

Office of the City Manager

## **SUPPLEMENTAL AGENDA MATERIAL for Supplemental Packet 1**

**Meeting Date:** December 6, 2022

**Item Number:** 1

**Item Description:** Urgency Ordinance for Leasing the Real Property at 1720 San Pablo Avenue

**Submitted by:** Peter Radu, Assistant to the City Manager

The original report titled “Urgency Ordinance for Leasing the Real Property at 1720 San Pablo Avenue” contains, as Exhibit A, a proposed master lease for the Berkeley Inn for the purposes of providing noncongregate shelter to persons experiencing homelessness. The attached revision to Exhibit A contains non-substantive revisions to several typos and accidental omissions of material.



described below, Owner grants to the City exclusive access to and use of the Premises on a continual basis (i.e., twenty-four (24) hours per day, seven (7) days per week) for purposes of providing interim housing for persons experiencing homelessness under a specialized housing program ("**Program**") administered by the City (each such occupant or invitee through that Program is referred to herein as a "**Program Guest**"), either directly or through a Program operator under the City's control ("**Operator**"). The City will not (i) allow any nuisance conditions to exist on the Premises, and (ii) shall use diligent efforts to promptly eliminate any Program Guest from accessing the Premises if such Program Guest has engaged in activity that causes material damages to the Premises.

Owner acknowledges that during the Term, Owner shall not rent or allow occupancy of any Room or facilities in the Premises to any person other than City, and City agrees that it will use the Premises exclusively for the implementation of the Program and the housing of Program Guests (together with any administrative or management function required on site at the Premises for the Program). Under no circumstances shall the City engage in any conduct that would jeopardize (i) Owner's existing permits for the Hotel; or (ii) its ability to surrender the Premises at the end of the Term vacant, and in the condition required by this Occupancy Agreement. Owner shall have no obligation to manage any Program Guest or monitor or control any of the operations on the Premises; all such operations and control shall be the sole responsibility of the City. Owner represents that Owner has not received a notice of violation of any permit condition with respect to the Premises, and, to Owner's knowledge, that the Premises comply with all laws.

The City acknowledges that there is a storage room in which the Owner stores tools, parts and supplies to make repairs to improvements and equipment, and that Owner is reserving its use of such storage room for that purpose in order to more efficiently undertake any repairs required at the Premises. The City shall not permit others to gain access to such storage room which shall remain locked when not in use by Owner or its agents.

**Term; Early Termination; Option**

2. The term of this Occupancy Agreement shall commence on December 7, 2022 ("**Commencement Date**"), with the City taking physical occupancy on December 7, 2022. The City acknowledges and accepts that there is pending work on a retaining wall that affects some of the parking on site and accepts the temporary loss of that parking, provided the work is diligently pursued to completion by Owner. The term of this Occupancy Agreement ("**Term**") and the City's rights to possession of the Premises shall end on the earlier of: (i) five (5) years after the Commencement Date (expected to be December 6, 2027) unless the parties negotiate an extension under the "Option" described below; (ii) on the effective date of termination under any election of a party to terminate the Occupancy Agreement upon an "Event of Default" (defined below); (iii) on the effective date of any termination by the City for convenience (in the City's sole discretion) that is based on a notice of termination given at any time after December 7, 2023, if the City elects to so terminate the Term ("**City's Termination Right**"); (iv) on the effective date of any termination by Owner for convenience (in the Owner's sole discretion) that is based on a notice of termination that takes effect at any time after December 7, 2024, if Owner elects to so terminate the Term ("**Owner's Termination Right**"); and (v) on the effective date of termination that takes effect under the exercise of the "Casualty Termination Right" under Section 10, below, or pursuant to the "Special Termination Right", as specified in **Exhibit C** of this Occupancy Agreement.

Any exercise of City's Termination Right or of Owner's Termination Right referenced in the prior paragraph, sections (iii) and (iv), shall be made by written notice, which shall become effective and end the Term on the day that is One Hundred Eighty (180) days after such termination notice is provided to the counterparty. Thus, an election by the City to terminate the Term under the City's Termination Right that is given 190 days before November 30, 2023 will be effective as of November 30, 2023, but one given 120 days before that date will mean that the

Term will end on January 29, 2024. Similarly, an election by the Owner to terminate the Term under the Owner's Termination Right that is given 190 days before November 30, 2024 will be effective as November 30, 2024, but one given 120 days before that date will mean that the Term will end on January 29, 2025. During any such period through the end of the Term the parties are bound by all of the terms of this Occupancy Agreement.

If mutually agreeable to City and Owner, the parties may extend the Term for an additional five (5) years ("**Option**"), so long (i) this Occupancy Agreement has not terminated and there is no pending default by the party invoking the Option, (ii) notice of the intention to extend the Term is given by written notice to the counterparty at least four (4) months prior to the then pending expiration date for the Term, and (iii) the terms and conditions of such an extension, including the amount of Monthly Rent, will be negotiated and must be agreed to and reduced to writing and signed by both parties to be effective.

3. Monthly Rent payments ("**Monthly Rent**") shall be paid by the City in advance and without deduction or offset (except as allowed in Section 6), on the first day of each month during the Term, regardless of whether each Room is occupied for the full month or not, as follows:

**Rent and Invoicing**

<b>TIME PERIOD</b>	<b>MONTHLY RENT RATE PER ROOM</b>
<b>12/7/2022-11/30/2023</b>	<b>\$2,450.00*</b>
<b>12/1/2023-11/30/2024</b>	<b>\$2,523.50</b>
<b>12/1/2024-11/30/2025</b>	<b>\$2,599.21</b>
<b>12/1/2025-11/30/2026</b>	<b>\$2,677.18</b>
<b>12/1/2026-12/6/2027</b>	<b>\$2,757.50*</b>

**\*PRORATED FOR THE PARTIAL MONTH**

Monthly Rent and all other payment obligations under this Occupancy Agreement are referred to collectively as "**Rent.**" All payments of Rent are due and payable thirty (30) days after Owner has provided a demand for payment. For payments other than Monthly Rent, Owner shall submit an invoice with reasonably sufficient detail to permit the City to reference and confirm the obligation to pay under the Occupancy Agreement. Rent shall be paid to Owner at the address specified in Section 4 or to such other address as the Owner may designate by a notice in writing.

Rent payments shall be paid from any source of legally available funds of the City, and so long as the Premises is available for the City's use, the City covenants to take such action as may be necessary to include all Rent payments due under this Occupancy Agreement in its budgets and to maintain such items to the extent unpaid for that fiscal year in its budgets, and to make the necessary appropriations and supplemental appropriations to the extent necessary, for all such Rent payments; which covenants of the City shall be deemed to be, and shall be, ministerial duties imposed by law, and it shall be the duty of each and every public official of the City to take such action and do such things as are required by law in the performance of the official duty of such officials to enable the City to carry out and perform the covenants made by the City in this Occupancy Agreement.

## Notices

4. All notices and correspondence herein provided to be given, or which may be given by either party to the other, shall be deemed to have been fully given when made in writing and when addressed as shown below, and one of the following applies: 1) two business days (i.e. not a Saturday, Sunday or a national or state holiday where the courts are closed) after it is deposited in the United States Mail, with certified first class postage prepaid; 2) on the day it is received if delivered by personal service, or if sent via a reputable commercial overnight delivery service (i.e. UPS, FedEx or similar) with receiver's signature required; and (3) on the next business day after it is by email to the address shown below and receipt has been electronically confirmed:

**To the Owner:** Ganga Holdings, LLC  
Attention: Pete Patel  
860 Eddy St  
San Francisco, CA 94109  
Phone No.: (415) 902-5718  
Email: [hotelqm101@gmail.com](mailto:hotelqm101@gmail.com)

**To the City:** City Manager's Office  
City of Berkeley  
2180 Milvia St, 5<sup>th</sup> Floor  
Berkeley, CA 94704  
Attn: Peter Radu  
Phone No. (510) 981-7045  
Email: [pradu@cityofberkeley.info](mailto:pradu@cityofberkeley.info)

ALL NOTICES AND CORRESPONDENCE MUST REFERENCE PREMISES ADDRESS.

Rent warrants shall be made payable to:

Ganga Holdings, LLC  
ATTN: Kiran Patel

and mailed to:

860 Eddy St  
San Francisco, CA 94109

The address to which notices and correspondence shall be mailed to either party may be changed on not less than five (5) days prior notice, by giving written notice to the other party as required above.

## Parking

5. Subject to the provisions of Section 2, parking spaces shown on Exhibit A, are to be available for City's use and that of its Program Guests during the Term; however, the Owner is not obligated to enforce any parking use. The City's obligations to hold harmless, defend and indemnify the Owner and Owner Parties extends to any use made by it or its Program Guests (or their invitees or licensees) in the Premises or the parking areas. Owner shall ensure that no Owner Party nor any of its agents use these parking spaces unless separately authorized by the City. The on-site parking spaces shall be provided at no additional charge.

