



**City of New Buffalo
224 W. Buffalo Street
New Buffalo MI 49117
SPECIAL CITY COUNCIL MEETING AGENDA
November 23, 2020 at 6:30 pm**

Join Zoom Meeting

<https://us02web.zoom.us/j/89093911847?pwd=U3BqMXq2VXN3bjlLMjJbIFmcEM1Zz09>

1. Call Meeting to Order
2. Roll Call
3. Approval of Agenda
4. Public Comment
5. Old Business
 - a. Proposed Pleasure Isle Marina Purchase Agreement
 - b. Proposed Hardware Store 3rd Addendum
6. Council Comments
7. Adjournment



STAFF REPORT

Special Meeting - November 23, 2020

AGENDA ITEM: Proposed Pleasure Isle Marina Purchase Agreement

SUMMARY: Over the past year, the City has been in discussions with the William J. Deputy Foundation regarding the possibility of purchasing a portion of the property at 120 E Water St, commonly known as the Pleasure Isle Marina. As currently configured, the property has 26 boat slips and a building that includes an office, bathrooms, benches, and locker facilities on the first floor, as well as a residential dwelling unit on the second floor. The proposed transaction, the details of which have changed somewhat during negotiations over the past week, can be briefly summarized as follows:

- The Foundation converts the property into 2-unit condominium with the first floor of the building being in Unit 1, and the residential dwelling unit on the second floor being Unit 2.
- The City would purchase Unit 1 from the Foundation for \$500,000 and would take over the marina boat slip operation. The proposed purchase agreement provides that the sale must close not later than December 15, 2020.
- The proposed purchase price of \$500,000 represents a significant discount on the fair market value of the marina. The Foundation intends to claim a charitable donation tax benefit for selling the property at this reduced price.
- The \$500,000 purchase price would be paid in 5 annual installments. It is projected that the moneys received from the boat slip leases (which would be assigned to the City) would be sufficient to cover these installment payments.
- The City would agree not to sell or otherwise convey the property for at least 75 years and to use the property only for marina or office purposes. The Foundation would have the ability to retake possession of the property, via a right to repurchase, if the City violated this or other elements of the proposed agreement.
- For a period of 25 years following the sale, the City would keep the revenues derived from the marina in a separate bank account and would reinvest them only in the area surrounding the marina.
- Unit 2 would be sold to a separate buyer and would continue to be used as a residential dwelling unit.
- The City would be a member of a condominium association along with the new owner of Unit 2. The association would be operated in accordance with the terms of a proposed master deed and bylaws.

Notably, the Deputy Foundation has agreed to a number of changes to its original proposal based on requests made by City staff over the past few weeks. Those changes include, among other things:

- Changing the length on the restriction on the use of marina funds from 75 years to 25 years.
- Adding language to the master deed and bylaws to clarify that the City has total control over the boat slips, including the right to rent them without further approvals from the condo association, despite the fact they are technically labeled as common elements of the condominium.
- Adding language to the master deed and bylaws to clarify that the City can allow the public to use the general common elements of the condominium without further approval of the condo association.
- Changing the formula for condominium assessments so as to be more favorable to the City. In particular, the Foundation has agreed to a 50% / 50% split between the City and the owner of Unit 2 with respect to maintaining and making capital improvements to the building the property. Expenses relating to general common elements that are not part of the building would remain subject to a 96% to 4% split as originally proposed, based on the fact that the City and the general public will be the primary users of those areas of the condo.

Given the Foundation's need to close the transaction by December 15, the Foundation respectfully requests the City Council take an up-or-down vote on the purchase agreement as proposed during the work session on November 23.

SALE, PURCHASE AND DONATION AGREEMENT

THIS SALE, PURCHASE and DONATION AGREEMENT (“Agreement”) is executed by and between Bill Deputy Foundation, a Delaware corporation (“Seller”), and City of New Buffalo, a Michigan municipal corporation (“Purchaser”), as of this ____ day of _____, 2020.

RECITALS

WHEREAS, there is a parcel of land, part of which is encompassed by navigable waters, which encompasses an area of, approximately 1.47 acres and which is legally described on the attached “Exhibit A” and which is located within the corporate boundaries of the Purchaser (“Land”); and

WHEREAS, located upon the Land are boat slips, a permit parking area, a two-story building (“Building”) and related improvements (“Improvements”) all of which constitute a marina commonly known as “Pleasure Isle Marina” (the Land, Building and the other Improvements shall be referred to herein collectively as the “Marina”); and

WHEREAS, the Marina is owned by Onex Properties, LLC, (“Owner”) which is an entity related to the Seller; and

WHEREAS, Onex intends to, in the immediate future, submit the Marina to the Michigan Condominium Act and otherwise convert, generally, the Building into two condominium units whereby the first floor of the Building shall be one condominium unit (“Unit 1”) and the second floor of which shall be the second condominium (“Unit 2”); and

WHEREAS, shortly after the condominium conversion, Unit 1 and the right to use the general common elements and the appurtenant limited common elements (collectively referred to herein as the “Common Elements”) are to be conveyed by Onex to the Seller; and

WHEREAS, shortly after acquiring Unit 1, Seller desires to sell Unit 1 and the accompanying right to use the Common Elements, to the Purchaser at a bargain-sale price, thereby donating the difference in the purchase price and the fair market value to the Purchaser. The Purchaser desires to purchase and accept the donation of Unit 1 subject to and in accordance with the terms of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Seller and Purchaser hereby agree as follows:

AGREEMENTS

1. **Recitals.** The terms set forth in the introductory section of this Agreement are an integral part hereof.

2. **Definitions.** In addition to the other terms as herein defined, the following terms shall have the following meanings unless the context otherwise requires:

The term “Development Area” shall mean that portion of the City of New Buffalo which is illustrated on the map which is attached hereto and made a part hereof as “Exhibit B”. The parties agree that they will work together to formulate an appropriate text description of the Development Area to be used for purposes of drafting the Deed (as defined in Paragraph 5 below).

The term "Effective Date" shall mean the earliest date when the following events have occurred:

- i. this Agreement has been executed by Seller and Purchaser; and
- ii. each party has received one fully executed Agreement via PDF, facsimile transmission or otherwise.

The term "Hazardous Materials" shall mean and include the following, including mixtures thereof: any hazardous substance, pollutant, contaminant, waste, by-product or constituent regulated under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601, et seq.; oil and petroleum products and natural gas, natural gas liquids, liquefied natural gas and synthetic gas usable for fuel; pesticides regulated under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136, et seq.; asbestos and asbestos-containing materials, PCBs and other substances regulated under the Toxic Substances Control Act, 15 U.S.C. §2601, et seq.; source material, special nuclear material, by-product material and any other radioactive materials or radioactive wastes, however produced, regulated under the Atomic Energy Act or the Nuclear Waste Policy Act of 1982; chemicals subject to the OSHA Hazard Communication Standard, 29 C.F.R. §1910.1200, et seq.; and industrial process and pollution control wastes whether or not hazardous within the meaning of the Resource Conservation and Recovery Act, 42 U.S.C. §6901, et seq.

