TOWN OF KILL DEVIL HILLS

Land Where Flight Began

MEMORANDUM April 12, 2021

TO: Mayor and Board of Commissioners

FROM: Debora P. Diáz, Town Manager

REF: Old Business

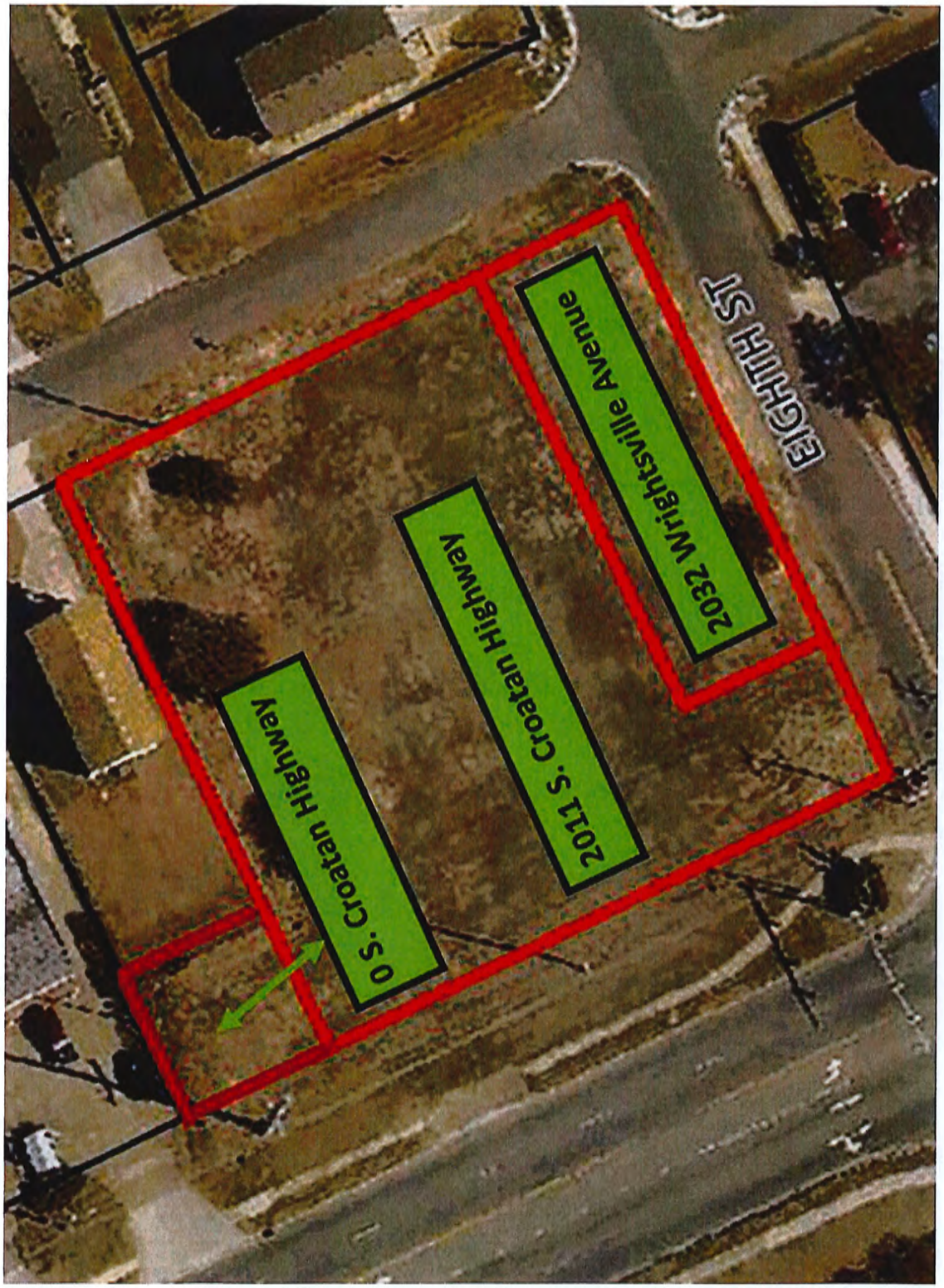
1. Offer received for purchase of Town-owned property and the Upset Bid Process for Sale of 2011 South Croatan Highway and 0 South Croatan Highway Adjacent Thereto, and 2032 Wrightsville Avenue (Attached OB-1)

This winter, the Town has gone through various steps to determine interest in the potential sale of the real property described in the above heading. This included, obtaining an appraisal, returning a valid bid to the BOC, adoption of a resolution authorizing the Upset Bid Process on the original bid for the property, which was in the overall amount of $1,505,000, including the 5% bid bond.

No upset bids were submitted within the required 10-day timeframe; therefore, the sale price was set at the original amount, $1,505,000. The BOC must approve this amount within 30 days of the final upset bed period. The final terms of the sale were to be negotiated prior to BOC approval, and, the BOC reserved the right to reject any and all bids.

Town Attorney Casey Varnell has reviewed the final purchase agreement, and identified sections to discuss with the BOC, which are printed in blue on the attached Purchase and Sale Agreement.

