

**MEMORANDUM OF UNDERSTANDING AND SETTLEMENT AGREEMENT  
AND MUTUAL RELEASE**

THIS MEMORANDUM OF UNDERSTANDING AND SETTLEMENT AGREEMENT AND MUTUAL RELEASE (the "**Agreement**") is dated and effective as of the 19<sup>th</sup> day of May, 2015 (the "**Effective Date**") and is by and between the TOWN OF SWANSBORO ("**Town**"), a North Carolina Municipality, and SWANSBORO INVESTORS, LLC, a North Carolina Limited Liability Company ("**SI**") (collectively, the "**Parties**" or individually, the "**Party**").

**WITNESSETH:**

WHEREAS, SI owns approximately 20.65 acres located in the extraterritorial jurisdiction of the Town, which is subject to the Town's zoning and land use regulations, with a street address of 1121 W. Corbett Avenue, Swansboro, North Carolina, and is currently identified in the Onslow County Tax Records as Tax Parcels 011600, 001318, 006801 and 032713 (the "**Property**"). The Property is divided into a 19+ acre lot ("**Parcel 1**") and two outparcels (the "**Outparcels**");

WHEREAS, the Property is zoned by the Town B1 – Highway Business – and a Business Planned Building Group application for development of the Property was received by the Town on May 16, 2014 (the "**Site Plan Application**");

WHEREAS, the Town adopted a zoning amendment on July 15, 2014, which established a structure size cap of 40,000 square feet that is applicable to all land in the Town's zoning jurisdiction (the "**Zoning Text Amendment**");

WHEREAS, SI commenced a legal action against the Town alleging, among other things, that the Zoning Text Amendment does not apply to SI's Site Plan Application. The caption of the legal action is currently styled "*Swansboro Investors, LLC vs Town of Swansboro, NCED 7:14-CV-00177-D*" (the "**Lawsuit**");

WHEREAS, the Site Plan Application was the only Site Plan Application pending when the Zoning Text Amendment was adopted that was affected by the Zoning Text Amendment;

WHEREAS, SI amended its complaint in the Lawsuit and now alleges fourteen claims against the Town, including claims for damages due to deprivation of its constitutional rights;

WHEREAS, the Town has defended against the allegations and claims contained in the Lawsuit;

WHEREAS, without admitting liability or wrongdoing and without conceding anything whatsoever concerning the strength or weakness or their respective positions in the Lawsuit, the Parties have reached a mutually agreeable resolution to the Lawsuit and their disputes concerning the Property, the Site Plan Application, and the Zoning Text Amendment. The Parties reached that mutually agreeable resolution in order to avoid the costs and uncertainty of further litigation and in order to reach a compromise as to disputed legal issues. The Parties desire to fully and finally resolve the disputes among them and all existing or potential claims or

matters relating to the Lawsuit, the Property, the Site Plan Application, and the Zoning Text Amendment in accordance with the terms and conditions set forth below.

WHEREAS, the Town Board of Commissioners (the "**Board**") finds that processing the Site Plan Application is appropriate;

WHEREAS, the Technical Review Committee and the Planning Board have reviewed the Site Plan Application as it has been modified and amended at the request of the Town staff (the "**Final Site Plan Application**");

WHEREAS, the Board has reviewed the Final Site Plan Application and finds that the Final Site Plan Application complies with the Town's Code of Ordinances, including the Unified Development Ordinances (the "**UDO**") as they existed on May 16<sup>th</sup>, 2014, (the "**Applicable Town Law**"), finds that the Final Site Plan Application exceeds in several respects the requirements of the Applicable Town Law, and finds that under Town laws and policies approval of the Final Site Plan Application is required;

WHEREAS, the Board reviewed the Zoning Permit (the "**Permit**") attached to the Agreement as Exhibit 1 and the Board and SI have jointly agreed to the additional amendments to the Final Site Plan Application which are written into the Permit and the Permit is incorporated by reference as terms and conditions of the Agreement;

WHEREAS, the Board finds that approving the Final Site Plan Application as amended by the Permit and entering into this Agreement is in the best interests of Town citizens because, among other reasons, the Agreement resolves significant and disputed legal issues related to the Site Plan Application and the Zoning Text Amendment; provides a plan for development of the Property; resolves the Lawsuit and ends the risk and uncertainty inherent in the Lawsuit; ends continued expense associated with the Lawsuit; and promotes the likelihood that the Town receives significant additional revenues when the Property is developed under the terms and conditions of this Agreement, thereby aiding the Town's ability to provide more services to Town citizens without raising property taxes.

