

**PREPARED BY AND
WHEN RECORDED
RETURN TO:**

Legal Department/City Attorney
City of Naperville
400 S. Eagle St.
Naperville, IL 60540

(Above Space for Recorder's use only)

REBATE AGREEMENT

BETWEEN

CITY OF NAPERVILLE, ILLINOIS

AN ILLINOIS MUNICIPAL HOME RULE CORPORATION

AND

WATER STREET PROPERTY OWNER, LLC,

A DELAWARE LIMITED LIABILITY COMPANY

Dated: _____, 2015

**REBATE AGREEMENT
BETWEEN THE CITY OF NAPERVILLE AND
WATER STREET PROPERTY OWNER, LLC**

This Rebate Agreement (“**Agreement**”) is made and entered into by and between the City of Naperville, an Illinois Municipal Corporation and home rule unit of local government under the laws and Constitution of the State of Illinois, with offices located at 400 South Eagle Street, Naperville, Illinois, 60540, (“**City**”), and Water Street Property Owner, LLC, with its principal offices located at 401 S. Main Street, 3rd floor, Naperville, IL 60540) (“**Developer**”). The City and the Developer are referred to herein individually as a “**Party**” and collectively as the “**Parties.**”

In consideration of the Recitals and mutual covenants and agreements set forth herein, in the Redevelopment Agreement, and the other Water Street Agreements, the receipt and sufficiency of which are hereby acknowledged by the Parties hereto, and in accordance with Section 8-11-20 of the Illinois Municipal Code and the City’s home rule authority, the Developer and the City hereby agree as follows:

SECTION 1 **RECITALS.**

A. The City is authorized by Article 7, Section 10(a) of the Illinois Constitution to contract with a corporation in any manner not prohibited by law.

B. The City is a home rule municipal corporation under and by virtue of Article 7, Section 6 of the Illinois Constitution and is acting in the exercise of its statutory and home rule authority in entering into this Agreement.

C. The City receives 1% of the gross receipts from the sale of tangible personal property at retail pursuant to the State of Illinois Retailers’ Occupation Tax, 35 ILCS 120/1 *et seq.* (the “**Sales Tax**”). The City is authorized pursuant to its home rule powers and by virtue of Section 8-11-20 and Section 8-11-21 of the Illinois Municipal Code, to enter into economic incentive agreements relating to the development of property and to provide therein for the sharing or rebating of a portion of the revenue received by the City pursuant to the Sales Tax.

D. The City also has in effect a 4.4% Hotel and Motel Use Tax imposed by the City as an exercise of its home rule powers and pursuant to Title 3, Chapter 10 of the Naperville Municipal Code (the “**Hotel Tax**”). The City is authorized pursuant to its home rule powers to enter into economic incentive agreements relating to the development of property and to provide therein for the sharing or rebating of a portion of the revenue received by the City pursuant to the Hotel Tax.

E. The City has had a longstanding interest in the unified and orderly development of the Water Street Project Property in conformity with the Water Street Vision Statement approved by Ordinance 06-242 as referenced in the Redevelopment Agreement in order to stimulate economic activity and increase revenues to the City and its businesses.

F. The Developer has proposed the development of the Developer Components (as such term is defined in the Redevelopment Agreement) which comprise a portion of the Water Street Project. The Developer Components will be located at 112-134 and 140 Water Street and 336 S. Webster Street, Naperville, Illinois in DuPage County. The Developer Components will be located on the property legally described on Exhibit 1 hereto. The Water Street Project will be developed pursuant to the terms and conditions of: (i) the Redevelopment Agreement; and (ii) the other Water Street Agreements identified in the Redevelopment Agreement.

G. The Water Street Project will be developed consistently with the objectives established in the Water Street Vision Statement approved by Ordinance 06-242.

H. The Developer Components will include, among other things, the Hotel Building, the Loggia Building, the Theater Building, the Pedestrian Bridge, the Riverwalk Improvements, the Parking Deck Improvements, and related public infrastructure improvements including but not limited to watermain, sanitary sewer, storm sewer and related appurtenances as shown on the Water Street Final PUD Plat (North Phase/South Phase) approved by Ordinance 14-170. The Developer Components identified in this Recital H are depicted on Exhibit 2 hereto, but the Developer Components do not include the Office Building depicted on Exhibit 2 hereto.

I. The Hotel Facility component of the Developer Components will provide approximately 158 hotel rooms and include a banquet facility, and will be located within the City's downtown boundaries and in close proximity to surrounding amenities.

J. The City has determined that it is in the best interest of the City to provide an economic incentive to the Developer to induce the construction of the Developer Components of the Water Street Project.

K. Without the incentive provided under this Agreement, construction of the Developer Components would not be feasible.

L. The Water Street Project is expected to generate substantial new tax revenue from both the Hotel Tax and the Sales Tax.

M. The Developer meets the high standards of creditworthiness and financial strength required by 65 ILCS 5/8-11-206(C).

N. The Water Street Project will strengthen the City's commercial sector and provide hotel, banquet, retail and office space in downtown Naperville and will enhance the City's tax base.

O. The City has determined that it is in the public interest to enter into an economic incentive agreement with the Developer that provides for the City to rebate Hotel Tax and Sales Tax up to a maximum of Seven Million Five Hundred Thousand Dollars (\$7,500,000) over a period not to exceed twenty (20) years on the terms and conditions set forth herein in order to pay for costs incurred by the Developer related to the construction of the Developer Components.

SECTION 2 **RECITALS INCORPORATED.** The Recitals set forth in Section 1 hereof are true and correct, constitute the findings and intent of the corporate authorities of the City, and are incorporated in their entirety in this Agreement.

SECTION 3 **DEFINITIONS.** Whenever used in this Agreement, the following terms shall have the following meanings unless a different meaning is required by the context:

City Finance Director: means the appointed Director of Finance of the City of Naperville.

Cure: means to remedy (to the reasonable satisfaction of the City) the circumstances giving rise to the Event of Default which are described in the Notice of Default.

Curing Lender: means any Lender which elects to exercise its rights to Cure an Event of Default pursuant to Article 18 of the Redevelopment Agreement.

Cure Period: has the meaning set forth in the Redevelopment Agreement.

Developer: means the entity identified in the opening paragraph of this Agreement, together with such other persons or entities identified in the definition of “Developer” as set forth in the Redevelopment Agreement.

Developer Components: has the meaning set forth in the Redevelopment Agreement.

Effective Date: means the date upon which this Agreement is fully executed by the Parties hereto.

Event of Default: has the meaning set forth in the Redevelopment Agreement.

Hotel Facility: has the meaning set forth in the Redevelopment Agreement.

