

LOCAL ROAD USE AND PRESERVATION LAW  
LOCAL LAW NO. 1 OF THE YEAR 2012

BE IT ENACTED by the Town Board of the Town of Worcester, Otsego County, New York as follows:

**Section 1: Legislative Findings and Purpose.**

The Town Board has determined that certain high-intensity traffic associated with Construction Activity, as defined herein, can damage and significantly reduce the life of Town highways, which must then be repaired at the expense of the Town's taxpayers. The Town Board has further determined that such damage can be reliably measured using recognized engineering standards. In addition, the Town Board has determined that the strength and capacity of Town highways may in some cases be inadequate to meet the demands of traffic for Construction Activity, as defined herein, and that upgrades to Town highways may be necessary to accommodate such traffic. The Town Board finds that it is in the best interest of the citizens and taxpayers of the Town to have the Person responsible for such Construction Activity bear responsibility for making any necessary upgrades to Town highways and repairing any damage caused to Town highways at the expense of such Person. The purpose of this local law is to establish a mechanism by which the Person responsible for Construction Activity that will generate traffic likely to require upgrades or cause damage to Town highways shall ensure that such upgrades are made and such damage is repaired at the Person's own expense.

**Section 2: Authority.**

This local law is enacted pursuant to New York Vehicle & Traffic Law Section 1660, New York Municipal Home Rule Law Section 10, New York Statute of Local Governments Section 10, New York Highway Law Sections 320 & 326, and other applicable statutes.

**Section 3: Definitions.**

As used in this local law, the following terms shall have the meaning set forth herein:

Baseline Traffic means recurring ambient traffic presented on an annualized basis. It includes typical daily activities on Town Highways (hereinafter defined) such as passenger vehicles, school buses, delivery vehicles, garbage trucks, and normal commuter and business traffic. Baseline Traffic is the cause of normal wear and tear for which a Town Highway is constructed. Baseline Traffic does not include unusual heavy traffic occurring on a temporary basis for such things as Construction Activity (hereinafter defined).

Construction Activity means any activity occurring or to occur that results in land disturbance or the improvement of a parcel. Evidence of Construction Activity includes, without limitation, those activities which are also being undertaken subject to:

Federal permits and approvals including, without limitation, approvals subject to the National Environmental Policy Act and activities subject to the following Nationwide Permits as amended and issued by the U.S. Army Corps of Engineers: Permit 8 (Oil and Gas Structures), Permit 12 (Utility Line Activities), Permit 13 (Bank Stabilization), Permit 16 (Return Water from Upland Contained Disposal Areas), Permit 17 (Hydropower Projects), Permit 21 (Surface Coal Mining Operations), Permit 29 (Residential Developments), Permit 33 (Temporary Construction, Access, and Dewatering), Permit 38 (Cleanup of Hazardous and Toxic Waste), Permit 39 (Commercial and Institutional Developments), and Permit 44 (Mining Activities); or

State permits and approvals, including, without limitation: Highway Work Permits, Waste Transporter Permits, SPDES General Permit for Stormwater Discharges from Construction Activity, Overweight/Oversize Vehicle Permit, Authority to Transport Property (Except Household Goods), Divisible Load Overweight Permit, Special Hauling Trip and Annual Oversize/Overweight Loads Permit, LCV/Tandem Trailer Permit, and Special Hauling Permit; or

Local permits and approvals, if applicable, including, without limitation: Aquifer Protection Permit, Sludge Disposal Permit, Mining Permit, Gravel Mining Permit, Permit for Well in Aquifer Area, Overweight/Oversize Vehicle Permit, Zoning Change, Special Use Permit, and site plan approval.

Construction Activity shall not include land clearing activity or the improvement of a parcel related solely to "farm woodland" or "land used in agricultural production," as those terms are defined pursuant to New York Agriculture & Markets Law Section 301. Construction Activity shall not include local travel by any vehicle(s) or implement(s) or combination thereof when used solely for farm purposes.

Person means any person, persons, corporation, partnership, limited liability company, or other entity.

Concentrated Traffic means traffic intended to travel upon or traveling upon Town Highways to or from the site of Construction Activity which (i) is not Baseline Traffic, and (ii) which will exceed the predetermined normal wear and tear thresholds of one or more Town Highways or segments of Town Highways.

Program Manual means Road Protection Program Manual, Version 1.0, dated November 2011, prepared by Delta Engineers, Architects, & Land Surveyors, P.C., a copy of which is on file at the Town Hall.

Technical Manual means Road Protection Program Technical Manual, Version 1.0, dated November 2011, prepared by Delta Engineers, Architects, & Land Surveyors, P.C., a copy of which is on file at the Town Hall.

Town Highway means those roads and highways and related appurtenances of the Town which are owned or maintained by the Town or otherwise exist as Town Highways by dedication or use, including without limitation, roadways, shoulders, guide rails, bridges, tunnels, culverts, sluices, ditches, swales, sidewalks, or any utilities or improvements therein, thereon, or thereunder. A map of all highways of the Town is and shall be maintained by the Town Highway Superintendent.

Town Highway Superintendent means the Superintendent of Highways or his or her designee.

Road Repair means any repair to or replacement in kind of a Town Highway to fix damages caused by Construction Activity.

Road Upgrade means any improvement to a Town Highway necessary to support or safely accommodate a Construction Activity's Concentrated Traffic.

Structural considerations refer to Town Highway structures such as bridges, culverts, guard rails and signs.

Geometric considerations refer to road width, curve radii and/or grades of Town Highways.

#### **Section 4: Applicability.**

This local law shall apply to any Person who individually or in concert with another Person, intends to undertake Construction Activity that will result in Concentrated Traffic on Town Highways.

#### **Section 5: Determination of Whether Proposed Use Constitutes Concentrated Traffic.**

- A. Any Person identified under Section 4 of this local law shall, prior to undertaking Construction Activity that results in or may result in Concentrated Traffic to travel upon Town Highways, submit a haul route application form and project traffic worksheet to the Town Highway Superintendent in accordance with the forms and procedures set forth in the Program Manual.
- B. The Town Highway Superintendent shall review such application and worksheet in accordance with the Program Manual and the Technical Manual. Within no more than thirty (30) days after receipt of a complete haul route application and project traffic worksheet, the Town Highway Superintendent shall notify the applicant whether the use of Town Highways will result in Concentrated Traffic.
  - (i) If the proposed use of Town Highways will not result in Concentrated Traffic, the remaining provisions of this local law shall not be applicable to the applicant.
  - (ii) If the proposed use of Town Highways will result in Concentrated Traffic, the applicant must either (a) modify the intended haul route and certify to the Town that no traffic generated by the applicant's

Construction Activity will travel over or upon a Town Highway so that such traffic will not constitute Concentrated Traffic or (b) comply with the provisions of Section 6 of this local law.

