

ORDINANCE NO.: 2015-044

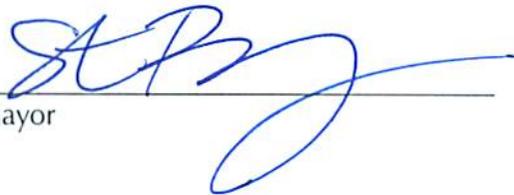
*Authorizing the City Manager to execute an Air Rights Development Contract
between the City of Columbia and Hallmark Homes International, Inc.*

ORIGINAL
STAMPED IN RED

BE IT ORDAINED by the Mayor and Council this 19th day of May, 2015, that the City Manager is hereby authorized to execute the attached Air Rights Development Contract between Hallmark Homes International, Inc. and the City of Columbia, or on a form approved by the City Attorney, for use of the air space over six City-owned parking garages and potential future garages for development of fully-taxable, non-student residential apartments.

Requested by:

Assistant City Manager Gentry



Mayor

Approved by:



City Manager

Approved as to form:



City Attorney

ATTEST:



City Clerk

Introduced: 5/5/2015

Final Reading: 5/19/2015

AIR RIGHTS DEVELOPMENT CONTRACT

This Air Rights Development Contract ("Contract") is made and entered into the 22nd day of June, 2015 by and between Hallmark Homes International, Inc., a South Carolina corporation, and its permitted assigns ("Developer"), and the City of Columbia, South Carolina ("City").

WHEREAS, the City issued a Request for Expressions of Interest regarding the potential to develop the air space over six City-owned parking garages and potential future garages (the "Parking Garages," as described in Article I below); and

WHEREAS, pursuant to its Procurement Code, the City subsequently issued a Request for Proposals to develop such air space, which included the potential grant of air rights as an inducement to build fully taxable, non-student residential apartments; and

WHEREAS, the City recognizes that the development of such air space is an opportunity to bring property that is currently not subject to *ad valorem* real property tax back on the tax rolls for the benefit of any applicable taxing entities (including the City, Richland County, and School District No. 1 of Richland County, South Carolina); and

WHEREAS, the City desires that its Central Business District, Downtown, and Vista neighborhoods can and should be residentially densified in accordance with the recommendations of the entire Midlands Community that were brought about and summarized by the Urban Land Institute's Midlands Reality Check; and

WHEREAS, the City has selected Developer as the successful responder to the Request for Proposal because of Developer's commitment to develop non-student rental apartments in the air space above the Parking Garages as further described in this Contract (the "Project", with each individual apartment building comprising the Project referred to as an "Apartment") in order to attract and retain knowledge economy workers, and the Developer's vision that the entire Project serve as an economic development impetus for the City; and

WHEREAS, this Contract is being entered into between the City and the Developer for the purposes of providing assurances (a) to the Developer so that the Developer (1) may, at the Developer's election, expend funds to initiate physical inspections, a review of operational interconnections between the Parking Garages and potential apartment buildings above, structural engineering and soils engineering studies, and architectural work on each Parking Garage; and (2) may, at the Developer's election, begin detailed engineering and architectural work on the first Parking Garage to have an

Apartment built upon it, in order to determine the structural, architectural, and financial feasibility of constructing Apartments on that Parking Garage and the remaining Parking Garages; and (b) to protect the City through indemnification and insurance and the City's ability to investigate the feasibility, capacity, and bond covenant compliance in connection with the transfer of air rights in connection with the Parking Garages and any proposed parking needs of the Developer, as further described in Article VI hereto; and

WHEREAS, the Parties desire to memorialize their respective contributions and commitments in this Contract in order to ensure the Project moves forward expeditiously and in good faith.

NOW THEREFORE, in consideration of the mutual covenants set forth in this Contract, and other good and valuable consideration, including but not limited to, the potential economic benefits to the City and the Developer by entering into this Contract, and to encourage a well-planned and well-executed Project by the Developer, the City and Developer agree as follows:

I. PARKING GARAGES

The Parking Garages covered by this Contract are:

1. Cannon Garage, 1227 Taylor Street
2. Lady Street Garage, 1100 Lady Street
3. Lincoln Street Garage, 820 Washington Street
4. Park Street Garage, 1007 Park Street
5. Taylor Street Garage, 1600 Assembly Street
6. Washington Street Garage, 1100 Washington Street

In the event that the City decides to construct a new City-owned parking garage, and determines that it will offer the air rights above the garage for development of a building that contains only a multifamily residential project, whether rental or condominium, or a mixed use project that contains 50 or more residential units whether rental or condominium ("Future Residential Garage") the City shall, during the Term of this Agreement, first offer the air rights to Developer as part of this Agreement. Developer shall also have a right of first refusal right of first offer on any Future Residential Garage during the term of this Agreement. Any garages to be built in the Bull Street Project and any garages jointly owned with another governmental agency shall not be included. The

specific terms of the rights of first offer or refusal shall be established by separate agreement prior to the Effective Date for the first garage.

