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May 3, 2010

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BY ELECTRONIC MAIL AND FIRST CLASS MAIL

Mr. Laurence Shaffer  
Town Manager  
Amherst Town Hall  
4 Boltwood Avenue  
Amherst, MA 01002

Re: Patterson – Option Agreement and Ground Lease

Dear Mr. Shaffer:

In response to your request, I have reviewed the Option Agreement (the “Option”) that the Town intends to enter into with Bruce H. Patterson and Arlette S. Patterson, Trustees of the Patterson Nominee Trust (“Patterson”), and the Ground Lease (the “Lease”) attached thereto. It is my understanding that the business terms in the Option and the Lease were negotiated under your direction, and that my associate, Shirin Everett, drafted those documents. The Option is the subject of Article 16 of the 2010 Annual Town Meeting that would authorize the Town Manager to enter into the Option. The Town Manager will not be authorized to enter into the Lease unless and until Town Meeting later votes to authorize the Lease.

You have asked me to address the Town’s liability and risks under the Lease, particularly after the Town has assigned it to a third party. I have been informed that Patterson was unwilling to enter into this transaction unless the Town remained liable after any assignment. Since the Town does not intend to be an end-user of the Premises (as defined in the Lease), the Town sought to include in the Lease provisions that would allow the Town to assign the Lease and minimize its liability thereunder. The parties finally agreed that the Town could assign the Lease but that the Town would remain liable until the Premises have been minimally developed. Specifically, Patterson insists that the Town remain liable until the following events occur: (a) water, sewer and other utilities are brought to the Premises, and, if required under the Town’s Bylaws to develop the Premises, a roadway leading to the Premises is constructed (the Lease refers to such work as the “Infrastructure Improvements”), and (b) a building containing 50,000 square feet is constructed on the Premises (which is referred to in the Lease as the “Initial Structure”). The Lease reflects the compromise reached by the parties.

Mr. Laurence Shaffer  
Town Manager  
May 3, 2010  
Page 2

1. Flow Chart

You have asked me to provide you with a flow chart of the proposed transaction. I have prepared and attached to this letter a Lease Analysis, which lists the Town's risk exposure at various points of the transaction. I discuss the Town's risks in greater detail below.

2. Definitions and Other Drafting Issues

The Lease has been amended with Patterson's consent to include a definitions section, including a definition of the term "Bond" and other capitalized terms not previously defined. The definition of "Tenant" has been changed. In addition, Section 16 has been revised to add headings, making the Section easier to read, and to state the Town's rights and liabilities in a clearer manner. The revised Lease is attached to this letter.

3. Risk Analysis

You have asked me to specify the risks that are inherent in this transaction and what the Town can do to minimize or avoid such risks. The chief liability under the Lease is the Town's obligation to pay rent for twenty-five (25) years to Patterson, which, at \$415,000 for the first year and increasing annually thereafter by the Consumer Price Index, is not an inconsiderable burden. The Town's other salient Lease obligations are to pay taxes, carry liability and property insurance, and to indemnify Patterson in the event that the Town causes injury or damage. The Lease does not require the Town to construct any improvements. The Town could choose to leave the Premise in their natural state and not incur any construction costs.

The Lease permits the Town to assign the Lease at any time, but initially requires the Town to obtain Patterson's consent to assign the Lease. The Lease provides that Patterson cannot condition, delay or withhold his consent to any assignment unreasonably. Such consent requirements are not uncommon in commercial leases, including ground leases. Thus, I anticipate that the Town will be allowed to assign the Lease to a developer, provided that the developer is financially sound and does not have a record of defaulting on its contracts. The Lease states that the Town may assign the Lease freely, without Patterson's consent, after the Infrastructure Improvements and the Initial Structure have been constructed (which I refer to together in this letter as the "Total Improvements").

If the Town assigns the Lease, the Lease requires the Town to remain secondarily liable until the Total Improvements have been completed. Thus, if the assignee defaults under the Lease, and Patterson fails to recover from the assignee (which is likely as the assignee will already be in default), the Town will be liable for paying rent and performing the other obligations under the Lease for the balance of the twenty-five (25) term.

Mr. Laurence Shaffer  
Town Manager  
May 3, 2010  
Page 3

The Lease allows the Town to limit its liability after the Infrastructure Improvements have been completed by providing Patterson with a performance bond in an amount necessary to construct the Initial Structure. If the assignee defaults in its obligations, the surety under the bond would be obligated to construct the Initial Structure. Note that even if the surety fulfills its obligations, the Town (and not the surety) will be responsible for paying rent and fulfilling the other Lease obligations for the balance of the twenty-five (25) year term. After the Total Improvements have been constructed, however, the Town can freely assign the Lease, whereupon the Town will be relieved of liability under the Lease.

