

SECOND AMENDMENT TO DOWNTOWN DEVELOPMENT AGREEMENT

This Second Amendment to Downtown Development Agreement (the "Second Amendment") is made and entered into as of the _____ day of _____, 2017 (the "Effective Date"), between PCH DEVELOPMENT CO., LLC, a North Carolina limited liability company ("Developer"), PRINCE CHARLES HOLDINGS, LLC, a North Carolina Limited Liability Company ("Prince Charles Holdings"), and the CITY OF FAYETTEVILLE, NORTH CAROLINA, a public body corporate and politic ("City"). Any party to this Agreement may be referred to herein as a "Party" and all the parties to this Agreement may be collectively referred to herein as the "Parties."

RECITALS:

A. The Parties entered into that certain Downtown Development Agreement dated as of March 28, 2017 concerning the development of the Project Area as therein described, as amended by that certain First Amendment to Downtown Development Agreement (the "First Amendment," and collectively with the Downtown Development Agreement, the "Agreement").

B. The Parties have continued to work cooperatively on the various matters relating to the development of the Project as contemplated under the Agreement.

C. Section 5 of the First Amendment contemplates that the Parties would work on further amendment(s) to the Agreement to memorialize the further agreements and understandings among the Parties based on the results of the work by the Parties on the Project subsequent to the date of the First Amendment.

NOW, THEREFORE, based upon the terms and conditions set forth herein and in consideration of the mutual promises and assurances provided herein, City, Developer and Prince Charles Holdings do hereby agree as follows:

1. Hotel and Parking Garage Parcel.

Purchase and Sale Agreement. The Parties entered into the Hotel and Garage Parcel Contract by the terms of which the City agreed to sell and the Developer agreed to buy the Hotel and Garage Parcel (as those terms are defined in the Downtown Development Agreement). Under the terms of the Hotel and Garage Parcel Contract the closing was to have occurred "within 30 days following the final stadium design approved by the City and the Astros" (see exhibit B to the Hotel and Garage Parcel Contract). Thirty (30) days has transpired since the approval of the final stadium design by the City and the Astros and notice to the Developer but the closing has not occurred. The City and the Developer agree that this Second Amendment to Downtown Development Agreement amends the Hotel and Garage Parcel Contract to the extent only that the closing date is extended to December 15, 2017 and that all other terms of the Hotel and Garage Parcel Contract remain in full force and effect.

Final Stadium Plans. City will not make changes to the Final Stadium Plans that could be reasonably calculated to affect the design, construction, cost of construction, use, operation or

maintenance of the improvements Developer plans to construct on the Hotel and Parking Garage Parcel without the prior written consent of Developer.

Residential Development. In addition to constructing the Parking Garage and the Hotel, Developer intends to construct an apartment component as part of its development of the Hotel and Parking Garage Parcel (the “Apartments”).

Parking Garage Design Coordination. That portion of the Hotel/Parking Garage to be built by the Developer, purchased by the City (as hereinafter described) and used as a parking garage is referred to herein as the “Parking Garage.” The building to be constructed on the Hotel and Garage Parcel by Developer containing the Parking Garage, the Hotel, and the Apartments is sometimes referred to herein as the “Mixed Use Building.” The Parking Garage will be designed and constructed to allow for the separate ownership and conveyance in fee simple title of the Hotel, Apartments, and Parking Garage, subject to cross easements, limited common property rights, common property rights, and air rights as are necessary under N.C. Gen. Stat. Chapter 47C, the North Carolina Condominium Act, or such other applicable laws. The Parking Garage will contain approximately 410 spaces. The Developer will be responsible for the design and construction of the Mixed Use Building. The City and the Developer will enter into a contract defining the terms of which the City will purchase or lease the Parking Garage (the “Garage Contract”) from the Developer following completion of construction and issuance of a temporary or conditional Certificate of Occupancy or Certificate of Occupancy for the Parking Garage, all as more fully described hereinafter. On or before November 22, 2017, Developer will provide the City with schematic plans and detailed cost estimates for the Parking Garage (the “Garage Plans”). The Garage Plans shall be subject to the approval of the City. In addition, the following portions of the Parking Garage Building and other matters pertaining to the Parking Garage are subject to the final approval of the City, not to be unreasonably withheld, conditioned or delayed:

- (a) Any part of the Mixed Use Building to be paid by the City under the terms of the Garage Contract;
- (b) The exterior of the Parking Garage including without limitation the façade, appearance, overhangs, appurtenant structures, access points and lighting;
- (c) Any document(s) required under N.C. Gen. Stat. 47C or such other legal documents as are required or utilized in the creation of a separate ownership interest in the Parking Garage;
- (d) Any document creating or designating a common element or limited common element affecting the Parking Garage, and easements and cross easements affecting the Parking Garage;
- (e) The access and control systems serving the Parking Garage;
- (f) The number of parking spaces in the Parking Garage;
- (g) The pedestrian access points from the Parking Garage to the Stadium;
- (h) Security infrastructure and lighting in the Parking Garage; and,
- (i) Elements of design and construction methods that are reasonably calculated to affect the appearance, maintenance, durability, safety and use of the Parking Garage.

Parking Garage Costs. On or before November 22, 2017, Developer will provide the City with a firm budget for the Parking Garage. The City will have until December 12, 2017, to

review and approve the budget maximum and authorize the execution of the Garage Contract. Should the City fail to do so, the City will be obligated to reimburse the Developer for verified pre-development costs incurred between October 1 and December 12, 2017, associated with design, architecture and pre-construction services for the Parking Garage, up to a maximum of \$125,000 and Developer will maintain records of such costs.

Surface Demolition. City is responsible for surface demolition of existing infrastructure located on the Hotel/Parking Garage Parcel prior to Developer's commencement of construction on the Parking Garage.

Garage Contract. On or before Developer's closing of the purchase of the Hotel and Garage Parcel Developer, the City will enter into the Garage Contract by the terms of which the Developer will convey the Parking Garage to the City by either (i) North Carolina Special Warranty Deed for a purchase price equal to the cost of construction as more fully described and defined in a purchase and sale agreement, or (ii) a master lease requiring City to pay a monthly rental that amortizes the cost of the Parking Garage with purchase. The terms of acquisition included in the Garage Contract are subject to prior approval by the North Carolina Local Government Commission.

Parking Space Leases. The Garage Contract will bind the Parties to enter into parking leases to serve the Hotel (minimum 120 spaces), new residential development (minimum 185 spaces), and the redeveloped Prince Charles Hotel (minimum 79 spaces). The leases will be for minimum terms of (15) fifteen years or one (1) year longer than tenant's or licensee's lender will require, to be specified in the Garage Contract whichever is longer, with renewal options. The lease rates for the spaces will be market based, materially similar to what City charges for parking in other parking decks owned by the City in downtown Fayetteville, and the leases or licenses will contain other standard terms used for such other market rate parking leases or licenses.

Hotel Flag Approval. City shall have the right to approve the initial hotel "flag," which approval shall not be unreasonably withheld, conditioned or delayed.

2. Easements.

Temporary Construction Easements. Upon request, each Party will promptly grant the other Party the temporary construction easements reasonably necessary to complete the Project. Such easements will contain commercially reasonable provisions for like easements in North Carolina.

Permanent REA. The Parties recognize that the orderly operation of the Project will depend on various easements and covenants in the form of a comprehensive reciprocal easement agreement recorded in the Registry (the "REA"). The REA will address reciprocal easements both temporary and permanent for construction, maintenance, repair, replacement, utilities, the existence of structures supporting project, encroachments, ingress, egress, use, air rights, view rights, structural support, lateral and subjacent rights, and both pedestrian and vehicular access and circulation, and such other easements as may be reasonably necessary and convenient to the

construction and operation of the Project. The REA will also contain such restrictions as may be reasonably necessary for the Mixed Use Project to comply with agreements the City has with the Astros, if any, concerning limitations on unauthorized “pirate” activities at the Mixed Use Project such as baseball ticket selling, for-profit baseball viewing parties, or the display of unauthorized “sponsorship” signage. The Parties will work together to establish the final version of the REA on or before December 1, 2017, or such earlier date that either Party shall need the REA recorded based on the reasonable needs of lenders or investors. It is understood that the REA may be executed in parts, with an initial REA recorded, and then amended as the Project progresses, or separate easements may be entered into to address one or more easement needs as the Project progresses.