#### **Section 6: Requirements for Concentrated Traffic.**

If the Town Highway Superintendent determines that traffic generated by an applicant's Construction Activity will result in Concentrated Traffic, the applicant shall be required to comply with the following provisions:

- A. The applicant shall be required to set forth a haul route declaration as set forth in the Program Manual.
- B. The Town's engineering consultant shall examine each segment of the proposed haul route in order to:
  - (i) evaluate the Town Highways on the proposed haul route for design, structural, geometric, or health and safety deficiencies, as those deficiencies are defined more fully by the Program Manual; and
  - (ii) estimate the costs and procedures necessary to upgrade such Town Highways on the proposed haul route if the Town's engineering consultant determines that the Town Highways on the proposed haul route must be upgraded to accommodate the applicant's Concentrated Traffic; and
  - (iii) if available, propose an alternate haul route if required due to design deficiencies or if desired by the applicant to minimize estimated upgrade or repair costs to the haul route.
- C. The Town's engineering consultant shall design or approve, in conjunction with the Town Highway Superintendent or the Town's Engineer, all structural, geometric, health and safety, and roadbed upgrades to Town Highways necessary to accommodate the applicant's Concentrated Traffic, which upgrades shall be made at the applicant's expense in accordance with the provisions of paragraph H of this Section 6. An applicant that has completed upgrades to Town Highways in accordance with this paragraph C will not be responsible for repairing Town Highways on the applicant's haul route provided that the applicant's actual traffic does not exceed the scope, volume, weight, or trips reported on the applicant's haul route declaration.
- D. The Town's engineering consultant shall conduct all pre-use testing and threshold evaluation of each segment of a haul route that is a Town Highway in accordance with the methods set forth in the Program Manual and the Technical Manual.
- E. If no upgrades have been required and/or made to the Town Highways on the proposed haul route and the Town's engineering consultant determines that the applicant's Concentrated Traffic is expected to cause damage to Town Highways, the Town's engineering consultant shall provide

the Town Highway Superintendent and the applicant with an estimate of the cost to repair such damage. Prior to the use of any haul route segment on Town Highways, the applicant shall agree to make all such repairs at the applicant's expense in accordance with the provisions of paragraph H of this Section 6 (including the posting of appropriate security). If any haul route segment is on unpaved Town Highways, the Town Highway Superintendent may require, upon the recommendation of the Town's engineering consultant, that such Town Highways be subject to weekly monitoring and that any damage be repaired within five (5) days at the applicant's expense in accordance with the provisions of paragraph H of this Section 6.

- F. The Town's engineering consultant shall conduct all post-use testing and damage assessment of each segment of a haul route that is a Town Highway in accordance with the methods set forth in the Program Manual and the Technical Manual. The Town's engineering consultant shall provide an estimate of the cost of repairing any actual damage to Town Highways caused by the applicant's Concentrated Traffic. Upon receiving the estimate, the applicant shall make all such repairs at the applicant's expense in accordance with the provisions of paragraph H of this Section 6. Upon the satisfactory completion of the repairs and the approval of such repairs by the Town Highway Superintendent, any unused security shall be returned to the applicant.
- G. Any security for performance and/or payment required under this local law shall be in an amount set by the Town Board upon the recommendation of the Town's engineering consultant. Any such security shall be provided pursuant to a written security agreement with the Town, approved by the Town Board and also approved by the Town Attorney as to form, sufficiency, and manner of execution. At the Town Board's discretion, the security may be in the form of (i) a performance or payment bond, as applicable, (ii) the deposit of funds with the Town, (iii) an irrevocable letter of credit from a bank authorized to do business in New York State, or (iv) other financial guarantee acceptable to the Town Board.
- H. An applicant shall be permitted to undertake upgrade or repair work only if the Town Highway Superintendent determines that the applicant, or a contractor hired by the applicant, has the capability and experience to make the necessary repairs or upgrades. All work shall be performed pursuant to an agreement in writing between the applicant and the Town, which shall require, among other things, the applicant or its contractor to (i) complete the work in a timely fashion, (ii) post security in accordance with the requirements of paragraph G of this Section 6, (iii) indemnify the Town against all liability stemming from the applicant's work, and (iv) provide the Town with satisfactory evidence of insurance as determined by the Town, including liability insurance naming the Town as additional insured. All repairs or upgrades to Town Highways shall be made in accordance with the specifications established by the Town Highway Superintendent and must be approved by the Town Highway Superintendent. In addition, the applicant shall comply with all applicable laws and regulations, including without limitation the prevailing wage requirements of New York Labor Law. The applicant or its contractor shall obtain all governmental permits and approvals and obtain any private land rights that are necessary to make any required repairs or upgrades to Town Highways. If the applicant does not



wish to make such repairs or upgrades to Town Highways, or is determined by the Town Highway Superintendent not to have the necessary capability to make such repairs or upgrades, then the applicant shall agree in writing to pay the Town for the cost of such repairs or upgrades to Town Highways and post security in accordance with the requirements of paragraph G of this Section 6.

- I. The applicant shall pay the Town for all of the Town's reasonable costs, attorneys' fees, and expenses in implementing the requirements of this Section 6, including without limitation the fees of the Town's engineering consultant in conducting all activities required hereunder and under the Program Manual and Technical Manual. The Town may in some cases provide the applicant with an estimate of such costs, attorney's fees, and expenses, and the Town Board may require the applicant to place funds in escrow to cover such costs, attorneys' fees, and expenses before the Town incurs any such costs, fees and expenses.
- J. The applicant shall defend, indemnify, and hold the Town harmless from all losses resulting from injury or death of persons or damage to property arising from the applicant's upgrades and repairs to Town Highways.
- K. If an applicant disagrees with any decision by the Town Board, the Town Highway Superintendent, or the Town's engineering consultant in the administration of this local law, including without limitation the extent or method of a proposed highway upgrade or repair, any cost imposed upon the applicant, or an estimate of the amount of security to be held by the Town, and the applicant and the Town are unable to resolve their dispute through negotiation, the applicant may make a written request to the Town Board appealing such decision and requesting a public hearing at which the applicant shall have the right to appear and be heard. The Town Board shall issue a public notice of hearing and shall hold such public hearing not fewer than five (5) days nor more than forty-five (45) days after such request. The Town Board may reverse, modify, or affirm, wholly or partly, the decision appealed from and shall make such decision as in its opinion ought to have been made in the matter and, to that end, shall have all the powers of the board, official, or consultant from whose decision the appeal is taken. The Town Board shall issue a determination on the applicant's request within thirty (30) days of the public hearing. In view of the Town's obligation to provide its residents with safe and properly maintained highways, the Town Board's determination shall be final.

