

ORDINANCE NO. 08-21

**AN ORDINANCE OF THE CITY COUNCIL OF THE
CITY OF ORANGE APPROVING A DEVELOPMENT
AGREEMENT WITH DCSG THREE THOUSAND
WEST, LLC FOR A HOTEL PROJECT ON A SITE
LOCATED AT 3000 W. CHAPMAN AVENUE.**

**DEVELOPMENT AGREEMENT
APPLICANT: DCSG THREE THOUSAND WEST, LLC**

WHEREAS, the Planning Commission conducted a duly advertised public hearing on June 8, 2018, at which time interested persons had an opportunity to testify either in support of or opposition to a project consisting of construction of a new 305 guest room, five-story hotel on a 4.555 acre site located at 3000 W. Chapman Avenue (the "Project"), including Major Site Plan Review No. 0937-18, Design Review No. 4937-18, Administrative Adjustment No. 0264-18; and

WHEREAS, the Planning Commission unanimously recommended approval of the Project and determined that the Project is categorically exempt from the provisions of the California Environmental Quality Act ("CEQA") pursuant to CEQA Guideline 15332 because:

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
- (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
- (c) The project site has no value as habitat for endangered, rare or threatened species.
- (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
- (e) The site can be adequately served by all required utilities and public services; and

WHEREAS, the Project applicant, DCSG THREE THOUSAND WEST, LLC, wishes to extend the entitlement period by means of a Development Agreement; and

WHEREAS, a Development Agreement application was filed by DCSG THREE THOUSAND WEST, LLC as authorized by the City of Orange Municipal Code; and

WHEREAS, the Development Agreement application was processed in the time and manner consistent with state and local law; and

WHEREAS, the City Council conducted a duly advertised public hearing on June 8, 2021, at which time interested persons had an opportunity to testify either in support of or opposition to the Development Agreement.

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF ORANGE DOES
ORDAIN AS FOLLOWS:**

SECTION I:

1. *The Development Agreement is consistent with the objectives, policies, general land uses, and programs specified in the General Plan and any applicable specific plan or redevelopment plan.*

The Development Agreement and related enhanced public benefits offered in conjunction with the Project (Major Site Plan Review No. 0937-18, Design Review No. 4937-18, and Administrative Adjustment No. 0264-18) are consistent with the objectives, policies, general land uses, and programs specified in the General Plan and any applicable specific plan or redevelopment plan.

The General Plan Economic Development Element calls for the City to strengthen the City's economic base and stimulate employment through new commercial and industrial development and expansion.

2. *The Development Agreement is compatible with the uses authorized in the district or planning area in which the real property is located.*

The Development Agreement and related enhanced public benefits offered in conjunction with the Project (Major Site Plan Review No. 0937-18, Design Review No. 4937-18, and Administrative Adjustment No. 0264-18) are compatible with the uses authorized in the district or planning area in which the real property is located.

3. *The Development Agreement is in conformity with the public necessity, public convenience, general welfare, and good land use practices.*

The Development Agreement and related enhanced public benefits offered in conjunction with the Project (Major Site Plan Review No. 0937-18, Design Review No. 4937-18, and Administrative Adjustment No. 0264-18) are consistent with public necessity, public convenience, and general welfare through the improvement of vacant property, the expansion of employment opportunities, increased transient occupancy tax revenues, and the public benefit payment to support City services.

4. *The Development Agreement will be beneficial to the health, safety, and general welfare consistent with the policy of the City with respect to development agreements as provided in Section 17.44.200.*

The development of the site replaces a vacant property with a modern, attractive commercial development that is beneficial to the local economy and generates revenue to support local government services that improve the quality of life for the community.

5. *The Development Agreement will not adversely affect the orderly development of property in the City.*

The Development Agreement and related enhanced public benefits offered in conjunction with the Project (Major Site Plan Review No. 0937-18, Design Review No. 4937-18, and Administrative Adjustment No. 0264-18) will ensure that it is compatible with the existing development of the surrounding area.

SECTION II:

The Development Agreement for the Project is approved and adopted as shown in Exhibit “A,” attached hereto and incorporated herein by reference.

SECTION III:

The Development Agreement described in Section II is consistent with the finding of categorical exemption pursuant to CEQA Guideline 15332 for Major Site Plan Review No. 0937-18, Design Review No. 4937-18, and Administrative Adjustment No. 0264-18 and no further environmental analysis is necessary because:

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
- (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
- (c) The project site has no value as habitat for endangered, rare or threatened species.
- (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
- (e) The site can be adequately served by all required utilities and public services.

SECTION IV:

If any section, subdivision, paragraph, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance, and each section, subdivision, paragraph, sentence, clause and phrase thereof, irrespective of the fact that any one (or more) section, subdivision, paragraph, sentence, clause or phrase had been declared invalid or unconstitutional.

SECTION V:

The City Clerk is hereby directed to certify the adoption of this Ordinance and cause the same to be published as required by law. This Ordinance shall take effect thirty (30) days from and after the date of its final passage.

ADOPTED this ____ day of _____, 2021.

Mark A. Murphy, Mayor, City of Orange

ATTEST:

Pamela Coleman, City Clerk, City of Orange

STATE OF CALIFORNIA)
COUNTY OF ORANGE)
CITY OF ORANGE)

I, PAMELA COLEMAN, City Clerk of the City of Orange, California, do hereby certify that the foregoing Ordinance was introduced at the regular meeting of the City Council held on the ____ day of _____, 2021, and thereafter at the regular meeting of said City Council duly held on the ____ day of _____, 2021, was duly passed and adopted by the following vote, to wit:

AYES: COUNCILMEMBERS:
NOES: COUNCILMEMBERS:
ABSENT: COUNCILMEMBERS:
ABSTAIN: COUNCILMEMBERS:

Pamela Coleman, City Clerk, City of Orange

Attachment: Exhibit A

EXHIBIT “A”

[Beneath this sheet.]

