

**PUBLIC-PRIVATE AGREEMENT FOR THE DEVELOPMENT AND  
CONSTRUCTION OF WHITESTOWN MAINTENANCE FACILITIES**

This Public-Private Agreement for the Development and Construction of Whitestown Maintenance Facilities (the “**Agreement**”) is entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2023 (“**Effective Date**”), by and between First Due Company LLC, an Indiana limited liability company (“**Developer**”), and the Town of Whitestown, Indiana, an Indiana municipality (“**Town**” or “**Whitestown**”), on the following terms and conditions:

**RECITALS**

**WHEREAS**, on or about \_\_\_\_, the Town issued its Request for Proposals and Qualifications to Build Operate and Transfer Maintenance Facilities (the “RFPQ”); and

**WHEREAS**, pursuant to the RFPQ, the Town sought offerors to design, construct, and transfer to the Town the Project on the Project Site, all pursuant to a public-private agreement between the Town and the winning offeror; and

**WHEREAS**, Developer submitted a proposal and statement of qualifications to the Town for the Project, the Town negotiated with Developer for its best and final offer, and the Town decided to make a recommendation to its Board of Public Works & Safety, operating as the “Board” as defined in the Act (the “Board”), to enter into a public-private agreement for the Project with Developer; and

**WHEREAS**, on \_\_\_\_\_ 2023, at a duly noticed, public meeting, the Board held a public hearing and unanimously voted to enter into this Agreement with Developer; and

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are acknowledged hereby, the Town and Developer agree as follows:

**1. Defined Terms.**

**Acquisition Property** shall mean the completed Project.

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

**Closing** shall mean the execution of this Agreement and any other Transaction Documents not yet executed.

**Conveyance Closing** shall mean the closing with respect to the conveyance of the Acquisition Property to Town.

**Cure Period** shall mean a period of: (a) sixty (60) days after written notice of an Event of Default in the case of any monetary default; and (b) thirty (30) days after a party failing to perform or observe any other term or condition of this Agreement to be performed or observed by it receives written notice specifying the nature of a defect, including a Non-Compliance

Notice or the Event of Default; provided that, if such Non-Compliance Notice or Event of Default is of such a nature that it cannot be remedied within thirty (30) days, despite reasonably diligent efforts, then the thirty (30) day cure period shall be extended as may be reasonably necessary for the defaulting party to remedy the Non-Compliance Notice or Event of Default, so long as the defaulting party: (i) commences to cure the default within the thirty (30) day period or implements an approved plan to remedy the default; and (ii) diligently pursues such cure to completion; provided that in no event shall a Cure Period extend more than ninety (90) days after the date of the default, unless otherwise agreed by the parties. Notwithstanding the foregoing, a Cure Period shall not be applicable to an Event of Default described in Section 13(b) & (c).

**Disbursement Request** shall mean: (a) a request, together with instructions, for disbursement of funds to Developer, which request shall be substantially in the form attached hereto as **Exhibit C**; (b) copies of invoices to be paid (or amounts to be reimbursed to Developer) with the disbursed funds; (c) copies of inspection reports or other reports showing: (i) the total amount disbursed to date; (ii) the percentage of completion of the Project; and (iii) the anticipated cost to complete the Project; and (d) such additional information as Town reasonably requests.

**Event of Default** shall have the meaning set forth in Section 13.

**Final Plans** shall mean all completed schematic design drawings, design development documents, construction drawings, specifications, and construction schedules for the Project, which are [add specific reference to final plans – prepared by \_\_\_\_ and dated \_\_\_\_].

**Latent Defect** shall mean a Material Defect that: (a) is not discovered by the Town during a Permitted Inspection and/or the Final Inspection; and (b) has an adverse effect on the use, operation, structure, or longevity of Project; and (c) is discovered within ten (10) years of the Conveyance Closing.

**Latent Defect Period** shall mean, pursuant to Ind. Code § 32-30-1-5, a period of time commencing at the Substantial Completion Date and ending on the date that is ten (10) years thereafter; provided, however, such ten (10) year period shall only apply to any Latent Defect.

**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 material defect in workmanship or materials; (b) deviates materially from the Final Plans; or (c) has not been constructed materially in accordance with the terms and conditions of this Agreement.

**Non-Compliance Notice** shall mean a written notice from the Town to Developer that identifies defects with respect to Project discovered by the Town during a Permitted Inspection, Final Inspection, and/or during the Latent Defect Period.

**Operating Period** shall mean the period: (a) commencing Effective Date; and (b) ending on the

Conveyance Closing date; provided that the Town at any time may deliver notice to Developer setting forth an earlier date on which the Operating Period shall end.

**Permitted Inspection** shall mean, as applicable, an inspection by the Town of any item or component of Project when deemed to be necessary or appropriate by the Town, in its sole discretion.

**Project** shall mean the construction on the Project Site of approximately a 33,000 square foot building that is intended to be operated as maintenance facilities for the Town, consisting of seven separated bays, which includes bays for offices, a break room, and a second-story woodshop area, storage, maintenance areas, and auto repair areas, a salt storage building, a brine building, and covered storage buildings, as well as related facilities and infrastructure, together with related improvements, in accordance with the Final Plans.

**Project Costs** shall mean the fees, costs, and expenses incurred in connection with the Project, including, without limitation: (a) the costs incurred in acquiring, or otherwise obtaining real estate rights with respect to, the Project Site; (b) the costs incurred in drafting and negotiating the Transaction Documents; (c) the costs incurred in connection with the Closing (to the extent that such costs are not included in clause (b) of this definition); (d) the cost to develop, design, and construct the Project in accordance with the terms and conditions of this Agreement, including all architect, engineer, and other professional fees; and (e) a reasonable and customary amount for contingencies.

**Project Site** shall mean the real estate depicted generally on **Exhibit A**.

**Property** shall mean, collectively, the Project Site, the materials to construct the Project, and, upon completion of the Project, the Acquisition Property.

**Purchase Price** shall mean the total amount of the Project Costs, not to exceed the Purchase Price Cap.

**Purchase Price Cap** shall mean \$10,500,000.00, including, without limitation, Developer's staffing costs for completion of the Project, and any other general conditions/generation requirements, and such amount may be increased by Town in writing in its sole discretion. Purchase Price Cap is inclusive of an owner's contingency allowance of \$24,550.00, which may be disbursed to Developer with Town approval.

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

**Retainage** shall be the amount, from each disbursement request made prior to Substantial Completion of the Work, the Town shall withhold ten percent (10%) of the disbursement request as retainage until the Work is fifty percent (50%) complete and then not withhold any additional amounts.