II. EXCLUSIVE DEVELOPMENT RIGHTS; TERM

Upon the mutual signing of this Agreement, Developer shall have the exclusive right to develop the air space above the Parking Garages and any Future Residential Garage and such exclusivity shall continue for ten (10) years following the Effective Date (defined in Section VI, below) for the first Parking Garage. Such exclusivity shall continue in effect so long as the Developer satisfies the following development milestones:

1. Within fourteen (14) days after the Effective Date, the Developer shall have commenced the Initial Due Diligence on the first Apartment, as described in Article III below.
2. Within twenty-four (24) months after the first Effective Date for the first Parking Garage, the Developer shall have commenced the construction of the Apartment above the first Parking Garage.
3. Developer will begin detailed engineering and architectural work on the second Apartment not later than the initiation of leasing and move-in of the first tenants in the first (previous) Apartment.
4. Developer will initiate construction on the second Apartment not later than twenty-four (24) months after the second Effective Date for the second Parking Garage.
5. The milestones set forth above, subject to appropriate modifications that may be mutually agreed upon from time-to-time by Developer and City due to market conditions or other factors, shall apply to the construction of each Apartment after the second Apartment until there are no remaining Parking Garages or Future Residential Garages.

III. INITIAL DUE DILIGENCE; ACCESS

Developer shall have immediate access to the Parking Garages to, at its election, conduct physical inspections, structural and soil engineering studies, and other engineering work on each of the six Parking Garages, in order to determine the initial feasibility and best methods of constructing an Apartment on each Parking Garage ("Initial Due Diligence"). Developer need not initiate any Initial Due Diligence prior to the Effective Date (as defined in Section VI, below), but may do so prior to Effective Date at its election.

All such Initial Due Diligence shall be completed at the Developer's sole cost and at no cost to the City. If the Initial Due Diligence requires potentially intrusive testing such as core drilling, Swiss hammer testing or other concrete hardness testing, such testing shall not occur without prior notification of the City by the Developer and such tests shall be conducted in a manner to minimize any interference with the City's operation of the Parking Garages. In the event that a level or an entire garage needs to be closed to conduct the Initial Due Diligence, such Diligence shall occur on a weekend, overnight, or at another time approved by and coordinated with City Parking Staff, in order to minimize the disruption to parking operations. In the event that access to an individual space needs to be restricted, a minimum of 72 hour notice shall be required in order to allow the City to notify the pertinent parties of the restriction and such restriction shall be minimized to the extent possible.

IV. CONDITIONS PRECEDENT FOR TRANSFER OF AIR RIGHTS

After the completion of Initial Due Diligence, Developer will select the first Parking Garage to be developed with an Apartment, in coordination with the City. Upon the City's approval of Developer's selection, which shall not be unreasonably withheld, the City and Developer shall progress as follows:

1. Developer will immediately proceed to comprehensively assess the structural, architectural, and economic feasibility of constructing an Apartment on top of the first selected Parking Garage, at Developer's sole cost.
2. Upon the successful determination of feasibility for the Apartment based on the expert opinion of independent professionals and Developer's internal financial studies, Developer will begin the detailed design/development stage of the Apartment and progress to detailed planning and regulatory review by the City.
3. Developer will proceed through standard City permitting and Design/Development Review Commission reviews and approvals for the proposed Apartment, and any required alterations or upgrades to the Parking Garage (to be paid for by Developer), as applicable as well as City Building Department study and review.
4. Upon completion of appropriate governmental requirements, such as Planning and Development Department and Utilities and Engineering Department review and approval, and Developer's payment of all building permit and tap fees, and Developer's receipt of a construction permit, and upon payment of all other applicable fees and licenses, the City will segment the air rights via the recording of a Deed or Declaration, and will convey the air rights to Developer, all as set forth more fully below.