Hotel Facility Owner: has the meaning set forth in the Redevelopment Agreement.

Hotel Flag: has the meaning set forth in the Redevelopment Agreement.

Hotel Master Tenant: means an entity affiliated with the Hotel Facility Owner which enters into a Hotel Master Lease with Hotel Facility Owner.

Hotel Tax Revenue: means the revenue received by the City on account of the Hotel Tax.

IDOR: means the Illinois Department of Revenue.

Notice: has the meaning set forth in Section 17 hereof.

Notice of Default: has the meaning set forth in the Redevelopment Agreement.

Other Public Improvements: has the meaning set forth in the Redevelopment Agreement.

Office Building: has the meaning set forth in the Redevelopment Agreement.

Office Building Land: has the meaning set forth in the Redevelopment Agreement.

Parking Deck Property: has the meaning set forth in the Redevelopment Agreement.

Purchase and Sale Agreement: has the meaning set forth in the Redevelopment Agreement.

Quarter: means each three (3) calendar month period ending on March 31st, June 30th, September 30th or December 31st.

Rebate Commencement Date: has the meaning set forth in Section 7.2 hereof.

Rebate Commencement Date Memorandum: means the Rebate Commencement Date Memorandum described in Section 7.2.1 hereof.

Rebate Expiration Date: means the date upon which the City's obligation to make Rebate Payments to the Developer shall cease, which date shall be the earlier to occur of: (a) the twentieth (20th) anniversary of the Rebate Commencement Date or (b) the date upon which the Developer shall have received Rebate Payments in the aggregate total amount equal to the Rebate Limit.

Rebate Limit: means Rebate Payments in the aggregate amount of Seven Million Five Hundred Thousand Dollars (\$7,500,000) paid to the Developer pursuant to the terms of Section 7 hereof.

Rebate Payment: has the meaning set forth in Section 7 hereof.

Redevelopment Agreement: means that certain Redevelopment Agreement entered into between the City and the Developer of even date herewith, which is one of the Water Street Agreements and which applies to the development of the Water Street Project on the Water Street Project Property.

Riverwalk Property: has the meaning set forth in the Redevelopment Agreement.

Sales Tax Revenue: means 1% of the gross receipts from the sale of tangible personal property at retail received by the City pursuant to the Illinois Retailer's Occupation Tax, 35 ILCS 120/1 *et seq.* from transactions subject to taxation at the Water Street Project (not including the Office Building). Sales Tax Revenue for purposes of this Agreement encompasses only the Sales Tax in effect as of the Effective Date of this Agreement and specifically excludes: (i) the City's food and beverage tax revenue imposed pursuant to Section 3-1-9 of the Naperville Municipal Code and (ii) any home rule sales tax should such a tax be implemented subsequent to the Effective Date of this Agreement.

Transfer: has the meaning set forth in the Redevelopment Agreement.

Uncured Default: means an Event of Default for which a Notice of Default has been given by the City for which: (i) no Cure is made within the Cure Period, and (ii) for which the City may pursue the remedies as set forth in Article 18 of the Redevelopment Agreement.

Water Street Agreements: has the meaning set forth in the Redevelopment Agreement.

Water Street Project: has the meaning set forth in the Redevelopment Agreement.

Water Street Project Construction Costs: has the meaning set forth in the Redevelopment Agreement.

Water Street Project Property: means that property legally described in Exhibit 1 hereto and which is depicted on Exhibit 2 hereto.

SECTION 4 TERM OF AGREEMENT.

4.1 This Agreement shall take effect upon the Effective Date. Rebate Payments hereunder shall begin accruing on the Rebate Commencement Date and shall automatically cease accruing upon the Rebate Expiration Date. This Agreement shall terminate on the Rebate Expiration Date; provided, however, that if the Rebate Expiration Date occurs because the twentieth (20th) anniversary of the Rebate Commencement Date has occurred, then the City's obligation to make the final Rebate Payment for the Quarter in which the Rebate Expiration Date occurred shall survive the Rebate Expiration Date (subject in all events to the Rebate Limit).

SECTION 5 CONDITIONS PRECEDENT TO THE OBLIGATIONS OF THE CITY.

The following are the conditions precedent to the City's obligations hereunder (the "**Conditions Precedent**"). In the event that one or more of the Conditions Precedent is not fully met, the City may, at its sole discretion, terminate its obligations hereunder by giving notice as provided in Section 17 hereof.

- 5.1 Project Budget and Owner's Sworn Statement: Within sixty (60) days after the issuance of the first building permit in the Water Street Project by the City, the Developer shall deliver to the City a sworn owner's statement reflecting that the total cost of the Water Street Project Construction Costs are anticipated to be approximately Ninety-Three Million One Hundred Thousand Dollars (\$93,100,000), but in no event shall such costs be less than Eighty-Eight Million Dollars (\$88,000,000). The Developer's investment, which shall be the Developer's cost to purchase the land for the Water Street Project plus all other sums expended for the Water Street Project, shall in no event be less than ten percent (10%) of the total Water Street Project Construction Costs.
- 5.2 Conveyance to the City. The Developer shall have conveyed the Parking Deck Property and the Riverwalk Property to the City by warranty deeds free from encumbrances other than Permitted Exceptions (as defined in the Purchase and Sale Agreement) in accord with the Redevelopment Agreement, Purchase and Sale Agreement, and the Public Improvements Escrow Agreement.

- 5.3 Deadline for Rebate Commencement Date: The Developer must open, operate and generate tax revenue at the Hotel Facility by a date occurring no later than **January 2, 2019**.
- 5.4 Hotel Agreement: The Developer shall have submitted to the City a fully executed agreement for the Hotel Facility which carries a Hotel Flag that complies with the Redevelopment Agreement including but not limited to the provisions of Article 10 thereof.
- 5.5 Schedule of Dates: In addition to the provision set forth in Section 5.3 above, compliance in full by the Developer with the schedule of dates set forth in Section 6.7 of the Redevelopment Agreement. The provisions of Subsection 6.7 of the Redevelopment Agreement shall apply.

