

## **FIFTH AMENDMENT TO AND EXTENSION OF AGREEMENT**

This Fifth Amendment to and Extension of Agreement ("Fifth Amendment ") is dated **March 10, 2022**, but is effective as of February 6, 2022 (the "Effective Date ") between the **City of Fort Wayne, Board of Park Commissioners** ("BPC ") and **Settlers, Inc.**, an Indiana non-profit corporation ("Settlers ").

### **RECITALS:**

BPC is the owner of certain real estate located in Swinney Park, Fort Wayne, Indiana commonly known as " The Homestead " and the residence located thereon (the "Swinney Homestead"). The Homestead and Swinney Homestead are sometimes referred to collectively herein as "the Swinney Homestead". BPC and Settlers entered into an Agreement regarding the use and maintenance of the Sweeney Homestead dated February 5, 1991 (the "Agreement") which was subsequently extended and amended by First, Second, Third, and Fourth Amendment and Extension Agreements between BPC and Settlers, dated February 5, 2001, February 9, 2012, February 11, 2016, and February 11, 2021, respectively. The Agreement and the First, Second, Third, and Fourth Amendment and Extension Agreements are collectively referred to herein as the "Agreement ".

The Agreement will expire on February 4, 2022, and BPC and Settlers desire to extend the Agreement for an additional year to continue to operate the Swinney Homestead as a period home and to make Swinney Homestead available for use by the public, with options to extend the Agreement for two (2) additional years following the one (1) year extension, all as hereinafter set forth.

**NOW, THEREFORE**, in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency are hereby acknowledged, BPC and Settlers agree as follows.

1. The term of the Agreement is extended for one (1) additional one (1) year term from February 5, 2022, to February 4, 2023 (the "Fifth Additional Term "). Provided no default exists under the Agreement at the expiration of the Fifth Additional Term, BPC and Settlers shall have the option to extend the term of the Agreement for an additional one (1) year term (the "Sixth Additional Term ") from February 5, 2023, to February 4, 2024, upon the expiration of the Fifth Additional Term, by entering into a Sixth Amendment to and Extension of Agreement not less than thirty (30) days before the expiration of the Fifth Additional Term. Provided BPC and Settlers enter into a Sixth Amendment to and Extension of Agreement for the Fifth Additional Term and provided no default exists under the Agreement at the expiration of the Fifth Additional Term, BPC and Settlers shall have the option to enter into an additional one (1) year term (the "Seventh Additional Term") from February 5, 2024, to February 4, 2025, by entering into a Seventh Amendment to and Extension of Agreement not less than thirty (30) days prior to the expiration of the Sixth Additional Term.

2. Subject to the prior written approval of BPC, Settlers may: (a) rent Swinney Homestead to groups for meetings, luncheons, tours, programs, and special events; and (b) allow one (1) tenant to occupy an apartment in the South Wing of Swinney Homestead in order to contribute in providing security for Swinney Homestead. Settlers shall be responsible for the payment of all expenses incurred in the use of Swinney Homestead for any such events.
3. Subject to the terms of this Agreement, Settlers shall have: (a) the right to occupy and use Swinney Homestead as a period home; (b) access to the Swinney Homestead from public streets; and (c) the non-exclusive use of the parking lot to the immediate south of Swinney Homestead in connection with the use of Swinney Homestead by Settlers as described herein.
4. Revenues realized by Settlers from programs and events held at Swinney Homestead shall be retained by Settlers which agrees to allocate to the maintenance and repair of Swinney Homestead that portion of such revenues which may be required to fulfill Settlers' maintenance and repair obligations hereunder.
5. Settlers shall be required at its cost to provide normal maintenance for Swinney Homestead and to repair any damage to Swinney Homestead which arises directly or indirectly from; (a) Settler's possession, occupancy, control, the management or use of Swinney Homestead (including without limitation damage caused by third parties); (b) the exercise or failure to exercise any other rights granted to Settlers under the Agreement; or (c) the failure to perform any covenant or obligation which is the responsibility of Settlers hereunder.
6. BPC may at its election perform or caused to be performed at BPC's cost maintenance and/or repair of Swinney Homestead, including but not limited to plumbing, heating, electrical, structural, roof, exterior, grounds maintenance (except garden, shrubs, flowers and other landscaping located on Swinney Homestead which shall be the responsibility of Settlers), lawn care and snow removal.
7. BPC shall bear the risk of loss for all structural damage to Swinney Homestead caused by fire, accident, or other casualty and shall carry insurance coverage insuring against such losses in amounts and upon terms deemed appropriate by BPC. Settlers shall carry occurrence-based hazard and extended coverage insurance insuring against damage to Swinney Homestead and occurrence-based public liability insurance insuring against physical injury and death arising from Settlers' occupancy, possession, control, management, and use of Swinney Homestead in the amount of \$1,000,000 per occurrence and \$2,000,000 aggregate. All such insurance shall name the City of Fort Wayne and the City of Fort Wayne Board of Park Commissioners as additional insureds ("Additional Insureds") thereon and shall provide a thirty (30) day written notice to the Additional Insureds if such insurance is terminated or canceled for any reason. Settlers

shall at all times during the Fifth Additional Term provide BPC a certificate or certificates of insurance evidencing compliance with the foregoing insurance requirements.