EXEMPT FROM RECORDER'S FEES
Pursuant to Government Code §§ 6103 and 27383

Recording requested by and when recorded return to:

City Clerk
City of Orange
300 East Chapman Avenue
Orange, CA 92866

(SPACE ABOVE FOR RECORDER'S USE)

DEVELOPMENT AGREEMENT

BY AND BETWEEN

CITY OF ORANGE,

a California Municipal Corporation,

and

DCSG THREE THOUSAND WEST, LLC,

a California Limited Liability Company

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the “Agreement”) is entered into as of the ____ day of _____, 2021 (“Agreement Date”), by and between DCSG THREE THOUSAND WEST, LLC (“OWNER”), and the CITY OF ORANGE, a municipal corporation, organized and existing under the laws of the State of California (“CITY”), pursuant to the authority of California Government Code Sections 65864 through 65869.5 (“Development Agreement Legislation”) and California Constitution Article XI, Section 7 as implemented through Orange Municipal Code Chapter 17.44.

RECITALS

This Agreement is predicated upon the following facts:

A. These Recitals refer to and utilize certain capitalized terms which are defined in this Agreement. The parties intend to refer to those definitions in conjunction with the use thereof in these Recitals.

B. The Development Agreement Legislation authorizes CITY to enter into binding development agreements with persons having legal or equitable interests in real property for the development of such property in order to, among other matters, ensure high quality development in accordance with comprehensive plans; provide certainty in the approval of development projects so as to avoid the waste of resources and the escalation in the cost of development to the consumer; provide assurance to the applicants for development projects that they may proceed with their projects in accordance with existing policies, rules and regulations and subject to conditions of approval, in order to strengthen the public planning process and encourage private participation in comprehensive planning and reduce the private and public economic costs of development; and provide for reimbursements to OWNER for the construction and financing of certain public infrastructure improvements.

C. OWNER has a legal and equitable interest in and plans to construct and operate a new 305 guest room, five-story hotel(s), related uses, and retail facilities on an approximate 4.555 acre site located at 3000 W. Chapman Avenue (the “Project”).

D. OWNER has applied for, and CITY has approved the Project with Major Site Plan Review No. 0937-18, Design Review No. 4937-18, Administrative Adjustment No. 0264-18 (the “Existing Project Approvals”), and adopts this Agreement in order to create a Project and a physical environment that will conform to and complement the goals of CITY, consistent with the elements and policies of CITY’s General Plan.

E. In consideration of the substantial public improvements and benefits to be provided by OWNER and the Project, and in order to strengthen the public financing and planning process and reduce the economic costs of development, by this Agreement CITY intends to give OWNER assurance that OWNER can proceed with the development of the Project for the Term of this Agreement pursuant to the terms and conditions of this Agreement and in accordance with CITY’s General Plan, ordinances, policies, rules and regulations existing as of the Effective Date. In reliance on CITY’s covenants in this Agreement concerning the Development of the Property,

OWNER has and will in the future incur substantial costs in site preparation and the construction and installation of major infrastructure and facilities in order to make the Project feasible.

F. Pursuant to Section 65867.5 of the Development Agreement Legislation, the City Council has found and determined that: (i) this Agreement and the Existing Project Approvals implement the goals and policies of CITY's General Plan, provide balanced and diversified land uses and impose appropriate standards and requirements with respect to land development and usage in order to maintain the overall quality of life and the environment within CITY; (ii) this Agreement is in the best interests of and not detrimental to the public health, safety and general welfare of CITY and its residents; (iii) adopting this Agreement is consistent with CITY's General Plan and constitutes a present exercise of the CITY's police power; and (iv) this Agreement is being entered into pursuant to and consistent with the requirements of Section 65867 of the Development Agreement Legislation and Orange Municipal Code Chapter 17.44.

G. CITY and OWNER agree that it may be beneficial to enter into additional agreements or to modify this Agreement with respect to the implementation of the separate components of the Project when more information concerning the details of each component is available, and that this Agreement should expressly allow for such contemplated additional agreements or modifications to this Agreement.

NOW, THEREFORE, pursuant to the authority contained in the Development Agreement Legislation, as it applies to CITY, pursuant to California Constitution Article XI, Section 7, and in consideration of the foregoing recitals of fact, all of which are expressly incorporated into this Agreement, the mutual covenants set forth in this Agreement and for other consideration, the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

1. **Definitions.** The following words and phrases are used as defined terms throughout this Agreement, and each defined term shall have the meaning set forth below.

1.1 **Authorizing Ordinance.** The "Authorizing Ordinance" means Ordinance No. 08-21 approving this Agreement.

1.2 **City Council.** "City Council" means the duly elected and constituted city council of the CITY.

1.3 **Development.** "Development" means the improvement of 3000 W. Chapman Avenue in the City of Orange (the "Property") for purposes of completing the Project, including, without limitation: grading, the construction of infrastructure and public facilities related to the Project (whether located within or outside the Property), the construction of structures and buildings and the installation of landscaping.

1.4 **Development Plan.** The "Development Plan" consists of the Existing Project Approvals, the Existing Regulations, and those Future Project Approvals (such as precise development plans) contemplated, necessary, and requested by OWNER to implement the Project Approvals.

1.5 **Development Transferee.** “Development Transferee” means an assignee or transferee from OWNER of all or a portion of OWNER’s interest in the Property pursuant to Section 3 and the successors and assigns of any such transferee.

