

## **HOTEL DEVELOPMENT AGREEMENT**

THIS HOTEL DEVELOPMENT AGREEMENT (the "Agreement") is made and entered into this \_\_\_\_ day of July, 2007 (the "Effective Date"), by and among **THE CITY OF FORT WAYNE, INDIANA** (the "City"), **DEPARTMENT OF REDEVELOPMENT, BY THE FORT WAYNE REDEVELOPMENT COMMISSION** (the "Commission") (the City and Commission collectively called the "City"), and **WHITE LODGING SERVICES CORPORATION**, an Indiana corporation, with its principal address located at 1000 East 80th Place, Suite 600 North, Merrillville, Indiana 46410 (the "Developer").

### **WITNESSETH:**

WHEREAS, tourism and conventions provide significant economic benefits for the City, creating jobs, generating tax revenues; and

WHEREAS, the City has determined that in order to sustain and promote growth in the convention industry in the City it is necessary to attract a new hotel adjacent to and supporting the Grand Wayne Center ("GWC"); and

WHEREAS, the Commission issued a Request for Proposals (the "Request") dated December 21, 2006 to solicit proposals for the development of a hotel, which Request was supplemented by Addendum dated January 17, 2007 (the Request and Addendum referred to hereinafter as the "RFP"); and

WHEREAS, in a response to the RFP dated February 13, 2007, the Developer has proposed to construct, on the condition that the City provide certain financial incentives to Developer, a 250 plus room hotel, as more fully described in this Agreement (the "Hotel"), adjacent to the GWC; and

WHEREAS, the City and Developer entered into a Memorandum of Understanding dated April 16, 2007, outlining the Developer's and City's respective obligations in respect to the development of the Hotel; and

WHEREAS, the City and Developer desire to enter into this Agreement to establish the terms and conditions under which each will undertake to perform its respective obligations; and

WHEREAS, the City has determined that the construction of the Hotel substantially in accordance with the terms of this Agreement will further the public purposes of the City, promote the development of the downtown area and further the goal of making downtown a more attractive and economically vibrant area.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and undertakings contained herein and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged by the parties, the parties agree as follows:

## ARTICLE I

### **OBLIGATIONS OF CITY**

Developer's obligations under this Agreement shall be conditioned upon the City undertaking and completing the following obligations on or before the respective dates set forth in Section 3.02 below, as and where applicable:

**Section 1.1. Acquisition of Hotel Site.** City agrees to acquire, at no cost to Developer, all parcels of real property partially bounded by Jefferson Boulevard on the north, Harrison Street on the east, and Lewis Street on the south, the to be developed multi-use stadium (the "Stadium")/City park on the west (the "Hotel Site"), as well as all parcels of real property in the block bounded by Lewis Street on the north, Harrison Street on the east, Douglas Street on the south, and Webster Street on the west (the "Garage Site"), such parcels currently being owned by a variety of private owners, the parcels and owners thereof being described more particularly on Exhibit A attached hereto.

**Section 1.2. Site Demolition and Preparation.** Upon acquisition of all parcels comprising the Hotel Site and Garage Site, the City, at its sole expense, shall demolish and remove all structures upon the Hotel Site and remove all debris resulting from such demolition ("Site Demolition"). "Site Demolition", as used in this Section, shall mean the removal of all structures above grade and the removal of all foundations, footings, basements or other obstruction encountered on the Hotel Site, but shall not include compacting any fill nor filling any excavations to restore the Hotel Site to its prior grade if not required for Developer's construction of the Hotel.

**Section 1.3. Environmental Remediation.** The City agrees to undertake, at its sole expense, and in consultation with Developer, environmental testing of the Hotel Site prior to demolishing the structures thereupon as required by Section 1.02 (the "Environmental Testing"). If the Environmental Testing discloses the existence of Hazardous Materials (as defined below) upon, on or under the Hotel Site, City agrees to develop a plan to remove, remediate or manage the Hazardous Materials consistent with the intended use of the Hotel Site ("Remediation/Management Plan"). In the event the Remediation/Management Plan fails to receive any and all necessary governmental approvals, or requires the City to undertake additional remedial measures which the City considers, in its sole judgment (after consultation with Developer) to be unreasonable or unduly expensive, the City may elect to terminate this Agreement. City agrees to provide Developer with any and all reports derived from the Environmental Testing and copies of any communications between City and the governmental entities relative to any Hazardous Material on or affecting the Hotel Site. All such reports pertaining to any such Environmental Testing shall be addressed to the City and Developer, with the agreement of the Environmental Consultant that any and all lenders providing funds to Developer shall be entitled to rely on such reports. As used herein, the term "Hazardous Material" means any hazardous or toxic substance, material or waste, which is or becomes regulated by any applicable federal, state or local governmental agency or authority. The term "Hazardous Material" includes, without limitation, any material or substance which is (i) petroleum, (ii) asbestos, (iii) designated as a "hazardous substance" pursuant to Section 311 of the Federal Water Pollution Control Act (33 USC Section 1317), (iv) defined as "hazardous

waste" pursuant to Section 1004 of the Federal Resource Conservation and Recover Act (42 USC Section 6903), (v) defined as a "hazardous substance" pursuant to Section 101(14) of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") (42 USC Section 9601), or (vi) defined as a "pollutant" or "contaminant" pursuant to Section 101(33) of CERCLA. After delivery of the Hotel Site to Developer, in the event Developer encounters, during construction, any foundations, structures, underground storage tanks, or other items required to be removed by City under Section 1.02 above, the City shall be responsible for removal of such items, but shall not be responsible for remediation of additional soil contamination encountered.

**Section 1.4. Transfer of Hotel Site.** Upon acquisition of all Hotel Site parcels pursuant to Section 1.01, completion of Site Demolition pursuant to Section 1.02, and completion of the Remedial Measures pursuant to Section 1.03 (if any), the City agrees to transfer fee title to the Hotel Site to the Developer for a cash consideration of One Dollar (\$1.00). As additional consideration for the transfer of the Hotel Site, Developer agrees to construct the Hotel as required by Article II and to enter into a hotel franchise agreement that requires Developer to continue to operate and maintain the Hotel for a period of not less than twenty (20) years commencing on the date the Hotel is opened for business to the general public. The Hotel shall be operated as a full service hotel consistent with the description set forth in Exhibit B attached hereto, and affiliated with the Marriott hotel reservation system or affiliated and operated with another equivalent national reservations system. The transfer of the Hotel Site shall be subject to reconveyance to the City in the event Developer fails to commence construction of the Hotel as set forth herein. The City agrees to release this reconveyance right upon commencement of operation of the Hotel and shall execute an instrument acknowledging the same upon the request of Developer.