**Services,  
Utilities, and  
Supplies**

6. Owner, at Owner's sole cost and expense, shall contract for and facilitate the delivery to the Premises of the following public utilities and public services: electricity and gas for heating, ventilating, air-conditioning as the City needs for its operations at the Hotel, plus sewer, trash disposal (of up to 3 yards per week), and internet services (as it currently operates at the Hotel). In addition, Owner shall provide and maintain security cameras, and hot and cold water service for the reasonable needs of the Hotel.

The City and Owner shall mutually determine baseline usage for these utilities and services, based on 100% occupancy of the Hotel, and the City shall be responsible for reimbursing the Owner for any usage costs that exceed 110% of the baseline costs for the utilities and services, per billing cycle used by the utility or service provider.

If Owner breaches its obligation to pay for and facilitate the delivery of the foregoing services, utilities or equipment, upon not less than one (1) business days' notice, City may furnish the same and deduct the cost, plus City's administrative expenses of 10%, of furnishing those services, utilities or equipment from the Rent.

**Repair and  
Maintenance**

7. During the Term, the Owner shall maintain the Premises substantially in its existing condition as of the Commencement Date and in tenantable condition, subject, however, to Casualty (defined in Section 10) and condemnation. Owner's obligation to pursue repairs is limited to the obligations set out in this Section 7; such obligations arise upon prior notice of disrepair from the City ("**Repair Notice**"). Upon any Repair Notice, Owner shall immediately respond to a Repair Notice if there is an emergency involving life safety issues; otherwise Owner shall respond with the required maintenance or repair with reasonable diligence, consistent with common property management practices. For Casualty and other events beyond the Owner's control, notice of the damage shall be promptly provided by the City and the obligations to repair and pay for any such repairs shall be governed by this Section 7, Schedule 7 and Section 10, below.

(a) Owner warrants and represents the common facilities of the Premises and at least one (1) Room shall be readily accessible to and usable by individuals with disabilities in compliance with Title III of the Americans with Disabilities Act of 1990 and California Title 24 ("Disability Laws"), as amended from time to time and regulations issued pursuant thereto and in effect from time to time. Any and all costs incurred to cause the Premises to comply with the Disability Laws shall be borne by Owner unless caused by alterations to the Premises pursued by the City. See also Schedule 7.

(b) The City shall promptly notify Owner of damage to the Premises, and/or Owner's fixtures, furnishings and equipment ("**FF&E**") and mattresses ("**Mattresses**") provided by Owner on the Commencement Date or replaced by Owner. Owner's actual out-of-pocket costs of repairing or replacing any damage to (i) the Property, (ii) the FF&E, and/or (iii) Mattresses and (iv) any required deep cleaning including pest control and heat treatments for any Room are herein collectively referred to as the ("**Repair Costs**"). The City's obligation to reimburse the Owner for such Repair Costs in any "Year", as defined below, is limited to the amount of the Yearly Damage Deposit applicable to the Year in which the Repair Costs are incurred, plus any additional Repair Costs in that Year caused by the gross negligence or willful misconduct of a City Party. In so calculating the applicable Repair Costs for such Year, the parties agree to offset from such Repair Costs any net amount recovered by Owner as insurance proceeds for such loss or damages pursuant to the insurance coverage required by this Occupancy Agreement. The sum of all such Repair Costs, less any applicable net insurance proceeds received, less any available balance of that Year's Yearly Damage Deposit as of the date of such loss or damage is herein referred to as "**Excess Costs**." The City shall be responsible to Owner for all Excess Costs incurred by Owner and must pay such Excess Costs within sixty (60) days of demand from Owner.

For the avoidance of doubt, Repair Costs are to first be satisfied from the aggregate "**Yearly Damage Deposit**" (see right column, below), which shall be equal to the "Damage Deposit per

Room" set forth below for each applicable "Year" (defined below) of the Term multiplied by 27 Rooms (e.g. for the first Year the Yearly Damage Deposit is \$2,200 x 27 Rooms = \$59,400.00). City shall pay any Excess Costs within 60 days of City's receipt of Owner's reasonable proof of payment for actual costs of good, services and labor.

The Yearly Damage Deposit may be used to address damage or destruction from a "Casualty" (defined in Section 10, below) if it was caused by the negligence, gross negligence, or the willful misconduct of a City Party. In such Casualty events, the cost allocations (including rights to insurance proceeds) shall be governed by Section 10 and Exhibit C.

Each 12-month time period noted below shall be referred to as a "Year."

TIME PERIOD	"YEARLY DAMAGE DEPOSIT" PER ROOM
12/7/2022-11/30/2023	\$2,200.00
12/1/2023-11/30/2024	\$2,266.00
12/1/2024-11/30/2025	\$2,333.98
12/1/2025-11/30/2026	\$2,404.00
12/1/2026-12/6/2027	\$2,476.12

(c) The City shall pay the first Year's Yearly Damage Deposit to the Owner within fifteen (15) days of the Commencement Date and receipt of demand for payment. If the Yearly Damage Deposit is not exhausted during the course of each such Year, Owner may retain the balance. If the Term continues beyond the first Year, then on the first anniversary of the Commencement Date, and after receipt of demand for payment, the City will remit that Year's Yearly Damage Deposit to the Owner. The City will follow this for each succeeding anniversary of the Commencement Date during the Term to ensure the Yearly Damage Deposit has been paid to Owner at the start of each Year in the Term. If either Owner or City exercises the Option to extend the Term, the parties shall attempt to resolve the amount and disposition of the Yearly Damage Deposit during any such extended Term.

(d) If any Room(s) are made uninhabitable due to the negligence or willful misconduct of an Occupant, the City shall not be entitled to Rent abatement for the affected Room(s) during the duration of rehabilitation.

The City further agrees that the City will ensure that every Program Guest agrees in writing – and as a condition of such person's occupancy - to refrain from engaging in damage to the Property, the FF&E or the Mattresses. See Schedule 7.

**Assignment**

8. The City shall have the right to assign this Occupancy Agreement with Owner's prior written consent, which shall not be unreasonably withheld, conditioned, or delayed. No such assignment shall relieve the City of any liability or responsibility under this Occupancy Agreement, unless the assignee agrees in writing to assume all of City's obligations under this Occupancy Agreement and is equally capable of performing them.

**Quiet Possession**

9. Subject to the terms of this Occupancy Agreement, the Owner agrees that the City, while keeping and performing the covenants herein contained, shall at all times during the existence of this Occupancy Agreement, peaceably and quietly have, hold, and enjoy the Premises without suit, trouble, or hindrance from the Owner or any person claiming a superior title under the Owner. City acknowledges that the Owner may access the Premises on not less than twenty-four (24) hours prior written notice to the City (except in case of an emergency, or where Owner is

undertaking repair of a Casualty event and it is part of a continuum of work days, in which case no notice is required) in order to (i) perform required repairs, (ii) address any failure of the utilities or services required under Section 6, or (iii) inspect the Premises. Owner's inspection of the Premises shall be limited as follows: (i) absent cause, an inspection to determine compliance with the Occupancy Agreement will not be more often than once per month; (ii) to complete an appraisal or due diligence analysis for any financing, sale or other bona fide valuation need; (iii) to show the Premises to a prospective lender or purchaser; (iv) access to a Program Guest's Room shall only occur if damage is being inspected or repaired, or the cause of a Casualty is being assessed, and then only with a person assigned by the City to accompany the Owner or its agent in completing such inspection. Absent an emergency, in which case access shall be provided immediately, any access by Owner shall only occur during regular 9 a.m. to 5 p.m. business hours. The City will reasonably cooperate in coordinating this access.

## Casualty and Destruction

10. If the Premises are damaged by fire, accident or other casualty (collectively, "**Casualty**"), and if the cost to repair such damage exceeds more than 20% of the Rent due for the remainder of the Term, or such damage is not fully covered by insurance proceeds made available to Owner, Owner may elect to terminate this Occupancy Agreement ("**Casualty Termination Right**"). Such election shall be made within twenty (20) days of the date of Casualty. Calculating the "remainder of the Term" shall be based on the shortest available Term if either party exercises an available Termination Right, If the Casualty does not provide Owner with such an election to terminate this Occupancy Agreement, or Owner does not timely elect to terminate, whether under a Casualty Termination Right, or a "Special Termination Right" under the provisions of Exhibit C, then Owner shall diligently pursue the repair and restoration of the Premises in a commercially diligent manner. Pending such repairs, Rent shall abate proportional to the number of Rooms that are untenantable during the repair efforts unless the Casualty was due to the gross negligence or willful misconduct of a City Party.

If a Casualty occurs and the Occupancy is not terminated, Owner shall tell the City the estimated number of days required to repair such Casualty within thirty (30) days of its occurrence ("**Owner's Notice**"), as the repair period may be determined in Owner's reasonable judgment. If the Owner's Notice specifies that more than fifty percent (50%) of the remainder of the Term, or more than two hundred ten (210) days, will be required to complete the repairs, whichever is less, City may at its option terminate this Occupancy Agreement by written notice to Owner within thirty (30) days of Owner's Notice ("**City's Notice**"). The "remaining Term" shall only include that portion of the Term that is not at the time of the Casualty susceptible to any early termination rights under this Occupancy Agreement. If the Premises are totally destroyed by a Casualty, this Occupancy Agreement shall terminate.