**Substantial Completion Date** shall mean the date on which (i) the progress of the Work or designated portion thereof is sufficiently complete in accordance with the Final Plans so that the Town may occupy or utilize the Work for its intended use; (ii) the Developer delivers to Town a copy of an architect's certificate of substantial completion indicating that the Project has been completed substantially in accordance with the Final Plans, subject to "punch-list" items to be identified in connection with the final inspection of the Project by Town, which "punch-list" items will not materially affect the use of the Project for its intended use; and (iii) the Town has received from any governmental authority having jurisdictional authority thereof all Certificates of Occupancy and all other permits, approvals, licenses or other documents necessary for the beneficial occupancy of the Project.

**Term** shall mean the period: (a) commencing on the date hereof; and (b) ending upon the parties' successful completion of the Conveyance Closing.

**Transaction** shall mean the public-private transaction contemplated in this Agreement.

**Transaction Documents** shall mean: (a) this Agreement; (b) an easement agreement to be executed by the parties contemporaneously with this Agreement; (b) certified copies of the resolutions, ordinances, and/or approvals enacted, adopted, and/or obtained by a party authorizing the Transaction and the execution of documents necessary or reasonably appropriate to consummate the Transaction, which certification states that such resolutions, ordinances, and/or approvals remain in full force and effect without amendment; and (c) such additional resolutions, consents, authorizations, certificates, documents, instruments, and/or other evidence as either party reasonably may request in connection with the Closing.

## **2. General.**

(a) **Project.** Subject to the terms and conditions of this Agreement, Developer shall construct the Project on the Project Site. Developer shall complete Project: (a) in a good and workmanlike manner that allows for construction to timely proceed; (b) in accordance with the Final Plans; and (c) in compliance with the all applicable Laws. Developer shall construct and design the Project in a manner to ensure that the Project is delivered under the Purchase Price Cap, unless otherwise agreed to in writing by the Town. Developer shall have the right to enter upon the Project Site to perform its obligations under this Agreement pursuant to the Temporary Construction Easement granted as part of the Transaction Documents, which is attached hereto as **Exhibit E**.

(b) **Utility Availability.** Unless, and except to the extent that the Final Plans reflect any responsibility of Developer with respect to utility services, Town, at its cost and expense, shall ensure that all necessary or reasonably appropriate utility services exist in adjoining public rights-of-way or properly granted and recorded utility easements, all of which serve the Project Site at adequate pressures, and in sufficient quantities and volumes, for the construction and use of the Project in accordance with the terms and conditions of this Agreement. In connection with the satisfaction of the foregoing obligation, Town, at its cost and expense, shall make any improvements outside the

Project Site that are necessary or reasonably appropriate.

(c) **No Fiduciary.** Town acknowledges and agrees that: (i) Developer is acting solely for its own account, and not as a municipal advisor, financial advisor, underwriter, placement or other agent, or fiduciary of, for, or to Town; (ii) Developer has not given “advice” within the meaning of Section 15B of the Securities Exchange Act of 1934; and (iii) Town has discussed the information set forth in this Agreement with such legal, accounting, tax, financial, and other advisors as Town has deemed to be necessary or appropriate.

**3. Closing.** The Closing is occurring on the date hereof, and in connection with the Closing, each party is executing and/or delivering the Transaction Documents to which it is a party or for which it is responsible.

**4. Conditions Satisfied.** Each party acknowledges that all conditions to its obligation to proceed to the Closing have been satisfied or waived in writing, including, without limitation, that:

(a) Developer has obtained, or Developer and Town are satisfied that Developer will be able to obtain, all Required Permits;

(b) neither Developer nor Town has identified any conditions with respect to the Project Site that would interfere with, or prohibit, construction of the Project in accordance with the terms and conditions of this Agreement;

(c) the form and substance of the Transaction Documents have been approved by Developer and Town, each in the exercise of its reasonable discretion;

(d) each of Developer and Town has adopted or will adopt all resolutions necessary to authorize the execution of, and the performance of its obligations under, the Transaction Documents, and such resolutions remain in full force and effect;

(e) with respect to each party: (A) there is no continuing Event of Default by the other party; and (B) all of the representations, warranties, and covenants made in this Agreement by the other party are true and accurate in all material respects.

**5. Final Plans and Change Orders.** Developer shall complete the Project in compliance with the Final Plans. If Developer or the Town desire to make any Permitted Change to the Final Plans, then Developer, on its behalf or at the direction of the Town, shall submit a Change Order Request acceptable to the Town for review and approval. Within ten (10) days after the Town receives the Change Order Request, the Town, in its sole discretion, shall deliver to Developer written notice that it approves or rejects the Change Order Request. For purposes of this Section, “**Permitted Change**” shall mean a change to the Final Plans that: (i) does not result in the Final Plans containing structurally flawed elements; (ii) does not result in the total budgeted amount of the Project Costs to exceed the Purchase Price Cap, unless otherwise agreed to in writing by the Town; and (iii) does not make it unlikely, impracticable, or impossible for Developer to

complete the Project by the applicable date (or within the applicable time period) reflected in the construction schedule comprising a portion of the Final Plans. In addition to the foregoing, changes required to for the Final Plans to comply with the Laws shall be deemed to be Permitted Changes.

**6. Construction.**

(a) **Permits.** Prior to commencing construction of the Project, Developer, at its cost and expense, shall obtain and submit to Town for its review the Required Permits that are obtainable by Law prior to commencement of construction, and shall obtain the remainder of the Required Permits upon availability. The Town shall use reasonable efforts to assist Developer in its efforts to obtain the Required Permits. Developer acknowledges that the Town cannot (and does not) guarantee that it will be able to obtain the Required Permits.

(b) **Sales Tax.**

(i) Promptly after the execution of this Agreement, Town shall deliver to Developer Indiana Department of Revenue Form ST-105 (General Sales Tax Exemption Certificate), pursuant to which Town shall represent that the acquisition of the materials to construct 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/or complete the Project, Developer promptly shall notify Town in writing. From and after receipt of the foregoing notice, Town shall provide such cooperation, information, and assistance as Developer reasonably may request.

(c) **Construction and Substantial Completion Date.** Developer shall construct the Project: (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. On or before the date that is fifteen (15) days after the Substantial Completion Date, Developer and Town shall execute a statement confirming the Substantial Completion Date, which statement shall be substantially in the form attached hereto as **Exhibit D**.