NOW, THEREFORE, for good and valuable consideration, the sufficiency of which hereby is acknowledged, the Parties agree to the terms and conditions set forth below:

1. The foregoing recitals are true, incorporated by reference as if fully set forth herein as terms and conditions of the Agreement and form a material part of it.
2. The Town shall issue the Permit on the Effective Date, the Town shall sign the Permit on the Effective Date and the Interim Town Manager shall deliver the Permit to SI on the Effective Date. The Permit runs with the Property and shall be transferable by SI as permitted by the Applicable Town Law.
3. As provided by Town and State law, the Town shall promptly process, advertise and consider adopting an amendment to the UDO which is attached as Exhibit 2. The intent of Exhibit 2 is to fully and unconditionally exempt all properties located in the Town's zoning jurisdiction which became nonconforming in any manner with

the Town's Code of Ordinances, including the UDO, due to the adoption of the Zoning Text Amendment, including without limitation the Property, the development shown on the Final Site Plan Application and permitted by the Permit. The purpose of Exhibit 2 is to provide full and complete relief to all properties and property owners who had developed or begun to develop their property in reliance upon town law which existed prior to July 15, 2014. The Board recognizes that clarification is needed as to the effect of the Zoning Text Amendment and without clarification; substantial harm could be inflicted upon such properties and property owners by adoption of the Zoning Text Amendment and agrees to consider and vote on Exhibit 2 no later than June 17, 2015. Should the Board adopt Exhibit 2, the Board shall direct the Town's Zoning Administrator to certify to SI that the legal effect of Exhibit 2 is that development undertaken on the Property pursuant to the Permit shall not be a nonconformity under Town Law because of adoption of the Zoning Text Amendment. Upon request, the Town's Zoning Administrator shall provide the same certification and interpretation to any other property owner whose property and development was rendered nonconforming by adoption of the Zoning Text Amendment.

4. The signatories to the Agreement represent and agree that (a) their legal counsel have reviewed the Agreement and advised them regarding the Agreement, (b) they have full power and all requisite authority to execute this binding Agreement and all necessary corporate or governmental action by the Parties, including without limitation pre-auditing of the Agreement, has been completed and the Parties are authorized to sign the Agreement, (c) the Agreement is valid, binding and enforceable upon the Parties and shall inure to the benefit of the successors-in-interest and assigns of SI, (d) nothing in the Agreement creates any rights enforceable by any person who is not a signatory or a successor-in-interest or assign of SI, but should a third person challenge the Agreement or claim rights under it, the Town and SI agree to cooperate and assist each other in defending the Agreement, (e) the Agreement shall be reasonably interpreted and construed to encourage, promote and aid development of the Property as allowed by the Permit, (f) if any paragraph, sentence, term, clause or provision of the Agreement is deemed unenforceable by a court of competent jurisdiction, the remaining provisions of the Agreement shall remain valid and the unenforceable portion of the Agreement shall be adjusted in order to achieve the intent of the Parties to the extent which is possible and in no circumstance shall the unenforceability of the Agreement adversely affect SI's common law right to develop the Property recognized and described in the Permit, (g) the Agreement shall be enforceable under law and in equity and (h) time is an essential term of the Agreement.
5. The Agreement does not relieve SI (or its transferees) from complying with the requirements of State law such as the State Building Code, regulations of ONWASA, NCDOT and Soil Erosion and Sedimentation Law. The Town agrees to process all applications, reviews, and inspections of the Property and the development permitted by the Permit expeditiously and to fully assist and cooperate with SI in connection with applications, reviews, approvals or permits by

ONWASA, State or Federal agencies necessary for completion of the development approved by the Permit.

