



CITY COUNCIL AGENDA REPORT

Meeting Date: April 6, 2023

From: Thomas McMorrow, City Attorney and Clayton Holstine, City Manager

Subject: Settlement Agreement Concerning Fees Paid to the City

Community Goal/Result:

Economic Development - Brisbane will work with the businesses and residents to provide for economic vitality/diversity

Recommendation:

Approve the Settlement Agreement with BRE SH Brisbane Owner LLC (the operator of the Homewood Suites Hotel in Sierra Point)

Background

In 2001, the City entered into an “Agreement to Provide Financial Incentives” with the owner of the property at 2000 Shoreline Court (in Sierra Point) concerning the construction of an extended stay hotel with 177 units. (The hotel is now operating as a Homewood Suites Hotel.) Under that Agreement, in order to provide an economic incentive to the hotel developer for the hotel’s construction, the City agreed to waive certain development impact fees (totaling \$171,009) and that other development impact fees (totaling \$110,665) that the developer would pay to the City would subsequently be reimbursed to the developer from the transient occupancy taxes (“TOT”) that the hotel operator would collect from its guests and would otherwise remit to the City. In relevant part, the Agreement provides, “It is expressly understood and agreed by the Developer that all of the 177 units in the Project shall be considered rented for transient occupancy and subject to the City’s Transient Occupancy Tax Ordinance, regardless of the length of time any individual unit may be rented by the same occupant or customer.”

Following the hotel’s construction and the hotel operator’s being reimbursed \$110,665 from the TOT generated by the hotel, for the past 20 + years the hotel operator has been remitting to the City, in addition to the TOT for stays of less than 30 days, an additional amount of money when stays have been greater than 30 days, consistent with the quoted language above. Although the amount of additional funds remitted under that sentence has varied from year to year based on various factors, such as occupancy rate and lengths of stay, generally the City has received about \$125,000 annually based on that provision of the Agreement.

In 2021, the hotel operator requested the Agreement be terminated on grounds that requiring that additional funds be collected and to be remitted for stays longer than 30 is contrary to State law and, in any event, could not have been the intention of the parties. The operator contended the continued remittance of these funds based on that provision once the development fees had been reimbursed is completely disproportional to the benefit the hotel developer received.

The City did not agree with the hotel operator pointing out that where there is a written contract, its meaning must be ascertained from the writing alone and the words of the Agreement are clear that the hotel is to collect and remit to the City funds equivalent to the TOT regardless of the length of stay. The City also noted that earlier operations honored the contract terms.

After discussion between City representatives and the hotel operator representatives did not resolve the disagreement, the hotel operator, BRE SH Brisbane Owner, LLC, stopped collecting the funds for stays longer than 30 days and filed a lawsuit against the City in March 2022. The lawsuit sought to declare the Agreement terminated and sought an award of attorney's fees. City staff has discussed in closed session with the City Council the strengths and weaknesses of the terms at issue in the litigation. They also discussed potential terms and conditions to settle the litigation. City Council is now asked to approve a settlement agreement.

Discussion

The Settlement Agreement provides that the hotel operator will pay the City \$123,000 in exchange for the termination of the Financial Incentives Agreement. It is anticipated the hotel will continue to collect and remit TOT for the first 30 days of any stay, regardless of the length of the stay, but the hotel will not be required to remit additional funds for stays longer than 30 days. Each side will bear its own costs and attorneys' fees.

The City reasonably anticipates making up the \$125,000 that it otherwise would have received from this hotel by reason that the voters in November 2022 approved a separate business license tax on hotels—a daily rate of \$2.50 for each room rented. In that this hotel has 177 rooms, at an occupancy rate of even 50%, the City would receive annually over \$80,000. Accordingly, this settlement is a fair resolution of the dispute between the hotel operator and the City.

Financial Impact

The City will receive \$123,000 as a result of this Settlement Agreement which will make up the difference between what the hotel should have remitted to the City between August 2021 (when it stopped collecting and remitting to the City funds for stays longer than 30 days) and December 2022. Going forward, although the Financial Incentives Agreement will no longer be in effect, the City's recently enacted business license tax on hotels should provide the funding that the Agreement previously provided. The City also expects the hotel operator to continue to collect and remit to the City TOT for the first 30 days of a stay, regardless of the length of the stay.