1.6 **Effective Date.** “Effective Date” means the date that the Authorizing Ordinance becomes effective.

1.7 **Existing Project Approvals.** “Existing Project Approvals” are those Project Approvals, including Major Site Plan Review No. 0937-18, Design Review No. 4937-18, and Administrative Adjustment No. 0264-18 which have been approved by the CITY on June 4, 2018, consistent with the Existing Regulations.

1.8 **Existing Regulations.** “Existing Regulations” means those ordinances, rules, regulations, policies, requirements, guidelines, constraints or other actions of the CITY, other than site-specific Project Approvals, which purport to affect, govern or apply to the Property or the implementation of the Development Plans in effect on June 4, 2018.

1.9 **On-Site Improvements.** “On-Site Improvements” means physical infrastructure improvements or facilities that are or will be located on the Property.

1.10 **OWNER.** “OWNER” is DCSG Three Thousand West, LLC, a California limited liability company.

1.11 **Project Approvals.** “Project Approvals” means Major Site Plan Review No. 0937-18, Design Review No. 4937-18, Administrative Adjustment No. 0264-18 and any future Project-related entitlements approved by the CITY.

2. **Term and Termination.**

2.1 The Term of this Agreement shall commence on the Effective Date and shall extend for a period of three (3) years thereafter, terminating at the end of the day preceding the third anniversary of the Effective Date, subject to specific extensions, revisions and termination provisions of this Agreement. The Existing Approvals are valid and shall not expire for the Term of this Agreement (as such Term may be extended). If construction has commenced within such three (3) year period, the Term of this Agreement shall automatically be extended until the completion of the events specified in Section 2.2.2. Once an occupancy permit has been issued for the Project, or the Project is otherwise vested pursuant to California law, the Existing Approvals shall be deemed permanently vested and control the use of the Property.

2.2 This Agreement shall be deemed terminated and of no further effect upon the occurrence of any of the following events:

2.2.1 If termination occurs pursuant to any specific provision of this Agreement;
or

2.2.2 Completion of the total build-out of the Project pursuant to the terms of this Agreement and the CITY’s issuance of all required occupancy permits and acceptance of all dedications and improvements required to complete Development of the Project.

2.3 The termination of this Agreement shall not affect any right or duty arising independently from entitlements issued by CITY or other land use approvals approved concurrently or subsequent to the approval of this Agreement.

3. **Transfers and Assignments.**

3.1 **Right to Assign.** OWNER shall have the right to sell, assign or otherwise transfer all or any portion of its interests in the Property together with all its right, title and interest in this Agreement, or the portion thereof which is subject to transfer (the "Transferred Property") to a Development Transferee at any time during the Term of this Agreement; provided, however, that any such transfer or assignment must be pursuant to a sale, assignment or other transfer of the interest of OWNER in the Property, or a portion thereof. In the event of any such sale, assignment, or other transfer (i) OWNER shall notify CITY thirty (30) days prior to such event of the name of the Development Transferee, together with the corresponding entitlements being transferred to such Development Transferee; and (ii) the agreement between OWNER and such Development Transferee pertaining to such transfer shall provide that either OWNER or the Development Transferee shall be liable for the performance of those obligations of OWNER under this Agreement which relate to the Transferred Property, if any. Each Development Transferee and OWNER shall notify CITY in writing which entity shall be liable for the performance of each respective obligation hereunder within thirty (30) days prior to the date of any sale, assignment or transfer pursuant to this subsection. Owner shall be released from any obligations assumed by a Development Transferee.

3.2 **Effect of Noncompliance.** From and after the assumption of obligations under this Agreement by a Development Transferee pursuant to Section 3.1, noncompliance by any such Development Transferee with the terms and conditions of this Agreement assumed by such Development Transferee shall entitle CITY to pursue any and all of its rights under this Agreement so assumed against such Development Transferee, but such noncompliance shall not be deemed a default or grounds for termination hereof with respect to, or constitute cause for CITY to initiate enforcement action against, other persons then owning or holding interest in the Property or any portion thereof and not themselves in default hereunder. Similarly, noncompliance by OWNER with respect to any terms and conditions of this Agreement not assumed by such Development Transferee shall entitle CITY to pursue any and all of its rights under this Agreement retained by OWNER against OWNER, but such noncompliance by OWNER shall not be deemed a default or grounds for termination hereof with respect to, or constitute cause for CITY to initiate enforcement action against, such Development Transferee or other persons then owning or holding interest in the Property or any portion thereof and not themselves in default hereunder.

3.3 **Rights of Successors and Assigns.** Except as otherwise set forth in this Agreement, a Development Transferee shall have all of the same rights, benefits and obligations of OWNER under this Agreement.

4. **Revisions to Development Agreement.**

4.1 **Initiation of Amendment.** Either party may propose an amendment to this Agreement when that party believes it would be beneficial to enter into additional agreements or

modification of this Agreement in connection with the implementation of the separate components of the Project.

4.2 **Procedure**. Except as set forth in Section 4.5 below, the procedure for proposing and adopting an amendment to this Agreement shall be the same as the procedure followed for entering into this Agreement in the first instance.

4.3 **Cancellation**. Either party may propose cancellation to this Agreement.

4.4 **Consent**. Except as expressly provided in this Agreement, any amendment to or cancellation of this Agreement shall require the written consent of both parties. No amendment to or cancellation of all or any provision of this Agreement shall be effective unless set forth in writing and signed by duly authorized representatives of each party.