6. No disparaging or derogatory statements in writing or orally related to the Parties or their representatives or agents, the Property, the development of the Property shown on the Final Site Plan Application, the Lawsuit or the Agreement shall be made by the Parties, their elected and appointed officials, officers, members, employees or spokespersons.
7. The Parties hereby release one another and their agents, representatives, successors, heirs, assigns, officers, shareholders, directors, and affiliates from any and all claims, claims for relief, damages of any and all types arising from tort, contract, demands, causes of action, or liability of any kind or nature arising under common law or statute, whether known or unknown, which they have or might have now or in the future, arising on or before the date of this Agreement; **provided**, however, that the Parties expressly reserve their respective rights to enforce the terms of this Agreement, including each of its Exhibits. It is the intent of the Parties that this Agreement constitutes a full and mutual general release of any and all claims between and among the parties and concludes all disputes of any nature or kind between them, except for the matters reserved herein.
8. SI has signed a notice of voluntary dismissal of the Lawsuit with prejudice (the "Notice") and delivered the Notice in trust to the firm of Crossley McIntosh Collier Hanley & Edes, PLLC (CMCHE) to hold the Notice in trust under the terms and conditions of the Agreement. Upon the Town adopting Exhibit 2 or an amendment which has the same intent and purpose as stated in this Agreement and is satisfactory to SI, in SI's sole discretion, by June 17, 2015, CMCHE shall file the Notice. In the event the Town fails to adopt Exhibit 2 or a similar amendment satisfactory to SI by June 17, 2015, CMCHE shall return the Notice to SI and the Town shall not object to intervention in the Lawsuit by any and all property owners whose rights were adversely affected by the Zoning Text Amendment.
9. The execution of this Agreement does not constitute and shall not be construed as an admission of liability or wrongdoing by the Town or by SI. Rather, the Parties are each entering into this Agreement, among other reasons, as a reasonable alternative to proceeding with litigation and to avoid the expenses and risks of potentially protracted litigation. The Parties believe this settlement, as set forth in this Agreement, to be reasonable in light of all facts and circumstances, including the risks of litigation and the potential expenses that could be incurred if they do not enter into this Agreement.
10. The Parties agree that they will bear their own costs, attorneys' fees, disbursements and expenses of any kind incurred in prosecuting and/or defending the Lawsuit. Each Party expressly acknowledges it is not a "prevailing party" for purposes of its 42 U.S.C. §1983 claim(s) and is therefore not entitled to an award of attorneys' fees

or costs. Each Party further represents and acknowledges it will not seek attorneys' fees or costs from the other Party and the Parties' execution of this Agreement is expressly conditioned on said representation and acknowledgment regarding attorneys' fees and costs.

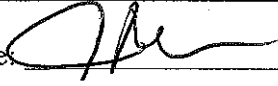
11. This Agreement may be amended only by a writing signed by each of the Parties.

SWANSBORO INVESTORS, LLC

TOWN OF SWANSBORO

By: \_\_\_\_\_ (Seal)


By:  \_\_\_\_\_

Name:  \_\_\_\_\_

Mayor Scott Chadwick

Title: manager \_\_\_\_\_

Attested to by:

 \_\_\_\_\_

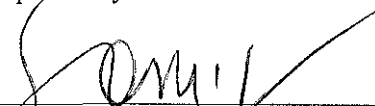
Clerk of Town Board

Date: 5/19/15 \_\_\_\_\_

Date: 5/19/15 \_\_\_\_\_



This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.

 \_\_\_\_\_

Town of Swansboro  
Finance Officer

**Exhibit 1 of Settlement Agreement**

**TOWN OF SWANSBORO**  
601 W. Corbett Avenue, Swansboro, NC 28584

**BUSINESS PLANNED BUILDING GROUP ZONING PERMIT**

OWNER'S NAME SWANSBORO INVESTORS, LLC ("SI") PHONE (910) 346-9800  
OWNER'S ADDRESS 405 JOHNSON BLVD., JACKSONVILLE, NC 28540  
APPLICANT'S NAME KYLE J. CROWE PHONE (980) 272-3400

On May 13, 2015, the Board of Commissioners for the Town of Swansboro, North Carolina, reviewed and approved the Business Planned Building Group Application originally received by the Town on May 16, 2014 which has been modified and amended (the "**Final Site Plan Application**") and directed issuance of this Business Planned Building Group Zoning Permit (the "**Permit**") in SI's name to SI. The Permit is issued to permit development of the 19+ acre parcel of land shown on the Final Site Plan Application ("**Parcel 1**") with additional amendments which are set out below.