The Town can minimize its liability by obtaining financial assurances from the developer to whom the Town will assign the Lease. The key to limiting the Town's liability is to ensure that the Total Improvements are in fact constructed. I recommend that the Town enter into a development agreement that requires the assignee to: (a) pay for the cost of constructing the Total Improvements; (b) provide the Town with performance bonds in the amount of the estimated cost of constructing the Total Improvement; (c) carry rent interruption insurance, which would guarantee the payment of rent if the assignee fails in its payment obligations; and (d) provide the Town with a letter of credit, deposit funds in an account controlled in part by the Town, and/or obtain a guarantee from a party with considerable resources, among other protections. The Town should also ensure that the bonds and insurance are provided by highly rated and reputable companies. Furthermore, the Town should enter into the Lease only if the Town has located a developer, Patterson has approved the assignee, and the assignee procures the foregoing bonds and insurance and enters into an assignment agreement immediately after the Town signs the Lease. These measures will minimize the Town's liability as soon as it enters into the Lease.

The foregoing protections do not, of course, guarantee that the Town will never be liable under the Lease. After the Lease has been assigned, even with these protections, it is possible that the assignee will fail. It is also possible that insurance companies and/or guarantees will become insolvent or otherwise unable to fulfill their obligations, in which case the Town will be obligated to pay rent, taxes, and insurance, and perform the other Lease obligations, and/or undertake legal efforts to enforce its rights under the bond or other form of guarantee. Since the Lease provides that the Town has no liability after the Total Improvements have been constructed, the Town could undertake such construction and assign the Lease to a developer, in which case the Town will have no further liability under the Lease. However, if the Town does not locate a developer who is willing to assume the Lease, the Town will remain liable for paying rent, taxes, and insurance, and performing the other Lease obligations for the remaining twenty-five (25) years.

The potential risks of this project must, of course, be balanced against the potential rewards, a policy decision best made by Town Meeting and Town officials. The Town can minimize (but not completely eliminate) its liability under the Lease at various stages: at the initial stage, the Town can control its liability by not entering into the Lease if the Town has not identified a suitable assignee or if the assignee cannot provide the Town with the financial protections. Since Town Meeting will have to authorize the execution of the Lease, Town Meeting will have the opportunity to appraise the

Mr. Laurence Shaffer  
Town Manager  
May 3, 2010  
Page 4

proposed terms and ensure that the Town is adequately protected. Of course, financial assurances are only as good as the persons or entities providing them; if such entities or persons become insolvent, the Town would be liable under the Lease.

4. Finalizing the Terms of the Ground Lease

The Option Agreement provides that if the Town exercises its option to lease the Premises, the Town and Patterson must execute the Lease attached to the Option, and cannot vary the terms of the Lease. Note that there is nothing in the Option or the Lease that prohibits the parties from changing its terms. It is my understanding that the parties contemplate that there may well be a need to renegotiate the Lease terms once a suitable assignee has been identified in order to accommodate the specifics of the proposed development. However, each party negotiated the terms of the Lease so that these terms would be finalized before the Option would be signed, thus binding the other to an agreement that the other party cannot change arbitrarily at a later date.

Moreover, it will be easier for the Town to locate a suitable developer if it has established the terms that are acceptable to Patterson. Otherwise, without Patterson's agreement on key Lease terms, such as the amount of the rent, the duration of the Lease, and other vital provisions, the Town would have to negotiate a lease with a developer without knowing if Patterson would accept the terms. Also, the Town would assume the risk that Patterson could refuse to lease the Premises altogether.

5. Letter from Kopelman and Paige, P.C.

Please note that this letter does not constitute a guarantee of the success of the proposed transaction. While the Option and Lease are legal document, the core of those documents consists of business terms and business risks that were negotiated by the parties. We are in the position of informing you of the most likely potential risks and advising of recommended protections; this letter does not purport to list in exhaustive detail all the potential risks and ways in which the transaction could fail. The decision as to whether or not to assume the business risks that are reflected in the Option and the Lease and outlined in this letter ultimately has to be made by Town Meeting and Town officials.

Please contact me if you have any further questions.

Very truly yours,

  
Jeanne S. McKnight

JSM/jmt

Enc.

399234/AMHR/0025

**TOWN OF AMHERST – LIABILITY ANALYSIS UNDER GROUND LEASE**

**Event**

**Risk Exposure**

*Enter into Option Agreement:*

\$40,000 for Option year 1, and, if Option is extended, \$40,000 for each of the next two Option years, for a total liability of \$120,000. Town may extend Option one year at a time. No assignment of Option.

*Do Not Exercise Option to Lease:*

No liability.

*Enter Into Lease Without Assignment:*

Town liable for rent and other Lease obligations for 25 years (Initial Term).

*Assignment Rights:*

Can assign immediately upon Lease execution with Landlord consent, not to be unreasonably conditioned, delayed, or withheld.

*Assign Lease Immediately Upon Lease Execution:*

Town secondarily liable for rent and other Lease obligations. Landlord must seek redress from assignee before holding Town liable.

*Exceptions to Liability under Lease:*

- Until Infrastructure Completed:
- Until 50,000 sf Building Constructed:
- Infrastructure & Building Completed:

Town is secondarily liable for rent, taxes, insurance, and other Lease obligations.

Town is secondarily liable for performance bond in amount of cost of constructing building and bond stays in effect.

No liability.

*Options to Avoid Risk After Assignment:*

Require developer to obtain:

- Performance bond in amount of cost of infrastructure and 50,000 s.f. building;
- Rent interruption insurance;
- Highly rated, reputable insurance companies; and

- Letters of credit, deposit of funds, and guarantees.