SECTION 6 **FINDINGS.**

- 6.1 The City finds that entering into this Agreement with the Developer pursuant to 65 ILCS 5/8-11-20 is in the best interest of the City and further makes the following findings:
- 6.1.1 The City has had a longstanding desire to achieve the goals set forth in the Water Street Vision Statement, approved by Ordinance 06-242;
- 6.1.2 Portions of the Water Street Project Property have been vacant and the buildings on the property have remained underutilized for a period of at least one (1) year;
- 6.1.3 The construction of the Water Street Project is expected to create job opportunities within the City;
- 6.1.4 The construction of the Water Street Project will serve to further the economic activity in adjacent areas by stimulating shopping and dining in downtown Naperville;
- 6.1.5 Without this Agreement, construction of the Water Street Project on the Water Street Project Property in the City of Naperville would not be feasible;
- 6.1.6 The Developer meets the high standards of creditworthiness and financial strength as demonstrated by specific evidence of equity investment of not less than 10% of the total Water Street Project Construction Costs;
- 6.1.7 The Water Street Project will strengthen the commercial base of downtown Naperville; and
- 6.1.8 The construction of the Water Street Project will enhance the tax base of the City through increased property tax revenue, Hotel Tax Revenue, Sales Tax Revenue and the creation of new jobs.

SECTION 7 HOTEL TAX REVENUE AND SALES TAX REVENUE REBATE PAYMENTS.

7.1 Rebate Payments. Subject to terms and conditions set forth herein and in the other Water Street Agreements, including but not limited to the Redevelopment Agreement, the City agrees to make payments (“**Rebate Payments**”) from Hotel Tax Revenues and Sales Tax Revenues generated by the Developer Components of the Water Street Project as follows:

- (1) To the Developer;
- (2) In an amount equal to the following to the extent actually received by the City:
 - a. 100% of Hotel Tax Revenues from the Hotel Facility (the “**Hotel Tax Rebate Payments**”), and
 - b. 50% of Sales Tax Revenue directly attributable to retail sales from the Water Street Project (the “**Sales Tax Rebate Payments**”);
- (3) From the Rebate Commencement Date until the Rebate Expiration Date.

In no event shall the City be obligated to pay any Hotel Tax Rebate Payment unless the Hotel Tax Revenues applicable to such Hotel Tax Rebate Payment shall have actually been received by the City. In no event shall the City be obligated to pay any Sales Tax Rebate Payment unless the Sales Tax Revenue applicable to such Sales Tax Rebate Payment shall have actually been received by the City.

7.2 Rebate Commencement Date. Rebate Payments hereunder shall begin to accrue on the date (the “**Rebate Commencement Date**”) upon which both of the following shall have first occurred: (1) a Hotel Flag that complies with the Redevelopment Agreement is operating as part of the Water Street Project; and (2) the Hotel Facility opens for business to the public.

7.2.1 Establishing the Rebate Commencement Date. In order to establish the Rebate Commencement Date, the Developer shall give the City written Notice of the date that the Hotel Facility opens for business to the public with a Hotel Flag that complies with the Redevelopment Agreement, including but not limited to Article 10 thereof, which Notice shall identify the date upon which the Rebate Commencement Date occurred and shall confirm that the Conditions Precedent have been satisfied. Further, the Developer shall provide the City Manager with a proposed **Rebate Commencement Date Memorandum** in the form of Exhibit 3 hereto and made part hereof, signed by the Developer, attested, and

notarized. Upon receipt of the aforesaid Notice and proposed Rebate Commencement Date Memorandum, the City Manager shall confirm that the Conditions Precedent have been satisfied and then sign and have the City Clerk attest the Rebate Commencement Date Memorandum. The City shall then record the Rebate Commencement Date Memorandum with the DuPage County Recorder against the Developer Components and provide a recorded copy to the Developer in accordance with Section 17 hereof.

- 7.3 Timing of Hotel Tax Rebate Payments. From and after the Rebate Commencement Date, the City shall remit Hotel Tax Rebate Payments to the Developer (as provided in Subsection 7.7 hereof) within thirty (30) days after the end of each Quarter provided that the Hotel Tax Revenues applicable to such Quarter have been received by the City. At no time shall the City owe interest on any Rebate Payment hereunder.
- 7.4 Timing of Sales Tax Rebate Payments. From and after the Rebate Commencement Date, the City shall remit Sales Tax Rebate Payments to the Developer (as provided in Subsection 7.7 hereof) within thirty (30) days after the end of each Quarter provided that: (i) the Sales Tax Revenue applicable to such Quarter have been received by the City; and (ii) the City has received notification from IDOR showing that the Sales Tax Revenue were generated by the Water Street Project (the “**IDOR Notification**”). If the City has not received the IDOR Notification within thirty (30) days after the end of any such Quarter, but the City has actually received the Sales Tax Revenue for such period, then the City shall make the Sales Tax Rebate Payment for such Quarter within twenty (20) calendar days after receiving the IDOR Notification. If the City has not received the IDOR Notification within thirty (30) calendar days after end of any Quarter, the City agrees to cooperate with the Developer to request the IDOR Notification for such Quarter.
- 7.5 Other Tax Revenues Not Implicated. Nothing contained in this Agreement shall be construed as an obligation on the City’s part to share any tax revenue with the Developer except as explicitly provided herein. For purposes of clarity, the City’s food and beverage tax revenue, imposed pursuant to Section 3-1-9 of the Naperville Municipal Code, is not subject to any sharing as part of this Agreement; nor shall any home rule sales tax be subject to this Agreement should such a tax be implemented subsequent to the Effective Date of this Agreement.
- 7.6 Overpayment. Any payment made by the City hereunder which exceeds the Rebate Limit shall be deemed to have been wrongfully paid. Any such overpayment shall be considered a debt due and owing to the City which shall be repaid within sixty (60) days of after Notice of such overpayment given by the City to the Developer with an invoice therefor.

- 7.7 Payment to the Developer/Single Entity. The City shall be obligated to make the payments described herein to the Developer. Notwithstanding the foregoing: (a) upon the Developer's written request, Rebate Payments shall be made to the Hotel Master Tenant (which direction may be revoked at any time by the Developer upon Notice to the City); (b) upon the Developer's written request, Rebate Payments shall be made to the Mortgage Lender or any Future Lender which holds a Future Mortgage against the Hotel Land (which direction may be revoked at any time by the Developer upon Notice to the City); (c) upon the Mortgage Lender's written request in the event that Mortgage Lender: (i) has commenced a Lender Control Action; or (ii) notifies the City that a default has occurred under the loan documents between Developer and the Mortgage Lender; or (d) upon a Future Lender's written request in the event that a Future Lender: (i) has commenced a Lender Control Action; or (ii) notifies the City that a default has occurred under the loan documents between Developer and the Future Lender and provides evidence to the City that: (A) this Agreement has been collaterally assigned to the Future Lender; and (B) that pursuant to such loan documents the Future Lender is entitled to all amounts due under this Agreement. In no event shall the City have any duty or responsibility to: (x) ensure that Rebate Payments are disbursed to other entities that may be entitled to them; or (y) to make payments to more than one single payee.
- 7.8 City's Right to Hold Rebate Payments. In the event that the City is provided with conflicting Notices as to whom the City should pay the Rebate Payments hereunder, the City may hold such payments until such time as the City is furnished evidence to its reasonable satisfaction of the identity of the entity to which payment should be made. In no event shall the City be responsible for any claims, interest, damages or losses to the Developer, Mortgage Lender, Mezzanine Lender, Hotel Master Tenant or any Future Lender as a result of the City's holding Rebate Payments as provided in this Section 7.8.
- 7.9 Rebate Expiration Date. This Agreement shall automatically expire upon the Rebate Expiration Date without action taken by either Party hereto, subject to the provisions of Section 4.1.
- 7.10 Annual Payee Verification. In January of each year that this Agreement is in effect, the Developer shall provide written confirmation to the City Finance Director of: (i) the name, address, telephone number and email address of the Developer, the Mortgage Lender, the Mezzanine Lender, any Hotel Master Tenant and any Future Lenders of the Hotel Facility (if any, based on the then current records of the Developer); and (ii) the then current identity of the person to whom the Rebate Payments shall be delivered pursuant to this Agreement.