If the Premises are to be repaired after a Casualty, Owner shall diligently prosecute to completion the repair of said Premises, and the parties shall cooperate in obtaining all available insurance coverage to pay for such repairs and make these available to the Owner for such purposes including the recovery of any Rents. Except for circumstances wherein an act of the City or Program Guest(s) unduly delay the completion, if Owner does not complete the repairs within 120% of the time noted in the Owner's Notice, the City shall have the option to terminate this Occupancy Agreement by giving written notice to Owner at any time prior to Owner's completion of such repairs.

During any period where a Room is untenantable, as a result of Casualty that was not caused by the negligence or willful misconduct of a City Party, then (i) to the extent any Room is not available for City's use, the rent for any affected Room shall be abated each month by dividing the number of days the Room is unable to be occupied by thirty (30) days, and (ii) if portions of the Premises located outside of the Rooms are damaged or destroyed and not available for City's use, the rent for each Room shall be abated during the time that those portions of the Premises are not available for City's use by multiplying the rent for each Room by a fraction, the numerator of which is the square footage of the Premises that has been damaged or destroyed and the



denominator of which is the square footage of the entire Premises. It is understood and agreed that the City or its agent has the right to enter the destroyed or partially destroyed Premises provided any such entry is not prohibited by law or emergency services, and in all events any such entry is at the sole risk of City. At the City's request, the Owner shall immediately identify an appropriate route through the Hotel building to access the Premises. If the Owner cannot identify an appropriate access route, it is agreed that the City may use any and all means of access at its discretion in order to enter the Premises.

**Subrogation  
Waived**

11. To the extent authorized by any fire and extended coverage insurance policy issued to Owner or City (or the Operator) related to the Premises or operations on it, each such insured will diligently pursue with its insurer a good faith effort to have such insurer waive its rights of subrogation against the party causing the loss or damage. If a premium is required to obtain such waiver, the party seeking and benefitting from such waiver may elect to pay the premium or other cost to ensure the waiver occurs, but otherwise the insured party is under no obligation to procure the waiver of subrogation. Each party agrees to release its counterparty from liability for any loss or damage to the extent it is covered by said insurance.

**Prevailing  
Wage  
Provision**

12. For those projects defined as "public works" pursuant to Labor Code §1720.2, the following shall apply during the Term:

- A. Owner/contractor shall comply with prevailing wage requirements and be subject to restrictions and penalties in accordance with §1770 et seq. of the Labor Code which requires prevailing wages be paid to appropriate work classifications in all bid specifications and subcontracts.
- B. The Owner/contractor shall furnish all subcontractors/employees a copy of the Department of Industrial Relations prevailing wage rates which Owner will post at the job site. All prevailing wage rates shall be obtained by the Owner/contractor from:

Department of Industrial Relations  
Division of Labor Statistics and Research  
455 Golden Gate Avenue, 8th Floor  
San Francisco, California 94102  
Phone: (415) 703-4774  
Fax: (415) 703-4771

For further information on prevailing wage: [http://www.dir.ca.gov/dlsr/statistics\\_research.html](http://www.dir.ca.gov/dlsr/statistics_research.html)

- C. Owner/contractor shall comply with the payroll record keeping and availability requirement of §1776 of the Labor Code.
- D. Owner/contractor shall make travel and subsistence payments to workers needed for performance of work in accordance with the Labor Code.
- E. Prior to commencement of work, Owner/contractor shall contact the Division of Apprenticeship Standards and comply with §1777.5, §1777.6, and §1777.7 of the Labor Code and Applicable Regulations

**Fair  
Employment  
Practices**

13. During the Term of this Occupancy Agreement, the Owner shall not deny benefits to any person on the basis of religion, color, ethnic group identification, sex, age, physical or mental disability, nor shall they discriminate unlawfully against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, mental disability, medical condition, marital status, age, or sex. Owner shall ensure that the evaluation and treatment of employees and applicants for employment are free of such discrimination.

Owner shall comply with the provisions of the Fair Employment and Housing Act (Government Code, Section 12900 et seq.), the regulations promulgated thereunder (California Code of Regulations, Title 2, Section 11000 et seq.), the provisions of Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (Government Code, Sections 11135-11139.8), and the regulations or standards adopted by the awarding City to implement such article.

**Holding Over**

14. In the event the City remains in possession of the Premises with the express written consent of the Owner after the termination or the expiration of the Term, or any extension or renewal thereof, this Occupancy Agreement shall be automatically extended on a month to month basis, subject to a thirty day (30) day notice of termination by the Owner or the City and otherwise on the terms and conditions herein specified, so far as applicable, with Monthly Rent to be at two hundred percent (200%) of the Monthly Rent in effect immediately prior to such holdover period. If no such consent is provided by Owner, then there shall be no holding over and City will be liable to Owner for any consequential or special damages caused by the unlawful holding over.

**Surrender of Possession**

15. Upon termination or expiration of this Occupancy Agreement, the City will peacefully surrender to the Owner the Premises entirely vacant and in good order and repair, except for reasonable use and wear thereof and damage by earthquake, fire, public calamity, the elements, acts of God, or circumstances for which Owner is responsible pursuant to this Occupancy Agreement. Notwithstanding the foregoing, City's obligation to restore the Premises shall also be limited in accordance with Section 19.

**Time of Essence, Binding upon Successors**

16. Time is of the essence of this Occupancy Agreement. Without affecting the provisions governing assignment and subleasing, the terms and provisions of this Occupancy Agreement shall extend to and be binding upon and inure to the benefit of the heirs, executors, administrators, successors, and assigns to the respective parties hereto.

**No Oral Agreements**

17. It is mutually understood and agreed that each party shall be deemed a drafter of the provisions of this Occupancy Agreement in equal measure, and that no alterations or variations of the terms of this Occupancy Agreement shall be valid unless made in writing and signed by the parties hereto, and that no oral understanding or agreement not incorporated herein, shall be binding on any of the parties hereto.

**Hazardous Substance**

18. City agrees that it will comply with all applicable laws in occupying and using the Premises. This obligation includes complying with all laws existing during the Term pertaining to the presence, use, storage, transportation, and disposal of any "hazardous substance" or "hazardous materials" (as those terms are defined in Exhibit B, attached to this Occupancy Agreement; "**Hazardous Materials**") in on or about the Premises. City shall promptly advise Owner of the discovery of any such Hazardous Materials in or about the Premises where the presence, use, storage or disposal of the Hazardous Materials constitute an event requiring reporting to any governmental agency charged with protecting the environment or public health, or reflects a violation of the Environmental Laws, as these are defined in Exhibit B. In the event a government order is issued naming the City or the City incurs any liability during or after the Term in connection with Hazardous Materials that were present on the Premises before the Commencement Date, or which was caused by the Owner or its agent during the Term, Owner shall hold harmless, indemnify, and defend the City in connection therewith and shall be solely responsible as between City and Owner for all efforts and expenses arising from such preexisting contamination.

Owner represents and warrants that, to the knowledge of the Owner's manager: (a) the Premises do not contain asbestos; (b) the Premises do not contain any substance that is deemed Hazardous Materials, other than normal quantities of such Hazardous Materials as may typically be found in commercial construction or cleaning products used and disposed of in accordance with applicable laws; (c) there has been no release of Hazardous Materials on the Premises in violation of applicable law; (d) there are no underground storage tanks for petroleum products or

Hazardous Materials, active or abandoned, located on or under the Premises; (e) Owner has received no notice of violation, administrative complaint, judicial complaint, or other formal or informal notice alleging any violation of any Environmental Laws or informing Owner that the Premises are subject to investigation, inquiry, or proceeding regarding Hazardous Materials or the potential violation of any Environmental Law; and (f) there are no environmental liens on the Premises.

**Improvements and Alterations; Restoration of Premises**

19. Throughout the Term, the City shall make no improvements or alterations to the Premises if these require permits or that affect any roof membrane, any structural elements or involve more than \$2,500 in costs without the express written permission of the Owner, which shall not be unreasonably withheld, conditioned, or delayed. City shall pay for the costs of any such works of improvement and ensure that no liens or other charges are imposed on the Premises. Upon termination of the Occupancy Agreement, any equipment installed on the Premises by the City shall remain the City's property and the City shall remove such property from the Premises and repair any damages caused by such removal before the end of the Term. Upon expiration or termination of the Term, the Premises shall be returned to Owner vacant and in the same condition that existed on the Commencement Date, reasonable wear and tear excepted. On expiration of the Occupancy Agreement, the Premises shall revert to its status as a tourist hotel.

