

## **BUILD-OPERATE-TRANSFER AGREEMENT**

### **Road & Utility Infrastructure Project**

This Build-Operate-Transfer Agreement (Road & Utility Infrastructure Project) (the "Agreement") is executed this \_\_\_\_ day of \_\_\_\_\_, 2025, by and between Patch Development, LLC (the "Developer") and the Town of McCordsville Redevelopment Commission (the "Redevelopment Commission") to be effective as of the Closing Date.

#### **1. Definitions.**

**Accepted** shall mean the specific written finding by the Redevelopment Commission or the Town that the Project has been reviewed and inspected by an independent third party and certified as meeting all requirements contained in the final design plans and this Agreement.

**Acquisition Price** shall mean the purchase price for the acquisition of the Acquisition Property, and subject to adjustment pursuant to Section 7, \$4,500,000.

**Acquisition Property** shall mean the completed, inspected and accepted Project.

**Books and Records** shall mean all books and records pertaining to the acquisition of materials to construct, and the construction of the Project in accordance with this Agreement and the construction contract.

**BOT Payments** (or **BOT Payment** in the singular) shall mean payments comprised of a portion of the outstanding Acquisition Price made by the Redevelopment Commission to reimburse Developer for Project Costs as such Project Costs are incurred by Developer.

**BOT Transaction** shall mean the design, construction, operation, management, and/or maintenance of the Project.

**Change Order** shall mean a change order executed by Developer and the Redevelopment Commission finalizing the inclusion into the Final Plans of a change proposed in a Change Order Request, which change has been approved in writing by authorized representatives of both parties.

**Change Order Request** shall mean a written request for a change to the Final Plans made by the Redevelopment Commission or Developer for purposes of changing the scope of the Agreement.

**Claims** shall mean claims, judgments, damages, liabilities, injuries, losses, costs, and expenses (including, without limitation, attorneys' fees).

**Closing** shall mean the closing of the BOT Transaction between the Redevelopment Commission and the Developer.

**Closing Date** shall mean the date of the Closing.

**Construction Drawings** shall mean the final construction drawings consistent with the Design Development Documents and the Laws.

**Contractor** shall mean the entity that will be the general contractor or the construction manager in connection with the construction of the Project.

**Conveyance Closing** shall mean the closing with respect to the automatic conveyance of the completed Project to the Redevelopment Commission and/or the Town.

**Conveyance Closing Date** shall mean the date of the Conveyance Closing, which shall take place as soon as possible following and in any event not later than thirty (30) days after the Substantial Completion Date.

**Design Costs** shall mean all fees, costs, and expenses incurred by Developer in connection with design and planning services in connection with the Project.

**Design Development Documents** shall mean fully completed and detailed design development documents that are consistent with the Schematic Design Drawings and the Laws which are warranted to be sufficient to support a public-private agreement under I.C. 5-23 and a guaranteed maximum price of the Project.

**Developer** shall mean Patch Development, LLC.

**Event of Default** shall have the meaning set forth in Section 16.

**Final Inspection** shall mean an inspection of the Project by Redevelopment Commission or Town after substantial completion thereof.

**Final Plans** shall mean final Schematic Design Drawings, final Design Development Documents, final Construction Drawings, and the final Plan Schedule, as each is finalized and approved and accepted by the Redevelopment Commission pursuant to the Plan Refinement Process.

**Force Majeure** shall mean an unanticipated event or circumstance beyond the reasonable control of the applicable party and not solely caused by the fault or neglect of such party, including without limitation: war, riot, fire, conditions of the Acquisition Property adversely impacting the design or construction of the Project or the costs or time required therefor, inclement weather beyond that ordinarily expected in the area where the Acquisition Property is located for the applicable time of year, other acts of God or casualties to or impacting the Project, acts or inactions of governmental authorities, changes in permits or legal requirements, and delays agreed upon by the parties during the resolution of any claims or disputes related to the Project, provided that the impacted party shall take undertake commercially reasonable efforts to mitigate the effects of such events and has notified the other party promptly after discovery of the impact of Force Majeure on the Project.

**Inspection** shall mean a Permitted Inspection or the Final Inspection, as applicable.

**Latent Defect** shall mean Material Defects that: (a) are not discovered; or (b) reasonably are not discoverable; by Redevelopment Commission during a Permitted Inspection or the Final Inspection.

**Laws** shall mean all applicable: (a) laws, statutes, and/or ordinances; (b) governmental rules, regulations, and/or guidelines of or from: (i) governmental agencies, boards, commissions, or departments; and (ii) judicial, administrative, or regulatory bodies; and (c) judicial orders, consents, and/or decrees.

**Material Defect** shall mean any item or component of the Project that: (a) contains a defect in workmanship or materials; (b) deviates from the Final Plans; or (c) has not been constructed in accordance with the terms and conditions of this Agreement.

**Non-Compliance Notice** shall mean a written notice from Redevelopment Commission to Developer that identifies Material Defects discovered by Redevelopment Commission during a Permitted Inspection or the Final Inspection.

**P&P Bonds** shall mean surety bonds provided on behalf of Developer from a surety which is on the U.S. Department of Treasury certified list (<https://www.fiscal.treasury.gov/surety-bonds/list-certified-companies.html>) for the construction of the Project, with Redevelopment Commission named as the obligee, which shall specifically include: (a) a performance bond in the amount of 50% of the Acquisition Price; and (b) payment bond for 100% of the Acquisition Price; both issued on the AIA A312 - 2010 form or another form as may be approved by Redevelopment Commission.

**Payment Due Date** shall mean no later than thirty (30) business days after Redevelopment Commission receives an itemized invoice from Developer for reimbursement of Project Costs incurred by Developer.

**Permitted Inspection** shall mean an inspection by Redevelopment Commission or Town of any item or component of the Project when deemed to be necessary or appropriate by Redevelopment Commission or Town, respectively.

**Plan Refinement Process** shall mean the process set forth in Section 7 for completion of the Final Plans and the Project Budget.

**Plan Schedule** shall mean a fully detailed schedule for construction of the Project with which Developer shall prepare and provide to Redevelopment Commission, which schedule is attached hereto as Exhibit B.

