

ORDINANCE NO. 1735  
DEVELOPMENT AGREEMENT NO. DA-23-1

AN ORDINANCE OF THE CITY OF BUENA PARK CITY COUNCIL  
APPROVING DEVELOPMENT AGREEMENT NO. DA-23-1 FOR  
THE DEVELOPMENT OF A SIX-STORY, 140-ROOM HOTEL  
WITH ASSOCIATED PARKING AND SITE IMPROVEMENTS AT  
7860 BEACH BOULEVARD AND AUTHORIZING THE MAYOR  
AND CITY CLERK TO EXECUTE THE SAME ON BEHALF OF  
THE CITY OF BUENA PARK

A. Recitals.

- (i) California Government Code § 65864 now provides, in pertinent part, as follows:

“The Legislature finds and declares that:

“(a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.

“(b) Assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development.”

- (ii) California Government Code § 65865 provides, in pertinent part, as follows:

“Any City may enter into a development agreement with any person having a legal or equitable interest in real property for the development of such property as provided in this article.”

- (iii) California Government Code § 65865.2 provides as follows:

“A development agreement shall specify the duration of the agreement, the permitted uses of the property, the density or intensity of use, the maximum height and size of proposed buildings, and provision for reservation or dedication of land for public purposes. The development agreement may include conditions, terms, restrictions and requirements for subsequent discretionary actions, provided that such conditions, terms, restrictions and requirements for subsequent discretionary actions shall not prevent development of the land for the uses and to the density or intensity of development set forth in the agreement”.

- (i) PBR Consulting Services, on behalf of KB Acquisitions, LLC, 2260 Corporate Circle, Suite 490, Henderson, NV 89074 (“Developer” or “Applicant”) has filed planning applications to redevelop real property located at 7860 Beach Boulevard (“Site”) with a six-story, 140-room hotel including 121 parking spaces (“Project”). The Developer submitted applications

for a Development Agreement, Site Plan Review and Variances from specified standards in the ECSP.

(ii) The Developer submitted a request to enter into a Development Agreement (DA-23-1) with the City to develop a six-story, 140-room hotel, parking and associated site improvements on property located at 7860 Beach Boulevard, in the City of Buena Park, California, (APN: 136-231-35) in the County of Orange. Hereinafter, in this Ordinance, the subject Development Agreement (DA-23-1) request is referred to as "Development Agreement". The Development Agreement, a substantive form of which is attached hereto as Exhibit "A", establishes the rights and obligations of the Developer and the City relating to the development of the Project, secures the Developer's vested right to development the Project in accordance with the requirements of the Development Agreement and the Development Plan, attached as Exhibit "B" to the Development Agreement.

(iii) Attached to this Ordinance, marked Exhibit "A" and incorporated herein by reference, is a proposed Development Agreement (DA-23-1), concerning that property located at 7860 Beach Boulevard in the City of Buena Park, and as legally described within the attached Exhibit "A". Hereinafter in this Ordinance, that agreement attached hereto as Exhibit "A" is referred to as "the Development Agreement."

(iv) The Project's potential environmental impacts were analyzed and it was determined that the project is Categorically Exempt from the provisions of CEQA pursuant to Section 15332 (In-Fill Exemption).

(v) On February 28, 2024, the Planning Commission conducted a duly noticed public hearing on the Development Agreement and other project entitlements, as required by law, and recommended (4-0) that the City Council approve said entitlements, including the Development Agreement.

(vi) On March 26, 2024, the City Council has heretofore conducted a duly noticed public hearing concerning the potential adoption of the Development Agreement and said public hearing was concluded prior to the adoption of this Ordinance.

(vii) All legal prerequisites to the adoption of this Ordinance have occurred.

B. Ordinance.

NOW, THEREFORE, the City Council of the City of Buena Park does ordain as follows:

Section 1. The City Council hereby finds that all the facts as set forth in the Recitals, Part A, of this Ordinance are true and correct and are incorporated herein by this reference.

Section 2. Based upon substantial evidence presented to the City Council during the above-referenced hearing, including written staff reports, verbal testimony, and Development Plans stamped "RECEIVED NOV. 17, 2023 PLANNING DIV." the City Council hereby finds that Development Agreement No. DA-23-1 will promote the orderly development of the project area along with the public health, safety and welfare.

1. The City Council also makes the following specific findings in support of Development Agreement DA-23-1.
  - a. The location, design, and proposed hotel development set forth in the Development Agreement and the Development Plan will be compatible with the existing and anticipated development in the vicinity and is consistent with the General Plan. The Site is designated Tourist-Entertainment in the General Plan, which focuses on the entertainment and tourist-related land uses that are unique to Buena Park. The proposed hotel development will redevelop a currently vacant property with a high-quality nationally branded hotel for guests seeking lodging in Buena Park. The Project is harmonious with the surrounding commercial development within the Entertainment Corridor and is consistent with the General Plan's desired character and expressed vision for the Entertainment Corridor Focus Area.
  - b. The Development Agreement will continue to produce an environment of stable and desirable character, will not significantly impact traffic on the surrounding streets, and will include adequate on-site circulation and pedestrian access.
  - c. The proposed project and improvements will enhance site and area aesthetics. The proposed project and improvements will be compatible with the surrounding development and will enhance site utility. Further, the Development Agreement will promote the orderly development of the project area along with the public health, safety and welfare. The Project is harmonious with the surrounding commercial development and will promote the orderly development of the Site by redeveloping a currently vacant property with a high-quality hotel development.
  - d. In conjunction with the associated Variance and Site Plan Review, the Development Agreement will conform with the City of Buena Park's General Plan and Zoning Ordinance requirements. The proposal will promote the maximum efficient utilization of the site.

Section 3. The City Council hereby finds and determines that the Project identified above in this Ordinance has been reviewed pursuant to CEQA and it has been determined that the project is Categorical Exempt from CEQA pursuant to Section 15332 (In-Fill). The project meets the specified criteria in Section 15332 to qualify for a Categorical Exemption.