4.5 **Consent of OWNER**. Where an assignee of OWNER applies for an amendment to this Agreement, the written consent of OWNER shall always be required before CITY approval of the amendment unless the Development Transferee has assumed all obligations under this Agreement. Further, an assignee shall not be required to approve an amendment to this Agreement. The recordation of this Agreement shall serve as notice to all assignees of the provisions of this Agreement.

4.6 **Operating Memoranda**. The parties acknowledge that refinements and further development of the Project may demonstrate that changes are appropriate with respect to the details and performance of the parties under this Agreement. The parties desire to retain a certain degree of flexibility with respect to the details of the Project Development and with respect to those items covered in general terms under this Agreement. If and when the parties mutually find that changes, adjustments, or clarifications are appropriate to further the intended purposes of this Agreement, they may, unless otherwise required by law, effectuate such changes, adjustments, or clarifications without amendment to this Agreement as specified in the Project Approvals or through operating memoranda mutually approved by the parties. The Orange City Manager and any corporate officer or other person designated for such purpose in a writing signed by a corporate officer on behalf of OWNER are authorized to execute said operating memoranda. After execution, said operating memoranda shall be attached hereto as addenda and become a part hereof and may be further changed and amended from time to time as necessary, with further approval by the parties. Unless otherwise required by law or by the Project Approvals, no such changes, adjustments, or clarifications shall require prior notice or hearing.

4.7 This Section shall not limit CITY's or OWNER's remedies as provided by Section 10.

5. **Description of Development**.

5.1 **Development and Control of Development**.

5.1.1 **Project**. During the Term of this Agreement, OWNER shall have the vested right to implement the Development pursuant to this Agreement and the Project Approvals and CITY shall have the right to control the Development of the Project in accordance with the terms and conditions of this Agreement.

5.1.2 **Permits and Future Project Approvals.** CITY shall accept and timely process, in the normal and legal manner for processing such matters, all applications for Future Project Approvals called for or required under this Agreement. The Existing Project Approvals are in full force and effect and the expiration of such Existing Project Approvals shall not occur unless the Term of this Agreement expires, and vested rights have not been achieved under California law.

5.2 **Rules, Regulations and Official Policies.** Except as otherwise specified in this Agreement and the Project Approvals, the rules, regulations and official policies governing the permitted uses of the Property, the density and intensity of use of the Property, the provisions for reservation or dedication of land for public purposes and the design, improvement and construction standards and specifications applicable to Development of the Property shall be the Existing Regulations and the Existing Approvals. In connection with any subsequent approval or action which CITY is permitted or has the right to make under this Agreement relating to the Project, CITY shall exercise its discretion or take action in a manner which complies and is consistent with the Project Approvals, the Existing Regulations and such other standards, terms and conditions contained in this Agreement.

5.3 **Reserved Authority.**

5.3.1 **Uniform Codes.** This Agreement shall not prevent CITY from applying new rules, regulations and policies relating to uniform codes (such as the Uniform Building Code, National Electrical Code, Uniform Mechanical Code or Uniform Fire Code, as amended) adopted by the State of California, which new rules and regulations are necessary to preserve the health and safety of the residents of CITY or which the CITY is required by state law to apply.

5.3.2 **State and Federal Laws and Regulations.**

5.3.2.1 **Precedence of State and Federal Laws.** In the event that state or federal laws or regulations prevent or preclude compliance with one or more of the provisions of this Agreement, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such state or federal laws or regulations; provided, however, that this Agreement shall remain in full force and effect to the extent it is not inconsistent with such laws or regulations and to the extent such laws or regulations do not render such remaining provisions impractical to enforce.

5.3.2.2 **Subsequent Amendment to Authorizing Statutes.** This Agreement has been entered into in reliance upon the provisions of the Development Agreement Legislation in effect as of the Effective Date. Accordingly, to the extent that subsequent amendments to the Government Code would affect the provisions of this Agreement, such amendments shall not be applicable to this Agreement unless necessary for this Agreement to be enforceable or required by law or unless this Agreement is modified pursuant to the provisions set forth in this Agreement and Government Code Section 65868 as in effect on the Agreement Date.

5.3.3 **Regulation for Health and Safety.** Notwithstanding anything to the contrary in this Agreement, CITY shall have the right to apply regulations (including amendments

to the Existing Regulations) adopted by the CITY after the Effective Date, in connection with any Project Approvals, or deny, or impose conditions of approval on, any Project Approvals provided that such application to the Development is required to protect the physical health and safety of existing or future residents or occupants of the Property, or any portion thereof or any lands adjacent thereto. OWNER may protest the imposition of any such emergency regulations or conditions to the City Council or as otherwise provided by CITY rules or regulations while continuing to construct the Development.

5.3.4 **Procedure For Application of New Regulations.** The CITY shall not apply to the Project any regulation, law, program, ordinance or action under Section 5.3.1, 5.3.2, or 5.3.3 (except for emergency ordinances adopted to protect health and welfare as set forth therein) which is not an Existing Regulation (“New Regulation”) without providing at least thirty (30) days’ prior written notice to OWNER of the CITY’s intent to apply such New Regulation to the Project. OWNER shall have thirty (30) days from the date of such notice to review and evaluate the New Regulation and to serve CITY with a written protest (“Protest”) against the application of the New Regulation to the Project. If the OWNER timely provides the Protest to CITY, then CITY will not apply the New Regulation to the Project until the City Council makes a finding, after a duly noticed public hearing, that such New Regulation does not conflict with the Existing Regulations as applied to the Project and is required (as opposed to permitted) to comply with state or federal laws or regulations after taking into consideration all reasonable alternatives. Should OWNER elect to continue to construct the Development after receipt of notice of the applicability of any New Regulation described in Section 5.3.3 to such construction, OWNER does so at its own risk.