**Project** shall mean the design, construction, and transfer of a new public road connecting W 500 N and Mt. Comfort Road through the property located at the northwest corner of North 600 West and West 500 North in the Town, together with all necessary onsite utility improvements (e.g., sanitary sewer mains, water mains, gas utilities, telecommunications systems, associated stormwater/detention systems) along the road to ensure the provisions of utility services to the area to enable the area to be utilized as a flex industrial park consisting of warehouse buildings ranging in size from 20,000 square feet to 100,000 square feet for business-to-business, warehousing and light industrial uses, and all related site work for construction thereof, in accordance with the Final Plans.

**Project Budget** shall mean the budget for the Project Costs, which budget is attached hereto as Exhibit E.

**Project Costs** shall mean the fees, costs, and expenses to be incurred in connection with the Project, including: (a) the costs incurred in connection with determining that all of the conditions set forth in Section 5 have been satisfied and/or will be waived by Developer and/or Redevelopment Commission; (b) the Design Costs; (c) the cost to develop and construct the Project in accordance with the terms and conditions of this Agreement; (d) a reasonable and customary amount for contingencies; and (e) the development and construction fees and overhead.

**Project Site** shall mean the real estate located in McCordsville, Indiana that is depicted generally on Exhibit A attached hereto and incorporated herein by reference.

**Redevelopment Commission** shall mean the Town of McCordsville Redevelopment Commission.

**Required Permits** shall mean all permits, licenses, approvals, and consents required by the Laws for the construction of the Project.

**Schematic Design Drawings** shall mean the detailed schematic design drawings for the Project, which drawings shall be consistent with the requirements of this Agreement and the Laws.

**Substantial Completion Date** shall mean the date, after the Final Inspection, on which: (a) all Material Defects noted in any properly given Non-Compliance Notice have been corrected; and (b) Developer delivers to Redevelopment Commission a copy of a certificate of substantial completion issued and executed by the architect or engineer for the Project indicating that the Project has been completed

substantially in accordance with the Final Plans, subject to “punch-list” items identified in connection with the Final Inspection, which “punch-list” items do not materially affect the use of the Project for its intended use.

**Town** shall mean the Town of McCordsville, Indiana.

**Transaction Documents** shall mean this Agreement and any other certificates and documents ancillary to the BOT Transaction.

**Transfer** shall mean: (a) any sale, transfer, conveyance, assignment, pledge, or other disposition of, or any encumbrance upon, the Project Site, the materials to construct the Project, or the Acquisition Property, or any interest in the foregoing; or (b) any granting of a security interest in the Project Site, the materials to construct the Project, or the Acquisition Property, other than to the Developer. Notwithstanding the foregoing, encumbrances created by the Transaction Documents or required by the terms and conditions of this Agreement shall not constitute Transfers.

## **2. General.**

(a) BOT Transaction. Subject to the terms and conditions of this Agreement:

(i) Each of Developer and Redevelopment Commission shall execute the Transaction Documents to which it is a party and satisfy its obligations under such Transaction Documents;

(ii) Developer shall construct the Project on the Project Site in accordance with the Plan Schedule and in accordance with the Construction Drawings; and

(iii) The Acquisition Price shall be used solely for the Redevelopment Commission to acquire the Project and reimburse the Developer for Project Costs.

(b) Conveyance. Subject to the terms and conditions of this Agreement: (i) Developer shall convey to Redevelopment Commission or the Town; and (ii) Redevelopment Commission shall purchase from Developer; title to the Acquisition Property for the Acquisition Price.

**3. Closing.** Subject to the terms and conditions of this Agreement, the Closing shall occur on or before \_\_\_\_\_, 2025. The Closing Date shall be established mutually by Developer and Redevelopment Commission, and the Closing shall take place at such location as Developer and Redevelopment Commission mutually agree.

**4. Closing Documents.** At the Closing, the documents and instruments set forth in this Section shall be executed and/or delivered.

(a) the Transaction Documents;

(b) copies of such resolutions, consents, authorizations, and other evidence as either party reasonably may request to establish that: (i) the persons executing and delivering the foregoing documents have been empowered and authorized by all necessary action of Developer or Redevelopment Commission, as the case may be; and (ii) the execution and delivery of such documents, and the performance by Developer or Redevelopment

Commission of its obligations hereunder and under the foregoing documents, have been authorized by Developer or Redevelopment Commission, as the case may be; and

(c) such other customary documents and instruments as the Redevelopment Commission may reasonably request in connection with the Closing.

## **5. Conditions.**

(a) Mutual. Except to the extent waived by proceeding to the Closing, the obligation of each of Developer and Redevelopment Commission to proceed to the Closing is subject to the satisfaction, as of the Closing Date, of the conditions set forth in this Subsection.

(i) Developer has obtained, or Developer and Redevelopment Commission are satisfied that Developer will be able to obtain, all Required Permits, if any.

(ii) The Final Plans and the Project Budget have been completed pursuant to the Plan Refinement Process, and either: (A) the budgeted Project Costs do not exceed the Acquisition Price; or (B) the budgeted Project Costs exceed the Acquisition Price and Redevelopment Commission has provided to Developer the written agreement contemplated pursuant to Subsection 7(e).

(iii) Developer and Redevelopment Commission have agreed to the form and substance of the Transaction Documents, and each of Developer and Redevelopment Commission has determined, in the exercise of its reasonable discretion, that they are prepared to close the BOT Transaction on the Closing Date.

(iv) Redevelopment Commission has adopted all necessary resolutions authorizing the execution of, and the performance of its obligations under the documents contemplated by this Agreement to be executed by it, which shall include, without limitation, a resolution awarding the Project to Developer.

(v) Developer has made a finding that there are no conditions with respect to the Project Site that will interfere with, or prohibit, construction of the Project in accordance with its obligations or the terms and conditions of this Agreement.

(b) Developer. In addition to the conditions set forth in Subsection 5(a), the obligation of Developer to proceed to the Closing is subject to the condition that: (i) there is no continuing breach by Redevelopment Commission of this Agreement; and (ii) all of the representations and warranties of Redevelopment Commission set forth in Section 6 are true and accurate in all respects.

