

ORDINANCE NO.: 2019-061

*Authorizing the City Manager to execute an Air Rights Development Contract
between the City of Columbia and Breakwater, LLC*

BE IT ORDAINED by the Mayor and Council this 6th day of August, 2019, that the City Manager is hereby authorized to execute the attached Air Rights Development Contract between Breakwater, LLC and the City of Columbia, or on a form approved by the City Attorney, for use of the air space over the Lady Street Parking Deck for development of a fully-taxable, hotel.

Requested by:

Assistant City Manager Gentry



Mayor

Approved by:




City Manager

Approved as to form:



City Attorney

ATTEST:



City Clerk

Introduced: 7/16/2019
Final Reading: 8/6/2019

ORIGINAL
STAMPED IN RED

**AIR RIGHTS DEVELOPMENT AGREEMENT
for the Lady Street Parking Deck
(ORDINANCE NO.: 2019-061)**

This Air Rights Development Agreement ("Agreement") is made and entered into between Breakwater, LLC and its permitted assigns ("Developer"), and the City of Columbia, South Carolina ("City"), as of the date of the last signature hereinbelow ("Effective Date"); and,

WHEREAS, the City issued a Request for Proposals regarding the potential to develop the air space over Lady Street Parking Deck (the "Parking Deck"); and,

WHEREAS, pursuant to its Procurement Code, the City subsequently issued a Request for Proposals to develop such air space, which included the potential grant of air rights as an inducement to build a fully taxable development; and,

WHEREAS, the City recognizes that the development of such air space is an opportunity to bring property that is currently not subject to *ad valorem* real property tax back on the tax rolls for the benefit of any applicable taxing entities (including the City, Richland County, and School District No. 1 of Richland County, South Carolina); and,

WHEREAS, the City desires that its Central Business District, Downtown, and Vista neighborhoods can and should be developed in accordance with the recommendations of the entire Midlands Community that were brought about and summarized by the Urban Land Institute's Midlands Reality Check; and,

WHEREAS, the City has selected Developer as the successful respondent to the Request for Proposal because of Developer's commitment to develop a hotel project in the air space above the Parking Deck as further described in this Agreement (the "Hotel") and the Developer's vision that the entire Project serve as an economic development impetus for the City; and,

WHEREAS, the Parties may also determine to develop at least one but not more than three additional levels of parking above the existing Parking Deck ("Additional Parking", together with the Hotel, shall be known as the "Project"), which shall be determined by mutual agreement during the due diligence processes set forth below; and,

WHEREAS, this Agreement is being entered into between the City and the Developer for the purposes of providing assurances (a) to the Developer so that the Developer (1) may, at the Developer's election, expend funds to initiate physical inspections, a review of operational interconnections between the Parking Deck and the Project, structural engineering and soils engineering studies, and architectural work on the Parking Deck; and (2) may, at the Developer's election, begin detailed engineering and architectural work to have the Project built upon it, in order to determine the structural, architectural, and financial feasibility of constructing the Hotel on the Parking Deck; and (b) to protect the City through indemnification and insurance and the City's ability to investigate the feasibility, capacity, and bond covenant compliance in connection with the transfer of air rights in connection with the Parking Deck and any proposed parking needs of the Developer, as further described in herein; and,

WHEREAS, the Parties desire to memorialize their respective contributions and commitments in this Agreement in order to ensure the Project moves forward expeditiously and in good faith;

NOW THEREFORE, in consideration of the mutual covenants set forth in this Agreement, and other good and valuable consideration, including but not limited to, the potential economic benefits to the City and the Developer by entering into this Agreement, and to encourage a well-planned and well-executed Project by the Developer, the City and Developer agree as follows:

I. EXCLUSIVE DEVELOPMENT RIGHTS; TERM

Upon the mutual signing of this Agreement, Developer shall have the exclusive right to develop the air space above the Parking Deck and such exclusivity shall continue for two (2) years following the Effective Date (defined below). Such exclusivity shall continue in effect so long as the Developer satisfies the following development milestones:

1. Within ninety (90) days after the Effective Date, the Developer shall have commenced the Initial Due Diligence, as defined in Article II below. Upon completion of the Initial Due Diligence, Developer will notify the City of its desire to proceed with the Project. The City shall have access to Developer's Initial Due Diligence materials and findings.
2. Upon completion of its financial due diligence, Developer will notify the City of its desire to proceed with the Project.
3. Within fifteen (15) months after the first Effective Date, the Developer shall have submitted necessary applications for permitting and any other related approvals required for the Project.
4. Within twenty-four (24) months after the first Effective Date, the Developer shall have commenced the construction of the Project.