8. BPC shall provide and pay for the following utilities used by Swinney Homestead: electrical for outside lighting of the garage. Settlers shall pay for security costs, heat, telephone, electrical (inside Swinney Homestead only), and water and sewage charges incurred for Sweeney Homestead.
9. Settlers shall bear the risk of loss to any personal property owned or held by Settlers and located in, on, or about Swinney Homestead and shall carry insurance to ensure against any such personal property loss in such amount as Settlers deems appropriate. In no event shall BPC bear any expense, cost, or liability in connection with any such personal property loss.
10. Settlers shall promptly notify BPC in writing during the Fifth Additional Term of any major repair or maintenance issues affecting Swinney Homestead. In the event any such repair or maintenance issue is of an emergency nature, Settlers shall notify BPC forthwith by e-mail or telephone followed by a written copy of such notification. No such notification by Settlers shall abrogate or modify the repair and maintenance obligations of Settlers contained herein. Any damage to Swinney Homestead which arises from Settlers' failure to timely notify BPC of a major repair or maintenance issue shall be resolved by Settlers at its cost.
11. Any amendment of this Agreement shall be by a written instrument executed by BPC and Settlers.
12. This Agreement shall be governed by the laws of the State of Indiana. All proceedings relating to the interpretation, enforcement, or other litigation or dispute resolution of this Agreement shall be venued in Allen County, Indiana.
13. If any provision of this Agreement shall be adjudged by a court of competent jurisdiction to be void or unenforceable for any reason, the same shall in no way affect any other provision of this Agreement, nor shall it affect the validity or enforceability of this Agreement as a whole.
14. This Agreement may be terminated in writing by either party hereto upon sixty (60) days prior written notice to the non-terminating party; provided, however, that in the event BPC deems that any conduct, circumstances or conditions in, on or about the Swinney Homestead or its immediate environs poses a risk to property or person, BPC may terminate this Agreement forthwith upon written notice to Settlers. Termination of this Agreement by either party shall not void any obligation of the terminating party which exists hereunder as of the effective date of the termination.

15. Upon reasonable advance notice to Settlers, BPC may enter Sweeney Homestead at any time during the Fifth Additional Term to; (a) inspect the condition of Sweeney Homestead, or (b) make any necessary repairs or improvements to Sweeney Homestead. BPC may enter Sweeney Homestead at any time during the Fifth Additional Term without notice to Settlers in the event BPC believes an emergency exists which places at risk any occupant of Sweeney Homestead or any member of the general public or the physical safety or integrity of Sweeney Homestead.
16. All notices and other communications required or permitted under this Agreement must be in writing (except as provided in Section 10. hereof concerning emergency repair and maintenance and Section 15 hereof concerning the inspection of the condition of Sweeney Homestead or in response to a perceived emergency) and shall be personally served or mailed postage prepaid via U.S. mail, or sent via personal courier service with guaranteed next day delivery, addressed to the respective parties as follows:

**Fort Wayne Department of Parks & Recreation**

ATTN: Kathy Pargmann  
705 E. State Boulevard  
Fort Wayne, Indiana  
(260) 427-6004  
e-mail: [Kathy.pargmann@cityoffortwayne.org](mailto:Kathy.pargmann@cityoffortwayne.org)

**Swinney Homestead**

ATTN: President  
1424 West Jefferson Boulevard  
Fort Wayne, Indiana 46802  
(260) 424-7212

17. Settlers shall waive, release, defend, indemnify and hold harmless the City of Fort Wayne, the City of Fort Wayne Board of Park Commissioners and their respective officers, members, employees, departments, divisions, business invitees, representatives and agents (each an "Indemnatee" and together the "Indemnitees") from and against all demands, claims, losses, costs and expenses (including legal costs and attorney's fees) (together, the "Losses") that may be asserted, claimed or recovered against Settlers or by Settlers or any third party against Indemnitees or any of them in connection with any personal injuries, death or property damage, including loss of use thereof, which arises directly or indirectly or is in any way associated with any act or omission to act by Settlers or any of Settlers employees, contractors, subcontractors, invitees, agents, representatives or guests in connection with : (a ) this Agreement, (b) Settler's possession, occupancy control, management or use of Swinney Homestead and/or Settler's performance of or failure to perform any of the covenants and obligations made or assumed by Settlers herein.

18. The Agreement and the First, Second, Third, and Fourth Amendments and Extensions thereof are on file as Exhibits A, B, and C, respectively, and incorporated herein by reference.

**IN WITNESS WHEREOF**, the parties have executed this Fifth Amendment to and Extension of Agreement as of the date and year first above written.

## **CITY OF FORT WAYNE BOARD OF PARK COMMISSIONERS**

BY: \_\_\_\_\_  
President

BY: \_\_\_\_\_  
Vice-President

BY: \_\_\_\_\_  
Commissioner

BY: \_\_\_\_\_  
Commissioner

**ATTEST:** \_\_\_\_\_, Board of Park Commissioners Secretary/Director of  
Fort Wayne Parks and Recreation Department

## **SETTLERS, INC.**

BY: \_\_\_\_\_  
ITS: \_\_\_\_\_

ATTEST: \_\_\_\_\_  
ITS: \_\_\_\_\_