(c) Redevelopment Commission. In addition to the conditions set forth in Subsection 5(a), the obligation of Redevelopment Commission to proceed to the Closing is subject to the condition that: (i) there is no continuing breach by Developer of this Agreement; and (ii) all of the representations and warranties of Developer set forth in Section 6 are true and accurate in all respects.

(d) Condition Failure. If one or more of the conditions set forth in this Section is not, or cannot be, timely and completely satisfied, then, as its sole and exclusive remedy, the applicable party either may elect to: (a) waive satisfaction of the conditions and proceed to Closing; or (b) terminate this Agreement by a written notice to the other party; provided that, with respect to breaches of this Agreement by a party, the other party shall have the rights and remedies set forth in Section 17.

Notwithstanding anything to the contrary set forth herein, Developer and Redevelopment Commission shall work diligently and in good faith to satisfy the conditions set forth in this Section.

**6. Representations.** Each of Redevelopment Commission and Developer represents and warrants that:

- (a) it has: (i) the power and authority, and has been authorized by proper action, to enter into this Agreement and perform its obligations hereunder; (ii) the power and authority to carry out all transactions contemplated by this Agreement; and (iii) complied with the Laws in all matters relating to such transactions;
- (b) neither the execution and delivery of this Agreement by it, nor the performance by it of its obligations hereunder: (i) violates any Law or the terms and conditions of any indenture, material agreement, or other instrument to which it is a party, or by which it or any of its properties or assets is bound; (ii) conflicts with, results in a breach of, or constitutes a default under any such indenture, agreement, or other instrument; or (iii) results in the creation or imposition of any prohibited lien, charge, or encumbrance of any nature upon any of its properties or assets;
- (c) Under this BOT Transaction, the Developer (i) is acting solely for its own account, and not as a municipal advisor, financial advisor, agent, or fiduciary to the Redevelopment Commission; (ii) is not acting as a municipal advisor, underwriter, or placement agent in connection with this Agreement; and (iii) has not given "advice" within the meaning of Section 15B of the Securities and Exchange Act of 1934;
- (d) this Agreement is a contractual Build-Operate-Transfer Agreement under Indiana Code § 5-23 and is not a municipal or other securities offering;
- (e) this Agreement, once executed, will be its legal, valid, and binding obligation;
- (f) it shall not enter into any contracts or undertakings that would limit, conflict with, or constitute a breach of this Agreement; and
- (g) it has discussed the representations contained herein with such legal, accounting, tax, financial, and other advisors as it has deemed appropriate.

In addition to the foregoing: (a) Redevelopment Commission represents and warrants that: (i) it is a public body organized and existing under the laws of the State of Indiana; and (ii) to the best of its knowledge, there is not now, and there has not been, any contamination or pollution of the Project Site or any groundwater thereunder by any hazardous waste, material, or substance in violation of any Laws, except as may be disclosed in any property information provided by Redevelopment Commission to Developer; and (b) Developer represents and warrants that it is a limited liability company duly formed, organized, and validly existing under the laws of the State of Indiana with sufficient financial resources at its disposal to complete and deliver the Project to the Redevelopment Commission and the Town in accordance with the Final Plans.

**7. Plan Refinement Process.**

- (a) Approvals. In accordance with the Plan Schedule, Developer, at its cost and expense, shall submit to Redevelopment Commission for its approval the Schematic Design Drawings, the Design Development Documents, and the Construction Drawings. Developer, at its cost and expense, shall submit to Redevelopment Commission for its approval a written detailed summary of any claimed adjustments to the Project Budget due to changes to the

Project initiated by Redevelopment Commission. The Developer shall prepare the Plan Schedule in accordance with this Agreement and to meet the Substantial Completion Date. The time limits identified in the Plan Schedule are of the essence. Within thirty (30) days after Redevelopment Commission receives the Schematic Design Drawings, Design Development Documents, the Construction Drawings or Plan Schedule from Developer, Redevelopment Commission shall deliver to Developer written notice of approval or rejection; provided that, in the case of a rejection, such notice shall: (i) specify the part or parts that Redevelopment Commission is rejecting; and (ii) include the specific basis for such rejection. Any agreed upon adjustments to the then-current Project Budget as a result of proceeding through the Plan Refinement Process shall not be of effect until delivered to Redevelopment Commission and promptly documented by Change Order after which they shall be reflected in an updated Project Budget delivered to the Redevelopment Commission. Upon approval of the Schematic Design Drawings, the Design Development Documents, the Construction Drawings, and the Plan Schedule by the Redevelopment Commission and Developer, such Schematic Design Drawings, Design Development Documents, Construction Drawings and Plan Schedule, respectively, shall be final, subject to modifications only by Change Orders.

(b) Construction Drawings. In accordance with the Plan Schedule, Developer, at its cost and expense, shall submit to Redevelopment Commission for its review and approval the Construction Drawings with respect to each trade or other discrete aspect of construction of the Project. Thereafter, such Construction Drawings shall be final construction drawings with respect to the applicable trade or other discrete aspect of construction, subject to modifications only by Change Orders.

(c) Re-submissions. If, at any stage of the Plan Refinement Process, Redevelopment Commission rejects any drawings, documents, or schedules, then, within ten (10) days after Developer receives notice from Redevelopment Commission of such rejection, Developer shall cause such drawings or documents to be revised, and submit to Redevelopment Commission, the applicable drawings and documents. Within thirty (30) days after Redevelopment Commission receives the resubmitted drawings and documents, Redevelopment Commission shall deliver to Developer written notice of approval or rejection and a revised Plan Schedule, if necessary, for Developer's approval; provided that, in the case of a rejection, such notice shall: (i) specify the part or parts that Redevelopment Commission is rejecting; and (ii) include the specific basis for such rejection. Upon approval of the resubmitted drawings, documents, or schedules by the Redevelopment Commission and the Developer, the resubmitted drawings, documents, or schedules shall become part of the Final Plans, subject to modifications only by Change Orders.

(d) [reserved].