**7. Construction Disbursements.**

(a) **Schedule of Values.** The Developer shall submit a schedule of values before its first Disbursement Request, allocating the entire Purchase Price to the various portions of the Work. The schedule of values shall be prepared in the form, and supported by the data to substantiate its accuracy required by the Town. The schedule of values shall be the basis for reviewing the Developer's Disbursement Requests.

(b) **Disbursement.** Based upon Disbursement Request(s) submitted by the Developer, the Town shall make payments on account of the Purchase Price to the Developer as provided herein. The period covered by each Disbursement Request shall be one (1) calendar month ending on the last day of the month. Within thirty (30) days after receipt of a Disbursement Request, Town shall disburse the amounts reflected in the Disbursement Request, less Retainage to the Developer; provided that, as required pursuant to Ind. Code § 5-23-3-2(a)(8), payments made to contractors and subcontractors shall comply with the payment provisions of Ind. Code § 36-1-12. The amount of funds disbursed pursuant to a Disbursement Request shall be applied against (reduce the outstanding amount of) the Purchase Price on a dollar-for-dollar basis. Under no circumstances will the Town be responsible for Project Costs that exceed the Purchase Price Cap, unless expressly agreed to by the Town in writing.

(c) **Disbursement Requests.** At least ten (10) days before the date established for each disbursement submission, the Developer shall submit a Disbursement Request prepared in accordance with the schedule of values, for completed portions of the Work. The request shall be notarized, if required; be supported by all data substantiating the Developer's right to payment that the Town requires and shall reflect Retainage. Progress Disbursement Requests shall be clearly itemized and include a notarized AIA Document G702, Application and Certificate for Payment, supported by AIA G703, Continuation Sheet. These progress Disbursement Requests shall detail the value of the various materials installed and the value of the various types of labor performed during the period of time since the previous disbursement request. The Developer shall attach to each Disbursement Request a statement certifying that all payments made and due design professionals, contractors or supplier from previously issued Disbursement Requests have been paid. The requests shall request disbursement for all Work completed during that pay period and for all materials securely stored at the Project Site. Should the Town determine that the Developer has requested an excessive disbursement, the request will be returned to the Developer indicating the corrections necessary for approval. Any Disbursement Request that does not comply with the terms of this Section will be rejected by the Town.

(i) The Developer warrants that title to all Work covered by a Disbursement Request will pass to the Town no later than the time of payment. The Developer further warrants that upon submittal of an Disbursement Request all Work for which payments received from the Town shall be free and clear of liens, claims, security interests, or encumbrances, in favor of the Developer, design professionals, contractors, suppliers, or other persons or entities that provided labor, materials, and equipment relating to the Work. All Work covered by a Progress Disbursement shall become the sole property of the Town. However, this Section shall not be construed as relieving the Developer from the sole responsibility and expense for the care and protection of materials and Work upon which payments have been made or the restoration of any

stolen, destroyed or damaged Work, or as a waiver of the right of the Town to require the fulfillment of all of the terms of the Final Plans.

(ii) Each Disbursement Request shall be accompanied by the following, all in form and substance satisfactory to the Town: (i) a current Developer's waiver and duly executed and acknowledged sworn statement showing all design professionals, contractors and suppliers with whom the Developer has entered into contracts, the amount of each such contract, the amount requested for any design professional, contractor and material supplier in the requested progress disbursement request, and the amount to be paid to the design professional, contractor or supplier from such progress disbursement; (ii) duly executed waivers of lien from all design professionals, contractors and suppliers and, when appropriate, from subcontractors and suppliers and lower tier sub-subcontractors establishing payment or satisfaction of payment of all amounts requested by the Developer on behalf of such entities or persons in any previous Disbursement Request; and (iii) all information and materials required to comply with the requirements of the Final Plans or reasonably requested by the Town.

(iii) Disbursement payments shall be made on account of materials and equipment delivered and suitably stored at the Project Site for subsequent incorporation in the Work. If approved in advance by the Town, payment may similarly be made for materials and equipment suitably stored off the Project Site at a location agreed upon in writing. Payment for materials and equipment stored on or off the Project Site shall be conditioned upon compliance by the Developer with procedures satisfactory to the Town to establish the Town's title to such materials and equipment or otherwise protect the Town's interest, and shall include the costs of applicable insurance, storage, and transportation to the Project Site, for such materials and equipment stored off the Project Site. The Developer shall provide the Town with written proof, reasonably satisfactory to the Town, that title to the materials and equipment stored off Project Site are vested in the Town, that the materials are properly labeled as belonging to the Project, and the materials are segregated from other materials at the storage location.

(iv) The Town shall make payments to the Developer on the basis of Disbursement Requests approved by the Town, but only if the Developer shall have submitted its Disbursement Request as



required herein. Failure to make timely and proper disbursement request shall result in a delay in payment.

(v) The Developer's final Disbursement Request shall contain evidence satisfactory to the Town that all payrolls, material bills, and other indebtedness connected with the Work have been paid.

(d) **Progress Disbursement Requests.** The Developer shall pay each design professional, contractor or supplier, no later than seven (7) days after receipt of payment from the Town, the amount to which the design professional, contractor or supplier is entitled, reflecting percentages actually retained from payments to the Developer on account of the design professional's, contractor's or supplier's portion of the Work. The Developer shall, by appropriate agreement with each design professional, contractor, or supplier require each to make payments to lower tier entities in a similar manner.

(i) Provided the Town has fulfilled its payment obligations, the Developer shall defend and indemnify the Town from all loss, liability, damage or expense, including reasonable attorney's fees and litigation expenses, arising out of any lien claim or other claim for payment by any design professional, contractor or supplier of any tier. Upon receipt of notice of a lien claim or other claim for payment, the Town shall notify the Developer. If approved by the applicable court, when required, the Developer may substitute a surety bond for the property against which the lien or other claim for payment has been asserted.

(ii) In the event the Town, consistent with its rights under the Agreement, withholds any payment, partial or final, from the Developer, the Town may, but shall not be obligated or required to, make direct or joint payment on behalf of the Developer of any part or all of such sums due and owing to design professionals, contractors, suppliers and/or laborers, not to exceed the Purchase Price remaining due and owing to the Developer, and charging all such direct or joint payments against the Purchase Price. Before making any such direct or joint payments, the Town first shall give the Developer five (5) days' written notice stating the Town's intention to make such payment and setting forth the names of the design professionals, contractors, suppliers and/or laborers which the Town intends to pay directly or jointly, the amounts to be paid to them, and the reason therefor. If the Developer does not pay or otherwise satisfy such bills, statements and/or claims of the parties so identified within five (5) days after receipt of such notice or give the Town satisfactory assurances that the same will be paid or otherwise satisfied, the Town may proceed with such payments.