*Town's Liability After Protections in Place:*

Town will be liable for Lease obligations if:

- Assignee fails; and
- Insurance company fails; and
- Letters of credit and other guarantees fail.

*Liability After Infrastructure & Building Constructed:*

No liability if Town assigns Lease (no consent required, free of liability).

Continuing liability for 25 years if Town does not assign Lease.

**GROUND LEASE**

This Ground Lease (this "Lease"), dated as of \_\_\_\_\_, 20 \_\_\_\_, is by and between **Bruce H. Patterson and Arlette S. Patterson, Trustees of the Patterson Nominee Trust**, u/d/t dated April 4, 2001, recorded with the Hampshire County Registry of Deeds in Book 6217, Page 137 ("Landlord"), having an address of 340 Montague Road, Amherst, MA 01002, and the **Town of Amherst**, a Massachusetts municipal corporation acting by and through its Town Manager, having an address of 4 Boltwood Avenue, Amherst, MA 01002, ~~together with its assignee or nominee~~ ("Tenant"). The term "Effective Execution Date" as used in this Lease shall mean the first date upon which both Landlord and Tenant have executed a final counterpart of this Lease and delivered the same to the other party.

**Section 1. Premises.**

**A. Definitions**

The following terms are defined in this Lease and generally have the meanings set forth in this Section 1A unless the context otherwise requires:

<u>Term</u>	<u>Section</u>	<u>Definition</u>
<u>Acquisition Notice</u>	<u>Section 24</u>	<u>Notice given by Landlord to Tenant of any Offer, triggering Tenant's right of first refusal to purchase the Premises.</u>
<u>Additional Compensation</u>	<u>Section 16.6</u>	<u>The additional compensation to be paid by Tenant to Landlord for any Transfer (defined in Section 16.2) of the Lease. The amount of addition compensation is: thirty percent (30%) of the excess of (1) all compensation received by Tenant for a Transfer (including without limitation all sublease rent, but not including any compensation allocable to Tenant's personal property or the general business value of Tenant's operations, if the Transfer is being made in connection with a sale or other transfer of Tenant's business at the Premises), over (2) the sum of (x) the reasonable costs incurred by Tenant with unaffiliated third parties in connection with such Transfer (i.e., brokerage commissions, all work done to make the Premises suitable for assignee/subtenant use, reasonable attorneys' fees, and the like), plus (y) the Base Rent.</u>
<u>Adjustment Date</u>	<u>Section 4.3</u>	<u>Each anniversary of the Commencement Date during the Term of the Lease, commencing on the second anniversary of the Commencement Date.</u>

<u>Assignment and Assumption Agreement</u>	<u>Section 16.1</u>	<u>An agreement whereby an assignee or transferee expressly assumes Tenant's rights and obligations hereunder and become Tenant hereunder.</u>
<u>Base Rent</u>	<u>Section 4.2</u>	<u>Rent in the amount of Four Hundred Fifteen Thousand and 00/100 Dollars (\$415,000.00), commencing on the Commencement Date. The Base Rent increases each lease year by the increase in the CPI, if any, during the previous lease year.</u>
<u>Bond</u>	<u>Section 16.2</u>	<u>A performance bond in favor of Landlord in an amount equal to the estimated cost of completing the Initial Structure as reasonably determined by Landlord.</u>
<u>Building</u>	<u>Section 14.1</u>	<u>Any building constructed or installed on the Premises.</u>
<u>Building Construction Period</u>	<u>Section 16.2</u>	<u>The period after the Infrastructure Improvements have been completed but prior to the issuance of a certificate of occupancy for the entire Initial Structure.</u>
<u>Casualty</u>	<u>Section 14.1</u>	<u>Fire or any other casualty.</u>
<u>Commencement Date</u>	<u>Section 2.1</u>	<u>The date that is no later than thirty (30) days from the Execution Date, on which the term of the Lease commences.</u>
<u>CPI</u>	<u>Section 4.3</u>	<u>The "Consumer Price Index --all items (1982-84=100) for All Urban Consumers, U.S. City Average," issued by the Bureau of Labor Statistics of the United States Department of Labor. Base Rent increases each lease year based on any increase, if any, in the CPI during the previous lease year.</u>
<u>Designated Parties</u>	<u>Section 9.3</u>	<u>The Tenant (in the event that the Tenant assigns this Lease), the Sublease Parties, any Leasehold Mortgagees, and their respective successors and assigns.</u>
<u>Environmental Laws</u>	<u>Section 18</u>	<u>Any and all laws, rules, orders and regulations of federal, state, county, and municipal authorities with jurisdiction over the Premises concerning any Hazardous Materials whatsoever, all as now in effect or hereafter from time to time enacted or amended.</u>
<u>Events of Default</u>	<u>Section 17.1</u>	<u>Failure by a party, after the expiration of any applicable cure period, to comply with its obligations under the Lease.</u>



