

**STATE OF NORTH CAROLINA  
COUNTY OF CARTERET**

**DONATION AGREEMENT  
FOR REAL ESTATE**

The **TOWN OF ATLANTIC BEACH**, a North Carolina municipal corporation, hereinafter referred to as "Donee," agrees to accept and FMB At The Grove, LLC (TIN: ) a North Carolina Limited Liability Company, having a primary business address of 2231 Nash Street NW, Suite D, Wilson, North Carolina 27896 (hereinafter referred to as "Donor") agrees to donate and convey, all of that described herein, together with all improvements located thereon as of the date of Closing, and upon the following terms and conditions:

**ARTICLE 1  
THE PROPERTY SOLD AND PURCHASED**

1.1 Description of Property (hereinafter "Property") That certain tract or parcel of land, approximately 15,315 square feet in size, which is at the northern end of that area generally known as "The Circle" in Atlantic Beach, Carteret County, North Carolina and more particularly described as:

DESCRIPTION BY METES AND BOUNDS FROM SURVEY

1.2 Improvements – Donee will receive title to all improvements, if any, located on the Property that are owned by Donor.

1.3 **deleted**

1.4 Easements and Rights of Way. Donee will receive title to all licenses, easements and rights of way benefiting the Property.

**ARTICLE 2**

## **DONATION VALUE**

Donee, as a municipal corporation, has agreed, subject to approval by its Town Council, to accept and use the Property described herein for public purposes and recognizes Donor's gift of the Property as a Charitable Contribution to the Town for such public use. Donee has agreed to complete and properly execute all Internal Revenue Service documents necessary to properly recognize the Donor's gift of the Property as a Charitable Contribution to the Donee. Donee makes no representation, warranty or agreement as to the fair market value of the Property and makes no representation that the contribution is valid or acceptable as a charitable contribution pursuant to the United States Internal Revenue Code, IRS rulings or any other law or regulation. In all cases, the burden of proof of such contribution qualification and value shall remain with the Donor. The arguments, evidence, and justifications for the contribution qualification and value shall be the responsibility of the Donor. Donee accepts no responsibility for any costs or liabilities that Donor or Donee may incur in regards to this donation and Donor agrees to hold Donee harmless from and indemnify Donee for any such costs or liabilities.

### **ARTICLE 3**

#### **CONSIDERATION FOR DONATION**

Donor agrees to donate and convey the Property to the Donee in exchange for the potential tax advantages that may be derived by doing so and in further consideration of the covenants, conditions, warranties, stipulations and agreements herein contained, plus other good and valuable consideration, the receipt and sufficiency thereof being hereby acknowledged by Donor, it being the intent of the parties that this Agreement, once executed and approved by the Town Council of Donee, shall be enforceable by its terms contained herein and shall not fail for lack of consideration.

### **ARTICLE 4**

#### **CONDITIONS, WARRANTIES, STIPULATIONS, AND AGREEMENTS**

4.1 Environmental Condition - Donor represents and warrants that it has no actual knowledge of the presence or disposal, except as in accordance with applicable law, within the buildings or on the Property of hazardous or toxic waste or substances, which are defined as those substances, materials, and wastes, including, but not limited to, those substances, materials and wastes listed in the United States Department of Transportation Hazardous Materials Table (49 CFR Part 172.101) or by the Environmental Protection Agency as hazardous substances (40 CFR Part 302.4) and amendments thereto, or such substances, materials and wastes, which are or become regulated under any applicable local, state or federal law, including, without limitation, any material, waste or substance which is (i) petroleum, (ii) asbestos, (iii) polychlorinated biphenyls, (iv) designated as a Hazardous Substance pursuant to Section 311 of the Clean Water Act of 1977 (33 U.S.C. §1321) or listed pursuant to Section 307 of the Clean Water Act of 1977 (33 U.S.C. §1317), (v) defined as a hazardous waste pursuant to Section 1004 of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §6903) or (vi) defined as a hazardous substance pursuant to Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. §9601). Donor has no actual knowledge of any contamination of the Property from such substances as may have been disposed of or stored on neighboring tracts. Donor further warrants that it has received no notice of any environmental violation or problem or condition from any governmental office or agency other than those that have been provided to and acknowledged by Donee, and Donor shall execute an affidavit provided by Donee which states that Donor is familiar with the Property and that, to the best of Donor's knowledge, no environmental concerns exist thereupon. Donor has no knowledge of any underground storage tanks on the Property. If Donor shall fail to, or be unable to provide the above described environmental warranties and/or affidavit, Donee shall have the option to declare this contract null and void .