Nothing contained in this section shall create any personal liability on the part of the Town to any design professional, contractor, supplier or laborer, or create any direct contractual relationship between the Town and them.

(e) **Final Completion and Final Disbursement.** Upon receipt of the Developer's notice that the Work is ready for final inspection and acceptance and upon receipt of a Final Disbursement Request, the Town will promptly make such inspection and, when the Town finds the Work has been completed in accordance with the Final Plans, the entire balance due the Developer and noted in the Final Disbursement Request shall be payable. All warranties and guarantees required under or pursuant to the Final Plans shall be assembled and delivered by the Developer to the Town as part of the Final Disbursement Request. The Final Disbursement Request will not be issued by the Town until all warranties and guarantees have been received and accepted by the Town.

(i) Final payment shall not become due until the Developer has delivered to the Town a complete release of all liens arising out of this Agreement or receipts in full covering all labor, materials and equipment for which a lien could be filed, or a bond satisfactory to the Town to indemnify the Town against such lien. If such lien remains unsatisfied after payments are made, the Developer shall refund to the Town all money that the Town may be compelled to pay in discharging such lien, including costs and reasonable attorneys' fees.

(ii) Acceptance of the Final Disbursement by the Developer, a design professional, contractor or supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of the Final Disbursement Request.

(f) **Final Statement.** After the Town has paid all applicable Project Costs to Developer pursuant to valid Disbursement Request(s), Developer shall deliver to Town a statement certifying that all of the Project Costs have been determined and paid; provided that, if there are outstanding claims for payment that remain subject to dispute, then Developer shall certify as to the amount sufficient to pay all such claims. At such time (or, if applicable, after all outstanding claims are resolved and any amounts due in connection therewith are paid), the outstanding amount of the Purchase Price shall be deemed to have been reduced to \$0.00.

(g) **Records.** Developer shall keep and maintain, in accordance with generally accepted accounting principles consistently applied, true, correct, accurate, and complete books and records pertaining to the Project Costs. Town, at all reasonable times and following reasonable notice, shall have: (i) free access to, and rights of inspection of,

such books and records; and (ii) the right to audit, make extracts from, and receive from Developer accurate copies of, the books and records.

## 8. **Inspection.**

(a) **Inspection Rights.** At any time during construction of the Project, the Town may perform a Permitted Inspection. Upon reasonable written notice delivered to Developer, the Town may perform a Permitted 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 materially interfere with the performance of construction by Developer. Developer shall have the right to accompany, and/or to have its construction manager accompany, the Town during any such inspection. Within seven (7) business days after a Permitted Inspection, the Town may deliver to Developer a Non-Compliance Notice.

(b) **Cure of Defects.** If the Town timely delivers a Non-Compliance Notice to Developer, then Developer shall correct, or cause to be corrected, as soon as is practicable and within an applicable Cure Period, all defects identified in the Non-Compliance Notice in such manner and at such times as to minimize disruption (to the extent commercially reasonable) to the operation of Project. The Town shall not be responsible for any costs incurred curing a defect identified in a Non-Compliance Notice, and such cure costs shall not be applied to the Purchase Price or constitute Project Costs subject to a Disbursement Request. If Developer fails to cure any item in a Non-Compliance Notice within an applicable Cure Period, such a failure shall be deemed a violation of and an Event of Default under this Agreement. Notwithstanding the foregoing, the parties expressly acknowledge and agree that Developer may petition the Town for an alternative resolution (other than that provided in this Section 8) for items subject to a Cure Period, and the Town, in its sole discretion, shall determine whether such an alternative resolution is acceptable.

(c) **Final Inspection.** Developer shall deliver to the Town a written request for the final inspection at least seven (7) business days prior to the anticipated Substantial Completion Date. Absent agreement of the parties to the contrary, the Town shall conduct the final inspection within seven (7) business days after receipt of such request. If applicable, the Town shall deliver to Developer, within seven (7) days after completion of the final inspection, a Non-Compliance Notice identifying defects found during the final inspection; provided that: (i) if no such notice is delivered in a timely manner, then, within seven (7) business days after the expiration of the foregoing seven-day period, Developer and the Town shall identify the “punch-list” items; or (ii) if such a notice is delivered in a timely manner, then such “punch-list” items shall be identified within seven business days after correction by Developer of all defects identified in the above-referenced notice. Developer shall complete all “punch-list” items within sixty (60) days after identification thereof.

(d) Upon such acceptance, and consent of surety if any, the Town shall make payment of retainage applying to the Work or designated portion thereof. Notwithstanding the foregoing, the Town may withhold from payment an amount equal to two hundred percent (200%) of the value of all incomplete items and/or items requiring correction on the punch list. The amounts so retained shall be paid on a monthly pro rata basis as the punch list is satisfactorily completed or corrected.

(e) **Latent Defects.** Upon discovery of any Latent Defects by the Town after the Conveyance Closing, the Town shall promptly provide a Non-Compliance Notice thereof to Developer (or its successors and assigns), and Developer shall correct, or cause to be corrected, as soon as is practicable, all defects identified in the Non-Compliance Notice within an applicable Cure Period. Developer shall be responsible for all costs incurred in correcting or remedying Latent Defects of which it receives notice within the Latent Defect Period. If Developer fails to cure a Latent Defect within an applicable Cure Period, the Town, in addition to any other right or remedy provided herein (and regardless of any Cure Period provided herein), shall be entitled to payment, for Latent Defects if occurring post-Conveyance Closing in the amount of Five Hundred and no/100 Dollars (\$500.00) per day from Developer for each day after the expiration of any applicable Cure Period. This Section 9(d) shall survive termination of this Agreement.

(f) **Effect.** An inspection performed by or on behalf of Town pursuant to Section 8 shall not mean that Town has accepted, or Developer has been relieved of, responsibility for: (i) compliance with the Laws; (ii) the proper application of construction means or methods; (iii) correcting any portion of the Project if it later is determined that such portion is inconsistent with the proper completion of a subsequent portion of the Project; or (iv) any defects in the construction of the Project that are Latent Defects and, accordingly: (A) were not discovered; and (B) reasonably were not discoverable; by Town during an inspection.