Section 4. The City Council hereby adopts Development Agreement DA-23-1, the substantive form of which is attached hereto as Exhibit "A". This Ordinance is adopted under the authority of the California Government Code Section 65868 et seq. ("Development Agreement Statute") and City Council finds that the Development Agreement substantially complies with the requirements of the Development Agreement Statute.

Section 5. The City Council hereby authorizes and directs the Mayor and City Clerk to execute the Development Agreement DA-23-1 on behalf of the City of Buena Park forthwith upon adoption of this Ordinance, substantially in the form attached hereto as Exhibit "A".

Section 6. The City Clerk is hereby directed to record this Ordinance, including the fully executed form of the Development Agreement with the Orange County Recorder no later than ten (10) days following the effective date of this Ordinance.

Section 7. The City Clerk shall certify to the passage of this Ordinance and shall cause the same to be published in the manner required by law.

PASSED AND ADOPTED this 26th day of March 2024, by the following called vote:

AYES: COUNCILMEMBERS: Brown, Traut, Ahn, Sonne

NOES: COUNCILMEMBERS: Castañeda,


ABSENT: COUNCILMEMBERS: None

ABSTAIN: COUNCILMEMBERS: None

ATTEST:

  
City Clerk



  
Mayor

I, Adria M. Jimenez, MMC, City Clerk of the City of Buena Park, California, hereby certify that the foregoing resolution was duly and regularly passed and adopted at a regular meeting of the City Council of the City of Buena Park, held this 26th day of March 2024.

  
City Clerk

EXHIBIT A – Draft Development Agreement

Record At The Request Of And When  
Recorded Mail To:

Adria M. Jimenez City Clerk  
6650 Beach Boulevard  
Post Office Box 5009  
Buena Park, California 90622

**DEVELOPMENT AGREEMENT NO. DA [\_\_\_\_\_]   
CONCERNING PROPERTY LOCATED AT 7860 BEACH BOULEVARD   
(APN 136-231-35), BUENA PARK, CALIFORNIA**

THIS DEVELOPMENT AGREEMENT (this “**Agreement**”) is dated for reference this 9th day of April, 2024 (“**Reference Date**”), and is entered into by and between KB ACQUISITIONS, LLC, a Nevada limited liability company (“**Developer**”), and the CITY OF BUENA PARK, a California municipal corporation (“**City**”).

**RECITALS**

A. City is the owner of certain real property located at 7860 Beach Boulevard, Buena Park, California (APN 136-231-35), as such real property is legally described in **Exhibit “A”** hereto (the “**Property**”).

B. By way of that certain Agreement for the Purchase And Sale of Real Property dated March 26, 2024 (“**Purchase Agreement**”), City has agreed to sell and Developer has agreed to buy the Property subject to, among other conditions precedent to the closing, Developer applying for and being issued by City all land use and zoning approvals needed to develop and use the Property as a hotel.

C. The Property is governed by the land use and development regulations of the Buena Park Entertainment Corridor Specific Plan (“**ECSP**”) and the Buena Park Zoning Code (“**Zoning Code**”), both of which allow a hotel use of the Property provided Developer enters into and City approves a development agreement under authority of California Government Code section 65865 *et. seq.* (the “**Development Agreement Law**”).

D. The Development Agreement Law authorizes cities, and any person with a legal or equitable interest in real property, to enter into binding a development agreement that prescribes the permissible uses and development controls for the subject property, and provides private property owners with vested rights to use and develop the subject property in accordance with the

land use polices, rules and regulations existing as of the date of the development agreement.

E. Developer has submitted and City has accepted an application for all land use and zoning approvals needed to develop and use the Property for the “Project” defined hereinbelow. In furtherance of their mutual interests and the benefits offered by the Development Agreement Law the Parties desire to enter into this development agreement pursuant to the Development Agreement Law granting Developer the vested right to use and develop the Property for the Project on the terms and conditions specified herein.

F. The City has duly satisfied all procedural and legal prerequisites to entering into this Agreement including:

1) The potential environmental impacts of the Project have been independently reviewed and evaluated by the City pursuant to the California Environmental Quality Act (Public Resources Code § 21000 *et seq.*, “CEQA”), and the City has determined the Project is Categorically Exempt from the provisions of CEQA pursuant to Section 15332 (Class 32 In-fill Exemption) because: the Project is consistent with the applicable general plan and specific plan designation, all applicable policies of those plans, and applicable zoning code regulations; the Property is located within City limits and is less than five acres; the Property was previously developed with a hotel and has no value as habitat for endangered, rare or threatened species; and the Project will not result in any significant effects related to traffic, noise, air quality or water quality and the site is already served by all required utilities and public services (“CEQA Determination”).

2) On February 28, 2024, the Planning Commission for the City of Buena Park conducted the duly noticed public hearing required by Government Code Section 65867 and thereafter adopted Resolution No. DA-23-1 to: (a) approve Developer’s application for a variance excepting the Project from certain development standards of the Zoning Code (“Variance”); (b) approve a Site Plan Review establishing the location of building(s) and associated improvements comprising the Project (“Site Plan Review”); and (c) recommending the City Council for the City of Buena Park (“City Council”) make the CEQA Determination and approve this Agreement.

(3) On March 26, 2024, the City Council conducted the duly noticed public hearing required by Government Code Section 65867, and after considering all public comment, testimony, evidence, and other matters presented at the hearing adopted Ordinance No. \_\_\_\_\_ making certain findings and approving this Agreement in the manner specified by law.

NOW, THEREFORE, City and Developer (at times herein individually a “Party” and jointly the “Parties”) agree as follows:

### **AGREEMENT**

1. **Definitions.** In addition to the terms defined in the Recitals, the capitalized terms and phrases used throughout this Agreement shall have the following meaning:

“Applicable Rules” is defined in Section 6.A.

“City Representative” is defined in Section 8.A

“Deed of Trust” is defined in Section 10.A.

“Effective Date” means the date of the recording of this Agreement in the Official Records of the County of Orange.

“Existing Standards” is defined in Section 6.B.

