

CONTRACT FOR BROKERAGE SERVICES
BETWEEN CITY OF PENSACOLA AND
KUHN REALTY, LLC

THIS CONTRACT ("Contract") is made this ____ day of _____, 2021, to be effective as of December 16, 2020 (the "Effective Date"), by and between the **City of Pensacola** ("City"), a Florida municipal corporation created and existing under the laws of the State of Florida, and **Kuhn Realty, LLC** ("Consultant"), a limited liability company authorized to do business in Florida, located at 1216 North Palafox St., Pensacola, Florida 32501 (the City and Consultant are collectively referred to hereinafter as the "Parties").

WITNESSETH:

WHEREAS, City is the owner of those certain vacant parcels of land more particularly described on the attached **Exhibit "A"** (the "Lots" described in the description on Exhibit "A" are referred to hereinafter individually as a "Parcel", and collectively as the "Parcels" or the "Property");

WHEREAS, the City and Studer Properties, LLP, a Florida limited liability partnership ("Studer"), entered into that certain Option Agreement dated April 1, 2018, as amended by Addendum to Option Agreement dated April 1, 2020 (the "Option Agreement");

WHEREAS, Studer has assigned its rights in the Option Agreement by way of three (3) Partial Assignments of Option Agreement (hereinafter the "Partial Assignments") to the following parties: Valencia Development Corporation, Inspired Communities of Florida, LLC, and Silver Hills Development, Inc., their successors and/or assigns (hereinafter each referred to as a "Developer", and collectively the "Developers");

WHEREAS, City desires to engage a professional consultant to assist and advise it in the development of the Parcels at the Community Maritime Park (the "Project"), including without limitation negotiations with the Developers for ground leases(s), development agreements, and/or other agreements, and other services that the Parties may mutually agree upon;

WHEREAS, the City has evidenced the will of the citizens to retain ownership of all parcels at the Community Maritime Park through the adoption of section 2-3-4, Code of City of Pensacola, and Ordinance #25-20;

WHEREAS, Consultant has the skills, experience, and knowledge to assist the City in the Project and submitted to the City a statement of work, insurance requirements, and other information related to the consulting services requested (all such documentation hereinafter referred to as the "Proposal"), attached hereto as Exhibit B and incorporated herein by this reference; and

WHEREAS, the Parties desire to enter into this Contract.

NOW, THEREFORE, in consideration of the work to be performed and the payment for the performance of the work, and of the mutual covenants contained herein and the mutual benefits to flow each unto the other, and for other good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, the Parties agree as follows:

Section 1. Recitals. The recitals contained above are declared by the Parties to be true and correct and are incorporated into this Contract.

Section 2. Consultant's Appointment and Services. City appoints Consultant as a consultant and advisor to the City with respect to the Project. Consultant's services include, generally, all work and services described in, and in accordance with, the Proposal. Consultant hereby accepts such appointment and agrees to diligently use commercially reasonable efforts in the performance of its duties and functions described in this Contract. Consultant agrees to apply prudent, reasonable, and suitable business practices in the performance of its duties hereunder and shall exercise that degree of skill, competence, quality and professional care rendered by reputable and comparably credentialed companies performing the same or similar type of services. Consultant is an independent contractor of the City and this Contract shall not be construed to create any association, employment or any express or implied agency relationship. City acknowledges that Consultant is neither a design professional nor a contractor. The Consultant shall comply with all applicable federal, state, and local laws, ordinances, rules, and regulations pertaining to the performance of this Contract.

Section 3. Fiduciary Relationship and Duties Owed to City.

3.1 Consultant, Consultant's Managing Member, Consultant's agent, Andrew Rothfeder, and the City expressly acknowledge that the Consultant, through its agent, is performing the services provided by this Contract pursuant to a fiduciary relationship in which the City is dependent upon the Consultant to render consulting and negotiating services with third parties on behalf of the City, and the Consultant agrees to accept the undertaking to protect and benefit the interests of the City. In performing such services, the Consultant shall, at all times, extend the following duties to the City:

- a. Dealing honestly and fairly, avoiding conflicts of interest and self-dealing;
- b. Loyalty to the City as its exclusive client in all related transactions;
- c. In all situations related to this engagement, acting exclusively in the best interests of the City;
- d. Confidentiality, including the duty to refrain from disclosing information received from the City when specifically directed to refrain from disclosure;
- e. Adherence to all directions given to the Consultant by the City;
- f. Full disclosure of material information;
- g. Skill, care, and diligence in the transaction;
- h. Presenting all offers and counteroffers in a timely manner, unless previously directed otherwise in writing; and
- i. Disclosing all known facts and circumstances that materially affect the interests of the City in the transaction.

These duties shall be performed to the standard of conduct of one who is in a position of trust and is responsible for the interests of another party.

