

First Addendum to  
Real Property Purchase and Sale Agreement  
Capehart Property  
Pacific Northwest Communities/City of Seattle

This First Addendum to Real Property Purchase and Sale Agreement (the "First Addendum") is made and entered into as of the 28th day of August, 2007, by and between THE CITY OF SEATTLE, a Washington municipal corporation, ("Buyer" or "City"), and PACIFIC NORTHWEST COMMUNITIES, LLC, a Delaware limited liability company ("Seller" or "PNC") and modifies the Real Property Purchase and Sale Agreement (the "Agreement") made and entered into as of the 29th day of June, 2007.

A. Pursuant to Section 6.1(d) of the Agreement, the City and PNC agreed to negotiate the terms and conditions of the Utility Contract (as defined in the Agreement) and to attach the form of Utility Contract to the Agreement as Exhibit J on or before August 28, 2007.

B. The City and PNC have agreed to extend the time period for completion of their negotiations of the terms and conditions of the Utility Contract to on or before September 18, 2007. The City and PNC have now agreed on the final form of the Utility Contract and wish to provide for its incorporation into the Agreement as Exhibit J thereto.

The City and PNC now agree as follows:

1. Extension of Time Period Under Section 6.1(d). City and PNC hereby agree that the time period for satisfying the pre-Closing condition for completion of a mutually agreeable Utility Contract on the terms and conditions set forth in Section 6.1(d) is hereby extended to on or before September 18, 2007.

2. Exhibit J to Agreement. City and PNC hereby agree that the form of Utility Contract attached to this First Addendum is mutually agreeable and satisfies the pre-Closing condition for the parties' agreement on the form of a Utility Contract as set forth in Section 6.1(d) of the Agreement. City and PNC further agree and acknowledge that the Agreement is hereby modified to add the Utility Contract attached hereto and incorporated herein as Exhibit J to the Agreement.


3. Full Force and Effect. As modified by this First Addendum, the terms and provisions of the Agreement remain in full force and effect.

4. Counterparts. This First Addendum may be executed in any number of counterparts, and each such counterpart hereof shall be deemed to be an original instrument, but all such counterparts together shall constitute but one agreement.

IN WITNESS WHEREOF, the parties have executed and delivered this First Addendum as of the day and year first above written.

SELLER: PACIFIC NORTHWEST COMMUNITIES, LLC, a Delaware limited liability company

By: American Eagle Northwest, LLC, its Managing Member

By:   
Rick Lee  
Authorized Agent

BUYER: THE CITY OF SEATTLE, a Washington municipal corporation

By: \_\_\_\_\_  
Gregory J. Nickels, Mayor

List of Exhibits

Exhibit J Utility Contract

First Addendum to  
Real Property Purchase and Sale Agreement  
Capehart Property  
Pacific Northwest Communities/City of Seattle

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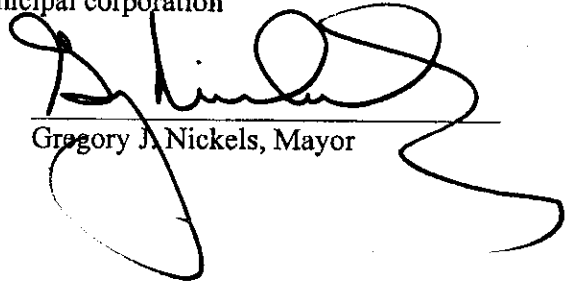
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Gregory J. Nickels, Mayor



List of Exhibits

Exhibit J Utility Contract

**Exhibit J to Real Property Purchase and Sale Agreement  
for Capehart Property at Discovery Park**

**UTILITY CONTRACT  
between  
THE CITY OF SEATTLE  
and  
PACIFIC NORTHWEST COMMUNITIES, LLC**

This Utility Contract is entered into this \_\_\_\_ day of \_\_\_\_\_, 2007, by and between the CITY OF SEATTLE (the "City"), a Washington municipal corporation, acting by and through its Seattle Public Utilities ("SPU") and its Department of Parks and Recreation ("Parks"), and PACIFIC NORTHWEST COMMUNITIES, LLC ("PNC"), a Delaware limited liability company.

**Purpose of Agreement**

The City and PNC (the "Parties") are entering into this Utility Contract in order to fulfill conditions in Subsection 6.1 (d) and Exhibit I of the Real Property Purchase and Sale Agreement dated as of June 29, 2007 for the Capehart Property at Discovery Park ("Purchase Agreement"). Additionally, this Utility Contract is made for the purpose of formalizing (i) the requirements for PNC's design, repair, construction, rehabilitation or replacement of certain identified sanitary sewer and water facility infrastructure consistent with Exhibit I ("Scope of Work") to the Purchase Agreement (the "Utility Improvements") for the benefit of the Historic Properties (otherwise known as the Montana Circle Housing, the Washington Avenue North Housing and the Washington Avenue South Housing), and (ii) the terms and conditions for the City's acceptance of the Utility Improvements once they are complete.

