

TRANSIENT OCCUPANCY TAX SHARING AGREEMENT

THIS TRANSIENT OCCUPANCY TAX SHARING AGREEMENT (“Agreement”) dated as of August 24, 2023, is entered into by and between the City of Palm Desert, a California charter city (“City”), and Kam Sang Company, Inc., a California corporation, dba JW Marriott Desert Springs Resort & Spa (“Operator”).

RECITALS

- A. The general welfare of the City depends in large measure upon the facilities, goods and services that businesses make available to the public, which, in turn, generate tax revenue to help fund necessary municipal services for the City and its residents.
- B. The Operator, which specializes in luxury resort hotels and facilities desires to expand its conference capacity at its JW Marriott Desert Springs Resort & Spa property located at 74-855 Country Club Drive, Palm Desert CA 92260, by constructing new ballroom that will add an additional 25,000 square feet of space available for conferences, weddings and other rental activities.
- C. The City recognizes that the expansion of a resort hotel and spa in Palm Desert would (i) attract increased visitors to the City; (ii) contribute to the economic vitality of the City; (iii) expand the City’s tax base; (iv) generate increased transient occupancy, sales and use taxes and other revenue to the City; (v) create and provide additional jobs in the City; and (vi) otherwise improve economic and physical conditions in the City. Taken together, these benefits would enhance the quality of facilities, goods and services available to the City and its residents, such as police, fire, street maintenance, and parks and recreation programs.
- D. The Palm Desert General Plan 2035 includes the goal of encouraging the development of tourism and leisure opportunities that attract residents and visitors, including a full-service resort that incorporates local amenities and attractions, such as the mineral hot springs.
- E. The City desires to encourage and incentivize such expanded operations in the City to assist the City in achieving its economic development goals by sharing a portion of the transient occupancy tax revenues generated by the resort with the Operator.
- F. The City is authorized under California law to provide economic incentives to businesses for economic development purposes.
- G. Prior to entering into this Agreement, and pursuant to Government Code section 53083, the City Council of the City provided public notice of an Economic Development Subsidy report containing all requisite information, including the name and address of the Operator, a description of the subsidy, and projected tax revenue. The Economic Development Subsidy Report is attached hereto as Exhibit A.
- H. By its approval of this Agreement, the City Council of the City of Palm Desert has made a discretionary finding and determination that this Agreement serves a valid public purpose through expanding economic opportunities in the City, expanding the City’s employment base, and

generating transient occupancy, use and sales taxes and other revenue that the City can utilize to fund general governmental services.

NOW, THEREFORE, based upon the foregoing Recitals and in consideration of the mutual covenants and conditions hereinafter set forth, the parties agree as follows:

AGREEMENT

1. DEFINITIONS

The capitalized terms and words used in this Agreement shall have the following meanings unless expressly provided to the contrary.

1.1 “Ballroom” means a newly constructed multi-purpose room of not less than 25,000 square feet in size that may be rented for a variety of events including, but not limited to, conferences, weddings, and other social and business functions.

1.2 “Baseline TOT Amount” means the amount established from the cumulative average of the past 3 years of transient occupancy tax payments by Operator to the City with such calculation made upon issuance of a certificate of occupancy for the Ballroom.

1.3 “Commencement Date” means the first day of the month following the certificate of occupancy for the new Ballroom at the Property.

1.4 “Event of Default” means any event so designated in this Agreement.

1.5 “Economic Development Subsidy” means a payment made by the City to the Operator in an amount equal to fifty percent (50%) of the TOT remitted to the City by the Operator for that period in excess of the Baseline TOT Amount.

1.6 “Fiscal Year” means the City’s fiscal year of July 1 to June 30.

1.7 “Laws” means all applicable Federal, State, or local statutes, laws, ordinances, regulations, orders, and rules.

1.8 “Maximum Payment” means the lesser of Ten Million Dollars (\$10,000,000.00) or fifty percent (50%) of Project Costs.

1.9 “Operating Period,” means the period beginning with the Commencement Date and continuing for a period of fifteen (15) years, or earlier termination of this Agreement as provided hereunder.

1.10 “Party” means any party to this Agreement. The “Parties” shall be all parties to this Agreement.

1.11 “Penalty Assessments” means penalties, assessments, collection costs and other costs, fees, or charges resulting from late or delinquent payment of Transient Occupancy Tax and which are levied, assessed, or otherwise collected from the Operator.

1.12 “Person” means any entity, whether an individual, trustee, corporation, partnership, trust, unincorporated organization, governmental agency or otherwise.