“Force Majeure” means: Acts of God; unusually severe weather; enemy action; civil disturbances; wars; terrorist acts; insurrection; riots; fire; floods; earthquakes; casualties; a local, state, or federal declaration of emergency based on an epidemic or pandemic including any quarantine or other health-related orders, directives, regulations, laws or other requirements implemented in response to such epidemic or pandemic; strikes, walkouts lockouts, and other labor difficulties; regional and enduring breakdown in communication facilities, electrical service, or wireless service; failure or inability to secure materials or labor by reason of priority or similar regulations or order of any governmental or regulatory body; or mediation, arbitration, litigation, or other administrative or judicial proceeding involving the Existing Standards or this Agreement.

“Lender” is defined in Section 10.A.

“Minor Change” is defined in Section 6.D.

“Permitted Delays” is defined in Section 9.

“Project” means and refers to development of the Property with an approximately 140-room extended stay hotel branded as a Hilton Home2Suites (or an equivalent Upper Midscale brand / chain based on the STR Chain Scales – North America and Caribbean, last updated February 10, 2018), and all associated amenities, landscaping, and other on and off-site improvements comprising the development that is described in Developer’s plans and specifications on file with City and dated November 17, 2023, and will be specifically described in the Project Entitlements and final building permits issued by City.

“Project Entitlements” means and refers cumulatively to the Variance, the Site Plan Review, the CEQA Determination, and this Agreement.

“Purchase Agreement” is defined in Recital B., a true and correct of which is on file with City’s Community Development Department located at 6650 Beach Boulevard, Buena Park, California 90622

“Reserved Powers” means the following specific City police powers statutorily excepted from this Agreement and which are instead reserved to the City, and include the power to enact regulations or take future discretionary actions after the Effective Date that may be in conflict

with the Applicable Rules but: (1) pertain to a change in the Permitted Use requested by Developer; (2) are reasonably necessary to protect the public health and safety, and is generally applicable on a Citywide basis; (3) are necessary to protect persons or property from dangerous or hazardous conditions which create a threat to the public health or safety or create a physical risk, so long as the City Council makes findings after a noticed public hearing that: identifies the dangerous or hazardous conditions requiring such regulations; explains why there are no commercially or economically reasonable alternatives to the regulation; and explains how such changes would alleviate the dangerous or hazardous condition; (4) are construction, engineering and design standards for private and public improvements that are applicable on a Citywide basis; or (5) are required to comply with state or federal laws and regulations (whether enacted previous or subsequent to the Effective Date).

“Schedule of Performance” is the outline of time and milestones for developing and opening of the Project that is set forth in Section 5.C of the Purchase Agreement.

“Subsequent Approvals” is defined in Section 6.C.

“Term” is defined in Section 5.

2. **Recitals Incorporated.** The introductory Recitals are true, correct, and made a material part of this Agreement.

3. **Binding Effect of Agreement.** As of the Effective Date and continuing for the entire Term, the conditions, terms and provisions of this Agreement are enforceable by the Parties as equitable servitudes affecting the Property, and the whole thereof, constituting covenants running with such Property pursuant to California law including, without limitation, Civil Code Section 1468. Each covenant in this Agreement to act or refrain from acting is for the benefit of or a burden upon the Property, and the whole thereof, run with such Property and shall be binding upon Developer and the successors and assigns of Developer during their respective ownerships of the Property, or any portion thereof. Each and every contract, deed or other instrument executed, covering or conveying the Project or any portion thereof shall conclusively be held to have been executed, delivered and accepted subject to the covenants, reservations and restrictions expressed in this Agreement, regardless of whether such covenants, reservations and restrictions are set forth in such contract, deed or other instrument.

4. **Relationship of Parties.** Each Party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement. No partnership, joint venture or other association of any kind is formed by this Agreement, and for purposes of this Agreement the only relationship between the Parties is that of a government entity regulating the development and use of private property.

5. **Term of Agreement.** The term of this Agreement shall commence on the Effective Date and shall continue in full force and effect expiring at 12:00 a.m. on the day that is ten (10) years after the Effective Date (“**Term**”); unless such Term is extended or earlier terminated in the manner



permitted by the Development Agreement Law. Notwithstanding the foregoing, so long as there are no material changes to the Project and Developer is not then in material breach of this Agreement the Term shall automatically renew and extend for one term of five (5) years without notice of demand by either Party.

**6. Development and Use of the Property.**

A. Applicable Rules. Developer shall have the vested right to develop and use the Property in the manner permitted by this Agreement, the Project Entitlements, and the Existing Standards (“**Applicable Rules**”); provided that Developer shall obtain any Subsequent Approvals required by governmental entities with jurisdiction over the Property or Project. Subject to City’s exercise of its Reserved Powers, the maximum height and size of the proposed buildings, parking requirements, setbacks, development standards, provisions for reservation or dedication of land for public purposes and location of public improvements, and the design, improvement, construction and other guidelines, standards and specifications applicable to the development and use of the Property shall be those set forth in the Project Entitlements. The payment of fees associated with the construction of the Project, including land use approvals, development fees, building permits, shall be pursuant to those fees in effect as of the Reference Date.

B. Existing Standards. Unless expressly provided otherwise in the Project Entitlements, all substantive and procedural requirements and provisions contained in City’s ordinances, specific plans, rules and regulations, including but not limited to the General Plan, ECSP, Municipal Code, or Zoning Code in effect on the Effective Date shall govern use and development of the Property (“**Existing Standards**”).

C. Subsequent Approvals. In addition to the Project Entitlements, certain other permits and approvals from City or other governmental agencies with jurisdiction over the Property will be necessary for Developer to construct and operate the Project on the Property including, without limitation: demolition permits, excavation permits, grading permits, building permits, sewer and water connection permits, utility connections, and/or certificates of occupancy (“**Subsequent Approvals**”). The conditions, terms, restrictions, and requirements associated with any Subsequent Approval shall be consistent with the Existing Standards except as otherwise provided in in the Project Entitlements. City shall in good faith review, consider, and make a final determination on any application from Developer for a Subsequent Approval in a manner that is consistent with the Project Entitlements and the Existing Standards. City shall not unreasonably delay or deny Developer’s application for any Subsequent Approval unless Developer is in material default of the Project Entitlements.