In order to comply with the requirements of this Section 6, an applicant shall have the option of entering into a road use agreement with the Town. A sample form of road use agreement is on file at the Town Hall. The sample form road use agreement may be amended from time to time by resolution of the Town Board, with any amended version replacing the prior version on file at the Town Hall. The applicant may ask to modify such form or propose a different form of road use agreement, but any such agreement must be in a form approved by the Town Board and also approved by the Town Attorney as to form, sufficiency, and manner of execution.

## **Section 7: Updates to the Program Manual and the Technical Manual.**

From time to time, updates to the Program Manual and the Technical Manual may be published. The Town Board may from time to time update or replace any manual referenced in this local law by adopting a local law referencing such new or updated manual, and thereafter, the new or updated manual shall be binding on all Persons subject to this local law.

## **Section 8: Application Fees.**

The Town Board may establish a schedule of fees relating to applications, approvals, inspections, and enforcement under this local law.

## **Section 9: Enforcement and Penalties for Offenses.**

- A. The Town Highway Superintendent, code enforcement officer, or law enforcement officials are hereby given the duty, power, and authority to administer and enforce this local law. Any Person may file a complaint with the Town Highway Superintendent alleging a violation of this local law, and the Town Highway Superintendent shall investigate and report on such complaint. If reasonable evidence of a violation exists, the Town Highway Superintendent may issue a notice of violation, an appearance ticket, and an order to cease and desist to the Person or Persons alleged to have violated this local law.
- B. Any Person or Persons convicted of violating any provision of this local law shall be subject to monetary civil penalties not exceeding \$500 for a first violation; not less than \$500 nor more than \$800 for the second violation occurring within a period of five years; and not less than \$800 nor more than \$1,000 for the third or subsequent violation occurring within a period of five years. Each week that a violation continues uncorrected or is resumed shall constitute a separate additional violation.
- C. The Justice Court of the Town shall have original and trial jurisdiction over all notices of violations and appearance tickets served charging violations of this local law. For the purpose of conferring jurisdiction upon courts and judicial officers generally, violations of this local law shall be deemed misdemeanors, and for such purpose only, all provisions of law relating to misdemeanors shall apply to such violations.
- D. In addition to the penalties prescribed herein, if any use of Town Highways is made or threatened in violation of the New York Highway Law, the New York Vehicle & Traffic Law, or other local law or ordinance of the Town, the Town Highway Superintendent may, in the name of and on behalf of the Town, seek all remedies allowed pursuant to such laws or ordinances and may institute an action or proceeding to restrain or enjoin such unlawful use.
- E. In lieu of or in addition to any fine or imprisonment, or both, imposed for a conviction of a violation of this local law, each such violation may be subject to a civil penalty not to exceed

\$10,000 to be recovered in an action or proceeding in a court of competent jurisdiction. Each week that a violation continues uncorrected or is resumed shall constitute a separate additional violation.

F. (1) In addition to any penalties or other remedies provided for or allowed herein, the Town Highway Superintendent shall have the right and authority to issue a stop-work order in order to halt any use of or work on one or more Town Highways that is determined by the Town Highway Superintendent to:

- a. pose an unreasonable risk to the safety, health, or general welfare of the public, without regard to whether such use of or work on Town Highways has been authorized pursuant to this local law or by a road use agreement, or
- b. pose a risk of imminent harm to Town Highways, without regard to whether such use of or work on Town Highways has been authorized pursuant to this local law or by a road use agreement, or
- c. be contrary to any applicable provision of this local law.

(2) All stop-work orders shall be in writing, be dated and signed by the Town Highway Superintendent, state the reason or reasons for issuance, state with specificity the particular use of and/or work on Town Highways that must cease and the particular Town Highways for which the stop-work order is effective, and, where applicable, state the conditions that must be satisfied before the use of or work on such Town Highways shall be permitted to resume.

(3) The Town Highway Superintendent shall cause the stop-work order, or a copy thereof, to be served personally or by certified mail on the following Persons, where applicable:

- a. the Person who has submitted a haul route declaration to the Town and whose use of or work on Town Highways is the subject of the stop-work order, and
- b. the Person who is a party to a road use agreement with the Town and whose use of or work on Town Highways is the subject of the stop-work order, and
- c. any identifiable contractor, subcontractor, construction superintendent, hauler, or any of their agents, or any other Person taking part or assisting in the use of or work on Town Highways that is the subject of the stop-work order.

Notwithstanding the foregoing, the failure to serve any Person mentioned above shall not affect the validity or effectiveness of the stop-work order.

(4) Upon the issuance of a stop-work order, all Persons performing, taking part in, or assisting in the use of or work on Town Highways that is the subject of the stop-work order shall immediately cease all such use of or work on such Town Highways. The failure to comply with the terms and conditions of a stop-work order issued hereunder shall constitute a violation of this local law.



(5) A stop-work order may be rescinded only by the Town Highway Superintendent upon receipt of evidence that the conditions or actions that lead to the issuance of the stop-work order have been abated or adequately addressed.

#### **Section 10: Time to Act.**

The time periods prescribed herein in which the Town Board, the Town Highway Superintendent, other Town official, or the Town's engineering consultant shall act are not of the essence and shall not be construed as imposing a limitation on the time to act.

#### **Section 11: Inconsistent Provisions and Repealer.**

In the event of any inconsistency between the provisions of this local law and the provisions of the Program Manual and the Technical Manual, the provisions of this local law shall control. All ordinances, local laws, and parts thereof inconsistent with this local law are hereby repealed. The provisions of this law shall supersede provisions of the Town of Maryland Local Law No. 1-2011, Wind Energy Systems, Section 1007 and Section 1007 Addendum that pertain to Road Use, Traffic, Permitting, Remediation of damage to roads and all subjects relative to the use of Town roads in conjunction with their operations and activities.

#### **Section 12: Severability.**

If any part or provision of this local law or the application thereto to any Person or circumstance shall be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part or provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this local law or the application thereof to other Persons or circumstances.

