

FIRST AMENDMENT TO 12th & OREAD TAX INCREMENT FINANCING DISTRICT REDEVELOPMENT AGREEMENT

THIS AMENDMENT is made and entered into by and between the **CITY OF LAWRENCE, KANSAS**, a municipal corporation duly organized and existing under the laws of the State of Kansas as a city of the first class (the “**City**”), and **OREAD INN, L.C.**, a limited liability company organized and existing under the laws of the State of Kansas (the “**Developer**,” and together with the City, the “**Parties**”), and is dated as of _____, 2017 (“the **Effective Date**”).

RECITALS

WHEREAS, on April 8, 2008, the Parties entered into the 12th & Oread Tax Increment Financing District Redevelopment Agreement (the “**Agreement**”); and

WHEREAS, a dispute has arisen regarding reimbursements made under the Agreement and the Parties desire to amend the Agreement in accordance with **Section 10.04** thereof; and

WHEREAS, in accordance with **Section 10.04** of the Agreement, the parties agree to enter into this First Amendment to 12th & Oread Tax Increment Financing District Development Agreement (the “**Amendment**”), which Amendment shall be affixed to the Agreement as an addendum and which shall hereby amend the Agreement.

NOW, THEREFORE, in light of the mutual promises and obligations contained herein, and in exchange for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties, the parties agree to amend the Agreement as follows:

TERMS

1. Unless specifically amended herein, all terms and conditions of the Agreement shall remain in full force and effect. All references herein to “the Agreement,” “this Agreement,” or “the Agreement, as amended,” shall be to the Agreement, as amended herein. Additionally, all references herein to sections, exhibits, or other terms, shall, unless specifically stated otherwise, be to sections, exhibits, and other terms of the Agreement, as amended herein.
2. **Section 1.02, “Definitions of Words and Terms,”** of the Agreement is hereby amended as follows:

“**Developer Representative**” means one of the co-managers of the Developer, who shall act in behalf of the Developer in matters relating to the Agreement, as evidenced by a written certificate furnished to the City containing the specimen signature of such person and signed in behalf of the Developer. During the term that the City is obligated to make reimbursements to the Developer, the City Manager shall have the right to approve the person selected as Developer Representative and Thomas Fritzel shall not serve nor be designated as Developer Representative.

“Fritzel Affiliate” means any business, corporation, limited liability company, partnership, or other entity in which Thomas Fritzel or his wife is an owner, manager, member, shareholder, partner, investor, or in which he or his wife has any other type of ownership or management interest.

3. **Section 3.02, “City’s Obligation to Reimburse Developer,”** of the Agreement is hereby amended as follows:

Section 3.02. City’s Obligation to Reimburse Developer.

A. **Obligation to Reimburse.** Subject to the terms of this Agreement and the conditions in this Section, the City agrees, solely and exclusively from Incremental Tax Revenues and TDD Sales Tax, to reimburse Developer for Redevelopment Project Costs and TDD Costs in a total amount not to exceed \$8,500,000 plus interest at Developer's actual borrowing rate (but not to exceed the WSJ Prime Rate plus 1%); provided however that once the Developer has been reimbursed \$5,750,000 plus interest, then the amount of Incremental Tax Revenues available for reimbursement will be reduced to 50% of Real Property Tax Revenues and 50% of Sales Tax Revenues plus 100% of the TDD Sales Tax. Developer may be reimbursed for Redevelopment Project Costs from the Tax Increment Fund by the City as funds are collected in the Tax Increment Fund (the “Pay As You Go” method, as defined in **Section 6.04**). The Parties agree that such reimbursement shall be made only on a Pay As You Go basis solely from Incremental Tax Revenues and TDD Sales Tax. The City shall have no obligation to reimburse Developer until funds are available in the Tax Increment Fund. Nothing in this Agreement shall obligate the City to reimburse Developer for any cost that is not a "Redevelopment Project Cost" as defined by the Act or a cost of the project under the TDD Act.

