewer mains and laterals to sewer cleanouts extending from existing where previously installed. Includes all testing and inspection of new installation per City standards. Setting existing manhole tops and lids to final elevations.
3. Storm drain piping and structures extending from existing. Setting existing structure tops to proposed elevations.
4. Water main and service laterals, inclusive of meter vaults and setters, fire hydrants and all water appurtenances per approved improvement plans.
5. Dry utility work to serve the lots being purchased to include electric, phone, and cable conduits and transformer pads.
6. Aggregate subbase, curb and gutter, base and surface paving and sidewalk.

7. Furnish and installation of street trees within roadways stations shown herein and fronting purchased lots only.
8. Street light and Street Signs per plan.
9. Excess clean (clean, compactible fill only, free of waste, trash, rubbish, garbage, stumps, hazardous waste, and other similar materials making the same unsuitable for future construction) material, if any, from development operations to be disposed and stockpiled on Phase 2 with the prior approval of Seller as to location and after sufficient advance notice to Seller to allow Seller's monitoring and testing at Seller's sole expense.
10. Any fill material necessary to complete development work, if necessary, can be cut from locations within Phase 2 with the prior approval of Seller as to location and after sufficient advance notice to Seller to allow Seller's monitoring and testing at Seller's sole expense.
11. Proposed open space areas shall be graded to top of curb height or plan finish elevations and permanently seeded only. Buyer has no obligation to provide and/or install any proposed amenities, playgrounds, or similar improvements within any portion or part of Phase 3, or existing or future phases of Martinsburg Station.
12. As-built surveys and bond release pertaining to the work outlined herein, if required.



**EXHIBIT D**

Agreed route of construction road through Phase 2:

### **THIRD AMENDMENT TO LOT PURCHASE AGREEMENT**

AND NOW, this 30<sup>th</sup> day of August, 2019 ("Third Amendment Effective Date"), this Third Amendment to Lot Purchase Agreement ("Third Amendment") is hereby entered into by and between **OVERLAY I, LLC**, a Virginia limited liability company ("Seller"), and **DAN RYAN BUILDERS MID-ATLANTIC, LLC**, a Maryland limited liability company, or its assigns ("Buyer").

#### **WITNESSETH:**

**WHEREAS**, Seller and Buyer entered into a Lot Purchase Agreement dated May 14, 2018, as amended by Amendment to Lot Purchase Agreement dated June 1, 2018, and as further amended by Second Amendment to Lot Purchase Agreement dated July 31, 2019 (collectively, the "Agreement," and after the Amendment Effective Date, the Agreement amended by this Third Amendment shall collectively be referred to as the "Amended Agreement"), involving certain real property situate and lying in the City of Martinsburg, Berkeley County, West Virginia, in the subdivision known as **Martinsburg Station**, and

**WHEREAS**, Seller and Buyer desire to amend the terms of the Agreement.

**NOW, THEREFORE**, in consideration of the covenants and undertakings provided for herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each party, the parties hereto agree as follows:

1. The above recitals are hereby incorporated herein as substantive provisions by this reference thereto. All capitalized terms used, but not defined, in this Third Amendment shall have the meaning ascribed to them in the Agreement.

2. Seller and Buyer hereby agree that the Agreement is hereby amended by making the Study Period Expiration Date that date which is fifteen (15) days after the Third Amendment Effective Date. Buyer's delivery to Seller of its written notice to proceed prior to the Study Period Expiration Date is a condition precedent of the Phase 3 Closing.


3. Except as specifically modified by this Third Amendment, all terms and conditions set forth in the Agreement shall be applicable and shall remain in full force and effect. To the extent that any provision of this Third Amendment is inconsistent with or in conflict with the terms and conditions as set forth in the Agreement, the terms and conditions in this Third Amendment shall govern and control.

4. The individuals executing this Third Amendment represent and warrant that they have authority to execute this Third Amendment and bind their respective parties.

5. This Third Amendment may be executed in counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument. In the event that any signature is delivered by facsimile or e-mail delivery, such signature shall create a valid and binding obligation of the party executing it with the same force and effect as if such signature page were an original thereof.


IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have executed this Third Amendment under seal on the date indicated above.

**SELLER:**  
**OVERLAY I, LLC**

  
By: \_\_\_\_\_ (SEAL)  
Stephen J. Polachek, Manager

Digitally signed by  
Stephen J. Polachek  
Date: 2019.08.30  
09:07:01 -04'00'

**BUYER:**  
**DAN RYAN BUILDERS WEST VIRGINIA, LLC**

  
By: \_\_\_\_\_ (SEAL)  
Matt Powell, Vice President

8/30/19

#### FOURTH AMENDMENT TO LOT PURCHASE AGREEMENT

AND NOW, this 13<sup>TH</sup> day of September, 2019 ("Fourth Amendment Effective Date"), this Fourth Amendment to Lot Purchase Agreement ("Fourth Amendment") is hereby entered into by and between OVERLAY I, LLC, a Virginia limited liability company ("Seller"), and DAN RYAN BUILDERS MID-ATLANTIC, LLC, a Maryland limited liability company, or its assigns ("Buyer").