1.13 “Project Costs” means the total funds expended to complete the construction of the Ballroom but does not include any indirect costs.

1.14 “Property” means 74-855 Country Club Drive, Palm Desert CA 92260 (APNs: 624-040-034, 624-300-002, 624-300-004, 624-310-001, 624-310-002, 624-310-003, 624-310-004, 624-320-002, 624-320-003, and 624-360-011).

1.15 “Resort” means a luxury resort, including a hotel, spa, and other guest amenities, owned by the Operator and operating at the Property as contemplated by and pursuant to the terms of this Agreement.

1.16 “Transient Occupancy Tax” or “TOT” means an amount attributable to the taxable room stay generated by the Resort and remitted to the City pursuant to the TOT Law. TOT shall not include Penalty Assessments, sales tax, any business improvement district (BID) fees or taxes, or any other taxes or fees levied by, collected for, or allocated to a Federal, State or local government or other entity.

1.17 “TOT Law” means (i) California Revenue and Taxation Code section 7280 granting cities and counties authority to levy TOT; (ii) State of California County Tax Collectors Reference Manual Chapter 13000: Transient Occupancy Tax, and any successor law thereto; (iii) Palm Desert Municipal Code Chapter 3.28; and (iv) any other Laws authorizing the City to levy TOT.

2. OPERATOR’S OBLIGATIONS

2.1 Agreement Contingencies. The validity of this Agreement is contingent upon the Operator completing construction of the Ballroom and obtaining from the City a certificate of occupancy . This Agreement is further contingent upon the Operator maintaining any government approvals required to operate the Resort at the Property. The City’s approval of this Agreement does not have any binding effect on any future land use applications or other approvals that the City may consider relating to the development of the Property or operation of a Resort on the Property.

2.2 Resort Operations. The Operator hereby covenants and agrees that it will continue throughout the term of this Agreement, to operate its hospitality business that offers resort room stays, spa, dining, as and other guest amenities and programs.

2.3 Indemnification. The Operator shall indemnify, defend, and hold harmless the City and its officers, employees and agents, from and against all liabilities, obligations, claims, damages, penalties, causes of action, judgments, costs and expenses (including, without limitations, reasonable attorneys’ fees and expenses) (collectively “Claims”) imposed upon or incurred by or asserted against the City arising out of any act or omission of the Operator and the Resort; provided, however, that the aforesaid obligations of the Operator shall not apply to the extent any Claim results from the active negligence or intentional misconduct of the City, or any of the City’s officers, employees agents or contractors. In the event that any action, suit or proceeding is brought against the City by reason of any such occurrence, the Operator, upon City’s request and using

counsel approved by the City, will defend such action, suit or proceeding at the Operator's sole cost and expense.

2.4 Compliance with Laws. The Operator shall comply with all Laws concerning its organization, existence and transactions in operating the Resort at the Property and performing its obligations hereunder.

2.5 Anti-discrimination. The Operator shall not discriminate against any employee or applicant for employment because of age, sex, marital status, race, handicap, color religion creed, ancestry, national origin, or any other class protected by Law.

2.6 Operator's Representations and Warranties. The Operator makes the following representations and warranties as of the effective date of this Agreement:

2.6.1 No Litigation. There is no litigation, action, suit or other proceeding pending or threatened against the Operator that may adversely affect the validity or enforceability of this Agreement. To the best of the Operator's knowledge, the Operator is not in violation of any Law, the effect of which would prohibit the Operator from performing its obligations hereunder.

2.6.2 Authority. The Operator has the full power and authority to enter into this Agreement and all authorizations and approvals required to make this Agreement binding upon the Operator have been duly obtained.

2.6.3 No Breach. To the Operator's knowledge, none of the undertakings contained in this Agreement violate any applicable Law, conflicts with, or constitutes a breach or default under any agreement by which the Operator is bound or regulated.

2.6.4 Warranty against Payment of Consideration for Agreement. The Operator has not paid or given, and will not pay or give, to any third Person, any money or other consideration for obtaining this Agreement, other than normal costs of conducting business and costs of professional services such as accountants and attorneys.

2.7 Release of City Officials. No member, official, agent, employee, or attorney of the City shall be personally liable to the Operator, or any successor in interest of the Operator, in the event of any default or breach of this Agreement by the City, or for any amount which may become due to the Operator or its successors. The Operator hereby waives and releases any Claim it may have personally against the members, officials, agents, employees, consultants, or attorneys of the City with respect to any default or breach of this Agreement by the City or for any amount that may become due to the Operator or its successors.