4.2 Suitability Contingency: It is a condition of this contract that there be no restrictions, easements, governmental regulations, structural issues, land conditions, usable space, environmental concerns, or other reasons that would prevent Donee's reasonable use of the real property and improvements thereon for a Town Center, as described in Section 4.3 G below, of suitable size, function and utility and at least 27

parking spaces. These required conditions may hereinafter sometimes be collectively referred to as the Donee's "Intended Use." Determination of suitability for the Donee's Intended Use shall be made by Donee, its engineers, architects, and other agents, and at the sole expense of Donee, within one year of the latest date of the party's execution of this Agreement ("Contingency Period"). This Contingency Period may be extended for a reasonable period of time if natural disasters such as storms, excessive rainfall, or other circumstances beyond the control of Donee and/or its agents should significantly hamper their ability to make a suitability determination. Prior to expiration of the Contingency Period, should Donee determine not to accept the gift of the Property for any reason, or for no reason at all, including, without limitation, Donee's determination that the Property is not suitable for the Intended Purposes, that determination being in Donee's sole and unfettered discretion, Donee will provide written notice to Donor of such determination and this Agreement will terminate.

4.3 Additional Considerations:

A. Donor is constructing a package sewer treatment plan near the site of the Property and agrees to allow the Town Center -constructed on the Property by the Donee to connect to and empty its sewer to the package plant once it is operational or the Property's improvements are completed, whichever shall occur last. Donor agrees not to charge the Donee for tap ~~,- or~~ impact, or other -fees for such connections, and Donee agrees to pay for all usage at the same rate that is charged to other similar users of the package plant. The Donee's connection to the package plant shall in no way be deemed as the Donee's acceptance of, or the Donor's passing of, any responsibility for ownership, operation, maintenance, licensing or any other matters of any kind related to the plant, and Donee shall remain exempt and otherwise removed from such matters and responsibilities other than payment of standard usage fees.

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B. ~~For landscaping and other common area maintenance, Donee will contribute~~

Comment [D1]: Will not agree to to belong to or pay dued to a POA.

~~to a master association established for the Circle on a prorata basis based on square footage of the Property compared with the entirety of the square footage of Circle property under the jurisdiction of the master association. This will be a restriction on the Property that runs with its title.~~

- C. The parties and their agents will cooperate and coordinate efficient permitting of the Town Center, including, but not limited to, stormwater systems and construction of improvements in a manner that is reasonably harmonious with other improvements located on adjacent and nearby properties. The Town will grade the Property, and any adjacent rights-of-way used by the Town for sidewalks and landscaping, so as not to divert storm water onto the Property or adjacent properties owned by Donor. Donee's financial responsibility for stormwater considerations is limited to improvements that it makes on the donated property.
- D. ~~All dumpsters, trash cans, generators, or other similar exterior elements placed on the Property by Donee will be screened from view to the mutual satisfaction of the parties.~~
- E. Any easements and rights of way required to provide reasonable ingress, egress, and regress to adjoining parties or to reasonably accommodate infrastructure needs shall be drafted and recorded with the Carteret County Register of Deeds.
- F. Prior to closing and expiration of the Contingency Period described below, Donor will provide Donee a recordable survey map of the Property indicating all boundary lines, easements, water lines, drainage facilities, rights of way, alleys, utilities, encroachments, and other matters associated with the Property as of the date that the survey is completed.
- G. Donor will restrict the title to the Property for use only as a Town Center. "Town Center" as used in this Agreement shall mean one building exclusively

**Comment [D2]:** Will foollow the requirements of the UDO in this regard which requires screening.

containing (i) administrative offices for employees and elected officials of the Town of Atlantic Beach, (ii) one or more meeting rooms and/or rooms of assembly for town employees, elected officials, and the public, and, (iii) accessory rooms. The restriction will allow the transient use of the parking lot by all members of the public and by staff, regardless of vehicles used but shall prohibit the stationing of police cars, fire trucks, or public works vehicles on the Property or the parking or cleaning of heavy equipment (such as garbage trucks, dump trucks, and earth moving equipment) on the Property. This Town Center restriction will run with the title to the Property.

- H. Prior to choosing a final design for the Town Center, Donee will share submit its sketch plans of the same and a proposed site plan including a layout of sidewalks and landscaping in the East Drive, West Drive and Morehead Avenue rights-of-way adjacent to the Property to Donor and Donee's architects shall discuss with Donor and Donor's architects potential methods of design, layout and construction of improvements, sidewalks, and landscaping in a manner that would cause them to be reasonably harmonious with other improvements located on adjacent and nearby properties while preserving the Town's intended purposes for, functionality of, and plans related to the project. solicit Donor's comments on the proposed exterior appearance of the structure, its layout on the Property and the sidewalks and landscaping. Donee in good faith will consider Donor's comments. It is the intent of the parties that the Town Center will blend harmoniously with Donor's aesthetic vision for the Circle.