**Section 1.5. Parking Facility.** The City or its assignee shall construct a new public parking garage on the Garage Site so as to create 250 new parking spaces (the "Hotel Parking Spaces") available for use by patrons of the Hotel (the "Parking Facility"). The Parking Facility shall be located on the Garage Site and shall be connected to the Hotel by a covered pedestrian walkway (the "Connecting Walkway") to be constructed by the City. The Hotel Parking Spaces within the Parking Facility shall be available to the operator of the Hotel for use by patrons of the Hotel. The Developer and the City shall, prior to commencement of construction of the Hotel by the Developer, enter into a mutually agreeable parking agreement which will provide for the management of the Parking Facility by a manager selected by the City and will provide that the Hotel shall pay to the City, for maintenance and operation costs of the Parking Facility, the amount of \$1.50 per day for each occupied Hotel Parking Space. Such parking fee shall increase by twenty-eight percent (28%) (e.g. From \$1.50 to \$1.92 per occupied space) on the first day of the first calendar month beginning in the eleventh year of use of the Parking Facility and on each tenth (10th) anniversary thereafter during the term of the parking agreement. The Developer or the operator of the Hotel shall be entitled to all revenue from the Hotel Parking Spaces. City shall design and construct the Parking Facility at its sole expense and the City shall be responsible for the operation and maintenance of the Parking Facility. City shall consult with Developer in respect to the design and construction of the Parking Facility so as to harmonize the same architecturally with the Hotel and so as to coordinate the contemporaneous construction in an efficient manner. City shall cause the construction of the Parking Facility to be substantially completed no later than sixty (60) days prior to the scheduled opening of the Hotel, unless

construction is delayed for reasons of Force Majeure as provided in Section 7.05. City shall provide an additional 20 designated spaces in the Parking Facility for the benefit of employees of Developer and/or the operator of the Hotel. Such spaces shall be provided on a 24/7 basis 365 days a year without cost to Developer and/or the operator of the Hotel.

**Section 1.6. Contribution of City.** In connection with the construction of the Hotel by Developer, and otherwise in support of the development, construction and operation of the Hotel by Developer, the City shall provide the following at its sole cost and expense:

A. The City shall transfer title to the Hotel Site and shall deliver the Hotel Site in construction-ready condition as described in Section 1.02. The City shall extend all utilities, including but not limited to electric, gas and water, together with sanitary and storm sewers to the Hotel Site in sufficient size and capacity so as to accommodate the intended operation of the Hotel thereon.

B. The City shall make funds available to Developer to construct sidewalks, streetscape, curbing, trees and other plantings and other infrastructure or improvements on the Hotel Site in areas available to public access, in an amount of One Million Dollars (\$1,000,000) in the aggregate. All such funds shall be expended by the City or distributed by Developer, subject to and in accordance with all applicable laws relating thereto.

C. The City shall construct the Parking Facility, to which the Developer shall have access for Hotel guests, and receive revenues from, as provided in Section 1.05.

D. The City shall assist Developer in obtaining deductions or abatement of real and personal property taxes to the maximum levels permitted by law (*i.e.*, 10 years), pursuant to Indiana Code §6-1.1-12.1, as amended, from time to time. The Developer shall be responsible for timely filing of all necessary applications and documents to qualify for the deductions described in this Section 1.06(D). In the event Developer elects to forgo available tax abatement, the City will make the present value of such tax abatement available to Developer to be used for the Hotel project as permitted by applicable law, subject to Developer's agreement to reimburse City, at the end of the term over which present value calculation was determined, the amount by which the actual taxes paid by Developer are less than the tax payments used to calculate the present value payment provided to Developer.

E. As the Hotel Site is located in a Community Revitalization Enhancement District ("CRED"), the State of Indiana has allocated a Six Million Dollar (\$6,000,000) CRED tax credit for the Hotel, not to exceed twenty five percent (25%) of the hard costs of the Hotel. The City will use all commercially reasonable efforts to procure, or assist Developer in procuring, an investor to monetize the available CRED tax credits, and will assist the Developer in the application process to secure the allocated credits. Developer's obligations hereunder are expressly subject to its ability to obtain an investor to monetize (purchase) such Six Million Dollar (\$6,000,000) CRED tax credits on or before the commencement of construction of the Hotel.

F. The Commission shall have agreed to provide additional support to the Developer of Two Hundred Fifty Thousand Dollars (\$250,000) per year, for a term of twenty (20) years, commencing upon opening of the Hotel. Such annual amount shall be paid on the first day of the first calendar month following opening of the Hotel, and shall be paid thereafter on each annual anniversary of such date for nineteen (19) consecutive years. Provided, however, that after the tenth (10th) full fiscal year of operations, such additional support shall be limited to the lesser of: (i) Two Hundred Fifty Thousand Dollars (\$250,000) or (ii) the shortfall between Developer's annual return on the Total Development Cost of the Hotel (as defined in Section 8.03 below) and a 16% threshold return for such fiscal year, and shall cease upon Developer generating a cumulative return in excess of 16% and of the total Development Cost of the Hotel (as defined in Section 8.03 below).

G. The City shall have obtained all governmental approvals, and entered into development agreements with other developers for the project known as Harrison Square (the "Harrison Square Project") as described in Section 3.04. The construction of the entirety of the Harrison Square Project is a condition to Developer's obligations hereunder, and the Harrison Square Project shall be progressing toward completion prior to commencement of construction of the Hotel by Developer. To this end the City shall have established to the reasonable satisfaction of Developer that all components of the Harrison Square Project, including but not limited to the Stadium, retail component and the Parking Facility shall have either commenced construction or the commencement of the construction thereof shall be eminent.

H. The City shall have designed and agreed to construct, at its sole cost, a physical connection from the proposed Hotel to the GWC, which connection shall be air conditioned and esthetically compatible and harmonious with the Hotel so as to provide pedestrian traffic between the Hotel and the GWC (the "Connecting Walkway"). However, such Connecting Walkway does not necessarily have to go direct between the Hotel and the GWC, but rather may first connect to the Embassy building and then connect from the Embassy to the GWC. Such Connecting Walkway shall be all season, with appropriate heating, cooling, maintenance and repair, and security provided by the owner/operator of the GWC. Access between the Hotel and the GWC shall be available via the Connecting Walkway at all times when the Grand Wayne Center is open to the public.

**Section 1.7. Approval of the Commission.** In addition to other governmental actions or approvals which may be required on the part of the City, the obligations of the City and Developer contained herein, are specifically conditioned on the Commission: (i) completing the expansion of the Jefferson-Illinois Economic Development Area to include the Hotel Site; and (ii) following the requirements of Indiana law to obtain bids to dispose of the Hotel Site. The Commission agrees that in disposing of the Hotel Site it will make it a requirement that the successful bidder must agree to construct improvements on the Hotel Site and perform the other Obligations of Developer set forth in Article II hereof in substantive accordance with the Project Schedule set forth in Article III hereof.

## **ARTICLE II**

### **OBLIGATIONS OF DEVELOPER**

City's obligations under this Agreement are predicated upon the agreement of Developer to fulfill the following obligations on or before the respective dates set forth in Section 3.02 below, as and where applicable:

**Section 2.1. Hotel Construction.** After the transfer of the Hotel Site to Developer, and subject to the conditions set forth in Sections 1.06 and 1.07, Developer shall construct the Hotel as described in Section 2.02 upon the Hotel Site following the acquisition of all necessary permits and approvals. The Hotel shall contain at a minimum the elements set forth in Exhibit B and shall be constructed substantially in accordance with the project schedule set forth in Article III. The Hotel shall be constructed in a good and workmanlike manner. Upon delivery of the Hotel Site, Developer shall commence construction and proceed diligently without undue delay, and substantial completion of the Hotel shall occur as provided in the project schedule set forth in Section 3.02, subject to delays for reasons of Force Majeure as provided in Section 7.05. Developer agrees to use its good faith efforts to employ qualified price competitive contracts from businesses located within Allen County, and to utilize qualified and competitive local contractors and trade organizations in the construction of the Hotel, including, where qualified, available minority and women-owned business enterprises.