In consideration of the foregoing, and the mutual promises and covenants herein and in the Purchase Agreement, the City and PNC agree as follows:

**1. Terms and Definitions**

1.1 Terms and Definitions. Unless given a different meaning in this Utility Contract, all capitalized terms that are defined in the Purchase Agreement are intended to have the same meaning herein.

1.2 Technical Terms and Definitions. All acronyms, abbreviated or capitalized terms that are technical terms are intended to have the meaning found in the City of Seattle 2005 Standard Plans and Specifications for Municipal Construction or the meaning commonly accepted in the relevant industry. The

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and Pacific Northwest Communities, LLC - 1

term "Standard Specifications" means the City of Seattle 2005 Standard Plans and Specifications for Municipal Construction.

## **2. Duration and Effect of Agreement**

2.1 Duration. Unless terminated earlier under Section 12 or as otherwise allowed by law, this Utility Contract shall be effective from the date executed by all Parties until PNC has completed, and the City has accepted, all of the Utility Improvements and related easements.

2.2 Effect of Agreement. This Utility Contract is intended to reflect and implement the parties' agreement set forth in Subsection 6.1(d) of the Purchase Agreement and the Scope of Work and, upon mutual execution and grant of any other necessary approvals or authorizations will supersede Subsection 6.1(d) of the Purchase Agreement.

## **3. Design and Construction**

3.1 General Requirements. At its own expense, PNC shall design, repair, construct, rehabilitate or replace the Utility Improvements in compliance with all necessary permits, Standard Specifications, the Scope of Work and final plans and drawings approved by the City. Notwithstanding the foregoing, the Parties agree and acknowledge that: (a) the Scope of Work is conceptual in nature as final designs have not been reviewed and approved by SPU; (b) the Scope of Work is intended to set forth material elements of the Parties' agreement on the Utilities Improvements to be performed by PNC and is not intended to include all of the specifications that will apply to final design and construction of the Utilities Improvements; and (c) all Standard Specifications not materially inconsistent with the Scope of Work shall apply to design and construction of the Utilities Improvements in order to complete and finalize the design and construction. PNC shall use properly licensed, insured and bonded contractors and professionals to design and construct the Utility Improvements.

3.2 Design. The Parties have agreed to certain conceptual sanitary sewer and water facility improvements as outlined and depicted in the Scope of Work, which is incorporated as Exhibit A to this Utility Contract. PNC acknowledges that it needs to complete additional design and field work and to prepare detailed plans and drawings before commencing work on the Utility Improvements. PNC shall design the Utility Improvements consistent with the Scope of Work and the Standard Specifications. Any material conflicts between the Standard Specifications and the Scope of Work shall be resolved pursuant to Section 3.1 above.

3.3 Plans and Drawings. PNC shall submit relevant applications to SPU and provide SPU four (4) detailed sets of plans and drawings for the Utility Improvements at the 60% and 100% design stages in a form and medium

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acceptable to SPU, and may, in PNC's sole discretion, submit the foregoing applications at the 90% design stage as well. PNC shall meet with SPU and submit its applications and initial set of plans and drawings for the proposed Utility Improvements to SPU at least three months prior to PNC's anticipated construction start date.

Within 15 working days of receipt of each design stage, SPU will provide a written response to PNC approving or requesting modification to the plans, specifications and drawings. SPU will provide reasons for requesting modifications. PNC shall submit revised plans, specifications and drawings at the next design stage, which SPU will review as provided above.

PNC will also provide SPU with a final set of as-built design plans, specifications and drawings once construction of the Utility Improvements is complete.

3.4 SPU On-Site Representative. At SPU's election, SPU may have an on-site field representative present during construction at such times and locations as SPU determines necessary, but the representative will be present for the City's benefit and will not in anyway relieve PNC from its duty to comply with this Utility Contract, the Scope of Work, the Standard Specifications, and all applicable permits, statutes, laws, regulations and ordinances. PNC will allow SPU's representatives access to the Utility Improvements work as requested, will notify SPU of the construction schedule in advance, and will notify SPU of the relevant timelines and changes to the construction schedule.