- I. After the Town Center is completed, should the Donee later choose to make (i) exterior modifications thereto, (ii) changes in the site plan, or (iii) changes in the plan for landscaping and sidewalks on adjacent rights-of-way, Donee will submit sketch plans of the same to Donor and solicit Donor's comments on the proposed changes. Donee in good faith will consider Donor's comments. Donor may assign this right to receive and comment on

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Comment [D3]: Public comments have revealed a public concern that FMB will control the look of and construction plans for this project, so we are suggesting this language as a compromise.

proposed changes to any master owners' association with jurisdiction over Circle properties. It is the intent of the parties that future changes to the Town Center will blend harmoniously with any established aesthetic theme for the Circle.

- J. After the Donee has installed landscaping and sidewalks in the street rights-of-way adjacent to the Property as part of development of the Town Center, until responsibility for maintenance of the landscaping and sidewalks is transferred to a Circle master association, Donor will maintain the same
  
- K. The parties agree that the Town Center will be developed so that it has a parking lot and driveway on the south side of the Property adjacent to land retained by Donor. Donor will reserve an easement over the travelled portion of the parking lot and driveway area for ingress, egress, and regress of motor vehicles and pedestrians between the public streets east and west of the Property and Donor's retained lands. Donee will arrange its parking spaces to facilitate this easement. Such easement will be appurtenant to Donor's retained land and will run with its title.

4.4 Access & Testing: Donor agrees that Donee, as part of Donee's determination of the Property's suitability for Donee's Intended Use, may go upon the Property for the purpose of surveying, delineation of wetlands, identification and testing of drainage, soil testing, boring of sample wells, and inspection of all aspects of the Property and any improvements thereon which is required to determine the suitability of the Property for its Intended Use. Any such activity done by or for the Donee will be accomplished with the least amount of damage to the Property as is reasonably possible to make such determinations. The Donee shall be responsible for all costs with respect to any and all contractors, agents, permitting fees, and any other charges incurred with respect to the testing and surveying performed by or for Donee. No contractor shall be permitted to place any materialman's, mechanic's, or other lien against the Property as a result of Donee's

actions or actions taken on Donee's behalf. In the event that Donee determines that the Property and improvements are not suitable for the Intended Use, Donee will provide Donor with copies of all documents prepared for the Donee pursuant to its surveying, delineations, and testing of the Property but Donor may not depend or rely upon such information for any purpose and Donee will not warrant, and specifically denies any liability for, the use of the information by Donor or any third party.

4.5 Hold Harmless: Without waiving any immunities or other defensive protections, and to the extent allowed by law, Donee agrees to indemnify and hold Donor harmless from any and all liability or expense, including reasonable attorney fees, that Donor may incur due to or arising from or connected with the Donee, the Donee's agents, contractors or employees entering upon the Property and/or conducting any tests or performing any surveys thereon, including, but not limited to any and all claims for death or injury to persons or property.

4.6 deleted

4.7 Environmental Survey: As part of Donee's determination of the Property's suitability for its Intended Purpose, Donee may have a Phase I Environmental Survey performed at its expense during the Contingency Period. Any additional environmental studies Donee deems necessary shall be based upon the results of the Phase I Survey and the Contingency Period will be extended until such additional studies are completed and reported to Donee, however such extension will not extend beyond 90 calendar days. Donee will proceed to obtain such environmental surveys and reports with due diligence. The result of the environmental studies must certify that the Property is free from any and all contamination and/or evidence of contamination from hazardous wastes, hazardous substances, hazardous materials, toxic substances, hazardous air pollutants or toxic pollutants or any other improper or illegal conditions as those terms are defined by any applicable federal, state or local law. Any such hazardous waste, hazardous substances, hazardous materials, hazardous air pollutants, toxic pollutants, toxic substances, or other pollutants or improper or illegal conditions found upon the property shall require Donor to

fully remedy such conditions to the satisfaction of the Donee and all regulatory agencies, or at the option of the Donor, this contract shall become null and void.

4.8 Council Approval: This Agreement is subject to the approval of the Donee's Town Council and shall not become finally effective until such approval has been formally given. Until Donee's Town Council has given such approval, Donor may terminate this Agreement without penalty or obligation to reimburse Donee any costs or expenses.