The time periods under I.3. and I.4, above, shall be automatically extended during the City's negotiations with the Central Midlands Regional Transit Authority ("COMET") and the Federal Transit Administration ("FTA") regarding the City's proposed removal of the gated transit stop on Assembly Street adjacent to the Parking Deck ("Transit Stop"). Such automatic extension of the time periods set forth above shall cease upon the City's written agreement with the COMET and the FTA to remove the Transit Stop such that it will be made available to the Developer for redevelopment as part of the Project. Developer recognizes that a bus stop for the COMET may continue to be located somewhere in the back of Assembly street between Gervais and Lady Streets, but no such stop will impair ingress or egress to the Project.

II. INITIAL DUE DILIGENCE; ACCESS

Developer shall have immediate access to the Parking Deck to, at its election, conduct physical inspections, structural and soil engineering studies, and other engineering work, in order to determine the initial feasibility and best methods of constructing the Project ("Initial Due Diligence"). Developer need not initiate any Initial Due Diligence prior to the Effective Date, but may do so prior to Effective Date at its election.

All such Initial Due Diligence shall be completed at the Developer's sole cost and at no cost to the City. If the Initial Due Diligence requires potentially intrusive testing such as core drilling, Swiss hammer testing or other concrete hardness testing, such testing shall not occur without prior notification of the City by the Developer and such tests shall be conducted in a manner to minimize any interference with the City's operation of the Parking Deck. In the event that a level or an entire garage needs to be closed to conduct the Initial Due Diligence, such Diligence shall occur on a weekend, overnight, or at another time approved by and coordinated with City Parking Staff, in order to minimize the disruption to parking operations. In the event that access to an individual space needs to be restricted, a minimum of seventy-two (72) hour notice shall be required in order to allow the City to notify the pertinent parties of the restriction and such restriction shall be minimized to the extent possible.

III. CONDITIONS PRECEDENT FOR TRANSFER OF AIR RIGHTS

After the completion of Initial Due Diligence, Developer shall notify the City if there are plans to proceed forward with the project. the City and Developer shall progress as follows:

1. Developer will immediately proceed to comprehensively assess the structural, architectural, and economic feasibility of constructing the Project, at Developer's sole cost.
2. Upon the successful determination of feasibility for the Project based on the expert opinion of independent professionals and Developer's internal financial studies, Developer will begin the detailed design/development stage of the Project and progress to detailed planning and regulatory review by the City.
3. Developer will proceed through standard City permitting and Design/Development Review Commission reviews and approvals for the Project, and any required structural improvements, alterations, or upgrades to the Parking Deck (to be paid for by Developer), as applicable, as well as City Building Department study and review based on the construction methodology chosen by Developer.

4. Upon completion of appropriate governmental requirements, such as Planning and Development Department and Utilities and Engineering Department review and approval, and Developer's payment of all building permit and tap fees, and Developer's receipt of a construction permit, and upon payment of all other applicable fees and licenses, the City will segment the air rights via the recording of a Deed or Declaration, and will convey the air rights to Developer, all as set forth more fully below.

Notwithstanding anything herein to the contrary, the entering into this Agreement, the Declaration or Deed, or other instruments by the City pursuant hereto shall not be deemed a waiver of or consent to any permitting, zoning, or other matter over which the City has jurisdiction in a governmental capacity.

IV. DECLARATION; DEED

City and Developer shall work together to draft a template air rights easement agreement ("Declaration") or air rights deed ("Deed") sufficient to provide a title insurable and financeable legal structure for development. City and Developer understand and agree that adjustments to the Declaration or Deed will be made to accommodate site-specific matters.

City and Developer shall cooperate to define in detail the easements necessary to provide access and support to, and to construct and operate elevators, utility connections, pedestrian and vehicular ingress and egress, and structural support additions to the Parking Deck. Except for any temporary construction easements, which may be documented in a separate instrument, such easements shall be created in the Declaration or Deed.

V. PARKING LICENSE AGREEMENT

City and Developer shall work together to draft a parking license agreement ("License Agreement") associated with the project. The License Agreement will, among other things, address parking needs of the Developer's Hotel Project, as well as accommodate additional public parking within the Parking Deck

The number of parking spaces required to support the project will be determined pursuant to City code or an exemption granted thereto.

Notwithstanding anything herein to the contrary, the City has determined that the Parking Deck does not have the capacity (e.g., number of spaces available) or financial feasibility to serve any or all of the needs of the Hotel contemplated hereby. As of the Effective Date, the City has made no commitment to the Developer to provide existing parking within the Parking Deck or at any location within its parking system and, until the City has executed a License Agreement for the Project it shall have no liability to Developer and any funds and/or time spent by Developer shall be at Developer's risk. "Effective Date" shall mean the date the parties execute the License Agreement for Parking Deck to have additional parking and the Hotel Development constructed upon it.