Thomas McMorrow, City Attorney



Clayton Holstine, City Manager

Attachment: Settlement Agreement

SETTLEMENT AGREEMENT AND RELEASE

1. PARTIES: The parties to this Settlement Agreement and Release (“Settlement Agreement”) are BRE SH Brisbane Owner LLC (“BRE”), a Delaware limited liability company, and the City of Brisbane (the “City”), a California municipal corporation. The foregoing parties may be referred to each as a “Party” or collectively as the “Parties.”

2. RECITALS: This Settlement Agreement is made with reference to the following facts:

2.1 In or around June of 2001, the City entered into an Agreement to Provide Financial Incentives (the “Incentive Agreement”) with Hardin Capital, LLC, a Georgia limited liability company, and Embassy Investments Brisbane, LLC, a California limited liability company, to incentivize the construction of a hotel. The hotel that was the subject of the Incentive Agreement is currently known as the Brisbane Homewood Suites, located at 2000 Shoreline Court, Brisbane, California, 94005 (the “Hotel”). A true and correct copy of the Incentive Agreement is attached as Exhibit A to this Settlement Agreement.

2.2 BRE is the current owner of the Hotel and, as such, assumed the former owners’ rights and obligations under the Incentive Agreement.

2.3 Certain claims, demands and differences have heretofore existed between BRE and the City.

2.4 Such claims, demands and differences include the following allegations, facts or contentions of the Parties (the “Disputes”):

2.4.1 BRE contends that, under Cal. Rev. & Tax Code § 7280(a) and Section 3.24.040 of the City’s Municipal Code, the City may not levy Transient Occupancy Tax (“TOT”) on stays at hotel accommodations that exceed 30 days (“Long-Term Stays”). As a result, the Incentive Agreement cannot require BRE to collect TOT on Long-Term Stays at the Hotel. To the extent the Incentive Agreement is reasonably susceptible to an interpretation that would require BRE to collect TOT on Long-Term Stays, then such interpretation would require BRE to collect a tax that is beyond the power of the City to impose and is, thus, unenforceable.

2.4.2 BRE also contends that the Incentive Agreement was not intended to (and cannot reasonably be interpreted to) impose an obligation on the Hotel’s owner to pay fees in perpetuity equal to the amount of hypothetical TOT that would have been collected from Long-Term Stays at the Hotel.

2.4.3 BRE has been collecting and making payment on TOT for all stays at the Hotel, including the first 30 days of any stay, regardless of the length of stay, as the City has represented is required to be collected and paid under applicable law.

2.4.4 The City disputes BRE’s contentions set forth in paragraphs 2.4.1 and 2.4.2.

2.4.5 On May 14, 2022, BRE filed a complaint entitled *BRE SH Brisbane Owner LLC v. City of Brisbane*, in the Superior Court of the State of California for the County of San Mateo (Case No. 22-CIV-01112) (the “Action”) alleging causes of action for (i) declaratory relief; (ii) breach of contract; (iii) money had and received; and (iv) mistaken payment.

2.4.6 On April 5, 2022, BRE filed a First Amended Complaint (“FAC”) against the City. In the FAC, BRE asserts a single claim seeking a judicial declaration that, among other things, (i) the Incentive Agreement does not require BRE to collect TOT on Long-Term Stays at the Hotel and (ii) the Incentive Agreement does not require BRE to pay a “fee” equal to the amount of hypothetical TOT that would have been collected on Long-Term Stays at the Hotel.

2.4.7 On May 9, 2022, the City filed an Answer in the Action generally denying the allegations of the FAC and asserting various affirmative defenses.

2.5 It is the intention of the Parties hereto to settle and dispose of, fully and completely, any and all Parties’ claims, demands and causes of action, of any nature whatsoever, heretofore or hereafter arising, against each other, out of or related to the Incentive Agreement, Disputes, Action and/or FAC.

3. THE PARTIES’ MUTUAL DENIAL OF LIABILITY

3.1 This Settlement Agreement affects the settlement of claims which are denied and contested and nothing contained herein shall be construed as an admission by either Party of any liability of any kind to the other Party. Each Party has denied, in good faith, and continues to deny, in good faith, each and all of the claims and contentions alleged by the other, as well as any and all allegations of fault, liability, misconduct, wrongdoing, or damages whatsoever. The Parties have entered into this Settlement Agreement merely to avoid litigation and buy their peace.