The process and the conditions precedent set forth above shall apply to every Parking Garage during the term of this Contract. Notwithstanding anything herein to the contrary, the entering into this Contract, the Declaration or Deed, or other instruments by the City pursuant hereto shall not be deemed a waiver of or consent to any permitting, zoning, or other matter over which the City has jurisdiction in a governmental capacity.

V. DECLARATION; DEED

City and Developer shall work together to draft a template air rights easement agreement ("Declaration") or air rights deed ("Deed") sufficient to provide a title insurable and financeable legal structure for development. City and Developer understand and agree that adjustments to the Declaration or Deed will be made to accommodate site-specific matters.

City and Developer shall cooperate to define in detail the easements necessary to provide access and support to, and to construct and operate elevators, utility connections, pedestrian and vehicular ingress and egress, and structural support additions within each Parking Garage. Except for any temporary construction easements, which may be documented in a separate instruments, such easements shall be created in the Declaration or Deed for each individual Parking Garage.

VI. PARKING LICENSE AGREEMENT

City and Developer shall work together to draft a parking license agreement ("License Agreement") for each Parking Garage. Each License Agreement will, among other things, address parking needs of tenants of Developer's Apartment(s), and if provisions are made to accommodate those needs within a City facility, such parking fees to be paid by such tenants directly to the City, at regular City monthly parking rates, subject to future adjustments in commensurate with public monthly parking rates, as further set forth therein.

The number of parking spaces required for each Apartment will be determined pursuant to City code or an exemption granted thereto.

Notwithstanding anything herein to the contrary, the City has not yet determined that its parking system has the capacity (*e.g.*, number of spaces available) or financial feasibility to serve any or all of the Apartments contemplated hereby, and the City has not yet determined what limitations, if any, the bond ordinance related to the City's parking system or applicable federal law and regulations related to tax-exempt bonds would have related to the transfer of air rights related to the Parking Garages or the provision of parking (including any City commitments to the Developer to provide such parking) to

serve any or all of the Apartments contemplated hereby. The City is currently evaluating alternatives but does not infer or represent that it has the ability to provide parking or to transfer any of the air rights related to the Parking Garages if such transfer would affect the operation or financial condition of its parking system. As of the date of this Contract, the City has made no commitment to the Developer to provide parking within any Parking Garage or at any location within its parking system and, until the City has executed a License Agreement for a particular Apartment it shall have no liability to Developer and any funds and/or time spent by Developer shall be at Developer's risk. "Effective Date" shall mean the date the parties execute the first License Agreement for the first Parking Garage to have an Apartment built upon it. If the City determines, in its sole discretion, that it is not feasible to provide parking for one or more Projects it shall so notify Developer whereupon this Agreement shall terminate as to such Parking Garage(s) unless Developer advises the City in writing within 120 days following such notice that it intends to proceed without parking.

VII. FINANCING; NO LIENS

Developer will secure financing for the construction of each Apartment from a reputable lending institution. In no event shall a lien be permitted to be placed against a Parking Garage or other property owned by the City.

VIII. INDEMNIFICATION AND INSURANCE

Developer shall indemnify, defend and hold harmless City and its officials and employees, from and against all claims, causes of action, damages, cost and expense relating to the Project by reason of or in connection with: (i) any injury to or death of any person, or damage to or loss of property, or any other matter occurring, resulting from or connected with the construction, use, condition or occupancy of the Apartments, (ii) any breach by Developer under this Contract, or (iii) the use and occupancy of a Parking Garage by Developer, but not by tenants of any Apartment, pursuant to a License Agreement.

Prior to the commencement of the Initial Engineering Due Diligence and thereafter throughout the term of this Contract, the Developer shall, at its own expense, maintain or cause its contractors to maintain in force a policy or policies of commercial general liability insurance written by one or more responsible insurance carriers licensed to do business in the State of South Carolina, with single limit liability coverage of not less than \$2,000,000 per occurrence (plus umbrella coverage for an additional \$5,000,000). Such policy or policies shall include, among other things, coverage for contractual liability and shall name the City as an additional insured. The Developer agrees to deliver to the City a certificate of insurance evidencing the existence of such liability

insurance prior to any entry onto a Parking Garage for purposes of conducting Initial Engineering Due Diligence.

