

DECLARATION OF RESTRICTIVE COVENANT

Dated as of _____

By

[_____]

Location of Premises

Street Address:

City or Town:

County:

Block:

Lot:

After Recording, Return to:

New York City Department of Environmental Protection

[Address]

Attention:

This DECLARATION OF RESTRICTIVE COVENANT (the “Declaration”) is made this ____ day of _____, 20__ by _____, having its principal office at _____, (the “Declarant”).

WITNESSETH

WHEREAS, the Declarant is the fee owner of certain real property situated in the Borough of _____, County of _____ and State of New York, which property is designated as Block _____, Lot _____ on the tax map for such Borough and is also known by the street address of _____, New York (such real property together with all improvements now or hereafter erected thereon, being hereinafter referred to as the “Premises”); and

WHEREAS, the Declarant has agreed to construct [INSERT DESCRIPTION] described on Attachment I hereto (the “Project”) at the Premises to offset potable water use by at least one (1) million gallons per year compared to use prior to installation of the Project in accordance with the grant application filed with the City’s Department of Environmental Protection (“NYCDEP”) and pursuant to the Funding Agreement, executed by Declarant on _____, by and between the Declarant and NYCDEP (the “Funding Agreement”); and

WHEREAS, Declarant has agreed to construct the Project and to keep it and provide for its continued operation and maintenance for the duration of the “Performance Term”, as more fully described below;

NOW, THEREFORE, in consideration of the funds to be provided by NYCDEP and other good and valuable consideration the receipt of which is hereby acknowledged by Declarant, Declarant for itself and on behalf of its successors, heirs, assigns, legal representatives, lessees and transferees, including, without limitation, any owners and/or users of the Premises, does hereby declare and agree that the Premises shall be hereinafter held, sold, transferred, conveyed and occupied subject to the restrictions, covenants, obligations and agreements set forth in this Declaration.

1. DEFINITIONS. For the purposes hereof the following terms shall have the following meanings. (Capitalized terms utilized and not otherwise defined herein shall have the meaning assigned to such terms in the Funding Agreement):

“City” means The City of New York.

“City Funds” means funds provided by the City to or for the benefit of Declarant and used in connection with the Project.

“City Purpose Covenant” has the meaning provided in Section 3 hereof.

“Declarant” has the meaning provided in the Preamble hereof.

“Declaration” has the meaning provided in the Preamble hereof.

“Existing Mortgage” means a Mortgage (A) that is identified on Schedule 1 hereto, (B) that is held by a Lending Institution, (C) that complies with the provisions of this Declaration, (D) a copy of which has been delivered to NYCDEP, together with a certification of a Qualified Certifying Party of Declarant confirming that the copy is a true and complete copy of such mortgage and giving the name and address of the mortgagee thereunder and (E) that has been approved by NYCDEP.

“Existing Mortgagee” means the holder of an Existing Mortgage.

“Force Majeure” means any of the following acts and events that occur without the negligence or fault, and beyond the reasonable control, of Declarant or that of any of its successors, heirs, assigns, legal representatives, lessees and/or transferees including, without limitation, any owners and/or users of the Premises and of which Declarant (or the owner or lessee of the Premises at the time of the occurrence of such act or event of Force Majeure) has given the NYCDEP written notice within thirty (30) days after such party knows of same: governmental actions, orders of any court of competent jurisdiction, war or act of war (whether an actual declaration of war is made or not), insurrection, riot, act of public enemy, terrorist acts, accidents, mechanical failure and acts of God (including, fire, flood or other inordinately severe weather conditions).

“Funding Agreement” has the meaning provided in the Recitals hereof.

“Governmental Authority” means the Federal Government, the State of New York, the City of New York and their respective agencies and instrumentalities.

“Lending Institution” means (A) a savings bank, savings and loan association, commercial bank or trust company (whether acting individually or in a fiduciary capacity) or a Control Affiliate of the foregoing, (B) an insurance company, (C) a real estate investment trust, a trustee or issuer of collateralized mortgage obligations, a loan conduit, or other similar investment entity which is listed on the New York, American Stock Exchange or other regional exchange (or their respective successors), (D) a federal, state, municipal or secular employee’s welfare, benefit, pension or retirement fund, a religious, educational or eleemosynary institution, any Governmental Authority or entity insured by a Governmental Authority, a credit union, trust or endowment, (E) any combination of the foregoing entities, and (F) any other Person approved by the City in its sole discretion; provided that each of the above entities shall qualify as a Lending Institution within the provisions of this definition only if it (1) shall be subject to the jurisdiction of the courts of the State of New York, (2) shall be subject to the supervision of the Comptroller of the Currency of the United States, the federal Securities and Exchange Commission, the Insurance Department or the Banking Department or the Comptroller of the State of New York, the Board of Regents of the University of the State of New York, or the Comptroller of the City or any federal, state or municipal agency or public benefit corporation or public authority advancing or assuring mortgage loans or making payments which, in any manner, assist in the financing, development, operation and maintenance of improvements or in the case of a commercial bank, organized under the laws of any other country which is a member of the Organization for Economic Cooperation and Development (the “OECD”), or a political