**Section 2.2. Hotel Description.** The Hotel to be constructed by Developer on the Hotel Site shall be, and the term "Hotel" when used in this Agreement shall mean, a hotel as described in Exhibit B attached hereto, and substantially similar in appearance to the rendering attached hereto as Exhibit C. Upon substantial completion of the Hotel, Developer shall install all necessary equipment, fixtures, and furniture necessary for the Hotel to be operated as a quality hotel in support of the GWC.

**Section 2.3. Hotel Franchise.** Developer shall obtain a binding commitment from Marriott International, Inc. or other national franchisor for a franchise to operate the Hotel as a Courtyard By Marriott or other equivalent national brand as provided in Section 1.04 and shall present satisfactory evidence of such binding commitment to the City.

**Section 2.4. Financing.** Developer shall provide evidence to the City that it has received binding commitments for debt and equity financing for the Hotel in an amount not less than the Hotel Budget. Such commitments shall be from persons or entities which are reasonably acceptable to the City.

**Section 2.5. Hotel Budget.** Prior to commencing construction on the Hotel, the Developer shall present to the City a proposed budget for the construction and the fit out of the Hotel in sufficient detail and specificity to enable the City to determine if said budget is reasonably sufficient to permit the Developer to construct the Hotel in accordance with the terms of this Agreement. Developer's preliminary estimate of the total cost to construct the Hotel is Thirty-five Million Dollars (\$35,000,000).

**Section 2.6. Design and Approval of the Hotel.**

A. Developer shall cause the architectural plans for the Hotel to be prepared and shall submit such architectural plans to the City for review prior to applying for permits and approvals necessary to commence construction (the "Design Plans"). The Design Plans shall be sufficient in detail to enable the City to determine whether the design of the Hotel, including size, scope and exterior, are reasonably satisfactory and in compliance with this Agreement. The design of the Hotel shall be consistent with good architectural practice and the preliminary designs set forth on Exhibit C, as well as the

approved urban design guidelines for the City of Fort Wayne. The City shall review the Design Plans and provide any comments thereon to Developer in writing within thirty (30) days after receipt thereof. Failure to provide comments within such period shall constitute approval by the City of the Design Plans.

B. Upon approval by City pursuant to Subsection A of this Section 2.06, Developer shall proceed to prepare the construction plans which shall be consistent with the Design Plans approved by the City and to obtain all permits and approvals required for construction of the Hotel. City shall cooperate with Developer to obtain all required permits and approvals.

**Section 2.7. Codes.** The construction of the Hotel shall comply with all federal, state and local codes, laws, ordinances, statutes and regulations.

**Section 2.8. Security and Street Closings.** Developer agrees to furnish reasonable and customary security at the Hotel Site during construction of the Hotel. During construction, the City shall close necessary portions of adjacent roads to facilitate construction of the Hotel at the reasonable request of Developer, at no charge to Developer, and provide adequate construction staging areas for construction activities, including but not limited to staging areas on the east portion of the adjoining City park situated to the west of the Hotel Site.

**Section 2.9. Liens.** Developer agrees to indemnify the City against any claim or filing of any lien on the Hotel Site as a result of the Developer's construction thereof and shall hold the City harmless from any and all such claims or liens. The City agrees to indemnify the Developer against any claim or filing of any lien on the Hotel Site as a result of the City's Demolition, Remediation/Management Plan, and construction of the Parking Facility, or in respect of any lien arising from anyone claiming by, through or under City, and shall hold the Developer harmless from any and all such claims or liens.

**Section 2.10. Management of Hotel.** Developer shall cause the Hotel to be managed and maintained in a first class manner, consistent with a hotel of similar design and general consistent with Developer's management of other similar branded hotels.

**Section 2.11. Non-discrimination.** Upon completion of the Hotel, Developer agrees that it will not discriminate on the basis of race, sex, color, or creed, or national origin, in the hiring of employees or in the sale, lease or rental or in the use or occupancy of the Hotel or any other part of the Project.

**Section 2.12. Insurance.** Developer, prior to commencing construction of the Hotel, shall provide evidence that it has obtained all insurance coverage reasonably required by the City as set forth in Exhibit D, attached hereto.

### ARTICLE III

#### **PROJECT SCHEDULE**

**Section 3.1. Project.** City and Developer each considers it critical to have the Project completed and the Hotel open for business on a timely basis and that, therefore, it is of utmost

importance that City perform its obligations under Article I and Developer perform its obligations under Article II (collectively, the "Project") in a timely manner. City and Developer acknowledge that time is of the essence and each covenants and agrees to use all commercially reasonable efforts to commence the Project as soon as all conditions precedent to commencing construction have been fulfilled. In order to have the Hotel completed and open not later than April 1, 2010, the parties agree to substantially adhere to the schedule for the Project set out in Section 3.02 ("Project Schedule"), except for delays caused by Force Majeure as provided in Section 7.05. No milestone date set forth in the Project Schedule shall be changed by a party unless such party shall have obtained prior written approval from the other party to this Agreement.

**Section 3.2. Project Schedule.** City and Developer each agree that it shall use its best efforts to meet the following milestone dates relevant to its elements of the Project:

**PROJECT SCHEDULE**

<u>Responsible Party</u>	<u>Milestone</u>	<u>Date to be Completed/Issued</u> (on or before)
Developer	Submit schematic design plans for approval	September 1, 2007
City	Notice to Proceed	September 15, 2007
City	Acquisition of Hotel Site	November 1, 2007
City	Complete Demolition & Remediation of Hotel Site	March 1, 2008
City & Developer	Closing on Hotel Site Transfer	April 1, 2008
Developer	Obtain Permits and Approvals	September 1, 2008
Developer	Construction Commencement Date	November 1, 2008
City	Substantial completion of Parking Facility and Connecting Walkway	Sixty (60) days prior to Hotel Completion
Developer	Substantial Completion of Hotel	March 1, 2010
Developer	Hotel Opens for Business	April 1, 2010

**Section 3.3. Detailed Schedule.** Developer and City shall jointly meet and agree, in good faith, on a detailed construction schedule so that the Project and the improvements to be constructed in accordance with this Agreement, as well as the other components of the Harrison Square Project are coordinated in timing and phasing. It is the intent of the Developer to instruct the architects to proceed on said construction documents for the Hotel as soon as requested by City and prior to City achieving all conditions precedent set forth in Sections 1.06 and 1.07. In consideration of Developer proceeding forward with the plans to develop the Hotel prior to such time as the City has fulfilled all of its obligations and the conditions precedent set forth in Sections 1.06 and 1.07 above, the City agrees to reimburse Developer for Developer's out of pocket costs and expenses incurred in connection with proceeding with the development of the

design and construction documents for the Hotel, as well as all other costs and expenses incurred in connection with advancing the proposed development of the Hotel in the event the City fails to timely fulfill its obligations under Sections 1.06 or 1.07 hereof due to reasons other than a Developer Event of Default. However, any such reimbursement shall be limited to the sum of One Hundred Thousand Dollars (\$100,000), unless the City issues a "Notice to Proceed" to Developer requesting that it proceed to prepare construction documents for the Hotel, in which case the reimbursement obligation shall increase by Four Hundred Thousand Dollars (\$400,000) for a total of Five Hundred Thousand Dollars (\$500,000). The parties further acknowledge that in the event the City is unable to meet the Project Schedule set forth above, the Developer and the City will agree to extend the Project Schedule on a day for a day basis; however, the parties recognize that it is not economically feasible for the Developer to open the Hotel in the months of October through February and, therefore, in certain instances delays by the City may require extensions to the Project Schedule greater than a day for day extension.