3. Environmental Remediation. The Parties recognize that the Hotel and Parking Garage Parcel will require a certain amount of additional environmental assessment and remediation. Developer will contract with and direct work to be performed by the environmental consultant for any necessary assessment and remediation efforts on the Hotel and Parking Garage Parcel and Developer and the City shall share the cost of such assessment and remediation equally, with Developer periodically invoicing City, with substantiation of cost, and City shall pay its share no later than thirty (30) of invoice.

4. Minimum Assessed Value. The estimated *ad valorem* tax value of the private development within the Project Area anticipated to be owned or controlled by Developer, its successors, or its affiliates (the “Private Development”) upon completion is \$37,000,000 if the compensation agreed to in the Garage Contract is sufficient for Developer to construct the Mixed Use Building in an economically feasible manner (the “Projected Tax Value”). Developer may from time to time update the Projected Tax Value by providing the City an updated estimate and explanation, and such updates may result from changes to the City’s millage rate. The Parties acknowledge that the City will rely on Private Development Ad Valorem Tax Revenues to pay a portion of the stadium debt (the “Stadium Debt”). “Private Development Ad Valorem Tax Revenues” shall be the ad valorem tax revenue calculated by using the City millage rate in effect on the date of this Amendment (.4995 cents per \$100.00) and the Projected Tax Value. The Developer guarantees the generation of Private Development Ad Valorem Tax Revenues through the operation of standard tax collection or the operation of the following provisions.

If, at any time beginning one (1) year after Substantial Completion of the Stadium the actual *ad valorem* tax value of the Private Development as determined by the Cumberland County Tax Assessor is less than the Projected Tax Value, then Developer and its successors, if any, will (i) prior to the date by which the ad valorem tax valuation is fixed for the succeeding year assist the City in advocating for an increase in the ad valorem assessment of the Private Development, and, if after such advocacy the actual ad valorem tax valuation of the Private Development remains less than the Projected Tax Value, then (ii) at the City’s direction and in the City’s discretion, the Developer and its successors, if any, will consent to a special tax district or enter into a minimum tax assessment agreement, in either case, to the extent permitted by law sufficient to meet the Developer’s obligation under the Private Development Ad Valorem Tax Revenues, and if not permitted by law such other method mutually agreeable to the Parties and both permitted by law and enforceable, whereby the shortage in the Private Development Ad Valorem Tax Revenues is collected (the “Gap Contribution”). In any calendar year in which

Developer or its successor is making a payment under any method or manner to fund the Gap Contribution it is determined by the City that a Gap Contribution will not be required in the amount being paid at that time or in any amount, then the Gap Contribution will be adjusted by the City accordingly and such adjusted Gap Contribution will be effective upon January 1st of the succeeding calendar year. In the event Developer transfers, assigns, enters into a long term ground lease, or otherwise conveys its interest in any or all of the Private Development then in that event the Developer's successor shall be obligated to pay any Gap Contribution for all or any such portion conveyed and in the event only a portion of the Private Development is conveyed the obligation for the Gap Contribution on such portion shall be determined pro rata based on the actual ad valorem valuation of the portion conveyed as a percentage of the total ad valorem valuation of the Private Development (which liability for each portion of the Private Development shall be recalculated pro rata upon any change in the ad valorem valuation of any portion of the Private Development). Notwithstanding anything herein to the contrary, herein neither the Developer nor any successor will be obligated to pay any Gap Contribution or have any liability under any special tax district where the actual annual ad valorem tax revenue from the Private Development equals or exceeds the Private Development Ad Valorem Tax Revenues.