(e) Budget/Costs. Developer has delivered the Project Budget to Redevelopment Commission for its review and approval, which Project Budget currently reflects total Project Costs in the amount of the Acquisition Price. Developer shall make such adjustments to the Project Budget as are determined by Developer and Redevelopment Commission to be necessary or appropriate in connection with the finalization of the drawings, documents, and schedules pursuant to the Plan Refinement Process or, after the Final Plans are complete, in connection with any change documented by a Change Order. If: (i) Developer and Redevelopment Commission agree that an adjustment to the Project Budget is necessary and appropriate; and (ii) the result of such adjustment is that the aggregated Project Costs will exceed the Acquisition Price; then Redevelopment Commission shall agree in writing that the Project Costs in excess of the Acquisition Price shall be added to the Acquisition Price. In no event shall the Acquisition Price be increased or decreased without written approval from the Redevelopment Commission.

(f) Sales Tax.

(i) Upon the reasonable request of the Developer, the Redevelopment Commission shall deliver to Developer Indiana Department of Revenue Form ST-105 (General Sales Tax Exemption Certificate), pursuant to which Redevelopment Commission shall represent that the acquisition of the materials to construct and to be incorporated into the Project is exempt from Indiana sales and use tax.

(ii) Upon any assessment, or threatened assessment, of Indiana sales and/or use tax in connection with the purchase of any materials to construct, install, and incorporate into the Project, Developer (or the Contractor, pursuant to the terms and conditions of the construction contract) shall promptly notify Redevelopment Commission in writing. From and after receipt of the foregoing notice, Redevelopment Commission may provide such cooperation, information, and assistance as Developer and/or the Contractor may reasonably request.

**8. Change Orders.**

(a) Developer Changes. If Developer desires to make any changes to the Final Plans, then Developer shall submit a Change Order Request to Redevelopment Commission for review and approval, together with an estimate of any increases to the approved Project Budget that would result from the change proposed in the Change Order Request. Within fifteen (15) days after Redevelopment Commission receives the Change Order Request, Redevelopment Commission shall deliver to Developer written notice that it approves or rejects the Change Order Request, provided that: if Redevelopment Commission approves a Change Order Request for a change that would result in an increase in the Project Budget, then the amount of such increase shall be included in the Acquisition Price; Notwithstanding the following, if the Redevelopment Commission fails to respond to the Change Order Request within fifteen (15) days of receipt, the Change Order Request is deemed denied.

(b) Redevelopment Commission Changes.

(i) If Redevelopment Commission desires to make any changes to the Final Plans, then Redevelopment Commission shall submit a Change Order Request to Developer for review and approval. Within ten (10) business days after Developer receives the Change Order Request, Developer shall deliver to Redevelopment Commission written notice stating whether the change proposed in the Change Order Request would result in an increase in the Project Budget; provided that, if the proposed change would result in an increase, then such notice also shall include an estimate of the amount of the increase.

(ii) If the foregoing notice states that the change proposed in the Change Order Request would not result in an increase in the Project Budget, then, within five (5) business days after delivery of such notice, Developer shall deliver to Redevelopment Commission written notice that it approves or rejects the Change Order Request; provided that Developer shall not withhold its approval unreasonably.

(iii) If the foregoing notice states that the change proposed in the Change Order Request would result in an increase in the Project Budget, then: (A) such notice also shall include an estimate of the amount of the



increase; and (B) within ten (10) business days after receipt of such notice, Redevelopment Commission shall provide written notice to Developer as to whether Redevelopment Commission would like to withdraw the Change Order Request. If Redevelopment Commission does not elect to withdraw the Change Order Request, then, within five (5) additional business days, Developer shall deliver to Redevelopment Commission written notice that it approves or rejects the Change Order Request, provided that Developer shall not withhold its approval unreasonably.

(iv) If Developer approves a Change Order Request from Redevelopment Commission, then Developer and Redevelopment Commission shall execute a Change Order. If the approved Change Order Request is for a change that will result in the Project Budget reflecting Project Costs in excess of the Acquisition Price, then, notwithstanding anything to the contrary herein, the amount of such excess shall be included in the Acquisition Price. (v) If Developer rejects all or any part of the Change Order Request, then such notice shall: (A) specify the part or parts that Developer is rejecting; and (B) include the specific basis for such rejection.

(c) A change in the Project Budget, Acquisition Price and/or Plan Schedule shall be accomplished only by a Change Order. No course of conduct or dealings between the parties, nor express or implied acceptance of alterations or additions to the work, and no claim that the Redevelopment Commission has been unjustly enriched by an alteration or addition to the work, whether or not there is any unjust enrichment to the work, shall be the basis of any claim for an increase in any amounts due under the Agreement or a change in any time period provided in the Agreement. The Developer specifically agrees that if it proceeds with an oral order to change the work, it shall waive any claim for additional compensation or additional time for such work and the Developer shall not be excused from compliance with the Agreement.

(d) Unless otherwise specifically stated in the Change Order, agreement on any Change Order shall constitute a full, final, and complete waiver and settlement of any and all claims, demands, and causes of action that Developer has, or may have in the future, arising out of or relating to the Change Order and the occurrences, acts, omissions, or events upon which the Change Order is based. Notwithstanding the foregoing, any Change Order shall not limit or have the effect of limiting any rights and remedies afforded to the Redevelopment Commission regarding defective work and/or warranty obligations.

## **9. Construction.**

(a) Permits. Prior to commencing construction of the Project and consistent with the time limit identified in the Plan Schedule, Developer, at its sole cost and expense, shall obtain and submit to Redevelopment Commission the Required Permits, if any, for the Redevelopment Commission's review.

(b) Construction. Developer shall construct the Project and warrants to Redevelopment Commission that such construction of the Project shall be: (i) in a good and workmanlike manner; (ii) in accordance with the Final Plans (as modified by any Change Orders) and the terms and conditions of this Agreement; and (iii) in compliance with the Laws and the Required Permits, if any. Developer shall construct the Project in accordance with the Plan Schedule (as modified by any approved and executed Change Orders) and the Construction Drawings (as modified by any approved and executed Change Orders), and such time limits identified in the Plan Schedule are of the essence.

(c) BOT Payments shall be disbursed to Developer in accordance with this Agreement to reimburse Developer for Project Costs.

(d) [Reserved].

(e) Records. Developer shall keep and maintain true, correct, accurate, and complete Books and Records. All Books and Records shall be kept and maintained in accordance with generally accepted accounting principles consistently applied. Redevelopment Commission and its members, attorneys, accountants, representatives, architects, engineers, and consultants at all reasonable times shall have: (i) free access to, and rights of inspection of, the Books and Records; and (ii) the right to audit, make extracts from, and receive from Developer originals or accurate copies of, the Books and Records.