3.5 Changes in the Field. To the extent that modifications of the approved plans and drawings are necessitated by conditions in the field, PNC shall consult with SPU's on-site representative and (as appropriate) Parks' designated contact and shall submit the proposed changes to the designated contact(s) for approval prior to implementing the change or modification. SPU and Parks will not withhold approval unreasonably, but may condition approval on other changes or modifications that are consistent with the Standard Specifications, Parks Permit (as defined in Section 3.9) and the Scope of Work. With respect to the Utility Improvements SPU shall make all final determinations, however, with respect to any restorations or routing across City-owned property, Parks shall make all final determinations.

#### 3.6 Special Provisions Applicable to Sanitary Sewer Improvements.

(a) Evaluations. Prior to undertaking additional design work and preparing plans, specifications and drawings, as provided in subsections 3.2 and 3.3 above, PNC will conduct an inspection and evaluation of any and all existing 6" and 18" gravity sewer mains which serve the Historic Properties via gravity flow to the north that PNC intends to either rehabilitate (or replace) and then turn over to the City. Inspection and evaluation shall be conducted utilizing CCTV inspection and NASSCO PACP Standards. PNC will provide SPU with complete

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and Pacific Northwest Communities, LLC - 3

copies of all reports, results, and documentation of such inspections and evaluations.

(b) Replacement or Rehabilitation of Sewer Mains. Based upon the results of the inspection and evaluation in (a) above, PNC will submit a written proposal to SPU regarding which sewer mains require rehabilitation or replacement and detailing the rehabilitation or replacement method as well as the proposed alignment and/or routing of the new 8" gravity sewer main to serve the Washington Avenue North Housing and the Washington Avenue South Housing to be constructed in the California Avenue right of way to convey sewage to the north and connecting with the Montana Circle sewer system. Such proposal must specifically identify which pipes (or segments thereof) will be new, which pipes(or segments thereof) will be rehabilitated, and which pipes (or segments thereof) will be replaced as well as which pipes will be retained in PNC ownership and which will be transferred to the City.

Any rehabilitation or replacement of the sewer mains shall utilize point repair or manhole-to-manhole relining methods (or a combination of both) as further detailed in the Scope of Work. All of the manholes will be replaced with City of Seattle Standard Type 200 manholes with the exception of the manhole directly over the King County sewer interceptor line which shall not be replaced.

Within 30 days of receiving PNC's proposal, as well as all reports, results, and documents relating to the inspection and evaluation of the sewer mains, SPU will review the proposal consistent with the terms and requirements of this Utility Contract, the Scope of Work and the Standard Specifications and provide PNC with written notice of its approval or disapproval of the proposal. In the event SPU disapproves PNC's proposal, SPU shall provide written reasons for the disapproval, including but not limited to the specific manner in which PNC's proposal is inconsistent with the terms and requirements of the Scope of Work, and the Parties will make good faith efforts to come to consensus regarding which mains will be repaired, rehabilitated or replaced. If the Parties are unable to come to consensus, SPU will make the final determination in its reasonable discretion. Upon final determination, PNC shall proceed with design and preparation of plans and drawings as provided in subsections 3.2 and 3.3 above.

(c) Final Inspection Report for Sewer. Upon substantial completion of sewer Utility Improvements, PNC will obtain, at its own cost, a final inspection report prepared, signed and stamped by a licensed Washington State Professional Engineer and verifying that all construction, repair and installation of sewer Utility Improvements have been completed as required by the terms and conditions of this Utility Contract. The final inspection report shall include but not be limited to daily inspection reports of the work status and issues completed by the engineer or designated representative, materials testing reports (aggregate gradation, backfill compaction, etc.), leak testing reports, manufacturer's literature of installed components, and a post-construction CCTV inspection of all

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pipes repaired, constructed, rehabilitated or replaced by PNC pursuant to this Utility Contract and intended to be turned over to the City.

(d) Abandonment of Sewer Lines. PNC, at its expense, shall abandon those sewer lines currently serving the Historic Properties that are taken out of service as a result of the work to be performed by PNC pursuant to this Utility Contract except for those portions of the sewer lines to be abandoned by the City (and not at PNC's expense) as depicted in Exhibit I-2, Utilities Scope of Work- Conceptual Sewer Diagram, to the Purchase Agreement. Sewer main abandonment to be performed by PNC pursuant to this Utility Contract shall consist of plugging pipes at manholes and backfilling the manholes. Abandoned sewer lines shall not be pumped with inert materials.