The term "Leases" shall mean all leases signed by the Seller for boat slips within the condominium project which are in effect as of the date of Closing.

The term "Office Lease" shall mean, that lease identified in item h. of Paragraph 29.A. below.

The term "Legal Requirements" shall mean all laws, statutes, codes, acts, ordinances, orders, judgments, decrees, injunctions, rules, regulations, permits, licenses, authorizations, orders, directions and requirements of all governments and governmental authorities having jurisdiction over the Premises (including, for purposes hereof, any local Board of Fire Underwriters), and the operation thereof.

The term "Premises" shall mean the following described property in the City of New Buffalo, County of Berrien, State of Michigan:

Unit 1, PLEASURE ISLE CONDOMINIUM, according to the Master Deed recorded in Liber ____, pages __ through __, both inclusive, as amended, Berrien County Records, together with rights in general common elements and limited common elements as set forth in the above described Master Deed, and as described in ACT 59 of the Public Acts of 1978, as amended.

The term "Term" shall mean, that period of time beginning on the date of Closing and continuing through and including the 75th anniversary thereof.

The term "Title Company" shall mean Chicago Title Insurance Company.

3. Agreement to Purchase. Seller, in consideration of the covenants and agreements herein contained and made by Purchaser, agrees to sell, convey, transfer and assign to Purchaser and Purchaser agrees to purchase and accept, pursuant to and in accordance with each of the terms and conditions set forth herein, all rights and interests of the Seller in and to the following:

- a. The Premises.

b. All intangible property, if any, now or hereafter owned or held by Seller relating to the use or occupancy of the Premises including but not limited to any and all contract rights, guaranties and warranties in effect with respect to the Premises including, but not limited to, any assignable guaranties, (all of the foregoing is hereinafter collectively referred to as the “Intangible Property”);

c. All plans and specifications relating to the Improvements, or any part thereof, which are in the physical possession of Seller.

(The Premises, Intangible Property and other items set forth in this Paragraph 3 are herein sometimes collectively referred to as the “ Subject Property”.)

4. Purchase Price and Bargain Sale. Subject to adjustments and prorations provided for herein, the Purchaser shall purchase the Subject Property from the Seller as follows:

a. Purchaser shall pay Seller a total of Five Hundred Thousand Dollars (\$500,000.00) (the “Purchase Price”) in accordance with the terms of a Promissory Note of substantially the same form and substance as that attached hereto and made a part hereof as “Exhibit C” (“Promissory Note”); and

b. Seller hereby agrees to donate to Purchaser and the Purchaser agrees to accept as a donation from the Seller the amount by which the fair market value of the Subject Property exceeds the Purchase Price as a charitable contribution of property. Purchaser shall have no responsibility or liability for the determination of the amount or availability of any income tax deduction which Seller may claim relating to such contribution. Notwithstanding the foregoing, the Purchaser agrees to reasonably cooperate with Seller with respect to any tax deduction claim, which cooperation shall include signing accurate and complete documentation prepared by Seller as required to substantiate a charitable contribution.

5. Conveyance. Conveyance of the Premises by a recordable Quit Deed in a customary form, which shall incorporate the concepts described in Paragraphs 33 and 34 below (“Deed”). The Conveyance shall be subject to those matters set forth on the attached “Exhibit D”. (Those exceptions set forth on said “Exhibit D”, together with other exceptions pertaining to liens or encumbrances of a definite or ascertainable amount which may be removed by the payment of money at the time of Closing and which Seller shall remove at that time, shall be referred to herein as the “Permitted Exceptions”.) Any State, county and local real estate transfer taxes, if any, shall be paid by the Seller.

6. Closing. When used herein, the term “Closing” shall mean the conveyance of the Subject Property to Purchaser and the delivery of the executed Promissory Note to the Seller upon the issuance to Purchaser of the title insurance described in Paragraph 7 below. Subject to the satisfaction and compliance of all conditions precedent to the transaction contemplated hereby, the Closing shall occur on or before December 15, 2020. Possession of the Premises, subject to the Permitted Exceptions, shall be tendered to the Purchaser on the date of Closing.

7. Escrow, Title Insurance and Survey.

A. The Closing shall be held at the office of the Title Company through an escrow with the Title Company, as escrowee (“Escrowee”), pursuant to the terms of written instructions of the parties conforming with the terms and conditions of this Agreement and prepared by Seller’s counsel (“Escrow”). The cost of the Escrow charged by the Title Company shall be divided evenly between the Seller and the Purchaser. In the event of any conflict between terms of the Escrow and any terms of this Agreement, the

terms of this Agreement shall prevail, unless the Escrow specifically recites that it is intended to amend or modify this Agreement.

B. The parties hereby acknowledge that they desire to cause the Title Company to provide “gap coverage” (otherwise known as a “New York style” closing) so that the disbursements of the Escrow deposits can be made on the same date when all Escrow deposits have been received by the Escrowee. The Seller hereby acknowledges that it is a usual and customary requirement for “gap coverage” that a seller execute a “GAP Undertaking” prepared by the Title Company. The premium charged by the Escrowee or Title Company shall be divided between Seller and the Purchaser.

C. The Purchaser shall not be obligated to close the transaction unless the Title Company is prepared to issue to the Purchaser an ALTA Owner’s Title Insurance Policy in the amount of the Purchase Price, naming the Purchaser as the insured and being subject only to the Permitted Exceptions and all other standard conditions of the Title Policy. The premium for the title insurance shall be paid by the Purchaser. The premium for any endorsements requested by Purchaser shall also be paid by the Purchaser. After the Effective Date, Purchaser shall have the right to obtain: i. a commitment for an Owner’s Title Insurance Policy (“Commitment”) issued by the Title Company, dated on or after August 1, 2020; and ii. all documents set forth on the Commitment other than those exceptions which Seller shall cause the Title Company to waive on or prior to the date of Closing. Purchaser’s counsel shall, within ten (10) days of the Effective Date, notify the Title Company as to the endorsements, if any, requested by the Purchaser. A duplicate copy of the communication shall be sent to Seller’s attorney. (All such endorsements requested by the Purchaser shall be referred to herein as “Purchaser’s Endorsements”.) Any and all premiums charged by the Title Company for purposes of issuing Purchaser’s Endorsements shall be paid by the Purchaser at the time of Closing. In the event the Title Company informs the Purchaser that the Title Company will not issue at the time of Closing any one or more of the Purchaser’s Endorsements, Purchaser shall have the right to deem such an event as an adverse matter and the Purchaser shall have the right to terminate this Agreement by providing written notice thereof to the Seller on or before December 10, 2020.