IX. TAXES AND LIENS

Developer shall be responsible for all City, County, State, or other tax liabilities generated from the Project and each Apartment. Developer will not ask for any tax breaks, tax incentives, or other tax-related benefits in conjunction with the Project, or any discounts, reductions, or waivers with respect to parking rates in connection with any License Agreement related thereto.

If any mechanics' or materialmen's lien or similar charge is filed against the City or any Parking Garage as a result of any work performed by or on behalf of the Developer under the terms of this Contract, then the Developer shall at its own cost and expense cause such lien or charge to be discharged of record, by bonding or otherwise, within thirty (30) days after notice from the City to do so; provided, however, that the Developer shall have the right to contest such the underlying claim at its sole expense so long as the lien is discharged of record as provided above. The Developer shall indemnify and hold the City harmless from and against all costs, liabilities, suits, penalties, claims and demands, including reasonable attorneys' fees and court costs, resulting from the filing of a lien against the City, or any Parking Garage, relating to any work performed by the Developer under the terms of this Contract.

X. INSPECTION

For each and every improvement to a Parking Garage undertaken by the Developer pursuant to this Contract, the City shall receive architectural and engineering inspection reports and/or materials testing reports (as applicable) from the approved project architect and engineers as such work is being installed in the Garage. The City confirms its approval of Kyzer & Timmerman as the structural engineer, GS2 Engineering, Inc. as the soils engineer, and Stevens and Wilkinson of South Carolina, Inc. as the inspecting architect for the purpose of this paragraph. Any additional engineers or architects shall be subject to the prior approval of the City, not to be unreasonably withheld or delayed. The cost of these inspections and reports shall be borne solely by the Developer. In the event that any work undertaken by the Developer within a Parking Garage does not pass the inspections of the project architects and engineers, such work shall be removed and corrected at the sole cost of the Developer.

XI. NOTICE

Any notice, instruction, direction or demand under the terms of this Contract required to be in writing shall be duly given upon delivery, if delivered by hand, overnight mail, facsimile transmission or mail (with postage prepaid), to the following addresses:

In the case of Developer:

Hallmark Homes International, Inc.
ATTN: Donald R. Tomlin, Jr.
4500 Fort Jackson Blvd., Suite 200
Columbia SC 29229

with a copy to:

Robert D. Coble, Esq.
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201

and an additional copy to:

W. Leighton Lord III, Esq.
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201

In the case of City:

City of Columbia
1737 Main Street
Columbia, SC 29201
Attention: City Manager

with a copy to:

City of Columbia
Office of City Attorney
P.O. Box 667
Columbia, SC 29202

and an additional copy to:

Joel E. Gottlieb, Esquire
McNair Law Firm, PA
1221 Main Street, Suite 1800

Columbia, SC 29201

or to such other addresses or facsimile numbers as may be specified by like notice. Any notice involving non-performance, termination or renewal shall be sent by hand delivery, recognized overnight courier or, within the United States, via certified mail, return receipt requested. All other notices may also be sent by facsimile, confirmed by first class mail. All notices shall be deemed to have been given when received, if hand delivered; when transmitted, if transmitted by facsimile or similar electronic transmission method with confirmation of successful transmission; one working day after it is sent, if sent by recognized overnight courier; and three days after it is postmarked, if mailed first class mail or certified mail, return receipt requested, with postage prepaid.

XII. OTHER PROVISIONS

- a. Exhibits.** Exhibits referenced in this Contract are incorporated by reference. If a conflict or inconsistency arises between the terms of this Contract and the terms of an exhibit, the terms of this Contract shall control.
- b. Assignment.** Developer has the right to assign its rights under this Contract, in whole or on part, without the consent of the City, to affiliated entities ~~or in conjunction with the sale of one or more completed Apartment(s)~~, or collaterally assign this Contract to a construction lender providing financing for the Project. This Contract shall not otherwise be assigned without the consent of the City.
- c. Entire Agreement.** This Contract contains, merges, and integrates the entire agreement and understanding between the parties to this Agreement, and there are no oral or written agreements, promises, or understandings between the parties other than those stated in this Contract. All prior contracts, negotiations, agreements, promises, statements, and understandings between the parties are considered superseded, withdrawn, and cancelled unless expressly stated in this Contract.
- d. Governing law and interpretation.** This Contract shall be deemed to have been negotiated, prepared, signed, and delivered exclusively in the State of South Carolina, and this Contract shall be governed by, interpreted, performed, and enforced in accordance with the laws of the State of South Carolina. No provision of this Contract shall be interpreted against any party by virtue of the fact that the provision was drafted by or on behalf of that party. If any provision of this Contract is deemed to be invalid or unenforceable, such provision shall be deemed severable from the remainder of this Contract and shall not cause the invalidity or unenforceability of the remainder of this Contract; and if a provision shall be deemed invalid only because of excessive scope or breadth, the provision shall be deemed valid to the extent of the scope and breath permitted by law.
- e. Severability.** If any provision of this Contract is deemed invalid or unenforceable, such provision shall be deemed severable from the remainder of