subdivision of any such country provided that such bank is acting through a branch or agency located in the country in which it is organized or another country in which it is organized or another country which is also a member of the OECD, (3) shall have a net worth of not less than One Hundred Million Dollars (\$100,000,000) provided in the case of any fund, the loan shall be administered by a Qualified Agent at the time of the initial determination of its status as a Lending Institution, and (4) is not a Related Entity of Declarant, and (5) is not a Unqualified Person.

“Lien” means any lien (statutory or otherwise), encumbrance, lease, easement, option, restriction, estate or other interest including, but not limited to, mechanic’s, laborer’s, materialman’s and public improvement liens, restrictive covenant, security interest, mortgage, deed of trust, priority, pledge, charge, conditional sale, title retention agreement, financing lease or other similar right of others, or any other agreement to give any of the foregoing

“NYCDEP” means the New York City Department of Environmental Protection.

“Performance Term” shall mean the period commencing upon the date of first disbursement of funding pursuant to the Funding Agreement and concluding on the date 20 years following substantial completion of the Project.

“Person” means an individual, corporation, partnership, joint venture, estate, trust, unincorporated association; any federal, state, county or municipal government or any bureau, department or agency thereof; and any fiduciary acting in such capacity on behalf of any of the foregoing.

“Premises” has the meaning provided in the Recitals hereof.

“Project” has the meaning provided in the Recitals hereof.

“Qualified Agent” means a Person who qualifies as a Lending Institution.

“Qualified Certifying Party” means with respect to any Person that is a partnership or limited liability company, a member or general partner thereof, or in the case of a Person, general partner, or member, that is a corporation, the President, Chief Executive Officer, Chief Operating Officer, Chief Financial Officer, Secretary or Treasurer of such Person or general partner.

“Register’s Office” means the Office of the City Register of the City of New York for the County where the Premises are located.

“Related Entity” means, as to any Person, any other Person that controls, is controlled by, or is under common control with, such Person, and “control” (and its correlative meanings, “controlled by” and “under common control with”), for purposes of “Related Entity”, means (A) direct or indirect ownership of more than fifty percent (50%) of the outstanding voting capital stock of a corporation or more than fifty percent (50%) of the beneficial interests of any other entity or (B) the possession, directly or indirectly, of the power to direct or cause the direction of the business decisions of such corporation or other entity.

“Unqualified Person” means:

(a) Any Person (1) that is in default or in breach, beyond any applicable grace period, of its obligations under any material written agreement with the City, or (2) that directly or indirectly controls, is controlled by, or is under common control with a Person that is in default or in breach, beyond any applicable grace period, of its obligation under any material written agreement with the City in each case unless such default or breach has been waived in writing by the entity with which such agreement was made; or

(b) Any Person (1) that has been convicted of a misdemeanor related to truthfulness and/or business conduct, or (2) that directly or indirectly controls, is controlled by, or is under common control with a Person that has been convicted of a misdemeanor related to truthfulness; or

(c) Any person that has been convicted of a felony; or

(d) Any Person that has received formal written notice from a federal, state or local governmental agency or body that such Person is currently under investigation for a felony; or

(e) Any Person that is in default in the payment to the City of any real estate taxes, sewer rents or water charges totaling more than Ten Thousand Dollars (\$10,000) and has been given written notice of such default (or any Person that directly controls, is controlled by, or is under common control with a Person in such default), unless such default is then being contested in good faith in accordance with the law.

2. EFFECTIVE DATE AND TERMINATION. This Declaration shall become effective immediately upon execution by Declarant and shall terminate upon expiration of the Performance Term except for rights and obligations that accrued prior to termination.

3. CITY PURPOSE COVENANT. Declarant agrees that for the Performance Term the Project shall be used to offset potable water use by at least one (1) million gallons per year ^[OBJ.] (“City Purpose Covenant”).

4. USE AND MAINTENANCE. The Declarant agrees that for the Performance Term, it will maintain the Project and keep it in good repair with full functionality for its intended purpose as described in the Funding Agreement. The Declarant further agrees that the Project shall for the duration of the Performance Term be kept free and clear of any and all obstructions that would impede the Project’s proper functioning.