D. Purchaser shall have the right to order a survey of the Land (“Survey”) at Purchaser’s sole cost and expense.

E. Purchaser shall notify Seller in writing on or prior to December 10, 2020, if the Title Commitment or the Survey discloses matters that are objectionable to Purchaser (the “Unpermitted Exceptions”), and Seller may endeavor to have the Unpermitted Exceptions removed from the Title Commitment or the Survey or have the Title Company commit to insure against loss or damage that may be occasioned by such Unpermitted Exceptions. If Seller (or Title Company) does not do so, Purchaser may elect to, within five (5) days after being advised of the Title Company’s inability or refusal to have the same deleted from the Title Commitment or insured against: i. terminate this Agreement; or ii. accept the Subject Property subject to such unpermitted exceptions, without any reduction in the Purchase Price.

8. Inspection. Purchaser hereby states and represents to the Seller and Purchaser acknowledges that the Seller has granted to the Purchaser every opportunity, prior to the date hereof, to inspect the Premises and that the condition of the Premises is acceptable to the Purchaser.

9. Seller’s Closing Documents. At the Closing, in addition to the other documents listed in this Agreement which are to be delivered to the Purchaser, the Seller shall deliver to the Purchaser or the Escrowee the following:

- i. The Deed;
- ii. Affidavit of Title;

- iii. A GAP Undertaking and any other documents required to be delivered to the Escrowee in accordance with the terms of the Escrow (said documents shall not include any judgment or lien searches);
- iv. An ALTA statement in such form as is required by the Title Company;
- v. An affidavit executed by the Seller or qualifying statement from the U.S. Treasury Department that the transaction is exempt from the withholding tax requirements imposed by Section 1445(A) of the Internal Revenue Code and the Rules and Regulations promulgated thereunder (“Section 1445(A)”). In the event the Seller fails to deliver either the Affidavit or the qualifying statement as aforesaid, Seller agrees that the Purchaser may, at closing, deduct and withhold from the proceeds that are due to the Seller the amount necessary to comply with the withholding tax requirements imposed by Section 1445(A). Purchaser shall deposit the amount so withheld in escrow with the Title Company pursuant to the terms and conditions acceptable to the Seller, the Purchaser and Title Company, but in any event, complying with Section 1445(A);
- vi. Pay-off letters for all mortgages and deeds of trust of record encumbering the Premises sufficient to permit the Title Company to procure releases of the liens of such mortgages and issue at Closing the Title Policy free and clear of the liens of such mortgages and deeds of trust, together with any other evidence that Purchaser may reasonably request relating to the removal of exceptions to title that are not Permitted Exceptions;
- vii. A list of all lessees set forth in the Leases;
- viii. Originals or photocopies of and warranties or guaranties pertaining to the Subject Property which are being assigned at Closing in accordance with the provisions of this Agreement;
- ix. Keys for all locks which are a part of the Premises;
- x. The Office Lease; and
- xi. A letter signed by Onex addressed to each lessee under the Lease and the Office Lease informing the Lessee that the Marina has been converted to the Purchaser and directly that all future rents be paid to the Purchaser.

(All closing documents required to be provided by the Seller pursuant to the terms hereof shall be referred to herein as “Closing Documents”.) Seller shall attempt to cause photocopies of all of the executed or unexecuted Closing Documents to be delivered to counsel for the Purchaser not less than four business days prior to the date of Closing.

10. Purchaser’s Closing Documents. On the Closing Date, the Purchaser shall deliver the following to the Seller or to the Escrowee for the benefit of Seller:

- i. The Promissory Note;

- ii. Such Internal Revenue Service donation documents, acknowledgements of donee and similar documents as Seller may require; and
- iii. Such other documents, instruments, certifications and confirmation as may be reasonably required by the Seller to fully effect and consummate the transaction contemplated hereby.

11. Joint Deposits. On the Closing date, the Seller (or Onex for the Assignment) and Purchaser shall execute the following:

- i. Closing Statement;
- ii. A Master Statement or similar document prepared by the Title Company reflecting monetary amounts which conform with the Closing Statement; and
- iii. Assignment and Assumption of Office Lease and the Leases.

12. Closing Adjustments.

A. Adjustments shall be made between Seller and Purchaser for the following items, prorated on a per diem basis, as of the date of Closing (“Proration Date”): rent received by the Seller for the month of December from the lessee under the Office Lease, charges for water, electricity, sewer rental, gas, and other utilities for the Premises. The Seller shall have the right, in lieu of prorating the utilities, to order final meter readings for all of the utilities which final meter readings shall be made on or about the Proration Date. The Seller shall be solely responsible for the payment of all utility charges through and including the Proration Date. Charges for all utility services provided to the Premises from and after the Proration Date shall be paid by the Purchaser.

B. Any installment of a special assessment confirmed and payable on or prior to the date of this Agreement shall be paid at or prior to the time of Closing by the Seller. All subsequent installments shall be paid by the Purchaser, its successors and assigns. There shall be no proration of real estate taxes. All real estate taxes which are due and payable from and after the date of Closing shall be paid by the Purchaser.

C. All prorations or adjustments provided for herein shall be final.

D. Operating Costs. Seller shall pay all expenses necessary to repair, operate and maintain the Premises accrued up to the Proration Date.

E. Costs of Document Preparation and Attorneys’ Fees. Each party shall pay the fees of its own attorney and the cost of preparing all documents which this Agreement requires such party to furnish.

F. Security Deposit. Seller shall provide a credit in the amount of the unapplied portion of the security deposit under the Office Lease.

13. Purchaser’s Representations. To induce Seller to execute, deliver and perform this Agreement, Purchaser hereby states, represents and warrants to the Seller as follows:

- a. The Purchaser has the financial ability to satisfy its duties and obligations as set forth in this Agreement and the Promissory Note;

b. Purchaser has full capacity, right, power and authority to execute, deliver and perform this Agreement including all documents to be executed by Purchaser pursuant hereto, and all required action and approvals therefor have been duly taken and obtained;

c. The individuals signing this Agreement and all other documents executed or to be executed pursuant hereto on behalf of Purchaser are and shall be duly authorized to sign the same on Purchaser's behalf and to bind Purchaser thereto; and

d. This Agreement and all documents to be executed pursuant hereby by Purchaser are and shall be binding upon and enforceable against Purchaser in accordance with their respective terms, and the transaction contemplated hereby will not result in a breach of or violation of any order or administrative decree or constitute a default or permit acceleration of maturity under any indenture, mortgage deed of trust, loan agreement or other agreement to which Purchaser is subject.