VI. FINANCING; NO LIENS

Developer will secure financing for the construction of the Project from a reputable lending institution. In no event shall a lien be permitted to be placed against the Parking Deck or other property owned by the City. Developer and City recognize and agree that financing and ownership structure of the Additional Parking are to-be-determined and may result in liens being placed on the Additional Parking.

VII. INDEMNIFICATION AND INSURANCE

Developer shall indemnify, defend and hold harmless City and its officials and employees, from and against all claims, causes of action, damages, cost and expense relating to the Project by reason of or in connection with: (I) any injury to or death of any person, or damage to or loss of property, or any other matter occurring, resulting from or connected with the construction, use, condition or occupancy of the Project, (ii) any breach by Developer under this Agreement, or (iii) the use and occupancy of the Parking Deck by Developer. Prior to the commencement of the Initial Due Diligence and thereafter throughout the term of this Agreement, the Developer shall, at its own expense, maintain or cause its contractors to maintain in force a policy or policies of commercial general liability insurance written by one or more responsible insurance carriers licensed to do business in the State of South Carolina, with single limit liability coverage of not less than Two Million and No/100 (\$2,000,000.00) Dollars per occurrence (plus umbrella coverage for an additional Five Million and No/100 (\$5,000,000.00) Dollars Such policy or policies shall include, among other things, coverage for contractual liability and shall name the City as an additional insured. The Developer

agrees to deliver to the City a certificate of insurance evidencing the existence of such liability insurance prior to any entry onto the Parking Deck for purposes of conducting Initial Due Diligence.

VIII. TAXES AND LIENS

Developer shall be responsible for all City, County, State, or other tax liabilities generated from the Project.

If any mechanics' or materialmen's lien or similar charge is filed against the City or any Parking Deck as a result of any work performed by or on behalf of the Developer under the terms of this Agreement, then the Developer shall at its own cost and expense cause such lien or charge to be discharged of record, by bonding or otherwise, within thirty (30) days after notice from the City to do so; provided, however, that the Developer shall have the right to contest such the underlying claim at its sole expense so long as the lien is discharged of record as provided above. The Developer shall indemnify and hold the City harmless from and against all costs, liabilities, suits, penalties, claims and demands, including reasonable attorneys' fees and court costs, resulting from the filing of a lien against the City, or the Parking Deck, relating to any work performed by the Developer under the terms of this Agreement.

IX. INSPECTION

For each and every improvement to the Parking Deck undertaken by the Developer pursuant to this Agreement, the City shall receive architectural and engineering inspection reports and/or materials testing reports (as applicable) from the approved Project architect and engineers as such work is being installed in the Parking Deck. The City confirms its approval of Chao and Associates as the structural engineer and Betsch Associates as the architect for the purpose of this Paragraph. Any additional engineers or architects shall be subject to the prior approval of the City, not to be unreasonably withheld or delayed. The cost of these inspections and reports shall be borne solely by the Developer. In the event that any work undertaken by the Developer within the Parking Deck does not pass the inspections of the project architects and engineers, such work shall be removed and corrected at the sole cost of the Developer.

The City may elect to retain independent third party consultants to assist with the review and inspection of any work performed by the Project team. The decisions of the City or it's designated consultant are the final decisions with regards to work performance and/or requirements.

X. COMMUNICATIONS AND NOTICE

Developer shall provide the City with a written update on the Project, via email to the Assistant City Manager, no less than every 60 days during the course of the Project. Any other notice, instruction, direction or demand under the terms of this Agreement required to be in writing shall be duly given upon delivery, if delivered by hand, overnight mail, facsimile transmission or mail (with postage prepaid), to the following addresses:

As to the City:
Attention: City Manager
City of Columbia
1737 Main Street
Post Office Box 147(29217)
Columbia, SC 29201

As to the Developer:
Breakwater, LLC
c/o Charles Barkeley
1201 Hampton Street
Suite 3B
Columbia, SC 29201

With a copy to:
Parking Services Director
City of Columbia
820 Washington Street
Columbia, SC 29201
Fax:

With a copy to:

or to such other addresses or facsimile numbers as may be specified by like notice. Any notice involving non-performance, termination or renewal shall be sent by hand delivery, recognized overnight courier or, within the United States, via certified mail, return receipt requested. All other notices may also be sent by facsimile, confirmed by first class mail. All notices shall be deemed to have been given when received, if hand delivered; when transmitted, if transmitted by facsimile or similar electronic transmission method with confirmation of successful transmission; one

working day after it is sent, if sent by recognized overnight courier; and three (3) days after it is postmarked, if mailed first class mail or certified mail, return receipt requested, with postage prepaid.