### 3.7 Special Provisions Applicable to Water System Improvements.

(a) Water System Improvements. A new 12" inch main will be connected to the existing 12" SPU main in Utah Avenue and extended in an easement in Montana Circle. A new domestic water meter and new fire hydrants will be installed as set forth in the Scope of Work. Any water mains serving the Historic Properties that are taken out of service as a result of the work to be performed by PNC pursuant to this Utility Contract shall be cut and capped.

(b) WAC Application and Private Watermain Extension Agreement. PNC shall apply for a Water Availability Certificate at the time it submits its detailed plans and drawings for water improvements consistent with the Scope of Work and this Utility Contract. SPU hereby agrees to issue a Water Availability Certificate to PNC conditioned only upon: (i) the satisfactory submission of final plans, specifications and drawings for the improvements contemplated by the Scope of Work and this Utility Contract; and (ii) the execution of SPU's standard private watermain extension agreement which may contain additional conditions consistent with those set forth in or contemplated by the Scope of Work or this Utility Contract. In the event of any conflict between the watermain extension agreement and this Utility Contract, this Utility Contract shall govern.

(c) Modeling of Fire Flows. Per SPU's standard process, PNC's water submittal must include modeling analysis sufficient to ensure that fire flow can be met for the Historic Properties.

(d) Water System Inspection. PNC will pay SPU such fees as are provided for by City Code (provided that such fees shall not exceed SPU's actual costs for such inspections) to inspect water main construction to verify that all construction, repair and installation of water Utility Improvements have been completed in accordance with the requirements of this Utility Contract.

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3.8 Specific Work to be Performed by SPU. SPU will perform the following work, at PNC's expense in accordance with Section 5, in connection with the Utility Improvement work:

(a) SPU will provide for the connection of the water Utility Improvements to the City's water distribution system, including shutdown, dewatering, and restoration of service following connection;

(b) SPU will install the water meters; and

(c) SPU will inspect the water Utility Improvements to be constructed by PNC hereunder.

3.9 Special Provisions Applicable to the Parks Permit. PNC and the City acknowledge that some portion of the Utility Improvements work will occur on City-owned property in Discovery Park. The Parties have agreed pursuant to Section 6.1 (d) of the Purchase Agreement that Parks shall issue to PNC such revocable park use permits, license agreements or other form of temporary construction easements (hereinafter a "Parks Permit") in order to provide PNC with reasonable access to such City-owned property in Discovery Park as are reasonably necessary for PNC's completion of the work set forth in this Utility Contract and Scope of Work. It is understood that the Parks Permit shall be issued to PNC without charge or fee of any kind, with the exception of any applicable application fees.

PNC will submit its plans and drawings and formally apply for a Parks Permit consistent with the submittal requirements of Section 3.3 of this Utility Contract and shall work with Parks to modify the design if necessary so that the Utility Improvements do not cause any permanent damage or disturbance to park features or vegetation. The application must include a legal description of the centerline, together with any area on either side of the centerline, of the proposed corridor of the Utility Improvements through any and all portions of City-owned property in Discovery Park.

#### **4. Compliance with Law; Other Permits**

4.1 General Requirement. PNC shall promptly comply, at its sole cost and expense, with all laws, ordinances and regulations now in force or hereafter adopted relating to or affecting the construction of the Utility Improvements on the terms described herein.

4.2 Other Permits and Approvals. Prior to commencing any Utility Improvements work, PNC shall, at its own cost and expense, obtain all other necessary permits or approvals required to perform the work in compliance with all applicable City, state, and federal statutes, ordinances and regulations on the terms described herein.

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and Pacific Northwest Communities, LLC - 6

## **5. SPU Charges**

**5.1 SPU Charges.** PNC shall make payment of all applicable SPU time and material charges related to the water and sewer Utility Improvements, including without limitation the costs and charges of plan review, inspection, materials (e.g. hydrants, meters) and work performed by SPU relative to these Utility Improvements (e.g. taps, service install) as provided by City Code, SPU Director's Rules, SPU Policy and Procedures and other standard and applicable agreements for such activities, provided that in no event shall such fees exceed SPU's actual costs for such activities.

**5.2 SPU Late Charges/ Interest.** PNC shall pay invoices for SPU costs and charges within 30 days of the date of the invoice. Late payments incur interest at the rate of 12% per year. In addition, PNC is responsible for all collection costs for nonpayment, including but not limited to SPU's administrative costs, and all attorneys' fees, and costs of litigation.

## **6. Liens and Hold Harmless**

**6.1 Liens.** From the date of commencement of work under this Utility Contract through the end of the construction period PNC shall use all commercially reasonable efforts to insure that all Utility Improvements, City-owned property, and PNC utility easement areas are kept free and clear of any materialman, subcontractor, or other liens or assessments arising as a result of PNC's work under this Utility Contract and if any such lien or assessment is filed, shall promptly undertake to clear such lien or assessment at PNC's expense.