Purchaser hereby agrees to and shall indemnify, defend, protect and hold harmless the Seller from all damages, liabilities or claims which may be asserted against the Seller or which the Seller may incur in the event any of the foregoing statements, representations or warranties may be deemed materially false or inaccurate. The duties and obligations of the Purchaser as set forth in the immediately preceding sentence shall survive the Closing and any termination of this Agreement.

14. Default.

A. Default by Seller. In the event of a default by the Seller which is not cured within twenty (20) business days of the date of written notification thereof from the Purchaser, the Purchaser shall have the right to terminate this Agreement by providing written notification thereof to the Seller within thirty (30) days following date of the default by the Seller. The right of the Purchaser as set forth in this Paragraph 14.A. shall be the sole and exclusive right and remedy of the Purchaser.

B. Default by Purchaser. In the event the sale of the Subject Property, as contemplated hereunder, is not consummated because of a default under this agreement on the part of the Purchaser, and if such default is not cured by Purchaser within twenty (20) business days after notice is given by Seller to Purchaser specifying the basis for claiming the default and Seller's intention to invoke the remedy of this Paragraph 14.B. then the Seller shall have the right to terminate this Agreement by providing written notification thereof to the Purchaser in which event this Agreement shall become null and void and neither party shall have any further duties or obligations hereunder except that the duties and obligations of the Purchaser as set forth in Paragraph 8.D. above shall remain and continue in full force and effect.

C. Right to Withdraw. Notwithstanding the foregoing, and notwithstanding the fact that Seller is not the developer of the Pleasure Isle Marina condominium project, Purchaser may withdraw from this Agreement without cause and without penalty if the withdrawal is made by notice to Seller within nine (9) business days after the date that is known as the "document receipt date." The calculation of the nine (9) business day withdrawal period shall include the document receipt date if this is a business day. The "document receipt date" is the date upon which Purchaser receives the documents referred to in Section 84a of the Michigan Condominium Act, as amended the ("Act"). The term "business day" means a day other than a Saturday, Sunday, or legal holiday. The parties expressly acknowledge that, because Seller is not the developer of the condominium project, this Agreement is not required to include the other provisions listed in Section 84(1)(d) of the Act.

15. AS IS. PURCHASER ACKNOWLEDGES THAT, EXCEPT FOR THE REPRESENTATIONS OF SELLER IN THIS AGREEMENT, IF ANY, OR IN THE CONVEYANCE DOCUMENTS DELIVERED AT CLOSING ("SELLER'S WARRANTIES"), IT WILL RELY SOLELY

UPON THE RESULTS OF PURCHASER'S OWN INSPECTIONS AND OBSERVATIONS OF THE PREMISES REGARDING THE PHYSICAL AND ENVIRONMENTAL CONDITION OF THE PREMISES AND THAT THE PREMISES IS BEING SOLD, AND WILL BE CONVEYED, "AS IS, WHERE IS" IN THE CONDITION IT IS IN ON THE CLOSING DATE (SUBJECT TO PURCHASER'S OWN ACTS AND OMISSIONS). EXCEPT FOR SELLER'S WARRANTIES, SELLER MAKES NO REPRESENTATIONS OR WARRANTIES, DIRECT OR INDIRECT, EXPRESS OR IMPLIED, ORAL OR WRITTEN, OF HABITABILITY, MERCHANTABILITY, USEABILITY, FITNESS FOR A PARTICULAR PURPOSE, ENVIRONMENTAL CONDITION, PROFITABILITY, COMPLIANCE WITH LAWS, OR OF ANY OTHER KIND WITH RESPECT THERETO. PURCHASER ACKNOWLEDGES THAT, AS OF THE DATE HEREOF, NEITHER SELLER NOR ANY AGENT OR CONSULTANT OF SELLER HAS MADE ANY REPRESENTATIONS OR WARRANTIES TO PURCHASER WITH RESPECT TO THE PROPERTY OR ANY ASPECT THEREOF, EXPRESS OR IMPLIED, WHICH ARE NOT SET FORTH IN THIS AGREEMENT.

16. Modification or Waiver.

A. Purchaser and Seller shall have the right to waive the performance of obligations or conditions required to be performed by the other party precedent or concurrent to their respective obligations hereunder. No such waiver and no modification, amendment, discharge or change of this Agreement, except as otherwise provided herein, shall be valid unless the same is in writing and signed by the party against which the enforcement of such modification, waiver, amendment, discharge or change is sought.

B. This Agreement contains the entire agreement between the parties relating to the transactions contemplated hereby and all prior or contemporaneous agreements, understandings, representations and statements, oral or written, are merged herein.

17. Notices. Any notice, demand, request or other communication shall be effective only if: i. delivered by hand to the party whose attention it is directed; ii. sent by Federal Express or similar service for next business day delivery; or, iii. by mailing the same by registered or certified mail postage prepaid, return receipt requested, to the addresses listed below, or at such other address as the parties may from time to time designate by notice or iii if sent by email. Every notice, demand, request or other communication hereunder shall be deemed to have been given when personally delivered or when delivered by email, on the second business day following the date when the communication is delivered to said service if it is sent by Federal Express or similar service or on the twenty-fifth (25th) business day following the date it is deposited in the United States mail if the U.S. Mail is utilized.

a. If intended for Seller:

Bill Deputy Foundation
Attention: Robert J. Deputy
4200 Middlebury Street
Elkhart, Indiana 46516
Facsimile: _____
Email: jrdad@msn.com

With a copy to:

Donald J. Russ, Jr.
Chuhak & Tecson, P.C.
30 South Wacker Drive
Suite 2600
Chicago, IL 60606-7413
Facsimile: (312) 444-9027
Email: druss@chuhak.com

b. If intended for Purchaser:

City of New Buffalo
Attention: City Manager
224 W Buffalo Street
New Buffalo, Michigan 49117
Facsimile:
Email:

With a copy to:

Nick Curcio, Curcio Law Firm PLC
710 Liberty Street, Suite C
Spring Lake, MI 49456

Alternatively, a notice, demand, request or other communication may be given by email or facsimile transmission subject to the following conditions:

- i. The facsimile numbers to be utilized shall be those addresses/numbers as listed above or such other numbers as are provided by any such parties;
- ii. Any facsimile which is initiated after 4:00 p.m. Chicago time on any given day shall be deemed given on the immediately following business day;
- iii. Any facsimile transmission made on a day other than a business day shall be deemed given on the first business day following the date the transmission is made; and
- iv. Any transmission made on a business day and prior to 4:00 p.m. Chicago time shall be deemed given on the date of transmission.

Any telephone number or email address set forth above are solely for purposes of convenience. Any communication made via email or verbally shall not be effective.