2.8 Monthly Report & TOT Remittance. The Operator shall submit a monthly report

to the City's Finance Director. Together with the monthly report, the Operator shall remit a monthly TOT payment to the City's Finance Director in accordance with the requirements of the City's Transient Occupancy Tax Ordinance (Palm Desert Municipal Code Chapter 3.28).

2.9 Annual Report. The Operator shall submit an annual report to the City's Finance Director each Fiscal Year containing the following information:

2.9.1 Name of the Operator and Resort;

2.9.2 Date of the Transient Occupancy Tax Sharing Agreement;

2.9.3 Transient Occupancy Tax revenue owed to the City during the reporting period; and

2.9.4 The number of full-time, part-time and temporary jobs generated by the Resort during the reporting period.

2.10 Expiration of Operating Period. The Operator agrees that upon the expiration of the Operating Period, or earlier termination of this Agreement, all TOT revenue sharing between the Parties shall cease, and the City shall be entitled to receive one hundred percent (100%) of all TOT generated by the Resort.

3. CITY'S OBLIGATIONS

3.1 Payment of Economic Development Subsidy. The Economic Development Subsidy shall be payable to Operator by City in annual installments within one hundred twenty (120) days subsequent to the end of the City's fiscal year and in accordance with the City Finance Department's procedures as they may change from time to time. Payment of the Economic Development Subsidy shall continue for the duration of the Operating Period, or earlier termination of this Agreement.

3.2 City's Obligation to Provide Assistance Conditional on TOT Generation. The City's obligation to provide the Operator with the Economic Development Subsidy payment pursuant to Section 3.1 of this Agreement, is conditioned upon the Resort generating TOT and the Operator remitting the appropriate amount of TOT owed to the City for each month during the Operating Period, or earlier termination of this Agreement.

3.3 Recapture of Economic Development Subsidy Payments. If, at any time during or after the term of this Agreement, a court of competent jurisdiction determines that all or any portion of the TOT received by the City was improperly allocated and/or paid to the City, and requires redistribution, repayment or offsets against any future TOT payments, or otherwise recaptures from the City any such TOT revenues determined to have been improperly allocated or paid, then the Operator will, within thirty (30) days after written demand from the City, repay all Economic Development Subsidy payments (or applicable portions thereof) paid to the Operator which are attributable to such repayment, offset, or recaptured TOT. If the Operator fails to make such repayment within thirty (30) days of the City's written demand, then such obligation will accrue interest from the date of the City's original written demand at the then-maximum legal rate imposed by the California Code of Civil Procedure on prejudgment monetary obligations, compounded

monthly, until paid. Nothing in this Section 3.3 will require repayment by the Operator of any Economic Development Subsidy payments made or received with respect to TOT for any periods other than those periods for which a court of competent jurisdiction has required redistribution, repayment offset, or recapture by or against City.

3.4 Legal Challenge. Should any third party successfully challenge the validity of this Agreement through a taxpayer suit which results in a final judgment in favor of said third party, either Party may terminate this Agreement upon thirty (30) days written notice to the other Party. Each Party agrees to vigorously defend any such legal challenges, including appeals of adverse court ruling where appropriate. In the event of such legal challenge, each Party will be responsible for all of its own costs and expenses, including attorneys' fees and expert witnesses.

4. DEFAULTS AND REMEDIES

4.1 Events of Default. Any of the following shall initiate an Event of Default for purposes of this Agreement:

4.1.1 The Operator materially breaches any of its obligations under Section 2 of this Agreement.

4.1.2 The City fails to timely make an Economic Development Subsidy payment to the Operator, once the accuracy of the amount is verified, pursuant to its obligation under this Agreement.

When any of the initiating events described in this Section 4.1 occur, the City or the Operator may give the other Party written notice to cure. Where such act or omission is not cured by the breaching Party within thirty (30) days after that Party's receipt of written notice that such obligation was not performed, it shall constitute an Event of Default; provided that, if cure cannot reasonably be effected within such 30-day period, such failure shall not be an Event of Default so long as the Party promptly (in any event, within ten (10) days after receipt of such notice) commences cure and notifies the other Party of its intent to cure, and thereafter diligently (in any event within a reasonable time after receipt of such notice) prosecutes such cure to completion.

4.2 Remedies Upon Default. Upon the occurrence of any Event of Default and thirty (30) days after written notice of such default, and after a reasonable opportunity to cure such default, if the defaulting Party has not cured the Event of Default, the non-defaulting Party may terminate this Agreement and/or file any action available in law or equity against the defaulting Party.