4.9 Property Condition: In the event the Property is suitable for the Donee's Intended Use, and all the other conditions of this Agreement are met, the Property must be delivered to Donee in substantially the same or better condition at closing as on the date of this Agreement, except for the condition changes caused by Donee and reasonable, foreseeable wear and tear. CLOSING SHALL CONSTITUTE DONEE'S ACCEPTANCE OF THE PROPERTY IN ITS THEN EXISTING CONDITION AND DONOR MAKES NO REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, AS TO THE CONDITION OF THE PROPERTY OR ITS SUITABILITY FOR DONEE'S INTENDED PURPOSES.

4.10 Encumbrances: All deeds of trust, liens and other charges against the Property must be paid and satisfied by Donor, or the Property must be released from the same, prior to or at Closing in such manner that cancellation may be promptly obtained following Closing. Donor shall remain obligated to obtain any such cancellations following Closing.

4.11 Title: Fee simple title must be delivered at closing by a General Warranty Deed to the Town of Atlantic Beach, free of all liens and encumbrances except for ad valorem taxes for the current year, prorated through the date of closing, utility easements, unviolated restrictive covenants that do not materially affect the value of the Property or its use for the Town's Intended Use, and such other encumbrances as may be assumed or specifically approved by Donee. Title delivered must be free from any defects other than zoning ordinances affecting the Property and matters of record existing at Closing which are accepted in writing by Donee. Donor shall not enter into or record any instrument that

affects the Property or title thereto after execution of the agreement without the prior written consent of the Donee. The General Warranty Deed must be in such form as Donee and its national title insurance company licensed to do business in North Carolina shall deem acceptable. If Donee's title examination regarding the Property shall show that Donor's title is not fee simple marketable and insurable, subject only to any exceptions permitted by Donee in writing, then Donee shall promptly notify Donor in writing of all such title defects and exceptions, in no case later than the end of the Contingency Period, and Donor shall have thirty (30) days to cure said noticed defects. If Donor does not cure the defects or objections within the thirty (30) days of such notice, then either party may terminate this Agreement, even if the Contingency Period may have already expired. If Donee determines to purchase title insurance from a company licensed to do business in the state of North Carolina, title to the property must be insurable at regular rates, subject only to standard exceptions and exceptions agreed to in writing by Donee.

4.12 Prorations And Adjustments: Unless otherwise provided, the following items shall be prorated and either adjusted between the parties or paid at closing:

- (A) Real estate ad valorem taxes, prorated to the date of Closing, all personal property taxes, late fees, interest, and other governmental and quasi-governmental charges for the fiscal year in which the Closing shall occur shall be paid by Donor except as hereinafter provided. If the Closing shall occur before the tax rate or assessment is fixed, the apportionment of such general ad valorem real estate taxes shall be upon the basis of the taxes paid in the prior year, but such taxes shall be readjusted as soon as the applicable rate and assessment is fixed. The obligation for prorated taxes shall survive Closing. To the knowledge of Donor and Donee, there are no special assessments affecting the Property. Should any special assessments be levied, they shall be prorated equitably between Donor and Donee at Closing.
  
- (B) All other items customary and appropriate to be apportioned between the

Donee and Donor in the case of other properties similar to the Property.

- (C) Any errors or omissions in computing apportionments at Closing shall be corrected. This provision shall survive Closing for one (1) year.
- (D) The amount of any unpaid real estate taxes, assessments, water charges and sewer charges other than items subject to pro-ration as above provided, which Donor is obligated to pay and discharge at Closing, with interest and penalties thereon, to a date not less than two business days after Closing, may, at the option of Donor, be allowed to be deducted by Donee out of the cash portion of the Purchase Price, provided official, verifiable bills therefore are furnished at Closing.
- (E) All late listing penalties, if any, shall be paid by Donor.

4.13 Closing Expenses: Donor shall pay for preparation of a deed and all other documents necessary to perform Donor's obligations under this agreement, and for excise tax (revenue/transfer stamps), any deferred or rollback taxes, and other conveyance fees or taxes required by law. Donee shall pay for recording the deed, all costs of any title search, title insurance, environmental investigations and reports, and any other inspections or investigations undertaken by Donee. The Donee will reimburse Donor fifty percent (50%) of the cost of the survey provided by Donor pursuant to Section 4.3.F. Each party shall pay its own attorney fees.

4.14 Evidence Of Title and Other Documentation: Donor agrees to use its best efforts to deliver to Donee, as soon as reasonably possible after execution of this Agreement, copies of all title information in possession of or available to Donor, including but not limited to: title insurance policies, attorney's opinions on title, and surveys related to the Property, and any covenants, deeds, notes and deeds of trust and easements relating to the Property. Donor authorizes any attorney presently or previously representing Donor to release and disclose any title insurance policy for the Property in such attorney's file or

storage to Donee and both Donee's and Donors agents and attorneys. Donor also authorizes the Property's title insurer or its agents to release and disclose all materials in the Property's title insurer's and/or title insurance agent's file to Donee and to both Donee's and Donors agents and attorneys. ; , provided, however, that Donee and Donee's attorney's or agents shall not disclose any such information except to its attorneys, accountants, lenders, relevant governmental agencies or regulatory bodies, and/or professional advisors.