D. Minor Changes to Project. Upon written application of Developer to City, minor modifications and changes to the Project or Project Entitlements may be approved by the Director of Community Development pursuant to the interdepartmental review process set forth in of Section 19.128100 of the Zoning Code (“**Minor Changes**”). Minor Changes shall not be deemed to be an amendment to this Agreement under Government Code Section 65868, but any changes or modification to the Project or Project Entitlements other than Minor Changes shall require an amendment to this Agreement pursuant to Government Code Section 65868.

E. Changes in Applicable Rules.

1) Non-Application of Changes in Applicable Rules. The adoption of any subsequent applicable general or specific plan, zoning, subdivision, or building regulation after the Effective Date, or any change in, or addition to, the Applicable Rules that would, absent this Agreement, be applicable to the Property and that conflicts in any way with or is more restrictive than the Applicable Rules shall not be applied to the Property during the Term of this Agreement, unless such changes represent an exercise of the City's Reserved Powers.

2) Changes in Uniform Codes. Notwithstanding any provision of this Agreement to the contrary, the Property and Project shall be subject to changes occurring from time to time in the provisions of the City's building, fire, seismic, mechanical, plumbing electrical, or similar health and safety regulations which become applicable within the City's jurisdiction, including, but not limited to, the California Building Code and other similar or related uniform codes.

3) Changes Mandated by Federal or California Law. Changes or additions to the Applicable Rules after the Effective Date shall apply to the Project or Property if and to the extent mandated by applicable California or federal law or regulations to be applied. If either Party believes that such a change or addition exists, then the applicable Party shall provide the other Party with a copy of such law or regulation and a statement of the nature of the change and any responsive action required. In the event any such changes in law or regulation prevent or preclude compliance with one or more of the provisions of this Agreement, such provisions shall be modified or suspended, or performance thereof delayed, as may be necessary to comply with such changes. In the event that the application to the Project of any of the City's Reserved Powers, or any change in California or federal law or regulation, materially impact the financial viability of the Project as demonstrated by Developer based upon a showing of substantial evidence, then City and Developer agree to meet and negotiate potential modifications or revisions to this Agreement provided that any amendment (other than a Minor Change) or cancellation of this Agreement shall require compliance with Government Code Section 65868.

4) Future Discretionary Approvals. City shall not require Developer obtain any approvals or permits for the Project other than those permits or approvals that are required by the Applicable Rules or Reserved Powers. However, any subsequent discretionary approval initiated by Developer that change the uses, intensity, density, or building

height, or decreases the lot area, setbacks, yards, parking or other development standards permitted on the Property by the Project Entitlements shall be subject to the rules, regulations, ordinances and official policies of City then in effect.

5) Future Consistent Enactments. City may apply any and all new ordinances, rules, regulations, plans and specifications adopted after the Effective Date to the Property provided such new rules and regulations apply jurisdiction wide and do not conflict with the Existing Standards or Project Entitlements.

F. Timing of Development. With the exception for Permitted Delays, Developer shall commence, pursue with reasonable diligence, and complete construction of the Project in accordance with the Schedule of Performance established by the Purchase Agreement. Notwithstanding the foregoing, the Parties acknowledge that Developer cannot at this time predict when or the rate at which the Project will be developed. Developer may, in Developer's sole discretion, build the Project in phases, provided doing so is consistent with the Project Entitlements and Purchase Agreement. Decisions about the timing and phasing of construction depend upon numerous factors not all of which are within the control of Developer, such as market orientation and demand, availability of financing and competition. Because the California Supreme Court held in Pardee Construction Co. v. City of Camarillo, 37 Cal.3d 465 (1984), that the failure of the Parties therein to provide for the timing of development permitted a later adopted initiative restricting the timing of development and controlling the Parties' agreement, Developer and City acknowledge and provide for the right of Developer to develop the Project in an order and at a rate and times as Developer deems appropriate within the exercise of its sole and subjective business judgment, subject to any restrictions that may exist in the Project Entitlements or Purchase Agreement. Developer shall use its best efforts, in accordance with its own business judgment and taking into consideration market conditions and other economic factors influencing its business decision, to promptly commence construction of the Project after the Effective Date and proceed with construction uninterrupted until complete.

1) Expiration. This Agreement and Developer's vested right to proceed with construction of the Project in accordance with the Applicable Rules shall expire if: (a) construction of the Project is not commenced within six months of the Effective Date; or (b) if building permits expire at any time after issuance and before a final certificate of occupancy is issued for the Project.

2) Extensions. Developer may apply to City for an extension of the deadline to commence or complete construction of the Project prior to expiration of the original deadline. A first-time extension shall be granted by the Director of Community Development if the Director finds, in the exercise of reasonable discretion and based upon substantial evidence, that because of Permitted Delays the original deadline is infeasible or would create a hardship

on Developer. For any additional extensions, the Planning Commission, or the City Council on appeal, may in the exercise of reasonable discretion grant an extension (or extensions) of such original deadline with each extension not exceeding one year from the original deadline if the Planning Commission, or the City Council on appeal, finds based on a showing of substantial evidence that, due to Permitted Delays, the original deadline is infeasible or would create a hardship, and such extension would not be materially detrimental to the public health, safety, and welfare in light of the facts and circumstances existing at the time.

G. Permitted Use. The uses allowed on the Property, as well as the density and intensity of such uses, the maximum height and size of proposed buildings, and other terms and conditions applicable to the Property shall be those set forth in the Project Entitlements.

H. Architectural Quality. Developer shall develop the Project by means of materials, workmanship and overall design that will result in a product that is in accordance with the approved plans. The building materials, elevations, surfaces, design, and architectural styling of the Project shall be consistent with that of the Applicable Rules.

I. Public Improvements. Public improvements consisting of sidewalk and drive approaches, as set forth in the Project plans and specifications on file with City and dated November 17, 2023, 2024, shall be installed by the Developer as part of the Project. City shall reimburse Developer for all documented costs actually incurred by Developer up to the maximum sum of \$200,000.00. Developer shall comply with California labor and prevailing wage laws in completing said public improvements as a condition of reimbursement, and the terms, conditions, and Developer's receipt of such reimbursement shall be documented in a separate reimbursement agreement entered into by the Parties.