this Contract and shall not cause the invalidity or unenforceability of the remainder of this Contract; and if a provision shall be deemed invalid only because of excessive scope or breadth, the provision shall be deemed valid to the extent of the scope and breath permitted by law.

- f. Adequate consideration.** The parties agree that they have received valuable and satisfactory benefit and consideration in exchange for entering into this Contract.
- g. Understanding of Agreement.** The parties have read and agreed to all of the terms of this Contract, and this Contract shall be a complete bar to any subsequent claim, action, or proceeding to alter or set aside this instrument because of mistake of fact or otherwise.
- h. Non-Waiver.** The failure of a party to insist upon strict performance of any term, obligation, condition, or covenant contained in this Contract shall not be deemed to be a waiver of any rights or remedies that party may have, and shall not be deemed a waiver of any subsequent breach or event of default in the terms, obligations, and conditions contained herein, unless expressly waived in writing and signed by a party.
- i. Authority to sign agreement.** Persons signing this Contract on behalf of a party that is a corporation, partnership or other entity, represent and warrant that they have the necessary and appropriate authority and capacity to enter into this Contract on behalf of the party and make this Contract fully binding upon and enforceable against that party. Persons signing this Contract further represent and warrant that this Contract is not prohibited or restricted by any contract or other legally recognized arrangement applicable to them or to the party they represent.
- j. Further assurances.** At any time during the course of this Contract, upon written request by either party, the other party will promptly perform any acts, sign and deliver any documents, and provide any information that may be reasonably required to give full force and effect to the terms of this Contract, including without limitation demonstrating their ability to perform and comply with their obligations under this Contract.
- k. No oral modification.** This Contract cannot be orally modified, and any modification of this Contract shall not be enforceable unless it is reduced to a writing signed by all parties. The parties acknowledge that no representative of either party has authority to orally modify any term or condition contained in this Contract, and the parties agree they will never attempt to enforce an oral modification of this Contract.
- l. Succession and survival.** This Contract shall inure to the benefit of, and be binding on, the successors and assigns of the parties. The provisions of this Contract shall survive completion of the Project.
- m. Execution in counterparts.** This Contract can be executed in counterparts by all parties signing this Contract and, when taken together, the signed counterparts

shall constitute one complete and fully executed and binding document. Any party may rely on a copy of the signed original received from another party by facsimile or email and may consider the copy as a legal, binding, and enforceable document.

n. **No partnership.** The provisions of this Contract are not intended to create, nor shall they in any way be interpreted to create, a joint venture, a partnership, or any other similar relationship between the parties.

City of Columbia

By: Teresa B. Wilson

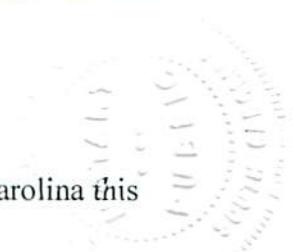
Witness: Erika D. Moore

Name (print): Teresa B. Wilson

Title: City Manager

WITNESS my hand and official seal of office at Columbia, South Carolina this the 21st day of May, 2015.

Erika D. Moore
Notary Public for South Carolina:
My commission expires: April 16, 2022



APPROVED AS TO FORM

Janne Lisowski
Legal Department City of Columbia, SC

Hallmark Homes International, Inc.

By: C. Daniel Turpe

Witness: Cheryl C. Love

Name (print): C. Daniel Turpe

Title: President

WITNESS my hand and official seal of office at 4500 Jackson Blvd., Richland County, Columbia SC this the 8th day of June, 2015.

WITNESS my hand and official seal of office at Columbia, South Carolina this the 8th day of June, 2015.

Cheryl C. Love
Notary Public for South Carolina:
My commission expires: 5-17-23