B. **Source of Reimbursement.** The City shall make payments from the Tax Increment Fund on a Pay As You Go basis in the order of priority set forth in **Section 6.02**.

4. **Section 5.01, “Tenants and Land Use Restrictions,”** of the Agreement is hereby amended as follows:

Section 5.01. Tenants, Other Occupants, and Land Use Restrictions. At all times while this Agreement is in effect”

A. **Conformance with Project Plan.** The Project Area shall be developed, and the Project constructed, in accordance with this Agreement and the Project Plan submitted by the Developer and approved by the City. No "substantial changes," as defined by K.S.A. 12-1770a(t), shall be made to the Project except as may be mutually agreed upon, in writing, between the Developer and the City and as provided in the Act.

B. **Tenants.** Prior to leasing, subleasing, renting, or letting any property within the Redevelopment District to any proposed commercial tenant, the Developer or any agent of the Developer shall provide to the City Manager, in writing, the name of the

proposed commercial tenant and the names of any persons or other entities, if any, who have an ownership interest in the proposed commercial tenant. In no case shall the Developer permit a Fritzel Affiliate to be located within the Redevelopment District without the prior written consent of the City.

C. Other Occupants. Prior to transferring any property rights or interests or occupancy rights or interests in space within the Redevelopment District for commercial use, whether by sale, assignation, let, or other conveyance, to any corporation, company, partnership, person or other entity that would occupy said property, the Developer shall provide to the City Manager, in writing of the name of the proposed commercial occupant and the names of any persons or other entities, if any, who have an ownership interest in the proposed commercial occupant. In no case shall the Developer permit a Fritzel Affiliate to be located within the Redevelopment District without the prior written consent of the City Manager.

~~D.B.~~ Land Use Restrictions. The types of land uses set forth in **Exhibit F** hereto are prohibited within the Redevelopment District, unless approved in writing by the City Manager prior to the execution of a letter of intent, lease, or prior to the sale of land. Additionally, all wholesale, storage, and distribution uses, as that term is defined in the City Code, as well as all warehousing, wholesale, or procurement uses shall be prohibited within the Redevelopment District.

5. **Section 5.05, “Sales Tax Information,”** of the Agreement is hereby amended as follows:

Section 5.05. Sales Tax Information.

A. The Developer agrees to provide the City Manager written notice of all commercial tenants in the Redevelopment District on November 1 of each year and at all other times upon the written request of the City Manager.

B. During the term that the City is obligated to make reimbursements to Developer under this Agreement, as amended, the Developer agrees that its books, records, invoices, and other documents, as may reasonably be necessary for an effective audit, shall be made available to the City on November 1 of each year for inspection and examination for the purpose of verifying the accuracy of the Developer’s monthly sales tax returns. Said annual audit shall be performed by the City, or its agent, and all reasonable costs associated with any such audit shall be assessed to and paid by the Developer.

C. During the term that the City is obligated to make reimbursements to Developer under this Agreement, as amended, the Developer agrees to cause all commercial assignees, purchasers, tenants, subtenants, or any other entity acquiring any property rights or interest or occupancy rights or interests in the Redevelopment District to be obligated by written contract (lease agreement or other enforceable written agreement) to:

1. provide to the City, simultaneously with submission to the Kansas Department of Revenue, the monthly sales tax returns for their facilities in the Redevelopment District;

2. retain, for a minimum of five (5) years, all books, records, invoices, and other documents, as may reasonably be necessary for an effective audit of their monthly sales tax returns; and

3. make available for inspection by the City, or its agent, on November 1 of each year – or upon the written request of the City at other times – all books, records, invoices, and other documents as may reasonably be necessary for an effective sales tax audit, the reasonable costs of which shall be borne by the Developer.