At the conclusion of discussion, if the BOC wants to take action to approve the sale of the properties at 2011 South Croatan Highway and 0 South Croatan Highway Adjacent Thereto, and 2032 Wrightsville Avenue then a motion will be in order to approve the final high offer of $1,505,000, including authorization to the Town Attorney to negotiate, as directed, any outstanding terms of the Sale and Purchase Agreement.



ATTACHMENT OB-1

SHARP, GRAHAM, BAKER AND VARNELL, L.L.P.
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KITTY HAWK, NC 27949-1027

Sender's E-mail Address:
varnell@ncobxlaw.com

April 7, 2021

TO: Honorable Mayor Sproul and KDH Board of Commissioners

FROM: Casey C. Varnell, Town Attorney

RE: Purchase by MFP Investment Company, L.P.

Dear Mayor and Board:

I am attaching to this memorandum a revised version of the Purchase and Sale Agreement presented to me by counsel for MFP Investment Company, L.P. (hereinafter "MFP") with regard to the potential purchase of Town-owned property. The upset period has expired on the initial bid submitted by MFP, resulting in MFP being the high bidder. There were no upset bids placed during the upset period.

The Purchase and Sale Agreement attached hereto contains redlined revisions that I am proposing for discussion amongst the Board at our upcoming open meeting. The purpose for this discussion will be to act on approving the Purchase and Sale Agreement in a form suitable to the Town.

I will be available to answer any questions concerning my proposed revisions. After discussion amongst the Board, a motion would be in order.

Sincerely,

Casey C. Varnell

PURCHASE AND SALE AGREEMENT

THIS PURCHASE AND SALE AGREEMENT ("**Agreement**") is made and entered into as of _____, 2020 by and between **TOWN OF KILL DEVIL HILLS,** a North Carolina municipal corporation ("**Town**"), and **MPF INVESTMENT COMPANY LP,** a Maryland limited partnership or assigns ("**Purchaser**").

RECITALS:

R1. Town is the owner of those certain unimproved parcels of real property located at 2011 S. Croatan Highway, 2031 Wrightsville Boulevard and 0 S. Croatan Highway, Kill Devil Hills, North Carolina 27949 (the three parcels being collectively referred to herein as the "**Property**") and having the following Dare County Parcel ID and PIN numbers:

a. PARCEL 1: Parcel ID # 026186000, PIN # 989313131395
b. PARCEL 2: Parcel ID # 008351000, PIN # 989313133228
c. PARCEL 3: Parcel ID # 008350000, PIN # 989313133272

R2. On December 10, 2020, Purchaser presented an offer to the Town to purchase the Property for the sum of $1,505,000.00 (the "**Bid Price**") and deposited the sum of $75,250.00 with the Town Clerk pursuant to that certain Deposit Agreement attached hereto as **Exhibit A** (the "**Deposit Agreement**").

R3. At the March 8, 2021 regular meeting of the Kill Devil Hills Board of Commissioners (the "**Board**"), the Board authorized the upset bid process for the sale of the Property pursuant to N.C. Gen. Stat. § 160A-269.

R4. The statutory upset bid period has elapsed and the Purchaser desires to purchase the Property at the Bid Price, subject to the terms and conditions of this Agreement.

R5. At the April 12, 2021 regular meeting of the Board, the Board formally accepted Purchaser's bid to purchase the Property at the Bid Price, subject to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are acknowledged by the parties to this Agreement, the parties agree to the following terms and conditions:

1. PURCHASE AND SALE. Pursuant to this Agreement, Buyer shall purchase and Town shall sell all of Town's right, title, and interest in and to the Property, together with: (a) All licenses, permits, and rights pertaining to ownership and/or operation of the Property; and (b) All strips, gores, easements, privileges, rights of-way, riparian and other water rights, air rights, mineral rights, development rights, rights to lands underlying any adjacent streets or roads, and other tenements, hereditaments and appurtenances, if any, pertaining to or accruing to the benefit of the Property.

2. EFFECTIVE DATE. The date of this Agreement shall be the date when the last one of Town or Purchaser has signed this Agreement, as stated on the signature page ("**Effective Date**").

3. CLOSING DATE.

(a) Subject to other provisions of this Agreement for extension or termination, closing on the transaction described in this Agreement ("**Closing**"), if in person, shall be held at a mutually agreeable location in Kill Devil Hills, North Carolina, on the date which is the later of the following ("**Closing Date**"): (i) thirty (30) days after the Expiration Date; ~~(ii) thirty (30) days after the Approvals of the Entitlements (as both are defined in Section 24 herein) have been obtained, if such Approvals occur after December 31, 2021~~, (iii) such other places, date, and time as Purchaser and Town may mutually agree upon in writing, or (iv) the Closing Notice Date (as defined in Section 3(c) below). In any event, Closing shall take place on or before June 1, 2022 (the "**Outside Closing Date**").

(b) Purchaser, in Purchaser's sole discretion may elect to proceed to Closing prior to the Closing Date upon Purchaser's issuance of written notice to Town (the "**Closing Notice**"), whereby Closing shall occur on the date set forth in the Closing Notice (the "**Closing Notice Date**"), such Closing Notice Date being not less than twenty-one (21) days after the date of the Closing Notice.