**7. Cooperation and Implementation by the Parties.** City agrees that it is bound to permit the use, intensity of use and density on the Property that are permitted by the Project Entitlements. The City hereby agrees that it will not unreasonably delay, withhold or unreasonably condition any future discretionary action or approval which may be issued by City in order for the Project to proceed, provided that Developer reasonably and satisfactorily complies with all preliminary procedures, actions, payments of fees, and criteria generally required of developers in the City. City further agrees to cooperate with Developer in Developer's endeavors to obtain permits and approvals as may be required from other governmental or quasi-governmental agencies having jurisdiction over the Property or portions thereof (such as, for example, without limitation, public utilities or utility districts and agencies having jurisdiction over transportation facilities and air quality issues), so long as the cooperation by City will not require City to incur any cost, liability or expense without adequate indemnity against or right of reimbursement therefor from Developer.

**8. Review of Developer's Compliance.**

A. Annual Reviews. City shall conduct annual reviews to determine whether

Developer is acting in good faith compliance with the provisions of this Agreement pursuant to Government Code Section 65865.1. The costs and expenses of each annual review conducted during the term of this Agreement shall be borne by the Party incurring the cost.

B. Special Reviews. In addition, the City Council may order a special periodic review of Developer's compliance with this Agreement at any time if it believes, on basis of substantial evidence, the Developer is in default of this Agreement. The cost of such special reviews shall be borne by City, unless such special review demonstrates that Developer is in default under the provisions of this Agreement after any notice and cure period hereunder. In such cases, Developer shall reimburse the City for all out of pocket third party costs incurred in conjunction with the special review.

C. Procedure for Review. The City Manager, or his or her designee ("**City Representative**"), shall conduct the reviews contemplated by this Section to ascertain whether Developer has reasonably complied in good faith with the material terms and conditions of this Agreement during the period for which the review is conducted. The City Representative shall give Developer notice that any such review has been commenced, and shall give Developer at least twenty (20) days after Developer's receipt of such notice to provide such information as Developer deems reasonably relevant to such review. In addition, Developer shall furnish such documents or other information as is reasonably requested by the City Representative. During the period of Construction, City must notify Developer of the date and time City would like to enter the construction site. City must obtain permission from the Developer and Developer's contractor to enter the site and must follow all required safety protocol when on the Property. To the extent City fails to abide by any safety protocol while on the Property for any reason, the City and any Indemnatee unconditionally waive Developer's duty to indemnify and defend the City and any Indemnatee for any injury, damage, or loss under this or any other agreement.

D. Result of Review.

1) Compliance. Following such a review, the City Representative shall issue to Developer an executed certificate of compliance covering the period of such review, unless the City finds and determines, on the basis of substantial evidence, that the Developer has not complied in good faith with the terms or conditions of the Agreement.

2) Noncompliance. If, following such a review, City Representative finds and determines, on the basis of substantial evidence, that Developer has not complied in good faith with the terms and conditions of the Agreement, the City Representative shall provide notice to Developer detailing such non-compliance. Upon receipt of such notice, Developer may commence to cure the stated non-compliance in accordance with the terms of this Agreement. If Developer fails to cure the non-compliance within 120 days after

receipt of such written notice (or such longer commercially reasonable period provided that Developer has commenced the cure and diligently pursues such cure) pursuant to the terms of this Agreement, City Representative shall notify the Planning Commission, which may recommend to City Council that the Agreement be terminated pursuant to the terms hereof. Developer shall have the ability to dispute any such claim of non-compliance or failure to cure at a public hearing prior to such termination.

3) Effect on Default Procedures. Nothing in this Section shall be interpreted to prevent City from providing Developer with a notice of default hereunder at any time, including any time other than during a periodic review under this Section.

9. **Permitted Delays.** Neither Party shall be deemed in default and performance shall be excused, where delays or defaults are caused unavoidably and beyond the reasonable control of the Party seeking the delay by a Force Majeure event (each a “**Permitted Delay**”). An extension of time for any such cause shall be for the period of the Permitted Delay and shall commence to run from the time of the commencement of the cause, if notice by the party claiming such extension is sent to the other party within sixty (60) days of the commencement of the cause. If notice is sent after such sixty (60) day period, then the extension shall commence to run no sooner than sixty (60) days prior to the giving of such notice. Times of performance under this Agreement may also be extended in writing by the mutual agreement of the City Manager and Developer. Developer’s inability or failure to obtain financing shall not be deemed to be a cause outside the reasonable control of the Developer and shall not be the basis for a Permitted Delay.

10. **Rights of Lenders Under this Agreement.**

A. Should Developer place or cause to be placed any encumbrance or lien on the Property (“**Deed of Trust**”), or any part thereof, the City acknowledges the beneficiary (“**Lender**”) of said Deed of Trust shall have the right at any time during the term of this Agreement and the Deed of Trust to:

- 1) Do any act or thing required of Developer under this Agreement, and any such act or thing done or performed by Lender shall be as effective as if done by Developer;
- 2) Realize on the security afforded by the Deed of Trust by exercising foreclosure proceedings or power of sale or other remedy afforded in law or in equity or by the security document evidencing the Deed of Trust;
- 3) Transfer, convey or assign the title of Developer to the Project to any purchaser at any foreclosure sale, whether the foreclosure sale be conducted pursuant to court order or pursuant to a power of sale contained in a Deed of Trust; and
- 4) Acquire and succeed to the interest of Developer by virtue of any

foreclosure sale, whether the foreclosure sale be conducted pursuant to a court order or pursuant to a power of sale contained in a Deed of Trust.

5) Should any Lender require or request an amendment of this Agreement with respect to the rights and remedies granted to a Lender in this Section 10, City hereby agrees to execute and deliver such an amendment so long as the proposed amendment does not materially and adversely affect the rights, powers, and remedies of the City with respect to a default by Developer hereunder.