(f) Safety. Developer shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of its obligations under the Agreement and shall be in full compliance with all Laws. Developer shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury, or loss to: (i) employees constructing the Project and other persons who may be affected thereby; (ii) the work and materials and equipment to be incorporated into the Project, whether in storage on or off the Project Site, under care, custody, or control of Developer or Developer's Contractor or subcontractors; and (iii) other property at the Project Site adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation, or replacement in the course of construction. Developer shall comply with and give notices required by applicable Laws bearing on safety of persons or property or their protection from damage, injury, or loss. Developer shall erect and maintain, as required by existing conditions and performance of its obligations under this Agreement, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations, and notifying owners and users of adjacent sites and utilities. Developer shall promptly remedy damage and loss to the Project or adjacent property caused in whole or in part by Developer, the Contractor, a subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable, except damage or loss attributable to the gross negligence or intentional misconduct of Redevelopment Commission.

(g) Twelve Month Correction Period. If a Material Defect is discovered in the Project within twelve (12) months of the Substantial Completion Date, Developer shall, unless and to the extent Developer shall have delivered a twelve month maintenance bond in connection the conveyance of the Acquisition Property, correct or cause the correction of such Material Defect promptly after being provided notice thereof by Redevelopment Commission, without any cost to Redevelopment Commission. The period for correction of Material Defects as stated herein shall not establish a statute of limitation or otherwise limit or restrict the period in which Redevelopment Commission may enforce Developer's other obligations under this Agreement, including but not limited to Developer's warranties under Subsection 9(b).

## **10. Inspection.**

(a) Inspection. Upon reasonable written notice delivered to Developer, which notice shall specify the portion of the construction to be inspected, Town may perform an inspection of any item or element of the Project; provided that, in connection therewith, Town shall: (i) comply with all health and safety rules of which Town has been informed that have been established for personnel present on the Project Site; and (ii) coordinate the inspection so that it does not interfere with the performance of construction by Developer. Developer shall have the right to accompany, and/or to have its construction

manager accompany, Town during any such inspection.

(b) Final Inspection. Developer shall deliver to Redevelopment Commission a written request for the Final Inspection of the Project at least fifteen (15) business days prior to the anticipated Substantial Completion Date. On or before the date that is fifteen (15) business days after receipt by Redevelopment Commission of such request; Redevelopment Commission shall: (i) conduct the Final Inspection; and (ii) deliver to Developer, if applicable, a Non-Compliance Notice. Upon: (i) correction of all Material Defects identified in the Non-Compliance Notice; or (ii) deemed acceptance pursuant to Subsection 10(c); Redevelopment Commission shall have no further inspection rights pursuant to this Agreement with respect to the Project. Within fifteen (15) business days after Redevelopment Commission conducts the Final Inspection, Developer and Redevelopment Commission shall identify the "punch-list" items. Developer shall complete all "punch-list" items within thirty (30) days after the "punch-list" items are identified. Time is of the essence for completion of all punch-list items.

(c) Non-Compliance. If Redevelopment Commission delivers to Developer a Non-Compliance Notice following an Inspection in accordance with this Section, then Developer shall correct, as soon as is practicable, all Material Defects identified in the Non-Compliance Notice, except and to the extent that any such Material Defects have been accepted or deemed to have been accepted, by Redevelopment Commission. All items or components of the Project with respect to which: (i) an Inspection is conducted; and (ii) no Material Defects are identified in a Non-Compliance Notice within thirty (30) days; shall be deemed to be accepted by Redevelopment Commission or the Town, as applicable.

(d) Latent Defects. Notwithstanding anything to the contrary set forth herein, no acceptance, or deemed acceptance, by Redevelopment Commission pursuant to this Section shall be applicable with respect to any Latent Defects.

(e) General.

(i) In connection with any Inspection pursuant to this Section, Redevelopment Commission shall: (A) comply with all health and safety rules of which Redevelopment Commission has been informed that have been established for personnel present on the construction site; and (B) coordinate the inspections so that the inspections do not interfere with the performance of construction. Developer shall have the right to accompany, and/or have its construction manager accompany, Redevelopment Commission during any Inspection.

(ii) Notwithstanding anything to the contrary in this BOT Agreement, an acceptance, or deemed acceptance, by Redevelopment Commission pursuant to this Section shall not mean that Redevelopment Commission has accepted, or Developer has been relieved of, responsibility for: (A) compliance with the Laws; (B) the proper application of construction means or methods; (C) correcting any portion of the Project if it is later determined that such portion is inconsistent with the proper completion of a subsequent portion of the Project; (D) any Latent Defects; or (E) any work or materials not in accordance with this Agreement.

**11. Bonds and Insurance.** During construction of the Project, Developer shall maintain the policies of insurance reflected on the certificate attached hereto as Exhibit C. Each such policy shall be written by a company reasonably acceptable to Redevelopment Commission, and Developer shall provide to Redevelopment Commission notice of any intended modification to, or cancellation of, such policy at least 30 days in advance. The policy of general liability insurance required by this Section to be maintained by Developer shall name Town and Redevelopment Commission as additional insureds and such coverage shall be primary and non-contributory. Prior to commencement of the work and as otherwise requested by

the Redevelopment Commission, Developer shall deliver to Redevelopment Commission certificates of the insurance policies required by this Section, executed by the insurance company or the general agency writing such policies. Developer shall procure and maintain casualty insurance covering the Project in the amount of the Acquisition Price. Upon and after the Substantial Completion Date, Developer shall have no obligation to maintain any policies of insurance with respect to the Project. P&P Bonds shall be obtained for the Project pursuant to Indiana statute. Developer shall provide the P&P Bonds to Redevelopment Commission prior to commencement of any construction activities at the Project Site. Notwithstanding the obligation of Developer to provide the P&P Bonds as provided for in this Agreement, Developer also has an affirmative obligation to timely pay all subcontractors, suppliers, and laborers and to take all other action necessary to prevent the filing of mechanics or other liens on the Project Site, including defending and indemnifying the Town and Redevelopment Commission from any costs, including attorneys' fees, incurred due to Developer's failure to meet this obligation.