**6.2 Hold Harmless.** PNC shall defend and hold the City harmless from any and all costs, including, without limitation, costs of permitting, inspection, construction, site restoration, cost overruns, and liens (collectively, "Costs"), to the extent such Costs are incurred by the City as a direct result of PNC's construction of the Utility Improvements as set forth herein.

## **7. Substantial Completion, City Acceptance, and Warranties**

**7.1 Substantial Completion.** All design, construction, pipe repair, pipe rehabilitation, abandonment of lines, and materials must be approved by SPU upon substantial completion in order to verify that the work has been completed to the City's satisfaction and in compliance with the requirements herein. Upon substantial completion, the City may require PNC to repair and correct any deficiencies or work not in compliance with the approved plans and drawings, Standard Specifications, Scope of Work and permits.

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**7.2 City Acceptance Conditioned Upon City Approval.** The City agrees to accept ownership of the Utility Improvements (with the exception of any of the Utility Improvements that shall remain in private ownership as contemplated by the Scope of Work) at such time as:

- (i) all work has been completed as set forth in the SPU-approved final plans, specifications and drawings and consistent with this Utility Contract; and
- (ii) all City property disturbed or damaged by PNC or its contractors in the course of work on Utility Improvements has been restored, repaired or replaced to the reasonable satisfaction of Parks and SPU;
- (iii) a transfer of ownership of the Utility Improvements to be conveyed to the City consistent with the Scope of Work via SPU's standard transfer of ownership document has been delivered by PNC to SPU;
- (iv) SPU has made final inspection and approved the installation of Utility Improvements as having been completed in accordance with this Utility Contract, the approved plans, specifications and drawings and the Standard Specifications, to the extent not materially inconsistent with the Scope of Work and this Utility Contract, and SPU has issued a notice of completion;
- (v) PNC has provided SPU with as-built surveys, including legal descriptions, of the Utility Improvements as prepared and stamped by PNC's licensed surveyor and approved by SPU;
- (vi) PNC has warranted to the City that (1) it has completed all Utility Improvements as required or contemplated by this Utility Contract and the Scope of Work, and that (2) the Utility Improvements to be conveyed to the City are free of any liens or encumbrances;
- (vii) PNC has assigned to the City any warranties for work and materials as provided in Subsection 7.3 below; and
- (viii) PNC has granted and relinquished easements as provided in Section 8 below.

Acceptance of ownership of the Utility Improvements shall be made in writing by SPU. Upon acceptance, the transferred Utility Improvements, in addition to all other water and sewer improvements that will continue to serve the Historic Properties following PNC's construction of the Utility Improvements and abandonment of any water/sewer lines taken out of service as provided for herein, with the exception of: 1) any portions of the water infrastructure serving the Historic Properties that shall remain in service as a private service line; and 2) any private side sewers that connect the Historic Properties to the City-owned sewer system, shall be maintained and repaired by the City and are subject to

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and Pacific Northwest Communities, LLC - 8

the control, use and operation of SPU as well as all regulations and conditions of service and charges as the City shall require.

**7.3 Warranties.** At the time PNC transfers and conveys the Utility Improvements to the City, it shall also assign to the City (to the extent assignable and without warranty or representation of any kind by PNC to the City) any and all warranties for work or materials used in the Utility Improvements and all enforcement rights for deficient design, construction, equipment, materials, and/or other items in any contracts arising out of or associated with the design, permitting, and construction of the Utility Improvements. PNC shall use its best efforts to obtain all commercially reasonable warranties in its contract with its general contractor for the Utility Improvements and shall require that all contract warranties be fully assignable to the City. In addition, PNC shall use all commercially reasonable efforts to have its general contractor include in its contracts with any subcontractors or material suppliers a similar provision permitting assignment of any warranties to the City. PNC's obligations under this subsection will survive the expiration or earlier termination of this Utility Contract. Subject to the terms and conditions set forth herein, PNC shall make no express or implied warranty or representation of any kind to the City and shall not be liable for any claim of any kind relating to deficient design, construction, equipment, materials and/or other items relating to the Utility Improvements.

## **8. Easements**

**8.1 Warranty of Title.** Prior to commencing any Utility Improvements work, PNC shall provide evidence of its ownership of the Historic Properties (or the Navy's ownership in the event that the Navy has by such date not yet conveyed ownership to PNC) and shall provide evidence of its authority to convey to the City any necessary utility easements over, across and through the Historic Properties for Utility Improvements.