**Section 3.4. Coordination With Harrison Square.** The City and Developer recognize that the construction of the Hotel and Parking Facility are integral components to the broader Harrison Square Project, which includes residential and commercial components, a multi-use stadium facility and certain public areas and improvements. The various components of the Harrison Square Project, including the Hotel, may be developed by different developers and the construction of the various components may be constructed by different contractors and/or subcontractors. In addition to the requirements of this Agreement regarding design and construction of the Hotel and Parking Facility, the City and Developer agree to cooperate with each other in all reasonable respects to coordinate the design and construction of the Hotel with the design, scope and construction of each of the other components of the Harrison Square Project. The City shall make every reasonable effort to coordinate the design and construction of the other components of the Harrison Square Project to compliment and support the design and construction of the Hotel.

## ARTICLE IV

### **CLOSING CONTINGENCIES**

**Section 4.1. Closing Contingencies.** The obligation of the parties to close on the Hotel Site and undertake the obligations contemplated hereby shall be subject to the following contingencies having been satisfied on or before December 31, 2007:

A. **Contingencies to Developer's Obligation to Close.** Developer shall be under no obligation to close on the Hotel Site (the "Closing") and commence the Project unless the following conditions have been satisfied or waived by Developer, in writing, at the time of Closing:

1. All of the City's representations and warranties shall remain true and correct as of the Closing and the City shall have duly performed all of its obligations required to be performed by that time under this Agreement.
2. Developer's construction and development plans for the Hotel Site (which shall include but not be limited to architectural and engineering drawings

for all improvements to be constructed thereon, all entrances and exits, curb cuts, driveways/roadways/walkways, parking areas, signage, signalization and landscaped areas) shall have been approved by all necessary regulatory authorities, and permits and any other approvals necessary for construction and operation of the Hotel shall have been obtained to Developer's sole satisfaction.

3. Developer shall have reasonably determined all required variances, if any, have been obtained to permit construction and operation of the Hotel.

4. The City shall have good and marketable title to the Hotel Site, subject to no encumbrances or other limitations which would, in the reasonable opinion of Developer, impair Developer's construction and operation of the Hotel.

5. Developer shall have obtained, at City's expense, (i) a title insurance commitment for an owner's policy of title insurance with reasonable coverage from a title company authorized to do business in Indiana and (ii) an ALTA survey of the Hotel Site, and such title commitment and survey shall not disclose any liens, encumbrances, exceptions, adverse conditions and encroachments to title which unreasonably interfere with Developer's intended use of the Hotel Site, except for permitted encumbrances or those other conditions acceptable to Developer in its reasonable discretion and the survey shall further indicate that all utilities and sewers that Developer may need to construct and operate the Hotel are acceptable and are located within five (5) feet of the building pad of the Hotel to be structured on immediately adjacent to the Hotel Site and in sufficient size and capacity to accommodate the opening thereof.

6. Developer shall have obtained a firm, binding commitment for debt financing sufficient to construct the Hotel.

7. Developer shall have received such other documents in the City's possession or control as Developer may reasonably request for the purpose of (a) evidencing the accuracy of any of the representations and warranties of the City, (b) evidencing the performance by the City of, or the compliance by the City with, any covenant or obligation required to be performed or complied with by it, or (c) evidencing the satisfaction of any condition referred to in this Section.

8. The City shall have obtained all governmental and other approvals required by it for the Hotel Project, and shall have complied with all conditions precedent set forth in Sections 1.06 or 1.07 required to commence construction of the Hotel.

B. Contingencies to City's Obligation to Close. The City shall be under no obligation to close on the Hotel Site unless the following conditions have been satisfied, or waived by the City, in writing, at the time of the Closing:

1. All of Developer's representations and warranties shall remain true and correct as of the date of Closing and Developer shall have duly performed all of its obligations to be performed by that time under this Agreement.

2. The purchase of the Hotel Site and its transfer pursuant to this Agreement shall have been approved by the Commission and the City, after the public disposition and satisfaction of all statutory requirements.

3. The Common Council of the City shall have authorized and approved the issuance of municipal bonds by the City in an amount sufficient to, construct the Stadium and the Parking Facility and to pay such other expenses required of the City by this Agreement, and granted such other approvals necessary for City to fulfill its obligations under this Agreement.

4. The City shall have received evidence that Developer has obtained financing sufficient to construct the Hotel, both from equity financing and a construction loan from a financial institution.

5. The City shall have received such other documents as either may reasonably request for the purpose of (a) evidencing the accuracy of any representation or warranty of Developer, (b) evidencing the performance by Developer of, or the compliance by Developer with, any covenant or obligation required to be performed or complied with prior to the Closing by Developer, or (c) evidencing the satisfaction of any condition referred to in this Section.

C. Termination for Failure to Fulfill Contingencies. Upon the exercise by the City or Developer of their option to terminate this Agreement because of the failure of the other party to fulfill the applicable contingencies referenced in Section 4.01.A. and B. above, this Agreement shall be void and the parties shall be relieved of any and all further obligations and duties hereunder, each unto the other, except as otherwise expressly provided for herein.

D. Completion Assurances. On or before the date that Developer issues its Notice to Proceed as provided in Section 3.03 hereof, the City and Developer shall mutually agree in writing what additional assurances, if any, the City may need from Developer to demonstrate to the City's satisfaction: (a) that the Hotel will be built as and when provided in this Agreement, at no additional cost or expense to the City, other than as specifically contemplated in this Agreement; and (b) that the City's investment in the Project shall be adequately protected by (i) this Agreement, as may be modified or supplemented between the parties hereto and the Developer's construction lender, (ii) the construction documents for the Hotel, (iii) the skill and expertise of the general contractor and/or construction manager for the Hotel, and (v) the Developer's ability to provide a satisfactory completion guarantee.

## ARTICLE V

### **REPRESENTATIONS AND COVENANTS OF THE PARTIES**

**Section 5.1. Representations and Covenants of Developer.** Developer represents, warrants and covenants as follows:

A. Developer is an Indiana corporation duly formed and validly existing and qualified to do business under the laws of Indiana with the power and authority to enter into this Agreement.

B. Developer is not a "foreign person" as that term is defined in Section 1445 of the Internal Revenue Code, and applicable regulations.

C. The execution of this Agreement and the construction of the Hotel by Developer will not violate any applicable statute, law, ordinance, code, rule or regulation or any restriction or agreement binding upon or otherwise applicable to Developer.

D. Developer has not made any untrue statement of a material fact or failed to state a material fact in this Agreement and in any schedule, exhibit, document or certificate delivered in accordance with the terms hereof.