5.4 **Vested Rights.** By entering into this Agreement and relying thereon, OWNER obtains vested rights to proceed with the Project in accordance with the terms and conditions of this Agreement, and in accordance with, and to the extent of, the Project Approvals. By entering into this Agreement and relying thereon, CITY secures significant public benefits and facilities which enhance the public health, safety and welfare, a partial listing of which benefits is set forth in Section 6.

5.5 **Consistency Between This Agreement and Current Laws.** CITY represents that there are no rules, regulations, ordinances, policies or other measures of the CITY in force as of the Agreement Date that would interfere with Development and use of all or any part of the Project according to the Project Approvals and this Agreement. The parties understand and acknowledge that the Agreement is consistent with CITY’s General Plan and zoning for the Property.

5.6 **Future Amendments to Development Plan.** The following rules apply to future amendments to the Development Plan:

5.6.1 **Compliance.** Any Development Plan amendment which is not in compliance with Section 4 of this Agreement shall not apply to the Property or the Project while this Agreement is in effect.

5.6.2 **Concurrent Development Agreement Amendment.** Any Development Plan amendment requiring amendment of this Agreement shall be processed concurrently with an amendment to this Agreement

5.6.3 **Effect of Amendment.** Except as expressly set forth within this Agreement or in any amendment to this Agreement, a Development Plan amendment will not alter, affect, impair or otherwise impact the rights, duties and obligations of the parties under this Agreement.

6. **Benefits to CITY; Obligations of OWNER.** The direct and indirect benefits CITY, its existing and future residents, will receive pursuant to the implementation of the Agreement include, but are not limited to, the following:

6.1 **Rehabilitation of Property.** The Development will result in the rehabilitation of a blighted, vacant property.

6.2 **Transient Occupancy Tax Revenue.** The Development will generate transient occupancy tax revenue to support City services that improve the quality of life for residents.

6.2.1 **Reduced Economic Development Assistance Payment.** OWNER agrees to amend the Participation Agreement to reduce the amount of Economic Development Assistance Payment for the first three years of the Term from thirty three and one third percent (33 1/3%) of the Transient Occupancy Tax generated less the Transient Occupancy Tax Base, to twenty five percent (25%) of the Transient Occupancy Tax generated less the Transient Occupancy Tax Base.

6.3 **Public Benefit Payment.** Upon execution of this Agreement, OWNER shall make a public benefit payment of FIFTY THOUSAND DOLLARS (\$50,000.00) to CITY.

6.4 **Assurances to OWNER.** The parties further acknowledge that the public benefits to be provided by OWNER to CITY pursuant to this Agreement are in consideration for and reliance upon assurances that the Property will be developed in accordance with the Project Approvals and this Agreement. Accordingly, while recognizing that the Development of the Property may be affected by exercise of the authority and rights reserved and excepted as provided in Section 5.3 of this Agreement, OWNER desires assurances that CITY will not and CITY agrees that it will not further restrict or limit the development of the Property in violation of this Agreement except in strict accordance with the Reserved Authority.

7. **Indemnification.**

7.1 **Defense Obligations.** Except to the extent of the gross negligence or willful misconduct of the Indemnified Parties (as defined below), OWNER, and with respect to the portion of the Property transferred to them, the Development Transferees, agree during the term of this Agreement, to, at CITY's request, defend CITY and its agents, officers, and employees (the "Indemnified Parties") from and against any claims, including claims for attorneys' fees, or proceeding against the Indemnified Parties to set aside, void or annul the approval of this Agreement or the Project Approvals.

7.2 **Notification Obligation.** CITY agrees to timely take all actions necessary or required to uphold the validity and enforceability of this Agreement and the Existing Regulations and shall promptly notify OWNER of any claim, action or proceeding brought challenging any provision of this Agreement or the Project Approvals. Should the CITY fail to promptly and timely

notify OWNER or cooperate fully or decide to terminate this Agreement, OWNER shall be relieved of its defense and indemnity obligations hereunder.

7.3 **Selection of Counsel; Costs of Defense.** OWNER and the CITY shall select joint legal counsel to conduct such defense which legal counsel shall represent both OWNER and the CITY in defense of such action. OWNER and CITY shall meet and confer to determine the reasonable estimate of the costs of defense of any such claim or action and OWNER shall deposit a sufficient portion of said amount with the CITY to ensure CITY that it will have sufficient funds to pay the costs of defense until a further deposit is required, if any. The CITY will draw down on such funds to pay for costs of defense and may require additional deposits if it appears that the costs of defense will exceed the amount on deposit. The CITY shall refund, without interest, any unused portions of the deposit once the claim or action is finally concluded.

7.4 **Defense and Settlement.** OWNER shall have the right to direct the prosecution, strategy and settlement of any defense hereunder in consultation with the CITY, provided however, that CITY and OWNER agree not to unreasonably withhold or delay approval of the settlement of any claim or action which does not significantly impair the rights and obligations of either party under this Agreement or the Project Approvals.

7.5 **Survival of Provisions.** The indemnities set forth in this Section shall survive any closing, rescission, or termination of this Agreement, and shall continue to be binding and in full force and effect in perpetuity with respect to the Indemnified Parties and their successors.

8. **Relationship of Parties.** The contractual relationship between CITY and OWNER is such that OWNER is independent from and not an agent or employee of CITY. CITY and OWNER hereby renounce the existence of any form of joint venture or partnership between them, and agree that nothing contained in this Agreement or in any document executed in connection with the Project shall be construed as making CITY and OWNER joint venturers or partners.