4.15. Labor And Material: Donor shall furnish at closing an affidavit and indemnification agreement in form satisfactory to Donee and Donee's national title insurance company showing that all labor and materials, if any, furnished to the Property within 120 days prior to the date of closing have been paid for, and agreeing to indemnify Donee against all loss from any cause or claim arising therefrom.

4.16 Termination of Lease or Rental Agreements – Unless otherwise allowed in writing by Donee, Donor shall terminate all leases, rental agreements, licenses, or other rights to possession of the Property by any person or entity. Prior to Closing, Donor will cause all tenants and other occupants in possession of any part of the Property to be permanently removed therefrom, and shall divest any and all persons or entities of any potential right to occupation or possession of the Property.

4.17 Risk Of Loss - The risk of loss or damage by fire or other casualty prior to Closing, except for those damages or casualties caused by Donee or Donee's agents, contractors or employees, shall be upon Donor. If the Property is destroyed or made unsuitable for Donee's Intended Use as described in this agreement prior to Closing, through no fault of the Donee or Donee's agents, contractors, or employees, Donee may elect to terminate this contract by written notice delivered to Donor or Donor's agent and all deposits and/or escrows shall be returned to Donee.

4.18 Assignments - This contract may not be assigned without the written consent of all parties, but if assigned by agreement, then this contract shall be binding on the

assignee and his/her/its heirs, successors, and assigns.

4.19 Grant Funding and/or Financing - The Town may apply for grant funding and/or installment purchase financing in order to pay for some or all of the improvements it plans to make on the Property. Donor agrees to allow inspection of the Property by any such agencies and to reasonably assist such agencies in their informational requirements for determination of Donee's qualification for such funding or financing.

4.20 Termination During Contingency Period - If Donee chooses not to accept conveyance of the Property, for any reason or no reason, within its sole and unfettered discretion, and provides written notice to Donor prior to the expiration of the Contingency Period, then this Agreement shall terminate.

## **ARTICLE 5**

### **CLOSING**

5.1 Defined: Closing shall be defined as the date and time of recording of the General Warranty deed provided by Donor to Donee. All parties agree to execute any and all documents and papers necessary in connection with Closing and transfer of title within 30 days following the end of the Contingency Period at the law office of Taylor and Taylor, PA, 610 Arendell Street, Morehead City, NC or such other place as may be designated by Donee. Donee shall have the right to declare the Contingency Period concluded prior to the end of its term set in Section 4.2 by giving written notice to Donor and the Closing will be consummated within thirty (30) days of such declaration. The General Warranty deed is to be made to Town of Atlantic Beach, a municipal corporation.

5.2 Donor - At the Closing, the Donor shall deliver or cause to be delivered to the Donee the following:

- (A) A North Carolina General Warranty Deed (the "Deed"), duly executed and acknowledged by Donor, sufficient to transfer and convey to Donee, fee

simple, absolute, marketable and insurable title and interest in and to the Property.

- (B) Proof that all persons that might have a right to occupy, use or otherwise possess any part of the Property have been removed or divested.
- (C) An affidavit in form required by Donee's selected national title insurance company showing that all labor and materials, if any, furnished to the Property on behalf of Donor within 120 days prior to the date of Closing have been paid for.
- (D) Such other instruments and documents as may be reasonably required to consummate the transaction herein contemplated.

5.3 Donee - At the Closing, Donee shall deliver or cause to be delivered to the Donor such instruments and documents as may be reasonably required to consummate the transaction herein contemplated.

5.4 Real Estate Commissions – Donor and Donee represent and warrant to each other that they have not dealt with any broker or real estate agent in connection with this transaction. Donor agrees to indemnify and hold Donee harmless from all loss, damage, costs and expenses (including attorney's fees and disbursements) that the Donee may suffer as a result of any claim for a fee, commission or payment of any description brought by any person with whom Donor may have dealt in connection with this transaction. Donee agrees to indemnify and hold Donor harmless from all loss, damage, costs and expenses (including attorney's fees and disbursements) that the Donor may suffer as a result of any claim for a fee, commission or payment of any description brought by any person with whom Donee may have dealt in connection with this transaction. The representations and covenants set forth in this provision shall survive delivery of the Deed and closing or other termination of this Agreement.

