

## **THIRD AMENDMENT TO MUTUAL AGREEMENT AND RELEASE**

**THIS THIRD AMENDMENT TO MUTUAL AGREEMENT AND RELEASE** ("**Third Amendment**") is hereby made and entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 2015 (the "**Effective Date**"), by and between Dewey Beach Enterprises, Inc. ("**DBE**"), Ruddertowne Redevelopment, Inc. ("**RR,**" DBE and RR, together as the "**Owners**") and the Town of Dewey Beach, DE ("**Dewey Beach**" or the "**Town**").

### **BACKGROUND**

**WHEREAS**, the parties entered into a Mutual Agreement and Release dated December 6, 2010, as amended on February 19, 2011, and further amended on February 26, 2011 (the "**Agreement**"), to resolve the Litigation (as defined in the Agreement) and set forth zoning and building restrictions in connection with the Property (as defined in the Agreement) for the construction of a mixed-use project (the "**Project**") including a hotel and residential condominium units; and

**WHEREAS**, the Agreement is not entirely clear in certain provisions and the Town's needs and desires have changed since the MAR was entered into; and,

**WHEREAS**, the Town no longer desires space in the Project, as the MAR contemplates, but would instead prefer to find space elsewhere in Town, and would therefore be willing to forego its right to space in the project in exchange for certain cash payments (both an upfront payment and continuing annual payments) as set forth in this Third Amendment; and,

**WHEREAS**, the maximum number of hotel rooms (90) have been constructed in the first phase; and,

**WHEREAS**, market conditions have changed since the Project was first envisioned; and,

**WHEREAS**, the Agreement provides that a certain number of residential condominium units (20) may be rented through the hotel, but does not specify how said units would be constructed; and,

**WHEREAS**, the parties desire to clarify the intent of the MAR regarding the residential condominium units that may be rented through the hotel; and,

**WHEREAS**, parties desire to further amend the Agreement pursuant to the terms and conditions set forth herein.

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the parties agree that the Agreement shall be amended as follows:

1. **Incorporation of Recitals.** The foregoing recitals are incorporated into and made a part of this Third Amendment.
2. **\$500,000 Payment, Together With \$37,500 Annual Payment, To Town In Lieu of Town Space In Project.** To the extent the Agreement calls for at least 3,000 square

feet of space in the Project to be dedicated to the Town and made available to the Town, that requirement is hereby stricken, and, instead, on or before the earlier of (i) the date of issuance of certificate(s) of occupancy for at least 5,000 square feet of non-hotel, non-residential space in the Project, or (ii) June 30, 2017, the Owners shall cause to be paid to the Town the sum of \$400,000. Payment of this sum shall be secured by a letter of credit in favor of the Town and in form and substance acceptable to the Town, which letter of credit shall not expire before July 1, 2017 and which shall entitle the Town to draw on the letter of credit if the required \$400,000 payment is not made by the date required above. In addition, beginning December 31, 2015, and on each December 31 thereafter, the owner of the hotel space shall make an annual payment to the Town of \$37,500. In addition, on or by April 1, 2020, the Owners shall pay the Town an additional \$100,000. The obligations set forth herein shall run with the land and shall be binding on the all future owners of the hotel space with respect to the \$37,500 annual payment and shall be binding on all future owners of the balance of the Project (excluding the residential condominium units) with respect to the \$400,000 and \$100,000 payments.

3. **Additional \$5,000/Month Payment.** Beginning April 1, 2015, the Owners shall pay the Town \$5,000 per month on the first of each month until the initial \$400,000 payment required by paragraph 2 above is paid in full. Such payments shall be credited against the initial \$400,000 payment. Upon payment of the \$400,000 payment, the \$5,000/month obligation shall cease, but the \$100,000 payment due on or by April 1, 2020 shall remain.

4. **Revision To Hotel Room/Condominium Room Formula.** Notwithstanding anything set forth in the Agreement to the contrary, it is hereby agreed by the parties that (i) there shall be a maximum of ninety (90) hotel rooms as part of the hotel; (ii) under the original Agreement, the twenty (20) condominium units that could be rented out using the hotel as their property management company is hereby increased to a maximum of forty (40) condominium units, provided, however, that all such units shall consist of only one bedroom, one bathroom and no other rooms and that all such units shall be owned by individuals or entities other than the hotel (these units are sometimes referred to as the "Small Units"); and (iii) an additional ninety (90) residential condominium units may be constructed for private residential ownership (these units are sometimes referred to as the "Large Units"). Thus, a total of one hundred thirty (130) condominium units may be constructed subject to the foregoing conditions and subject to compliance with all other applicable laws and regulations.

5. Except as set forth herein, the Agreement is hereby ratified and confirmed by the parties hereto and remains in full force and effect.

6. Any capitalized terms used in this Third Amendment and not otherwise defined herein shall have the same meanings as in the Agreement.

7. This Third Amendment shall be governed by and construed according to the laws of the State of Delaware.

8. This Third Amendment may be signed in one or more counterparts (or with counterpart signature pages) which, taken together, shall constitute a fully executed Third Amendment and shall be considered a single document. The transmission of a signed counterpart of this Third Amendment by facsimile or by portable document file shall have the

same force and effect as delivery of an original signed counterpart of this Third Amendment, and shall constitute valid and effective delivery for all purposes.

9. The effective date of this Third Amendment shall be the date upon which the last required signatures necessary to complete this Third Amendment is affixed and the duly signed Third Amendment has been delivered to both parties hereto, which date shall be inserted as the Effective Date referenced above.

10. To the extent that payments required by paragraph 2 or paragraph 3 of this Third Amendment are not made when required, then, in addition to all other remedies, legal and equitable which the Town may possess, the Town shall also have the right, after 30 days' written notice and opportunity to cure, to revoke the business license for the hotel space and withhold such license until all payments due are paid in full, meaning that the hotel will be prohibited from operating until its license is restored; and, further, to the extent the hotel does not cease operations, the Town may seek injunctive relief prohibiting the use of the Hotel until payment in full is made and the owner(s) of the hotel space hereby consent to such injunctive relief.

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

**IN WITNESS WHEREOF**, the parties hereto have executed this Third Amendment as a sealed instrument under Delaware law as of the Effective Date referenced above.

**DEWEY BEACH ENTERPRISES, INC.**

By: \_\_\_\_\_ (SEAL)

Name:

Title:

Date: \_\_\_\_\_, 2015

**RUDDERTOWNE REDEVELOPMENT,  
INC.**

By: \_\_\_\_\_ (SEAL)

Name:

Title:

Date: \_\_\_\_\_, 2015

**TOWN OF DEWEY BEACH, DELAWARE**

By: \_\_\_\_\_ (SEAL)

Name:

Title:

Date: \_\_\_\_\_, 2015