9. **Periodic Review of Compliance with Agreement.**

9.1 **Periodic Review.** CITY and OWNER shall review this Agreement at least once every twelve (12) month period from the Agreement Date. CITY shall notify OWNER in writing of the date for review at least thirty (30) days prior thereto. Such periodic review shall be conducted in accordance with Government Code Section 65865.1.

9.2 **Good-Faith Compliance.** During each periodic review, OWNER shall be required to demonstrate good faith compliance with the terms of this Agreement. OWNER agrees to furnish such reasonable evidence of good faith compliance as CITY, in the exercise of its reasonable discretion, may require. If requested by CITY, CITY agrees to provide to OWNER, a Development Transferee or any party designated by OWNER or a Development Transferee, an estoppel certificate that OWNER or a Development Transferee is in compliance with the terms of this Agreement, provided OWNER reimburses CITY for all reasonable and direct costs and fees incurred by CITY with respect thereto.

9.3 **Failure to Conduct Annual Review.** The failure of the CITY to conduct the annual review shall not be an OWNER default and OWNER shall not be entitled to any remedy for CITY failure to conduct the annual review.

9.4 **Initiation of Review by City Council.** In addition to the annual review, the City Council may at any time, but not more than once in any twelve (12) month period, initiate a review of this Agreement by giving written notice to OWNER. Within thirty (30) days following receipt of such notice, OWNER shall submit evidence to the City Council of OWNER's good faith compliance with this Agreement and such review and determination shall proceed in the same manner as provided for the annual review.

9.5 **Availability of Documents.** If requested by OWNER, CITY agrees to provide to OWNER copies of any documents, reports or other items reviewed, accumulated or prepared by or for CITY in connection with any periodic compliance review by CITY, provided OWNER reimburses CITY for all reasonable and direct costs and fees incurred by CITY with respect thereto.

10. **Events of Default; Remedies.** Unless amended or canceled as provided in Section 4, or modified or suspended pursuant to Government Code Section 65869.5, or terminated pursuant to this Section 10, this Agreement is enforceable by either party hereto.

10.1 **Defaults by OWNER.** If CITY determines on the basis of substantial evidence that OWNER has not complied in good faith with the terms and conditions of this Agreement, CITY shall, by written notice to OWNER, specify the manner in which OWNER has failed to so comply and state the steps OWNER must take to bring itself into compliance ("First Default Notice"). CITY and OWNER shall meet in good faith for the purpose of resolving any disputes within fifteen (15) days of OWNER's receipt of written notice of default from CITY. If the CITY determines that following these meetings, OWNER is not taking necessary steps to cure such default, it shall provide notice of same to OWNER ("Second Default Notice") and if, within thirty (30) days after the effective date of such notice OWNER has failed to so comply or OWNER does not commence all steps reasonably necessary to bring itself into compliance as required and thereafter diligently pursue such steps to completion, then OWNER may be deemed to be in default under the terms of this Agreement and CITY may initiate the process to terminate this Agreement pursuant to Government Code Section 65868. In event of default by OWNER, except as provided in Section 10.3, CITY's sole remedy for any breach of this Agreement by OWNER shall be CITY's right to terminate this Agreement.

10.2 **Defaults by CITY.** If OWNER determines on the basis of substantial evidence that CITY has not complied in good faith with the terms and conditions of this Agreement, OWNER shall, by written notice to CITY, specify the manner in which CITY has failed to so comply and state the steps CITY must take to bring itself into compliance. CITY and OWNER shall meet in good faith for the purpose of resolving any disputes within fifteen (15) days of CITY's receipt of written notice of default from OWNER. If the OWNER determines that following these meetings, CITY is not taking necessary steps to cure such default, it shall provide notice of same to CITY and if, within thirty (30) days after the effective date of such notice, CITY has failed to so comply or CITY does not commence all steps reasonably necessary to bring itself into compliance as required and thereafter diligently pursue such steps to completion, then CITY shall be deemed to be in default under the terms of this Agreement and OWNER may initiate the process to terminate this Agreement and, in addition, may pursue any other remedy available at law or equity, including specific performance as long as such remedy is consistent with Section 10.3.

10.3 **Specific Performance Remedy.**

10.3.1 **OWNER's Remedies.** Due to the size, nature and scope of the Project, it will not be practical or possible to restore the Property to its natural condition once implementation of this Agreement and the Project Approvals have begun. After such implementation, OWNER may be foreclosed from other choices it may have had to utilize the Property and provide for other benefits. OWNER has invested significant time and resources and performed extensive planning and processing of the Project in agreeing to the terms of this Agreement and will be investing even more significant time and resources in implementing the Project in reliance upon the terms of this Agreement, and it is not possible to determine the sum of money which would adequately compensate OWNER for such efforts. For the above reasons, CITY and OWNER agree that damages alone would not be an adequate remedy if CITY fails to carry out its obligations under this Agreement and that, in addition to any all other remedies OWNER may have at law or in equity, including, without limitation, claims for general, special or compensatory damages for any default under this Agreement, OWNER shall have the right to seek and obtain specific performance or injunctive relief as a remedy for any breach of this Agreement. OWNER may seek to enjoin any threatened or attempted violation of this Agreement, seek to enjoin any threatened or attempted violation hereof, or enforce by specific performance the obligations and rights of OWNER.

10.3.2 **CITY's Remedies.** CITY's remedy of terminating this Agreement shall be sufficient if OWNER fails to carry out its obligations hereunder. Notwithstanding the above, CITY may not seek specific performance to require OWNER to construct the Development except to the extent that OWNER becomes otherwise obligated under this Agreement to construct any or all of the public facilities identified in the Development Plan. Nothing contained in this Agreement shall prevent OWNER from enforcing the right to seek a refund or return of a deposit made, or a fee paid, to the CITY in accordance with the provisions of the Existing Rules.