1. The terms, conditions and definitions of the Memorandum of Understanding and Settlement Agreement between the Owner and the Town dated May 13, 2015, (the "**Agreement**") are incorporated by reference as material amendments of this Permit.
2. The Town agrees that development of Parcel 1 is governed by the Town's Code of Ordinances, including the Unified Development Ordinances existing on the date of May 16, 2014 (the "**Applicable Town Law**"). SI shall have the right to reconfigure as needed by SI (but not the obligation) the development, layout and construction on Parcel 1 without amending the Permit subject only to: (1) the development conforming to the Applicable Town Law and (2) the total cumulative building square footage on Parcel 1 shall not exceed 158,583 square feet. Such reconfigurations shall be deemed insignificant deviations under Section 7-10(A) of the Applicable Town Law and the administrator shall approve such reconfigurations so long as they comply with the provisions of this amendment. The Permit is transferable by SI as permitted by the Applicable Town Law.

3. The development of the two outparcels shown on the Final Site Plan Application shall be treated as development phases under Section 7-14 of the UDO and shall be governed by the Applicable Town Law and the Permit. Improvements shown on the Final Site Plan Application that benefit Parcel 1 and the two outparcels will be constructed as part of the development of Parcel 1.
4. As a condition of issuance of a certification of occupancy for Parcel 1, the property owner shall submit to the Town a voluntary petition for annexation of Parcel 1 within thirty (30) days after its receipt of the certificate of occupancy and waives its right to withdraw the petition. SI agrees to insert this provision into every purchase contract selling Parcel 1 and in every deed conveying Parcel 1. In the deed, the provision shall constitute an affirmative restrictive covenant and the Town shall have rights to enforce it. Should the Town fail to annex Parcel 1 within ninety (90) days after the Town's receipt of a valid voluntary annexation petition offering Parcel 1 for annexation, this affirmative restrictive covenant shall be discharged and shall terminate automatically. This paragraph is a material consideration for formation of the Agreement.
5. The Permit does not relieve SI (or its transferees) from complying with the requirements of State law such as the State Building Code, regulations of ONWASA, NCDOT and Soil Erosion and Sedimentation Law. The Town agrees to process all applications, reviews, and inspections of Parcel 1 and the two outparcels shown on the Final Site Plan Application expeditiously and to fully assist and cooperate with SI or its transferees in connection with applications, reviews, approvals or permits by ONWASA, State or Federal agencies necessary for completion of the development approved by the Permit.

IN WITNESS WHEREOF, the Town has caused this Permit to be issued, and SI accepts this Permit, together with terms, conditions and amendments stated herein, as binding on them and their successors in interest.

TOWN OF SWANSBORO

(Corporate Seal)

By: \_\_\_\_\_  
Scott Chadwick,  
Mayor of the Town of Swansboro

ATTEST:

\_\_\_\_\_, Town Clerk

ACCEPTED BY:

SWANSBORO INVESTORS, LLC

By: \_\_\_\_\_  
John Pierce, Managing Member

NORTH CAROLINA  
COUNTY OF \_\_\_\_\_

I, a Notary Public of the County and State aforesaid, certify that \_\_\_\_\_, personally appeared before me this day and acknowledged that he/she is Clerk of the Town of Swansboro Board of Commissioners, and that by authority duly given, the foregoing instrument was signed in its name by the Mayor of the Town of Swansboro, sealed with its corporate seal and attested by \_\_\_\_\_ as its Clerk.

Witness my hand and official stamp or seal this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

(Seal)

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Printed name of Notary Public

My commission expires: \_\_\_\_\_

NORTH CAROLINA  
COUNTY OF \_\_\_\_\_

I, a Notary Public of the County and State aforesaid, certify that John Pierce personally appeared before me and acknowledged that he is Managing Member of Swansboro Investors, LLC and that being authorized to do so, executed the foregoing on behalf of Swansboro Investors, LLC.