4. DEPOSIT. Pursuant to the Deposit Agreement, the terms of which are incorporated by reference as if fully set forth, Purchaser has deposited the sum of $75,250.00 with the Town Clerk for the Town ("**Initial Deposit**" and together with any Investigation Period Extension Deposit(s), the "**Deposit**"). The Deposit shall be disbursed only in accordance with the terms of this Agreement. ~~All interest accrued or earned on T~~the Deposit shall be paid or credited to Purchaser except in the event of a default by Purchaser, in which event the Deposit and all interest accrued on the Deposit shall be disbursed to Town ~~, together with the Deposit,~~ as liquidated damages in accordance with Section 15. Except as otherwise specifically set forth in this Agreement, including, but not limited to Section 24, the Deposit shall be non-refundable immediately following the Expiration Date and shall be applicable to the Purchase Price (as defined in Section 5 below).

5. PURCHASE PRICE.

(a) The total purchase price ("**Purchase Price**") to be paid by Purchaser to Town for the Property shall be One Million Five Hundred and Five Thousand and No/100 Dollars ($1,505,000.00).

(b) The Purchase Price shall be paid to Town as follows:

(i) The Deposit described in Section 4 of this Agreement, which shall be paid to Town at Closing; and

(ii) Balance of the Purchase Price: in cash at Closing, subject to prorations and adjustments as provided in this Agreement.

6. NO OTHER PURCHASE AND SALE AGREEMENTS. As long as this Agreement is in full force and effect and Purchaser is not in default hereunder, Town shall not actively market the Property or enter into any other purchase and sale agreement for any portion of the Property.

7. TITLE EVIDENCE. On or prior to Purchaser's Title Notice Date (as defined herein), Purchaser shall, at Purchaser's expense, obtain an ALTA title insurance commitment ("**Commitment**"), with fee owner's title policy premium to be paid by Purchaser at Closing, issued by the Purchaser's title insurance company ("**Title Insurer**"). The Commitment shall show Town to be vested with good and marketable and insurable fee simple title to the Property, insurable in an amount equal to the Purchase Price at standard rates, free and clear of all liens, encumbrances, leases, tenancies, covenants, conditions, restrictions, rights-of-way, easements and other matters affecting title, except the following ("**Permitted Exceptions**"):

(a) Ad valorem real estate taxes for 2021 and subsequent years;

(b) All applicable zoning and building law ordinances and regulations;

(c) Public utility service easements and rights-of-way in customary form and easements as shown on the recorded plats of the Property; and

(d) Other matters as approved by Purchaser hereunder.

8. SURVEY.

(a) During the Investigation Period, Purchaser may also obtain, at Purchaser's expense, an ALTA survey ("**Survey**") of the Property.

(b) If the Survey shall reflect any encroachments, overlaps, unrecorded easements or similar rights in third parties, or any other adverse matters not specifically provided for in this Agreement or not otherwise disclosed in the Commitment, then the same shall be deemed "title defects" as set forth in Section 9. In the event Purchaser fails to obtain a Survey during the Investigation Period, then Purchaser shall be deemed to have waived the right to claim any title defects based on the Survey.

9. TITLE DEFECTS.

(a) No later than fifteen (15) days prior to the Expiration Date, defined below, ("**Purchaser's Title Notice Date**"), Purchaser shall notify Town in writing specifying any title defect(s) ("**Purchaser's Title Notice**"), along with a copy of the Commitment and Survey, if not previously provided. If Purchaser fails to give Town Purchaser's Title Notice on or before Purchaser's Title Notice Date, Town shall have no obligation to respond to Purchaser, such failure by Town to respond shall be in no way deemed an acceptance by Town to accept the cure of any title defect(s) or exceptions shown in the Commitment and Survey, and any defects or exceptions shown in the Commitment and Survey shall be deemed to be waived by Purchaser and shall be deemed Permitted Exceptions.

(b) In the event Purchaser provides Town with a Purchaser's Title Notice on or before Purchaser's Title Notice Date, Town shall have ten (10) business days to respond to such Purchaser's Title Notice and notify Purchaser in writing of the items that Town elects to cure as of Closing. If Town does not elect to cure or eliminate any such defects as of Closing, or Town fails to respond to Purchaser's Title Notice within the above-mentioned ten~~five~~-day time period, then Town shall be deemed to have elected to not cure any such defects. On or before the Expiration Date, Purchaser shall have the option to:

(i) Accept the title "as is," without reduction in the Purchase Price and without claim against Town for such title defects; or,

(ii) Terminate this Agreement, in which event, Purchaser shall deliver to Town the Due Diligence Documents and the Town Clerk shall immediately return the Deposit ~~together with all interest earned on it~~ to Purchaser. Upon such return of the Deposit, both parties shall be released from all further obligations under this Agreement except as otherwise provided herein.