## **12. Conveyance.**

(a) Completion. On the Conveyance Closing Date, Developer shall: (i) provide as-built record drawings to Redevelopment Commission and grant the Redevelopment Commission a perpetual license to use such drawings in the use, occupancy, operation, maintenance, repair, alteration, and additions to the Project; (ii) provide to Redevelopment Commission the warranties, if any, for the Project issued by the Contractor and its subcontractors, suppliers, and manufacturers in favor of Redevelopment Commission; (iii) provide to Redevelopment Commission operating manuals, if any, for the Project; and (iv) execute a certificate substantially in the form attached hereto as Exhibit D.

(b) Conveyance. Upon Substantial Completion of the Project, the Acquisition Property shall automatically transfer to the Redevelopment Commission or the Redevelopment Commission's designee (including the Town). After the Conveyance Closing, this Agreement and all the rights of the parties hereunder shall remain in full force and effect for a period of twelve (12) months, after such time this Agreement shall automatically terminate. The total Acquisition Price shall be paid by the Redevelopment Commission to the Developer on or before the Conveyance Closing. Redevelopment Commission shall be responsible for all costs and expenses incurred in connection with the acquisition of the Acquisition Property, including, without limitation: (i) costs to obtain all surveys, title searches, abstracts, and/or title policies deemed by Redevelopment Commission to be necessary or appropriate; and (ii) Redevelopment Commission's attorneys' fees and closing costs. Upon the receipt of a written request from Redevelopment Commission, Developer shall execute any and all documents that are reasonably necessary to effectuate the Conveyance Closing on the Conveyance Closing Date.

## **13. Acquisition Property-Payments.**

(a) Reserved.

(b) Payment.

(i) At least thirty (30) business days prior to the Payment Due Date, Developer shall deliver to Redevelopment Commission an itemized invoice setting forth: (A) the amount of money incurred by Developer for Project Costs to date and the total amount required to be paid as the BOT Payment and (B) the remaining balance of the Acquisition Price;

and

(ii) On the Payment Due Date, Redevelopment Commission shall pay the BOT Payment directly to the Developer.

(c) Payment Conditions. Except as set forth in Section 17, the obligation of Redevelopment Commission to pay the BOT Payments shall not be subject to reduction, whether by offset or otherwise. The foregoing shall not be deemed to affect the right of Redevelopment Commission, during the continuance of an Event of Default, to assert a claim against, and recover any resulting damages from, Developer and the surety providing the P&P Bonds. In no event shall payment by Redevelopment Commission of any BOT Payments be construed as a waiver of any rights or claims that Redevelopment Commission may have against Developer and its surety under this Agreement, the P&P Bonds, or the Laws.

(d) Payment Source. The Acquisition Price is payable from such funds of Redevelopment Commission that may legally be used to pay the Acquisition Price, including, but not limited to, the proceeds of Redevelopment District Bonds approved by the Redevelopment Commission for such purpose.

**14. Redevelopment Commission Covenants.** The covenants set forth in this Section shall apply at all times during the term of this Agreement.

(a) Agreement Compliance. Redevelopment Commission: (i) shall pay the BOT Payments in conformity with the terms of this Agreement; and (ii) shall faithfully observe and perform all of its obligations under this Agreement.

(b) Other Contract Compliance. Redevelopment Commission shall: (i) not take, or fail to take, any action under any contract, if the effect of such act or failure to act would materially impair or adversely affect the ability of Redevelopment Commission to pay the BOT Payments; and (ii) observe and perform all of its obligations under all other contracts affecting or involving the Project to which Redevelopment Commission is a party.

(c) [Reserved]

(d) Protection. Redevelopment Commission shall: (i) preserve and protect the security hereof, and the rights of Developer, with respect to receipt of the BOT Payments; and (ii) warrant and defend such rights against all claims and demands of all persons during such time.

(e) Assurances. Redevelopment Commission shall adopt such resolutions, execute and deliver such instruments, and make any and all further assurances as reasonably may be necessary or proper: (i) to carry out the intention of this Agreement; (ii) to facilitate the performance of this Agreement; and/or (iii) in connection with assuring and confirming the rights and benefits provided to Developer.

**15. Developer Covenants.**

(a) Filings. Developer shall keep in full force and effect, without any violations by Developer, any and all filings or registrations required by the Laws in connection with: (i) the performance by Developer of its obligations under the Transaction Documents; (ii) the acquisition of the materials to construct, and/or the construction of, the Project in accordance with this Agreement; or (iii) the sale of the Acquisition Property to Redevelopment Commission in accordance with this Agreement.

(b) No Liens. At all times prior to conveyance of the Acquisition Property to Redevelopment Commission, Developer shall, to the extent the lien claim does not result from the Redevelopment Commission's failure to make payment when due: (i) keep the materials to construct the Project free from any and all liens, claims, security interests, encumbrances, and restrictions, excepting only: (A) those existing on the Closing Date or resulting from compliance with this Agreement and/or the Transaction Documents; and (B) the lien of current real estate taxes not delinquent; and (ii) defend such materials against the claims and demands of others. If any mechanic's, supplier's, or similar lien is filed against the Project Site, the Acquisition Property, or the materials to construct the Project, for work claimed to have been done for, or materials claimed to have been furnished to, Developer, then Developer shall cause such mechanic's, supplier's, or similar lien to be discharged of record within thirty (30) days after notice of the filing by bonding or providing other adequate security therefor, or as provided or required by the Laws, so long as such lien does not result from the Redevelopment Commission's failure to make payment when due. All expenses incurred by the Developer in bonding, defending against, paying, or settling any such lien claim shall not be included in the Project Budget or Acquisition Price, and the Developer shall be responsible for any such expenses, including attorneys' fees.

(c) Laws. Developer shall comply with all Laws in the performance of its obligations under this Agreement and the Transaction Documents.

(d) No Transfer. Except as permitted by the Transaction Documents, Developer shall not undertake, permit, or cause a Transfer.