**Indemnification and Insurance**

21. The City agrees to indemnify and hold harmless the Owner, its members, manager(s), agents, successors and assigns ("**Indemnitees**") in the event of any third party claim, demand, cause of action, judgments, obligations, liabilities, expenses and costs (including, e.g., court costs and reasonable attorney's fees) and all other reasonable expenses (collectively "**Claims**") which Owner may suffer as a proximate result of the negligence or other wrongful act or violation of law by a City Party (or by any person or persons acting under the direct control and authority of the City, the Operator, or the agents or employees or either of them), in connection with the City's occupancy of the Premises under and during the Term of this Occupancy Agreement, and agrees to repair or pay for any damage proximately caused by reason of the City's use of the Premises during the Term of this Occupancy Agreement, in accordance with the terms the City committed to in Sections 7, 10, Schedule 7 and Exhibit C, as well as when due to the City's default or an Event of Default, except (i) to the extent such damages are the result of Owner's negligence or willful misconduct or it is the result of negligence or willful misconduct of any person(s) acting under the direct control and authority of Owner. The City's defense and indemnity obligations under this Section shall not be limited by the policy limits of any policy of insurance.

Owner agrees to indemnify and hold harmless the City in the event of any third party Claims that the City may suffer as direct and proximate result of the negligence or other wrongful act or violation of law by the Owner, its employees, or any person or persons acting under the direct control and authority of the Owner and further excluding that portion of the Claim caused by the negligence or willful misconduct of a City Party. Owner's defense and indemnity obligations under this Section shall not be limited by the policy limits of any policy of insurance.

Without limiting either party's defense and indemnity obligations under this Section, each party shall be entitled to participate in the defense of any third party claim that is reasonably likely to give rise to an indemnification claim under this Section.

The parties shall maintain in force at all times such policies of insurance as specified in Exhibit C, and shall abide by all of the terms and conditions of Exhibit C, which are incorporated by reference as if set forth in full herein. The provisions of this Section 21 shall continue in full force and effect despite any expiration or termination of the Occupancy Agreement.

**Taxes** 22. Owner is solely responsible for all tax liabilities, including property taxes. However, the City represents and warrants that under no circumstances shall any room occupied by the City or Program Guests be subject to the City's Transient Occupancy Tax.

**Exclusive Use** 23. Owner shall not rent or allow occupancy of any vacant Rooms or facilities in the Hotel during the Term of the City's occupancy of the Premises.

**Occupancy of Premises** 24. Owner and City understand that they shall not receive rent, fees, or any other form of payments or consideration, or gifts from Program Guests of Rooms in exchange for access to or use of the Premises. Owner and City also understand that neither has entered into any contract with the occupants of the Rooms related to the use of the Premises within the meaning of California Civil Code section 1925. The occupants of the Rooms are not persons who hire any dwelling unit from Owner or City within the meaning of California Civil Code section 1940 and are not subject to the benefits of the California Civil Code or any other state statutes, rules, or regulations or local government rules, regulations or ordinances that confer tenancy rights on the occupants.

**Remedies** 25. (a) It is an "Event of Default" – and a breach by the City - under this Occupancy Agreement if the following occurs: (i) Monthly Rent is not timely paid and such failure is not cured within five (5) days of notice from Owner; (ii) Rent other than Monthly Rent is not timely paid and such failure is not cured within fifteen (15) days of notice from Owner; (iii) City is in breach of its obligation to maintain the insurance coverages required of it, or fails to ensure that the Operator maintains its required insurance coverages; (iv) the City fails to perform any other obligation under this Occupancy Agreement (other those enumerated below), and fails to cure such default within thirty (30) days of notice from Owner; (v) the City abandons the Premises; (vi) the City fails to timely surrender the Premises, or (vii) City permits nuisance conditions to exist on the Premises.

(b) It is an "Event of Default" – and breach by the Owner- under this Occupancy Agreement if the following occurs: (i) Owner fails to timely pay an obligation to City within thirty (30) days of notice from City of such delinquency; (ii) Owner fails to perform an obligation that is required of Owner under this Occupancy Agreement and it fails to cure such default within thirty (30) days of notice from City of such default; and (iii) the Owner is in breach of its obligation to maintain the insurance coverages required of it.

(c) Except to the extent budget has been authorized by the City for Rents due under this Occupancy Agreement, there shall be no right under any circumstances to accelerate the payment of Rent or otherwise declare any payments of Rent not then in default to be immediately due and payable, Owner reserves and shall have all of the remedies reserved to a landlord for a breach of a lease, including:

(1) Owner may: (i) terminate this Occupancy Agreement upon service of lawful notice, and City shall then surrender the Premises to Owner; or (ii) enter and take possession of the Premises, in accordance with any applicable laws governing such repossession, and remove City, with or without having terminated this Occupancy Agreement. The provisions of this Section 25 (c)(1) shall operate as a notice to quit, any other notice to quit or of Owner's intention to re-enter the Premises being expressly waived. If necessary, Owner may proceed to recover possession of the Premises under applicable laws, or by such other legal proceedings, including re-entry and possession. Owner's exercise of any of its remedies or its receipt of City's keys to the Premises shall not be considered an acceptance or surrender of the Premises by City. A surrender must be agreed to in writing and signed by both parties. City shall pay to Owner all costs, losses or damages howsoever arising or occurring payable at the same time and in the same manner as is provided herein in the case of payment of Rent. Any surplus received by the Owner from re-leasing the Premises shall be the absolute property of Owner and City shall have

no right thereto, nor shall the City be entitled to any credit in the event of a surplus in the rentals received by Owner.

(2) Owner shall have the right to continue the Occupancy Agreement in effect after City's breach and recover Rent as it becomes due, and Owner, in addition to all other rights and remedies, shall have the rights and the remedy described in California Civil Code § 1951.4 (which provides that the Owner may continue the Occupancy Agreement in effect after City's breach and abandonment and recover Rent as it becomes due, if the City has right to sublet or assign, subject only to reasonable limitations). Acts of maintenance or preservation, efforts to relet the Premises, or the appointment of a receiver upon Owner's initiative to protect its interest under this Occupancy Agreement shall not of themselves constitute a termination of City's right to possession. City consents to Owner repossessing the Premises and re leasing it for the account of City, in which event the City's obligation will accrue from year to year in accordance with this Occupancy Agreement and City will continue to receive the value of the use of the Premises from year to year in the form of credits against its obligation to pay Rent. The obligations of City shall remain the same as prior to such default, to pay Rent whether City re-enters or not. City agrees to and shall remain liable for the payment of all Rent and the performance of all conditions contained herein and shall reimburse Owner for any deficiency arising out of the re leasing of the Premises, or, in the event Owner is unable to re lease the Premises, then for the full amount of all Rent to the end of the Term, but said Rent and/or deficiency shall be payable only at the same time and in the same manner as provided above for the payment of Rent hereunder, notwithstanding such repossession by Owner or any suit, brought by Owner for the purpose of effecting such repossession of the Premises or the exercise of any other remedy by Owner.

(d) Unless specifically reserved in this Occupancy Agreement, or the damage is caused by the gross negligence or willful misconduct of a party or any agent of such party, each party waives any claims for consequential or special damages arising from this Occupancy Agreement or the use of the Premises. Subject to the preceding sentence, if a party breaches any term or provision of this Occupancy Agreement, the counterparty shall have the right to pursue all available remedies at law or equity, including recovery of damages and specific performance of this Occupancy Agreement. The parties hereto agree that monetary damages would not provide adequate compensation for any losses incurred by reason of a breach of any of the provisions of this Occupancy Agreement and hereby further agrees that, in the event of any action for specific performance in respect of such breach, each party shall waive the defense that a remedy at law would be adequate. Except as expressly provided elsewhere in this Occupancy Agreement, each party's rights and remedies under this Occupancy Agreement are cumulative and in addition to, not exclusive of or in substitution for, any rights or remedies otherwise available to that party.

**Conflict of Interest**

26. By executing this Occupancy Agreement, Owner certifies that it does not know of any fact which constitutes a violation of California Government Code Section 1090, Berkeley City Charter Section 36 and B.M.C. Chapter 3.64, and further agrees promptly to notify the City if it becomes aware of any such fact during the Term of this Occupancy Agreement.

**Right of First Offer**

27. If Owner elects to complete a "Market Transaction" (as defined below) during the Term, then the City will have a right to make the first offer ("ROFO") to purchase the Property. Any such ROFO, if it arises can only be exercised by the City during the Term, and then only if there has been no Event of Default. No rights under this Section 27 are assignable, except that if the City otherwise is capable of exercising the ROFO it may assign such rights to a nonprofit with which the City is partnering to provide housing for people experiencing homelessness, if (and only if) all of the following apply to the non-profit and its exercise of the ROFO ("**Valid Assignee**"): (i) at or before the Offer is made, the City notifies Owner that it has a nonprofit corporation that qualifies for the assignment and it provides reasonable proof of this, (ii) the City's nominated nonprofit makes an Offer and is capable of completing the purchase on the terms of the ROFO set out in

the Offer and provides reasonable evidence of this, and (iii) the City expressly assigns all such ROFO rights, and remains bound to perform the balance of its obligations under the Occupancy Agreement through the Closing Date. Any Valid Assignee shall have the same rights and obligations that the City has under the ROFO once it has made a good faith Offer. For the avoidance of doubt, once the non-profit has made an Offer, any remedies shall be solely those of the non-profit, and those shall be subject to any limitations set out in this Occupancy Agreement for the City.