SECTION 8

RESERVED.

SECTION 9

DEVELOPER OBLIGATIONS.

- 9.1 Transfer. It is the intent of the Parties that the Rebate Payments hereunder, and all the rights and privileges granted pursuant to this Agreement, are for the benefit of the Developer of the Developer Components within the Water Street Project. As such, all Transfers of this Agreement (or any interest therein) shall be subject to the provisions of Article 11 of the Redevelopment Agreement, including (without limitation) Section 11.6.2 thereof.
- 9.2 Initial Documentation to be Provided by the Developer. Within twenty (20) calendar days of the Effective Date, the Developer shall provide any information and/or documentation required and requested by the State of Illinois and by the City in order to file this Agreement in compliance with state statute and in order for the City to make payments hereunder. Filing of this Agreement, however, shall be the responsibility of the City.
- 9.3 Disclosure Documents for Individual Businesses within the Water Street Project.

9.3.1 Sales Tax. In order to be entitled to Sales Tax Rebate Payments as provided for herein, the Developer shall provide the City with document(s) in a form satisfactory to IDOR to authorize IDOR to release to the City Finance Director all Sales Tax Revenue information relating to the Water Street Project for each calendar month of each year this Agreement is in effect. It shall be the Developer's responsibility to ensure compliance with this provision on behalf of all entities within the Water Street Project that generate Sales Tax Revenue that may be subject to a Sales Tax Rebate Payment hereunder.

9.3.1.1 The Developer shall provide the documentation described in Subsection 9.3.1 above to the City Finance Director within thirty (30) calendar days of a business opening within the boundaries of the Water Street Project Property and within thirty (30) calendar days of the expiration of any such documentation previously filed with the City Finance Director as to a business within the Developer Components.

9.3.2 Hotel Tax. In order for the City to be obligated to make Rebate Payments hereunder, the Developer shall comply with any reasonable request for information or documentation from the City Finance Director within thirty (30) calendar days of such request and shall comply (or cause the Hotel Flag to comply) with the requirements of Section 3-10-4 of the Naperville Municipal Code, as amended from time to time.

9.3.3 Failure to Provide Information or Documentation. If the information or documentation described in this Section 9 is not provided to the City by the Developer within the timeframes provided in Section 9.3.1 and 9.3.2, the City may issue a Notice of Default in which case Section 16 hereof shall apply. If said information or documentation is not provided within one (1) year after the issuance of the Notice of Default, the City may, at its discretion, deem any Rebate Payment with respect to which such information or documentation was requested (but not provided) to have been waived by the Developer. The one (1) year timeframe after a Notice of Default is issued by the City may be extended by mutual agreement of the Developer and the City Manager. For purposes of clarity, in the event particular Rebate Payments are waived because of the failure to provide the required information, such waiver shall not have the effect of reducing the Rebate Limit. Rather, despite not being able to collect such waived Rebate Payments, the Developer shall still be entitled to be paid the entire Rebate Limit from other Rebate Payments for which the Developer has provided the information required to be delivered hereunder.

9.3.4 Confidentiality. Except to the extent required by law, any financial information received by the City under this Agreement not otherwise accessible to the public shall be considered confidential and proprietary information and shall not be disclosed to any other person or entity by the City, including the City Finance Director, without prior written consent. In the event such disclosure is required by law, the City may disclose said information to those persons legally entitled to same, but only after providing the Developer with notice of such request (which may be given by email) prior to the release of such information, which notice shall include the name of the entity to which the information will be provided and a copy of the documentation to be provided. The City will use good faith efforts to comply with the provisions set forth in this Section 9.3.5; however, the City shall not be in default hereunder or in any way liable to the Developer or any other individual or entity in the event that it fails to comply with this provision.

9.4 Developer Prompt Payment. The Developer hereby covenants and agrees to promptly pay or cause to be paid, as the same become due, any and all taxes and governmental charges of any kind that may be lawfully imposed upon Water Street Project (or any part thereof), for which the Developer is responsible. The Developer may not withhold any tax payment or charge for which it has filed a formal protest unless said withholding is done pursuant to a prescribed statutory procedure or legal ruling allowing for such nonpayment until the protest has been ruled upon; provided further, however, that any payment required after such protest is finally and conclusively ruled upon shall be promptly paid.

9.5 Notice to City of Developer Delinquency. The Developer shall give the City prompt written notice regarding any tax payment delinquency of Sales Tax

Revenue due to the IDOR generated by the Water Street Project (or any part thereof), when notice thereof is actually received by the Developer, unless such amounts have been paid pursuant to such notice.

SECTION 10 **REPRESENTATIONS AND WARRANTIES OF DEVELOPER.**

- 10.1 The Developer represents and warrants that it requests economic assistance from the City in order to construct the Water Street Project, and that but for the economic assistance to be given by the City as provided herein, the Water Street Project as contemplated would not be economically acceptable to the Developer.
- 10.2 The Developer represents and warrants that it is an entity authorized to do business in the State of Illinois.
- 10.3 The Developer represents and warrants that it meets high standards of creditworthiness and financial strength as demonstrated by specific evidence of equity investment of not less than 10% of the total Water Street Project Construction Costs.
- 10.4 The Developer represents and warrants that the Water Street Project Construction Costs are anticipated to be approximately Ninety-Three Million One Hundred Thousand and Dollars (\$93,100,000) as provided in Section 5.1 hereof and in Section 5.1 of the Redevelopment Agreement.
- 10.5 The Developer further represents that, as of the Effective Date, it is not in default with respect to any indenture, loan agreement, mortgage, deed, note, or any other agreement related to the borrowing of money to which the Developer is a party or any of its assets is bound that would materially adversely affect its ability to comply with its obligations hereunder.
- 10.6 The Developer acknowledges that the City's obligation to make the Rebate Payments hereunder shall not be a general debt of the City or a charge against its general credit or taxing powers, but shall be a special limited obligation payable solely as provided herein. The Developer shall have no right to, and agrees that it shall not, attempt to compel any exercise of the taxing power of the City to make any payment hereunder from (and no execution of any claim, demand, cause of action or judgment shall be levied upon or collected from) the general credit, general funds or other property of the City.