18. Governing Law. The validity, meaning and effect of this Agreement shall be determined in accordance with the laws of the State of Michigan applicable to contracts made and to be performed in that State.

19. Captions. The captions of this Agreement are inserted for convenience or reference only and in no way define, describe or limit the scope or intent of this Agreement or any of the provisions hereof.

20. Miscellaneous.

A. As used herein, the terms (a) “persons” shall mean an individual, a corporation, a partnership, a trust, an unincorporated organization or any agency or political subdivision thereof; (b) “including” shall mean including, without limiting the generality of the foregoing; (c) the masculine shall include the feminine and the neuter; and (d) “to the best knowledge” or any similar phrase shall be deemed to include the assurance that best knowledge is based upon a reasonable investigation.

B. It is the intention of the parties that this Agreement shall be executed in duplicate with each party retaining one fully executed Agreement. The Seller shall deliver to the Purchaser within five (5) business days of the date hereof one fully executed copy of this Agreement. In the event the Seller fails to deliver such a copy, the Purchaser shall have the right, but not the obligation, to declare this Agreement null and void and all earnest money and interest thereon shall be returned to the Purchaser. Executed counterparts of this Agreement may be delivered by facsimile or other reliable electronic means (including emails of pdf documents), and such facsimile or other electronic transmission shall be valid and binding for all purposes when transmitted to and actually received by the other party.

C. This Agreement is for the sole and exclusive benefit of the parties hereto and their respective successors and assigns, and no third party is intended to or shall have any rights hereunder.

D. This Agreement embodies the entire understanding that the parties relating to the subject matter hereof and there are no further or other agreements or understandings, written or oral, in effect between the parties relating to the subject matter hereof, except as maybe set forth in a written instrument executed by all parties contemporaneously with or subsequent to the execution of this Agreement. This Agreement shall not be construed more strictly against one party hereto that against the other party rely by virtue of the fact that it may have been prepared by counsel for one of the parties. It is understood and recognized that both parties have contributed substantially material to the preparation of this Agreement.

21. Assignability. Neither party hereto shall have the right to assign or transfer any of its rights hereunder without the prior written consent of the other party.

22. Time and Binding Effect. Time shall be of the essence of this Agreement and the covenants and agreements herein contained shall be binding upon and shall inure to the benefit of the parties hereto and their respective legal representatives, successors and assigns.

23. No New Leases. From and after the Effective Date, Seller shall not execute any new slip lease.

24. Modification or Waiver.

A. Purchaser and Seller shall have the right to waive the performance of obligations or conditions required to be performed by the other party precedent or concurrent to their respective obligations hereunder. No such waiver and no modification, amendment, discharge or change of this Agreement, except as otherwise provided herein, shall be valid unless the same is in writing and signed by the party against which the enforcement of such modification, waiver, amendment, discharge or change is sought.

B. This Agreement contains the entire agreement between the parties relating to the transactions contemplated hereby and all prior or contemporaneous agreements, understandings, representations and statements, oral or written, are merged herein.

25. Partial Invalidity. Seller and Purchaser intend and believe that each provision of this Agreement comports with all applicable local, state and federal laws and judicial decisions. However, if any provision or provisions, or any portion of any provision or provisions, of this Agreement is found by a court of law to be in violation of any applicable local, state or federal ordinance, statute, law, administrative or judicial decision, or public policy, and if such court should declare such portion, provision or provisions of this Agreement to be illegal, invalid, unlawful, void or unenforceable as written, then it is the intent both of Seller and Purchaser that any such portion, provision or provisions shall be given force to the fullest possible extent that they are legal, valid and enforceable, that the remainder of this Agreement shall be construed as if such illegal, invalid, unlawful, void or unenforceable portion, provision or provisions were not contained herein, and that the rights, obligations and interest of Seller and Purchaser under the remainder of this Agreement shall continue in full force and effect.

26. No Recordation. Under no circumstance shall Purchaser record or file this Agreement or any portion hereof or any memorandum hereof in the office of the Recorder of Deeds of Berrien County or in any other public place. In the event the Purchaser violates the terms of the immediately preceding sentence, such an occurrence shall constitute an immediate and material default by the Purchaser for which there will be no opportunity to cure.

27. Business Day. As used herein, the term “business day” shall mean any day other than a Saturday, Sunday, or any federal or State of Illinois holiday. If any period expires on a day which is not a business day or any event or condition is required by the terms of this Agreement to occur or be fulfilled on a day which is not a business day, such period shall expire or such event or condition shall occur or be fulfilled, as the case may be, on the next succeeding business day.

28. Seller’s Maximum Aggregate Liability. In the event the limitations on the remedies available to the Purchaser, as set forth in Paragraph 14.A. above, are determined by a court of competent jurisdiction to be unlawful, then the maximum aggregate amount which may be awarded to and collected by Purchaser, in connection with this transaction and under this Agreement (including, without limitation, in connection with the breach of any representations and warranties contained herein, if any) and any and all documents executed pursuant hereto or in connection herewith, for which a claim is timely made by Purchaser shall not exceed \$10,000.00.

29. Covenants and Representations of Seller.

A. To induce Purchaser to enter into this Agreement, Seller, to the best of its knowledge, represents and states to Purchaser that the following statements are true and correct as of the date of the signing of this Agreement:

- a. This Agreement has been duly authorized and executed on behalf of Seller and constitutes a valid and binding agreement, enforceable in accordance with its terms, subject to applicable bankruptcy, reorganization, insolvency, moratorium and other similar laws now or hereafter in effect.
- b. Seller has entered into, and shall enter into or negotiate, no real estate contract or other agreement with any third party pursuant to which said third party has any right to purchase any portion of the Premises.
- c. Seller has entered into no maintenance contract or service contract with any third party pertaining to the Premises which will survive the Closing, which have not been disclosed to the Purchaser.

- d. Seller has received no written notification, during the preceding twelve months, from any governmental entity (other than Purchaser, if at all) or quasi-public governmental entity wherein it is alleged or claimed that any of the Improvements or the use of any portion of the Land violates any applicable law, ordinance, order or regulation of any such entity having jurisdiction over the Land or any portion thereof and which violation has not previously been cured.
- e. Seller has received no written notification during the preceding twelve months from any governmental entity wherein it is alleged or claimed that there are any Hazardous Materials located in the Premises which require remediation.
- f. No Lease executed by the Seller, as of Effective Date, has a term which extends beyond October 15, 2021.
- g. Seller has no reason to believe that it will not become the owner of Unit #1 on or before the date of Closing.
- h. Onex Properties, LLC, an entity related to Seller entered into a Commercial Lease Agreement dated April 15, 2014, wherein Frank S. Paukowits is identified as the tenant and wherein the demised premises is a portion of the first floor of the Building. The term of said lease ended in April of 2015. The lease has been extended on a month-to-month basis pursuant to the verbal agreement of the landlord and the tenant.