#### WITNESSETH:

WHEREAS, Seller and Buyer entered into a Lot Purchase Agreement dated May 14, 2018, as amended by Amendment to Lot Purchase Agreement dated June 1, 2018, as amended by Second Amendment to Lot Purchase Agreement dated July 31, 2019, and as further amended by Third Amendment to Lot Purchase Agreement dated August 30, 2019 (collectively, the "Agreement," and after the Amendment Effective Date, the Agreement amended by this Fourth Amendment shall collectively be referred to as the "Amended Agreement"), involving certain real property situate and lying in the City of Martinsburg, Berkeley County, West Virginia, in the subdivision known as Martinsburg Station, and

WHEREAS, Seller and Buyer desire to amend the terms of the Agreement.

NOW, THEREFORE, in consideration of the covenants and undertakings provided for herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each party, the parties hereto agree as follows:

1. The above recitals are hereby incorporated herein as substantive provisions by this reference thereto. All capitalized terms used, but not defined, in this Fourth Amendment shall have the meaning ascribed to them in the Agreement.

2. The Agreement is hereby amended to (i) restate the Study Period Expiration Date as September 23, 2019 and (ii) require that closing occur thereafter by September 27, 2019 subject to the satisfaction of closing conditions set forth in the Agreement.

3. Except as specifically modified by this Fourth Amendment, all terms and conditions set forth in the Agreement shall be applicable and shall remain in full force and effect. To the extent that any provision of this Fourth Amendment is inconsistent with or in conflict with the terms and conditions as set forth in the Agreement, the terms and conditions in this Fourth Amendment shall govern and control.


4. The individuals executing this Fourth Amendment represent and warrant that they have authority to execute this Fourth Amendment and bind their respective parties.

5. This Fourth Amendment may be executed in counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument. In the event that any signature is delivered by facsimile or e-mail delivery, such signature shall create a valid and binding obligation of the party executing it with the same force and effect as if such signature page were an original thereof.

**IN WITNESS WHEREOF**, the parties hereto, intending to be legally bound hereby, have executed this Fourth Amendment under seal on the date indicated above.


**SELLER:**

**OVERLAY I, LLC**

Digitally signed  
by Stephen J.  
Polachek  
Date: 2019.09.13  
16:09:02 -04'00' (SEAL)  
By:  Stephen J. Polachek, Manager

**BUYER:**

**DAN RYAN BUILDERS WEST  
VIRGINIA, LLC**

By:  (SEAL)  
Matthew Powell, Vice President

## FIFTH AMENDMENT TO LOT PURCHASE AGREEMENT

AND NOW, this \_\_\_\_\_ day of September, 2019 ("Fifth Amendment Effective Date"), this Fifth Amendment to Lot Purchase Agreement ("Fifth Amendment") is hereby entered into by and between OVERLAY I, LLC, a Virginia limited liability company ("Seller"), and DAN RYAN BUILDERS MID-ATLANTIC, LLC, a Maryland limited liability company, or its assigns ("Buyer").

### WITNESSETH:

WHEREAS, Seller and Buyer entered into a Lot Purchase Agreement dated May 14, 2018, as amended by Amendment to Lot Purchase Agreement dated June 1, 2018, as amended by Second Amendment to Lot Purchase Agreement dated July 31, 2019, and as further amended by Third Amendment to Lot Purchase Agreement dated August 30, 2019, and as further amended by Fourth Amendment to Lot Purchase Agreement dated September 13, 2019 (collectively, the "Agreement," and after the Amendment Effective Date, the Agreement amended by this Fifth Amendment shall collectively be referred to as the "Amended Agreement"), involving certain real property situate and lying in the City of Martinsburg, Berkeley County, West Virginia, in the subdivision known as Martinsburg Station, and

WHEREAS, Seller and Buyer desire to amend the terms of the Agreement.

NOW, THEREFORE, in consideration of the covenants and undertakings provided for herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each party, the parties hereto agree as follows:

1. The above recitals are hereby incorporated herein as substantive provisions by this reference thereto. All capitalized terms used, but not defined, in this Fifth Amendment shall have the meaning ascribed to them in the Agreement.