#### **Section 13: Effective Date.**

This local law shall take effect upon filing with the New York Secretary of State.

## **AGREEMENT FOR ROAD USE, REPAIR, AND IMPROVEMENTS**

This AGREEMENT FOR ROAD USE, REPAIR, AND IMPROVEMENTS (this "Agreement") is made and entered into this [DATE] by the TOWN OF WORCESHER (the "Town"), a municipal corporation with offices at [ADDRESS] and [DEVELOPER], a [TYPE OF ENTITY] with a mailing address at [ADDRESS] ("Developer"). The Town and Developer are sometimes referred to herein individually as a "Party" and collectively as the "Parties".

### **RECITALS**

1. The Town has adopted Local Law No. 1 of the Year 2012 (the "Road Use and Preservation Law").
2. Developer intends to undertake construction activity which is subject to the requirements of the Road Use and Preservation Law (the "Project").
3. The Town is responsible for the maintenance and repair of certain roads and highways within the Town.
4. In connection with the Project, it may be necessary for Developer and its contractors, subcontractors or designees to: (a) frequently travel upon or transport heavy equipment and materials over certain roads and highways in the Town which may in certain cases be in excess of the design limits of such roads; (b) transport certain materials, such as concrete and gravel, on roads within the Town; and (c) widen certain roads and make certain modifications and upgrades (both temporary and permanent) to such roads to permit equipment and materials to pass.
5. The Parties wish to enter into this Agreement to set forth the terms and conditions for the use, improvement, and repair of Town roads by Developer in connection with the Project. NOW THEREFORE, in consideration of mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

## ARTICLE I

### USE OF HAUL ROUTES BY DEVELOPER

**Section 1.1** Use of Designated Roads by Developer. In connection with the Project, the Town hereby acknowledges and agrees that Developer, its contractors and subcontractors and each of their respective agents, officers, employees, representatives, and assigns (collectively, the "Developer Parties") may use the portions of the roads and highways located in and maintained by the Town identified as haul routes by Developer on Appendix A attached hereto (the "Haul Routes") subject to the terms and conditions of this Agreement and in accordance with the most recent versions of the Delta Road Protection Program Manual (the "Program Manual") and the Delta Road Protection Program Technical Manual (the "Technical Manual"). Developer and the Developer Parties may not use any other Town roads or highways (roads not included as Haul Routes) in connection with the Project.

**Section 1.2** Responsibilities of Engineer and Developer's Duty to Pay for Town's Reasonable Expenses. The Town shall retain an engineer (the "Engineer") to undertake surveys of the Haul Routes, to conduct pre-use testing and post-use testing of the Haul Routes, to prepare estimates of the cost of upgrades or improvements to Haul Routes necessary to accommodate Project traffic and repairs for any damage to Haul Routes caused by Project traffic, and to perform such other tasks that the Town may designate to implement the Road Use and Preservation Law. Developer shall pay for all of the Town's reasonable costs and expenses in implementing this Agreement including the fees of the Engineer in connection with the work to be performed pursuant to this Agreement. The Town shall provide Developer with an estimate of such costs and expenses, and Developer shall place funds in escrow with the Town in an amount sufficient to cover such costs and expenses before the Town incurs any such costs and expenses.

**Section 1.3** Evaluation and Pre-Use Testing of Haul Routes. Developer shall submit to the Town Highway Superintendent a Haul Route Declaration on a form supplied by the Town. The Haul Route Declaration shall identify the Project location and the routes that all material and equipment required for the Project shall be carried over to reach the Project. The Engineer shall

undertake a public safety evaluation, structural evaluation, and a geometric evaluation of each segment of the proposed Haul Route as provided in Chapter 3 of the Program Manual. The Engineer shall also pre-test each segment of the proposed Haul Routes as provided in Chapter 3 of the Program Manual. The Engineer shall also conduct a capacity analysis as provided in Chapter 3 of the Program Manual. If Developer decides to revise any Haul Routes, whether on the basis of the Engineer's evaluation of the Haul Routes or otherwise, Developer shall submit a revised Haul Route Declaration, and the Engineer shall evaluate the revised Haul Routes as provided herein.

**Section 1.4**     Upgrades to Haul Routes. If the Engineer determines that any structural, geometric, or roadbed upgrades are necessary to accommodate Project traffic, as documented on a Technical Haul Route Evaluation Form, Developer shall have the option of either revising the Haul Route or ensuring that such necessary upgrades are completed at Developer's expense. The design, review, approval, and construction of any upgrades agreed to by Developer shall be completed as provided in Chapter 3 of the Program Manual and made in accordance with the provisions of Section 2.4 hereof.

**Section 1.5**     Use of Haul Routes. Upon the completion of the capacity evaluation and any necessary upgrades to the Haul Routes, Developer and Developer Parties shall be permitted to use the Haul Routes for Project traffic as provided in Chapter 3 of the Program Manual. If the Engineer determines that Project traffic is likely to damage any segment of the Haul Routes, Developer shall be required to post security to cover the estimated cost of repairing such damage in an amount to be determined by the Engineer and approved by the Town Board. If Project traffic will travel over unpaved Town highways, the Town Highway Superintendent may require, upon the Engineer's recommendation, that such Town highways be subject to weekly monitoring and that any damage be repaired within five (5) days at the Developer's expense. Developer shall be responsible for keeping, at its sole cost and expense, the Haul Routes clean and free from rubbish and debris resulting from Project traffic or Developer's use of the Haul Routes. Materials and equipment of Developer or the Developer Parties, if any, shall be timely removed from the Haul Routes when they are no longer reasonably necessary to the Project. Developer will also take reasonable steps to minimize fugitive dust and to mitigate or minimize the transport of such materials as mud or dirt to public streets.

**Section 1.6**     Post-Use Testing and Damage Assessment. At the completion of the

Project, the Engineer shall conduct post-use testing of all segments of the Haul Route as provided in Chapter 3 of the Program Manual. Using the pre-use testing and post-use testing data, the Engineer will make a determination of damages to Haul Route segments (and any related appurtenances and improvements), if any, as a result of Project traffic as provided in Chapter 3 of the Project Manual. The Engineer will make recommendations for repair alternatives and estimated costs of repairs. If any segments of Haul Route are shared with other developers subject to a separate road use agreement with the Town, the Engineer shall also provide an allocation analysis of the damage caused by the Developer and such other developers. The Town Highway Superintendent shall review the Engineer's recommendations and select an appropriate repair alternative.