Witness my hand and official stamp or seal this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

(Seal)

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Printed name of Notary Public

My commission expires: \_\_\_\_\_



**Exhibit 2 to Settlement Agreement**

ORDINANCE 2015- \_\_\_\_

**AN ORDINANCE AMENDING THE UNIFIED DEVELOPMENT ORDINANCE TO PROTECT PROPERTIES  
AND DEVELOPMENT UNFAIRLY AFFECTED BY ORDINANCE 2014-014**

WHEREAS, North Carolina General Statute § 160A-383 requires the zoning regulations shall be made in accordance with a Comprehensive Plan;

WHEREAS, NCGS § 160A-383 also states that when adopting or rejecting any zoning amendment the governing board shall approve a statement describing whether its action is consistent with an adopted Comprehensive Plan and any other officially adopted plan that is applicable, and briefly explain why the Board considers the action taken to be reasonable and in the public interest; and

WHEREAS, the Board of Commissioners finds (1) that ORDINANCE 2014-014 could potentially adversely affect (a) properties with structures located in the Town's zoning jurisdiction in excess of 40,000 gross square feet and (b) an application for construction of a structure in excess of 40,000 gross square feet received by the Town before adoption of ORDINANCE 2014-014 (collectively "Affected Properties"), (2) that applying ORDINANCE 2014-014 to the Affected Properties could potentially cause adverse impacts to those who had made substantial expenditures and investments in good faith reliance upon Town law and policies existing before adoption of ORDINANCE 2014-014 and (3) that it is in the public interest to provide relief to the Affected Properties. Further, the Board finds (4) that the Affected Properties were consistent with the overall vision of the Town for future development before adoption of ORDINANCE 2014-014;

WHEREAS, NCGS § 160A-383 specifically states that one of the purposes for zoning laws is to conserve the value of buildings and application of ORDINANCE 2014-014 to the Affected Properties could reduce the value of buildings existing and planned on the Affected Properties;

WHEREAS, adoption of this Ordinance mitigates any potential adverse impacts of ORDINANCE 2014-014 and satisfies one of the core purposes of zoning; and

WHEREAS, because the Comprehensive Plan and other officially adopted plans applicable to ORDINANCE 2014-014 do not contradict adopting laws to conserve the value of buildings or otherwise provide relief to the Affected Properties and the Comprehensive Plan and other officially adopted plans applicable to size of structures support providing relief to the Affected Properties, the Town Board of Commissioners finds adoption of this amendment of the Unified Development Ordinance is consistent with the Comprehensive Plan and all other officially adopted applicable plans.

NOW BE IT ORDAINED by the Board of Commissioners of the Town of Swansboro:

Section 1. Notwithstanding any provision which may be to the contrary in ORDINANCE 2014-014, ORDINANCE 2014-014 shall not apply to any structure in excess of 40,000 gross square feet existing before July 15, 2014 and shall not apply to any property for which the Town received an application for a permit showing a structure greater than 40,000 gross square feet before July 15, 2014.

Section 2. The Town Staff is directed to add as a codified footnote to any and all amendments of the Town of Swansboro Unified Development Ordinance made by ORDINANCE 2014-014 the language of Section 1 of this Ordinance.

Section 3. Upon the request of any property owner who owns a structure in excess of 40,000 square feet existing before July 15, 2014, or whose property was the subject of an application for a permit received by the Town before July 15, 2014 showing a structure greater than 40,000 gross square feet, the Zoning Administrator shall certify that ORDINANCE 2014-014 does not apply to such property.

Section 4. Notwithstanding anything to the contrary contained herein, this Ordinance shall not be construed to allow an owner of one of the Affected Properties to expand the square footage of its structure beyond that which either existed or was applied for on or before July 15, 2014.

Section 5. This ordinance shall be effective upon adoption.

Adopted by the Board of Commissioners in regular session \_\_\_\_\_, 2015.

Attest:

\_\_\_\_\_  
Scott Chadwick, Mayor

\_\_\_\_\_  
Paula Webb, Town Clerk

**Exhibit 1 of Settlement Agreement**

**TOWN OF SWANSBORO**  
601 W. Corbett Avenue, Swansboro, NC 28584

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OWNER'S ADDRESS 405 JOHNSON BLVD., JACKSONVILLE, NC 28540

APPLICANT'S NAME KYLE J. CROWE PHONE (980) 272-3400

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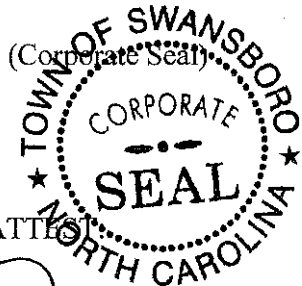
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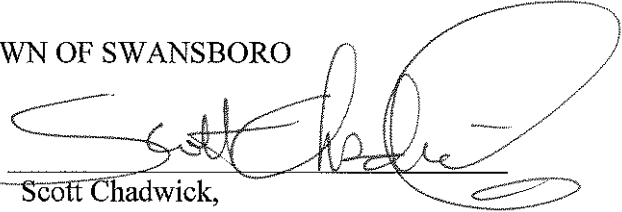
4. As a condition of issuance of a certification of occupancy for Parcel 1, the property owner shall submit to the Town a voluntary petition for annexation of ~~Parcel 1~~ <sup>the Property</sup> within thirty (30) days after its receipt of the certificate of occupancy and waives its right to withdraw the petition. SI agrees to insert this provision into every purchase contract ~~selling Parcel 1~~ <sup>and the Property</sup> and in every deed conveying ~~Parcel 1~~ <sup>the Property</sup>. In the deed, the provision shall constitute an affirmative restrictive covenant and the Town shall have rights to enforce it. Should the Town fail to annex ~~Parcel 1~~ <sup>the Property</sup> within ninety (90) days after the Town's receipt of a valid voluntary annexation petition offering ~~Parcel 1~~ <sup>the Property</sup> for annexation, this affirmative restrictive covenant shall be discharged and shall terminate automatically. This paragraph is a material consideration for formation of the Agreement.

5. The Permit does not relieve SI (or its transferees) from complying with the requirements of State law such as the State Building Code, regulations of ONWASA, NCDOT and Soil Erosion and Sedimentation Law. The Town agrees to process all applications, reviews, and inspections of Parcel 1 and the two outparcels shown on the Final Site Plan Application expeditiously and to fully assist and cooperate with SI or its transferees in connection with applications, reviews, approvals or permits by ONWASA, State or Federal agencies necessary for completion of the development approved by the Permit.

IN WITNESS WHEREOF, the Town has caused this Permit to be issued, and SI accepts this Permit, together with terms, conditions and amendments stated herein, as binding on them and their successors in interest.

(Corporate Seal)  
  
ATTEST  
Paula W. Webb  
Paula W. Webb, Town Clerk

TOWN OF SWANSBORO

By:   
Scott Chadwick,  
Mayor of the Town of Swansboro

ACCEPTED BY:

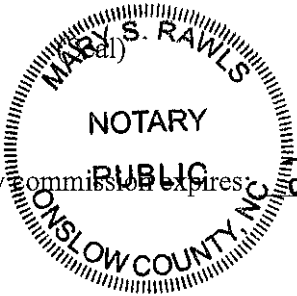
SWANSBORO INVESTORS, LLC

By:   
John Pierce, Managing Member

NORTH CAROLINA  
COUNTY OF Onslow

<sup>MSR</sup> I, a Notary Public of the County and State aforesaid, certify that John Pierce Paula W. Webb, personally appeared before me this day and acknowledged that he/she is Clerk of the Town of Swansboro Board of Commissioners, and that by authority duly given, the foregoing instrument was signed in its name by the Mayor of the Town of Swansboro, sealed with its corporate seal and attested by Paula W. Webb as its Clerk.

Witness my hand and official stamp or seal this 19 day of May, 2015.



My commission expires: 2-1-2017

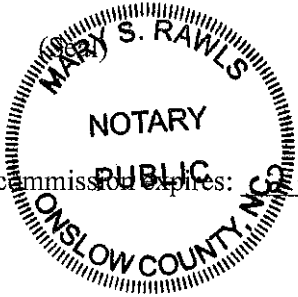
  
Notary Public

Mary S. Rawls  
Printed name of Notary Public

NORTH CAROLINA  
COUNTY OF Onslow

I, a Notary Public of the County and State aforesaid, certify that John Pierce personally appeared before me and acknowledged that he is Managing Member of Swansboro Investors, LLC and that being authorized to do so, executed the foregoing on behalf of Swansboro Investors, LLC.

Witness my hand and official stamp or seal this 19 day of May, 2015.



My commission expires: 2-1-2017

  
Notary Public

Mary S. Rawls  
Printed name of Notary Public