B. All the statements and representations of the Seller as set forth in Paragraph 29.A. above shall be deemed to be remade on the date of Closing. All statements and representations of Seller as set forth in Paragraph 29.A. above shall be deemed to merge with the Deed and shall not survive the Closing.

C. Notwithstanding anything to the contrary contained herein, if Purchaser becomes aware by way of its due diligence activities or otherwise that any representation, warranty or statement made by Seller is not true or correct as of the date of Seller's acceptance hereof or that such representation or warranty is not true and correct as of the date of Closing, and Purchaser nevertheless proceeds to consummate its acquisition of the Subject Property, Purchaser shall then automatically be deemed to have irrevocably and automatically waived and relinquished any and all rights and remedies that Purchaser might otherwise have had as a result of said representation or statement not being true and correct.

D. If Seller hereafter becomes aware, at or prior to the date of Closing, of any material changes respecting any of the foregoing matters, Seller shall promptly disclose the same to Purchaser. In the event that Seller so discloses any material changes to Purchaser, then Purchaser may terminate the Agreement, in which event the parties shall have no further duties or obligations hereunder except for those duties and obligations which are expressly identified as surviving any termination of this Agreement.

30. Definition of Seller's Knowledge. All references in this Agreement to "Seller's knowledge" or words of similar import shall refer only to the actual knowledge of John Deputy ("Designated Employee") and shall not be construed to refer to the knowledge of any other officer, agent or employee of Seller or any affiliate thereof or to impose or have imposed upon the Designated Employee any duty to investigate the matters to which such knowledge, or the absence thereof, pertains, including, but not limited to, the contents of the files, documents and materials made available to or disclosed to Purchaser or the contents of files maintained by the Designated Employee. There shall be no personal liability on the part of the Designated Employee arising out of any representations or statements made herein.

31. Seller's Representations Deemed Modified. To the extent that Purchaser knows or is deemed to know prior to the expiration of the Inspection Period that Seller's representations and statements are inaccurate, untrue or incorrect in any way, such representations and statements shall be deemed modified to reflect Purchaser's knowledge or deemed knowledge, as the case may be. For purposes of this Agreement, Purchaser shall be "deemed to know" of the existence of a fact or circumstance to the extent that such fact or circumstance is disclosed by this Agreement, or any studies, tests, reports or analyses ("Purchaser's Documents") prepared by or for Purchaser or any of its employees, agents, representatives or attorneys (all of the foregoing being herein collectively called the "Purchaser's Representatives") or otherwise obtained by Purchaser or Purchaser's Representatives discloses such fact or circumstance; and Purchaser shall be "deemed to know" that a representation or statement was untrue, inaccurate or incorrect to the extent that this Agreement, Purchaser's Documents, or any other documents otherwise obtained by Purchaser or Purchaser's Representatives contain information which is inconsistent with such representation or statement.

32. Seller's Operating Covenant. Seller agrees, through the Closing Date that it will continue to operate the Premises and pay for all expenses in a manner similar to its operation prior to the execution of this Agreement.

33. Purchaser's Post-Closing Covenants. Purchaser hereby states, represents, warrants and agrees as follows all of which shall be in full force and effect at all times during the Term unless a duration of a different length is expressly noted:

a. From and after the date of Closing until the end of the Term, Purchaser, including its successor, assigns, lessees, or other tenants will operate the Premises solely as a marina or office space. Further, Purchaser shall not convey the Premises during the Term without Seller's express written consent.

b. No portion of the Premises shall be used for any use or purpose other than as a marina, office, or other attendant uses.

c. During any given calendar year, it is anticipated that income generated by the Purchaser's operation of the marina will be greater than the costs and expenses incurred by the Purchaser in operating and maintaining the marina. (Such excess shall be referred to herein as "Net Income".) Beginning on April 1, 2022, and on the first day of every April until April 2, 2047, Purchaser shall deliver to the Seller a detailed income and expense statement identifying all income received by the Purchaser for the preceding calendar year and a description of all expenses and costs incurred by the Purchaser relative to that calendar year.

d. Promptly after the date of the Closing, the Purchaser shall establish a segregated operating account. All income received by the Purchaser from the operation of the marina shall be deposited by the Purchaser into said segregated account.

e. From the date of Closing until April 1, 2047, all Net Income shall be used by the Purchaser solely and exclusively for the benefit of the Development Area. No Net Income may be used by the Purchaser for any use or purpose, whether on a temporary basis or otherwise, for any use or purpose except as set forth in the immediately preceding sentence, except with Seller's express written consent.

f. From the date of Closing until April 1, 2047, upon written demand of the Seller, which shall be made no more than once per calendar year, Purchaser shall provide a written description and explanation of all expenditures of Net Income made by the Purchaser.

In the event of the failure of the Purchaser to satisfy its obligations as set forth above in this Paragraph 33, such an event shall constitute an immediate and material default of the Purchaser. Seller shall have the right to notify Purchaser of such a default and, in the event the default is not cured by the Purchaser within thirty (30) days of the date of notification from the Seller, the Seller shall have the following rights and remedies:

- i. Seller shall have the right to repurchase the Premises for an amount equal to 90 cents for each dollar of the principal amount paid by the Purchaser to the Seller under the Promissory Note,, plus the verifiable cost of any capital improvements made by Purchaser. Seller may exercise the repurchase option by providing written notice to Purchaser of its intent to do so. Purchaser shall convey the Premises back to Seller upon Seller's tender of the amount described in this paragraph.
- ii. The Seller shall have the right to exercise all rights and remedies available at law or otherwise including, but not limited to, specific performance; and
- iii. All costs and expenses incurred by the prevailing party in any action to enforce the terms of this Paragraph, including but not limited to court costs and reasonable attorney's fees, shall be paid by the other party upon written demand.

The terms and provisions of this Paragraph 33 shall be set in substantially similar form in the Deed. Once signed and recorded, the terms in the Deed shall supersede and replace the terms in this Paragraph 33 and Paragraph 34 below, to the extent of any inconsistency.

