BOROUGH OF WATCHUNG

RESOLUTION AUTHORIZING THE BOROUGH OF WATCHUNG MAYOR AND CLERK TO SIGN AN ESCROW AGREEMENT WITH BNE-WATCHUNG, LLC, TO FUND THE COSTS AND EXPENSES IN CONNECTION WITH EXPLORING THE REDEVELOPMENT OF BLOCK 7402, LOTS 19.01 AND 19.02 AND BLOCK 7403, LOTS 5 AND 10.

WHEREAS, BNE-Watchung, LLC, and the Borough of Watchung desire to enter into an Escrow Agreement to fund the costs and expenses in connection with exploring the redevelopment of Block 7402, Lots 19.01 and 19.02 and Block 7403, Lots 5 and 10 ("Property"); and

WHEREAS, by Resolution R2:05/17/18 the Council directed the Planning Board to undertake a preliminary investigation of the "Property" to determine whether the "Property" constitutes an area of non-condemnation redevelopment; and

WHEREAS, the Borough by entering into the Escrow Agreement does not provide any assurance of a particular result, the intent being only to defray the costs and expenses exploring the potential for redevelopment of the "Property;" and

NOW, THEREFORE, BE IT RESOLVED, by the Borough of Watchung Council as follows:

1. The Mayor and Clerk are hereby authorized to sign the Escrow Agreement in the form attached.

2. The Resolution takes effect immediately upon adoption.

Council

Stephen K. Pote, Mayor

Date: June 7, 2018
Index: Finance Misc
C: Pl. Board
Finance 6/7/18

I, Michelle DeRocco, Municipal Clerk of the Borough of Watchung, County of Somerset, State of New Jersey, do hereby certify the foregoing to be a correct and true copy of a Resolution adopted by the Mayor and Council at a meeting held on June 7, 2018.

99837122.2

Michelle DeRocco, RMC

ESCROW AGREEMENT

THIS ESCROW AGREEMENT ("Agreement") is made as of the _____ day of _____, 2017 by and between **BNE-WATCHUNG, LLC**, a New Jersey limited liability company (the **"Entity"**), with an address at c/o BNE Real Estate Group, 16 Microlab Road, Suite A, Livingston, New Jersey, **THE BOROUGH OF WATCHUNG**, a municipal corporation of the State of New Jersey (the "**Borough**"), with an address at 15 Mountain Boulevard, Watchung, New Jersey 07069, and **BNE REAL ESTATE GROUP LLC**, a New Jersey limited liability company (the **"Guarantor"** and together with the Entity and the Borough, the **"Parties"**), with an address at 16 Microlab Road, Suite A, Livingston, New Jersey.

WITNESSETH:

WHEREAS, the Entity is the contract purchaser of certain real property identified as Lots 19.01 and 19.02 in Block 74.02, and Lots 5 and 10 in Block 74.03, Borough of Watchung, Somerset County, New Jersey (the **"Property"**); and

WHEREAS, the Guarantor is an affiliate of the Entity; and

WHEREAS, the Parties desire to explore the potential for the redevelopment of the Property, and the Entity recognizes the Borough will incur costs and expenses in connection therewith, and is willing to defray those costs, with no assurance of a particular result from the Borough; and

WHEREAS, the Entity has agreed to deposit with the Borough the amount of **FIFTEEN THOUSAND and 00/100 ($15,000.00) DOLLARS** (the **"Escrow Deposit"**), to be deposited in an escrow account and disbursed in accordance with the provisions of this Agreement to defray certain costs and expenses incurred by or on behalf of the Borough arising out of or in connection with, among other things, consideration of the Entity's proposed development plans and concepts and alternatives thereto, including but not limited to, if and as appropriate, the development and adoption of amendments to the redevelopment plan for the Property, the negotiation and preparation of a redevelopment agreement, affordable housing fair share plan, and/or agreement for financial assistance (collectively, the **"Municipal Undertakings"**),

NOW THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, and intending to be legally bound hereby, the Parties hereto agree as follows:

1. **Escrow Deposit.** The Escrow Deposit is separate from and in addition to all other application fees and escrow deposits that may be required by the Borough pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 *et seq.*, as and to the extent applicable.