(c) If any new title defects having a material effect on the Property, including, but not limited to, loss of parking or loss of building size, appear after the Expiration Date through the Closing Date, then Purchaser shall notify Town of such new title defect(s) and Town shall have the opportunity to elect to cure. For such title defects not caused by Town's actions, if Town does not elect to cure as of the Closing Date, Purchaser shall have the same options set forth in subsection (b)(i) and (ii) above as Purchaser's sole and exclusive remedy. For such title defects that are caused by Town's actions ~~(other than those caused by or are consistent with the Entitlements),~~ the same shall be considered a default under this Agreement and Purchaser may proceed as provided in Section 14.

(d) Town covenants that Town will not take or expressly consent to any action that would create a materially adverse title defect after the Effective Date, except that Town may take such actions as are required or permitted by the terms of this Contract, including to cure title defects noted by Purchaser.

(e) Notwithstanding the foregoing or anything in this Agreement to the contrary, Town shall convey title to the Property free and clear of any mortgage liens placed by Town, if any, and any encumbrances Town has prior thereto elected in writing to cure at Closing, as specifically set forth in this Section 9.

10. LEASES. Town warrants and represents that there are no leases, tenancies, or occupancies affecting any portion of the Property. Town shall not enter into any new leases or allow any tenancies or occupancies affecting the Property at any time after the Effective Date.

11. INVESTIGATION PERIOD.

(a) From the Effective Date until December 31, 2021 (the "**Investigation Period**"), Purchaser shall have the right to conduct, at Purchaser's expense, whatever reasonable

investigations, analyses and studies of the Property that Purchaser may deem appropriate with regard to:

(i) Purchaser's review of the physical and environmental characteristics and condition of the Property. Town agrees to provide Purchaser access to the Property following the Effective Date for the purpose of performing, at Purchaser's sole cost and expense, studies, physical inspections, investigations and tests on the Property (the "**Tests**") provided that no such Tests shall be conducted without prior written notice to Town and Town's prior approval of such Tests, which approval shall not be unreasonably withheld. Town's execution of this Agreement shall constitute its consent to a non-invasive Phase I environmental site assessment and geotechnical soil boring analysis being performed on the Property, provided Purchaser gives Town advance written notice of such soil borings. Except for geotechnical soil boring analysis, all forms of invasive Tests are prohibited without Town's prior written consent, which consent may be granted or withheld in Town's sole discretion. Invasive Tests hereunder include, but are not limited to, any tests or testing beyond a Phase I environmental site assessment, such as collecting or testing asbestos, water, radon, soil or air samples. Purchaser's access is further conditioned on Purchaser providing Town with certificates of insurance listing Town as an additional insured on all insurance policies evidencing that Purchaser's agents or contractors performing said Tests have insurance in types and amounts satisfactory to Town as determined by Town in its reasonable discretion. Purchaser shall be required to conduct such Tests in a manner as to not unreasonably disturb or interfere with the current use of the Property and upon completion of such Tests, Purchaser agrees at its sole cost to restore the Property to the condition it was in immediately prior to such Tests, including, but not limited to the immediate removal of anything placed on the Property in connection with such Tests. Copies of any third-party reports, letters or other written information generated as a result of such Tests gathered during the Investigation Period may be provided to Town upon Town's request. Purchaser shall indemnify, defend (with counsel reasonably satisfactory to Town), protect, and hold Town harmless from and against any and all liability, loss, cost, damage, or expense (including, without limitation, reasonable attorney's fees and costs) which Town may sustain or incur by reason of or in connection with any Tests made by Purchaser or Purchaser's agents or contractors relating to or in connection with the Property, or entries by Purchaser or its agents or contractors onto the Property including, without limitation, any losses, damages, expenses, liabilities, claims, demands, and causes of action resulting, or alleged to be resulting, from personal injury or death, or property damage (including without limitation Purchaser's breach of its obligation to restore the Property following any Tests as set forth above), or mechanic's or materialmen's liens. Notwithstanding any provision to the contrary in this Agreement, the indemnity obligations of Purchaser under this Agreement shall not be applicable to claims arising solely from the discovery of the presence of an adverse environmental condition not caused or exacerbated by the Tests. Further notwithstanding any provision to the contrary in this Agreement, the indemnity obligations of Purchaser under this Agreement shall survive any termination of this Agreement or the delivery of the Deed and the transfer of title pursuant to this Agreement;

(ii) ~~The Entitlements (as defined in Section 24) and~~ Tthe permitted uses of and improvements to the Property under applicable building and zoning ordinances and the present compliance or non-compliance with the same;

(iii) All existing contracts, agreements, leases and tenancies affecting the Property, if any; and

(iv) Any other matters Purchaser deems relevant to the Property subject to the terms hereof.

(b) Within fourteen (14) days following the Effective Date, Town shall deliver to Purchaser via electronic transmission certain non-privileged documents relating to the Property in Town's possession or readily available to Town at no additional material cost, those items described in **Exhibit B** attached hereto (collectively, the "**Due Diligence Documents**").

(c) Purchaser, its agents, and employees shall have the right to enter upon the Property for the purpose of making inspections at Purchaser's sole risk, cost and expense.