5.5. Possession - Possession shall be delivered at closing.

**ARTICLE 5A**  
**CONSTRUCTION OF THE TOWN CENTER**

5A.1 Commencement and Completion of Construction. Donee agrees to commence construction of the Town Center ~~within within twelve months sixty (60) days~~ of the Closing Date and to complete the same within eighteen (18) months thereafter.

5A.2 Donee's Default. Should Donee default in a requirement of 5A.1, it agrees to reconvey title to the Property to Donor on demand of Donor. In such case, title shall be the same as originally conveyed by Donor to Donee.

5A.3 Survival. This Article 5A survives closing and is binding on the Donee notwithstanding Section 7.1

**ARTICLE 6**  
**OTHER DONOR WARRANTIES**

6.1 Authority - Donor warrants that it has full power, license and authority to enter into this agreement and to convey and assign the Property identified herein.

6.2 Not In Default – Donor warrants that it is not now, and continuously up to the time of closing will not be, in default in respect to any of its material obligations under any contract or other obligation or otherwise declared in default of any of its liabilities pertaining to the Property, and that there is not now, nor will there be at Closing, any state of facts or circumstances or condition or event which would constitute or result in any such default.

6.3 No Adverse Information - Donor has no actual knowledge of (i) condemnation(s) affecting or contemplated with respect to the Property; (ii) actions, suits or proceedings pending or threatened against the Property, (iii) changes contemplated in any

applicable laws, ordinances or restrictions affecting the Property; or (iv) governmental special assessments, either pending or confirmed, for sidewalk, paving, water, sewer, or other improvements on or adjoining the Property, and no pending or confirmed owners' association special assessments. For purposes of this Agreement, a "confirmed" special assessment is defined as an assessment that has been approved by a governmental agency or an owners' association for the purpose(s) stated, whether or not it is fully payable at time of closing. A "pending" special assessment is defined as an assessment that is under formal consideration by a governing body. Donor shall pay all owners' association assessments confirmed as of the time of Closing, if any, all confirmed governmental assessments shall be equitably prorated between the parties, and Donee shall take title subject to all pending assessments disclosed by Donor herein, if any.

6.4 Compliance With Law - To Donor's actual knowledge, (i) Donor has complied with all applicable laws, ordinances, regulations, statutes, rules and restrictions pertaining to or affecting the Property; (ii) performance of the Agreement will not result in the breach of, constitute any default under or result in the imposition of any lien or encumbrance upon the Property under any agreement or other instrument to which Donor is a party or by which Donor of the Property is bound; and (iii) there are no legal actions, suits or other legal or administrative proceedings pending or threatened against the Property, and Donor is not aware of any facts which might result in any such action, suit or other proceeding. There is no litigation, proceeding, or covenant either pending or, to the best of the Donor's knowledge, threatened, nor will there be at the time of Closing, any law or regulation impediment which would in any way prevent, restrict or impede Donee from utilizing the Property for its Intended Use as described in this Agreement. Donor warrants that it will continue to comply with all applicable laws and regulations pending Closing and will correct any violations arising prior to Closing.

6.5 Possession – Donor warrants that it has not committed any act which has impaired or which could impair Donor's rights to possession and conveyance of the property which is being purchased under this contract.

**ARTICLE 7**  
**DEFAULT / FAILURE TO PERFORM**

7.1 Donee's Default - If Donee defaults prior to Closing, Donee will pay to Donor all of Donor's costs in procuring and providing the survey described in Section 4.3.F, and Donor shall be entitled, as its sole remedy in addition to receiving payment for the survey, to terminate this Agreement, whereupon the obligations hereunder shall terminate, except those expressly stated to survive termination hereof; it being understood that actual damages sustained by the Donor in the event of such a default are difficult if not impossible to ascertain. This Section shall survive termination of this Agreement.

7.2 Donor's Default - If Donor defaults in its obligations hereunder or makes any material misrepresentation or breaches any warranty, the Donee may, at its option, either:

- (A) Terminate this Agreement, whereupon the obligations of the parties hereto, other than those expressly set forth to survive termination hereof, shall terminate, or
- (B) Terminate this Agreement, whereupon the obligations of the parties hereto, other than those expressly set forth to survive termination hereof, and receive reimbursement from Donor of (i) all of Donee's expenses in testing the property during the Contingency Period, (ii) all of Donee's expenses in designing the Town Center, and (iii) all of Donee's expenses in preparation for Closing.

This Section shall survive Closing or other termination of this Agreement.

**ARTICLE 8**  
**OTHER PROVISIONS**

8.1 Parties - This contract shall be binding upon and shall inure to the benefit of the parties, i.e., Donee and Donor and their heirs, successors and assigns. As used

herein, words in the singular include the plural and the masculine includes the feminine and neuter genders, as appropriate.