**8.2 Release and Relinquishment of Easements.** Simultaneously with PNC's transfer of title to the Utility Improvements to the City, PNC will release any reserved rights for existing and future utility easements on property owned by the City, excepting those easements that shall remain in place to serve the Historic Properties.

**8.3 Conveyance of Utility Easements to City.** PNC will convey easements in a form acceptable to the City as necessary for ownership, operation, maintenance, repair, replacement and access to Utility Improvements on the Historic Properties. The Parties acknowledge that the specific legal descriptions of the easements cannot be determined until as-built surveys are completed and agree to cooperate and take all steps necessary to clarify and secure the easements. The City's obligation to accept any Utility Improvements is conditioned upon PNC's grant of acceptable easement rights required to access, operate, maintain, repair and replace the Utility Improvements.

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and Pacific Northwest Communities, LLC - 9

8.4 Conveyance of Utility Easements to PNC. City and/or Parks will convey easements, or the Parties will restate and clarify existing easements, as the case may be in a form mutually acceptable to the Parties as necessary for the location, maintenance and repair of any utility easements serving the Historic Properties that cross either City or Parks-owned property.

## **9. Indemnity**

9.1 PNC's Duty to Indemnify City. PNC shall indemnify, defend (using legal counsel reasonably acceptable to City) and hold City, City's officers, agents, departments, employees and contractors harmless from all claims, suits, losses, damages, fines, penalties, liabilities and expenses (including City's actual, out-of-pocket fees and other costs incurred in connection with claims including reasonable attorneys fees and regardless of whether such claims involve litigation) resulting from any actual or alleged injury (including death) of any person or from any actual or alleged loss of or damage to, any property, but only to the extent such claims arise out of or in connection with PNC's construction of the Utility Improvements, including (i) PNC's occupation or use of any City property, including the occupation and use by any of PNC's employees, agents or contractors, or (ii) any act or omission of PNC or any subcontractor, officer, agent, employee, guest or invitee of PNC. PNC agrees that the foregoing indemnity specifically covers actions brought by its own employees, and to the extent necessary to fulfill its obligations under this indemnity, PNC waives its immunity under RCW Title 51, but only with respect to the City.

9.2 Limitation of PNC's Indemnification. In compliance with RCW 4.24.115 as in effect on the date of this Utility Contract, all provisions of this contract pursuant to which PNC agrees to indemnify the City against liability for damages arising out of bodily injury to persons or damage to property relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, road, or other structure, project, development, or improvement attached to real estate, including the Utility Improvements, (i) shall not apply to damages caused by or resulting from the sole negligence of the City, its agents or employees, and (ii) to the extent caused by or resulting from the concurrent negligence of (a) the City or the City's agents or employees, and (b) PNC or PNC's agents or employees, shall apply only to the extent of PNC's negligence; PROVIDED, HOWEVER, the limitations on indemnity set forth in this subsection shall automatically and without further act by either City or PNC be deemed amended so as to remove any of the restrictions contained in this subsection no longer required by then applicable law.

9.3 Indemnification in Construction Contracts. PNC shall include in its contract with its general contractor for the Utility Improvements a similar provision requiring the general contractor to indemnify the City under the same terms and conditions as PNC is obligated to indemnify the City as set forth above, and PNC

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and Pacific Northwest Communities, LLC - 10

shall use all commercially reasonable efforts to have its general contractor include in its contracts with any subcontractors or material suppliers a similar provision indemnifying the City.

BY SIGNING BELOW, THE PARTIES AGREE THAT THIS SECTION WAS INDIVIDUALLY NEGOTIATED AND THAT THE INDEMNIFICATION DUTIES DESCRIBED ABOVE SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS UTILITY CONTRACT.

## **10. Insurance and Surety Bond**

10.1 Coverages and Limits of Liability. Prior to commencing any Utility Improvements work, PNC shall obtain and maintain at its expense the following insurance coverages and minimum limits of liability:

(i) Commercial General Liability ("CGL") insurance, including premises operations and products and completed operations, with a minimum limit of liability of \$1,000,000 each occurrence combined single limit bodily injury and property damage ("CSL"). Such insurance shall not exclude coverage for the perils of explosion, collapse and underground property damage ("XCU" perils) or for subsidence perils to adjacent property resulting from excavation.

(ii) Automobile Liability insurance, including coverage for owned, scheduled, hired and non-owned vehicles, as appropriate, with a minimum limit of liability of \$1,000,000 CSL.

(iii) Employer's Liability/Stop Gap Liability insurance with a minimum limit of liability of \$1,000,000 each accident/disease/employee.