(d) If Purchaser, in its sole discretion, is not satisfied with the results of its inspection and studies, Purchaser may terminate the Agreement by written notice to Town on or before 5PM on the last day of the Investigation Period (the "**Expiration Date**"). If Purchaser terminates this Agreement in accordance with this subparagraph (d), Purchaser shall deliver to Town the Due Diligence Documents and the Town Clerk shall immediately disburse the Deposit to Purchaser. Upon such return of the Deposit, both parties shall be released from all further obligations under this Agreement except as otherwise provided herein.

(e) Purchaser, in Purchaser's sole discretion, may extend the Investigation Period by two (2) periods of sixty (60) days each (each an "**Investigation Period Extension**"), upon written notice to Town of Purchaser's intent to exercise an Investigation Period Extension and Purchaser's deposit of an additional $25,000.00 in earnest money with the Town Clerk (each a "**Investigation Period Extension Deposit**"). Upon the Payment of each Investigation Period Extension Deposit, the Expiration Date shall be extended until the end of the exercised Investigation Period Extension.

12. REPRESENTATIONS, WARRANTIES AND COVENANTS.

(a) Town represents and warrants to Purchaser and covenants and agrees with Purchaser as follows:

(i) Town has not entered into any contracts, subcontracts, arrangements, licenses, concessions, or other agreements, either recorded or unrecorded, written or oral, that will be binding upon Purchaser or the Property after Closing (collectively, "**Contracts**"), except as may be necessary with regard to any zoning ~~the Entitlements or~~ Approvals. To the extent such Contracts exist, unless otherwise requested by Purchaser, Town shall cancel any Contracts affecting the Property on or prior to Closing;

(ii) There are no (A) existing, pending or, to Town's knowledge, threatened lawsuits or appeals of prior lawsuits affecting the Property; or (B) existing, pending or, to Town's knowledge, threatened condemnation proceedings affecting the Property;

(iii) There are no agreements currently in effect which restrict the sale of the Property;

(iv) Town has the right, power and authority to execute and deliver this Agreement and to consummate the transactions contemplated by it. Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated by it nor the fulfillment of nor the compliance with the terms, conditions and provisions of this Agreement will conflict with or result in a violation or breach of any relevant law, or any other instrument or agreement of any nature to which Town is a party or by which it is bound or may be affected, or constitute (with or without the giving of notice or the passage of time) a default under such an instrument or agreement. All consents, approvals, authorizations or orders required with respect to the consummation of the transaction contemplated by this Agreement shall be in place by Closing;

(v) To the best of Town's knowledge, except as disclosed in the Due Diligence Documents, there are no toxic wastes, hazardous chemicals or other similar hazardous materials, the removal of which is required or the presence of which is restricted, prohibited or penalized by any governmental law or regulation, located in or affecting the Property covered by this Agreement. There are no landfills or dumping grounds of any sort on the Property, no underground storage tanks on the Property, and no materials the presence of which requires any remedial action. Town shall not permit or allow any of the foregoing to be placed or installed in or under the Property between now and Closing;

(vi) Town has not (A) made a general assignment for the benefit of creditors, (B) filed any voluntary petition in bankruptcy or to Town's knowledge suffered the filing of any involuntary petition by Town's creditors, (C) suffered the appointment of a receiver to take possession of all, or substantially all, of Town's assets, (D) suffered the attachment or other judicial seizure of all, or substantially all, of Town's assets, (E) admitted in writing its inability to pay its debts as they come due, or (F) made an offer of settlement, extension or composition to its creditors generally;

(vii) To the best of Town's knowledge, Town has received no written notice from any governmental authority of any violation of any law applicable to the Property that has not been corrected.

(b) The foregoing representations and warranties shall be in full force and effect on the Agreement Date and at the Closing. Such representations and warranties shall be deemed to have been reaffirmed and restated by Town as of the Closing Date, except for any material change in any of the foregoing representations or warranties or any material breach thereof that occurs and that is expressly disclosed by Town to Purchaser in writing at any time and from time to time prior to the Closing (each a "**Disclosure**" and collectively, the "**Disclosures**"), which Disclosures shall thereafter be updated by Town prior to the Closing Date (and the affected