(e) Developer Interests. Prior to conveyance of the Acquisition Property to Redevelopment Commission, Developer: (i) shall not change its name; (ii) shall not: (A) merge into, or consolidate with, any other entity, or otherwise reorganize; (B) sell, convey, or transfer to any person any interest in Developer; and/or (C) otherwise permit any change in the directors of Developer or the percentage of ownership in Developer; (iii) shall notify Redevelopment Commission in writing of any change of the nature specified in the foregoing clause (ii); and (iv) shall not grant any security interest in any interest in Developer or any director thereof.

(f) No Amendments. Prior to conveyance of the Acquisition Property to Redevelopment Commission, Developer shall not: (i) amend, modify, or restate the articles of organization or bylaws of Developer; (ii) cause or permit any such amendment, modification, or restatement; or (iii) be dissolved, wound up, or converted to another type of entity, or have its existence as a limited liability company terminated.

(g) Business. Prior to conveyance of the Acquisition Property to Redevelopment Commission, Developer shall not make or permit to be made any material change in the character of its business as currently conducted.

(h) Performance. Developer is able to fully perform all of its obligations under this Agreement and complete the Project pursuant to the Final Plans.

**16. Events of Default.** Each of the following shall be deemed to be an "Event of Default" by Developer or Redevelopment Commission, as applicable:

(a) the failure to pay any amount when due hereunder, after receipt of fourteen (14) days' advance written notice and opportunity to cure, including, without limitation, the failure by Redevelopment Commission to pay the BOT Payment on the applicable Payment Due Date;

(b) the failure to observe or perform any term or condition of this Agreement to be observed or performed by it (other than the payment of any amount due hereunder), which failure is not cured within thirty (30) days after receipt by the defaulting party of written notice specifying the nature of the failure; provided that, if the failure is of such a nature that it cannot be remedied within thirty (30) days, despite the exercise of reasonably diligent efforts, then the 30-day period shall be extended as reasonably may be necessary for the defaulting party to remedy the failure, so long as the defaulting party: (i) commences to remedy the failure within the 30-day period; and (ii) diligently pursues such remedy to completion;

(c) the filing or commencement of any bankruptcy or similar proceeding by or against including, without limitation: (i) the filing of a petition for arrangement or reorganization; (ii) the appointment of a receiver for all or a substantial portion of the party's property; or (iii) the assumption of custody or control of a party or any of its property by a court of competent jurisdiction pursuant to any Law for the relief or aid of debtors; provided that, if any of the foregoing are filed, appointed, assumed, or otherwise commenced against a party without its consent, then there shall not be an Event of Default unless and until such filing, appointment, assumption, or other commencement remains in effect and/or active in excess of 45 days;

(d) becoming insolvent or generally unable to pay its debts as they become due; and

(e) the occurrence of any of the circumstances set forth in Section 16(c) or 16(d) with respect to Developer if such occurrence is prior to the Conveyance Closing Date.

## **17. Remedies.**

(a) Remedies.

(i) During the continuance of an Event of Default, each non-defaulting party may take such actions at law or in equity as are necessary or appropriate to: (i) collect any amounts due from the defaulting party under this Agreement; (ii) protect the rights granted to the non-defaulting party under this Agreement; (iii) enforce the performance or observance by the defaulting party of any term or condition of this Agreement (including, without limitation, through the exercise of the equitable remedies of injunction and/or specific performance); or (iv) cure, for the account of the defaulting party, any failure of the defaulting party to perform or observe a material term or condition of this Agreement to be performed or observed by it (including, without limitation, procuring on behalf of the defaulting party any required policy of insurance that the defaulting party has failed to maintain); provided that no cure undertaken by a non-defaulting party shall be construed to be a waiver of the Event of Default.

(ii) Except to the extent provided to the contrary by the Laws, a non-defaulting party is not required to give notice to the defaulting party prior to exercising its remedies during the continuance of an Event of Default.

(iii) To the extent that Developer has committed an Event of Default as defined in Section 16 herein, Redevelopment Commission shall have the right to suspend payments to Developer for ongoing or future Project Costs until Developer remedies its failure without Redevelopment Commission being deemed to be in breach of this Agreement

(b) No Remedy Exclusive. No right or remedy herein conferred upon, or reserved to, a non-defaulting party is intended to be exclusive of any other available right or remedy, unless otherwise expressly stated; instead, each and every such right or remedy shall be

cumulative and in addition to every other right or remedy given under this Agreement or now or hereafter existing at law or in equity.

(c) **No Waiver.** None of: (i) a waiver by the non-defaulting party of an Event of Default; (ii) a delay in the exercise (or the failure to exercise) by a non-defaulting party of any right or remedy with respect to an Event of Default; or (iii) the acceptance by Developer of all or any portion of the Acquisition Price during the continuance of an Event of Default by Redevelopment Commission; shall be deemed to: (i) constitute a waiver of the current or any subsequent Event of Default; (ii) release or relieve the defaulting party from performing any of its obligations under this Agreement; or (iii) constitute an amendment or modification of this Agreement.

(d) **Damages.** A non-defaulting party may recover from the defaulting party all costs and expenses (including, without limitation, reasonable attorneys' fees and court costs) that the non-defaulting party incurs: (i) by reason of any Event of Default by the defaulting party; and/or (ii) in connection with exercising its rights and remedies with respect to any Event of Default. All such amounts shall be due and payable by the defaulting party immediately upon receipt of written demand from the non-defaulting party, and the obligation of the defaulting party to pay such amounts shall survive the acquisition by the Redevelopment Commission of the Acquisition Property.

**18. Notice.** Any notice required or permitted to be given by either party to this Agreement shall be in writing, and shall be deemed to have been given when: (a) delivered in person to the other party; or (b) sent by national overnight delivery service, with confirmation of receipt, addressed as follows: to Developer at 6950 E. 96<sup>th</sup> Street, Fishers, Indiana 46038, Attn: Andrew Greenwood; to Redevelopment Commission at 6280 Vail Road, McCordsville, Indiana 46055, Attn: Town Manager. Either party may change its address for notice from time to time by delivering notice to the other party as provided in this Section.

**19. Assignment.** Neither of Developer or the Redevelopment Commission shall assign this Agreement without the prior written consent of the other parties. Notwithstanding any consent granted by the parties, the assigning party shall remain liable to perform all of, and shall not be released from the performance of, its obligations hereunder.