<u>Execution Date</u>	<u>Preamble</u>	<u>The first date upon which both Landlord and Tenant have executed a final counterpart of this Lease and delivered the same to the other party.</u>
<u>Extension Term</u>	<u>Section 2.2</u>	<u>An extension of the term of the Lease for a period of ten (10) years. Tenant has the right to extend the Lease for seven (7) periods of ten (10) years each.</u>
<u>Fee Mortgage</u>	<u>Section 9.1</u>	<u>Any mortgage or deed of trust now or hereafter encumbering Landlord's fee interest in the Premises or any portion thereof.</u>
<u>Fee Mortgagee</u>	<u>Section 9.1</u>	<u>The holder or beneficiary of a Fee Mortgage.</u>
<u>Hazardous Materials</u>	<u>Section 18</u>	<u>Any, medical waste, blood, biohazardous materials, hazardous waste, hazardous materials, hazardous substances, pollutants or contaminants, petroleum or petroleum products, radioactive materials, asbestos in any form or condition, or any pollutant or contaminant or hazardous, dangerous or toxic chemicals, materials or substances within the meaning of any Environmental Laws.</u>
<u>Total Construction Period</u>	<u>Section 16.1</u>	<u>The period until the Initial Improvements have been completed and a certificate of occupancy has been issued for the entire Initial Structure.</u>
<u>Infrastructure Improvements</u>	<u>Section 8.2</u>	<u>Water, sewer, and other utilities are brought to the Premises, and, if necessary under the Town's Bylaws to develop the Premises, a roadway leading to the Premises is constructed.</u>
<u>Initial Structure</u>	<u>Section 8.2</u>	<u>Principal building or buildings containing, in the aggregate, fifty thousand (50,000) square feet of interior space.</u>
<u>Initial Term</u>	<u>Section 2.1</u>	<u>The term commencing on the Commencement Date and terminating on the date that is twenty-five (25) years thereafter (plus any number of days required to have the term of the Lease expire on the last day of a month).</u>

<u>Landlord</u>	<u>Preamble</u>	<u>Bruce H. Patterson and Arlette S. Patterson, Trustees of the Patterson Nominee Trust, u/d/t dated April 4, 2001, recorded with the Hampshire County Registry of Deeds in Book 6217, Page 137.</u>
<u>Laws</u>	<u>Section 22</u>	<u>All laws, ordinances, requirements, and regulations of the federal, state, county and municipal governments affecting the Premises.</u>
<u>Leasehold Mortgage</u>	<u>Section 9.2</u>	<u>A mortgage or other encumbrance granted by Tenant on the leasehold estate, including a lease-lease back.</u>
<u>Leasehold Mortgagee</u>	<u>Section 9.2</u>	<u>Any holders of the indebtedness secured by a Leasehold Mortgage, or, in the event of a lease-lease back, the superior lease holder.</u>
<u>Loan Documents</u>	<u>Section 13.2</u>	<u>Any Leasehold Mortgage or other loan documents pertaining to the Leasehold Mortgage.</u>
<u>Loss</u>	<u>Section 12.1</u>	<u>Any and all liabilities, damages and other expenses, including reasonable attorneys' fees, that may be imposed upon, incurred by, or asserted against Landlord or Tenant by third parties (including reasonable attorneys' fees in connection therewith) for any injury to or death of any person or persons, or damage to, or theft, destruction, loss, or loss of use of, any property, except to the extent attributable to the negligent or reckless acts or omissions of the other party or the other party's agents, employees, contractors, licensees or invitees.</u>
<u>Offer</u>	<u>Section 24</u>	<u>A bona fide binding offer to purchase (or obtain an option or other pre-emptive right to purchase) all or any portion of the Premises made by a third party that Landlord desires to accept, or a bona fide binding (subject to the Tenant's Right of First Refusal contained herein) offer made by Landlord to a third party to sell (or grant an option or other pre-emptive right to purchase) all or any portion of the Premises.</u>
<u>Option</u>	<u>Section 24</u>	<u>Tenant's option to purchase the Premises at a price of Five Million Dollars (\$5,000,000) at any time after the expiration of the Initial Term.</u>

<u>Premises</u>	<u>Section 1B</u>	<u>Three parcels of land: (1) a parcel identified by the Assessors as Lot 2C-3, containing 38.97 acres and described as Tract Two in a deed recorded with the Hampshire District Registry of Deeds (the "Registry") in Book 6217, Page 146 (the "Deed"), (2) a parcel identified by the Assessors as Lot 2C-9, containing 21.5 acres, more or less, and described as Parcel No. 1 of Tract Five in the Deed, and (3) a parcel identified by the Assessors as Lot 2C-30 containing 0.165 acres, more or less, and described as Parcel No. 2 of Tract Five in the Deed. Excluded from the Premises are the parcels of land shown as "Excluded" on the attached sketch plan, said excluded parcels being identified by the Assessors as Lot 2C-6, Lot 2C-21, Lot 2C-24, Lot 2C-29, Lot 23-33, and a portion of Lot 2C-3.</u>
<u>Purchase Price</u>	<u>Section 24</u>	<u>Five Million Dollars (\$5,000,000), the price at which Tenant may purchase the Premises after the expiration of the Initial Term.</u>
<u>Rent</u>	<u>Section 4.2</u>	<u>The Base Rent, together with all other charges and fees owed by Tenant to Landlord from time to time under the Lease.</u>
<u>Research Technology Park</u>	<u>Section 3</u>	<u>As defined in the Town of Amherst's Zoning Bylaws.</u>
<u>Right of First Refusal</u>	<u>Section 24</u>	<u>A right of first refusal to match the terms of any Offer received by Landlord during the Term of the Lease.</u>
<u>Sublease Parties</u>	<u>Section 9.3</u>	<u>The undersigned Tenant (in the event that the undersigned Tenant assigns this Lease), any subtenants and any of their guarantors and mortgagees (or holders of a financing lease).</u>
<u>SNDA (Subordination, Nondisturbance and Attornment Agreement)</u>	<u>Section 9.1</u>	<u>A recordable Subordination, Nondisturbance and Attornment Agreement, to be signed by each Fee Mortgagee, meeting the requirements set forth in Section 9.1.</u>