representations and warranties shall at Closing be deemed updated by such Disclosures, subject to Purchaser's termination right described below). Town agrees to give prompt written notice of any Disclosure to Purchaser following Town's discovery of any material breach or change that would require a Disclosure. If any change in any of the foregoing representations or any breach of any of the foregoing warranties or agreements is a material change or breach, and Town does not elect to cure such matters within twenty (20) Business Days after Town's receipt of a written request from Purchaser to do so, or does not agree in writing within said twenty (20) Business Day period to indemnify Purchaser against and hold Purchaser harmless from any and all losses, liabilities, claims, costs and expenses incurred by Purchaser as a result thereof, then, notwithstanding anything contained herein to the contrary, Purchaser, at its sole option, and as its sole remedy, may either (a) close and consummate the transaction contemplated by this Agreement, without reduction in the Purchase Price or (b) terminate this Agreement by written notice to Town, whereupon the ~~Title Company~~Town Clerk shall return the Deposit to Purchaser and the parties shall have no rights or obligations hereunder, except for those that expressly survive any such termination. Such election shall be made by Purchaser within twenty (20) Business Days after receipt of notice from Town that Town has elected not to cure or indemnify Purchaser with respect to such material change or breach. Failure of Purchaser to deliver to Town a notice of such election of Purchaser within such twenty (20) Business Day period shall conclusively be construed as Purchaser's having elected alternative (a) above. The Closing Date shall be postponed automatically, if necessary, to permit the full running of each such period described in this paragraph. Notwithstanding the foregoing, in the event Town willfully caused the material change or breach, Town shall be in default hereunder and Purchaser shall have the rights and remedies set forth in Section 14 hereof. The term "Town's Knowledge" as used herein means the actual knowledge (and not the implied or constructive knowledge) without any duty of investigation or inquiry, and without any personal liability, of any individual member or representative of Town. All representations and warranties made by Town in this Section shall survive the Closing for twenty-four (24) months (the "**Survival Period**") and written notification of any claim arising therefrom must be received in writing by Town within the Survival Period or such claim shall be forever barred and Town shall have no liability with respect thereto. Notwithstanding the foregoing, no representation, warranty, covenant or agreement made in this Agreement by Town shall survive the Closing relative to any matters known to Purchaser to be untrue or incorrect prior to or at the Closing.

13. SECTION 1031 EXCHANGE. Town and Purchaser each acknowledge that the other, in connection with the sale or purchase of the Property (as the case may be) may desire to consummate an exchange which will qualify for non-recognition of gain under Section 1031 of the Internal Revenue Code, and each party agrees to fully cooperate with the other to effect such an exchange, provided, however, that no costs or liability associated with one party's exchange shall be borne by the other party, and neither party shall be required to acquire or agree to acquire title to any other property in connection with such exchange.

14. DEFAULT BY TOWN. If Town is in default of its obligations under this Agreement, then Purchaser, at Purchaser's sole option and as its sole remedies, may elect to:

(a) Waive the default or failure and close "as is"; or

(b) Cancel this Agreement by written notice to Town given on or before the Closing Date, in which event Purchaser shall deliver to Town the Due Diligence Documents, the Town Clerk shall return the Deposit ~~together with all interest earned on it~~ to Purchaser, ~~and Town shall reimburse Purchaser for Purchaser's reasonable and actual third party out-of-pocket due diligence and pre-development expenses incurred prior thereto in an amount not to exceed One Hundred Thousand and 00/100 Dollars ($100,000.00)~~ and the Purchase shall be entitled to pursue any available remedies at law for such breach by the Town. ~~both parties shall be released from all further obligations under this Agreement except as otherwise provided herein~~. There shall be no cap on Town's monetary liability under this paragraph in the event of Town's "Bad Conduct," which for purposes of this Agreement shall mean Town's acts or omissions constituting gross negligence, willful or wanton misconduct, felony criminal misconduct or fraud (e.g., the sale or deeding of the Property or any portion thereof to another party while this Agreement is in force and effect) and the Purchaser shall be entitled to pursue any available remedies at law for such "Bad Conduct" by the Town; or

(c) In the event Purchaser proceeds to Closing and Town fails to deliver a deed at Closing as required herein, and only in that event, Purchaser may seek specific performance of Town's obligations to deliver such deed under this Agreement.

15. DEFAULT BY PURCHASER. After the Expiration Date, and except as provided in Section 24 below, in the event of the failure or refusal of Purchaser to close this transaction, Town shall have the right to receive the Deposit together with all interest earned on it as agreed upon liquidated damages for said breach, whereupon the parties shall be relieved of all further obligations under this Agreement except as otherwise provided in this Agreement. The parties have agreed that Town's actual damages, in the event of a failure to consummate this sale due to Purchaser's default, would be extremely difficult or impracticable to determine. After negotiation, the parties have agreed that, considering all the circumstances existing on the date of this Agreement, the amounts of the Deposit are a reasonable estimate of the damages that Town would incur in such event.

16. PRORATIONS.

(a) Real estate taxes shall be prorated on a calendar year basis as of the Closing Date. In the event the taxes for the year of Closing are unknown, the tax proration will be based upon such taxes for the prior year and, at the request of either party within ninety (90) days after receipt of the tax bill for the year of Closing and the actual amount of taxes is known, such taxes shall be re-prorated and adjusted between the parties.

(b) The parties agree that, except as otherwise specifically stated elsewhere in this Agreement, all income and expenses of the Property are intended to be prorated as of midnight of the day before the Closing Date. Purchaser shall be deemed the owner of the Property, for the purpose of such calculation, for the entire Closing Date. Income shall include all revenue of Town derived from the operation of the Property. Expenses shall include all expenses from the operation of the Property. Income actually received by Town prior to Closing in payment for a period subsequent to Closing shall appear on the closing statement as a credit to Purchaser. Expenses actually paid by Town prior to Closing in payment for a period subsequent to Closing shall appear on the closing statement as a credit to Town.

17. IMPROVEMENT LIENS. Certified, confirmed or ratified liens for governmental improvements or special assessments as of the Closing Date, if any, which are then due and payable shall be prorated as of the Closing Date in the same manner as taxes, and pending liens for governmental improvements or special assessments as of the Closing Date shall be assumed by Purchaser if and when implemented.