B. **Notice to Lender.** City shall give written notice of any default or breach under this Agreement by Developer to Lender (if known by City) and afford Lender the opportunity after service of the notice to:

1) Cure the breach or default within thirty (30) days after service of said notice, where the default can be cured by the payment of money;

2) Cure the breach or default within thirty (30) days after service of said notice where the breach or default can be cured by something other than the payment of money and can be cured within that time; or

3) Cure the breach or default in such reasonable time as may be required where something other than payment of money is required to cure the breach or default and cannot be performed within thirty (30) days after said notice, provided that acts to cure the breach or default are commenced within a thirty (30) day period after service of said notice of default on Lender by City and are thereafter diligently continued by Lender.

C. **Action by Lender.** Notwithstanding any other provision of this Agreement, a Lender may forestall any action by City for a breach or default under the terms of this Agreement by Developer by commencing proceedings to foreclose its encumbrance or lien on the Project. The proceedings so commenced may be for foreclosure of the encumbrance by order of court or for foreclosure of the encumbrance under a power of sale contained in the instrument creating the encumbrance or lien. The proceedings shall not, however, forestall any such action by the City for the default or breach by Developer unless:

1) They are commenced within thirty (30) days after service on Developer of the notice described hereinabove;

2) They are, after having been commenced, diligently pursued in the manner required by law to completion; and

3) Lender keeps and performs all of the terms, covenants and conditions of this Agreement requiring the payment or expenditure of money by Developer until the foreclosure proceedings are complete or are discharged by

redemption, satisfaction or payment.

11. **Notices.** Any notice required to be given by the terms of this Agreement shall be provided by certified mail, return receipt requested, at the address of the respective parties as specified below or at any other such address as may be later specified by the parties hereto.

To City: City of Buena Park  
Buena Park City Hall  
ATTN: City Manager  
6650 Beach Boulevard  
Buena Park CA 90622

With Copy To: Christopher G. Cardinale, City Attorney  
ALVAREZ-GLASMAN & COLVIN  
13181 Crossroads Pwky North – Suite 400  
City of Industry, CA 91746

To Developer: C/o Kingsbarn Realty Capital, LLC  
1645 Village Center Circle, Suite 200  
Las Vegas, NV 89131  
ATTN: Anthony Hama  
With Copy to: General Counsel

12. **Assignment.** Developer's identity, experience, and capacity to complete the Project are important to City, and except as permitted by the Purchase Agreement, prior to issuance of a final certificate of occupancy for the Project Developer shall not assign or transfer this Agreement or Property, in whole or in part, without the advance written approval of City, which City may grant or deny in the exercise of its sole and independent discretion. Upon and after the issuance of a certificate of occupancy for the Project, Developer shall have the right to sell, mortgage, hypothecate, assign, or transfer the Site to any person or entity at any time. If this Agreement is then in effect, any such transfer shall be conditioned upon the Developer causing to be executed and delivering to the City a fully executed assignment and assumption agreement in a form attached in **Exhibit B** and shall provide the City with written notice of the effective date of a transfer of any right, title or interest in any portion of the Property within ten (10) days after such effective date. Upon the execution and delivery of the assignment and assumption agreement, Developer shall be released from any prospective liability or obligation under the Agreement with respect to those rights, duties, obligations or interests and real property so transferred. The written assumption by the assignee of all of the obligations of Developer under this Agreement pursuant to any such transfer shall relieve Developer, without any act or concurrence by the City, of its legal duty to perform those obligations except to the extent that Developer is in default with respect to any and all obligations at the time of the proposed transfer.

13. **Indemnification.** Except as expressly provided in this Agreement, Developer shall, defend, indemnify and hold City and its elected officials, officers, contractors serving as City officials, agents, and employees ("**Indemnitees**") harmless from liability for damage and/or claims for damage for personal injuries, including death, and claims for property damage, and with respect



to all other actions and liabilities under California or federal law for damages caused or alleged to have been caused by reason of Developer's activities in connection with Developer's exercise and enjoyment of rights arising out of this Agreement, and which may arise from the direct or indirect actions or inactions of Developer or of Developer's contractors, agents, employees or any other persons acting or failing to act on Developer's behalf. This defense and indemnity obligation includes payment of attorney's fees and all costs of litigation. City shall have the right to select counsel of its choice. The parties hereby agree to cooperate in defending such action. City will not voluntarily assist in any such third-party challenge or take any position adverse to the Developer in connection with such third-party challenge.

Notwithstanding the foregoing, Developer shall not be liable for, and shall not indemnify any Indemnitee(s) from any liability for damage and/or claims for damage for personal injuries, including death, and claims for property damage, and liabilities for damages to the extent caused by the intentional misconduct or gross negligence of such Indemnitee(s).

**14. Amendments.** This Agreement may be amended or canceled, in whole or in part, only by mutual written consent of the parties and then in the manner provided for in California Government Code § 65868, *et seq.*, or successor provisions thereto.

**15. Enforcement.** In the event of a default under the provisions of this Agreement by Developer, City shall give written notice to Developer (or its successor) by registered or certified mail addressed at the address stated in this Agreement. If such violation is not corrected to the reasonable satisfaction of City within thirty (30) days after such notice is given, or if not corrected within such reasonable time as may be required to cure the breach or default if said breach or default cannot be cured within thirty (30) days (provided that acts to cure the breach or default must be commenced within said thirty (30) days and must thereafter be diligently pursued by Developer), then City may, without further notice, declare a default under this Agreement and, upon any such declaration of default, City may bring any action necessary to specifically enforce the obligations of Developer growing out of the operation of this Agreement, apply to any court, state or federal, for injunctive relief against any violation by Developer of any provision of this Agreement, or apply for such other relief as may be appropriate. Before sending a notice of default in accordance with this, the party asserting that the other party has failed to perform or fulfill its obligations under this Agreement shall first attempt to meet and confer with the other Party to discuss the alleged failure and shall permit such Party a reasonable period, but not less than thirty (30) days, to respond to or cure such alleged failure.