<u>Taxes</u>	<u>Section 5.1</u>	<u>Any real estate taxes, or assessments levied or assessed against buildings and improvements located on or constructed on the Premises or levied or assessed upon the land constituting the Premises.</u>
<u>Tenant</u>	<u>Preamble</u>	<u>Town of Amherst.</u>
<u>Tenant's Property</u>	<u>Section 9.7</u>	<u>Any of Tenant's personal property located at the Premises.</u>
<u>Term</u>	<u>Section 2.1</u>	<u>The Initial Term and any and all Extension Terms, for a total maximum term of ninety-five (95) years.</u>
<u>Transfer</u>	<u>Section 16.1</u>	<u>An assignment, transfer, or sublease, in whole or in part, of this Lease or Tenant's rights and obligations under the Lease, in whole or in part.</u>

**Section 1B. Premises.**

Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, three (3) parcels of land located on Montague Road, Amherst, Massachusetts, together any and all appurtenances, rights, privileges and easements benefiting, belonging or pertaining thereto and all existing improvements thereon (collectively, the "Premises"), described as follows: (a) a parcel identified by the Assessors as Lot 2C-3, containing 38.97 acres and described as Tract Two in a deed recorded with the Hampshire District Registry of Deeds (the "Registry") in Book 6217, Page 146 (the "Deed"), (b) a parcel identified by the Assessors as Lot 2C-9, containing 21.5 acres, more or less, and described as Parcel No. 1 of Tract Five in the Deed, and (c) a parcel identified by the Assessors as Lot 2C-30 containing 0.165 acres, more or less, and described as Parcel No. 2 of Tract Five in the Deed. Excluded from the Premises are the parcels of land shown as "Excluded" on the attached sketch plan, said excluded parcels being identified by the Assessors as Lot 2C-6, Lot 2C-21, Lot 2C-24, Lot 2C-29, Lot 23-33, and a portion of Lot 2C-3.

**Section 2. Term.**

2.1. Term. The term of this Lease shall begin on the \_\_\_\_\_, 20\_\_\_\_ (the "Commencement Date") and shall continue until the date that is twenty-five (25) years thereafter (plus any number of days required to have the Term of the Lease expire on the last day of a month), all subject to all terms and conditions of this Lease (the "Initial Term") (the Initial Term and any and all Extension Terms described below, if exercised, are referred to collectively as the "Term").

2.2. Extension Terms. Tenant may extend the Term of this Lease for seven (7) extension terms of ten (10) years each (each, an "Extension Term"), for a total maximum Term of ninety-five (95) years, upon all of the terms set forth in this Lease. Tenant may elect to exercise an Extension Term by giving Landlord written notice of each such election ("Extension Notice") at least ninety (90) days prior to the expiration of the then-current Term. Notwithstanding

anything to the contrary in this Lease, Tenant's right to extend the Term of this Lease hereunder shall not terminate or be extinguished due to Tenant's failure to give Landlord an Extension Notice as herein provided unless and until (i) Landlord shall have notified Tenant and the Leasehold Mortgagee (defined below in Section 9.2) of such failure; and (ii) Tenant shall have failed to exercise its rights to extend the Lease for an Extension Term within ten (10) days of such notice from Landlord.

### **Section 3. Permitted Uses, Design Plans.**

Permitted Uses. Tenant may only use the Premises as a Research Technology Park, as that term is defined in the Town's Zoning Bylaws, or any other use permitted under the Town's Zoning Bylaws for the Premises, by right or by obtaining any zoning relief, as of the date of this Ground Lease Execution Date, provided such use does not require a permit from the Massachusetts Department of Environmental Protection pursuant to 310 CMR 19.000 *et seq.* as amended.

### **Section 4. Rent.**

4.1. Triple Net Lease. This Lease shall be an absolute triple net lease, and Tenant shall have the sole responsibility with regard to maintaining and operating the Premises. All payments of rent shall be absolutely net to Landlord so that this Lease shall yield to Landlord the Rent herein specified in each year during the Term of this Lease free of any taxes, assessments, charges, impositions or deductions of any kind charged, assessed or imposed on or against the Premises and so that all costs, expenses and obligations of every kind and nature whatsoever, including without limitation, real estate taxes, personal property taxes, insurance, maintenance of buildings and roads, relating to the Premises and any improvements thereon shall be paid by Tenant.