**Section 1.7**    Haul Route Repair. If Developer is found to be responsible for any damage to any segment of a Haul Route, Developer shall be responsible for repairing such damage at its own expense or paying the Town for the cost of such repairs. Such repairs shall be made in accordance with the provisions of Section 2.4 hereof.

## ARTICLE II

### GENERAL TERMS AND CONDITIONS

**Section 2.1**    Designees. Either Party may at any time provide written notice to the other Party with the name and contact information of a person who shall serve as that Party's primary point of contact between the Parties. A Party may change its designee at any time by providing the other Party with written notice of the change and the effective date of such change.

**Section 2.2**    Cooperation in Good Faith; Resolution of Disputes. The Parties shall communicate expeditiously and cooperate and negotiate in good faith with respect to all matters that must be agreed upon after the execution of this Agreement. If Developer disagrees with any decision by the Town Board, the Town Highway Superintendent, or the Engineer, including without limitation the extent or method of a proposed highway upgrade or repair, any cost imposed upon Developer, or an estimate of the amount of security to be held by the Town, and



the Parties are unable to resolve their dispute through negotiation. Developer may make a written request to the Town Board appealing such decision and requesting a public hearing at which Developer shall have the right to appear and be heard. The Town Board shall hold such public hearing not fewer than five (5) days nor more than forty-five (45) days after such request. The Town Board may reverse, modify, or affirm, wholly or partly, the decision appealed from and shall make such decision as in its opinion ought to have been made in the matter. The Town Board shall issue a determination on Developer's request within thirty (30) days of the public hearing. In view of the Town's obligation to provide its residents with safely and properly maintained highways, the Town Board's determination shall be final.

**Section 2.3** Emergency Action by the Town. If the Town determines that in the interest of public health, safety, or welfare that an emergency condition exists that has been caused by Developer or Developer Parties and that a repair to a Town highway must be made sooner than Developer is willing to agree to, the Town may make such repair and invoice Developer for the costs incurred by the Town in connection with the repair, provided the Town has given Developer twenty-four (24) hours advance written notice of the Town's intent to make such repairs, or such advance written or oral notice as may be appropriate based upon the nature of the emergency. Developer shall pay such invoiced amounts for repairs undertaken by the Town within thirty (30) days following receipt of the invoice; provided, however, that if Developer disputes the invoice for such repairs, such dispute shall be resolved in accordance with the provisions of Section 2.2 hereof.

**Sectionn 2.4** Terms and Conditions of Repairs and Upgrades of Hwy. Route 1. If the Engineer determines that any repairs or upgrades to segment of Hwy. Route 1 are necessary because of Project traffic, Developer shall have the option of making such repair or upgrade on its own subject to the terms set forth herein. Developer shall be permitted to undertake such work only if the Town Highway Superintendent determines that Developer, or a contractor hired by Developer, has the capability and experience to make the necessary repairs or upgrades. All work shall be performed pursuant to an addendum to this Agreement that shall specify the scope of work to be performed and which shall require Developer or its contractor to (i) complete the work in a timely fashion (ii) provide security for performance and/or payment in a form reasonably satisfactory to the Town and in amounts deemed sufficient by the Town, (iii)

indemnify the Town against all liability stemming from the work, and (iv) provide the Town with satisfactory evidence of insurance as provided in Article V hereof. All repairs or upgrades shall be made in accordance with the specifications established by the Town Highway Superintendent and must be approved by the Town Highway Superintendent. In addition, Developer shall comply with all applicable laws and regulations, and all work performed on Town highways or Town property shall be subject to the prevailing wage determinations of New York Labor Law. Developer or its contractor shall obtain all governmental permits and approvals and obtain any private land rights that are necessary to make any required repairs or upgrades. If Developer does not wish to make such repairs or upgrades, or is determined by the Town Highway Superintendent not to have the necessary capability to make such repairs or upgrades, then Developer shall agree in an addendum to this Agreement to pay the Town for the cost of such repairs or upgrades and shall post security in a form reasonably satisfactory to the Town and in amounts deemed sufficient by the Town. If Developer fails to fully complete or pay for any repairs required hereunder, such failure shall be deemed an Event of Default as set forth in Article VI hereof and the Town shall have such remedies as are set forth therein.

**Section 2.5** Expiration of this Agreement. After the completion of the Project, and upon the Town Highway Superintendent's determination that all repairs or upgrades have been satisfactorily completed, this Agreement shall expire and Developer shall be released from all obligations herein except for those that expressly survive the expiration or termination of this Agreement.

### ARTICLE III

#### COVENANTS OF PARTIES

The Parties' engineering responsibilities shall be carried out in accordance with generally accepted engineering practices, and construction responsibility shall be carried out in accordance with sound construction practices. The Parties shall require from their respective construction contractors and subcontractors no less a standard of engineering and construction practice. The Parties shall perform and complete all repairs, upgrades, modifications, and improvements

hereunder in a good and workmanlike manner.

## ARTICLE IV

### INDEMNIFICATION; LIMITATION OF LIABILITY

#### Section 4.1 Indemnification.

(a) Except to the extent caused by the (i) gross negligence (including willful misconduct) of or by the Town or its officers, agents, employees or subcontractors, Developer agrees that it will defend, indemnify, and hold harmless the Town and its officers and employees (the "Indemnified Parties") from and against any and all liability, actions, administrative proceedings, damages, claims, demands, judgments, losses, costs, expenses and fees, including reasonable attorney's fees (collectively, "Losses"), resulting from (A) injury or death of persons or damage to property arising directly or indirectly from any acts, errors or omissions of Developer or its officers, agents, employees or subcontractors in connection with the Project or the performance of any upgrades or repairs to Town highway or Town property; or (B) breach or default of this Agreement by Developer. In the event a claim, action, demand, suit or proceeding to which the Indemnified Parties are entitled to be indemnified hereunder is instituted by any third party, the Town shall promptly notify Developer in writing and provide Developer with a copy of the written documents presented by such third party.

(b) Developer will have the right to control the defense of any such actions or claims and will have the right to settle such actions or claims on such terms as Developer may deem reasonable so long as such defense and/or settlement (i) provides for the release or indemnification of the Indemnified Parties and (ii) does not create any financial or other obligation on the part of the Indemnified Parties that is not paid or reimbursed in full by Developer. The Indemnified Parties shall have the right to retain, at Developer's expense, separate legal counsel from Developer's legal counsel, subject to Developer's approval of such legal counsel, the scope of services contemplated to be provided by the Indemnified Parties' legal counsel, and the billing rates of and charged for services by the Indemnified Parties' legal

counsel. If Developer is not named as a party in any action or proceeding instituted against an Indemnified Party, and Developer requests the right to intervene as a party, the Town hereby consents thereto.