PNC shall maintain the above coverages at its expense for a period of not less than three (3) years following the completion of the Utilities Improvements and shall include in its contract with its general contractor for the Utilities Improvements a provision similarly requiring such general contractor to maintain the coverages for the same three year period at the contractor's expense.

### 10.2 Terms and Conditions.

(i) Additional Insured. The CGL and Automobile Liability insurance shall include "The City of Seattle" as an additional insured for primary and non-contributory limits of liability subject to a "Separation of Insureds" clause.

(ii) No Limitation of Liability. The limits of liability specified herein are minimum limits of liability only. They shall in no manner be construed as limiting the liability of any contractor or, except as respects the limit of liability of each policy, the liability of any contractor's insurer. Where required to be an additional insured, the City shall be an additional insured for the total limits of liability maintained by any contractor, whether such limits are primary, excess, contingent or otherwise.

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(iii) Security of Insurer. Insurers providing coverage shall maintain A.M Best's ratings of not less than A- VII unless coverage has been procured as surplus lines under the provisions of chapter 48.15 RCW.

(iv) Notice of Cancellation. An insurer must deliver or mail written notice of cancellation to the City at least thirty (30) days before the effective date of the cancellation, except ten (10) days with respect to cancellation for non-payment of premium, unless otherwise required under RCW 48.18.290 ("Cancellation by insurer.").

(v) Incorporation of Insurance and Indemnity Requirements. PNC shall endeavor to incorporate the insurance requirements in this Section 10 in its construction contract(s) for the Utility Improvements.

10.3 Certification of Insurance. PNC shall require its general contractor to provide, or cause to be provided, to the City an Acord certificate evidencing compliance with the requirements of this Section 10. Such Acord certificate shall include an actual copy of the CGL policy provision (or other evidence satisfactory to the City) that documents that the City is an additional insured for primary and noncontributory limits of liability and shall be issued to: The City of Seattle, Risk Management Division, P.O. Box 94669, Seattle, WA 98126 and shall be delivered electronically to fax number (206) 470-1270 or as an email attachment to riskmanagement@seattle.gov.

10.4 Surety Bond. Prior to commencing work, PNC will be required to obtain a surety payment and performance bond or will be required to have its contractor obtain a surety payment and performance bond in an amount not to exceed the actual cost of the Utilities Improvements to be constructed by PNC hereunder including any anticipated restoration costs. The bond must be on a form and with a surety reasonably satisfactory to the City. The bond will be conditioned upon PNC's complete and faithful performance of all Utility Improvements work in compliance with the requirements of all applicable laws, statutes, regulations, ordinances, permits, and the requirements of this Utility Contract. Additionally, the bond will be conditioned upon PNC's restoration or replacement of all City property disturbed or damaged by the Utility Improvements work as described in this Utility Contract.

**11. Hazardous Materials** PNC shall not, without City's prior written consent, bring onto City property any substance designated as, or containing any component now or hereafter designated as hazardous, dangerous, toxic or harmful and/or subject to regulation under any federal, state or local law, regulation or ordinance ("Hazardous Substances"), nor shall PNC use any Hazardous Substance in construction of the Utility Improvements without the City's consent. PNC shall be fully and completely liable to City for any and all cleanup costs and expenses and any and all other charges, expenses, fees, fines, penalties (both, civil and criminal) and costs imposed with respect to PNC's use, disposal, transportation, generation and/or sale of Hazardous Substances

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brought onto City property by PNC during the Utility Improvements work or arising as a result of PNC's violation of this Section.

**12. Default and Termination** The following events shall be considered a material breach of this Utility Contract ("Default"):

- (a) PNC fails to diligently pursue the Utility Improvements work once commenced except to the extent that any delay on the part of PNC is caused in whole or part by the failure or delay on the part of City, SPU and/or Parks to perform any task required of such entities hereunder, including but not limited to any inspection or review required hereunder, issuance of any necessary permit, approval or license necessary in connection with PNC's construction of the Utility Improvements, including the Parks Permit;
- (b) PNC (or its contractor, as applicable) fails to correct, repair or restore any deficiencies in the Utility Improvements within a reasonable time as determined by SPU; and
- (c) PNC (or its contractor, as applicable) fails to repair or restore any damage to or disturbance of City-owned property within a reasonable time as determined by Parks.
- (d) Any other act or omission by either party that the other party deems a material breach of this Utility Contract, so long as the non-defaulting party provides notice in writing to the other party of the act or omission, notice that the party considers the act or omission to be a material breach, and notice of the non-defaulting party's proposed cure.