Any adjustment to or elimination of the Gap Contribution as described hereinabove will not release the then current owner(s) of the Private Development from future Gap Contributions in such amount and paid in such a manner as determined by the City and provided in this Second Amendment or subsequent documents in the event that the actual tax assessed value of the Private Development is less than \$37,000,000. In such a case the City will notify the then current owner(s) of the Private Development within the calendar year immediately preceding January 1st of the calendar year in which the Gap Contribution is to resume, together with the amount of such Gap Contribution and the manner in which the Gap Contributions will be generated and collected. In any case, the Developer's and any successor's obligation to make any Gap Contribution shall terminate upon the earlier of (i) the maturity of the initial Stadium Debt, (ii) the payoff of the Stadium Debt, or (iii) or the Private Development achieving an actual tax assessed value of \$37,000,000. In no event shall the Developer's or any successor's obligation to pay Gap Contribution obligation be extended beyond the initial term of the Stadium Debt by any refinancing or recapitalization of the Stadium Debt by the City. With respect to any portion of the Private Development sold by Developer, Developer's successor shall be liable for any Gap Contribution for such portion after such sale in pro rata fashion (based on the actual *ad valorem* valuation of the portion sold relative to the actual *ad valorem* valuation of the Private Development).

The Developer shall be obligated to ensure that this obligation is transferred as a material term and continuing obligation upon any subsequent owner of Private Development property. Failure to do so will be a material breach of this agreement entitling the City to void such sale or seek any other legal remedy.

The City will consider but is not obligated to accept an alternative and legally enforceable proposal from the Developer to generate funds to pay the Developer's Gap Contribution. By way of an example but without limiting any possibilities, the Developer may propose using private sector financing without altering the payment amount or payment schedule in any way which would be adverse or unacceptable to the City, characterized as ground lease payment or other

form of guaranteed payments to City in exchange for the Developer's investment in the Project Area. In the event the City decides at its option and in its sole discretion to accept an alternative proposal from Developer then the City and Developer will amend this Amendment accordingly or execute such other document as would be required.

5. Gap Contribution Enforcement. Prior to or simultaneously with the closing of the Garage Contract, the City will record restrictive covenants in form acceptable to Developer setting terms of the City's right to the Gap Contribution as described in paragraph numbered 4 herein above. Such covenants will encumber all of the Private Development real property and improvements, be binding upon the Developer, its successors and assigns and will run with the land, and will contain an estoppel provision whereby the City upon request will certify to any owner or ground tenant of the Private Development, or such owner's or ground tenant's lender, or any prospective buyer or ground tenant of the Private Development the status of compliance with the restrictions.

The Developer will ensure that any transferee of any or all of the Private Development will be obligated under the terms of any contract to transfer or sell any or all of the Private Development to pay the Gap Contribution as described in paragraph 4 herein above after such transferee takes title to such portion of the Private Development. The transferee will be obligated as a condition of any transfer to execute a contract with the City committing to a continuing obligation to make that portion of the Gap Contribution attributable to the property acquired consistent with all terms hereof. Developer and any successor-in-interest or transferee acknowledge that the failure to comply with the provisions of this paragraph will result in immediate and irreparable damage to the City for which a legal remedy may not be immediately available and that the City, upon application, will be entitled to a preliminary injunction enjoining the transfer of any or all of the Private Development until the conditions of this paragraph are met and that the City will further be entitled to actual damages, attorney's fees and costs. Further, in addition to enjoining any such transfer: (i) the City will be entitled to an order determining that any transfer of any or all of the Private Development without notice to the City and compliance with the provisions of this paragraph to be null and void; and (ii) City will be entitled to such other legal and equitable remedies as are available.

6. Development Timeline.

Stadium. City will begin the development of the Stadium on or before October 1, 2017, and will cause the Stadium to be substantially completed on or before March 31, 2019.