5. GENERAL PROVISIONS

5.1 Time of the Essence. Time is of the Essence under this Agreement and all Parties' obligations hereunder.

5.2 Venue. In the event of any litigation hereunder, all such actions shall be instituted

in the Superior Court of Riverside, State of California, or in an appropriate municipal court in the County of Riverside, State of California or an appropriate Federal District Court in the Central District of California.

5.3 Applicable Law. The laws of the State of California shall govern the interpretation and enforcement of this Agreement.

5.4 Execution in Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument.

5.5 Attachments Incorporated. Any attachment to this Agreement is incorporated herein by this reference.

5.6 Copies. Any executed copy of this Agreement shall be deemed an original for all purposes.

5.7 Severability. If any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability, unless it affects the substantial rights of a Party or defeats the purpose of this Agreement, shall not affect any other provision of this Agreement, but this Agreement shall be construed as if such invalid, illegal or unenforceable provision has not been contained herein.

5.8 Interpretation. The language in all parts of this Agreement shall in all cases be construed as a whole according to its fair meaning, and not strictly for or against any Party. When the context of this Agreement requires, the neutral gender includes the masculine, the feminine, a partnership or corporation of joint venture or other entity, and the singular includes the plural.

5.9 No Partnership or Joint Venture. The Parties hereto agree that nothing contained in this Agreement shall be deemed or construed as creating a partnership, joint venture, or association between the City and the Operator, or cause the City or the Operator to be responsible in any way for the debts or obligations of the other Party, and no other provision contained in this Agreement nor any acts by the Parties hereto shall be deemed to create any relationship between the City and the Operator other than that of contracting Parties. Further, nothing herein shall give or is intended to give any rights of any kids to any Person not an express Party hereto.

5.10 Integration. This Agreement, including the attachments, if any, attached hereto, is the entire Agreement between and final expression of the Parties, and there are no agreements or representations between the Parties except as expressed herein. All prior negotiations and agreements between the City and the Operator with respect to the subject matter hereof are superseded by this Agreement. Except as otherwise provided herein, no subsequent change or addition to this Agreement shall be binding unless in writing and signed by the Parties hereto.

5.11 Non-waiver. None of the provisions of this Agreement shall be considered waived by any Party except when such waiver is given in writing. The failure of any Party to insist in any one or more instances upon strict performance of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights for future, but the same shall continue and remain in full force and effect.

5.12 Attorneys Fees. In the event of the bringing of an arbitration, action or suit by a Party hereto against another Party hereunder by reason of any breach of any covenants or agreements or intentional inaccuracies in any of the representations and warranties on the part of the other Party arising out of this Agreement or any other dispute between the Parties concerning this Agreement, each Party will be responsible for all of its own costs and expenses, including attorneys' fees and expert witnesses.

5.13 Assignment. Except for a one-time assignment and transfer, at the time the Operator purchases the Property, to a newly formed single purpose entity that is controlled by, and an affiliate of, the Operator, which City hereby approves, no portion of this Agreement may be assigned by the Operator without the express written consent of the City, nor may any interest in this Agreement be transferred by the Operator without the express written consent of the City.

5.14 Notices. Any notice, approval, demand or other communication required or desired to be given pursuant to this Agreement shall be in writing and shall be effective upon personal service (including by means of professional messenger service) or, five (5) days after mailing via United States first-class mail, or two (2) days after mailing via Federal Express or other similar reputable overnight delivery service. Any notice shall be address as set forth below:

For CITY: Todd Hileman, City Manager
City of Palm Desert
73510 Fred Waring Drive
Palm Desert, CA 92260
Phone: (760) 461-6065
Facsimile: (760)

For OPERATOR: Ronnie Lam, President
Kam Sang Company
411 East Huntington Drive
Arcadia, CA 91006
Phone: (626) 446-2988
Facsimile: (626)

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the day and year first above written.

CITY:
City of Palm Desert,
a California charter city

OPERATOR:
Kam Sang Company, Inc.,
a California corporation,
dba The Palm Desert Hot Springs Resort & Spa

By: Todd Hileman, City Manager

By: Name:
Its:

ATTEST:

By: Anthony Mejia, MMC, City Clerk

By: Name:
Its:

APPROVED AS TO FORM:

By: _____
Robert Hargreaves, City Attorney

EXHIBIT A

Economic Development Subsidy Report