## 9. Insurance and Bonds.

(a) **Insurance Requirements.** During construction of the Project, Developer shall maintain the policies of insurance reflected on the certificate attached hereto as **Exhibit B**. Each such policy shall be written by a company reasonably acceptable to Town, and Developer shall provide to Town notice of any intended modification to, or cancellation of, such policy at least thirty (30) days in advance. The policy of general liability insurance required by this Section to be maintained by Developer shall name Town as an additional insured. Developer shall deliver to Town certificates of the insurance policies required by this Section, executed by the insurance company or the general agency writing such policies. Town shall hold the policy of Builder's Risk Insurance during the construction period. From

and after the Conveyance Closing, Developer shall have no obligation to maintain any policies of insurance with respect to the Property.

(b) **Bond Requirements.** Developer shall furnish a performance bond with penal sum equal to **fifty percent (50%) of the Purchase Price** and a separate payment bond with a penal sum equal to **one hundred percent (100%) of the Purchase Price** and as further required herein. Developer bonds shall cover the faithful performance of the Agreement and payment of obligations arising thereunder as stipulated herein on the date of execution of the Agreement as required by applicable Law. Payment and Performance Bonds shall be AIA Document A312, Payment Bond and Performance Bond, or contain provisions identical to AIA Document A312, current as of the date of this Agreement. The costs of all bonds are included in the Project Costs. The bonds shall meet all statutory requirements of the State of Indiana. The bonds shall be executed by a responsible surety licensed in the State of Indiana and approved by the Town and shall remain in effect for a period not less than one (1) year following the date of Substantial Completion or the Developer's warranty period, whichever time period is longer. The Developer shall require the attorney-in-fact who executes the required bonds on behalf of the surety to affix thereto a certified and current copy of his or her power-of-attorney indicating the monetary limit of such power. Every bond must display the surety's bond number. A rider including the following provisions shall be attached to each bond. The Developer shall keep the surety informed of the progress of, and changes in, the Work, and requests for reduction or release of retainage and for the Final Disbursement Request. The surety shall agree that it consents to and waives notice of any addition, alteration, omission, change, or other modification of the Final Plans. Any addition, alteration, change, extension of time, or other modification of the Final Plans, or a forbearance on the part of either the Town or the Developer to the other, shall not release the surety of its obligations, and notice to the surety of such matters is hereby waived. The surety shall agree that it is obligated under the bonds to any successor, grantee, or assignee of the Town.

(c) Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Agreement, the Developer shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

**10. Casualty.** If, during the Term, there is damage to, or total or partial destruction of, the Property by fire or other casualty, then Town may elect to terminate this Agreement by delivery of written notice to Developer within thirty (30) days after the casualty event. If this Agreement is terminated, then the terms and conditions of Section 11(d) shall apply. If Town does not terminate this Agreement, then Town and Developer, working jointly and in good faith, shall revise the Project budget as necessary to allow for the repairs and/or replacements necessary or

reasonably appropriate to allow Developer to complete construction of the Project; provided that, in no event shall the Town bear responsibility for Project Costs incurred in excess of the Purchase Price Cap.

**11. Operating Period and Conveyance.**

(a) **Operating Period.** Subject to the terms and conditions of this Agreement, Developer shall operate the Acquisition Property during the Operating Period. At any time during the Operating Period, Town may deliver written notice to Developer specifying the date on which the Operating Period will end; provided that, consistent with the definition of Operating Period, in no event shall the Operating Period continue beyond the Conveyance Closing. The Developer shall be responsible for payment of all costs and expenses incurred by Developer in connection with its possession, use, operation, maintenance, and/or repair of the Property during the Operating Period, including, without limitation: (A) all administrative costs; and (B) other costs and expenses customarily attributed to the ownership of real estate including, without limitation: all usage and other charges for utility services furnished to the Acquisition Property.

(b) **Conveyance.** Upon the payment (or reimbursement) of all applicable Project Costs after the Substantial Completion Date such that the Purchase Price has been reduced to \$0.00 or the earlier termination of this Agreement, Developer and the Town shall proceed to the Conveyance Closing, which shall occur on a date mutually determined by the parties, each acting in a commercially reasonable manner. At the Conveyance Closing, Developer shall convey the Acquisition Property to Town (or its designee) pursuant to a bill of sale substantially in the form attached hereto as **Exhibit F**, or pursuant to such other form of transfer instrument that the parties jointly deem to be appropriate.

The obligations of the parties under this Section shall survive the expiration of the Term or the earlier termination of this Agreement.

**12. No Liens.** No mechanic's liens are valid as the Project is held for public use. If any mechanic's, supplier's, or similar lien is filed against all or any portion of the Property for work claimed to have been done for, or materials claimed to have been furnished to, Town or 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. Developer shall indemnify, defend and hold the Town harmless against any mechanic's liens, claim of lien (including claims filed pursuant to Ind. Code §32-28-3-9), claim of liability, loss, personal injury, property damage, expenses, claims, or liens, (including, without limitation, mechanics' liens) or claims to any applicable retainage in connection with the Project. If the Developer refuses a demand for a defense and indemnification, the Developer shall reimburse the Twon for all damages incurred as a result of any such lien or claim. If the Developer disputes a lien or claim, the Developer shall have the right to contest such claim or lien but such right shall not in

any way abridge, modify or nullify the Developer's obligations to the Town under this Section. Should any such liens or notices be received by Town or filed of record, Developer shall promptly pay or discharge the same and cause the same to be released of record, or shall furnish Town with appropriate bond in the form and amount satisfactory to Town. Assuming the Town is current in its payments to the Developer, yet the Developer fails to promptly pay or discharge such lien or notice, the Town shall have the right to retain an additional amount from any payment then or thereafter due Developer sufficient to satisfy and defend such lien or notice, including all attorneys' fees and expenses, and the **Purchase Price** shall be reduced by such amount. If the remaining portion of the **Purchase Price** not yet paid to the Developer is insufficient to satisfy and defend such lien or notice, the Developer shall be liable for and shall immediately reimburse the Town for such amounts, including all attorneys' fees and expenses.

**13. Events of Default.** It shall be an "Event of Default" by a party if:

(a) Such party fails to perform or observe any term or condition of this Agreement that is required to be performed or observed by it: (i) with respect to the obligation to pay money, if such failure is not remedied within sixty (60) days after such payment is due; and (ii) with respect to any other obligation, if such failure is not cured after the applicable Cure Period, if any.

(b) Developer (i) engages in gross misconduct (notwithstanding whether such conduct concerns the subject of this Agreement or Developer's contractual relationship with the Town); or (ii) it becomes generally known that Developer is insolvent, plans to make a general assignment for the benefit of creditors, is expected to file a voluntary petition of bankruptcy, suffers or permits the appointment of the receiver for its business or assets, or becomes subject to any proceeding under any bankruptcy or insolvency law, whether domestic or foreign, dissolved or liquidated, voluntarily or otherwise; or

(c) Developer fails to maintain the requisite professional licenses and approvals to cause completion of the Project.