(c) Without limiting the foregoing, Developer agrees to defend, indemnify, and hold harmless the Indemnified Parties for Losses in connection with any litigation commenced against the Indemnified Parties by reason of the Town's performance of this Agreement, including but not limited to any litigation commenced against the Town by any entity relating to the payments to be made by Developer to the Town hereunder. In the event a claim, action, demand, suit or proceeding is instituted against an Indemnified Party by any third party challenging the exercise of the Town's municipal powers or obligations in connection with the Project, pursuant to which such Indemnified Party is entitled to be indemnified hereunder, the Town shall promptly notify Developer in writing and provide Developer with a copy of such written documents presented by such third party, and the provisions of Section 4.1 (b) hereof shall apply.

**Section 4.2    Limitation of Liability.** The Developer waives all claims against the Town for any consequential, incidental, indirect, special, exemplary, or punitive damages (including, without limitation, loss of actual or anticipated profits, revenues, or production by reason of shutdown or non-operation; increased expense of operation, borrowing, or financing; loss of use or productivity; or increased cost of capital); and, regardless of whether any claim arises out of breach of contract or warranty, tort, product liability, indemnity (including the indemnity set forth in this Section 5.1), contribution, strict liability, or other legal theory.

**Section 4.3    Survival.** The provisions of this Article IV shall survive the expiration or earlier termination of this Agreement and continue until the later of (i) the date that is six (6) months after the expiration of the applicable statute of limitations of any claim, action, demand, suit, or proceeding to which the Indemnified Parties are entitled to be indemnified hereunder or (ii) in the event that a claim, action, demand, suit, or proceeding is brought against an Indemnified Party, the date that a final judicial or administrative determination or settlement of such claim, action, demand, suit, or proceeding becomes binding on the parties hereto and is not subject to appeal.

## ARTICLE V

### INSURANCE

**Section 5.1** Required Insurance. If Developer or Developer Parties perform any upgrades or repairs to Town highways or Town property, the party performing such work shall at all times while performing such work maintain in full force and effect such insurance as will protect Developer or Developer Parties from claims set forth below that arise out of or as a result of Developer's or Developer Parties' operations or completed operations and for which Developer or Developer Parties may be legally liable, whether such operations be by the Developer or Developer Parties or by a subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- (a) claims under worker's compensation, disability benefit, and other similar employee benefit acts that are applicable to the work to be performed;
- (b) claims for damages because of bodily injury or death of any person;
- (c) claims for damages insured by usual personal injury liability coverage;
- (d) claims for damages because of injury to or destruction of tangible personal property, including loss of use therefrom;
- (e) claims for bodily injury, death of a person, or property damage arising out of ownership, maintenance, or use of a motor vehicle;
- (f) claims for bodily injury or property damage arising out of completed operations;
- (g) claims involving contractual liability insurance applicable to Developers' indemnification obligations in this Agreement; and



(h) claims for remedial costs, bodily injury, and property damage arising out of the presence or discharge of pollutants, which in turn arise out of Developer's or Developer Parties' operations and completed operations hereunder.

**Section 5.2 Specific Insurance Requirements.** The insurance required in Section 5.1 hereof shall in all cases be purchased from an insurer authorized to do business in New York State and bearing A.M. Best financial strength ratings of "A-" or better. The commercial liability coverage (including without limitation all commercial general liability, pollution legal liability, and automobile liability) (i) shall have limits of not less than \$2 million per occurrence and in the aggregate; (ii) shall name the Town as additional insured, on a primary and non-contributing basis for claims arising in whole or in part from the Developer's or Developer Parties' operations and completed operations, whether or not the Town is itself actually or allegedly negligent and whether or not any such claim involves bodily injury to the employee of any other insured or additional insured under said policy; (iii) shall provide for the severability of interest; and (iv) shall state that the Town is entitled to recover for acts and omissions of Developer or Developer Parties even though the Town is named as an additional insured. Certificates of insurance acceptable to the Town, with all applicable additional insured endorsements attached, shall be filed with the Town prior to commencement of any work and thereafter upon renewal or replacement of each required policy of insurance. These certificates and the insurance policies required by this Article V shall contain a provision that coverages afforded under the policies will not be materially changed, cancellation or expiration until at least 30 days' prior written notice has been given to the Town. Upon receipt of the notice, the Town shall have the right to examine any policy of insurance required to be maintained hereunder. If Developer or Developer Parties should fail to purchase or maintain any of the insurance required under this Article V, the Town shall be entitled to recover all damages arising from such failure, in addition to all other rights and remedies, even if the Town has itself obtained insurance to cover the same risks.

## ARTICLE VI

### DEFAULT AND REMEDIES

**Section 6.1** Events of Default. The occurrence and continuance of any applicable cure or grace period of anyone or more of the following shall constitute an "Event of Default" hereunder:

(a) Developer shall fail to make any payment due under the terms of this Agreement and such failure shall continue for a period of fifteen (15) days beyond the due date; provided, however, that if Developer timely disputes any amounts due, such amounts shall be deemed due as of thirty (30) days after the date that such dispute is finally resolved by agreement of the Parties, (ii) a final determination by the Town Board in accordance with Section 2.2 hereof, or (iii) a final and binding determination by a court having jurisdiction over the matter;

(b) Developer shall fail to increase the amount of, or replace any security for the benefit of the Town, whether provided under the terms of any security agreement or otherwise, and such failure shall continue for a period of ten (10) days following written notice by the Town of such failure; or

(c) Developer fails to properly perform or complete any obligation or repair it or Developer Parties have agreed to complete and such failure shall continue for fifteen (15) days following written notice by the Town of such failure. Anything to the contrary notwithstanding, the time for cure of (i) any Event of Default may be extended by written agreement of the Parties, and (ii) any non-monetary Event of Default shall be extended for a reasonable period so long as Developer has commenced efforts to cure within such the applicable cure period and pursued such efforts with due diligence.