10.4 **Institution of Legal Action.** OWNER may institute legal action to cure, correct or remedy any default, to enforce any covenants or agreements herein, to enjoin any threatened or attempted violation hereof, or to obtain any other remedies consistent with this Agreement. Such legal action shall be heard by a referee approved by the Orange County Superior Court pursuant to the applicable procedures of California Code of Civil Procedure ("CCP") Sections 638, et seq. OWNER and CITY shall agree upon a single referee who shall then try all issues, whether of fact or law, and report a finding and judgment thereon and issue all legal and equitable relief appropriate under the circumstances of the controversy before it. If OWNER and CITY are unable to agree on a referee within ten (10) days of a written request to do so by either party hereto, either party may seek to have one appointed pursuant to CCP Section 640. The cost of such proceeding shall initially be borne equally by the parties. Any referee selected pursuant to this Section 10.4 shall be considered a temporary judge appointed pursuant to California Constitution Article VI, Section 21.

10.5 **Estoppel Certificates.** Either party may at any time deliver written notice to the other party requesting an estoppel certificate ("Estoppel Certificate") stating:

10.5.1 The Agreement is in full force and effect and is a binding obligation of the parties.

10.5.2 The Agreement has not been amended or modified either orally or in writing or, if so amended, identifying the amendments.

10.5.3 No default in the performance of the requesting party's obligations under the Agreement exists or, if a default does exist, the nature and amount of any default.

A party receiving a request for an Estoppel Certificate shall provide a signed certificate to the requesting party within thirty (30) days after receipt of the request. The City Manager or any person designated by the City Manager may sign the Estoppel Certificate on behalf of the CITY. Any officer of OWNER may sign on behalf of OWNER. An Estoppel Certificate may be relied on by assignees and mortgagees. In the event that one party requests an Estoppel Certificate from the other, the requesting party shall reimburse the other party for all reasonable and direct costs and fees incurred by such party with respect thereto.

11. **Waivers and Delays.**

11.1 **No Waiver.** Failure by a party to insist upon the strict performance of any of the provisions of this Agreement by the other party, and failure by a party to exercise its rights upon a default by the other party hereto, shall not constitute a waiver of such party's right to demand strict compliance by such other party in the future.

11.2 **Third Parties.** Non-performance shall not be excused because of a failure of a third person, except as provided in Section 11.3.

11.3 **Force Majeure.** OWNER and CITY shall not be deemed to be in default where failure or delay in performance of any of their obligations under this Agreement is caused by floods, earthquakes, epidemics, other Acts of God, fires, wars, riots, or similar hostilities, strikes and other labor difficulties beyond OWNER or CITY control, including government regulations (including, without limitation, local, state and federal environmental and natural resource regulations), voter initiative or referenda, moratoria (including, without limitation, any "development moratorium" as that term is applied in Government Code Section 66452.6) or judicial decisions.

11.4 **Extensions.** The Term of this Agreement and the time for performance by OWNER or CITY of any of its obligations hereunder or pursuant to the Project Approvals shall be extended by the period of time that any of the events described in Section 11.3 or this Section 11.4 exist and/or prevent performance of such obligations; provided that, in no event shall any such extension exceed a total of twenty-four (24) months without the prior approval, in their sole and complete discretion, of both OWNER and CITY. Subject to this limit the Term shall be extended for delays arising from the following events for a time equal to the duration of each delay which occurs during the Term.

11.4.1 **Litigation.** The period of time after the Effective Date during which litigation related to the Project Approvals, which has the actual effect of delaying implementation of the Project, is pending, including any litigation pending on the Agreement Date. This period shall include any time during which appeals may be filed or are pending.

11.4.2 **Referenda**. Any referenda or petition initiative which would invalidate or delay the implementation of the Project Approvals.

11.4.3 **Government Agencies**. Any delay resulting from the acts or omissions of the CITY or any other governmental agency or public utility and beyond the reasonable control of OWNER.

11.5 **Notice of Delay**. Each party shall give notice to the other of any delay that either party believes to have occurred as a result of the occurrence of any of the events described in Section 11.3 or 11.4. Such notice shall be provided as soon as either party becomes aware of any such delay, and in no event shall notice of a delay of any length be given later than sixty (60) days after the end of the delay or it shall be deemed waived.

12. **General Provisions**.

12.1 **Binding Covenants**. The provisions of this Agreement, to the extent permitted by law, shall constitute covenants which shall run with the Property for the benefit thereof, and the benefits and burdens of this Agreement shall bind and inure to the benefit of the parties and all successors in interest to the parties hereto.

12.2 **Notices**. All notices required or provided for under this Agreement shall be in writing and either (i) delivered in person; or (ii) sent by certified mail, postage prepaid, return receipt requested; or (iii) sent by independent courier service or overnight delivery service. Notices required to be given to CITY shall be addressed as follows:

City of Orange, City Manager
300 E. Chapman Avenue
Orange, CA 92866
Attn: City Manager

With a copy to:

City of Orange
300 E. Chapman Avenue
Orange, CA 92866
Attn: City Attorney

Notices required to be given to OWNER shall be addressed as follows:

DCSG Three Thousand West, LLC
732 S Walnut Ave
San Dimas CA 91773
Attn: Scott Gunderson

Any notice given as required herein shall be deemed given only if in writing and upon delivery by one of the methods set forth above. A party may change its address for notices by giving notice in writing to the other party as required herein and thereafter notices shall be addressed and transmitted to the new address.

