

**SECOND AMENDMENT**  
to  
**AGREEMENT TO PURCHASE AND SELL REAL ESTATE**

**THIS SECOND AMENDMENT TO AGREEMENT TO PURCHASE AND SELL REAL ESTATE** ("Amendment") is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2009 by and between the Borough of Downingtown, of Chester County, Pennsylvania, a municipality organized and existing under the laws of the Commonwealth of Pennsylvania ("Seller"); and J. Loew & Associates, Inc., a Pennsylvania corporation, and Progressive Housing Ventures, LLC, a limited liability company (collectively the "Buyer").

**BACKGROUND**

- A. Seller and Buyer entered into a certain Agreement to Purchase and Sell Real Estate with an effective date of August 24, 2007 ("Original Agreement"), and a First Amendment to Agreement to Purchase and Sell Real Estate dated the same date ("First Amendment" and, together, the "Agreement of Sale" or "Agreement"), for the sale and purchase of certain real property owned by Seller located in the Borough of Downingtown and East Caln Township, Chester County, Pennsylvania, more fully described and defined therein.
- B. The parties desire to amend, modify, and supplement the Agreement in the manner and on the terms hereinafter set forth in this Amendment.

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements of the parties herein, and intending to be legally bound hereby, the parties agree as follows:

1. Agreement of Sale; Incorporation by Reference; Definitions.
  - (a) The Agreement of Sale is incorporated herein by this reference. This Amendment amends, modifies, and supplements the Agreement of Sale and is hereby made a part thereof. If there is any conflict or inconsistency between the terms and conditions of this Amendment and the terms and conditions of the Agreement of Sale, this Amendment shall be controlling; otherwise, the Agreement of Sale shall remain in full force and effect.
  - (b) Any capitalized terms used in this Amendment that are defined in the Agreement of Sale shall, unless otherwise provided for in this Amendment, have the meanings ascribed to such terms therein.
  - (c) Except as expressly provided in this Amendment, all terms, conditions precedent and concurrent, conditions to performance, contingencies, representations, warranties, covenants and agreements of the parties set forth in the Agreement of Sale shall continue in full force and effect.

2. Retention by Seller of Ponds and Open Space Areas. Buyer obtained from Borough Council a Decision dated July 15, 2009, approving Buyer's conditional use application (the "Conditional Use Approval"). The Buyer's proposed redevelopment of the Property and/or the Additional Property pursuant to the Conditional Use Approval contemplates that portions of the real estate that include existing ponds, a mill race, and other areas would be used for public park purposes, and that certain improvements would be made thereto by the developer. Pursuant to condition 3.a. of the Conditions of Conditional Use Approval, the parties agree that the Property and the Additional Property will exclude the area approximately shown on the plan attached hereto as Exhibit "A" and made a part hereof, containing the ponds, millrace, Victims' Memorial, public parking areas, trail areas, and surrounding open space/park areas (the "Park Property"). The Park Property will, therefore, be retained by Seller and will not be conveyed to Buyer. The parties recognize that the boundaries as depicted on Exhibit "A" will be precisely determined at time of subdivision and land development approval however, in no event will the total acreage for the Park Property be reduced by more than 10 percent (10%) from that shown in Exhibit "A". Seller agrees to grant to Buyer, at Closing, such free, uninterrupted perpetual and/or temporary (as applicable) easements over, under and through the Park Property as Buyer reasonably requires in order to (i) construct any improvements and perform any work on the Park Property shown on or required by the Conditional Use Approval, approved final subdivision and/or land development plans, or by other governmental approvals, including any environmental remediation (ii) construct or extend utilities to serve the development of all or any part of the remainder of the Property, Additional Property or Option Property, (iii) discharge storm water into the ponds, and (iv) maintain such improvements to the extent of any ongoing maintenance responsibility of the Buyer or of any community association organized to maintain common amenities of Buyer's development.

3. Litigation. The parties acknowledge that there is litigation (multiple cases, now consolidated) pending against the Seller, captioned "In Re: Petition of the Borough of Downingtown", in the Orphan's Court Division of the Court of Common Pleas, Chester County, Pennsylvania, at Consolidated Docket No. 1509-0516 (together with any ancillary or related proceedings, the "Litigation") that, among other things, challenges the validity of the Zoning Ordinance adopted by Borough Council as contemplated by the Agreement of Sale, adopted April 15, 2009, and also challenges the authority of the Seller to convey and/or cause to be developed or redeveloped all or a part of the Property and/or Additional Property as contemplated by Seller and Buyer. Buyer is excused from pursuing other governmental approvals for development of the Property and Additional Property until the Litigation is finally resolved and determined by an unappealable court order or decision, or binding settlement signed by all parties to the Litigation, reasonably acceptable to Buyer that resolves the issues in the Litigation favorably to the Seller and Buyer consistent with the Agreement of Sale, the Zoning Ordinance as enacted by Seller, and the Conditional Use Approval, and permits the transactions contemplated hereby and Buyer's development without any additional burden or restriction on Buyer ("Favorable Determination"). Seller's obtaining a Favorable Determination shall be a condition of Buyer's obligations under the Agreement of Sale. Section 11(a) of the Original Agreement is amended by adding at the end: "The Closing Date shall be extended by one (1) day for each day after the sixtieth (60<sup>th</sup>) day after the Due Diligence Period that a Favorable Determination of the Litigation has not been obtained."