XI. OTHER PROVISIONS

a. Exhibits. Exhibits referenced in this Agreement are incorporated by reference. If a conflict or inconsistency arises between the terms of this Agreement and the terms of an exhibit, the terms of this Agreement shall control.

b. Assignment. Developer has the right to assign its rights under this Agreement, in whole or in part, without the consent of the City, to affiliated entities or collaterally assign this Agreement to a construction lender providing financing for the Project. The City shall be notified of the intent to assign 15 days ahead of any such assignment being made. This Agreement shall not otherwise be assigned without the consent of the City.

c. Entire Agreement. This Agreement contains, merges, and integrates the entire agreement and understanding between the parties to this Agreement, and there are no oral or written agreements, promises, or understandings between the parties other than those stated in this Agreement. All prior contracts, negotiations, agreements, promises, statements, and understandings between the parties are considered superseded, withdrawn, and cancelled unless expressly stated in this Agreement.

d. Governing law and interpretation. This Agreement shall be deemed to have been negotiated, prepared, signed, and delivered exclusively in the State of South Carolina, and this Agreement shall be governed by, interpreted, performed, and enforced in accordance with the laws of the State of South Carolina. No provision of this Agreement shall be interpreted against any party by virtue of the fact that the provision was drafted by or on behalf of that party. If any provision of this Agreement is deemed to be invalid or unenforceable, such provision shall be deemed severable from the remainder of this Agreement and shall not cause the invalidity or unenforceability of the remainder of this Agreement; and if a provision shall be deemed invalid only because of excessive scope or breadth, the provision shall be deemed valid to the extent of the scope and breath permitted by law.

e. Severability. If any provision of this Agreement is deemed invalid or unenforceable, such provision shall be deemed severable from the remainder of this Agreement and shall not cause the invalidity or unenforceability of the remainder of this Agreement; and if a provision shall be deemed invalid only because of excessive scope or breadth, the provision shall be deemed valid to the extent of the scope and breath permitted by law.

f. Adequate consideration. The parties agree that they have received valuable and satisfactory benefit and consideration in exchange for entering into this Agreement.

g. Understanding of Agreement. The parties have read and agreed to all of the terms of this Agreement, and this Agreement shall be a complete bar to any subsequent claim, action, or proceeding to alter or set aside this instrument because of mistake of fact or otherwise.

h. Non-Waiver. The failure of a party to insist upon strict performance of any term, obligation, condition, or covenant contained in this Agreement shall not be deemed to be a waiver of any rights or remedies that party may have, and shall not be deemed a waiver of any subsequent breach or event of default in the terms, obligations, and conditions contained herein, unless expressly waived in writing and signed by a party.

i. Authority to sign agreement. Persons signing this Agreement on behalf of a party that is a corporation, partnership or other entity, represent and warrant that they have the necessary and appropriate authority and capacity to enter into this Agreement on behalf of the party and make this Agreement fully binding upon and enforceable against that party. Persons signing this Agreement further represent and warrant that this Agreement is not prohibited or restricted by any contract or other legally recognized arrangement applicable to them or to the party they represent.

j. Further assurances. At any time during the course of this Agreement, upon written request by either party, the other party will promptly perform any acts, sign and deliver any documents, and provide any information that may be reasonably required to give full force and effect to the terms of this Agreement, including without limitation demonstrating their ability to perform and comply with their obligations under this Agreement.

k. No oral modification. This Agreement cannot be orally modified, and any modification of this Agreement shall not be enforceable unless it is reduced to a writing signed by all parties. The parties acknowledge that no representative of either party has authority to orally modify any term or condition contained in this Agreement, and the parties agree they will never attempt to enforce an oral modification of this Agreement.



l. Succession and survival. This Agreement shall inure to the benefit of, and be binding on, the successors and assigns of the parties. The provisions of this Agreement shall survive completion of the Project.

m. Execution in counterparts. This Agreement can be executed in counterparts by all parties signing this Agreement and, when taken together, the signed counterparts shall constitute one complete and fully executed and binding document. Any party may rely on a copy of the signed original received from another party by facsimile or email and may consider the copy as a legal, binding, and enforceable document.

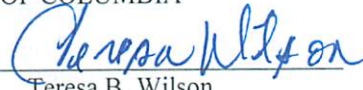
n. No partnership. The provisions of this Agreement are not intended to create, nor shall they in any way be interpreted to create, a joint venture, a partnership, or any other similar relationship between the parties.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed and effective as of the date of the last signature hereinbelow.



WITNESSES:


CITY OF COLUMBIA

BY: 
Teresa B. Wilson
ITS: City Manager
Date: 8/19/2019

WITNESSES:

BREAKWATER, LLC

BY: 
Name: CHARLES BARKLEY
ITS: MANAGER
Date: 8/19/2019

APPROVED AS TO FORM


Legal Department City of Columbia, SC