A failure to exercise the ROFO in accordance with these provisions when the ROFO arises, or a breach of the ROFO provisions by City or a Valid Assignee, or the City's or the Valid Assignee's breach of the "Purchase Agreement" (defined below) will terminate any further rights of the City or any such Valid Assignee under this Section 27.

The ROFO only operates if the Owner intends to enter into a "Market Transaction" which shall mean that the Owner intends to sell the Property in an arms'-length market transaction to a third party. It specifically excludes the following transactions: (i) any transfers associated with a loan transaction; (ii) changes in the membership of the Owner; (iii) any gift transaction; (iv) any transfer to facilitate estate planning by any principal of Owner (or transfer to a family member within the third degree of consanguinity or spouse of the same), and (v) any involuntary transfer. If a ROFO arises, and the City or a Valid Assignee duly exercises it, the City must continue to perform all of its obligations under this Occupancy Agreement until the closing on the purchase of the Property under the ROFO. If City or a Valid Assignee under this Section 27 causes an Event of Default under this Occupancy Agreement or is in breach under the Purchase Agreement, Owner may elect to terminate this Occupancy Agreement and the Purchase Agreement and exercise all other remedies it has.

Where the Owner intends to engage in a Market Transaction, Owner must notify the City of such an intent to market the Premises for sale, and the City (or its Valid Assignee) will have a right to make the first offer on the Premises, which shall be carried out in accordance with the procedure set forth in the *AIR-CRE* form, attached hereto as Exhibit D. If the City exercises such right and elects to purchase the Property, or the Valid Assignee does, the resulting purchase agreement ("**Purchase Agreement**") shall cause the Occupancy Agreement to terminate as of the closing on the Purchase Agreement ("**Closing Date**").

If the City or the Valid Assignee fails to exercise the ROFO, or either fails to complete the Purchase Agreement, then the City and the Valid Assignee shall provide Owner with a quitclaim deed to the Property when requested by Owner to show that the Property is free of any claims by the City or the Valid Assignee except for any obligations pending during the remaining term of this Occupancy Agreement.

## CITY OF BERKELEY PROVISIONS

28. City Non-Discrimination Ordinance. Owner hereby agrees to comply with the provisions of the Berkeley Municipal Code ("**B.M.C.**"), including without limitation Chapter 13.26, as amended from time to time. In the performance of its obligations under this Occupancy Agreement, Owner agrees as follows during the Term:

a. Owner shall not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age (over 40), sex, pregnancy, marital status, disability, sexual orientation or AIDS.

b. Owner shall permit City access to records of employment, employment advertisements, application forms, EEO-1 forms, affirmative action plans and any other documents which, in the reasonable opinion of City, are necessary to monitor compliance with this non-discrimination provision. In addition, Owner shall fill out, in a timely fashion, forms supplied by City to monitor this non-discrimination provision.

29. Non-Discrimination Against Persons With Disabilities.

a. If Owner provides any aid, service or benefit to others on the City's behalf, Owner shall, in the provision of such aid, service or benefit, observe and comply with all applicable provisions of Title II of the Americans with Disabilities Act of 1990 and any amendments thereto. Owner shall further observe and comply with all applicable federal, state, municipal and local laws, ordinances, codes and regulations prohibiting discrimination against individuals with disabilities or ensuring that individuals with disabilities are not excluded from participating in or receiving benefits, services or activities of the City, if applicable.

b. If Owner is or becomes a "public accommodation" as defined in Title III of the Americans with Disabilities Act of 1990, Owner shall observe and comply with all applicable provisions of the Act and any amendments thereto, and all applicable federal, state, municipal and local laws, ordinances, codes and regulations prohibiting discrimination on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations offered by the Owner. All of Owner's activities must be in accordance with these laws, ordinances, codes, and regulations, and Owner shall be solely responsible for complying therewith.

30. Conflict of Interest Prohibited.

a. In accordance with California Government Code Section 1090, Berkeley City Charter Section 36 and B.M.C. Chapter 3.64, neither Owner nor any employee, officer, director, partner or member of Owner, or immediate family member of any of the preceding, shall have served as an elected officer, an employee, or a committee or commission member of City, who has directly or indirectly influenced the making of this Occupancy Agreement.

b. In accordance with California Government Code Section 1090 and the Political Reform Act, (Government Code Section 87100 et seq.,) no person who is a director, officer, partner, trustee, employee or consultant of Owner, or immediate family member of any of the preceding, shall make or participate in a decision made by City or any of its boards, commissions or committees, if it is reasonable foreseeable that the decision will have a material effect on any source of income, investment or interest in real property of that person or City, except to the extent permitted by 2 California Code of Regulations, Section 18700(c)(2).

Interpretation of this Section shall be governed by the definitions and provisions use in the Political Reform Act, Government Code section 87100 et seq., its implementing regulations, manuals and codes, Government Code section 1090, Berkeley City Charter section 36 and B.M.C. Chapter 3.64, as amended from time to time.

31. Nuclear Free Berkeley. Owner agrees to comply with B.M.C. Chapter 12.90, the Nuclear Free Berkeley Act, as amended from time to time.

32. Oppressive States.

a. In accordance with Resolution No. 59,853-N.S., Owner certifies that it has no contractual relations with, and agrees during the Term of this Occupancy Agreement to forego contractual relations to provide personal services to, the following entities:

i. The governing regime in any Oppressive State.

ii. Any business or corporation organized under the authority of the governing regime of any Oppressive State.

iii. Any individual, firm, partnership, corporation, association, or any other commercial organization, and including parent-entities and wholly-owned subsidiaries (to the extent that their operations are related to the purpose of this Occupancy Agreement) for the express purpose of assisting in business operations or trading with any public or private entity located in any Oppressive State.

b. For purposes of this Occupancy Agreement, the Tibet Autonomous Region and the provinces of Abo, Kham, and U-Tsang shall be deemed Oppressive States.

c. Owner's failure to comply with this Section 31 shall constitute a default of this Occupancy Agreement and Owner may terminate this Occupancy Agreement on five days' written notice to Owner. In the event that City terminates this Occupancy Agreement due to a default under this provision, City may deem Owner a non-responsible bidder for five (5) years from the date this Occupancy Agreement is terminated.

33. Berkeley Sanctuary City Ordinance. Owner hereby agrees to comply with the provisions of the Sanctuary City Contracting Ordinance, B.M.C. Chapter 13.105. In accordance with this Chapter, Owner agrees not to provide the U.S. Immigration and Customs Enforcement Division of the United States Department of Homeland Security with any Data Broker or Extreme Vetting Services as defined herein:

a. "Data Broker" means either of the following: (1) The collection of information, including personal information about consumers, from a wide variety of sources for the purposes of reselling such information to their customers, which include both private-sector business and government agencies; (2) the aggregation of data that was collected for another purpose from that for which it is ultimately used.

b. "Extreme Vetting" means data mining, threat modeling, predictive risk analysis, or other similar services. Extreme Vetting does not include: (1) The City's computer-network health and performance tools; (2) Cybersecurity capabilities, technologies and systems used by the City of Berkeley Department of Information Technology to predict, monitor for, prevent, and protect technology infrastructure and systems owned and operated by the City of Berkeley from potential cybersecurity events and cyber-forensic based investigations and prosecutions of illegal computer-based activity.

**IN WITNESS WHEREOF, this Occupancy Agreement has been executed by the parties hereto as of the dates written below.**

CITY:

CITY OF BERKELEY

By \_\_\_\_\_  
\_\_\_\_\_



CITY:

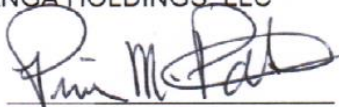
CITY OF BERKELEY

By \_\_\_\_\_  
\_\_\_\_\_

Date \_\_\_\_\_

OWNER:

GANGA HOLDINGS, LLC

By   
PRAVIN PATEL,  
Manager

Date 11/22/2022

**Approved as to Form**  
\_\_\_\_\_  
CITY ATTORNEY  
By \_\_\_\_\_

Date \_\_\_\_\_

## SCHEDULE 7

### REPAIRS, FUNDING, AND RISK MANAGEMENT OBLIGATIONS

The parties intend by these provisions to provide certain standards for reducing (and allocating) risks and costs between them, including the costs of repairs arising from the use of the Premises and the need for repairs or reconstruction of the Premises during the Term.

**A. ADA Accessibility And Disability Access Disclosure Under Section 1938 of the California Civil Code.** City acknowledges and agrees that it is familiar with the condition of the Premises and all improvements thereon and, except with respect to pending work on a retaining wall that affects some of the parking on site, is leasing the Premises in its "AS-IS" condition, and, except with respect to said retaining wall, Owner shall have no obligation whatsoever to perform any work, supply any materials, incur any expenses or make any installations in order to prepare the Premises for City's occupancy. Moreover, Owner has not granted any allowances of any kind for the condition of the Premises. Except as expressly provided in this Occupancy Agreement, Owner makes no representation or warranty of any kind or nature, express, implied or otherwise, regarding the condition or usefulness of the Premises by or for City, its compliance with applicable Legal Requirements, or the suitability of the Premises for any particular use or purpose.