E. There are no actions, suits or proceedings pending or threatened against Developer, which would, if adversely determined, affect Developer's ability to enter into this Agreement or construct the Hotel in accordance with this Agreement.

**Section 5.2. Representations and Covenants of City.** The City represents, warrants and covenants as follows:

A. The City is an Indiana municipal corporation of the second class established and validly existing under the laws of the State of Indiana with the power and authority to enter into this Agreement

B. The execution of this Agreement by the City will not violate any applicable statute, law, ordinance, code, rule or regulation or any restriction or agreement binding upon or otherwise applicable to the City.

C. The City has not made any untrue statement of a material fact or failed to state a material fact in this Agreement or in any schedule, exhibit, document or certificate delivered in accordance with the terms hereof.

D. There are no actions, suits or proceedings pending or threatened against the City which would, if adversely determined, affect the City's ability to enter into this Agreement.

E. The City agrees to cooperate with Developer and use reasonable efforts to assist Developer to obtain approval for all development plans and utility and street plans from all other applicable regulatory bodies and utilities.

## ARTICLE VI

### **EVENTS OF DEFAULT, REMEDIES, AND TERMINATION RIGHTS**

**Section 6.1. Developer Events of Default.** Each of the following shall constitute a "Developer Event of Default" by Developer for purposes of this Agreement, when coupled with

the giving of all requested notices and the passage of all applicable grace periods without the defaults being corrected or cured:

A. Subject to Force Majeure as set forth in Section 7.05, the failure by Developer (i) to commence construction of the Hotel by the Construction Commencement Date, (ii) to at all times continue to use its commercially reasonable efforts to cause the Hotel to be open to the general public no later than the Hotel Opening Date, or (iii) if construction of the Hotel is discontinued for any reason for more than thirty (30) days, except as otherwise contemplated by this Agreement, without the written approval of the City; or

B. Subject to Force Majeure as set forth in Section 7.05, the failure of Developer to punctually and properly perform any other material term, covenant, condition or agreement contained in this Agreement, which shall specifically include Developer's failure, as may be applicable, to diligently and in good faith use reasonable efforts to discharge and perform its duties, responsibilities and obligations under this Agreement, for more than thirty (30) days after written notice thereof from the City; or

C. Any representation or warranty given or furnished by or on behalf of Developer to the City shall prove to be materially false as of the date as of which the representation or warranty was given and is still materially false for more than thirty (30) days after written notice thereof from the City and which will have a material adverse effect on the Hotel Site, the Hotel or Developer's ability to perform under this Agreement.

Notwithstanding the foregoing, if a Developer Event of Default occurs and cannot be cured within thirty (30) days after written notice from the City (or a third party beneficiary), Developer or the Developer's construction lender, if applicable, shall have such additional time as may be reasonably necessary to cure such Developer Event of Default so long as Developer or such construction lender, as the case may be, is diligently, continuously and in good faith pursuing such cure.

**Section 6.2. Remedies for Events of Default.** Upon the happening of any one or more of the Events of Default by Developer that remains uncured beyond the applicable cure period, the City, at its option and with prior notice, may institute any action, suit or other proceeding at law, in equity (including any action to compel specific performance) or otherwise which it shall deem necessary or proper for the protection of its interests under this Agreement, provided that in no event shall the City have the right, by reason of any one or more Events of Default, to terminate this Agreement unless there is an abandonment of the Hotel by Developer and its construction lender.

**City Events of Default.** Each of the following shall constitute a "City Event of Default" for purposes of the Agreement when coupled with the giving of all required notices and the passage of all applicable grace periods without the defaults being corrected or cured:

A. The failure of the City to (i) deliver the Hotel Site in the condition required hereunder, or (ii) construct or cause the construction of the Parking Facility and/or the Connecting Walkway on a timely basis; or

B. Subject to Force Majeure as set forth in Section 7.05, construction of the Parking Facility and/or the Stadium is discontinued for any reason for more than thirty (30) days after such construction has commenced, except as otherwise contemplated by this Agreement, without the written approval of Developer; or

C. Subject to Force Majeure as set forth in Section 7.05, the failure of the City to punctually and properly perform any other material term, covenant, condition, warranty or agreement contained in this Agreement, the other project documents and the construction documents to which it is a party, which shall specifically include the City's failure to diligently and in good faith use its best efforts to discharge and perform its duties, responsibilities and obligations under this Agreement or the other project documents and the construction documents to which it is a party for more than thirty (30) days; or

D. Any representation or warranty given or furnished by or on behalf of the City to Developer shall prove to be materially false as of the date as of which the representation or warranty was given and is still materially false as of the time of declaration hereunder of a City Event of Default and which will have a material adverse effect on the Hotel Site, the Project, the City's work or the City's ability to perform under this Agreement.

Notwithstanding the foregoing, if a City Event of Default occurs and cannot be cured within 30 days of receipt of written notice from Developer (or a third party beneficiary), the City shall have such additional time as may be reasonably necessary to cure such City Event of Default so long as the City is diligently, continuously and in good faith pursuing such cure.

**Section 6.3. Remedies for City Events of Default.** Upon the happening of any one or more of City Events of Default, subject to Force Majeure and applicable cure rights, Developer, at its option and with prior notice may, in the event of any City Event of Default, institute any action, suit or other proceeding at law, in equity (including any action to compel specific performance) or otherwise which it shall deem necessary or proper for the protection of its interests under this Agreement.

**Section 6.4. Rights of Others.** Notwithstanding anything contained herein to the contrary, the City will neither terminate this Agreement, Developer's rights hereunder nor the City's obligations under this Agreement so long as the Developer's construction lender or any third party performs the obligations of Developer under and subject to this Agreement and other project documents to which Developer is a party.

**Section 6.5. Attorneys' Fees and Costs of Collection.** If a Developer Event of Default or a City Event of Default shall occur and as a result thereof the other party brings any action against the other arising under this Agreement, the losing party shall pay the prevailing party its

reasonable attorneys' fees and costs in such action, at trial and on appeal, and such fees and costs shall be deemed to have accrued on the commencement of such action.

## ARTICLE VII

### MISCELLANEOUS

**Section 7.1. Governing Law.** This Agreement, the construction thereof and the rights and obligations of the parties hereunder shall be governed in all respects by the laws of the State of Indiana.

**Section 7.2. Severability.** Each and every provision hereof, including Articles, Sections, and Subsections shall be separate, several and distinct from each other provision hereof, and the invalidity, unenforceability or illegality of any such provision shall not affect the enforceability of any other provision hereof.

**Section 7.3. Section Headings and Captions.** **The Section headings and captions in this Agreement are for** convenience of reference only and shall not affect the construction of the terms and provisions hereof.

**Section 7.4. Time of the Essence; Mutual Extension; Diligent Performance.** Time shall be of the essence with respect to the duties and obligations imposed on the parties hereto. Where any time for performance or otherwise is set forth herein, such time may be extended by mutual agreement of the City and Developer. With respect to any duty or obligation imposed on a party to this Agreement, unless a time limit is specified for the performance of such duty or obligation, it shall be the duty or obligation of such party to commence and perform the same in a diligent manner and to complete the performance of such duty or obligation as soon as reasonably practicable after commencement of performance thereof.