**Section 6.2** Town Remedies. If an Event of Default has occurred upon notice and the expiration of any applicable cure or grace period provided in Section 6.1 hereof:

(a) with respect to any monetary Event of Default, the Town may look upon any

security provided therefore and any late payments shall accrue interest at the greater of 1.5% per month or the highest rate permitted by law; or

(b) with respect to any Event of Default involving the failure of Developer or Developer Parties to carry out any work, the Town may at its discretion either (i) draw or call upon any security for the completion of such work, or (ii) correct or complete such work on its own or through contractors hired by the Town and charge Developer with all costs and expenses in connection therewith; or

(c) the Town may commence an action at law or in equity seeking such remedy or relief as it deems appropriate or expedient; or

(d) the Town may issue a stop-work order or impose any other remedies available under applicable law.

No remedy conferred upon or reserved to the Town under this Agreement is intended to be exclusive of any other remedy under this Agreement or by law provided that each shall be cumulative and shall be in addition to every other remedy given to the Town by Agreement now or hereafter existing at law or in equity or by statute. No delay or omission of the Town to exercise any right or power accruing upon any Event of Default shall impair any right or power or shall be construed to be a waiver of any Event of Default or any acquiescence therein, and every power and remedy given to the Town under this Agreement may be exercised from time to time as often as may be deemed expedient by the Town.

**Section 6.3**     Attorney's Fees. In the event that the Town employs an attorney or incurs other expenses to enforce the terms of this Agreement or correct an Event of Default hereunder, to the extent permitted by law, Developer shall pay all costs of the Town in obtaining any payments due from Developer or in performing any work required by Developer, including reasonable attorneys' fees and expenses.

## ARTICLE VII

### FORCE MAJEURE EVENT

**Section 7.1** Force Majeure Event Defined. A "Force Majeure Event" shall mean acts of God; strikes, lockouts, or other industrial disturbances; acts of a public enemy; war; terrorism; insurrections; riots; civil disturbances; epidemics; fires; natural disasters of all kinds; floods; washouts; droughts or other weather-related events; arrest, restraining of government and people; explosions; partial or entire failure of utilities; shortages of labor, material, supplies or transportation; or any other similar or different cause not reasonably within the control of the Developer or Developer Parties.

**Section 7.2** Applicability of Force Majeure Event. Developer will not be in breach or liable for any delay or failure in its performance under this Agreement to the extent such performance is prevented or delayed due to a Force Majeure Event, provided that:

- (a) Developer gives the Town written notice within forty-eight (48) hours of the commencement of the Force Majeure Event, with details to be supplied within seven (7) calendar days after the commencement of the Force Majeure Event further describing the particulars of the occurrence of the Force Majeure Event; the duration of performance will be of no greater scope and of no longer duration than is directly caused by the Force Majeure Event;
- (b) Developer proceeds with commercially reasonable efforts to overcome the events or circumstances preventing or delaying performance and will provide a written report to the Town during the period that performance is delayed or prevented describing actions taken and to be taken to remedy the consequences of the Force Majeure Event, the schedule for such actions and the expected date by which performance will no longer be affected by the Force Majeure Event; and

## ARTICLE VIII

### REPRESENTATIONS AND WARRANTIES

#### Section 8.1 Town Representations and Warranties.

- (a) Existence and Good Standing. The Town validly exists as a political subdivision in good standing under the laws of the State of New York.
- (b) Approval and Authorization. The Town has full power and authority to enter into this Agreement and to fully perform all of its duties and obligations hereunder. The Town has duly authorized the execution and delivery of this Agreement and the Town's performance of all of its duties and obligations contained herein, and, to the extent permitted by applicable law, this Agreement constitutes a valid and legally binding obligation of the Town, enforceable in accordance with applicable law.
- (c) All Statements True. No statement, information, representation or warranty of the Town contained in this Agreement or furnished by or on behalf of the Town in connection with the transactions contemplated herein contains any untrue statements of a material fact or omits to state a material fact necessary in order to make a statement contained herein not misleading.

#### Section 8.2 Developer Representations and Warranties.

- (a) Existence and Good Standing. Developer is a \_\_\_\_\_ established and in good standing under the laws of the State of \_\_\_\_\_.
- (b) Approval and Authorization. Developer has full power and authority to enter into this Agreement and to fully perform all of its duties and obligations hereunder. Developer is duly authorized to execute and deliver this Agreement and perform all of its duties and obligations contained herein, and, to the extent permitted by applicable law, this Agreement constitutes a valid and legally binding obligation of Developer, enforceable



in accordance with its terms.

- (c) All Statements True. No statement, information, representation or warranty of Developer contained in this Agreement or furnished by or on behalf of Developer in connection with the transactions contemplated herein contains or contains true statements of a material fact or omits to state a material fact necessary in order to make a statement contained herein not misleading.

## ARTICLE IX

### MISCELLANEOUS PROVISIONS

**Section 9.1** Governing Law. This Agreement shall be governed by, construed and enforced in accordance with, the laws of the State of New York, without regard to the conflict of laws provisions in such state.

**Section 9.2** Entire Agreement and Amendments. All Appendices attached to this Agreement are incorporated into and form a part of this Agreement. This Agreement (including all Appendices) shall constitute the complete and entire agreement between the Parties and supersedes all prior and contemporaneous agreements and understandings, oral or written, with respect to the subject matter hereof. This Agreement may be amended only by a written agreement signed by all of the Parties.

**Section 9.3** Binding Effect. This Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and assigns.

**Section 9.4** Notices. All notices, requests, demands, and other communication hereunder shall be in writing and shall be deemed to have been duly given as of the date delivered by hand or fax (with appropriate acknowledgement of receipt); (b) three (3) business days after having been mailed by certified mail, postage prepaid, return receipt requested, or (c) the next business day after having been sent for delivery on the next business day, shipping prepaid, by a nationally recognized overnight courier, in each case to the receiving Party at the address set forth below or

at such other address as any Party may specify by written notice to the other party sent in the manner set forth herein.

(a) If to Developer:

Contact Person:

Tel.:

Fax:

E-mail:

With a copy to:

[Name and title of copied person]

Tel.:

Fax:

E-mail:

(b) If to the Town:

Attn: Supervisor

Tel.:

Fax:

E-mail:

With a copy to:

[Town Attorney]

Tel.:

Fax:

E-mail:

And (if applicable for the project) a copy to:

[Town and/or County Road Preservation Program Coordinator]

Tel:

Fax:

E-mail

**Section 9.5** Exercise of Rights and Waiver. The failure of any Party to exercise any right under this Agreement, or to insist upon the strict performance of any term or condition thereof, shall not be construed to be a waiver or relinquishment thereof, and at the time of such Party's failure to insist upon strict performance or any time in the future, all such terms and conditions shall remain in full force and effect.