Parking Garage. Subject to City's prior completion of surface demolition on the Hotel and Parking Garage Parcel, Developer will begin the development of the Parking Garage on or before March 1, 2018, and will cause the Garage to be substantially completed, meaning open for use by the public, on or before March 31, 2019.

Infrastructure and Plaza. All infrastructure and plaza work shall be substantially completed on or before March 15, 2019.

7. Miscellaneous.

(a) *Assignment.* Developer may, in its role as master developer, with the consent of City, which will not be unreasonably withheld, assign its rights and delegate its duties under this Amendment in part or whole to another developer or developers and/or its lender(s) in the form of a collateral assignment. Provided, however, that such assignment or delegation shall not relieve the Developer of its obligations under this Amendment or impair the City rights to enforce this Amendment.

(b) *Disclaimer of Joint Venture, Partnership and Agency.* Neither this Agreement nor any agreement entered into pursuant to this Amendment shall be interpreted or construed to create an association, joint venture, or partnership between Developer and City, or to impose any partnership obligation or liability upon the Parties. Neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent of representative of, or to otherwise bind, the other Party.

(c) *No Third Party Beneficiaries.* This Amendment is not intended to and does not confer any right or benefit on any third party that is not a Party.

(d) *Entire Agreement.* This Amendment sets forth and incorporates by reference all of the agreements, conditions and understandings between the Parties relative to the Project and supersedes all previous agreements. There are no promises, agreements, conditions or understandings, oral or written, expressed or implied, among the Parties relative to the matters addressed herein other than as set forth or as referred to in this Amendment. All exhibits attached hereto are incorporated herein by reference.

(e) *Construction.* The Parties agree that each Party and its counsel have reviewed and revised this Amendment and that any rule of construction to the effect that ambiguities are to be resolved against the drafting Party shall not apply in the interpretation of this Amendment or any amendments or exhibits hereto.

(f) *Governing Law.* This Amendment shall be governed by the laws of the State of North Carolina.

(g) *Counterparts.* This Amendment may be executed in several counterparts, each of which shall be deemed an original and such counterparts shall constitute one and the same instrument.

(h) *No Deemed Waiver.* Failure of a Party to exercise any right under this Amendment shall not be deemed a waiver of any such right and shall not affect the right of such Party to exercise at some future time said right or any other right it may have hereunder.

(i) *Severability.* If any term or provision herein shall be judicially determined to be void or of no effect, such determination shall not affect the validity of the remaining terms and provisions. The Participating Parties agree that if any provision of this Amendment is judicially determined to be invalid because it is inconsistent with a provision of state or federal law, this

Amendment shall be amended to the extent necessary to make it consistent with state or federal law and the balance of the Amendment shall remain in full force and effect.

(j) *Authority.* Each Party represents that it has undertaken all actions necessary for approval of this Amendment, and that the person signing this Amendment has the authority to bind City and Developer. Notwithstanding the foregoing, with the approval of this Amendment, City Council hereby delegates to the City Manager the authority to execute any supplemental documents required to effectuate the purposes of this Amendment.

(k) *Representations and Warranties of Developer.* Developer represents and warrants to City that: (i) it is a valid limited liability company duly organized, validly existing and in good standing under the laws of the State of North Carolina; (ii) it has the full right, power, and authority to enter into this Amendment and to perform its obligations hereunder.

(l) *Representations and Warranties of City.* City represents and warrants to Developer that (i) it has the full right, power, and authority to enter into this Amendment and to perform its obligations hereunder, and (ii) it has obtained all necessary final approvals in accordance with all Applicable Law, including but not limited to all approvals required by City Council.

(m) *Continuing Obligation.* From time to time after March 28, 2017 (the effective date of the Agreement), the Parties will execute additional instruments of assignment, lease, license, conveyance and other documents and take such other actions that are reasonably necessary to further the purposes of this second amendment.

(n) *Immunity Not Waived.* City does not intend to waive its sovereign immunity by reason of this Amendment; provided, however, that the City acknowledges and agrees that by entering into this Amendment, governmental immunity shall not be a valid defense to a breach of contract claim brought hereunder.