**Section 7.5. Force Majeure.** In the event that Developer or the City shall be delayed, hindered in or prevented from the performance of any act required hereunder by reason of any unusually inclement weather, strikes, lock-outs, labor troubles, inability to procure materials which could not have been reasonably anticipated and avoided by Developer or the City (as applicable), failure of power, restrictive governmental laws or regulations, act of God, fire, earthquake, flood, explosion, terrorism, action of the elements, war (declared or undeclared), police action, invasion, insurrection, riot, mob violence, sabotage, the act, failure to act or default of the other party, or other causes beyond such party's reasonable control (a "Force Majeure"), then performance of such act shall be extended for a period equivalent to the reasonable period of delay caused by such Force Majeure.

**Section 7.6. Notices.** Whenever a notice is required or permitted to be given to a party hereunder, such notice shall be in writing and shall be deemed to have been made when hand delivered or when delivered by an overnight carrier, or three (3) business days after being deposited in the United States mail, certified or registered mail return receipt requested, postage prepaid, addressed to the parties, or to such other address as the receiving party shall have notified the sender, as follows:

If to Developer:

White Lodging Services Corporation

1000 East 80<sup>th</sup> Place, Suite 600 North  
Merrillville, IN 46410  
Attn: Deno Yiankes, President

With copy to: White Lodging Services Corporation  
1000 East 80<sup>th</sup> Place, Suite 600 North  
Merrillville, IN 46410  
Attn: Ann Bowman, General Counsel

And a copy to: Ice, Miller LLP  
One American Square, Suite 3100  
Indianapolis, IN 46282-0200  
Attn: Zeff Weiss, Esq.

If to the City: City of Fort Wayne  
City County Building, 9<sup>th</sup> Floor  
100 East Main Street  
Fort Wayne, IN 46802  
Attn: Mayor of the City of Ft. Wayne

With copy to: Department of Redevelopment  
City of Fort Wayne  
City County Building, 8<sup>th</sup> Floor  
100 East Main Street  
Fort Wayne, IN 46802  
Attn: Executive Director

In addition, in the case of any notice to Developer alleging or asserting an Event of Default by Developer, written notice also shall be provided to Developer's lender(s) from time to time designated by Developer, at the address(es) of such lender(s) provided by Developer to the City.

**Section 7.7. Entirety of Agreement.** This Agreement, together with all Exhibits and Schedules attached hereto, constitutes the entire understanding and agreement of the parties with respect to the matters set forth herein, and all prior agreements and understandings between the City and Developer are merged herein. The Exhibits and Schedules to this Agreement constitute a material part hereof and are incorporated by reference herein. This Agreement may not be modified, amended or revoked, except in writing, executed by each of the parties.

**Section 7.8. Brokers and Finders; Fees and Expenses.** Each of the parties represents and warrants to the other that it has engaged no broker or finder in connection with the negotiation of this Agreement, and each party indemnifies and holds the other harmless against any claims for fees for such services by any person or firm claiming under or through such indemnitor. Each party hereto shall bear its own respective expenses and costs for legal, accounting and administrative services in connection with the negotiation of this Agreement and consummation of the transactions contemplated hereby, except as mutually agreed to by the parties. Each party hereto indemnifies and holds the other harmless against any claims for fees

for such services by any person or firm claiming under or through such indemnitor. However, and notwithstanding the foregoing, Developer hereby acknowledges and agrees that it shall be obligated to satisfy any and all obligations in respect of the services heretofore or hereafter provided by Acquest Realty Advisors, Inc. ("Acquest"), in connection with the negotiation, execution and development of this Agreement and the Hotel as contemplated hereunder. Developer shall compensate Acquest pursuant to a separate written agreement entered into by and between such parties and shall hold harmless the City from any claim of Acquest in respect thereto.

**Section 7.9. Successors and Assigns.** The covenants, terms and conditions contained in this Agreement shall inure to the benefit of the successors and permitted assigns of the parties hereto.

**Section 7.10. Estoppels.** Each of the parties hereto agrees to provide to the other, or to such third parties as may be reasonably requested by the other, within ten (10) days of request, written estoppels from time to time certifying, among other matters, the continued effectiveness of this Agreement, the absence of any defaults hereunder (or, if defaults exist, specifying in detail the nature of such defaults), the status of the obligations of the parties each to the other, and such other matters as may reasonably be requested by the party requesting such estoppel certificate(s).

**Section 7.11. No Third Party Beneficiaries; No Partnership or Joint Venture Created.** Each of the parties hereto agrees that nothing contained in this Agreement shall be deemed or construed by either of them, or by any third party, as creating any relationship of third party beneficiary, principal and agent, general partnership or joint venture or any other association or relationship between Developer and the City. The terms and provisions of this Agreement are solely for the benefit of each of the parties hereto, their successors and permitted assigns, and shall not benefit in any manner any person not a party to this Agreement.

**Section 7.12. No Abrogation of Legal Requirements.** Nothing contained herein shall be construed to permit either party to violate any applicable law, regulation or code.

**Section 7.13. Binding Effect.** Each of the parties hereto covenants and warrants that (i) it is duly authorized to transact business in the State of Indiana, (ii) the person executing this Agreement on behalf of the party is duly authorized by the party to sign and execute this Agreement on its behalf, (iii) this Agreement is a valid and binding obligation of the party and enforceable in accordance with its terms, and (iv) it is the intention of each of the parties to this Agreement that it shall be binding and legally enforceable in accordance with its terms.

**Section 7.14. Assignment.** Developer may not, prior to the initial opening of the Hotel, assign its interest in this Agreement to any other person or entity without obtaining the prior approval of the City; provided, however, that Developer may mortgage and assign all of Developer's right, title and interest under this Agreement and the Hotel to secure mortgage loans or other indebtedness incurred by Developer with respect to the development, construction and operation of the Hotel. Provided, further, that Developer shall be entitled to assign any and all of its rights hereunder in and to a corporation, limited partnership or limited liability corporation, formed as special purpose entity for purposes of developing, construction and owning the Hotel,

so long as Developer or an affiliate of Developer is in control of the management of such affiliated assignee. Following the opening of the Hotel, Developer shall have the right to assign this Agreement, together with all of its right, title and interest in and to the Hotel and the Hotel Site, to any third party, provided that such third party (i) agrees to assume all of Developer's rights and obligations under this Agreement and (ii) satisfies all of the then franchisor's requirements for the assignment and assumption of Developer's rights and obligations under the then existing franchise agreement related to the Hotel. Upon any such assignment, Developer shall be relieved of all of its obligations hereunder. This Agreement and any other project documents may not be assigned by the City, without the express written consent of Developer, provided the City may assign its right, title and interest in this Agreement and the Project to another governmental agency of the City of Fort Wayne, provided that the Developer is given notice thereof.

**Section 7.15. Related Agreements.** The City and Developer understand and agree that as part of the financing of the Hotel, Developer's construction lender may require the City and Developer to execute and deliver estoppels, certificates and/or other agreements that are commercially reasonable, but are not otherwise contemplated by this Agreement. The City and Developer agree to execute commercially reasonable agreements provided-such do not increase either party's economic obligations under this Agreement or change the scope of the Project.