SECTION 11 **REDUCTION OF REBATE PAYMENTS.**

- 11.1 City's Right to Reduce Rebate Payments. The City shall be entitled to reduce any Rebate Payments to be paid hereunder pursuant to the Water Street Agreements, including but not limited to Section 20.1 of the Redevelopment Agreement. The City shall: (a) maintain an accounting of the amounts of any reductions made and the specific reasons therefore; and (b) provide notice to the Developer, Mortgage Lender and Mezzanine Lender in accordance with Section 17 hereof of such

reduction. Failure to provide effective notice shall not affect the validity of the reduction.

SECTION 12 **CITY AUDIT AND RECORDS.**

- 12.1 Right to Audit. The City shall have the right, at its sole cost and expense, to conduct an annual audit of: (a) the gross retail sales that account for the Sales Tax Revenue derived by the City from the Water Street Project and (b) the Hotel Facility receipts that account for Hotel Tax Revenues derived by the City from the Hotel Facility. Upon request by the City, the Developer shall provide, or shall cause to be provided, within a reasonable period of time (not to exceed thirty (30) calendar days), relevant retail sales and Hotel Facility records to the City, or to the City's designee, required to perform such an audit.
- 12.2 Copy of Audit. The City shall provide the Developer with a copy of such an audit and with written notification and reconciliation of Rebate Payment amounts payable under this Agreement within thirty (30) days of the determination of such amounts. All such information received by the City shall be considered confidential proprietary information and shall not be disclosed to any other person or entity by the City or the City Finance Director without the Developer's prior written consent, unless disclosure is otherwise required by law. In the event such disclosure is required, the City shall provide Notice to the Developer as set forth in Section 9.3 herein.

SECTION 13 **FLOW-THROUGH.**

- 13.1 Flow-Through Contract Provisions. The Developer agrees to include contractual provisions in its agreements and leases with retail businesses within the Water Street Project and with the Hotel Facility which require each of them to: (a) promptly provide the information and documentation described in Section 9.3 above; and (b) retain documentation which comports with the audit requirements set forth in Section 12.1 above.

SECTION 14 **CHANGE IN THE LAW.**

- 14.1 Change in Law. The City and the Developer acknowledge and agree that the City's obligation to pay the Sales Tax Rebate Payments to the Developer is predicated on the Retailers' Occupation Tax Act governing the Sales Tax as of the Effective Date. In the event that the State of Illinois: (a) repeals the Retailers' Occupation Tax Act; (b) makes any other promulgation, enactment, or change that eliminates the distribution of Sales Tax Revenue to the City, or (c) otherwise alters the distribution formula of Sales Tax Revenue in a manner that prevents the City from determining with a reasonable degree of certainty the amount of the Sales Tax Rebate Payments to be paid hereunder, then in such event the City shall have no further obligation to pay to the Developer any of the Sales Tax Rebate Payments generated by the Water Street Project on or after the effective date of the change in law. Notwithstanding the foregoing provision, if the State of Illinois effects another change in law that either results in the distribution of Sales Tax

Revenues to the City or allows the City to again determine with a reasonable degree of certainty the amount of the Sales Tax Revenue to allow it to make the Sales Tax Rebate Payments hereunder, then the provisions of this Agreement with regard to Sales Tax Rebate Payments shall be reinstated prospectively upon a written request from the Developer, subject in all events to the Rebate Expiration Date provided for herein.

SECTION 15 **INDEMNIFICATION AND HOLD HARMLESS.**

- 15.1 Developer Indemnity and Hold Harmless. The Developer shall have the defense, indemnification, and hold harmless obligations provided for in Article 15 of the Redevelopment Agreement.
- 15.2 Assignee/Transferee Acknowledgement, Indemnity and Hold Harmless.

Any assignee or Transferee of this Agreement, including but not limited to a Hotel Master Tenant, is hereby put on notice that pursuant to the terms and conditions set forth herein and in the other Water Street Agreements, the City is entitled under certain circumstances to: (1) terminate this Agreement and the Rebate Payments provided for herein (a “Termination”); and/or (2) offset amounts due to the City against said Rebate Payments (an “Offset”), and/or (3) deem Rebate Payments waived pursuant to the provisions of Section 9.3.3 hereof (a “Waiver”).

Further, the rights of any such Transferee or assignee (including, without limitation, any Hotel Master Tenant) to receive Rebate Payments hereunder are: (1) subject to all of the terms and conditions of the Water Street Agreements; and (2) may be subject to Termination, Offset or Waiver by the City in accordance with the Water Street Agreements. The Developer and any Transferee or assignee (including any Hotel Master Tenant) waives any claims it may have against the City on account of any Termination, Offset or Waiver of the Rebate Payments which is made in accordance with the terms of the Water Street Agreements. Should the Developer or any Transferee or assignee (including any Hotel Master Tenant) make any claim against the City in connection with any such Termination, Offset or Waiver of the Rebate Payments, the party making such claim against the City shall hold harmless the City and its officers, agents, and employees from any and all actions, claims, damages, and losses of any kind resulting from or associated in any way with said Termination, Reduction, or Waiver.

SECTION 16 **FAILURE TO STRICTLY COMPLY/EVENTS OF DEFAULT.**

- 16.1 Events of Default. An Event of Default as set forth in the Redevelopment Agreement shall constitute an Event of Default hereunder. If an Event of Default is not Cured within the applicable Cure Period (as defined in, and provided for under the terms of, the Redevelopment Agreement) and thereby becomes an Uncured Default, the City may elect to terminate this Agreement, offset Rebate

Payments hereunder to pay amounts due to the City under the Water Street Agreements, and/or pursue any other remedy at law or in equity to which it may be entitled. In the event of termination of this Agreement, the City shall be relieved of any further obligations hereunder (except as to terms which survive the termination or expiration of this Agreement), and all money held by the City as provided herein may be retained by the City and used for any lawful purpose.