In accordance with Section 1938 of the California Civil Code, Owner has notified City that the Premises has undergone an inspection by a Certified Access Specialist to determine if the Premises meet all applicable construction related accessibility standards pursuant to Section 55.53 of the California Civil Code. Owner makes the following statement in compliance with the requirements of Section 1938(e) of the California Civil Code:

*"A Certified Access Specialist ("CASp") can inspect the subject premises and determine whether the subject premises comply with all of the applicable construction-related accessibility standards under state Laws. Although state law does not require a CASp inspection of the subject premises, the commercial property owner or lessor may not prohibit the lessee or tenant from obtaining a CASp inspection of the subject premises for the occupancy or potential occupancy of the lessee or tenant, if requested by the lessee or tenant. The parties shall mutually agree on the arrangements for the time and manner of the CASp inspection, the payment of the fee for the CASp inspection, and the cost of making any repairs necessary to correct violations of construction-related accessibility standards within the subject premises."*

If City desires to obtain such CASp inspection, the CASp party, the scope of the inspection and date such inspection shall be performed shall be subject to the prior written approval of Owner, which will not be unreasonably withheld. Owner shall have the right to have a representative present during such inspection. The cost of such inspection shall be paid by City without reimbursement or other payment from Owner. Any work with respect to the Premises required to be completed as described in the CASp report shall be performed and paid for by City. Nothing contained in this Schedule 7 (including, without limitation, the notice to City above), shall alter the Parties' respective obligations under the other express provisions of this Occupancy Agreement.

**B. Life Safety Systems.** At its cost, Owner shall provide the existing life safety systems on the Premises, together with any upgrades required by applicable law. City agrees that its Program manager will, at least on a weekly basis, (i) test all smoke/CO detectors throughout the Hotel, and (ii) report to Owner on any smoke detectors that fail the test. Separately, the City will promptly notify the Owner of any defects that it becomes aware of in the life safety systems on the Premises.

C. **Yearly Damage Deposit.** As provided in Section 7 of the Occupancy Agreement, on the Commencement Date and on each anniversary of the Commencement Date (thus, at the start of each Year of occupancy), the City will provide an annual amount as a "damage deposit" for the ensuing Operating Year to cover anticipated costs of repairing the Premises following a Casualty caused by a City Party.

Any unused portion of the Yearly Damage Deposit will be retained by Owner as Rent; provided, however, if the Owner exercises an Owner Termination Right, a Casualty Termination Right, or a Special Termination Right, or the City exercises a termination due to Owner's Event of Default, then as of the date the Term ends, any unused portion of the Yearly Damage Deposit shall be (i) applied to the need for repairs to the extent that City fails to surrender the Property in the condition required by the Occupancy Agreement; and (ii) the balance is to be paid over to the City within thirty (30) days of such surrender, or the completion of such repairs, whichever is later.

D. **Program Management.** The City has advised Owner that each Program Guest is bound by an agreement with the City ("**Residency Agreement**") to use the Premises for residential purposes only and to exercise care in pursuing that occupancy and use.

1. It is a material part of the Occupancy Agreement that the City observe and enforce the following requirements under the Residency Agreement: (i) it will ensure that the Program Guest will test the smoke/CO detector in that person's assigned Room and report on whether it functions (this shall not relieve the City from its own testing obligations); and (ii) the City will ensure that each Residency Agreement will be duly reviewed and signed by the Program Guest, and that it will contain the following warnings and provisions in capital letters and 14 point font (and it shall note that doing these things will be grounds for eviction from the Premises):

*[CITY/PROGRAM COMPANY] WANTS TO ENSURE THAT THE HOUSING OFFERED IS KEPT IN A SAFE AND USABLE CONDITION.*

*YOU AGREE TO HELP ENSURE THAT YOU DO YOUR PART TO REACH THIS GOAL.*

*IF YOU OR ANY GUEST OF YOURS ENGAGES IN ANY OF THE FOLLOWING CONDUCT, IT WILL CONSTITUTE **WILLFUL MISCONDUCT** AND WILL BE IMMEDIATE GROUNDS FOR TERMINATING YOUR RIGHT TO ENTER THE PROPERTY: (A) ANY INTENTIONAL DAMAGE TO THE ROOM OR ANY PART OF THE BUILDING OR EXTERIOR PREMISES (i.e., PURSUING A COURSE OF ACTION WITH THE LIKELY RESULT THAT IT WILL SO DAMAGE THE PREMISES); (B) SMOKING IN THE ROOM OR ANYWHERE IN THE BUILDING; (C) ANY TAMPERING OR DAMAGE TO THE SMOKE DETECTORS IN THE ROOM OR THE BUILDING; (D) ALLOWING ANYTHING TO ENTER THE TOILET OR BE FLUSHED DOWN THE TOILET OTHER THAN HUMAN WASTE AND REGULAR TOILET PAPER, (THIS IS **WITHOUT EXCEPTION** - SO, ALL OF THE FOLLOWING ARE PROHIBITED: SYRINGES, "WIPES" OF ANY KIND [INCLUDING THOSE THAT CLAIM TO BE "DISPOSABLE"], TAMPONS, PAPER TOWELS, HAIR BALLS, DENTAL FLOSS, STRING, ETC. ARE ALL STRICTLY PROHIBITED); (E) TAMPERING WITH ANY PLUMBING OR ELECTRICAL DEVICES (THAT IS, ANYTHING OTHER THAN TURNING FAUCETS ON OR OFF, OR PLUGGING IN APPLIANCES, ETC.); (F) ALLOWING ANY SINK TO OVERFLOW; (F) THE USE OF ANY OF THE FOLLOWING: ANY OPEN FLAME, ANY HOT PLATES AND ANY SPACE HEATERS; (G) TAMPERING WITH ANY ELECTRICAL WIRING; (H) BRINGING ANY HAZARDOUS MATERIALS ONTO THE PREMISES UNLESS IT IS A CONSUMER PRODUCT THAT IS KEPT IN ITS AUTHORIZED CONTAINER AND USED SOLELY FOR THE PURPOSE IT WAS DESIGNED FOR; AND (I) BRINGING PROPANE, GASOLINE OR ANY OTHER FLAMMABLE PRODUCT ONTO THE PREMISES, EXCEPT FOR FUEL IN A VEHICLE'S FUEL TANK.*

2. *IF YOU ARE RESPONSIBLE FOR ANY LOSS OR DAMAGES TO THE ROOM OR ANY PART OF THE PROPERTY, DUE TO YOUR NEGLIGENCE OR WILLFUL MISCONDUCT, THEN [THE CITY] CAN TERMINATE YOUR USE OF THE ROOM OR THE PREMISES IMMEDIATELY AND YOU WILL LOSE ALL PRIVILEGES AND BENEFITS OF THIS PROGRAM PROVIDED TO YOU BY THE CITY.*

3. For all purposes under this Occupancy Agreement, City acknowledges that if any City Party engages in any of the conduct identified as "willful misconduct" in the enumerated actions set out in capital letters of subsection 1., above, it shall be binding on City as an act of "willful misconduct" for all purposes under this Occupancy Agreement.