**Section 7.16. Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original copy of this Agreement and all of which, when taken together, shall be deemed to constitute one and the same agreement.

## ARTICLE VIII

### **ADDITIONAL PROVISIONS**

**Section 8.1. GWC Connection.** Notwithstanding anything herein contained to the contrary, Developer's obligations hereunder are subject to Developer and City reaching agreement, within 60 days of the Effective Date of this Agreement, of the precise location and design of the Connecting Walkway. The Connecting Walkway shall be designed and installed by City at its sole cost and expense and completed no later than February 1, 2010 (sixty (60) days prior to the projected date of opening of the Hotel). The parties shall prepare an addendum to this Agreement evidencing their agreement with respect to such connector between the Hotel and the GWC within such time period.

**Section 8.2. Expansion Rights.** At the election of Developer, on or before April 1, 2015, upon written request therefor from Developer to the City, the City shall convey to Developer that parcel of real estate, consisting of \_\_\_\_\_ acres, more or less, which is situated immediately adjacent to the Hotel Site and depicted on Exhibit \_\_ attached hereto(the "Expansion Property"). The City shall convey such Expansion Property to the Developer for the sum of One Dollar (\$1.00). Such conveyance shall be made free and clear of any and all liens and encumbrances other than those that are permitted hereunder with respect to the transfer of the Hotel Site. Such conveyance shall be made by the City to the Developer upon the condition that the Developer, within twenty-four (24) months following transfer of title by the City to Developer, shall commence the expansion thereon of the Hotel for purposes of adding additional

rooms, meeting space, and/or retail space which will also be supportive of the Hotel and the Harrison Square Project. At closing of the transfer and conveyance of the Hotel Site, the parties shall place of record a Memorandum of Option in respect of Developer's right to cause the City to transfer and convey the Expansion Property to Developer as provided hereunder. In the event Developer fails to exercise its right hereunder on or before April 1, 2015, this option to acquire the Expansion Parcel shall expire and be of no further force or effect.

**Section 8.3. City Profit Participation.** In consideration of the support provided by the City in respect of the Hotel as described in this Agreement, Developer shall pay to the City, on an annual basis commencing following the end of the first full calendar year following the opening of the Hotel, an amount equal to twenty-five percent (25%) of the amount by which Net Operating Income exceeds, on a cumulative basis, sixteen percent (16%) of the then Total Development Cost of the Hotel (the "Cumulative Preferred Return"). For purposes of this calculation, "Net Operating Income" shall mean all revenue actually received from operation of the Hotel, less all operating expenses, real estate and other taxes, and insurance expense incurred in the operation of the Hotel, but excluding debt service payments and all noncash expenses such as depreciation and amortization. "Total Development Cost" shall mean all costs and expenses incurred in the initial development and construction of the Hotel, together with any capital improvements made thereto from and after the date of substantial completion of the Hotel. Developer shall provide an annual statement to City, within ninety (90) days after the end of each such calendar year, outlining the Net Operating Income, the Total Development Cost, the aggregate amount of the shortfall in the cumulative preferred return to Developer (if any) and the amount of the City's share of the prior year's excess Net Operating Income, if any. This provision shall survive the sale or assignment of the Hotel by Developer, and be binding upon any and all subsequent owners thereof except in the event of a foreclosure or transfer of the Hotel by deed in lieu of foreclosure.

**[Signature pages to follow]**

**IN WITNESS WHEREOF**, the authorized representatives of the parties hereto have executed this Agreement as of the day and year first written above.

**"CITY"**

THE CITY OF FORT WAYNE, INDIANA

By: \_\_\_\_\_  
Graham A. Richard, Mayor

FORT WAYNE REDEVELOPMENT  
COMMISSION

By: \_\_\_\_\_  
Christopher Guerin, President

**"DEVELOPER"**

WHITE LODGING SERVICES CORPORATION

By: \_\_\_\_\_  
Deno Yiankes, President/CEO  
Investments and Development

**EXHIBITS**

- A. PARCELS COMPRISING HOTEL SITE AND GARAGE SITE
- B. HOTEL DESCRIPTION
- C. HOTEL RENDERING
- D. INSURANCE REQUIREMENTS
- E. EXPANSION PARCEL

**EXHIBIT A**

Parcels Comprising Hotel Site

Parcel Comprising Garage Site

## **EXHIBIT B**

### **Hotel Description**

The Hotel shall be an "urban design" Courtyard by Marriott or comparable national brand and shall contain at a minimum the following elements and amenities:

Two hundred fifty (250) rooms;

Meeting space of at least 3500 square feet in one or more rooms;

Casual sports themed restaurant/bar;

A restaurant/coffee shop serving three meals each day;

Indoor pool and exercise facility;

Room service during restaurant hours; and

Kitchen, laundry, support and maintenance facilities appropriate to a the Hotel.

**EXHIBIT C**

**[Hotel Rendering]**

## EXHIBIT D

### INDEMNIFICATION AND INSURANCE REQUIREMENTS FOR THE HOTEL DEVELOPMENT AGREEMENT

#### **I. HOLD HARMLESS AND INDEMNIFICATION CLAUSE**

The Developer shall indemnify and hold harmless the City of Fort Wayne, and the Fort Wayne Redevelopment Commission, their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees, arising out of or resulting from the performance of the Hotel Development Agreement provided that such claim, damage, loss or expense (1) is attributable to personal injury, bodily injury, sickness, disease or death, or to injury to or destruction of property, including the loss of use resulting therefrom, and/or breach of the Hotel Development Agreement and (2) is not caused by the negligent act or omission or willful misconduct of the City of Fort Wayne, the Fort Wayne Redevelopment Commission or their employees acting within the scope of their employment.

#### **II. INSURANCE**

Prior to commencing work, the Developer and all Contractors and/or subcontractors shall obtain at their own cost and expense the following types of insurance through insurance companies licensed in the State of Indiana. Insurance written by non-admitted carriers will also be considered acceptable, in accordance with Indiana Insurance Law. Workers' Compensation written through qualified group self-insurance programs in accordance with Indiana law will also be acceptable. The Developer shall not commence work under this Hotel Development Agreement until all insurance required under the Hotel Development Agreement has been obtained and until Certificates of Insurance are submitted to and approved by the City's Risk Management Division, at the addresses listed at the end of this Exhibit. The Developer shall not allow any Contractor and/or subcontractor to commence work until the insurance required of such Contractor or subcontractor in this section has been obtained.

Without limiting Developer's indemnification requirements, it is agreed that Developer shall maintain in force for the entire term of this Hotel Development Agreement the following policy or policies of insurance covering its operations, and require all Contractors and/or subcontractors to procure and maintain these same policies until final acceptance of the work by the City of Fort Wayne and Fort Wayne Redevelopment Commission.