**20. Indemnification.**

(a) **Mutual.** Each party shall, to the extent permitted by law, indemnify and hold harmless the other party from and against any and all Claims arising from, or connected with: (i) the indemnifying party's negligence or willful misconduct (or the negligence or willful misconduct of any party acting by, under, through, or on behalf of it); and/or (ii) any default by the indemnifying party under this Agreement.

(b) **Individual.**

(i) Developer shall indemnify and hold harmless the Redevelopment Commission from and against any and all Claims arising from, or in connection with, construction of the Project.

(ii) Redevelopment Commission shall, to the extent permitted by law, indemnify and hold harmless Developer from and against any and all Claims arising from, or in connection with, any inspection of the Project conducted by or on behalf of Redevelopment Commission.

The indemnification obligations of the parties under this Subsection shall survive the termination of this Agreement.



**21. Force Majeure.** Notwithstanding anything to the contrary set forth in this Agreement, if either party is delayed in, or prevented from, observing or performing any of its obligations (other than the obligation to pay money) under, or satisfying any term or condition of, this Agreement as a result of Force Majeure; then: (a) the party asserting Force Majeure shall deliver written notice to the other party within seven (7) days after the occurrence of the event that is the basis of the Force Majeure assertion; (b) such observation, performance, or satisfaction shall be excused for the period of days that such observation, performance, or satisfaction is delayed or prevented; and (c) the deadlines for observation, performance, and satisfaction, as applicable, shall be extended for the same period. Failure to provide timely notice as required by this Section 21 is a waiver of all such claims. Notwithstanding anything contained in this Agreement to the contrary, Developer acknowledges that (i) the Project Budget, Acquisition Price, and Plan Schedule were agreed upon based on its evaluation of the work and Project, including any potential issues and conditions that may arise during the time that Developer and/or its subcontractors are performing the work and (ii) the Project Budget, Acquisition Price, and Plan Schedule include amounts for delay, material cost escalations, and other effects directly or indirectly resulting from known or reasonably foreseeable conditions, including, but not limited to, current market conditions whether existing as of the date of this Agreement or reasonably foreseeable to a prudent general developer or contractor as of the date of this Agreement (collectively, the "Anticipated Conditions"). Developer agrees that it shall not be entitled to a change in the Project Budget, Acquisition Price, and Plan Schedule from the Redevelopment Commission arising from or in connection with any Anticipated Conditions unless the Redevelopment Commission approves the same in accordance with the terms and conditions of the Agreement. Developer acknowledges the Project Budget and Acquisition Price anticipate all potential material cost escalations which may occur prior to Substantial Completion and, accordingly, Developer agrees it is not entitled to any increase in the Project Budget or Acquisition Price for such price escalation but may be entitled to an extension of the Plan Schedule if not the result of Anticipated Conditions.

**22. BOT Statute.** This Agreement is intended to be a "public-private agreement" authorized by Indiana Code §5-23. If and to the extent this Agreement is not such a "public-private agreement", then this Agreement shall be deemed to: (a) include such terms not otherwise included; and (b) exclude such terms not otherwise excluded; as is necessary to cause this Agreement to be a "public-private agreement".

**23. Miscellaneous.** Subject to Section 19, this Agreement shall inure to the benefit of, and be binding upon, Developer and the Redevelopment Commission, and the respective successors and assigns of each. This Agreement (a) constitutes the entire agreement between Developer and the Redevelopment Commission with respect to the subject matter hereof, and may be modified only by a written agreement executed by all parties; (b) shall be governed by, and construed in accordance with, the laws of the State of Indiana; and (c) may be executed in separate counterparts, each of which shall be an original, but all of which together shall constitute a single instrument. The invalidity, illegality, or unenforceability of any one or more of the terms and conditions of this Agreement shall not affect the validity, legality, or enforceability of the remaining terms and conditions hereof. All Exhibits to this Agreement are attached hereto and incorporated herein by reference.

**[Signature Page Follows]**

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date set forth in the introductory paragraph hereof.

PATCH DEVELOPMENT, LLC

By: \_\_\_\_\_  
Patrick Chittenden, Manager

TOWN OF MCCORDSVILLE  
REDEVELOPMENT COMMISSION

By: \_\_\_\_\_  
Alex Jordan, President

Attested by:

\_\_\_\_\_  
Larry J. Longman, Secretary

## **INDEX TO EXHIBITS**

Exhibit A	Depiction of Project Site
Exhibit B	Plan Schedule
Exhibit C	Certificates of Insurance (Developer)
Exhibit D	Form Completion Certificate
Exhibit E	Project Budget

## **EXHIBIT A**

### **Project Site**

# EXHIBIT B

## Plan Schedule



**EXHIBIT C**

**Certificates of Insurance (Developer)**

## **EXHIBIT D**

### **Completion Addendum**

This Completion Addendum (the "Addendum") is entered into this \_\_\_\_ day of \_\_\_\_\_, by and between Patch Development, LLC (the "Developer") and the Town of McCordsville Redevelopment Commission (the "Redevelopment Commission").

#### **Recitals**

WHEREAS, Developer and the Redevelopment Commission have executed that certain Build-Operate-Transfer Agreement (Road & Utility Infrastructure Project) dated \_\_\_\_\_ (the "Agreement");

WHEREAS, the Agreement provides that, subsequent to the Substantial Completion Date (as defined in the Agreement), Developer and Redevelopment Commission shall execute this Addendum; and

WHEREAS, Developer and Redevelopment Commission agree that the Substantial Completion Date has occurred.

#### **Agreement**

ACCORDINGLY, for good and valuable consideration, the receipt and sufficiency of which are acknowledged hereby, each of Developer and Redevelopment Commission states and agrees that the Substantial Completion Date occurred on \_\_\_\_\_.

[Signature Page Follows]

IN WITNESS WHEREOF, Developer and Redevelopment Commission have executed this Addendum as of the date set forth above.

PATCH DEVELOPMENT, LLC

By: \_\_\_\_\_  
Patrick Chittenden, Manager

TOWN OF MCCORDSVILLE  
REDEVELOPMENT COMMISSION

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

Printed: Alex Jordan

Title: President



**EXHIBIT E**

**Project Budget**