During the term that the City is obligated to make reimbursements to Developer under this Agreement, as amended, the Developer hereby agrees that each such written contract or agreement with such third parties shall provide that the City is an intended third-party beneficiary of the agreement and that the City has a separate and independent right to enforce the agreement directly against the commercial assignee, purchaser, tenant, subtenant, or other entity acquiring property interests or rights or occupancy interests or rights within the Redevelopment District.

D. To the extent that it may legally do so, information obtained pursuant to this **Section 5.05** shall be kept confidential by the City in accordance with K.S.A. 79-3657, as amended. In furtherance of maintaining the confidentiality of the information provided in this **Section 5.05**, the City shall take all reasonable steps necessary to ensure that such information is kept confidential.

E. The Developer agrees to use its best efforts to obtain waivers, consenting to the release of aggregate Sales Tax Revenues generated within the Redevelopment District from all commercial assignees, purchasers, tenants, subtenants, or any other entity acquiring property or occupancy rights within the Redevelopment District.

6. **ARTICLE VI, “REIMBURSEMENT OF REDEVELOPMENT PROJECT COSTS; TAX INCREMENT FINANCING,”** of the Agreement is amended by adding the following:

Section 6.06. Annual Certification. During the term that the City is obligated to make reimbursements to Developer under this Agreement, as amended, on November 1 of each year, the Developer shall certify to the City in writing, under penalty of law, that its sales tax returns for the preceding year are true and materially accurate and that all reimbursement made hereunder are materially accurate and due and owing to the Developer -- as the result of its own sales tax returns -- under the Agreement, as amended.

7. **Section 7.02, “Corporate Reorganization; Assignment or Transfer to Related Party,”** of the Agreement is hereby deleted in its entirety.

8. **Section 7.03. Prohibition Against Transfer of the Redevelopment District, the Buildings or Structures Therein,**” of the Agreement is amended as follows:

Section 7.02. Prohibition Against Transfer of the Redevelopment District, the Buildings or Structures Therein. The Developer shall not, except as permitted by this Agreement and in accordance with the Act, without prior written approval of the City Manager, which shall not be unreasonably withheld, make any total or partial sale, transfer, conveyance, assignment or lease of the Oread Site or the Oread Inn except as permitted by this Agreement. This prohibition shall not be deemed to prevent the granting of temporary or permanent easements or permits to facilitate the development of the Redevelopment District or to prohibit or restrict the leasing of any part or parts of a building, structure or land for a term commencing on completion.

9. **ARTICLE VII, “ASSIGNMENT; TRANSFER,”** of the Agreement is amended by adding the following:

Section 7.03. Prohibition Against Transfer of Interests in Developer. The Developer recognizes the importance of the Project to the general welfare of the community and that the identity of the Developer and its qualifications are critical to the City in entering into and maintaining this Agreement, as amended, particularly in view of the public incentives that have been or will be made available for the purpose of making such Project and Public Improvements possible. The City considers that a transfer of the ownership in the Developer or of a substantial part thereof, or any other act transaction involving or resulting in significant change in the ownership of or with respect to the parties in control of the Developer or the degree thereof, is for practical purposes a transfer or disposition of the Project. The Developer recognizes that it is because of such qualifications and identity that the City is entering into this Agreement, as amended, with Developer, and, in so doing, the City is relying on the obligations of Developer and not some other person or entity for the faithful performance of all undertakings and covenants to be performed by the Developer hereunder.

Except as may be permitted in **Section 7.05**, without the prior written approval of the City Manager (which approval shall not be unreasonably withheld) the Developer agrees, for itself and all successors in interest, that there shall be no transfer or assignment of: (1) any equity interest in the Developer, nor (2) any direct or indirect change in control of the Developer as it exists on the date of the Amendment, whether by changes in capitalization, sale of assets, liabilities, merger, or otherwise.

