

Schedule "D"
Public Use and Access Agreement

PUBLIC USE AND ACCESS AGREEMENT

THIS PUBLIC USE AND ACCESS AGREEMENT (“Agreement”), made as of this ___ day of _____, 2009, by and among **BEAR CREEK FOUNDATION**, a Pennsylvania not for profit corporation and private foundation organized under section 170 of the Internal Revenue Code of 1986, as amended with offices at 1900 Bear Creek Boulevard, Wilkes-Barre, Luzerne County, PA 18702; (the “Developer”); the **BEAR CREEK COMMUNITY CHARTER SCHOOL**, a Pennsylvania Public Charter school, with offices at 2000 Bear Creek Boulevard, Wilkes-Barre, Luzerne County, PA 18702 (the “School”); **BEAR CREEK TOWNSHIP**, a Pennsylvania municipal corporation organized as a Township of the second class with offices located at 3333 Bear Creek Boulevard, Luzerne County, PA 18702 (“Township”).

Recitals

WHEREAS, the Developer, the School and the Township have entered into a Development Agreement on the same date as set forth above for the purpose of the acquisition and development of land for the ultimate expansion of the Bear Creek Community Charter School, a recognized pillar and resource in the Bear Creek Township Community;

WHEREAS, the Township, as part of the consideration under the Development Agreement is desirous of expanding the amenities available to the residents of Bear Creek Township and to residents of the surrounding communities;

WHEREAS, the Development Agreement contemplates a significant expansion of recreational and educational facilities, including, but not limited to, soccer fields, baseball fields, basketball courts, and a library (hereinafter referred to as the “Facilities”) which are to become located within Bear Creek Township upon the real property (herein “Property”) more fully set forth in Exhibit “A “ annexed hereto and made a part hereof.;

WHEREAS, the Township, the Developer and the School, in an effort to make this project inclusive of all residents, intend, through this Agreement, to allow the Township and its residents to use the Facilities consistent with the terms and conditions herein.

NOW THEREFORE, intending to be legally bound hereby, in consideration of the foregoing Recitals, and for other good and valuable consideration, which all parties acknowledge, the Developer, the School and the Township shall agree as follows:

Covenants

1. **PUBLIC ACCESS.** The Developer and the School hereby agree that each shall grant and permit the Township and its residents a limited right to use the Facilities identified herein and as may be expanded as part of this project for recreational uses for so long as the Facilities shall be under the control of the School, the Developer, or any third party which is assigned the duty to manage the Facilities.

Further, all parties recognize the goals of safety and security, while maintaining free public access, subject to the terms of this Agreement. The Property shall be divided, for recreational purposes, into two Zones. The regulations governing public access and the designation of the Zones are outlined as follows:

- 1A. **ZONE A.** Zone A shall include the school and other ancillary structures, the parking lot(s) adjacent to these structures, and a recreation field to be used by the school during school hours. Such access and use shall be at reasonable hours and times established by the School and may be subject to reasonable rules and regulations regarding use as may be promulgated jointly by the School and the Developer from time to time. The use of the Facilities is reasonably restricted for use by the School for School activities, and the grant of access by this Agreement shall not interfere with such use.
- 1B. **ZONE B.** Zone B shall include all Facilities not included in Zone A. Zone B shall be open to the public from dawn to dusk. The Facilities located in Zone B, subject to a reasonable schedule established by the Developer, the School, and the Township, shall be open to the general public and/or for reservation by specific organizations, including but not limited to, soccer organizations, baseball organizations, and clubs provided that Township based organizations shall have preference in scheduling. In the absence of agreement as to a reasonable schedule, the schedule shall be consistent with the schedules then prevailing in other public school districts with respect to public access. The rules and regulations for all other public parks within Bear Creek Township shall also be applicable to Zone B.
- 1C. In the event that such access vitiates public liability insurance of the School or the Developer, the Township shall be afforded the opportunity to provide such coverage in the same amounts with the School and the Developer named as an additional insured, in which event the right of public access shall be restored. If the Township secures such insurance, any increase in premium associated with insuring the Facilities shall be paid by the Developer and/or the School up to a maximum of 150% of the last premium amount paid by the Developer and/or the School to insure the Facilities.
2. **FREE ACCESS.** The Township and its residents shall not be charged any fees or costs for the use of the Facilities, though where appropriate, organizations using the Facilities shall be required to provide certificates of insurance before use of the Facilities is granted. The Developer, School and Township reserve the right to collectively agree on a fee for the use of the Facilities otherwise, should the same be necessary or desired. It is intended that the free public access also includes access through the roads leading to the Facilities.
3. **PRIMARY USE.** The Developer, School and Township agree that the primary use of the Zone A Facilities is for the School and its students. The

School shall have first right to use the Zone B Facilities consistent with the usual and customary school schedule for specific school sporting functions.