- 16.2 Cure. The provisions of Article 18 of the Redevelopment Agreement are incorporated herein by reference.
- 16.3 Rebate Funds Held. Upon issuance of a Notice of Default by the City, any monies due or becoming due under this Agreement shall be reserved and held by the City until such time as the Event of Default is Cured. If the alleged Event of Default can be Cured by the payment or expenditure of money, the Developer or Hotel Master Tenant may post a letter of credit from a source and in a form and amount reasonably acceptable to the City Attorney until the matter can be resolved and (in such an event) the City shall continue to make Rebate Payments to the Developer as provided herein.
- 16.4 Reserved.
- 16.5 City Default/City Cure Period. Subject to the provisions of Section 7.8 hereof, the City shall be considered to be in default if it fails to timely make the Rebate Payments provided for herein to the Developer or the Hotel Master Tenant, as applicable, so long as all terms and conditions hereof applicable to any such Rebate Payments have been fully met and so long as the City is not otherwise entitled to reduce or terminate payments hereunder pursuant to the terms hereof or in any other Water Street Agreement (a “**City Default**”).

If a City Default occurs, the Developer shall notify the City of the City Default in writing within sixty (60) days of such claimed default. Upon receipt of such notice from the Developer, the City shall have a period (the “**City Default Cure Period**”) of sixty (60) days in which to cure the City Default. A different period of time for the City Default Cure Period may, however, be mutually agreed upon in writing by the Developer and City Manager. The City Default Cure Period shall commence on the second day following issuance of the notice of the City Default to the City in conformity with the provisions of Section 17 hereof. The City’s failure to cure the City Default shall not relieve the Developer or its assignee of their obligations under this Agreement or any of the other Water Street Agreements. In the event of a City Default, the Developer or its assignee shall be entitled to seek specific performance under the terms set forth in this Agreement only for such amounts originally due (not including interest).

SECTION 17 NOTICE PROVISIONS.

- 17.1 Notice. Notice hereunder shall be provided in accordance with the Notice provisions contained in Article 12 of the Redevelopment Agreement.

SECTION 18 MISCELLANEOUS PROVISIONS.

- 18.1 No Third Party Beneficiary. No claim as a third party beneficiary under this Agreement by any person, firm, or corporation shall be made or valid against the City.
- 18.2 Time is of the Essence. Time is of the essence to this Agreement.
- 18.3 Defined Terms. Where a term is capitalized herein, it is either defined herein or is defined in the Redevelopment Agreement.
- 18.4 Incorporation by Reference. Where terms or provisions herein reference the Redevelopment Agreement, or other Water Street Agreements, the terms and provisions so referenced shall be deemed incorporated herein and made part hereof.
- 18.5 Severability. The invalidity or unenforceability of any particular provision, or part thereof, of this Agreement shall not affect the other provisions contained herein and this Agreement shall continue in all respects as if such invalid or unenforceable provision had not been contained herein.
- 18.6 Ambiguities. If any term of this Agreement is ambiguous, it shall not be construed for or against any party on the basis that the party did or did not write it.
- 18.7 Choice of Law/Venue. This Agreement shall in all respects be subject to and construed in accordance with and governed by the laws of the State of Illinois. Venue for any action arising out of the terms or conditions of this Agreement shall be proper only in the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois.
- 18.8 Cumulative Rights and Remedies. The rights and remedies of the Parties to this Agreement, whether provided by Law or by this Agreement, shall be cumulative, and the exercise of any one or more of such remedies shall not preclude the exercise by such Party, at that time or different times, of any other such remedies.
- 18.9 Construction. This Agreement, except where the context by clear implication shall otherwise require, shall be construed and applied as follows:
- (a) Definitions include both singular and plural.
 - (b) Pronouns include both singular and plural and cover all genders.
 - (c) The word “include,” “includes” and “including” shall be deemed to be followed by the phrase “without limitation.”
 - (d) Headings of Articles and Sections herein are solely for convenience of reference and do not constitute a part hereof and shall not affect the meaning, construction or effect hereof.

(e) When the words “day” or “days” are used herein, calendar days are intended unless business days are specified.

- 18.10 Inconsistent Provisions. In the event of a conflict between this Agreement and the Redevelopment Agreement, this Agreement shall control.
- 18.11 Covenants Running with the Land. The Developer and the City intend this Agreement to be a covenant running with the land.
- 18.12 Recordation. The Developer and the City hereby consent to recording this Agreement in the Office of the DuPage County Recorder. The Developer shall cause said recording to occur and shall pay for all fees and charges incurred therewith. Upon recording, the Developer shall promptly transmit to the City Attorney an executed original of this Agreement showing the date and recording number of record.
- 18.13 No Waiver. Failure of either Party to this Agreement to insist upon the strict and prompt performance of the terms, covenants, agreements, and conditions herein contained shall not constitute or be construed as a waiver or relinquishment of any Party’s right thereafter to enforce any such term, covenant, agreement or condition, but the same shall continue in full force and effect.
- 18.14 Amendments. No alteration, amendment, change, or addition to this Agreement shall be binding upon the Parties hereto unless authorized in accordance with law and reduced in writing and signed by them.
- 18.15 Survival. The following Sections and provisions shall survive the expiration or termination of this Agreement: Section 4.1, Section 7.5, Section 7.6, Section 7.7, Section 7.8, Section 9.3.3, Section 11.1, Section 12.1 and 12.2 [but only for a period of three (3) years after the Rebate Expiration Date with respect to 12.1 and 12.2], Section 15.1, Section 15.2, Section 16.5, Section 16.6 and all of Section 18.
- 18.16 Binding Effect. The Parties acknowledge and agree that this Agreement shall be binding upon the City and the Developer as “City” and “Developer” are defined herein and upon any Transferee, and/or Hotel Master Tenant, as those terms are defined herein and in the Redevelopment Agreement, to which this Agreement is Transferred or assigned.
- 18.17 Termination. In the event that this Agreement is terminated for any reason provided for herein or in any Water Street Agreement, all funds held by the City hereunder shall be retained by the City and may be used for any lawful purpose.
- 18.18 Authorization to Execute. The Developer’s authorized representatives who have executed this Agreement warrant that they have been lawfully authorized by the Developer’s members or its operating agreement to execute this Agreement on its behalf. The City Manager and City Clerk hereby warrant that they have been lawfully authorized by the City Council to execute this Agreement. Within five (5) days of a request from either Party, the other Party shall deliver to the other

copies of all articles of incorporation, bylaws, resolutions, ordinances or other documents required to legally evidence their authority to so execute this Agreement on behalf of the respective Parties.