**14. Remedies.**

**Remedies.** Following an Event of Default, the 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); (iv) cure, provided that no cure undertaken by the non-defaulting party shall be construed to be a waiver of the Event of Default; or (v) terminate this Agreement. Following an Event of Default, the Town shall have the right to seek any and all remedies available to the Town under applicable Laws, including but not limited to

recovering all its compensatory and consequential damages directly or indirectly resulting from Developer's Event of Default. Except to the extent provided to the contrary by the Laws, the non-defaulting party is not required to give notice to the defaulting party prior to exercising its remedies following an Event of Default. Notwithstanding anything to the contrary set forth herein, an Event of Default described in Sections 13(b) or (c), shall subject this Agreement to immediate termination in the sole discretion of the Town, a Cure Period shall not apply, and the Town shall be only be responsible for paying for the value received by the Town of work performed hereunder prior to any such Event of Default.

(a) **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. No delay or omission by a non-defaulting party in exercising any right or remedy upon any Event of Default shall impair any such right or remedy, or be construed to be a waiver thereof, and any such right or remedy may be exercised from time to time, and as often as may be deemed to be expedient.

(b) **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 the non-defaulting party of any right or remedy with respect to an Event of Default; or (iii) the acceptance by Developer of disbursements from Town during the continuance of an Event of Default by Town; 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.

(c) **Costs.** The 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; together with interest thereon at the rate of 8% per annum. All such amounts shall be due and payable by the defaulting party immediately upon receipt of written demand from the other party, and the obligation of the defaulting party to pay such amounts shall survive the Conveyance Closing.

## 15. **Representations.**

(a) **Mutual.** Each of Developer and Town represents and warrants that:

(i) it has: (A) the power and authority to enter into, and perform its obligations under, this Agreement; and (B) complied with the Laws (including all local requirements) in all matters relating to the Transaction;



(ii) it has taken all actions necessary to authorize the execution and delivery, and the performance of its obligations under, this Agreement;

(iii) neither the execution and delivery, nor the performance by it of its obligations hereunder: (A) 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; (B) conflicts with, results in a breach of, or constitutes a default under any such indenture, agreement, or other instrument; or (C) results in the creation or imposition of any prohibited lien, charge, or encumbrance of any nature upon any of its properties or assets; and

(iv) this Agreement, once executed, will be its legal, valid, and binding obligation, subject to: (A) Laws relating to bankruptcy, insolvency, reorganization, moratorium, or other similar subjects; (B) the exercise of judicial discretion in appropriate cases; and/or (C) general principles of equity.

(b) **Developer.** In addition to the representations set forth in Subsection 15(a) Developer represents and warrants that:

(i) Developer is a limited liability company organized and existing under the laws of the State of Indiana;

(ii) Developer for itself, agrees that during the completion of Project, Developer will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. Developer agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause; and Developer will state, in all solicitations or advertisements for employees placed by or on behalf of Developer, that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin; and

(iii) Developer shall be liable for ensuring that all subcontractors, employed by or contracting with Developer to complete all or any portion the Project fully comply with the terms included herein.

(c) **Town.** In addition to the representations set forth in Subsection 15(a), Town represents and warrants that:

(i) it is a public body organized and existing under the laws of the State of Indiana; and

(ii) no litigation is pending or, to its knowledge, threatened: (A) seeking to restrain or enjoin Town from executing, and/or satisfying its obligations under, the Transaction Documents; (B) in any way contesting or affecting Town's

existence or powers; or (C) in any way contesting the validity of this Agreement or the Transaction.

**16. 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 PO Box 146, Danville, IN 46122, Attn: Donnie Ross; and to Town at 6210 Veterans Drive, Whitestown, IN 46075, 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.

**17. Assignment.** Neither Developer nor Town shall assign this Agreement without the prior written consent of the other party. Notwithstanding any consent granted by a party, the assigning party shall remain liable to perform all of, and shall not be released from the performance of, its obligations hereunder.

**18. Indemnification.**

(a) **Mutual.** Each party shall 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 Town from and against any and all Claims arising from, or in connection with, the Project, including but not limited to the following: (A) breaches by Developer under contracts to which Developer is a party, to the extent that such contracts relate to the performance of any work on the Project Site by Developer or any party acting by, under, through, or on behalf of Developer; (B) injury to, or death of, persons or loss of, or damage to, property, suffered in connection with performance of any work on the Project Site by Developer or any party acting by, under, through, or on behalf of Developer; (C) the negligence or willful misconduct of Developer or any party acting by, under, through, or on behalf of Developer; (D) Developer suffering or causing the filing of any mechanic's or materialmen's lien against the Project Site, Project or any adjacent property owned by Town not caused by a failure of the Town to timely pay the Purchase Price; or (E) the breach by Developer of any term or condition of this Agreement or any Transaction Document.

(ii) Town shall 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 Town.

The indemnification obligations of the parties under this Subsection shall survive for a

period of two years after the expiration of the Term or the earlier termination of this Agreement.

**19. Force Majeure.** Notwithstanding anything to the contrary set forth in this Agreement, other than the final sentence of this Section, 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 of the occurrence of the event that is the basis of the Force Majeure assertion; (b) the asserting party's 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; provided that the asserting party shall exercise reasonable, good-faith efforts to mitigate the effects of the occurrence of the event that is the basis of the Force Majeure assertion on such party's observation, performance, or satisfaction of any term or condition of this Agreement. For purposes of this Section, "**Force Majeure**" shall mean, with respect to a party: (a) an act or omission of the other party; or (b) any other cause that is not within the reasonable control of such party (including, without limitation: (i) unusually inclement weather; (ii) the unusual unavailability of materials, equipment, services or labor; (iii) epidemics, pandemics, and other public health circumstances resulting in a governmental declaration of a public health emergency; and (iv) utility or energy shortages or acts or omissions of public utility providers.

**20. Public-Private 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".

**21. No Waiver of Police Power.** The foregoing rights in favor of the Town shall be in addition to, and not in lieu of, any rights and remedies the Town may have under this Agreement or applicable Laws; and nothing set forth herein shall be deemed to waive any authority, right, remedy, or power vested in any of the Town under applicable Laws.

**22. Miscellaneous.** This Agreement shall inure to the benefit of, and be binding upon, Developer, Town, and the respective successors and assigns of each. This Agreement (a) constitutes the entire agreement between Developer and Town with respect to the subject matter hereof, and may be modified only by a written agreement executed by both Developer and Town; (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.