3.2 Neither the Settlement Agreement itself nor any of the terms of this Settlement Agreement shall be construed or deemed for any purpose to be, and the Parties each affirmatively deny that this Settlement Agreement or any of the terms of this Settlement Agreement are, evidence of or constitute an admission, concession, or finding, of any fault, liability, wrongdoing, or damage whatsoever, or any infirmity in the claims or defenses that either Party has, or could have, asserted in the Action

4. SETTLEMENT PAYMENT:

4.1 BRE shall pay the City the total amount of one hundred and twenty three thousand and 00/100 dollars (\$123,000.00) (the "Settlement Payment") no later than ten (10) days after receiving a complete copy of this Settlement Agreement fully executed by the City and its counsel. Payment shall be made by BRE via ACH or wire transfer to the City's account pursuant to the payment instructions below:

Name: The City of Brisbane
Bank: Wells Fargo Bank, N.A.

Account Number: To be confidentially provided by counsel for the City of Brisbane
Routing Number (Wire Transfers): To be confidentially provided by counsel for the City of Brisbane
Routing Number (ACH payment): To be confidentially provided by counsel for the City of Brisbane
Address: To be confidentially provided by counsel for the City of Brisbane

4.2 For the avoidance of doubt, this Settlement Payment shall constitute the full consideration to be tendered by or on behalf of BRE under the Settlement Agreement, including all attorneys' fees and costs; provided, however, that nothing in this Settlement Agreement shall relieve BRE of its ongoing obligation to collect and/or pay any taxes due to the City including, without limitation the collection and remittance to the City of all TOT required to be collected and/or paid under applicable law.

5. DISMISSAL OF LAWSUIT WITH PREJUDICE: Within two (2) days of counsel for BRE's receipt of the Settlement Agreement fully executed by the City and its counsel, counsel for BRE shall file a "Request for Dismissal (CIV-110)," in the form attached as **Exhibit B** hereto dismissing the Action as to all parties and causes of action with prejudice, each Party bearing its own attorneys' fees and costs.

6. THE PARTIES' MUTUAL RELEASES:

6.1 Upon BRE's satisfaction of its obligations under Section 4.1 of this Settlement Agreement, the Parties grant each other the following releases:

6.1.1 The City, including as applicable, its assigns, successors-in-interest, employees, council members, appointed officials, agents, representatives, delegates, attorneys and anybody that can claim by or through the City fully and forever releases, relieves, waives, relinquishes, and discharges BRE and its past or present affiliates, parent and subsidiary companies and prior entities, divisions, executors, administrators, assigns, successors-in-interest, officers, directors, owners, shareholders, employees, agents, representatives, attorneys, and insurers of and from any and all claims, demands, causes of action, suits or liabilities at law or in equity arising out of or related to the Incentive Agreement, the Disputes, the Action, and/or the FAC, whether known or unknown, that exist or could exist on or prior to the Effective Date (defined below).

6.1.2 BRE and, as applicable, its past or present affiliates, parent and subsidiary companies and prior entities, divisions, executors, administrators, assigns, successors-in-interest, officers, directors, owners, shareholders, employees, agents, representatives, attorneys, insurers and anybody that can claim by or through BRE fully and forever releases, relieves, waives, relinquishes, and discharges the City and its assigns, successors-in-interest, employees, council members, appointed officials, agents, representatives, delegates, attorneys, and insurers of and from any and all claims, demands, causes of action, suits or liabilities at law or in equity arising out of or related to the Incentive Agreement, the Disputes, the Action, and/or the FAC, whether known or unknown, that exist or could exist on or prior to the Effective Date; provided, however, that BRE's release does not extend to any potential future claim by BRE against the City for contribution and/or indemnity as a result of a third-party initiating legal proceedings or arbitration against BRE to recover TOT collected on Long-Term Stays at the Hotel.

6.2 Each Party hereby acknowledges that it may hereafter discover facts different from, or in addition to, those which each of them, respectively, now claim or believe to be true regarding their dealings and interactions prior to the Effective Date. Each Party, nevertheless, knowingly and voluntarily waives its rights under Section 1542 of the California Civil Code to the fullest extent allowable under the law and acknowledges that it has consulted with its counsel regarding the consequences of such waiver. Each Party is familiar with the provisions of Section 1542, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

6.3 For the avoidance of doubt and only to the extent the Incentive Agreement or any portion thereof could be construed to continue to be operative and/or to have legal effect, the Incentive Agreement shall be deemed irrevocably terminated and of no further legal effect as of the Effective Date.