2. **Scope of Reimbursable Services. (a)** The Borough shall be entitled to be reimbursed for all professional charges incurred in connection with the Municipal Undertakings, the preparation and review of all related documents and materials, including but not limited to correspondence, meetings and all communications (including by telephone and e-mail) with the Entity, the Entity's professionals, the Borough planner, the Borough engineer,

the Borough attorney or retained professional(s) with respect to the Municipal Undertakings (collectively, the **"Reimbursable Activities"**). **Reimbursement may include charges incurred in connection with Reimbursable Activities prior to the date of this Agreement, and is not contingent upon the outcome of any negotiations between the Parties.**

(b) Properly reimbursable professional charges shall be reasonable and necessary and shall relate to Reimbursable Activities performed by outside consultants and professionals.

3. **Deposit and Administration of Escrow Funds.** The Escrow Deposit and all additions thereto shall be held by the Borough in a banking institution or savings and loan association in the State of New Jersey insured by an agency of the federal government, or in any other fund or depository approved for such deposits by the State of New Jersey, in a segregated, non-interest bearing account (the **"Escrow Account"**) referenced to this Agreement.

4. **Payments from the Escrow Funds. (a)** The Borough shall use such funds to pay reimbursable professional charges.

(b) Professional charges paid out of the Escrow Account shall include professional charges in connection with the Reimbursable Activities. The Entity shall not be charged for any costs and expenses not associated with the Reimbursable Activities. The only costs that shall be added shall be actual out-of-pocket expenses of such professionals or outside consultants, including normal and typical expenses incurred in connection with such Reimbursable Activities.

(c) Each payment for professional services charged to the Escrow Account shall be pursuant to a voucher from the professional, identifying the personnel performing the Reimbursable Activities, each date the services were performed, the hours spent in not greater than one-tenth hour increments, the hourly rate, and specifying properly reimbursable expenses. All professionals shall submit the required vouchers or statements to the Borough on a monthly basis in accordance with the schedule and procedures established by the Borough. The professional shall simultaneously send an informational copy of each voucher or statement submitted to the Borough to the Entity.

5. **Payment Guaranty.** In the event that the Entity fails to render any payment due and owing hereunder to the Entity with thirty (30) days of receiving such request for payment, the Borough shall notify the Guarantor in writing of such failure to pay and Guarantor shall render such payment to the Borough promptly following receipt of such written notice.

6. **Accounting and Additional Deposits.** As reasonably requested by the Entity, the Borough shall prepare and send to the Entity a statement which shall include an accounting of funds listing all deposits, interest earnings, disbursements and the cumulative balance of the Escrow Account. In the event that such statement shows that

the cumulative balance of the Escrow Account is below $3,000.00 (the **"Escrow Balance Minimum"**), or if the Borough otherwise notifies the Entity that the cumulative balance of the Escrow Account is below the Escrow Balance Minimum, or is within $100.00 of the Escrow Balance Minimum, the Entity shall replenish the Escrow Account in an amount reasonably determined by the Borough. Notwithstanding the foregoing, at no time shall the Borough require the Entity to replenish the Escrow Account in an amount that would cause the Escrow Account to have a balance of $15,000.00 or greater. The Entity hereby acknowledges that the Borough has the right to suspend all Reimbursable Activities for the period of time during which the balance of the Escrow Account is below the Escrow Balance Minimum. Notwithstanding the foregoing, the Borough shall provide the Entity with reasonable notice that the Escrow Balance is at or near the Escrow Balance Minimum.

7. **Close Out Procedures.** Upon termination of negotiations, or upon the execution of a redevelopment agreement, the Entity may send written notice by certified mail to the Borough, the Borough Administrator, the Borough's Chief Financial Officer and to the relevant municipal professional(s), requesting that the remaining balance of the Escrow Account be refunded, or otherwise transferred to another escrow account if and as appropriate under the circumstances. After receipt of such notice, the professional(s) shall render a final bill to the Borough within thirty (30) days, and shall send a copy simultaneously to the Entity. Within thirty (30) days of receipt of the final bill the Borough shall pay all outstanding bills and render a written final accounting to the Entity detailing the uses to which the escrow funds were put. The Entity will not be responsible for any additional charges once the final accounting has been rendered by the Borough in accordance with this section.