FIRST DUE COMPANY LLC

By: \_\_\_\_\_  
Donnie Ross, President

TOWN OF WHITESTOWN,  
INDIANA

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

Printed: \_\_\_\_\_

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

4650557v2

## INDEX TO EXHIBITS

<u>Exhibit A</u>	Description of Project Site
<u>Exhibit B</u>	Developer Insurance Certificate
<u>Exhibit C</u>	Disbursement Request
<u>Exhibit D</u>	Form Completion Certificate
<u>Exhibit E</u>	Temporary Construction Easement
<u>Exhibit F</u>	Form Bill of Sale

**EXHIBIT A**  
**Project Site**

## EXHIBIT B Developer Insurance Certificate



### CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)  
09/19/2023

**THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.**

**IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).**

<b>PRODUCER</b> Mantooth Insurance Agency 7378 Business Center Dr Ste 100  Avon IN 46123	<b>CONTACT NAME:</b> Terry Sutherland <b>PHONE (A/C, No, Ext):</b> (317)272-1010 <b>FAX (A/C, No):</b> (317)272-8085 <b>E-MAIL ADDRESS:</b> terry@mantoothinsurance.com  <b>INSURER(S) AFFORDING COVERAGE</b> <b>NAIC #</b> INSURER A : Erie Ins Exch      26271 INSURER B : INSURER C : INSURER D : INSURER E : INSURER F :
<b>INSURED</b>  First Due Company LLC Po Box 146  Danville IN 46122-0146	

**COVERAGES      CERTIFICATE NUMBER:      REVISION NUMBER:**

**THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.**

INSR LTR	TYPE OF INSURANCE	ADDITIONAL INSURER (NSD / WVD)	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	<input checked="" type="checkbox"/> <b>COMMERCIAL GENERAL LIABILITY</b> <input type="checkbox"/> CLAIMS-MADE <input checked="" type="checkbox"/> OCCUR  GEN'L AGGREGATE LIMIT APPLIES PER: <input checked="" type="checkbox"/> POLICY <input type="checkbox"/> PROJECT <input type="checkbox"/> LOC OTHER:		Q41-1450897	05/14/2023	05/14/2024	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 1,000,000 MED EXP (Any one person) \$ 5,000 PERSONAL & ADV INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMP/OP AGG \$ 2,000,000 \$
	<b>AUTOMOBILE LIABILITY</b> <input type="checkbox"/> ANY AUTO <input type="checkbox"/> OWNED AUTOS ONLY <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS ONLY <input type="checkbox"/> NON-OWNED AUTOS ONLY <input type="checkbox"/> AUTOS ONLY					COMBINED SINGLE LIMIT (Ea accident) \$ BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ \$
A	<input checked="" type="checkbox"/> <b>UMBRELLA LIAB</b> <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> EXCESS LIAB <input type="checkbox"/> CLAIMS-MADE DED <input checked="" type="checkbox"/> RETENTION \$ 0		Q29-1470283	05/14/2023	05/14/2024	EACH OCCURRENCE \$ 3,000,000 AGGREGATE \$ 3,000,000 \$
A	<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b> ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? <input type="checkbox"/> Y/N    N/A (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below		Q89-1400728	05/14/2023	05/14/2024	<input checked="" type="checkbox"/> PER STATUTE <input type="checkbox"/> OTHER E.L. EACH ACCIDENT \$ 1,000,000 E.L. DISEASE - EA EMPLOYEE \$ 1,000,000 E.L. DISEASE - POLICY LIMIT \$ 1,000,000

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

<b>CERTIFICATE HOLDER</b>  Town of Whitestown 6210 Veterans Drive  Whitestown IN 46075	<b>CANCELLATION</b>  SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.  AUTHORIZED REPRESENTATIVE 
---	--



**EXHIBIT C**  
**Form of Disbursement Request**

**Disbursement Request**

The undersigned hereby states and certifies that:

- (a) he is the president of First Due Company LLC (the “Developer”) and, as such, is:
  - (i) familiar with the facts herein certified; and (ii) authorized to make the certifications set forth herein;
- (b) pursuant to that certain Public-Private Agreement for the Development and Construction of Whitestown Maintenance Facilities executed by and between Developer and the Town of Whitestown, Indiana (“Town”), and dated September \_\_\_\_\_, 2023 (the “Public-Private Agreement”), the undersigned hereby requests that Town disburse funds to the payees set forth on the attached Schedule 1 the amounts set forth on such Schedule 1 for the purposes set forth on such Schedule 1;
- (c) all of the materials specified in the definition “Disbursement Request” have been provided (or contemporaneously herewith are being provided) to Town;
- (d) all amounts being paid pursuant to Schedule 1 are Project Costs;
- (e) no Project Costs being paid pursuant to Schedule 1 have previously been paid with a disbursement of funds from Town;
- (f) no Project Costs being paid pursuant to Schedule 1 have been incurred as a result of curing an item listed on a Notice of Defect provided from the Town to Developer;
- (g) he is not aware of any continuing Event of Default by Developer; and
- (h) any payments to contractors and subcontractors to shall comply with Ind. Code § 36-1-12.

All capitalized terms used but not defined in this request shall have the meanings ascribed to such terms in the Public-Private Agreement.

FIRST DUE COMPANY LLC

By: \_\_\_\_\_  
Donnie Ross, President

Date:

**EXHIBIT D**

**Completion Statement  
Whitestown Maintenance Facilities Project**

This Completion Statement (Whitestown Maintenance Facilities) (the "Certificate") is entered into this \_\_\_ day of \_\_\_\_\_, by and between First Due Company LLC (the "Developer"), and the Town of Whitestown, Indiana ("Town").

**Recitals**

WHEREAS, Developer and Town have executed that certain Public-Private Agreement for the Development and Construction of Whitestown Maintenance Facilities dated September \_\_\_\_\_, 2023 (the "Agreement");

WHEREAS, pursuant to the Agreement, Developer is obligated to construct and/or renovate certain buildings on the real estate more particularly described on **Exhibit A**;

WHEREAS, the Agreement provides that, subsequent to the Substantial Completion Date (as defined in the Agreement), Developer and Town shall execute a statement of completion; and

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

**Statement**

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

IN WITNESS WHEREOF, Developer and Town have executed this Statement as of the date set forth above.