4.2. Base Rent. Commencing on the Commencement Date, the annual rent payable under this Lease shall be Four Hundred Fifteen Thousand and 00/100 Dollars (\$415,000.00) for the first lease year (the "Base Rent"), payable in advance in equal monthly installments on the first of each month. If the Commencement Date shall be on any day other than the first day of a calendar month, Base Rent and other charges for such month shall be pro rated on a per diem basis. The Base Rent, together with all other charges and fees owed by Tenant to Landlord from time to time under this Lease, are referred to, collectively, as the "Rent." Within ten (10) days after the Commencement Date the parties shall memorialize the date constituting the Commencement Date by mutually executing and delivering a "Commencement Date Certificate" in a form supplied by and satisfactory to Tenant.

4.3. Annual Increases. On the first anniversary of the Commencement Date, the Base Rent shall be adjusted so as to equal the product of the Base Rent on the Commencement Date multiplied by a fraction, the numerator of which is the "Consumer Price Index --all items (1982-84=100) for All Urban Consumers, U.S. City Average," issued by the Bureau of Labor Statistics of the United States Department of Labor (the "CPI") as of the first day of the first month immediately preceding the first anniversary of the Commencement Date and the denominator of which is the CPI as of July 1, 2009, provided however that the increase shall not exceed an

annualized rate of 2% during the period from July 1, 2009 through the Commencement Date. On each anniversary of the Commencement Date thereafter (each an “Adjustment Date”), the Base Rent hereunder shall be adjusted so as to equal the product of the then-applicable Base Rent multiplied by a fraction, the numerator of which is the “Consumer Price Index --all items (1982-84=100) for All Urban Consumers, U.S. City Average,” issued by the Bureau of Labor Statistics of the United States Department of Labor (the “CPI”) as of the first day of the first month immediately preceding the Adjustment Date and the denominator of which is the CPI as of the date twelve (12) months prior to such Adjustment Date. Following each Adjustment Date, the term Base Rent hereunder shall be deemed to refer to the Base Rent as hereby adjusted pursuant to the terms of this Lease. Notwithstanding the foregoing two sentences, the Base Rent following any such annual adjustment shall not be less than the Base Rent for the twelve months preceding such adjustment. In addition, Tenant shall pay Landlord thirty percent (30%) of all Additional Compensation (defined below in Section 16.6) received by Tenant for a Transfer (defined below in Section 16.1).

4.4. **Additional Building Increases.** If the interior space of buildings constructed on the Premises exceeds the Rent Threshold Space (defined below in Section 8.1), then the Base Rent shall be adjusted so as to equal the product of the Base Rent (as adjusted for any CPI increase in the preceding section) times a fraction, the numerator of which is the total interior square footage, in the aggregate, of all buildings on the Premises and the denominator of which shall be the Rent Threshold Space.

4.5. **Late Fee.** If Tenant fails to pay any installment of Base Rent or any other amount that may be due to Landlord under the terms of this Lease within thirty (30) days of the date such Base Rent or other amount is due, Tenant shall owe Landlord a late fee of two percent (2%) of the late installment.

## **Section 5. Taxes.**

5.1. **Taxes.** During the Term of this Lease, Landlord shall not be responsible for any real estate taxes, or assessments levied or assessed against buildings and improvements located on or constructed on the Premises or levied or assessed upon the land constituting the Premises. Tenant shall, commencing on the Commencement Date and continuing during the Term of this Lease, as additional rent, pay as and when due and payable, all real property taxes, including special and general assessments (“Taxes”). Landlord shall be responsible for causing the applicable taxing authorities to send all bills directly to Tenant, at the notice address for Tenant set forth in Section 26 hereof. If any Taxes may be paid in installments over time (without incurring any penalty therefor), then Tenant may elect to pay such Taxes over the longest period available. Any such installments of such Taxes allocable to the period prior to the Commencement Date, or allocable to the period from and after the date that this Lease expires or is sooner terminated, shall be the responsibility of Landlord.

5.2. **Right to Contest Taxes.** Tenant or its designees shall have the right to contest or review all Taxes by legal proceedings or in such other manner as it may deem suitable (which, if instituted, Tenant or its designees shall conduct at its own cost and expense, and, if necessary, in the name of and with the cooperation of Landlord, and Landlord shall execute all documents

necessary to accomplish the foregoing).

5.3. Refunds. Landlord covenants and agrees that if there shall be any refunds or rebates on account of the Taxes paid by Tenant under the provisions of this Lease, such refund or rebate shall belong to Tenant. Any refunds received by Landlord shall be deemed trust funds and as such are to be received by Landlord in trust and paid to Tenant forthwith.

5.4. Exclusions. Nothing herein contained shall require Tenant to pay municipal, state, or federal income taxes assessed against Landlord, any estate, successor, inheritance or transfer taxes of Landlord, or corporation franchise taxes or other similar types of business (as opposed to real estate or real estate related) taxes imposed upon any entity or individual owner of the Premises, and any parties related thereto, or mortgage or other loan payments with respect to the Premises.