A. Event of Default. Developer is in default under this Agreement upon the happening of one or more of the following events or conditions:

1) If a material warranty, representation or statement is made or furnished by Developer to City and is false or proved to have been false in any material respect when it was made;

2) If a finding and determination is made by City following an annual or special review, upon the basis of substantial

evidence, that Developer has not complied in good faith with any material terms and conditions of this Agreement, after notice and opportunity to cure as described in this Section 15 hereinabove; or

3) A breach by Developer of any of the provisions or terms of this Agreement, after notice and opportunity to cure as provided in this Section 15 above.

B. No Waiver of Remedies. City does not waive any claim of defect in performance by Developer if on periodic review City does not enforce this Agreement. With the exceptions of Permitted Delays, nonperformance by Developer shall not be excused because performance by Developer of the obligations herein contained would be unprofitable, difficult or expensive or because of a failure of any third party or entity, other than City. Subject to the limitations expressly set forth in this Agreement, all remedies at law or in equity which are not otherwise provided for in this Agreement are available to the Parties to pursue in the event that there is a breach of this Agreement. No waiver by City of any breach or default under this Agreement shall be deemed to be a waiver of any other subsequent breach thereof or default hereunder.

C. City Not Liable For Damages. Except for the payment of attorney's fees in accordance with Section 16.A. this Agreement, City shall not be liable in damages to the Developer, or to any assignee, transferee or any other person, unless caused by any intentional misconduct or gross negligence of City. Otherwise, the Parties agree that in the event of a breach of this Agreement, each of the Parties hereto may pursue the following: (a) specific performance; (b) suits for declaratory or injunctive relief; (c) suits for mandamus or special writs; or (d) cancellation of this Agreement. The Parties hereby warrant that each enters into this Agreement with the understanding that if the City defaults on its obligations under this Agreement due to an action taken by the electorate of the City in the exercise of the reserved powers of citizen initiative and referendum, this Agreement shall be modified or suspended to the extent required by California Government Code Section 65869.5 and the Developer's right to seek specific performance, a writ of mandate, or other mandatory relief shall be limited by such force as the action taken by the electorate may have in light of state law as determined by any court of competent jurisdiction, in which case the Developer's principal remedy shall lie in reformation of this Agreement.

## **16. Miscellaneous Terms.**

A. Attorneys' Fees. In any court proceedings arising from the enforcement or to interpret this Agreement, the prevailing party shall be entitled to recover its costs and reasonable attorneys' fees and experts' fees incurred during the proceeding (including appeals) as may be fixed within the sound discretion of the court.

B. Binding Effect. This Agreement shall bind, and the benefits and burdens hereof shall inure to, the respective Parties hereto and their legal representatives, executors, administrators, successors and assigns, wherever the context requires or admits.

C. Applicable Law and Venue. This Agreement shall be construed in accordance with and governed by the laws of the State of California. Venue for any action or litigation brought for breach or to enforce any provision of this Agreement shall be the Superior Court of the County of Orange, California.

D. Partial Invalidity. If any provisions of this Agreement is be deemed to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions hereof shall not in any way be affected or impaired thereby. In the event of any litigation challenging the effectiveness of this Agreement, or any portion hereof, this Agreement shall remain in full force and effect while such litigation, including any appellate review, is pending, unless otherwise ordered by the court.

E. Recordation. This Agreement shall be deposited into the escrow established by the Purchase Agreement within ten (10) business days following adoption of the Ordinance, and as instructed in the Purchase Agreement shall be recorded on the Property at the closing of said escrow as a condition precedent to the closing. Upon the expiration of the terms of this Agreement, upon the request of the Developer, City will execute and deliver to Developer, in recordable form, an instrument confirming that the provisions of this Agreement have expired.

F. Time of Essence. Time is of the essence in every provision hereof in which time is a factor.

G. Integrated Agreement. This Agreement consists of this Agreement together with all Exhibits attached hereto, and referenced documents, and all of the same are hereby incorporated herein by reference. The provisions of this Agreement shall govern over any inconsistent or conflicting provisions set forth in the Exhibits or incorporated documents, or in any other agreement between the parties. No representation or promise, verbal or written, not expressly set forth herein shall be binding or have any force or effect.

IN WITNESS WHEREOF, this Agreement has been executed by the parties and shall be effective on the Agreement Date set forth hereinabove.

CITY OF BUENA PARK,

a Municipal Corporation

Dated: \_\_\_\_\_

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

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

Adria M. Jimenez, City  
Clerk City of Buena Park

Approved as  
to form:

\_\_\_\_\_  
City Attorney  
[remaining signatures on following page]

By: \_\_\_\_\_  
(Developer)

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

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

**Exhibit A**  
**LEGAL DESCRIPTION**

Real property in the City of Buena Park, County of Orange, State of California, described as follows:

**PARCEL 1:**

THAT PORTION OF THE WEST HALF OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 2, IN TOWNSHIP 4 SOUTH, RANGE 11 WEST, IN THE RANCHO LOS COYOTES, AS SHOWN ON MAP THEREOF RECORDED IN BOOK 51, PAGE 11 OF MISCELLANEOUS MAPS, RECORDS OF SAID ORANGE COUNTY, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF THE LAND DESCRIBED AS PARCEL 1 IN THE DEED TO MT. SPINDLE, AND OTHERS, RECORDED MAY 01, 1961 IN BOOK 5707, PAGE 855 OF OFFICIAL RECORDS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, THENCE NORTH 89° 42' 22" EAST 300 FEET; THENCE NORTH 0° 12' 50" WEST 45 FEET, THENCE 89° 42' 22" EAST 100 FEET TO THE WESTERLY CORNER OF THE LAND DESCRIBED IN THE DEED TO M.T. SPINDLER RECORDED JULY 13, 1961 IN BOOK 5783, PAGE 318 OF OFFICIAL RECORDS IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, THENCE NORTH 89° 42' 22" EAST 20 FEET TO THE NORTHEAST CORNER OF LAST SAID SPINDLER LAND; THENCE SOUTH 0° 12' 50" EAST 125 FEET ALONG THE EAST LINE OF LAST SAID LAND OF SPINDLER AND THE EAST LINE OF SAID LAND OF SPINDLER RECORDED MAY 01, 1961 TO THE SOUTHEAST CORNER OF SAID SPINDLER LAND RECORDED MAY 01, 1961, SAID POINT BEING ALSO THE NORTHEAST CORNER OF THE LAND DESCRIBED AS PARCEL 2 IN SAID DEED TO SPINDLER RECORDED MAY 01, 1961; THENCE SOUTH 89° 42' 22" WEST 420 FEET TO THE SOUTHWEST CORNER OF SAID PARCEL 1; THENCE NORTH 0° 12' 50" WEST 80 FEET TO THE POINT OF BEGINNING.