18. CLOSING COSTS. At the Closing, Town shall pay the cost of documentary stamps, excise tax, or transfer tax due on the deed of conveyance. Purchaser shall pay the cost of the Survey and the owner's title insurance premium. Each party shall bear the recording costs of any instruments received by that party, except that Town shall pay the recording costs on documents necessary to clear title.

19. CLOSING.

(a) Town shall deliver the following items to Purchaser at the Closing:

(i) A special warranty deed;

(ii) If requested by Purchaser, a non-warranty deed using the Property description set forth in Purchaser's Survey;

(iii) A commercial owner/seller affidavit, to the Title Insurer and Purchaser, in usual and customary form reasonably acceptable to Town and Title Insurer to delete the standard exception relating to such liens in Purchaser's owner's title insurance;

(iv) As maybe required by Title Insurer or Purchaser, appropriate evidence of Town's existence and authority to sell the Property (delivered by Town to the settlement agent);

(v) A non-foreign certificate as may be appropriate and satisfactory to Purchaser to meet the non-withholding requirements under FIRPTA and any other federal statute or regulations in the same form attached hereto as **Exhibit C**;

(vi) Such other affidavits as Purchaser or Title Insurer may reasonably require and are usual and customary for the jurisdiction.

(b) At Closing, Purchaser shall deliver to Town immediately available funds sufficient to pay the Purchase Price.

(c) Town shall cooperate as reasonably necessary to enable the settlement agent to report proceeds of the sale to taxing authorities, including the submittal of Form 1099-S to the Internal Revenue Service, if applicable.

(d) Town and Purchaser shall each execute such other documents as are usual and customary for the jurisdiction and reasonably necessary to consummate this transaction.

20. BROKERS. The parties each represent and warrant to the other that there are no brokers involved in this transaction. If a claim for brokerage or similar fees in connection with this transaction is made by any broker, salesman or finder other than the above-named brokers claiming to have dealt through or on behalf of one of the parties to this Agreement, then that party shall indemnify, defend and hold the other party under this Agreement harmless from all liabilities, damages, claims, costs, fees and expenses whatsoever (including reasonable attorneys' fees and court costs, including those for appellate matters and post judgment proceedings) with respect to said claim for brokerage. The provisions of this section shall survive the Closing or the termination or cancellation of this Agreement.

21. ASSIGNABILITY. This Agreement is not assignable by Purchaser except with the prior written consent of Town, which consent will not be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing, Purchaser may assign this Agreement to any entity affiliated with or controlled by, or controlling, the first-named Purchaser.

22. NOTICES. Any notices required or permitted to be given under this Agreement shall be delivered by hand, by PDF file via electronic mail, or by a nationally recognized overnight delivery service, and addressed as described below; notices shall be deemed effective only upon receipt or refusal of delivery or, if by PDF file via electronic mail sent after 5:00 p.m., Eastern time, on the next business day after transmission.

Notices to Purchaser:
MPF INVESTMENT COMPANY LP
102 W. Airstrip Road
Kill Devil Hills, NC 27948
Attn: Jeffrey Fabrikant
Office: 202-853-9016
Email: jeff@mpfic.com

With a copy to:
Williams Mullen
301 Fayetteville Street, Suite 1700
Raleigh, NC 27601
Attn: Wyatt M. Booth
Office: 919-981-4031
Email: wbooth@williamsmullen.com

Notices to Town:
Town of Kill Devil Hills
102 Town Hall Drive
P.O. Box 1719
Kill Devil Hills, NC 27948
Attn: Town Manager
Office: 252-449-5300
Email: debbie@kdhnc.com

With a copy to:
Casey C. Varnell, Town Attorney
Sharp, ~~Michael, Graham & Baker~~Graham, Baker and Varnell, LLP
P.O. Drawer 1027

Kitty Hawk, NC 27949
Office: 252-261-2161
Email: varnell@ncobxlaw.com

23. RISK OF LOSS.

(a) The Property shall be conveyed to Purchaser in the same condition as on the date of this Agreement, reasonable wear and tear excepted, free of all tenancies or occupancies, and Town shall operate and manage the Property in a manner consistent with Town's practices in effect on the Effective Date. Town agrees to keep its customary insurance, if it currently has any such policy in place covering the Property, in effect during the term of this Agreement.

(b) Upon receipt of an offer or any notice or communication from any governmental or quasi-governmental body seeking to take under its power of eminent domain all or any portion of the Property, Town shall promptly notify Purchaser of the receipt of same and shall send such communication, or a copy of it, to Purchaser. Upon receipt of such notice, and in the event such governmental or quasi-governmental taking would result in either loss of parking or loss of building size as shown on Purchaser's Concept Plan, Purchaser shall have the right to rescind this Agreement by delivery of written notice to Town within ten (10) business days after Purchaser receives notice of such action. In the event Purchaser elects to rescind, then Purchaser shall deliver to Town the Due Diligence Documents and the Town Clerk shall immediately return the Deposit together with all interest earned on it to Purchaser, in which case both parties shall be relieved of all further obligations under this Agreement except as otherwise provided herein. In the event Purchaser elects not to rescind, then Purchaser shall proceed to Closing as set forth herein and upon completion of Closing shall be entitled to all condemnation awards and settlements.