5. NO DESTRUCTION, REMOVAL OR ALTERATION. The Declarant agrees that during the Performance Term no aspect of the Project shall be destroyed, removed or altered in any way by, through or as the result of the action or inaction of Declarant, unless the City’s prior written consent shall have been obtained. It is understood and agreed that none of the following shall constitute a breach of this covenant: (1) destruction, removal or alteration of any aspect of the Project as a result of the intervention of Force Majeure, (2) the undertaking of any

repair or restoration of the Project as may be reasonably necessary to protect and preserve its character and functionality, and (3) the removal and disposal of any portion of the Project as may become worn or obsolete, provided that simultaneously with or prior to such removal, any such portion shall be replaced in such a way as to be functionally comparable (or better) in all material respects to the removed portion.

6. NO SALE, MORTGAGE OR TRANSFER OF THE PREMISES. (a)

During the Performance Term, the Declarant shall not sell or otherwise transfer the Premises to any Person, unless: (i) the City receives not less than thirty (30) days prior written notice of such sale or transfer, (ii) if required by the City, such Person (i.e., the purchaser, mortgagee, transferee or assignee) shall execute an instrument in recordable form and otherwise reasonably satisfactory to the City in form and substance whereby such Person agrees to be bound by each and every term, covenant and condition on the part of Declarant to be performed and/or observed under this Declaration, (iii) Declarant shall, or shall cause, said instrument to be recorded against the property records of the Premises in the Register's Office, and (iv) Declarant shall provide the City with evidence of the execution and recordation of said instrument in accordance with the requirements of this Declaration. Any purported sale or transfer that fails to comply with the requirements of this Section shall be null and void and of no force or effect whatsoever as if such sale, pledge, transfer or assignment shall not have been consummated.

(a) Notwithstanding the foregoing, Declarant shall have the right to enter into a mortgage without NYCDEP's consent and such mortgage shall be subordinate to the Declaration. Any modification or amendment of an Existing Mortgage shall also render such mortgage subordinate to this Declaration.

(b) Declarant shall deliver to NYCDEP at _____, Attention: _____, within ten (10) Business Days after the execution and delivery thereof, by hand with proof of delivery or by mailing the same by express, certified or Federal Express or United Parcel Service mail, postage prepaid, return receipt requested, a true copy of such mortgage and of any subsequent modification, amendment or assignment thereof, and of any modification, amendment or assignment of an Existing Mortgage, and recorded copies thereof upon return receipt of same and shall notify NYCDEP of the address of the mortgagee to which notices may be sent.

(c) Such mortgage shall contain provisions permitting the disposition and application of insurance proceeds and condemnation awards (if any) in a manner consistent with the provisions of this Declaration.

(d) Such mortgage shall specifically include provisions requiring written notice to NYCDEP of any defaults thereunder, and prohibiting any modification, amendment, extension or consolidation of the mortgage without delivering a copy thereof to NYCDEP.

7. SUBORDINATION. Other than any Existing Mortgage, any future estate in and to the Premises and any Lien of any kind arising, claimed or asserted after the date hereof and to or with respect to the Premises shall be subject and subordinate to this Declaration. Accordingly, Declarant for itself and on behalf of its successors, heirs, assigns, legal representatives, lessees

and transferees including, without limitation, any owners and/or users of the Premises shall cause any Person that at any time after the date hereof asserts any right or claim in and to or with respect to the Premises, other than an Existing Mortgagee, to subordinate any such right or claim to the Premises to this Declaration. In addition, other than an Existing Mortgagee, Declarant for itself and on behalf of its successors, heirs, assigns, legal representatives, lessees and transferees including, without limitation, any owners and/or users of the Premises agrees that it shall not permit the imposition of any restriction on the use of the Premises that conflicts with the City Purpose Covenant in any manner without first obtaining the written consent of the City, and that any such restriction imposed on the Premises in violation of the foregoing requirement shall be unenforceable for the duration of the Performance Term.