Seller agrees to prosecute the Litigation in a manner consistent with the intention of the parties as set forth in the Agreement of Sale and this Amendment, good faith and with due diligence,

at its expense, to a conclusion on the merits, including taking appeals from any adverse determination, unless and until Buyer exercises its rights to terminate the Agreement of Sale as provided below. Buyer agrees to cooperate with Seller in connection therewith subject to Buyer's right of termination. Buyer shall have the right to terminate the Agreement of Sale by giving written notice thereof to Seller within thirty (30) days after (i) issuance of any written decision or verdict on the merits in the Litigation by any Court at any level of the proceedings (e.g., Court of Common Pleas and each appellate level) that is not a Favorable Determination, or (ii) Buyer's receipt of written notice that a Favorable Determination on the merits of the Litigation by any such court at any such level has been appealed or that allowance of appeal has been requested. In the event of any termination of the Agreement of Sale pursuant to the preceding sentence, or Buyer's exercise of its right to terminate the Agreement of Sale because of lack of a final Favorable Determination, all Deposits shall be immediately returned to Buyer as provided for in Section 7(a) of the Agreement of Sale (for failure of conditions benefitting Buyer) and thereafter neither Seller nor Buyer shall have any further liability to the other.

4. Buyer's Option to Purchase Option Property. Without modifying Seller's Put Right with respect to the Option Property, as set forth in the First Amendment, Seller hereby grants Buyer the exclusive right, option and privilege to purchase the Option Property ("Buyer's Option") which may be exercised at any time upon Buyer giving Seller at least sixty (60) days prior written notice ("Exercise Notice") but no later than two (2) years after the expiration or termination of the Agreement of Sale or the occurrence of Closing on the Property or Additional Property, whichever is last to occur. Buyer's Option can be exercised prior to and independently of, and without regard to, the status of governmental approvals for development of, or the occurrence of Closing with respect to the Property and/or Additional Property and shall survive Closing on the purchase of the Property or the Additional Property or the termination or expiration of the Agreement of Sale. The parties contemplate that the Option Property may be capable of being developed independently and/or as a legally distinct phase of the development, and Buyer intends to seek approval of East Caln Township to do so, and Seller agrees to cooperate in connection therewith. If Buyer purchases the Option Property before purchasing other parts of the Property or Additional Property, Seller will grant to Buyer such easements over the Property, Additional Property and/or Park Property as Buyer may reasonably require to construct improvements that will serve the development on the Option Property or that are otherwise required to satisfy the terms of any governmental approval, provided that after construction of such improvements Buyer will restore the Property or Additional Property as reasonably as practicable to its condition prior to such construction and disturbance. If Buyer exercises Buyer's Option, all other terms and conditions of the Agreement of Sale shall apply to the sale and purchase of the Option Property to the extent not inconsistent herewith, except it shall be within Buyer's sole discretion to waive any conditions relating to the status of approvals for development of the Option Property. The parties recognize that for purposes of this Amendment and the Agreement of Sale, the boundaries of the "Option Property" may not exactly correspond with the existing legal description for Chester County UPI 40-1-23E, and that some alteration of the boundary lines may be necessary. However in no event will such boundary alterations cause the Park Property acreage to diminish and in fact the Park Property may increase in land area as a result of such boundary line alterations. Seller and Buyer agree to cooperate in connection with any lot line change or other subdivision approval that may be necessary in connection therewith..

**IN WITNESS WHEREOF**, the parties hereto have executed this Amendment the day and year first above written.

WITNESS:

**BOROUGH OF DOWNINGTOWN**

\_\_\_\_\_

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

Its: \_\_\_\_\_

WITNESS:

**J. LOEW & ASSOCIATES, INC.**

\_\_\_\_\_

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

Jack R. Loew, President

WITNESS:

**PROGRESSIVE HOUSING VENTURES, LLC**

\_\_\_\_\_

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

Sarah E. Peck, President