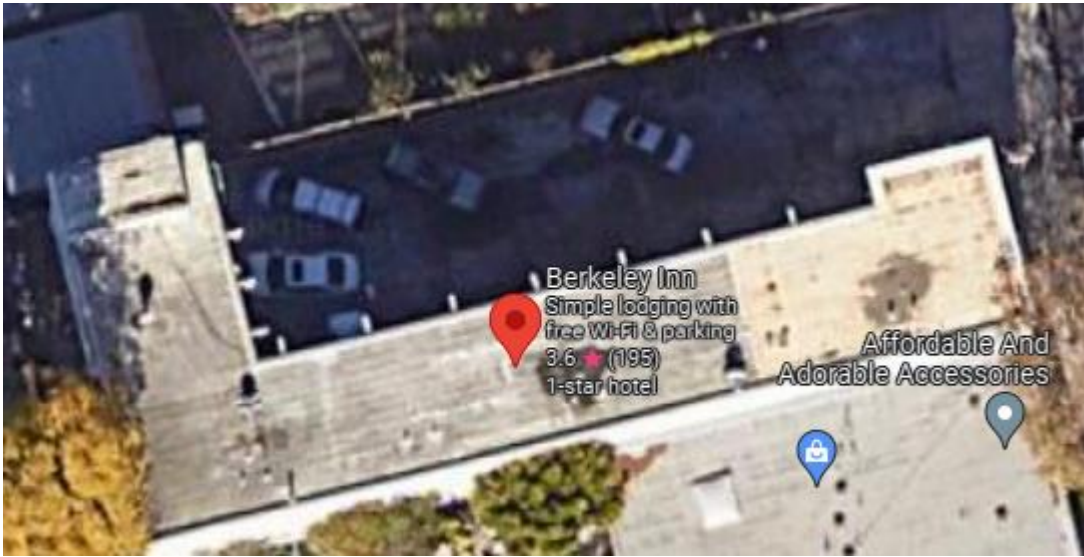
- Eviction for Misconduct. The City and its Operator shall ensure that Owner is promptly notified of any events or occurrences constituting a violation of the above requirements under the Residency Agreement (regardless of any ostensible "cure" period). All of the above must be grounds for immediate eviction under the Residency Agreement, and where any of the prescribed events occurs, the City will take all reasonable and lawful measures to cause such Program Guest to be evicted from the Premises within TEN (10) days of the occurrence, and ensure that he or she is precluded from reentering the Premises for the balance of the Term. Until such eviction is accomplished, the City will be responsible for any further losses caused by that Program Guest.
- Other Evictions/Risk Allocation. Moreover, if the Program Guest has more than one such damage incident, that is the result of mere negligence (i.e., the first such occurrence was not caused by an act or omission constituting gross negligence or willful misconduct, including, as defined in the Residency Agreement), and the aggregate damage inclusive of prior Casualties attributable to such Program Guest is greater than \$5,000, then, if the City does not oust the Program Guest, the City will be responsible for any further damages caused by that Program Guest's negligence (after the Yearly Damage Deposit has been exhausted). Where any Program Guest causes a loss of more than \$5,000.00 (in a single instance or in the aggregate), regardless of the degree of negligence or misconduct, and the City does not remove such person from the Premises immediately after such a threshold of harm has been reached, then the City shall be responsible for any further Claim, loss or damage caused by such Program Guest's acts or omissions (whether due to simple or gross negligence or due to willful misconduct); provided that, if the City is so obligated to pay for such further losses, the City can apply any balance remaining in the Yearly Damage Deposit for that Year (defined in Section 7, above) to cover the resulting costs.
  - Thus, if a Program Guest has caused two instances where repairs were needed and these cost more than \$5,000 in losses, and the City does not remove such person from the Premises, and then a further loss of \$10,000 occurs due to that person's acts or omissions, the City will pay for such additional \$10,000 loss; however, it can use any remaining balance in the Yearly Damage Deposit to pay for those costs. For example, if there are three thousand dollars (\$3,000) remaining in the Yearly Damage Deposit account for that Year, then the parties will apply the \$3,000 to pay for such repairs, and the City will provide further payment of the \$7,000.00 balance to cover the additional costs of repairs.
  - See additional provisions in Exhibit C.

D. Laundry FF&E. Only staff supervised by the Operator may have access to the laundry room area. If any damage is caused to the laundry equipment during the Term by any City Party, and such damages ultimately aggregate to more than \$2,000.00 (Two Thousand Dollars), Owner may, in its discretion remove the existing laundry equipment and install a coin operated laundry serviced by a vendor.

E. Insurance. See Exhibit C.

**Exhibit A  
Aerial Site Plan**

This is an aerial site plan including all parking spaces contiguous to the subject hotel building.



This is a street view showing parking spaces contiguous to the subject hotel building.



## Exhibit B

### Hazardous Substances and Environmental Laws

**“Hazardous Substances”** means any hazardous or toxic substance, material or waste, or any pollutant or contaminant, or any substance that is or becomes regulated by any local governmental authority, the state in which the Premises are located or the United States Government, including without limitation: (a) those substances included within the definitions of “hazardous substances,” “hazardous materials,” “toxic substances,” or “solid waste” in CERCLA or RCRA; (b) those substances defined as “hazardous wastes” in section 25117 of the California Health & Safety Code, or as “hazardous substances” in section 25316 of the California Health & Safety Code, and in the regulations promulgated pursuant to said laws; (c) those substances listed in the United States Department of Transportation Table (49 C.F.R. 172.101 and amendments thereto) or by the Environmental Protection Agency (or any successor agency) as hazardous substances (40 C.F.R. part 302 and amendments thereto); (d) any material, waste or substance which is (i) petroleum (including crude oil or any fraction thereof, natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel, or any mixture thereof), (ii) petroleum products, (iii) asbestos, (iv) polychlorinated biphenyls, (v) designated as a “hazardous substance” pursuant to section 311 of the Clean Water Act, 33 U.S.C. 1251 et seq. (33 U.S.C. §1321) or listed or designated as a “hazardous substance” pursuant to section 307 of the Clean Water Act (33 U.S.C. §1317), (vi) flammable explosives, or (vii) radioactive materials, (viii) urea formaldehyde, (ix) radon gas, (x) medical waste, and (xi) chemicals that may cause cancer or reproductive toxicity; (e) defined as a “hazardous waste” pursuant to Section 1004 of the Federal Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq. (42 U.S.C. § 6903), (f) defined as a “hazardous substance” pursuant to section 101 of the Comprehensive Environmental Response Compensation and Liability Act (42 U.S.C. § 9601, et seq.); and (g) such other substances, materials, and wastes which are or become classified as hazardous or toxic under any of the Environmental Government Regulations or any other applicable local, state or federal law, or otherwise are or become regulated under any Environmental Law(s).

**“Environmental Law(s)”** means any federal, state, or local laws, ordinances, rules, regulations, requirements, orders, directives, guidelines, or permit conditions, in existence as of the Commencement Date or as later enacted, promulgated, issued, modified or adopted, regulating or relating to Hazardous Substances, and all applicable judicial, administrative, and regulatory decrees, judgments, and orders, and common law, including those relating to industrial hygiene, public safety, human health, or protection of the environment, or the reporting, licensing, permitting, use, presence, transfer, treatment, analysis, generation, manufacture, storage, discharge, Release, disposal, transportation, Investigation or Remediation of Hazardous Substances. Environmental Government Regulations include the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. section 9601, et seq.) (“CERCLA”); the Resource Conservation and Recovery Act, as amended, (42 U.S.C. section 6901 et seq.) (“RCRA”); the federal Water Pollution Control Act, as amended, (33 U.S.C. section 1251 et seq.); the Toxic Substances Control Act, as amended, (15 U.S.C. section 2601 et seq.); the Hazardous Substances Account Act (Chapter 6.8 of the California Health and Safety Code section 25300 et seq.); Chapter 6.5 commencing with section 25200 (Hazardous Waste Control) and Chapter 6.7 commencing with section 25280 (Underground Storage of Hazardous Substances) of the California Health and Safety Code; and the California Water Code, sections 13300 et seq.



## EXHIBIT C

### Minimum Insurance Requirements

Unless separately defined below, capitalized terms shall have the meaning given to them in the main body of the Occupancy Agreement. To the extent of any conflict between these provisions and those in the main body of the Occupancy Agreement, these shall prevail. In addition, the City will provide all of the coverages contained in its "Memorandum of Coverages" attached hereto as Schedule 2 to the extent that such coverages are broader than and more protective of Owner (otherwise the broader coverages of this Exhibit C and the provisions of the main body of the Occupancy Agreement will prevail).

a. For the Term of this Occupancy Agreement, City shall self-insure or maintain, at its own expense, comprehensive general liability insurance in an amount not less than ONE MILLION DOLLARS (\$1,000,000) combined single and aggregate limits for both bodily injury and property damage, personal injury, completed operations and products liability. City shall insure all of the City's personal property located on or in the Premises against all risks. All such liability insurance shall name the Owner and its members and manager and its agents and employees as additional insureds and shall contain a severability of interests clause, specifying that, with respect to the coverage limits, such liability insurance applies to each person named as additional insureds as though a separate policy were issued to each, thus providing primary coverage with respect to the claims arising from the operations on the Premises.

City shall cause its Operator to provide the following insurance coverages: (a) comprehensive general liability insurance in an amount not less than ONE MILLION DOLLARS (\$1,000,000) combined single and aggregate limits for both bodily injury and property damage, personal injury, completed operations and products liability; (b) "all risks" form of property insurance for all of the Operator's personal property on the Premises; (c) If any licensed professional performs services as the Operator, a professional liability insurance policy in the minimum amount of \$1,000,000 to cover any claims arising out of Operator's performance of services under this Occupancy Agreement; (d) Worker's Compensation Insurance at levels required by statute; and (e) if Operator uses any vehicles in its operations in or about the Property, automobile liability coverage for bodily injury and property damage of not less than \$100,000 per person bodily injury per accident and \$50,000 in property damage per accident. The Workers' compensation policy shall include Employer Liability Insurance with limits not less than \$1,000,000 each accident, and shall provide that the insurance carrier shall not cancel, terminate, or otherwise modify the terms and conditions of said insurance except upon thirty (30) days prior written notice to Owner and shall provide for a waiver of any right of subrogation against Owner, to the extent permitted by law

City has provided a Memorandum of Coverage to signify its proposed coverage of these coverage obligations. A copy is attached to this Exhibit C as **Schedule 1**. The City agrees to maintain these coverages at its cost throughout the Term.

Subject to the provisions of this Exhibit C, Owner shall maintain at all times during the performance of this Occupancy Agreement the insurance coverages (for property damage to the Property and for liability insurance) as identified in the quote relating to property damage and liability insurance attached hereto as **Schedule 1**. To the extent permitted under Owner's Policies, Owner's liability insurance shall name the City, its officers, agents, volunteers and employees as additional insureds but shall be subordinate to the primary coverage provided by the City.