- 18.19 Fees and Costs. In the event of any litigation hereunder, the Developer shall promptly reimburse the City for its reasonable attorneys' fees (in-house and/or out-of-house) plus costs to the extent that the City prevails in such action. If the cost of in-house counsel is to be assessed pursuant to this Agreement, then the hourly rates therefor must be reasonable and such in-house counsel shall be required to keep detailed time sheets for expenses incurred for which reimbursement is sought.
- 18.20 Exhibits. All exhibits attached hereto or referred to herein shall be made part hereof and incorporated herein.

IN WITNESS WHEREOF, the Parties hereto have executed this Rebate Agreement as of the date first set forth above.

/Rest of Page Intentionally Left Blank; Signature Pages Follow/

CITY:

CITY OF NAPERVILLE

By: _____
Douglas A. Krieger
City Manager

ATTEST

By: _____
Pam LaFeber, Ph.D.
City Clerk

State of Illinois)
) ss
County of DuPage)

I, the undersigned, a Notary Public, in and for the County and State aforesaid, DO HEREBY CERTIFY that Douglas A. Krieger, personally known to me to be the City Manager of the City of Naperville, and Pam LaFeber, Ph.D. personally known to me to be the City Clerk for the City of Naperville, appeared before me this day in person and acknowledged that they signed this instrument in their respective capacities as the City Manager and City Clerk of the City of Naperville pursuant to authority granted to them by the City Council of the City of Naperville.

Given under my hand and official seal this _____ day of _____, 2015.

(seal)

Notary Public

DEVELOPER:

WATER STREET PROPERTY OWNER, LLC,
a Delaware limited liability company

By: Water Street Property Mezz, LLC, a Delaware
limited liability company, its Member

By: Marquette Water Street Venture, LLC, an
Illinois limited liability company, its
Member

By: MP Water Street District, LLC, an
Illinois limited liability company, its
Manager

By: _____
Name: Nicholas M. Ryan
Title: Manager

State of Illinois)
) ss
County of DuPage)

I, _____, a Notary Public in and for the County and State aforesaid, do hereby certify that Nicholas M. Ryan, Manager of MP Water Street District, LLC, an Illinois limited liability company and the Manager of Marquette Water Street Venture, LLC, an Illinois limited liability company and the Member of Water Street Property Mezz, LLC, a Delaware limited liability company and the Member of Water Street Property Owner, LLC, a Delaware limited liability company, being personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that (s)he signed and delivered this said instrument as his/her own free and voluntary act, and as the free and voluntary act of said limited liability company, for the uses and purposes therein set forth.

Given under my hand and notarial seal this _____ day of _____, 2015.

Notary Public

My Commission Expires: _____

Exhibit 1

Legal Description of the Developer Components

NORTH PHASE

Existing Legal Description

LOTS 3 THROUGH 7 INCLUSIVE IN BLOCK ONE IN MARTIN'S ADDITION TO NAPERVILLE, BEING A SUBDIVISION IN THE SOUTHEAST 1/4 OF SECTION 13, TOWNSHIP 38 NORTH, RANGE 9 EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED FEBRUARY 6, 1847 AS DOCUMENT 2584, IN DUPAGE COUNTY, ILLINOIS.

Existing PINS

07-13-440-004; 07-13-440-005

Existing Addresses

117 Water Street
121 Water Street
123 Water Street
125 Water Street

Future Legal Description

LOTS 1 THROUGH 4 INCLUSIVE IN THE WATER STREET DISTRICT NORTH PHASE, BEING A SUBDIVISION IN THE SOUTHEAST QUARTER OF SECTION 13, TOWNSHIP 38 NORTH, RANGE 9, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED ON _____ AS DOCUMENT NO. _____ IN DUPAGE COUNTY, ILLINOIS.

Future PINS to be determined

Future Addresses to be determined

SOUTH PHASE

Existing Legal Description

LOTS 2 THROUGH 8 INCLUSIVE IN BLOCK FOUR, A NINE (9') STRIP OF TO BE VACATED WATER STREET LYING IMMEDIATELY NORTH OF SAID LOTS 2 THROUGH 8 INCLUSIVE, ALL IN BLOCK FOUR IN MARTIN'S ADDITION TO NAPERVILLE, BEING A SUBDIVISION IN THE SOUTHEAST 1/4 OF SECTION 13, TOWNSHIP 38 NORTH, RANGE 9 EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED FEBRUARY 6, 1847 AS DOCUMENT 2584, IN DUPAGE COUNTY, ILLINOIS.

Existing PINS

07-13-442-001; 07-13-442-002; 07-13-442-003; 07-13-442-004; 07-13-442-005; 07-13-442-006;
07-13-442-020

Existing Addresses

112 Water Street
124 Water Street
126 Water Street
130 Water Street
134 Water Street
140 Water Street
336 South Webster Street

Future Legal Description

LOTS 1 AND 2 INCLUSIVE IN THE WATER STREET DISTRICT SOUTH PHASE, BEING
A SUBDIVISION IN PART OF THE SOUTHEAST QUARTER OF SECTION 13,
TOWNSHIP 38 NORTH, RANGE 9, EAST OF THE THIRD PRINCIPAL MERIDIAN,
ACCORDING TO THE PLAT THEREOF RECORDED ON _____ AS DOCUMENT NO.
_____ IN DUPAGE COUNTY, ILLINOIS.