In the event of a Default, the non-defaulting party shall provide the other party with written notice of the Default. If the defaulting party fails to complete a cure within thirty (30) days, or if the defaulting party fails to commence and diligently pursue cure within thirty (30) days if a cure cannot reasonably be completed within thirty (30) days, the non-defaulting party may elect to terminate this Utility Contract and pursue any and all remedies and damages available at law and equity. This section is not intended to in any way limit either party's remedies in the event of breach, and is intended to be cumulative, not restrictive, of any other remedies available at law or equity.

**13. Designated Contact Persons; Notice** All notices, demands, requests, consents and approvals which may, or are required to, be given by any party to any other party hereunder shall be in writing and shall be deemed to have been duly given if (i) delivered personally, (ii) sent by a nationally recognized overnight delivery service, or (iii) electronically transmitted with confirmation sent by another method specified in this Section 13 to:

**For the City:**

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Seattle Public Utilities  
c/o Ray Hoffman  
700 Fifth Avenue, Suite 4900  
P.O. Box 34018  
Seattle, WA 98124-4018  
Phone: (206) 684-5852  
Fax: (206) 684-4631  
Email: ray.hoffman@seattle.gov

and to

Department of Parks and Recreation  
c/o Terry Dunning  
RDA Building  
800 Maynard Avenue South  
Seattle, WA 98134  
Phone: (206) 684-4860  
Fax: (206) 233-7038  
Email: Terry.Dunning@seattle.gov

**For PNC:**

Pacific Northwest Communities, LLC  
c/o Shaw Environmental & Infrastructure  
623 Meadowbrook Lane  
Rock Hill, S.C. 29730  
Attn: Mr. Rick Lee, Vice-President  
Phone: (360) 779-2158  
Fax: (803) 328-0780  
Email: Rick.Lee@Shawgrp.com

**14. Entire Contract; Applicable Law; Venue**

14.1 Entire Contract. This Utility Contract and the Exhibits attached hereto, and by this reference incorporated herein, set forth the entire agreement of City and PNC concerning the Utility Contract, and there are no other agreements or understanding, oral or written, between City and PNC concerning the Utility Improvements. Any subsequent modification or amendment of this Utility Contract shall be binding upon City and PNC only if reduced to writing and signed by them.

14.2 Applicable Law. This Utility Contract will be governed under the laws of the State of Washington.

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14.3 Venue. The venue for any cause of action arising from or related to this Agreement will be the Superior Court of King County.

**15. Force Majeure** Neither City nor PNC shall be deemed in default hereof nor liable for damages arising from its failure to perform its duties or obligations hereunder if such is due to any cause beyond its reasonable control, including, but not limited to an act of Nature, act of civil or military authority, fire, flood, windstorm, earthquake, strike or labor disturbance, civil commotion, delay in transportation, governmental delay, or war; provided, however, that the foregoing shall not excuse PNC or the City from any costs or obligations incurred prior to such force majeure event.

**16. Assignment** PNC's rights and obligations set forth in this Utility Contract may not be assigned without the prior written consent of the City, which shall not be unreasonably withheld, provided, however, that no prior written consent by the City shall be required in connection with an assignment of this Utility Contract to a third party buyer of fee title to the Historic Properties conditioned upon such third party buyer evidencing in writing its commitment to be bound by all of the terms and conditions of this Utility Contract.

**17 Exhibits** The following Exhibit and its attachments are incorporated into this Utility Contract:

Exhibit A. The Utilities Scope of Work: Conceptual Sanitary Sewer and Water Facility Improvements, American Eagle Properties, Discovery Park, Seattle, WA, dated 06/02/07 and revised 6/14/07, 6/20/07, and 6/22/07 (Exhibit I to Real Property Purchase and Sale Agreement for Capehart Property)

Attachment 1: Diagram of Conceptual Water Improvements

Attachment 2: Diagram of Conceptual Sanitary Sewer Improvements

(Both Attachments were collectively Exhibit I-1 to the Capehart Purchase and Sale Agreement)

IN WITNESS WHEREOF, the Parties, through their duly authorized representatives, have executed and delivered this Utility Contract as of the day and year above.

**Pacific Northwest Communities, LLC**

By: American Eagle Northwest, LLC, its  
Managing Member

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

print name and title

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**The City of Seattle**  
Seattle Public Utilities Department

By: \_\_\_\_\_  
Chuck Clarke  
Director of Seattle Public Utilities

The City of Seattle  
Department of Parks and Recreation

By: \_\_\_\_\_  
Betty Jean Brooks  
Interim Superintendent

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