Owner shall not be in breach of this Occupancy Agreement if it is unable to procure ongoing or replacement coverage(s) for the policies or coverages noted on Schedule 1 (whether property damage or liability coverage; individually, an "**Owner's Policy**", and collectively, "**Owner's Policies**"), so long as Owner has made commercially reasonable efforts to find replacement coverage for an Owner's Policy

and is unable to find equivalent coverage, or is unable to find it at a premium cost that does not exceed the prior Year's coverage costs for such insurance by more than 50% and City will not cover the excess premium costs over such 50% maximum (referred to as a "**Coverage Failure**"). If Owner suffers a Coverage Failure, it may elect to terminate this Occupancy Agreement on thirty (30) days' notice ("**Special Termination Right**"), and if there is a loss of coverage under the Owner Policies before the City surrenders possession, City shall be responsible for any Claim, loss or damage suffered or incurred by Owner until such surrender occurs. If Owner exercises its Special Termination Right then City shall timely surrender the Premises to Owner as required within such thirty (30) days, unless the next sentence applies. The City shall have an option to extend the surrender date by ninety (90) days (so that the surrender date is one hundred and twenty (120) days after notice of the Special Termination Right ("**Extension Election**") if (i) it has not otherwise caused an Event of Default, (ii) the Coverage Failure is only with respect to Owner's property damage coverage, and (iii) the City makes its Extension Election within ten (10) days of Owner's notice of exercising its Special Termination Right. If an Extension Election occurs, the City shall hold harmless, defend and indemnify the Owner and the Indemnitees from all Claims arising from the City's continued use of or operations on the Property until the Premises are duly surrendered by the City. Time is of the essence in making such Extension Election.

All insurance policies shall: 1) provide that the insurance carrier shall not cancel, terminate or otherwise modify the terms and conditions of said policies except upon thirty (30) days written notice to the City's Contract Administrator or the Owner, as applicable (unless otherwise noted on Schedule 1); and 2) be evidenced by the original Certificate of Insurance, specifying the required coverage and the insurance carrier's standard additional insured form endorsement. If any of the stipulated coverages are to change, such change is to be approved as to form and sufficiency by the City's Contract Administrator and Owner, as applicable, with such approval to be reasonably exercised. A failure by City or Owner to procure and maintain the required coverage(s) is an Event of Default unless the failure is a Coverage Failure. The original insurance certificates and all extensions to the insurance certificates should be sent to the addresses identified below.

b. If the commercial general liability insurance referred to above or shown in Schedule 1 is written on a Claims Made Form then, following termination of this Occupancy Agreement, the applicable party required to provide coverages must purchase and ensure there is coverage that will survive for a period of not less than five years after the end of the Term. Coverage shall also provide for a retroactive date of placement coinciding with the effective date of this Occupancy Agreement.

c. If a party to the Occupancy Agreement (including any Operator) employs any person to be in or around the Premises, it shall carry workers' compensation and employer's liability insurance and shall provide a certificate of insurance to its counterparty. The workers' compensation insurance shall: 1) provide that the insurance carrier shall not cancel, terminate or otherwise modify the terms and conditions of said insurance except upon thirty (30) days written notice to the City's Contract Administrator or Owner (as applicable); 2) provide for a waiver of any right of subrogation against the counterparty, to the extent permitted by law; and 3) shall be approved as to form and sufficiency by the Contract Administrator and the Owner, as applicable.

Where there is a Casualty event, and coverage may be available under an Owner's Policy, it is within the Owner's discretion to tender a claim under such policies, except to the extent the City can direct that decision under this subsection (d). If, in any given Year there is a liability claim, or a Casualty event that involves a loss or damage (to Owner or a third party) that is covered under an Owner's Policy (a "**Covered Claim**"), then Owner shall (i) provide notice to the City of the nature of the Covered Claim and the date of occurrence ("**Claim Notice**"), and (ii) tender the Covered Claim under the applicable Owner's Policy if (i) the amount of the Covered Claim for an occurrence is more than \$150,000.00 (One Hundred and Fifty Thousand Dollars), (ii) if the amount of the Covered Claim is less than \$150,000.00, but more

than one Covered Claim has occurred during the applicable Year and the aggregate of all such Covered Claims in that Year (regardless of whether they were tendered) exceeds \$250,000.00, and (iii) the City directs the Owner to pursue submission of the Covered Claim within ten (10) days of the Claim Notice. If Owner submits such Covered Claim and, as a result, there is a Coverage Failure, Owner may elect to terminate this Occupancy Agreement as a Special Termination Right.

e. City agrees that it will pay for up to \$30,000 per Year towards (i) the premium costs of Owner's Policies and (ii) any deductibles imposed during that Year under those Owner's Policies for a Covered Claim. Such contribution will first be applied towards any premium costs for the applicable Year, with any remainder of the \$30,000 to be payable to the extent of any deductibles incurred during such Year for a Covered Claim. Owner shall provide a reasonable accounting of such costs and City will reimburse Owner for these costs within sixty (60) days of such invoice from Owner.

f. If there is a Casualty or Claim that exceeds the coverage limits required of Owner under the Occupancy Agreement (e.g., \$5 million in property coverage and \$1 million in liability coverage), the City agrees to hold harmless, defend and indemnify the Owner and the Indemnitees from and against any loss or Claims arising from the Casualty or Claim that exceed the required coverage limits.

g. Owner shall forward all insurance documents to:

Department Name: City Manager

Department Address: 2180 Milvia Street, Berkeley, CA 94704

The City shall forward all insurance documents to the Owner at its address for notices.

### **SCHEDULE 1**

[[ATTACHATTACHED](#) QUOTES APPROVED BY CITY]

### **SCHEDULE 2**

[[ATTACHATTACHED](#) MEMORANDUM OF COVERAGES BY CITY]

EXHIBIT D

AIR/CRE Right of First Offer to Purchase



RIGHT OF FIRST OFFER TO PURCHASE
STANDARD LEASE ADDENDUM

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

By and Between

Lessor: \_\_\_\_\_

Lessee: \_\_\_\_\_

Property Address: \_\_\_\_\_

(street address, city, state, zip)

Paragraph \_\_\_\_\_

a. Subject to the provisions of Para. 27 of the Occupancy Agreement and this paragraph, during the Term (the "First Offer Period"), Lessee shall have a Right of First Offer ("ROFO") to purchase the Premises. The defined terms used in the Occupancy Agreement between the parties shall be used except that herein, "Lessor" is the equivalent of "Owner", "Lessee" is the equivalent of "City," and "Premises" is the equivalent of "Property" in the Occupancy Agreement.

b. If, at any time during the First Offer Period, Lessor decides, in its sole and absolute discretion, that it is interested in pursuing a "Market Transaction," Lessor shall notify Lessee of such interest (the "First Offer Notice"). Lessor is not, however, under any obligation to sell the Premises.

c. If Lessor should send a First Offer Notice to Lessee and Lessee wishes to exercise Lessee's right of First Offer with respect to the Premises, then within fifteen (15) days of delivery of the First Offer Notice to Lessee, Lessee shall deliver notice to Lessor of Lessee's exercise of its right of First Offer. Such notice shall be in the form of a binding offer to purchase the Premises and Lessee in making such offer shall use the then most current "Standard Offer, Agreement and Escrow Instructions for Purchase of Real Property" form published by the AIR Commercial Real Estate Association (the "Offer"), together with an addendum specifying that the sale is "as is, where is and with all faults" that will include a full release of Lessor for any physical conditions of the Property.

d. If Lessee does not deliver to Lessor its Offer with respect to the Premises within the specified delivery period, time being of the essence, then Lessee's ROFO shall terminate and be void.

e. If Lessee delivers the required Offer in a timely fashion then Lessor shall review said Offer and decide whether or not it wishes to sell the Premises on the terms contained therein. If Lessor in its sole and absolute discretion determines that the Offer is unacceptable, it shall notify the City ("Notice"); then Lessor shall be allowed to market and enter into a contract to sell the Premises to a third party free of the ROFO, if (i) it is entered into within nine (9) months of the Notice, (ii) the terms are more favorable (financially) than those offered by Lessee, as determined by discounting all cash flows to present value, and (iii) it closes within a year of the Notice. If Lessor determines that the terms of Lessee's Offer are acceptable then the parties shall proceed with the sale in accordance with the terms of Lessee's Offer.

f. If the Occupancy Agreement, or Lessee's right to possession of all or any portion of the Premises shall terminate in any manner whatsoever, then immediately upon such termination the ROFO herein granted shall simultaneously terminate and become null and void and of no force or effect whatsoever. Time is of the essence with regard to Lessee's Right of First Offer.

g. Lessee's ROFO is intended to apply only to voluntary transfers involving third party transferees and shall not apply therefore: where the Premises or any portion of either is taken by eminent domain or sold under threat of condemnation, to transfers to an entity related to the Lessor, to intra-family or intra-ownership transfers, or to transfers by Lessor to a trust created by Lessor or if Lessor is a trust to transfers to a trust beneficiary.

AIR CRE, 500 North Brand Blvd, Suite 900, Glendale, CA 91203, Tel 213-687-8777, Email contracts@aircre.com

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