4. **MAINTENANCE AND INSURANCE.** The Developer and the School shall have the primary responsibility for securing insurance for the Facilities and maintenance of the Facilities, as outlined in 1C above.
5. **CONSIDERATION AND CONTRACTUAL AGREEMENT.** The parties hereto agree that this Agreement constitutes partial consideration for the Township entering into the Development Agreement. This Agreement shall constitute a binding contract as to all terms and conditions set forth herein.
6. **CHOICE OF LAW.** This Agreement is to be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania, without regard to conflict of laws principles. Jurisdiction and venue for any dispute hereunder shall be exclusively in the Court of Common Pleas of Luzerne County, Pennsylvania, and all parties shall use said forum in the event of litigation.
7. **SEVERABILITY.** In the event that any section, paragraph, or portion of this Agreement shall be or be deemed to be by any Court having lawful jurisdiction over the subject matter of this Agreement, void, voidable, or invalid for any reason, this Agreement shall be otherwise valid and enforceable as if the said void, voidable or invalid section, paragraph, or portion of this Agreement had not been a part hereof in the first instance.
8. **SURVIVAL.** This Agreement and all its provisions, including promises, covenants, representations, warranties, and agreements by, between or among the parties hereto.
9. **BINDING EFFECT.** This Agreement shall be legally binding on all parties hereto, their successors (and successor officials and board members), heirs, executors, administrators and assigns upon execution by all parties hereto. Each party that executes this Agreement shall be immediately bound hereby, notwithstanding the execution by other parties. Assigned counterparts of this Agreement shall have the full force and effect of an original Agreement.
10. **INTEGRATION.** This Agreement constitutes and expresses the whole agreement of the parties hereto with reference to the subject matter hereof and specifically the right of public access to the Facilities, or hereinbefore discussed or mentioned, all prior promises, undertakings, representations, agreements, understandings and arrangements relative thereto being superseded and herein merged. This Agreement may be modified only in writing executed by all parties hereto. To the extent that there is any conflict between a provision of this Agreement and any provision of any subsequent document, agreement, or writing,

this Agreement shall control unless such subsequent writing explicitly states that it shall control over this document.

11. **RIGHT OF FIRST REFUSAL.** Developer, for Developer, and Developer's successors and assigns, hereby grants Township and its successors and assigns, an exclusive Right of First Refusal to purchase the Property. The Right of First Refusal herein granted commences upon the date of the execution of this Agreement and terminates based upon the terms and conditions as set forth herein. Before Developer may sell or transfer the Property or any portion of the Property to any person or entity other than the School, Developer must first offer the Property Developer wishes to sell or transfer to Township by giving Township written Notice of the terms and conditions of any bona fide offer that Developer is willing to accept, which Notice shall include an unredacted copy of the original of said bona fide offer. During the Option Term (as hereinafter defined) such Notice shall constitute an offer to sell the Property to Township for the purchase price set forth in the Notice and enclosed bona fide offer. The terms and conditions (other than the purchase price) shall be stated in the Notice and unredacted copy of the original bona fide offer. Upon expiration of the Option Term, such Notice shall constitute an offer to sell the Property to Township for the purchase price and upon the terms and conditions set forth in the Notice and enclosed bona fide offer. Township will have fifteen (15) days after receipt of such Notice within which to advise Developer whether Township accepts the offer of Developer (the "Option Term") and, during the Option Term, whether Township will purchase the Property. Township must exercise this Right of First Refusal by giving Developer written notice of its acceptance of Developer's offer. Township and Developer will thereafter execute, within five (5) days from the date of Township' exercise of his Right of First Refusal, an Agreement of Sale in form mutually acceptable to Developer and Township. The purchase price for the Property will be paid by Township to Developer according to the terms and conditions agreed upon by Developer and Township. Developer's receipt of a notice of foreclosure sale shall constitute a bona fide offer of sale with the purchase price being the unpaid balance of any mortgage or other liens encumbering the Property together with all costs of the foreclosure sale with closing to occur prior to the scheduled sale date.

12. **NOTICES.** All Notices, demands and/or other communication hereunder shall be in writing and shall be effective when given or made by messenger, first-class mail or Federal Express or other nationally recognized overnight delivery service, addressed to the appropriate party at the address set forth below (or such other address as such party may designate from time to time by notice given in like manner):

If to the Developer:

1900 Bear Creek Boulevard
Wilkes-Barre, PA 18702
Attention: President

With copy to :

Rosenn, Jenkins & Greenwald, LLP
Attn: Mark A. Van Loon, Esq.
15 South Franklin Street
Wilkes-Barre, PA 18711

If to the Township:

Board of Supervisors
3333 Bear Creek Boulevard
Wilkes-Barre, PA 18702
Attention: Twp. Secretary

With copy to:

Vinsko & Associates, PC
Attn: William E. Vinsko, Jr. Esquire
253 South Franklin Street
Wilkes-Barre, PA 18701

If to the School:

2000 Bear Creek Boulevard
Wilkes-Barre, PA 18702
Attn: Chief Executive Officer

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Agreement as of the day and year first above written.

ATTEST/WITNESS:

BEAR CREEK FOUNDATION

By: _____
Name: _____
Title: _____

ATTEST/WITNESS:

BEAR CREEK TOWNSHIP

TWP. SECRETARY

GARY ZINGARETTI, CHAIR

BONNIE J. WASILEWSKI, VICE CHAIR

RUTH ANN KOVAL

E. GARY SLUSSER

JOSEPH MASI

ATTEST/WITNESS:

**BEAR CREEK COMMUNITY
CHARTER SCHOOL**

By: _____
Name: _____
Title: _____