8. RESTORATION. If, during the Performance Term, the Project shall be damaged or destroyed by fire or other casualty, ordinary or extraordinary, foreseen or unforeseen, the Declarant shall promptly restore the Project to the extent and the value of, and to the extent reasonably practicable, the character of the Project as it existed prior to said casualty such that the Project can continue to be used in accordance with the City Purpose Covenant. Declarant shall so restore the Project whether or not (i) such damage or destruction has been insured or was insurable, (ii) the Declarant is entitled to receive any insurance proceeds, or (iii) the insurance proceeds are sufficient to pay in full the cost of the restoration of the Project. However, if after a fire or other casualty the Project cannot be repaired or restored so that the Project can continue to be used in accordance with the requirements of the City Purpose Covenant, unless the City agrees otherwise, the insurance proceeds shall be allocated between an Existing Mortgagee, if any, Declarant and the City as follows: (a) to an Existing Mortgagee, if any, in an amount equal to the outstanding amount due on an Existing Mortgage, including the principal amount and interest due thereon for the remainder of the term of an Existing Mortgage; and (b) the balance, if any, to the City, an amount equal to the amount of City Funds actually disbursed to Declarant; and (c) finally, the remaining balance, if any, to the Declarant or a subordinate mortgage, if any.

9. CERTIFICATION. On the anniversary of the date of this Declaration and on each anniversary thereafter during the Performance Term, the Declarant (or the owner of the Premises at such time) shall issue a certification to NYCDEP certifying that the Project is held, and used in compliance with the requirements of this Declaration. The certification required by this Section shall be signed by the Chief Executive Officer of Declarant or that of the owner of the Premises at such time.

10. INSPECTION OF PROJECT. At any time and from time to time during the Performance Term upon reasonable prior notice, NYCDEP and its respective employees, servants, consultants and agents shall be permitted to enter the Premises to confirm that the Project is being used in compliance with the requirements of this Declaration.

11. SECTARIAN USE. During the Performance Term, the Project shall not be used to discriminate against any person on the basis of race, religion, creed, color, national origin, sex, age, disability, marital status, sexual orientation, or political affiliation. The Project shall not be used to advance religion or support sectarian activity, including religious worship, instruction or proselytization. Notwithstanding the preceding, subject to the requirements of this Declaration,

the Premises may be made available to any Person, including Declarant itself, on a neutral, non-discriminatory basis for any religious or nonreligious purposes or activities, if the Premises is generally made available to the general public for such purposes or activities on substantially similar terms and conditions, the availability of the Premises for such purposes or activities on such terms and conditions is made known to the general public, and the use of the Premises for any such purposes or activities is occasional and temporary.

12. INDEMNIFICATION. To the fullest extent permitted by law, the Declarant shall defend, indemnify and hold harmless the City, including its officials and employees, against any and all claims (even if the allegations of the claim are without merit), judgments for damages on account of any injuries or death to any person or damage to any property, and costs and expenses to which the City or its officials and employees may be subject to or which they may suffer or incur allegedly arising out of or in connection with the Project. This obligation to defend, indemnify and hold harmless shall survive completion of the construction of the Project and shall extend to the operation and maintenance of the Project for its full life and existence. Insofar as the facts or law relating to any claim would preclude the City or its officials or employees from being completely indemnified by the Declarant, the City and its officials and employees shall be partially indemnified by the Declarant to the fullest extent permitted by law.

13. REPRESENTATIONS AND WARRANTIES. The Declarant represents and warrants that:

(a) there are no restrictions of record on the use of the Premises, nor any present or presently existing future estate or interest in and to the Premises, nor any Lien, obligation, covenant, easement, limitation, lease or other encumbrance of any kind, on or with respect to the Premises, which prevent, preclude or delay, or may prevent, preclude or delay, the imposition, performance and/or observance of the restrictions, covenants, obligations and agreements of this Declaration which have not been extinguished or subordinated to this Declaration other than the Existing Mortgages specified in Schedule 1, attached hereto; and

(b) the execution, delivery, performance and recordation of this Declaration by Declarant has been authorized by all necessary corporate action of Declarant and does not and will not: (i) require any consent or approval by any Person, (ii) contravene the charter or by-laws of Declarant, (iii) violate any provision of, or require any filing, registration, consent or approval under, any law, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect having applicability to Declarant or its affiliates, (iv) result in a breach of, or constitute a default or require any consent under, any indenture or agreement, lease, mortgage or instrument to which Declarant is a party or its properties may be bound or affected, or (v) cause Declarant to be in violation of any law, rule, regulation, order, writ, judgment, injunction, decree, determination or award, or in default under any such indenture, agreement, lease or instrument.

14. REAL COVENANTS. Declarant understands and agrees that the restrictions, covenants, obligations and agreements contained in this Declaration shall be real covenants running with the land and shall inure to the benefit of the City and its successors and assigns, and

bind Declarant and its successors, heirs, assigns, legal representatives, lessees and transferees, including, without limitation, any owners and/or users of the Premises.