12.3 **Attorneys' Fees.** If legal action is brought by either party against the other for breach of this Agreement or to compel performance under this Agreement, the prevailing party shall be entitled to an award of its costs, including reasonable attorneys' fees, and shall also be entitled to recover its contribution for the costs of the referee referred to in Section 10.4 above as an item of damage and/or recoverable costs. If CITY is the prevailing party and uses in-house counsel in the litigation, it shall be entitled to recover attorneys' fees at the hourly rate that OWNER is being charged by its attorney or at the in-house counsel's fully burdened rate, whichever is higher.

12.4 **Recording.** This Agreement and any amendment or cancellation hereto shall be recorded by the City Clerk, in the Official Records of Orange County within ten (10) days after the Effective Date, as provided in Section 65868.5 of the Development Agreement Legislation.

12.5 **Severability of Terms.** If any term, provision, covenant or condition of this Agreement shall be determined invalid, void or unenforceable, the remainder of this Agreement shall not be affected thereby to the extent such remaining provisions are not rendered impractical to enforce.

12.6 **Rules of Construction and Miscellaneous Terms.**

12.6.1 **Interpretation and Governing Law.** The language in all parts of this Agreement shall, in all cases, be construed as a whole and in accordance with its fair meaning. This Agreement and any dispute arising hereunder shall be governed and interpreted in accordance with the laws of the State of California. The parties understand and agree that this Agreement is not intended to constitute, nor shall be construed to constitute, an impermissible attempt to contract away the legislative and governmental functions of the CITY, and in particular, the CITY's police powers. In this regard, the parties understand and agree that this Agreement shall not be deemed to constitute the surrender or abnegation of the CITY's governmental powers over the Property.

12.6.2 **Section Headings.** All section headings and subheadings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

12.6.3 **Gender.** The singular includes the plural; the masculine gender includes the feminine; "shall" is mandatory, "may" is permissive.

12.6.4 **Joint and Several Liability.** If there is more than one signatory to this Agreement, their obligations are joint and several.

12.6.5 **Time of Essence.** Time is of the essence regarding each provision of this Agreement of which time is an element.

12.6.6 **Recitals.** All Recitals set forth herein are incorporated in this Agreement as though fully set forth herein.

12.6.7 **Entire Agreement.** This Agreement together with the Development Plan constitutes the entire agreement between the parties with respect to the subject matter hereof, and the Agreement supersedes all previous negotiations, discussion and agreements between the

parties, and no parol evidence of any prior or other agreement shall be permitted to contradict or vary the terms hereof.

12.6.8 **Not for Benefit of Third Parties.** This Agreement and all provisions hereof are for the exclusive benefit of CITY and OWNER and its Development Transferees and shall not be construed to benefit or be enforceable by any third party.

13. **Effect of Agreement on Title.**

13.1 **Effect on Title.** OWNER and CITY agree that this Agreement shall not continue as an encumbrance against any portion of the Property as to which this Agreement has terminated.

13.2 **Encumbrances and Lenders' Rights.**

13.2.1 OWNER and CITY hereby agree that this Agreement shall not prevent or limit any owner of any interest in the Property, or any portion thereof, at any time or from time to time in any manner, at its or their sole discretion, from encumbering the Property, the improvements thereon, or any portion thereof with any mortgage, deed of trust sale and leaseback arrangement or other security device. CITY acknowledges that any Lender (as hereinafter defined) may require certain interpretations of or modifications to the Agreement or the Project and CITY agrees, upon request, from time to time, to meet with the property owner(s) and/or representatives of such Lenders to negotiate in good faith any such request for interpretation or modification. CITY further agrees that it will not unreasonably withhold its consent to any such requested interpretation or modification to the extent such interpretation or modification is consistent with the intent and purpose of this Agreement. A default under this Agreement shall not defeat, render invalid, diminish or impair the lien of any Lender.

13.2.2 The mortgagee of a mortgage, or beneficiary of a deed of trust, or holder of any other security interest in the Property or any portion thereof and their successors and assigns, including without limitation the purchaser at a judicial or non-judicial foreclosure sale, or a person or entity which obtains title by deed-in-lieu of foreclosures ("Lender") shall be entitled to receive a copy of any First Default Notice, as defined in Section 10.1, at the name and address Lender has provided to the City Clerk of the CITY. As a pre-condition to the institution of any legal proceedings or termination proceedings, the CITY shall deliver to all such Lenders written notification of any Second Default Notice. The Second Default Notice shall specify in detail the alleged default and the suggested means to cure it. Each such Lender shall have the right, at its sole option, to cure such default within seventy-five (75) days of receipt of the Second Default Notice or, if such default cannot be reasonably cured within seventy-five (75) days, to commence and diligently pursue a cure of such default, in which case CITY shall not terminate this Agreement or otherwise institute legal proceedings. Within twenty (20) days of receipt of the Second Default Notice, such Lenders shall provide written notice to the CITY as to whether such Lender intends to cure the default. If the CITY does not receive such notice within twenty (20) days, the Lender shall be deemed to have elected not to cure and the CITY may pursue all available remedies provided to it under this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year dated below.

Dated: _____, 2021

“CITY”

THE CITY OF ORANGE,
a municipal corporation,

By: _____
Mark A. Murphy, Mayor

ATTEST:

Pamela Coleman, City Clerk

APPROVED AS TO FORM:

Gary A. Sheatz, City Attorney

Dated: _____, 2021

“OWNER”

DCSG THREE THOUSAND WEST, LLC,
a California limited liability company,

By: _____

[Notary Acknowledgments Attached]