8.2 Survival - If any provision herein contained which by its nature and effect is required to be observed, kept or performed after the closing, it shall survive the closing and remain binding upon and for the benefit of the parties hereto until fully observed, kept or performed. All covenants or warranties made by the Donor to the Donee under this Agreement shall survive the closing.

8.3 Entire Agreement - This contract contains the entire agreement of the parties and there are no representations, inducements or other provisions other than those expressed herein. All changes, additions or deletions hereto must be in writing and signed by all parties. The non-fulfillment of any of the conditions contained in this agreement may be waived in a writing executed by the parties.

8.4 Execution - This offer shall become a binding contract when signed by both Donee and Donor as indicated below and approved by the Donee's Town Council. Parties represent that they have taken all steps required by law or otherwise necessary to enter into this transaction and that the individuals executing this agreement and such other documents as may be necessary to effectuate any transactions contemplated by this agreement, have been granted full authority to do so by their respective organizations, and that his or her signature is fully sufficient to bind their respective organization, except that the Town's obligations herein are subject to approval of its Town Council. This contract is executed under seal in signed multiple originals, all of which together constitute one and the same instrument, with a signed original being retained by each party.

8.5 Memorandum of Contract - Upon request by either party, the parties hereto shall execute a memorandum of contract in recordable form setting forth such provisions hereof (other than the Purchase Price and other sums due) as either party may wish to incorporate. Such memorandum of contract shall contain a statement that it automatically terminates and the Property is released from any effect thereby as of a specific date to be

stated in the memorandum (which specific date shall be no later than the date of Closing). The cost of recording such memorandum of contract shall be borne by the party requesting execution of same.

8.6 Merger Of Understandings - It is understood and agreed that all negotiations, understandings and agreements heretofore had between the parties hereto are hereby merged into this Agreement which alone fully and completely expresses their agreement, and that this Agreement is entered into after full investigation, neither party relying upon any statement or representations made by the Donor or the Donee or anyone else not embodied in this Agreement. This Agreement and the exhibits attached hereto embody the entire agreement between the parties in connection with this transaction, and there are no oral agreements existing between the parties relating to this transaction which are not expressly set forth herein. This Agreement may not be modified or, except as expressly provided to the contrary herein, canceled or terminated, other than by a writing signed by all parties. This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument. This paragraph shall survive the Closing and delivery of the Deed or other termination of this Agreement.

8.7 Waiver - Failure of either party to object to any act or omission on the part of the other party, no matter how long the same may continue, shall not be deemed to be a waiver by such party of any of its rights hereunder unless expressly provided to the contrary herein. No waiver by any party at any time, express or implied, of any breach of any provision of this Agreement shall be deemed a waiver of a breach of any other provision of this Agreement or a consent to any subsequent breach of the same or any other provision. If any action by any party shall require the consent or approval of another party, such consent or approval of such action on any one occasion shall not be deemed a consent to or approval of said action on any subsequent occasion.

8.8 Headings - The headings, captions, section numbers and article numbers appearing in this agreement are inserted only as a matter of convenience and do not

define, limit, construe or describe the scope or intent of such sections or articles of this agreement.

8.9 Notices - Except as expressly provided to the contrary in this agreement, notices which must or may be given by any party hereto must be in writing and shall be deemed as given:

- (A) Upon personal delivery to the address of the party to be noticed as set forth below, or
- (B) Four (4) days from the date of posting the same in the United States mails by prepaid certified or registered mail, return receipt requested, to the party to be notified at the address of that party given below, or
- (C) One (1) day after depositing such notice addressed as set forth below to the party to receive notice, with proper payment or credit arrangement, in the custody of a nationally recognized overnight delivery service.

**If to Donor:** Manager  
FMB At The Grove, LLC  
2231 Nash Street NW, Suite D  
Wilson, North Carolina 27896

**With copies to:** Neil B. Whitford  
Kirkman Whitford Law Firm  
710 Arendell St., Suite 105  
Morehead City, NC 28557

**If to Donee:** Town Manager  
Town of Atlantic Beach  
Atlantic Beach, North Carolina 28557

**With Copies to:** Derek Taylor  
Taylor & Taylor, PA  
610 Arendell Street  
Morehead City, NC 28557

Except as set forth to the contrary herein, any party may designate, by notice in writing as above provided, a new or other address to which such notice or demand shall thereafter be given, made or mailed. The respective attorneys for the parties are hereby authorized (i) to give any notice which the party is required to give or may give under this Agreement; and (ii) to agree to adjournments of Closing. It is understood that Donee's attorney is Derek Taylor, Esq. of Taylor & Taylor, PA, 610 Arendell Street, Morehead City, NC 28557. Donor will inform Donee, in writing, of the contact information of its attorney, if any, at least two weeks prior to Closing.