8. **Disputed Charges. (a)** The Entity may dispute the propriety or reasonableness of professional charges paid out of the Escrow Deposit by written notice to the Borough. A copy of such notice shall be sent simultaneously to the professional(s) whose charges or estimated costs are the subject of the dispute. Such written notice of a disputed charge shall be given within forty-five (45) days from the Entity's receipt of the informational copy of the professional's voucher, except that if the professional has not supplied the Entity with an informational copy of the voucher, then the Entity shall send notice within sixty (60) days from receipt of the first statement of activity against the escrow account containing the disputed charge. Failure to dispute a charge in writing within the prescribed time shall constitute the Entity's acceptance of the charge and a waiver by the Entity of all objections to the charge and to payment thereof out of the escrow account.

(b) In the event of a dispute described in subsection (a) above, the Parties shall endeavor to amicably resolve such dispute by all reasonable means, including but not limited to, promptly meeting with the professional rendering the activities for which the disputed amounts were charged. If the Parties are unable to resolve such a dispute within thirty (30) days of the Borough's receipt of the Entity's initial notice of dispute, each of the Parties shall have fifteen (15) business days from the end of the aforementioned 30-day period to seek an opinion of a similarly situated professional of the same profession as to (i) the reasonableness of the disputed charges relating to the services rendered, and

(ii) if the disputed charges are deemed unreasonable, a reasonable amount for such services rendered, and each Party shall promptly provide a copy of such opinion to the other Party. Upon receipt and review of such opinions, the Parties shall attempt to resolve the dispute by calculating the average of each of the reasonable amounts set forth in the opinions (it being understood that if an opinion deems the disputed charges to be reasonable, then the amount of the disputed charges shall be used as the reasonable amount set forth therein).

(c) During the pendency of a dispute the Borough may continue to pay undisputed charges out of the Escrow Account. If a dispute over a charge is resolved in the Entity's favor after having been paid, the Borough shall reimburse the Escrow Account in the amount determined to be properly disputed.

9. **Governing Law.** This Escrow Agreement shall be governed, construed and enforced according to the laws of the State of New Jersey, without regard to its conflicts of laws principles. Any action hereunder shall be brought exclusively in a court of the State of New Jersey sitting in Somerset County, New Jersey, and the Entity hereby waives all objections to such venue.

10. **Successors and Assigns.** This Escrow Agreement shall be binding upon, and inure to the benefit of, the Parties hereto and upon each party's successors and assigns.

11. **Entire Agreement; No Modification Unless in Writing.** This Escrow Agreement contains the entire agreement of the Parties relative to the subject matter hereof. Any amendment hereto or modification or variation hereof shall be ineffective unless in writing signed by each of the Parties hereto.

12. **Effective Date.** This Agreement shall not become effective unless and until the Escrow Deposit is made.

13. **Counterparts.** This Agreement may be executed and delivered in any number of counterparts, each of which so executed and delivered shall be deemed an original, but all of which together shall constitute one in the same instrument.

14. **No Redevelopment Guarantee.** The Parties hereto expressly acknowledge and agree that execution of, and compliance with, this Agreement, including but not limited to, payment of any amounts due hereunder, does not guarantee any particular outcome or resolution, and in particular, with respect to the redevelopment potential for the Property.

[Signature Page to Follow]

IN WITNESS WHEREOF, the Parties have executed this Agreement the date and year first above written.

Witness or Attest:

Michelle DeRocco

BOROUGH OF WATCHUNG

By:
Name: Stephen K. Pote
Title: Mayor

BNE-WATCHUNG, LLC

By:
Name: David Pantirer
Title: Member

BNE REAL ESTATE GROUP LLC

By:
Name: Larry Pantirer
Title: Member

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