15. RECORDING. Declarant shall file and record, or shall cause to be filed and recorded, immediately upon execution hereof, this Declaration in the Office of the City Register of the City of the New York, County of _____ ("**Register's Office**") and shall cause the Register's Office to index this Declaration against the Premises. Promptly upon recordation hereof Declarant shall deliver to NYCDEP a true and complete copy of this Declaration bearing the recording information and certified by the Register. If Declarant fails to record this Declaration and/or deliver a copy thereof to NYCDEP as required hereby, the City may record this Declaration, at the sole cost and expense of Declarant and all recording fees and other fees, costs and expenses including, without limitation, any and all expenses for the purchase of a reasonable number of certified copies of the recorded Declaration shall be immediately paid by Declarant to the City.

16. REMEDIES AND ENFORCEMENT. The Declarant understands, acknowledges and agrees as follows:

(a) The City is an interested party to this Declaration and Declarant consents to enforcement by the City administratively or at law or equity, of the restrictions, covenants, obligations and agreements contained herein.

(b) Monetary damages would not be adequate or sufficient to compensate the City for a breach of any of the restrictions, covenants, obligations and/or agreements of this Declaration. Accordingly, in addition to any other remedies available to the City administratively, at law or equity, under this Declaration or otherwise, the City may obtain a mandatory and/or prohibitory injunction compelling Declarant to specifically perform and observe the restrictions, covenants, obligations and agreements contained in this Declaration or to remedy any failure on the part of Declarant or any of its successors, heirs, assigns, legal representatives, lessees and transferees including, without limitation, any owners and/or users of the Premises to perform or observe any such restriction, covenant, obligation or agreement.

(c) No right or remedy conferred upon the City in this Declaration is intended to be exclusive of any other right or remedy contained in this Declaration or at law or equity. Every such right or remedy shall be cumulative and shall be in addition to each other right and remedy contained in this Declaration or now or hereafter available to the City at law, in equity, by statute or otherwise.

17. MISCELLANEOUS.

(a) Headings, Captions and Table of Contents. The descriptive headings and captions used in this Declaration are for the purposes of convenience only and do not constitute a part of this Declaration.

(b) Governing Law. This Declaration and its performance shall be governed by and construed in accordance with the laws of the State of New York, excluding New York's rules

regarding conflict of laws and any rule requiring construction against the party drafting this Declaration.

(c) Amendments; Waiver. This Declaration may not be amended except by an instrument in writing signed by the City and Declarant. The failure by the City to exercise in any respect any right provided for herein will not be deemed a waiver of any rights hereunder.

(d) Severability; Invalidity of Certain Provisions. The provisions of this Declaration are intended to be severable. If any term or provision of this Declaration or the application thereof to any Person or circumstances shall, to any extent, be invalid and unenforceable, the remainder of this Declaration, and the application of such term or provision to Persons or circumstances other than those as to which it is held invalid and unenforceable, shall not be affected thereby and each term and provision of this Declaration shall be valid and enforceable to the fullest extent permitted by law.

(e) Required Provisions of Law Controlling. It is understood and agreed that each and every provision of law required to be inserted in this Declaration should be and is inserted herein. Furthermore, it is hereby stipulated that every such provision is deemed to be inserted and if, through mistake or otherwise, any such provision is not inserted herein or is not inserted in correct form, then this Declaration shall forthwith, upon the application of either party, be amended by such insertion so as to comply strictly with the law and without prejudice to the rights of either party.

(f) Construction of Terms and Words. All terms and words used in this Declaration regardless of the number and gender in which they are used shall be deemed and construed to include any other gender, masculine, feminine or neuter, as the context or sense may require, with the same effect as if such numbers and words had been fully and properly written in the required number and gender.

18. GREEN BUILDING STANDARDS. If the amount of City Funds and the nature of the improvements contemplated by the Project trigger the requirements of the Green Building Standards Law (New York City Charter Section 224.1 and Chapter 10 of Title 43 of the Rules of the City of New York), Declarant shall comply with the requirements of said Green Building Standards Law in the construction of the improvements contemplated by the Project.

19. AMENDMENT. This Declaration may not be amended, terminated or modified without the prior written consent of the City. Any amendment to this Declaration shall be recorded in accordance with Section 15, above.

FURTHERMORE, this Declaration shall be a covenant running with the land, and shall be binding upon the heirs, assigns and successors of the Declarant, and shall remain in full force and effect for the Performance Term.

(The remainder of this page is intentionally left blank)

IN WITNESS WHEREOF, this Declaration has been duly executed the day and year first above written.

DECLARANT

By: _____

Title: _____

ACKNOWLEDGEMENT

STATE OF NEW YORK

SS:

COUNTY OF _____

On the ____ of _____ the year 20__ before me, the undersigned, a Notary Public in and for said State, personally appeared _____ personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.