8.10 Choice of Law and Venue - The execution, interpretation and performance of this agreement, and any disputes with respect to the transactions contemplated by this agreement, including any fraud claims, shall be governed by the internal laws and judicial decisions of the State of North Carolina, without regard to principles of conflicts of laws. If any party commences a lawsuit or other proceeding relating to or arising from this Agreement, the parties hereto agree that the United States District Court for the Eastern District of North Carolina shall have sole and exclusive jurisdiction over any such proceeding where the federal court would have subject matter jurisdiction, and the courts of the State of North Carolina in the County of Carteret shall have sole and exclusive jurisdiction in all other cases. Any of these courts shall be proper venue for any such lawsuit or judicial proceeding and the parties hereto waive any objection to such venue. The parties hereto consent to and agree to submit to the jurisdiction of any of the courts specified herein and agree to accept service of process to vest personal jurisdiction over them in any of these courts. Process in any action or proceeding referred to in the preceding sentence may be served on any party anywhere in the world.

8.11 Severability. If any provision contained in this agreement shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein, unless the invalidity of any such provision substantially deprives either party of the practical benefits intended to be conferred by this Agreement. Notwithstanding

the foregoing, any provision of this Agreement held invalid, illegal or unenforceable only in part or degree shall remain in full force and effect to the extent not held invalid or unenforceable, and the determination that any provision of this Agreement is invalid, illegal or unenforceable as applied to particular circumstances shall not affect the application of such provision to circumstances other than those as to which it is held invalid, illegal or unenforceable.

8.12 Construction - This Agreement has been executed after negotiation and the opportunity by both parties to have this agreement reviewed and revised by legal counsel of their choice. None of the provisions of this Agreement shall be interpreted or construed against a party hereto solely by virtue of the fact that any such provision shall have been drafted by their legal counsel or any other person or entity on behalf of or representing such party.

8.13 Further Assurances; Records. Each party shall cooperate and take such actions, and execute all such further instruments and documents, at or subsequent to the Closing, as another party or other parties may reasonably request in order to convey title to the Property to Donee and otherwise to effect the terms and purposes of this agreement.

8.14 Binding Effect - This Offer shall become a binding contract when signed by both Donee and Donor as indicated below and duly authorized by Donee's Town Council. The parties represent that they have taken all steps required by law or otherwise necessary to enter into this transaction and that the individuals executing this agreement have been granted full authority to do so by their respective organizations, except for approval by Donee's Town Council. This contract is executed under seal in signed multiple originals, all of which together constitute one and the same instrument, with a signed original being retained by each party.

8.15. Time of the Essence; Force Majeure. Time is of the essence with respect to performance of the parties by each date set forth herein; however, in the Event of Force Majeure, the time for performance is extended for a commercially reasonable time. For

the purpose of this Agreement, an “Event of Force Majeure” means any act of God or third party act, not within the reasonable control of the Party affected, but only if and to the extent that (i) such act, despite the exercise of reasonable diligence, cannot be, or be caused to be, prevented, avoided or removed by such Party, and (ii) such act materially and adversely affects the ability of the Party to perform its obligations under this Agreement, and such Party has taken all reasonable precautions, due care and reasonable alternative measures in order to avoid the effect of such event on the Party’s ability to perform its obligations under this Agreement and to mitigate the consequences thereof. If a Party wishes to claim protection in respect of an Event of Force Majeure, it shall, as soon as possible following the occurrence or date of commencement of such Event of Force Majeure, notify the other Party of the nature and expected duration of such Event of Force Majeure and shall thereafter keep the other Party informed until such time as it is able to perform its obligations. The Parties shall use their reasonable endeavors to:

- (i) overcome the effects of the Event of Force Majeure;
- (ii) mitigate the effect of any delay occasioned by any Event of Force Majeure, including by recourse to alternative mutually acceptable (which acceptance shall not be unreasonably withheld by either Party) sources of services, equipment and materials; and
- (iii) ensure resumption of normal performance of this Agreement as soon as reasonably practicable and shall perform their obligations to the maximum extent practicable.

**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement as of the day indicated beside each signature below.

**DONOR: FMB AT THE GROVE, LLC**

**DONEE: TOWN OF ATLANTIC BEACH**

By: \_\_\_\_\_  
Fred Bunn - Manager

By: \_\_\_\_\_  
David Walker – Manager

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

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