Future PINS to be determined

Future Addresses to be determined

Exhibit 2
Depiction of Water Street Project Property

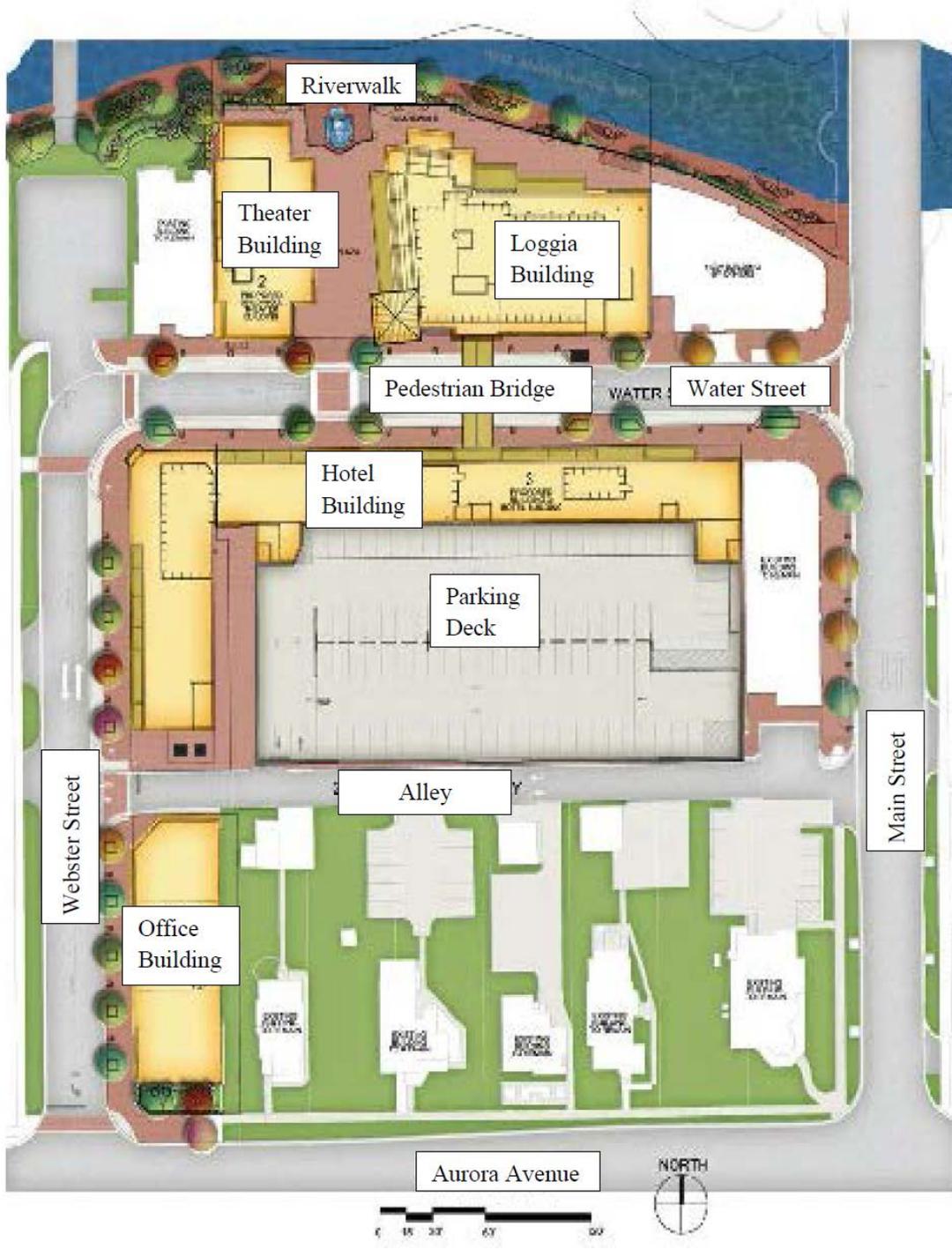


Exhibit 3

Rebate Commencement Date Memorandum

PREPARED BY:

RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:

Legal Department/City Attorney
City of Naperville
400 S. Eagle St.
Naperville, IL 60540

(Space above this line for Recorder’s use)

**MEMORANDUM OF HOTEL REBATE COMMENCEMENT DATE,
HOTEL FACILITY COMMENCEMENT DATE AND OTHER INFORMATION
REGARDING CERTAIN WATER STREET AGREEMENTS**

THIS MEMORANDUM OF HOTEL REBATE COMMENCEMENT DATE, HOTEL FACILITY COMMENCEMENT DATE AND OTHER INFORMATION REGARDING CERTAIN WATER STREET AGREEMENTS (the "**Memorandum**") is entered into as of the _____ day of _____, 20____, by and among City of Naperville, an Illinois Municipal Corporation and home rule unit of local government under the Constitution and laws of the State of Illinois (“**City**”), and _____ (“**Developer**”).

RECITALS

A. The City and the Developer have entered into that certain Water Street Redevelopment Agreement dated _____ (as amended, the “**Redevelopment Agreement**”) which Redevelopment Agreement was recorded in the records of DuPage County on _____ as document number _____.

B. Pursuant to the Redevelopment Agreement, among other Water Street Agreements, the following additional agreements were executed and delivered:

- (i) that certain Rebate Agreement dated _____ (as amended, the “**Rebate Agreement**”) which Rebate Agreement was recorded in the records of DuPage County on _____ as document number _____; and
- (ii) that certain Parking Facility License Agreement dated _____ (as amended, the “**Parking Facility License Agreement**”) which Rebate Agreement was recorded in the records of DuPage County on _____ as document number _____.

C. The Redevelopment Agreement, the Rebate Agreement and the Parking Facility License Agreement (along with the other Water Street Agreement) were executed to facilitate the redevelopment of the Water Street Project Property, which is described in the Redevelopment Agreement and which is legally described on **Exhibit A** hereto. Unless otherwise specified herein, capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Redevelopment Agreement.

D. The Hotel Rebate Commencement Date (as defined in the Rebate Agreement) has occurred and the City and the Developer wish to execute this Memorandum in order to memorialize such fact and certain other matters relating to the Water Street Agreements.

NOW, THEREFORE, the City and the Developer hereby acknowledge and agree as follows:

1. Rebate Commencement Date. For all purposes under the Rebate Agreement and the other Water Street Agreement, the Rebate Commencement Date is hereby acknowledged and agreed to be _____, 20 _____. This Memorandum shall constitute conclusive evidence of the satisfaction of all condition precedent set forth in Section 5 of the Rebate Agreement.

2. Hotel Facility Opening Date. For all purposes under the Parking Facility License Agreement and the other Water Street Agreement, the Rebate Commencement Date is hereby acknowledged and agreed to be _____, 20 _____.

3. License Fee Under Parking Facility License Agreement. For purposes of the Parking Facility License Agreement, the City and the Developer acknowledge the following:

(a) the Initial Term License Fee payable under the Parking Facility License Agreement is \$ _____ which is payable in quarterly installments of \$ _____ (the “**Quarterly Payment**”);

(b) the first Quarterly Payment is due on _____, 20 _____;

(c) the Initial Term of the License (as defined in the Parking Facility License Agreement) commenced on the Hotel Facility Opening Date specified above and shall terminate on _____, 20 ____, subject to extension as provided in the Parking Facility License Agreement.

4. Recording. The Developer shall cause this Memorandum to be recorded in the Official Records of DuPage County, Illinois, and shall promptly provide conformed copies of the recorded Memorandum to the City.

5. Successors and Assigns. Subject to the restrictions on transfer set forth in the Redevelopment Agreement, all of the terms, covenants, conditions and provisions of this Memorandum shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

6. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed to constitute an original, but all of which, when taken together, shall constitute one and the same instrument, with the same effect as if all of the parties to this Agreement had executed the same counterpart.

IN WITNESS WHEREOF, Assignor and Assignee have entered into this Agreement as of the date first above written.

[INSERT SIGNATURE PAGES, NOTARY BLOCKS AND
EXHIBIT A WHICH DESCRIBES THE DEVELOPER COMPONENTS]