5.5. Forwarding Bills. This Section of the Lease and other applicable provisions of this Lease concerning Taxes are predicated on the Town of Amherst allowing the bills for the Taxes to be sent directly to Tenant and for Tenant to pay such bills directly. If the Town of Amherst should ever modify this practice, with the result that the bills for the Taxes are not sent to Tenant directly, then Landlord and Tenant shall, at Tenant's written request, enter into an amendment of this Lease, satisfactory to Tenant, to provide that Landlord shall deliver any tax bills to the Tenant within ten (10) days from the date Landlord receives them and Tenant shall pay the same.

#### **Section 6. Utilities.**

Tenant shall be responsible for connecting the Premises to all public utilities and to pay for all charges for water, gas and electricity supplied to it. Landlord shall grant any easements, approvals and licenses to utility companies and others as necessary or convenient for the development of the Premises.

#### **Section 7. Landlord's Warranties and Representations.**

Landlord represents and warrants to Tenant as follows, each such representation and warranty being material and a central inducement to Tenant to enter into this Lease:

(a) Landlord has good record title to the Premises in fee simple, free and clear of all restrictions, leases, tenancies, and easements except as disclosed in any leasehold title policy obtained by Tenant;

(b) Landlord has full right and authority to enter into this Lease and perform Landlord's obligations under this Lease, and Landlord owns the entire Premises and holds good and clear, record and marketable fee simple title thereto;

(c) Landlord has not received any notice of, nor is it aware of, any pending action to take by condemnation all or any portion of the Premises;

(d) The Premises have free and full access to and from all adjoining streets, roads and highways, and to Landlord's knowledge there is no pending or threatened action which would impair such access;

(e) There is no litigation, and no other proceedings are pending or threatened, relating to the Premises or their use;

(f) No party other than Tenant has a right of first refusal, right of first offer, option, or other pre-emptive right of any kind, to purchase, lease or otherwise possess the Premises or any portion thereof.

(g) The Premises are not subject to any existing claim for mechanics' liens, nor are there any third parties in or entitled to possession thereof.

(h) The Premises have not been classified under any designation authorized by law to obtain a special low ad valorem tax rate or receive either an abatement or deferment of ad valorem taxes which, in such case, will result in additional, catch-up ad valorem taxes in the future in order to recover the amounts previously abated or deferred, nor are the Premises subject to any agreement, contract or commitment regarding valuation and/or minimum valuation.

(i) Landlord has received no notice and is not otherwise aware that the Premises are, or will be, in violation of any local governmental rule, ordinance, regulation or building code, nor has Landlord received notice of any pending or threatened investigation regarding a possible violation of any of the foregoing.

(j) This Lease is and shall be binding upon and enforceable against Landlord in accordance with its terms, and the transaction contemplated hereby will not result in a breach of, or constitute a default or permit acceleration and maturity under any indenture, mortgage, deed of trust, loan agreement or other agreement to which Landlord or the Premises are subject or by which Landlord or the Premises are bound.

(k) Landlord has not (i) made a general assignment for the benefit of creditors, (ii) filed any involuntary petition in bankruptcy or suffered the filing of any involuntary petition by Landlord's creditors, (iii) suffered the appointment of a receiver to take possession of all or substantially all of Landlord's assets, (iv) suffered the attachment or other judicial seizure of all, or substantially all, of Landlord's assets, (v) admitted in writing its inability to pay its debts as they come due, or (vi) made an offer of settlement, extension or composition to its creditors generally.

Landlord shall indemnify, defend and hold Tenant harmless from and against any and all claims, actions, judgments, liabilities, liens, damages, penalties, fines, costs and expenses, including but not limited to reasonable attorneys' fees, costs of defense and expert/consultant fees, and increased costs of construction, asserted against, imposed on, or suffered or incurred by Tenant or any Designated Party (defined below) in Section 9.3 (or the Premises) arising out of or in connection with any breach of the foregoing representations and warranties. Landlord shall give Tenant prompt written notice if any such representation or warranty ceases to be true,



correct, and complete. The foregoing representations, warranties and indemnity of Landlord contained in this Section shall be deemed reaffirmed and restated as of the Commencement Date and shall survive the expiration or sooner termination of this Lease.

**Section 8. Improvements, Maintenance, and Surrender.**

8.1. Improvements. Tenant shall have the right, to be exercised in its sole discretion, subject to the provisions of this Lease, to improve the Premises and construct or raze thereon any temporary or permanent buildings and other structures, all at the sole cost and expense of Tenant, necessary or convenient to carry out the permitted uses, title to all of which shall automatically be the property of and belong to Tenant during the term of the Lease. Tenant shall provide Landlord with copies of plans and specifications prior to undertaking any improvements; if the Landlord's request changes within fifteen (15) of receipt of such plans and specifications, the Town will use reasonable efforts (but will not be required to) incorporate the Landlord's requests, provided that the cost of incorporating such requests is not excessive, in the Town's discretion. Tenant shall have the sole responsibility for obtaining all federal, state or local permits necessary to improve the Premises or raze any structures on the Premises. At Tenant's sole cost, Landlord agrees to cooperate with Tenant (including, without limitation, by signing applications) in obtaining any necessary permits or approvals for any work (including, without limitation, sign installation) which Tenant is permitted to perform pursuant to this Lease. If the buildings on the Premises contain, in the aggregate, more than Five Hundred Thousand (500,000) square feet of interior space (the "Rent Threshold Space"), the Base Rent shall increase as provided in Section 4.4.