24. PURCHASER'S CONDITIONS PRECEDENT.

~~24.~~

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~~(b) The obligation of Purchaser to consummate the transactions contemplated by this Agreement is contingent upon Purchaser obtaining development permits, site plan approval, building permits, and other necessary entitlements on the Property for the development, in Purchaser's discretion and to Purchaser's satisfaction, of a commercial retail/office center, a multifamily development, or a mixed use combination thereof (together, "**Entitlements**").~~

~~(d) Purchaser shall be obligated to use diligent good faith efforts in pursuit of the Entitlements. The parties acknowledge that the Entitlements process may take longer than the time allotted for the Investigation Period. Notwithstanding anything to the contrary set forth in this Agreement, failure by Purchaser to obtain the Entitlements after its diligent good faith efforts shall not be a default hereunder. In the event Purchaser has used diligent good faith efforts to obtain the necessary governmental approvals for the Entitlements (the "Approvals"), but has failed to obtain such Approvals on or before the Outside Closing Date, including all Closing Extensions, Purchaser may terminate this Agreement by written notice to Town given on or before the Outside Closing Date. If Purchaser terminates this Agreement in accordance with this Section 24(b), Purchaser shall deliver to Town the Due Diligence Documents and the Town Clerk shall~~

~~immediately disburse the Deposit together with all interest earned on it to Purchaser. Upon such return of the Deposit, both parties shall be released from all further obligations under this Agreement except as otherwise provided herein.~~

~~(f)~~(a) The obligation of Purchaser to consummate the transactions contemplated by this Agreement shall also be subject to the performance and observance, in all material respects, by Town of all covenants, warranties and agreements specifically set forth in this Agreement to be performed or observed by Town prior to or on the Closing Date (the "**Town Obligations**"), any or all of which may be waived by Purchaser in its sole discretion by an express written waiver. Upon the occurrence of the failure by Town of a Town Obligation, Purchaser shall give notice to Town of such failure, and Town shall have thirty (30) days to cure such failure, and if such failure is not cured upon the expiration of such thirty day period or waived by Purchaser, then Purchaser may terminate this Agreement, in which event the Deposit together with all interest earned on it shall be immediately returned to Purchaser and neither party hereto shall have any further obligation or liability to the other except for any obligations hereunder which are expressly stated to survive Closing, or in the event such failure is the result of Town's default, then Purchaser may pursue the default remedies provided in Section 14.

~~25.~~ 25. MISCELLANEOUS.

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(a) This Agreement has been negotiated and executed in North Carolina. It shall be construed and governed in accordance with the laws of the State of North Carolina, without application of conflicts of laws principles.

(b) In the event any term or provision of this Agreement is determined by appropriate judicial authority to be illegal or otherwise invalid, such provision shall be given its nearest legal meaning or be construed as deleted as such authority determines, and the remainder of this Agreement shall be construed to be in full force and effect.

(c) The parties hereto agree that any dispute between or among any of the parties arising out of, relating to or in connection with this Agreement, shall be resolved exclusively through ~~binding arbitration conducted in accordance with the commercial arbitration rules of the American Arbitration Association (the "**AAA**") to the fullest extent permitted by law~~the appropriate courts of Dare County, North Carolina. The prevailing party shall be entitled to reasonable attorneys' fees. Wherever provision is made in this Agreement for "attorneys' fees," such term shall be deemed to include accountants' and attorneys' fees and for paralegals and similar persons. ~~The arbitration hearing shall be held in Dare County, North Carolina. Disputes shall not be resolved in any other forum or venue.~~

(d) Each party has participated fully in the negotiation and preparation of this Agreement with full benefit of counsel. Accordingly, this Agreement shall not be more strictly construed against either party.

(e) Whenever used in this Agreement, the singular shall include the plural, the plural shall include the singular, any gender shall include every other and all genders, and captions and section/paragraph headings shall be disregarded.

(f) The captions in this Agreement are for the convenience of reference only and shall not be deemed to alter any provision of this Agreement.

(g) Any time period provided for in this Agreement which shall end on a Saturday, Sunday or legal holiday shall extend to 5:00 p.m., Eastern time, of the next full business day.

(h) This Agreement constitutes the entire agreement between the parties and may not be changed, altered or modified except by an instrument in writing signed by the party against whom enforcement of such change would be sought.

(i) All references in this Agreement to exhibits, schedules, paragraphs, subparagraphs and sections refer to the respective subdivisions of this Agreement, unless the reference expressly identifies another document.

(j) All of the terms of this Agreement, including but not limited to the representations, warranties and covenants of Town, shall be binding upon and shall inure to the benefit of the parties to this Agreement and their respective successors and assigns.

(Signature pages follow)

IN WITNESS WHEREOF, Town has executed this Agreement as of the date set forth hereinbelow.

TOWN:

TOWN OF KILL DEVIL HILLS,
a North Carolina municipal corporation,

By: _____

Name: _____

Title: _____

Date: _____, 2020