**Section 9.6** Independent Contractor; Relation of the Parties. The status of Developer under this Agreement shall be that of an independent contractor and not that of an agent. In accordance with such status, Developer and its officers, agents, employees, representatives, and servants shall at all times during the term of this Agreement conduct their affairs in a manner consistent with such status and by reason of this Agreement shall not hold themselves out as, nor claim to be acting in the capacity of officers, employees, agents, representatives, or servants of the Town. As an independent contractor, Developer shall accept full responsibility for providing to its employees all statutory coverage for workers compensation, unemployment, disability or other coverage required by law.

**Section 9.7** Severability. In the event that any clause, provision or paragraph in this Agreement shall, for any reason, be deemed invalid or unenforceable, the remaining clauses and provisions shall not be affected, impaired, or invalidated and shall remain in full force and effect.

**Section 9.8.** Headings and Construction. The Article and Section headings in this Agreement are inserted for convenience of reference only and shall have no way effect, modify, define, limit, or be used in construing the text of the Agreement. If the context requires, all singular words in the Agreement shall be construed to include the plural and all words of neuter gender shall be construed to include the masculine and feminine forms of such words. Notwithstanding the fact that this Agreement has been prepared by one of the Parties, all of the Parties confirm that they and their respective counsel have reviewed, negotiated and adopted this Agreement as the joint agreement and understanding of the Parties. This Agreement is to be construed as a whole and any presumption that ambiguities are to be resolved against the primary drafting party shall not apply.

**Section 9.9** Counterparts. This Agreement may be executed in multiple counterparts,

each of which shall be deemed an original, but all of which together shall constitute one and the same Agreement.

**Section 9.10 No Third Party Beneficiary.** No provisions of this Agreement shall in any way inure to the benefit of any person or third party so as to constitute such person or third party as a third-party beneficiary under this Agreement, or of any part of the terms of this Agreement or otherwise give rise to any cause of action in any court against a Party hereto.

**Section 9.11 Ownership of Subject Matter of Agreement.** Notwithstanding anything to the contrary contained herein, this Agreement does not create nor shall it confer upon Developer any easement or any ownership rights of any nature whatsoever in the Town's property or public rights-of-way.

**Section 9.12 Consents to be Reasonable.** Any consent, permission, authorization, judgment, satisfaction, determination, or approvals required from the Town or any Party's consultant or inspector under this Agreement shall not be unreasonably withheld, conditioned, or delayed, except as may be specifically provided otherwise in this Agreement.

**Section 9.13 Safety.** Developer and the Developer Parties shall perform the work hereunder in a safe manner and shall obey all safety requirements that may be imposed from time to time, and shall comply with all State and federal safety regulations applicable to the work being done. While work is being done on any of the public roads in the Town for or on behalf of Developer, Developer shall establish work zones with appropriate signage warning the traveling public of the existence of the construction zone and providing adequate traffic control as to assure safe passage through said construction zone. Developer shall also provide traffic control on the Haul Routes when such highways are blocked during the course by Developer or the Developer Parties under this Agreement. All traffic control plans to be used on Town highways shall be approved by the Town Highway Superintendent.

**Section 9.14 Excess Material.** Developer and the Developer Parties agree that in connection with any upgrades or repairs to be made hereunder, there may be certain materials removed that are no longer necessary (the "Excess Materials"). Developer agrees to remove such materials and

stockpile them for use by the Town if requested by the Town Highway Superintendent. The Town Highway Superintendent shall designate the place on Town property in which the Excess Materials will be stored.

**Section 9.15 Rights of Termination.** Developer may terminate this Agreement upon thirty (30) days notice to the Town if and only if: (a) Developer has substantially completed the Project and (b) all obligations of Developer under this Agreement as of the date of termination have been satisfactorily met.

**Section 9.16 Transfer of Project.**

- (a) Except as provided in subsections 9.16(b), 9.16(c) and 9.16(d), no Party may assign, transfer, or encumber this Agreement or any part of its rights, interests or obligations under this Agreement without the prior written approval of the other Party.
- (b) In the event that Developer proposes to sell, lease, assign, or otherwise transfer ownership to a third party (collectively, "Transferee" of the Project) and this Agreement, no approval by the Town is required, provided:
  - (i) Developer shall be in compliance with all material terms of this Agreement, and no Event of Default shall have occurred and be continuing;
  - (ii) Developer shall notify the Town in writing, at least thirty (30) days prior to any sale, lease, assignment, or transfer, and inform the Town in writing that the Transferee has notice of, and acknowledges, this Agreement and the duties and obligations of Developer hereunder; and
  - (iii) The Transferee shall agree in writing, to comply with the terms of this Agreement and any other agreement between the parties.



(c) In the event of any such sale, lease, transfer or assignment (collectively, "Assignment") of all of Developer's rights interest and obligations under this Agreement to a Transferee, Developer shall be released of all of its obligations under from and after the effective date of any such Assignment.

(d) Developer may, without approval of the Town, pledge, mortgage, grant a security interest in, or otherwise collaterally assign this Agreement or any part of its rights, interests and obligations under this Agreement to any party receiving financing for the Project as security for Developer under the financing agreement (including a trustee or agent for the benefit of any financing parties) (a "Permitted Collateral Assignee"), provided that such pledge, mortgage, grant of a security interest or other collateral assignment does not materially diminish or impair the Town's obligations pursuant to this Agreement. In connection with any such collateral assignment to a Permitted Collateral Assignee, the Town shall cooperate with Developer and the Permitted Collateral Assignee to execute and deliver a consent agreement or statement of opinion as reasonably requested by Developer or the Permitted Collateral Assignee.

(e) Developer shall reimburse the Town for its reasonable costs and expenses, including reasonable attorney's fees, in connection with the Town's review of any Assignment.

**Section 9.17. Jurisdiction and Venue.** Each Party hereby irrevocably and exclusively consents that any legal action or proceeding against it, under, arising out of, or in any way connected with this Agreement or any other agreement, document, or instrument arising from or executed in connection with this Agreement shall be brought only in a state or federal court of competent jurisdiction in the State of New York and County of Otsego. Each Party, by the execution and delivery of this Agreement, expressly and irrevocably consents and agrees to the personal jurisdiction of any such courts in any such action or proceeding. Each Party expressly and irrevocably waives any claim or defense in any action or proceeding based on any alleged lack of personal jurisdiction, improper venue; forum non conveniens or on any other basis.