##### **A. DEVELOPER FOR ENTIRE TERM OF HOTEL DEVELOPMENT AGREEMENT:**

- 1. COMMERCIAL GENERAL LIABILITY**, via the Occurrence Form, with a minimum of \$1,000,000 Combined Single Limit for any one Occurrence and

\$5,000,000 aggregate for Bodily Injury, Personal Injury and Property Damage, including:

- a. Premises - Operations Coverage
- b. Products and Completed Operations
- c. Contractual Liability and
- d. Independent Contractors Protective Liability

**B. CONTRACTORS AND SUBCONTRACTORS UNTIL FINAL ACCEPTANCE OF WORK:**

**1. COMMERCIAL GENERAL LIABILITY**, via the Occurrence Form, with a minimum of \$1,000,000 Combined Single Limit for any one Occurrence and \$2,000,000 aggregate for Bodily Injury, Personal Injury and Property Damage, including:

- a. Premises - Operations Coverage
- b. Products and Completed Operations
- c. Contractual Liability and
- d. Independent Contractors Protective Liability

**NOTE:** The following clause shall be added to the Developers' and all approved Contractors and/or subcontractors' Commercial General Liability Policies:

"The City of Fort Wayne, and the Fort Wayne Redevelopment Commission are added as Additional Insured as respects operations of the Named Insured performed relative to Hotel Development Agreement for the design and construction of a 250 room hotel adjacent to the Fort Wayne-Allen County Grand Wayne Convention Center."

**C. DEVELOPER, CONTRACTORS AND SUBCONTRACTORS:**

- 1. AUTOMOBILE LIABILITY**, insuring all Owned, Non-Owned and Hired Motor Vehicles. \$1,000,000 is the minimum acceptable Combined Single Limit for any one accident. The Limit of Liability may be subject to increase according to any applicable State or Federal Transportation Regulations.
- 2. WORKERS' COMPENSATION**, insuring the employers' obligations and **EMPLOYERS' LIABILITY** with a minimum acceptable limit of \$100,000 for any one accident.
- 3. BUILDERS RISK INSURANCE**, The following coverage is required for construction of "Hotel" under the Hotel Development Agreement. The Developer must provide evidence of "Builders Risk" insurance coverage prior to beginning construction in either the form of a Certificate of Insurance or an actual policy copy. Developer shall purchase an "All Risk" (Comprehensive Form including theft of building materials, flood, earthquake, and Building, Ordinance coverage including loss to the undamaged portion of the building; demolition and removal

costs of undamaged parts of the structure; and any increased cost of repairs or reconstruction) Builders Risk policy with Limits of Liability equaling the full estimated Replacement Cost of the building being constructed plus Replacement Cost of labor and materials. The policy shall list the City of Fort Wayne as a "Named Insured/Owner".

**4. ARCHITECTS AND ENGINEERS PROFESSIONAL LIABILITY INSURANCE**, with a minimum \$1,000,000 Limit of Liability per occurrence and annual aggregate (or project):

A Professional Architects and Engineers Liability policy covering the development architectural firm's general practice (a Practice policy) which includes the Contractual Liability Endorsement. Developer shall maintain such coverage for at least one (1) year after substantial completion of the construction phase of the project.

**NOTE:** If the Developer subcontracts design work required under the Hotel Development Agreement, then Developer need not purchase this coverage, but must require the architectural firm approved to design these improvements to purchase this coverage, and Developer must obtain a Certificate of Insurance as proof of this coverage, and make it available to the City, upon request.

**5. PROFESSIONAL SERVICES INSURANCE REQUIREMENT.** If the Developer subcontracts portions of the work to be performed under this Hotel Development Agreement to a Contractor and/or subcontractor(s) relied upon principally because of the professional services rendered by their firm (such as, but not limited to, surveyors, civil, structural, geotechnical, or other professional engineering services), the Developer shall also require that these Contractor(s)/subcontractor(s) provide proof to the Developer, via a Certificate of Insurance, that the Contractor(s)/subcontractor(s) has purchased Professional Liability (Errors and Omissions) insurance, which includes a minimum Limit of Liability of \$1,000,000 per claim and aggregate, in addition to the other types of insurance referenced in Section II above. The professional service Contractor shall maintain such coverage for at least one year after substantial completion of the construction phase of the project. The Developer is responsible for obtaining and maintaining copies of the Certificate of Insurance until final acceptance of work by the Fort Wayne Redevelopment Commission, and for making these Certificates available to the City's Risk Management Division, upon request.

The following insurance coverages are to be procured and maintained by the Developer immediately upon substantial completion of the "hotel". These coverages must be maintained for the entire duration of the Ground Lease referred to in Section 1.04 of the Hotel Development Agreement.

**1. REAL PROPERTY INSURANCE,** Upon completion of the "Hotel," the Developer shall furnish the Fort Wayne Redevelopment Authority and the City's Risk Management Division (and continue to do so during the tenure

of the Ground Lease) a Certificate of Insurance evidencing that Real Property Insurance is in effect, as follows:.

a. Real Property insurance shall be written on the I.S.O. (or equivalent) Special Property Form with the real property limit of liability equal to full Replacement Cost of the "Hotel" including equipment and furnishings. The policy should also include the perils of Flood and Earthquake. The policy shall be endorsed to add the City of Fort Wayne as Mortgage ATIMA with respect to all real property.

2. **BUSINESS INTERRUPTION INSURANCE**, Developer shall secure Business Interruption insurance including Extra Expense coverages, in sufficient amounts to satisfy the Profit Participation agreement with the City of Fort Wayne, as described in Article VIII of the Hotel Development Agreement. This policy shall be endorsed to include the City of Fort Wayne and the Fort Wayne Redevelopment Commission as Loss Payees, if written separately from the above Real Property Insurance.

3. **COMMERCIAL GENERAL LIABILITY INSURANCE**, The Commercial General Liability insurance required of the Developer in Insurance Requirement Section II of this Exhibit, must be purchased and in force when the Developer enters into this Agreement. This insurance must be maintained for the duration of the Ground Lease. The policy shall be endorsed to add the City of Fort Wayne and the Fort Wayne Redevelopment Commission as Additional Insured as respects operations of the Named Insured performed under the Ground Lease with the City of Fort Wayne.

### **III. ACCEPTABILITY OF INSURERS**

Insurance covering the Developer, Contractor and all subcontractors must be placed with Insurance Companies with an A. M. Best Rating of no less than "A+ VI," unless proper financial information relating to the Company is submitted to and approved by the City's Risk Management Division.

### **IV. MISCELLANEOUS**

A. The Developer shall procure and maintain insurance policies as described herein and for which the Fort Wayne Redevelopment Commission the City's Risk Management Division shall be furnished Certificates of Insurance prior to the execution of the Hotel Development Agreement.

B. The Certificates shall include provisions stating that the policies may not be cancelled or materially amended without the City's Risk Management Division, and the Fort Wayne Redevelopment Commission having been provided at least (30) thirty days written notice. The Certificates shall identify the Hotel Development Agreement to which they apply and shall include the name and address of the person executing the Certificate of Insurance as

well as the person's signature. If policies expire before the completion of the Hotel Development Agreement, renewal Certificates of Insurance shall be furnished to both the City's Risk Management Division before the expiration date of such policies.

C. At the time the Developer signs the Development Agreement Certificates of Insurance required of the Developer shall be furnished to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

AND

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

D. Approval of the insurance by the City shall not in any way relieve or decrease the liability of the Developer hereunder. It is expressly understood that the City or the Fort Wayne Redevelopment Commission does not in any way represent that the specified Limits of Liability or coverage or policy forms are sufficient or adequate to protect the interest or liabilities of the Developer.

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