7. REPRESENTATIONS AND WARRANTIES:

7.1 Each of the Parties to this Settlement Agreement represents, warrants and agrees as to itself as follows:

7.1.1 Independent Legal Advice: Each Party has had the opportunity to receive independent legal advice from its attorneys with respect to the advisability of making the

Settlement provided for herein, with respect to the advisability of executing this Settlement Agreement, and with respect to the meaning of California Civil Code section 1542.

7.1.2 Opportunity to Review: Each Party has read this Settlement Agreement and understands the contents hereof.

7.1.3 Authority to Execute: The individuals executing this Settlement Agreement on behalf of the Parties are empowered to do so.

7.1.4 Opportunity to Investigate: Each Party to this Settlement Agreement has made such investigation of the facts pertaining to this settlement and this Settlement Agreement and of all the matters pertaining thereto as it deems necessary. Each Party is aware that it may hereafter discover claims or facts in addition to or different from those it now knows or believes to be true with respect to the matters set forth herein. Nevertheless, it is the intention of the Parties that this Settlement Agreement shall be final and binding between the Parties hereto, regardless of any claims of misrepresentation, promise made without the intention of performing, concealment of fact, mistake of fact or law, or of any other circumstance whatsoever.

7.1.5 No Reliance Upon Other Statements: In entering into this Settlement Agreement, the Parties do not rely upon any statement, representation, or promise other than those specifically stated in writing in this Settlement Agreement.

7.1.6 Settlement Agreement Read and Understood: The Parties have read this Settlement Agreement and understand its contents.

7.1.7 No Assignment: The Parties have not heretofore assigned, transferred, or granted, or purported to assign, transfer or grant, any of the claims, demands, and cause or causes of action disposed of by this Settlement Agreement.

8. MISCELLANEOUS:

8.1 Governing Law: This Settlement Agreement shall be deemed to have been executed and delivered in the City of Brisbane, California, and the rights and obligations of the Parties hereunder shall be construed and enforced in accordance with, and governed by, the laws of the State of California.

8.2 Integration: This Settlement Agreement, including the Exhibits hereto, constitutes the entire Settlement Agreement between the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous oral and written agreements and discussions. The Settlement Agreement may be amended only by an agreement in writing executed by all Parties hereto.

8.3 Drafting: Each Party has cooperated in the drafting and preparation of this Settlement Agreement. As a result, the Settlement Agreement shall not be construed against any Party.

8.4 Attorney's Fees and Costs: Each Party agrees to bear its own attorneys' fees and costs.

8.5 Binding Effect of Settlement Agreement / Signatures in Counterpart: This Settlement Agreement is binding upon and shall inure to the benefit of the Parties. This Settlement Agreement may be executed in counterparts. When each Party has signed and delivered at least one such counterpart, each counterpart shall be deemed an original and, when taken together with other signed counterparts, shall constitute one agreement. No counterpart shall be effective until all Parties hereto have executed and exchanged an executed counterpart hereof. The effective date of this Settlement Agreement ("Effective Date") shall be the date upon which all executed counterparts have been exchanged and BRE has satisfied its obligations under Section 4.1 of this Settlement Agreement.

IN WITNESS WHEREOF, the Parties hereto enter into this Agreement:

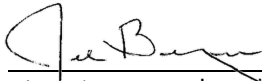
Dated: _____, 2023

THE CITY OF BRISBANE

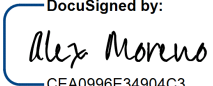
By: _____
Printed Name: _____
Its: _____

Dated: March 30, 2023

BRE SH BRISBANE OWNER LLC

By:  _____
Printed Name: Joseph Berger
Its: Chief Executive Officer

APPROVED AS TO FORM

Dated: _____, 2023	MANATT, PHELPS & PHILLIPS, LLP By: _____ Christian Baker Attorney the City of Brisbane
Dated: _____, 2023 3/30/2023	SHEPPARD, MULLIN, RICHTER & HAMPTON LLP DocuSigned by:  By: _____ CEA0998E34904C3 Alejandro E. Moreno Attorney for BRE SH Brisbane Owner LLC