8.2. Initial Improvements. Tenant intends to improve the Premises by bringing water, sewer, and other utilities to the Premises, and, if necessary under the Town's Bylaws to develop the Premises, by constructing a roadway leading to the Premises (the "Initial Improvements"). Tenant shall prepare initial designs and plans, which plans shall show the Initial Improvements and the principal buildings, along with accessory buildings, which shall not be less than, in the aggregate, Fifty Thousand (50,000) square feet of interior space (the "Initial Structure"). Tenant shall present said initial designs and plans, and any subsequent material changes or alterations thereto, to Landlord for Landlord's review and comment. Landlord shall comment on such plans within fifteen (15) days of receipt and Tenant shall, in good faith, attempt to include Landlord's requested changes provided that such changes are not inconsistent with Tenant's overall development plan for the Premises.

8.3. Maintenance. Tenant shall, at all times during the Term of this Lease, and at its own cost and expense, keep and maintain or cause to be kept and maintained in repair and good condition (ordinary wear and tear and damage by fire or other casualty and taking by eminent domain excepted), all buildings and other improvements at any time erected on the Premises; provided, however, that the foregoing merely concerns maintenance of any improvements that may from time to time exist on the Premises and does not obligate or prohibit Tenant from constructing any such improvements, or demolishing the same, so long as such construction and demolition is performed in accordance with applicable laws.

8.4. Surrender. On the termination of this Lease, Tenant shall quit and surrender the Premises, and the buildings and improvements then thereon shall become the property of Landlord, subject to the rights of a Leasehold Mortgagee (defined below in Section 9.2), as provided below. Such buildings and improvements shall be in good condition and repair (ordinary wear and tear, damage by fire or other casualty, and taking by eminent domain excepted). Notwithstanding the foregoing, Tenant may, at the termination of this Lease, remove all of its personal property, accessories and supplies, machinery, equipment, and inventory and all such other tangible personalty as may not be affixed or attached to the Premises, including without limitation its trade fixtures, furnishings, telecommunications systems, and equipment. Tenant shall, at its expense, repair any and all damage to the Premises resulting from or caused by the removal of such property. The provisions of this paragraph shall survive the expiration or sooner termination of this Lease.

### **Section 9. Mortgagees and Designated Parties.**

9.1. This Lease and Tenant's interest in the Premises shall be subordinate to any mortgage or deed of trust now or hereafter encumbering Landlord's fee interest in the Premises or any portion thereof (a "Fee Mortgage"), and to the interests of the mortgagee or beneficiary thereunder (the "Fee Mortgagee"). The foregoing subordination in respect of Fee Mortgages shall, however, not be operative unless and until Landlord shall procure and deliver to Tenant a recordable subordination, nondisturbance and attornment agreement from each Fee Mortgagee (an "SNDA") in form satisfactory to Tenant and any Leasehold Mortgagee. Landlord shall deliver to Tenant, no later than the Commencement Date, such an SNDA from any existing Fee Mortgagee. Such SNDA shall provide, without limitation, that in the event the Fee Mortgage is foreclosed or the Fee Mortgagee (or a designee or assignee thereof) otherwise succeeds to the interests of Landlord in the Premises, the Fee Mortgagee (or such designee or assignee as the case may be) shall not disturb Tenant's continued quiet possession and enjoyment of the Premises under the terms of this Lease (provided that there is not at that time an Event of Default of Tenant that would have entitled Landlord to terminate this Lease pursuant to the terms hereof) and that the Fee Mortgagee (or such designee or assignee as the case may be) shall recognize Tenant as its own tenant on all the terms and provisions of this Lease for the remaining Term of this Lease together with all Extension Terms hereunder that Tenant may exercise. Such SNDA shall also, among other provisions, expressly recognize the rights of Leasehold Mortgagee (defined in Section 9.2), and the other Designated Parties (defined in Section 9.3) under this Lease, and shall provide that the Fee Mortgagee agrees to be bound by all such rights of the Leasehold Mortgagee (defined below), and each of the other Designated Parties (defined below), and such rights shall not be disturbed in the event of a foreclosure of the Fee Mortgage or in any other circumstance, and that, without limiting the foregoing, the Fee Mortgagee shall execute such reasonable documents with the Leasehold Mortgagee and/or such other Designated Parties as they may request from time to time to evidence the same.

9.2. Tenant may, without the consent of Landlord, mortgage or otherwise encumber the leasehold estate, or enter into a so-called lease-lease back of the Premises (which mortgage or other encumbrance, or such lease used for such lease-lease back, is hereinafter referred to as the "Leasehold Mortgage"). The mortgagee (or, in the event of a lease-lease back, the superior lease holder) under the Leasehold Mortgage or the other holders of the indebtedness secured by the