(p) *Release of Information.* City and Developer acknowledge that (i) approval of this Amendment by the Council is subject to the notice requirements of NCGS § 160A-457 and (ii) this Amendment is subject to disclosure under the North Carolina Public Records Act, NCGS § 132-1 *et seq.* (the “Act”), except for information that is excluded from the disclosure requirements of the Act pursuant to NCGS § 132-1.2. Nothing in this Amendment precludes any Party from discussing the terms of this Amendment or its work product with its attorneys, accountants, consultants, contractors, or potential lenders or investors, or prevents the holding of public Council meetings in compliance with applicable laws.

(q) *Representations, Warranties and Indemnity Regarding Brokers.* Each Party represents and warrants to the other Party that it has contracted with no real estate broker with respect to the transactions contemplated by this Amendment. City and Developer covenant and agree, each to the other, to indemnify the other against any claims based upon or arising out of the employment or use by the indemnifying party of any real estate broker, agent or finder in connection with the purchase and sale of any property in the Project Area as it is the subject of

this Amendment. This Section shall survive Closing or any earlier termination of this Amendment.

(r) *Amendment.* This Amendment supersedes all prior discussions and agreements between the Parties with respect to the Project and contains the sole and entire understanding between the Parties with respect to the Project. All promises, inducements, offers, solicitations, agreements, commitments, representations and warranties heretofore made between the Parties are merged into this Amendment. This Amendment shall not be modified or amended in any respect except by a written instrument executed by or on behalf of each of the Parties.

8. Legal Structure and Associations for the Mixed-Use Project. The Parties contemplate that a Parking Garage, Hotel and Residential Apartments will be developed within a single structure on the Hotel and Garage Parcel. The Developer or its assignee and the City will hold its ownership interest in each of the separate projects through a condominium structure developed in accordance with the provisions of N.C. Gen. Stat. Chapter 47C in form and substance satisfactory to the City, Developer and its assigns. The City and the Developer will prepare and file, where necessary, all required condominium documents, owners association, bylaws together with any other required documents subject to the City and Developer's mutual satisfaction in accordance with N.C. Gen. Stat. Chapter 47C.

[SIGNATURES ON FOLLOWING PAGES]

In witness whereof, the Parties have caused this Amendment to be duly executed under seal to be effective as of the Effective Date

CITY OF FAYETTEVILLE NORTH CAROLINA

[SEAL]

ATTEST:

Name: _____

Title: _____

_____, _____ City Clerk

Approved as to form:

_____, City Attorney

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

I, _____, a Notary Public of the State and County aforesaid, certify that _____ personally came before me this day and acknowledged that (s)he is _____ City Clerk of the City of Wilmington, and that by authority duly given and as the act of the Council, the foregoing instrument was signed in its name by its Mayor, sealed with its corporate seal and attested by himself/herself as its _____ City Clerk.

WITNESS my hand and official seal, this _____ day of _____, 2017.

Notary Public

My commission expires: _____

CERTIFICATION

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

This _____ day of _____, 2017.

_____, City Finance Officer

[Developer Signature Page to Downtown Development Agreement]

PCH DEVELOPMENT CO., LLC (seal)

By: _____

Name: _____

Title: _____

STATE OF NORTH CAROLINA, COUNTY OF _____

I certify that the following person(s) personally appeared before me this day, acknowledging to me that he or she signed the foregoing document: _____

Date: _____

Notary Public

Print Name: _____

[Official Seal]

My commission expires: _____

[Prince Charles Holdings Signature Page to Downtown Development Agreement]

Prince Charles Holdings, LLC (seal)

By: _____

Name: _____

Title: _____

STATE OF NORTH CAROLINA, COUNTY OF _____

I certify that the following person(s) personally appeared before me this day, acknowledging to me that he or she signed the foregoing document: _____

Date: _____

Notary Public

Print Name: _____

[Official Seal]

My commission expires: _____