Section 7.04. Prohibition of Transfer of Agreement. The Developer further agrees, for itself, its agents, and its representatives, that, except as may be permitted in **Section 7.05**, the Developer will not make or create, or suffer to be made or created, any assignment or other transfer of its interests in this Agreement, amended, without the prior written approval of the City Manager, which approval shall not unreasonably be withheld. Any transfer in violation of this Agreement, as amended, shall be deemed to be a Default by Developer and shall be null and void. Such Default shall entitle the City to seek all available remedies under the Agreement, as amended, including the right to terminate the

agreement, and all other remedies available under the Agreement, as amended, and available by law.

Section 7.05. Consent to Permitted Transfers. Notwithstanding anything herein to the contrary, the City hereby consents, without the necessity of further approvals from any entity, to the following Transfers each hereinafter a "Permitted Transfer":

A. A mortgage or related security interest granted by the Developer to a mortgagee;

B. Transfer of easements or dedications of property as may be required by the City or for other governmental approvals, or as permitted in **Section 7.02**, *supra*;

C. Transfer of residential condominium units within the Oread Inn;

D. Transfer to additional development or ownership entities to replace or to be a joint venture with Developer for the purpose of estate planning; provided that the current principals of the Developer (Thomas Fritzel, Timothy Fritzel, Andy Fritzel, and Todd Sutherland and their lineal descendants) own not less than 51% of any new or restructured company (a "**Related Entity**"). Any assignment or transfer to a Related Entity shall be automatically permitted by the City upon receipt by the City of the documentation described in Section 7.01(A) of the Agreement, as amended; or

E. Transfers of membership interest in Developer among existing members, immediate family members of such members, or trusts created for the sole benefit of such member or family members, if such transfers are made for estate planning purposes or occur as the result of the death of a member (*e.g.*, as part of probate proceeding or intestate succession) and do not result in a change in the controlling interest in Developer; and substitution or replacement of the trustee of any such trust with a trustee who is an immediate family member of the member, if such substitution or replacement is made for estate planning purposes (or the implementation thereof).

Section 7.06. Information as to Ownership of Developer. In order to assist in the effectuation of the purpose of this Article VII, the Developer represents that the certificate attached to this Amendment as **Exhibit 1** is an incumbency certificate of Developer as of the date of this Amendment, subscribed and sworn to by a manager or authorized member of the Developer, setting forth the name(s) and address(es) of all entities owning at least a 10% interest in the Developer.

A. Subject to **Section 7.06(C)**, *infra*, on November 1 of each year, the Developer will update the incumbency certificate and keep **Exhibit 1** current.

B. The Developer will immediately notify the City in writing of any and all changes whatsoever in the ownership of the Developer, or with respect to the identity of the parties in control of the Developer.

C. The Developer shall, at such time or times as the City may request, furnish the City with a complete statement subscribed and sworn to by a managing member of the Developer, setting forth the names of all of managing members or other owners of equity interests of Developer and the extent of their respective holdings. To the extent that it may legally do so, information obtained pursuant to **Section 7.06(C)** shall be kept confidential by the City. In furtherance of maintaining the confidentiality of the information provided under **Section 7.06(C)**, the City shall take all reasonable steps necessary to ensure that such information is kept confidential.

10. **Section 10.12, “Notice,”** of the Agreement is hereby amended as follows:

Section 10.12. Notice. All notices and request required pursuant to this Agreement shall be sent as follows:

To the City:

City Clerk
City Hall
Box 708
Lawrence, Kansas 66044-0708

With a copy to:

Toni Ramirez Wheeler
City Attorney
City Hall
Box 708
Lawrence, Kansas 66044-0708

and

Gary A. Anderson
Gilmore & Bell, P.C.
2405 Grand Blvd., Suite 1100
Kansas City, Missouri 64108

To the Developer:

Oread Inn, L.C.
643 Massachusetts Street
Suite 300
Lawrence, Kansas 66044

With a copy to:

Barber Emerson, L.C.
1211 Massachusetts Street
P.O. Box 667
Lawrence, Kansas 66044