34. Purchase Money Financing. As described in Paragraph 4 above, the Purchase Price shall not be due and payable at the time of Closing but, alternatively, shall be due and payable by the Seller in accordance with the terms of the Promissory Note. From the date of Closing through and including the date when all duties and obligations of the Purchaser set forth in the Promissory Note have been fully satisfied, Purchaser shall maintain commercial comprehensive fire and casualty insurance. The insurance policy terms shall provide that in the event of the payment of any insurance proceeds, proceeds shall first be paid to Seller to satisfy the monetary obligations of the Purchaser as set forth in the Promissory Note. Evidence of such insurance shall be provided to the Seller by the Purchaser on the date of Closing and every year thereafter until all obligations of the Purchaser as set forth in the Promissory Note have been satisfied in full. A copy of the insurance policy shall be provided to the Seller at the time of Closing. Every year thereafter until the Promissory Note is paid in full, Purchaser shall provide evidence of the continuation of such insurance coverage. In the event the Purchaser fails to satisfy the obligations set forth in this Paragraph 34, that event shall constitute a material default by the Purchaser. The Purchaser shall have the right to exercise all rights and remedies available to it in the event of such a default including, but not limited to, those remedies and rights set forth in Paragraph 33 above. The terms of this Paragraph 34 shall survive the Closing and shall be included in the Deed.

35. Condominium Unit #2. Onex Properties, LLC ("Onex"), is the owner of Unit #2 as of the date of this Agreement. Under no circumstance shall the terms of this Agreement or any of the closing documents adversely affect the rights of Onex in and to Unit #2, including all rights of ownership as set forth in the Master Deed or the Condominium Declaration. Accordingly, and without limiting the terms of the immediately preceding sentence, in the event Onex does not secure a purchaser for Unit #2, Onex shall have the right to lease Unit #2 to any third party as determined by Onex.

36. Conveyance by Onex. In the event the Seller does not become the owner of Unit 1 on or before the day of Closing, the Seller shall have the right to terminate this Agreement by providing written notification thereof to the Purchaser on or before the day of Closing. In the event of such notification, this Agreement shall automatically terminate and neither party hereto shall have any further obligation hereunder.

[signature page follows]

IN WITNESS WHEREOF, this Sale, Purchase and Donation Agreement has been executed as of the day and year first above written.

SELLER:

Bill Deputy Foundation, a Delaware corporation

By: _____
Robert J. Deputy
Its: President

PURCHASER:

City of New Buffalo, a Michigan municipal corporation

By: _____

Its: Mayor

By: _____

Its: Clerk

Exhibit A

Description of the Land

THAT PART OF FRACTIONAL SECTION 9, TOWNSHIP 8 SOUTH, RANGE 21 WEST, CITY OF NEW BUFFALO, BERRIEN COUNTY, MICHIGAN, DESCRIBED AS: COMMENCING AT THE INTERSECTION OF THE NORTHERLY RIGHT OF WAY LINE OF WATER STREET AND THE WESTERLY RIGHT OF WAY LINE OF WHITTAKER AVENUE IN SAID CITY OF NEW BUFFALO; THENCE SOUTH 59° 15' 00" WEST ON SAID NORTHERLY RIGHT OF WAY LINE OF WATER STREET 305.50 FEET TO A POINT THAT IS 2005.67 FEET NORTH 59° 15' EAST OF THE EASTERLY MOST CORNER OF LOT 16, BLOCK 1, RECORDED PLAT OF "SUNSET SHORES NO. 1" IN SAID CITY OF NEW BUFFALO AND THE POINT OF BEGINNING OF THE LAND HEREIN DESCRIBED; THENCE SOUTH 30° 45' 00" EAST 0.68 FEET; THENCE SOUTH 58° 43' 48" WEST 275.21 FEET; THENCE NORTH 32° 21' 56" WEST 231.89 FEET; THENCE NORTH 59° 15' 00" EAST 281.74 FEET; THENCE SOUTH 30° 45' 00" EAST 228.62 FEET TO THE POINT OF BEGINNING. CONTAINING 1.47 ACRES MORE OR LESS.

BEARINGS ARE RELATED TO THE RECORDED CONDOMINIUM OF "SOUTHCOVE", RECORDED IN LIBER 15 OF CONDOMINIUMS, PAGES 1-295, BERRIEN COUNTY RECORDS.