2. The Agreement is hereby amended to (i) restate the Study Period Expiration Date as October 1, 2019 and (ii) require that closing occur thereafter by October 4, 2019 subject to the satisfaction of closing conditions set forth in the Agreement.

3. Seller and Buyer hereby agree that Paragraph 2(a) of the Agreement is amended to state that the Purchase Price for the Phase 3 Lots to be paid by Buyer to Seller at the Phase 3 Closing shall be **Two Million Dollars (\$2,000,000.00)**.

4. Seller and Buyer hereby agree that Paragraph 12(c) of the Agreement is amended to state that Buyer shall pay all documentary stamps, recordation taxes, and transfer taxes due and payable at the Phase 3 Closing.

5. Section 12(e)(iv) of the Agreement is hereby amended to extend the ten (10) business day inspection period to forty-five (45) days. Seller and Buyer hereby agree that if Seller fails to inspect repairs Buyer made pursuant to a Post Construction Report within said forty-five (45) day timeframe set forth pursuant to Section 12(e) of the Agreement, then Seller shall be

deemed to have accepted the work and the applicable portion of the Damage Fund shall be released to Buyer.

6. Except as specifically modified by this Fifth Amendment, all terms and conditions set forth in the Agreement shall be applicable and shall remain in full force and effect. To the extent that any provision of this Fifth Amendment is inconsistent with or in conflict with the terms and conditions as set forth in the Agreement, the terms and conditions in this Fifth Amendment shall govern and control.

7. The individuals executing this Fifth Amendment represent and warrant that they have authority to execute this Fifth Amendment and bind their respective parties.

8. This Fifth Amendment may be executed in counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument. In the event that any signature is delivered by facsimile or e-mail delivery, such signature shall create a valid and binding obligation of the party executing it with the same force and effect as if such signature page were an original thereof.

**IN WITNESS WHEREOF**, the parties hereto, intending to be legally bound hereby, have executed this Fifth Amendment under seal on the date indicated above.

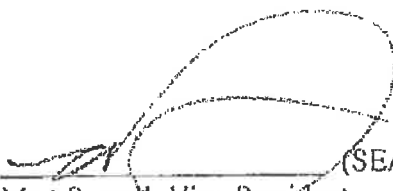
**SELLER:**

**OVERLAY I, LLC**

By: \_\_\_\_\_ (SEAL)  
Stephen J. Polachek, Manager

**BUYER:**

**DAN RYAN BUILDERS WEST  
VIRGINIA, LLC**

By:  \_\_\_\_\_ (SEAL)  
Matt Powell, Vice President

## FIFTH AMENDMENT TO LOT PURCHASE AGREEMENT

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### WITNESSETH:

WHEREAS, Seller and Buyer entered into a Lot Purchase Agreement dated May 14, 2018, as amended by Amendment to Lot Purchase Agreement dated June 1, 2018, as amended by Second Amendment to Lot Purchase Agreement dated July 31, 2019, and as further amended by Third Amendment to Lot Purchase Agreement dated August 30, 2019, and as further amended by Fourth Amendment to Lot Purchase Agreement dated September 13, 2019 (collectively, the "Agreement," and after the Amendment Effective Date, the Agreement amended by this Fifth Amendment shall collectively be referred to as the "Amended Agreement"), involving certain real property situate and lying in the City of Martinsburg, Berkeley County, West Virginia, in the subdivision known as Martinsburg Station, and

WHEREAS, Seller and Buyer desire to amend the terms of the Agreement.

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6. Except as specifically modified by this Fifth Amendment, all terms and conditions set forth in the Agreement shall be applicable and shall remain in full force and effect. To the extent that any provision of this Fifth Amendment is inconsistent with or in conflict with the terms and conditions as set forth in the Agreement, the terms and conditions in this Fifth Amendment shall govern and control.

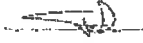
7. The individuals executing this Fifth Amendment represent and warrant that they have authority to execute this Fifth Amendment and bind their respective parties.

8. This Fifth Amendment may be executed in counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument. In the event that any signature is delivered by facsimile or e-mail delivery, such signature shall create a valid and binding obligation of the party executing it with the same force and effect as if such signature page were an original thereof.

**IN WITNESS WHEREOF**, the parties hereto, intending to be legally bound hereby, have executed this Fifth Amendment under seal on the date indicated above.

**SELLER:**

**OVERLAY I, LLC**

  
Digitally signed  
by Stephen J.  
Polachek  
Date: 2019.09.23  
16:40:26 -04'00' (SEAL)  
By: \_\_\_\_\_  
Stephen J. Polachek, Manager

**BUYER:**

**DAN RYAN BUILDERS WEST  
VIRGINIA, LLC**

By: \_\_\_\_\_ (SEAL)  
Matt Powell, Vice President