FIRST DUE COMPANY LLC

By: \_\_\_\_\_  
Donnie Ross, President

TOWN OF WHITESTOWN,  
INDIANA

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

Printed: \_\_\_\_\_

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

**EXHIBIT E**  
**Temporary Construction Easement**

This Temporary Construction Easement (Whitestown Maintenance Facilities) (the “Temporary Easement”) is executed as of this \_\_\_ day of September, 2023, by and between the Town of Whitestown, Indiana (the “Grantor”) and First Due Company LLC (the “Grantee”).

**Recitals**

WHEREAS, Grantor owns fee simple title to that certain real estate more particularly described on **Exhibit A**, attached hereto and incorporated herein by reference (the "Grantor Property");

WHEREAS, Grantor and Grantee have executed that certain Public-Private Agreement for the Development and Construction of Whitestown Maintenance Facilities of even date herewith (the “Public-Private Agreement”);

WHEREAS, pursuant to the Public-Private Agreement, Grantee is obligated to construct on the Grantor Property the project described in the Public-Private Agreement (the “Project”);

WHEREAS, Grantor has agreed to grant to Grantee a temporary construction easement on, over, above, across, and through the Grantor Property for the purpose of constructing the Project in accordance with the terms and conditions of the Public-Private Agreement; and

WHEREAS, the parties wish to execute this Agreement.

**Agreement**

ACCORDINGLY, for good and valuable consideration, the receipt and sufficiency of which are acknowledged hereby, Grantor and Grantee agree to the terms and conditions of this Agreement.

**1. Temporary Construction Easement.**

(a) **Easement Grant.** Grantor hereby grants, for the benefit of Grantee and any of its affiliates, contractors, subcontractors together with any of the employees, contractors, consultants, and/or agents of the foregoing and its successors and assigns (collectively, the “Permitted Parties”), a temporary easement on, over, above, across, and through the Grantor Property for the purposes of constructing the Project in accordance with the terms and conditions of the Public-Private Agreement. Grantee agrees to repair promptly any damage to the Grantor Property caused by or resulting from the Permitted Parties’ use of the Grantor Property hereunder.

(b) **Termination.** The Construction Easement shall terminate automatically, without any action of, or instrument signed by, Grantor or Grantee, on the date that is ten (10)

business days after the date on which the Project is completed. Notwithstanding that no instrument is necessary to terminate the Construction Easement, upon receipt of written request from Grantor, accompanied by a memorandum of termination that reasonably is acceptable to Grantee, Grantee shall execute such memorandum of termination.

**2. Indemnification.** Grantee shall indemnify and hold harmless Grantor from and against any and all claims arising from or connected with: (i) the breach by Grantee of any term or condition of this Temporary Easement; (ii) injury to, or death of, persons or loss of, or damage to, property, caused by the performance of any work at or about the Grantor Property by the Permitted Parties except to the extent such claims or damages may be due to or caused by the gross negligence or willful misconduct of Grantor; (iii) the negligence or willful misconduct of a Grantee related to this Temporary Easement or work at or about the Grantor Property except to the extent such claims or damages may be due to or caused by the gross negligence or willful misconduct of Grantor; or (iv) the Permitted Parties causing the filing of any mechanic's or materialmen's lien against the Grantor Property unless such mechanic's or materialmen's lien is due to Grantor's unjustified non-payment of amounts due and owing to Grantee under the Public-Private Agreement.

**3. Binding Effect.** Until terminated in accordance with Subsection 1(b)), the Construction Easement shall: (a) inure to the benefit of Grantee and its successors and assigns, as the "Developer" under the Public-Private Agreement; (b) run with and bind the Grantor Property; and (c) bind Grantor and its successors and assigns, as owners of the Grantor Property.

**4. Miscellaneous.** The invalidity, illegality, or unenforceability of any one or more of the terms and conditions of this Temporary Easement shall not affect the validity, legality, or enforceability of the remaining terms and conditions hereof. This Temporary Easement may be executed in separate counterparts, each of which shall be an original, but all of which together shall constitute a single instrument. This Temporary Easement shall be governed by, and construed in accordance with, the laws of the State of Indiana.

[Signature Pages Follow]

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

TOWN OF WHITESTOWN,  
INDIANA

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

Printed:  
\_\_\_\_\_

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

FIRST DUE COMPANY LLC

By: \_\_\_\_\_  
Donnie Ross, President

4650557\_2 (2023 10 09)

This instrument prepared by Stephen C. Unger, Bose McKinney & Evans LLP, 111 Monument Circle, Suite 2700 Indianapolis, IN 46204.

I affirm, under the penalties for perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law. *Stephen C. Unger*

**EXHIBIT F**

**BILL OF SALE**

This Bill of Sale (this “Bill of Sale”), dated as of (the “Effective Date”), is by and between First Due Company LLC, an Indiana limited liability company (“Developer”), and the Town of Whitestown, Indiana (“Town”) as follows:

**RECITALS**

**WHEREAS**, Developer and the Town have entered into that certain Public-Private Agreement for the Development and Construction of Whitestown Maintenance Facilities, dated as of September \_\_\_, 2023 the (“Public-Private Agreement”), pursuant to which, among other things, Developer has agreed to sell, assign, transfer and convey to Developer, upon the terms and conditions set forth therein, the Project as defined therein.

**NOW, THEREFORE**, in consideration of the mutual covenants, terms and conditions set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. **Transfer.** Developer hereby sells, assigns, transfers and conveys to Town, and Town hereby accepts, as of the date hereof, in accordance with and subject to the terms of the Public-Private Agreement, all of Developer’s right, title and interest in and to the Acquisition Property (as defined therein), including all buildings, facilities, fixtures, equipment, personal property, and all other property associated with the Project, and more specifically detailed in Exhibit A attached hereto and incorporated herein.

2. **Conflict.** This Bill of Sale is subject to all the terms and conditions of the Public-Private Agreement, including without limitation all representations and warranties and indemnities. Notwithstanding anything to the contrary set forth herein, if there is any conflict between the terms and provisions of this Bill of Sale and the terms and provisions of the Public-Private Agreement, the terms and provisions of the Public-Private Agreement shall control.

3. **Punch List Items.** Notwithstanding the transfer and conveyance of the Project to the Town, the parties acknowledge and agree that Developer shall be liable for completion of all punch list items identified in Exhibit B attached hereto and incorporated herein.

**IN WITNESS WHEREOF**, this Bill of Sale has been duly executed and delivered by the duly authorized representatives of Town and Developer as of the Effective Date.

TOWN OF WHITESTOWN,  
INDIANA

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

Printed:

\_\_\_\_\_

Title:

\_\_\_\_\_

FIRST DUE COMPANY LLC

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

Donnie Ross, President