Exhibit B

DEPICTION OF DEVELOPMENT AREA

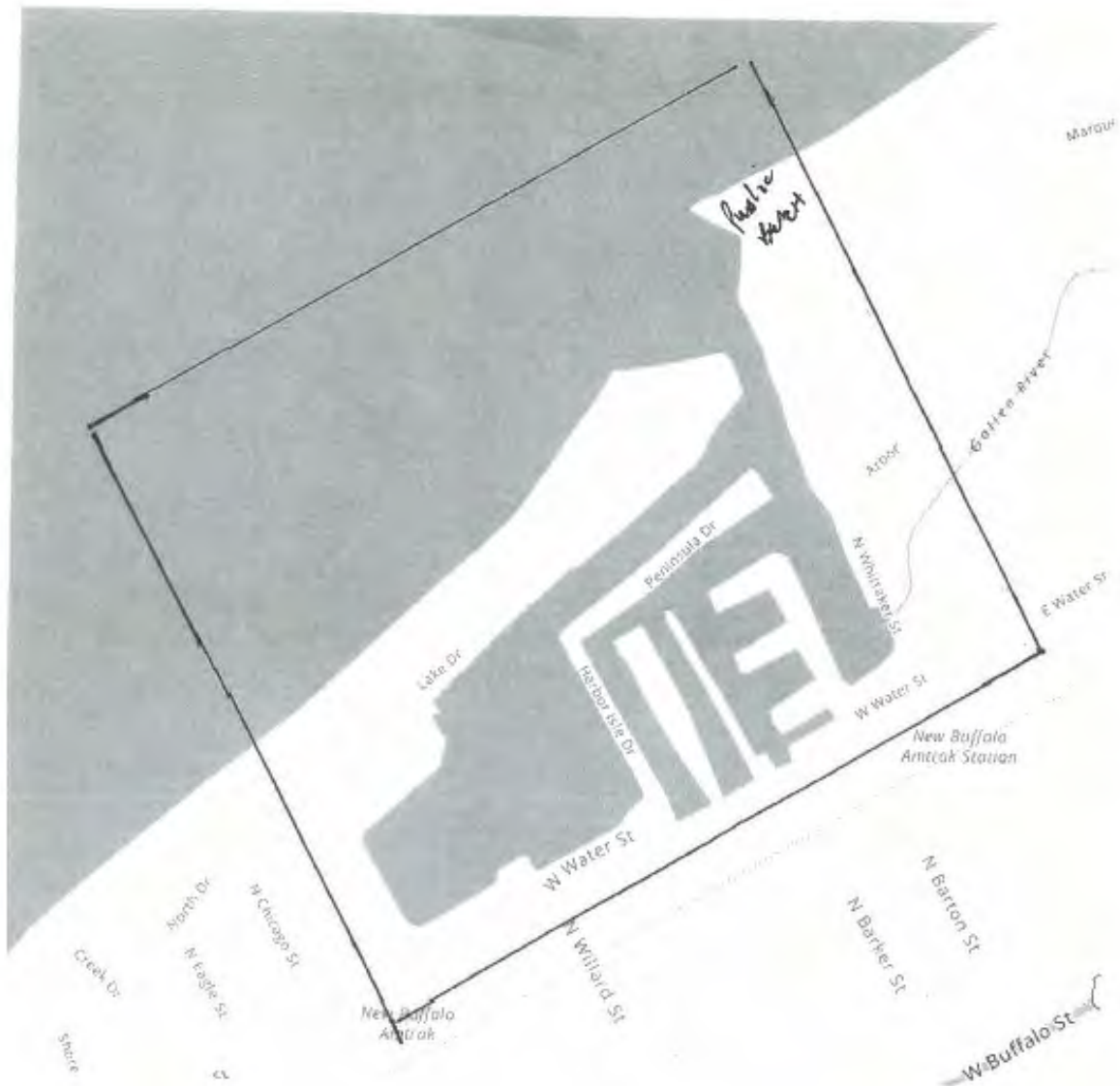


Exhibit C

PROMISSORY NOTE

Date: December ____, 2020

Amount: \$500,000.00

FOR VALUE RECEIVED, the undersigned, CITY OF NEW BUFFALO, BERRIEN COUNTY, MICHIGAN (“Maker”), a Municipal Corporation, hereby promises to pay, in the manner and at the time hereinafter stated, to the order of BILL DEPUTY FOUNDATION, a Delaware corporation (“Lender”), its successors and assigns, at such place as the holder hereof may designate, the principal sum of Five Hundred Thousand Dollars and 00/100 (\$500,000.00), together with interest thereon until this Promissory Note shall be fully paid and satisfied.

1. Interest. Interest will be charged on that part, or any part thereof, of the outstanding principal which has not been paid beginning on the date that principal is disbursed hereunder, and continuing until the full amount of principal has been paid. Beginning on the date set forth above, the undersigned will pay interest at the rate of one percent (1.00%) per annum (the “Interest Rate”).

2. Payments.

(a) Time of Payments. The undersigned will make payments in successive, annual installments commencing on June 1, 2021, and continuing on the first day of each June thereafter and a final payment on June 1, 2025, which is anticipated to be the “**Final Payment Date**.” The undersigned will pay all sums owed under this Promissory Note including all outstanding principal, accrued interest and any other charges described below no later than the Final Payment Date.

(b) Prepayment. Maker may prepay all or any part of the principal of this Promissory Note at any time, without penalty.

3. Events of Default. The occurrence of any one or more of the following events shall constitute an event of default hereunder (“Event of Default”):

(a) If Maker shall fail to pay when due any payment of principal or interest on this Promissory Note and such failure continues for seven (7) days after the due date.

(b) If a court of competent jurisdiction enters an order or decree under any Bankruptcy Law that (i) is for relief against Maker in an involuntary case, or (ii) appoints a trustee, receiver, assignee, liquidator or similar official for Maker or substantially all of Maker’s properties, and the order or decree is not dismissed within sixty (60) days.

(c) Any other breach or default by Maker of any representations, warranties or obligations set forth in this Promissory Note, which is not cured within thirty (30) days.

Upon the occurrence of an Event of Default, the Lender shall have the right to exercise all rights and remedies available to it whether set forth in law or otherwise.

4. Assignment. Lender shall have the right to assign or dispose of the rights to receive payments hereunder with the written consent of the Maker, which shall not be unreasonably withheld.

5. Notice. Notwithstanding anything to the contrary contained herein, in the event of any act allowing acceleration of the indebtedness evidenced hereby or any breach hereof or default hereunder, the Lender shall mail notice to the Maker at its offices specifying: (a) the breach; (b) the action required to cure such breach; (c) the date by which such breach must be cured as provided hereunder; and (d) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the entire principal amount outstanding and accrued interest thereon. No failure, even though repeated, by holder to exercise any option contained in this Promissory Note, and no waiver, even though repeated, or performance of any of the covenants contained in either such instrument shall in any way affect the right of holder thereafter to exercise such option or to require or enforce performance of such covenant.

6. Waivers. The makers, sureties, guarantors and endorsers of this Promissory Note, jointly and severally, hereby waive notice of and consent to any and all extensions of this Promissory Note or any part thereof without notice, and each hereby waives demand, presentment for payment, notice of nonpayment and protest, and the exhaustion of legal remedies hereon.

7. General. In this Promissory Note, wherever the context requires, the singular shall include the plural and the masculine shall include the feminine and the neuter. All and each of the rights, options and privileges of the Lender hereunder shall extend to any holder hereof.

8. Fees and Costs. In the event any action is brought to enforce the obligations under this Promissory Note, the prevailing party shall be entitled to reasonable attorneys' fees.

The undersigned has executed this Promissory Note the day and year first above written.

MAKER:

City of New Buffalo, Berrien County,
Michigan

By: _____

Exhibit D

TITLE EXCEPTIONS

1. Real estate taxes which are not yet due and payable;
2. Those matters set forth in the title commitment which are accepted by the Purchaser;
3. Installments of special assessments which are due and payable after the date hereof;
4. State, county and municipal zoning and building laws and ordinances which affect the Premises;
5. Condominium Declaration and all amendments thereto, if any;
6. Acts done or suffered by or through the Purchaser; and
7. Terms and provisions of the slip leases which are in effect as of the Effective Date and Office Lease.

**3RD ADDENDUM TO BUY AND
SELL AGREEMENT**

The undersigned parties to a Buy and Sell Agreement dated June 9, 2020, by and between Firas Naji (“Buyer”), and City of New Buffalo (“Seller”), for the purchase and sale of that certain property known as 435 S. Whittaker Street, New Buffalo, MI 49117 (“Property”), hereby further agree as follows:

- In paragraph 7 of the Agreement, the phrase "agreed to date" shall be replaced with "November 24, 2020, or as soon thereafter as reasonably possible."
- Deputy City Clerk Nancy Griffin is authorized to sign conveyance documents on behalf of the City if City Clerk Amy Fidler is unavailable.
- The Deed shall include the following restriction: Grantee shall obtain a certificate of occupancy for a commercial use on the property on or before December 31, 2021. In the event that Grantee fails to do so, Grantor shall have the right to repurchase the Property for \$113,000 plus the verifiable cost of any improvements made by Grantees. Grantor may exercise the repurchase option by providing written notice to Grantee of its intent to do so. Grantee shall convey the Property back to Grantor upon Grantor’s tender of the amount described in this paragraph. The rights and obligations described in this paragraph shall run with the land and shall be binding on the parties’ successors and assigns, but shall expire if not exercised on or before December 31, 2022.

All other terms and conditions of the Buy and Sell Agreement to remain the same.

BUYER(S):



Date: 11/18/2020

Date: _____

SELLER(S):

Date: _____

Date: _____