EXCEPT THEREFROM THAT PORTION CONVEYED TO THE STATE OF CALIFORNIA BY A DEED RECORDED AUGUST 27, 1998 AS INSTRUMENT NO. 98-570962 OF OFFICIAL RECORDS.

**PARCEL 2:**

THE SOUTHERLY 60 FEET OF THE WESTERLY 499.70 FEET OF THE NORTHERLY 585 FEET OF THE WEST HALF OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 2, IN TOWNSHIP 4 SOUTH, RANGE 11 WEST, IN THE RANCHO LOS COYOTES, AS SHOWN ON A MAP THEREOF RECORDED IN BOOK 51, PAGE 11 OF MISCELLANEOUS MAPS, RECORDS OF SAID ORANGE COUNTY.

EXCEPT THE WESTERLY 80 FEET THEREOF.

EXCEPT THEREFROM THAT PORTION CONVEYED TO THE STATE OF CALIFORNIA BY A DEED RECORDED AUGUST 27, 1998 AS INSTRUMENT NO. 98570962 OF OFFICIAL RECORDS.

APN: 136-231-35

**Exhibit B**

**FORM OF ASSIGNMENT AND ASSUMPTION AGREEMENT**

RECORDING REQUESTED BY  
CITY CLERK  
OF THE CITY OF BUENA PARK  
(Exempt from Recording Fees  
Pursuant to Government Code  
Section 27383)  
AND WHEN RECORDED MAIL TO:

**ASSIGNMENT AND ASSUMPTION AGREEMENT  
RELATIVE TO f FOR [\_\_\_\_\_]**

THIS ASSIGNMENT AND ASSUMPTION AGREEMENT (hereinafter, the "Assignment") is entered into this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between \_\_\_\_\_, a \_\_\_\_\_ ("Assignor") and \_\_\_\_\_, a \_\_\_\_\_ ("Assignee").

**RECITALS**

A. \_\_\_\_\_, a \_\_\_\_\_ and the City of Buena Park, a California charter city and municipal corporation of the State of California (the "City"), entered into that certain Development Agreement (the "Agreement") dated as of \_\_\_\_\_, 20\_\_ for reference purposes, with respect to certain real property owned by Assignor, as such property is more particularly described in the Agreement (the "Property"). The Agreement was recorded in the Official Records of the Orange County on \_\_\_\_\_ as Document No. \_\_\_\_\_.

B. The Agreement provides that, subject to the terms and requirements set forth therein, Developer (Assignor) has the right to: (i) transfer all or a portion of the Property, (ii) assign all of its rights, title, interest and obligations under the Agreement to a transferee with respect to the portions of the Property transferred to the transferee, and (iii) upon the execution and delivery of an approved Assignment and Assumption Agreement, to be released from any prospective liability or obligation under the Agreement with respect to those rights, duties, obligations or interests and real property so Transferred, except as otherwise provided in the Agreement.

C. Assignor intends to convey certain real property as more particularly identified and described on Exhibit A attached hereto (hereafter the "Transferred Property") to Assignee. The Transferred Property is subject to the Agreement.

D. Assignor desires to assign and Assignee desires to assume Assignor's right, title, interest, burdens and obligations under the Agreement with respect to and as related to the Transferred Property, as more particularly described below.

## ASSIGNMENT AND ASSUMPTION

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor and Assignee hereby agree as follows:

1. Defined Terms. Initially capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Agreement.

2. Assignment of Agreement. Assignor hereby assigns to Assignee, effective as of the later of (i) Assignor's conveyance of the Transferred Property to Assignee or (ii) the date on which City receives a copy of the fully executed Assignment and Assumption Agreement, all of the rights, title, interest, burdens and obligations of Assignor under the Agreement with respect to the Transferred Property (the "Assigned and Assumed Obligations"). Assignor retains all the rights, title, interest, burdens and obligations under the Agreement with respect to (i) the Transferred Property that are not Assumed and Assigned Obligations and (ii) all other portions of the Project Site owned by Assignor.

3. Assumption of Development Agreement. Assignee hereby assumes, effective as of Assignor's conveyance of the Transferred Property to Assignee, all of the Assigned and Assumed Obligations with respect to the Transferred Property and agrees to observe and fully perform, and to be subject to, all of the Assumed and Assigned Obligations. The parties intend that, upon the execution of this Assignment and conveyance of the Transferred Property to Assignee, Assignee shall become the "Owner" under the Agreement with respect to the Transferred Property and the Assigned and Assumed Obligations.

4. Reaffirmation of Indemnifications. Assignee hereby consents to and expressly reaffirms any and all indemnifications of the City set forth in the Agreement, including without limitation Section \_\_\_\_ of the Agreement.

5. Binding on Successors. All of the covenants, terms and conditions set forth herein shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

6. Notices. The notice address for Assignee under Section \_\_\_\_ of the Agreement shall be:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

With copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



Attn: \_\_\_\_\_

7. Counterparts. This Assignment may be executed in as many counterparts as may be deemed necessary and convenient, and by the different parties hereto on separate counterparts, each of which, when so executed, shall be deemed an original, but all such counterparts shall constitute one and the same instrument.

8. Governing Law. This Assignment and the legal relations of the parties hereto shall be governed by and construed and enforced in accordance with the laws of the State of California, without regard to its principles of conflicts of law.

IN WITNESS HEREOF, the parties hereto have executed this Assignment as of the day and year first above written.

**ASSIGNOR:**

[insert signature block]

**ASSIGNEE:**

[insert signature block]