3.2 Consultant specifically is not authorized to enter into any lease on behalf of City or to make any representations or commitments on behalf of City. Consultant agrees that Consultant shall act solely as City's single agent and broker and not as a transaction agent or broker, a lessee's agent or broker, or a joint agent or broker. Further, Consultant shall be compensated only as provided in this Contract and shall not seek, receive, accept, or agree to accept any compensation or reimbursement from any Developer, lessee, potential lessee, or any other third party except as specifically authorized by this Contract or consented to in writing by the City with approval of City Council.

Section 4. Term. The term of this Contract shall commence on the Effective Date of this Contract and shall end on March 31, 2022. However, this Contract may be terminated for convenience by either party by providing no less than thirty (30) days written notice to the other party of the intent to terminate this Contract.

Section 5. Consultant Fee and Payment.

5.1 The Consultant agrees to perform all work and services in Section 2 and to furnish all necessary labor, materials, equipment, machinery, tools, apparatus, and means of transportation related to such work and services at Consultant's sole cost and expense. In consideration of the services provided, Consultant shall be entitled to a fee for Consultant's services ("Consultant's Fee") equal to four percent (4%) of the total base rent to be paid under any new lease entered into during the Term (including any rent escalations but excluding any common area maintenance charges and any other amounts payable by lessee) for the time period commencing on the date that rent first becomes due and payable under the lease and ending on the earlier of (a) the last day of the initial term of the lease or (b) twenty-five (25) years after the initial rent commencement date. Consultant's Fee is subject to a maximum cap of \$750,000.00 regardless of the number of leases entered.

5.2 Consultant's Fee shall be deemed earned if and when, during the Term, (a) a lease is entered into between City and the Developer upon terms and conditions acceptable to City in its sole and absolute discretion, and (b) any due diligence, inspection, or similar time period that would permit the lessee to terminate the lease has expired without the lease having been terminated. City's obligation to pay Consultant's Fee shall continue if City enters into a lease with Developer within one hundred twenty (120) days following the expiration or termination of this Contract.

5.3 Upon the full execution of a lease with a Developer and the expiration of any due diligence period as described in subsection 5.2, the City will remit to the Consultant as payment of the Consultant's Fee an amount up to or equal to the total amount of option payments collected from that Developer and not otherwise encumbered or allocated until the Consultant's Fee for that Developer is paid in full. If there remains an amount owed by the City to the Consultant for the Consultant's Fee, then for each year of the lease thereafter, on or within thirty (30) days of the anniversary date of the execution of the lease, the City will remit an amount up to or equal to the base rent revenue received from the lessee of that lease to the Consultant payment towards the remainder of the Consultant's Fee until the Consultant's Fee is paid in full. For each and every payment described in this Consultant, Consultant shall submit to the City an invoice no less than twenty days prior to the payment due date.

5.4 Consultant will be entitled to (a) the Consultant's Fee as described above in subsections 5.1 through 5.3 or (b) a flat fee of \$160,000.00 to be paid at the expiration of this Contract as extended by the one hundred twenty-day time period described above in subsection 5.2, whichever amount is greater.

5.5 It is understood and agreed to by the Parties that the City via City Council, the governing body, has made known its intentions to not sell property located south of Main Street between the Pensacola Bay Bridge and A Street absent exigent circumstances expressly declared to exist by the City Council (section 2-3-4, Pensacola Code), and further, the City Council has enacted Ordinance 25-20, declaring certain City-owned properties to be sensitive properties, including properties that are waterfront or that have a waterview, that require additional procedures before the City can consider selling or otherwise disposing of the City's rights in the real property. Nevertheless, should the City decide to sell all or part of the Project parcels, Consultant will be entitled to four percent (4%) of the sales price in full satisfaction of its fee obligation from the City payable upon the sale of the parcel(s).

Section 6. Performance Schedule. Intentionally deleted.

Section 7. Necessary Approvals. Consultant shall maintain any professional licenses required to act as a broker or consultant consistent with the scope of work described in this Contract.

Section 8. No Waiver. No waiver, alterations, consent or modification of any of the provisions of this Contract shall be binding unless in writing, approved by the City Council or Mayor, whichever is determined appropriate by the City Attorney in her/his sole opinion, and executed by all Parties.

Section 9. Governing Law. This Contract is governed and construed in accordance with the laws of the State of Florida. The law of the State of Florida shall be the law applied in the resolution of any claim, actions or proceedings arising out of this Contract.

Section 10. Venue. Venue for any claim, actions or proceedings arising out of this Contract shall be Escambia County, Florida.

Section 11. No Discrimination. Consultant shall not discriminate on the basis of race, creed, color, national origin, sex, age, or disability, in the performance of this Contract.

Section 12. No Other Agreements. The Parties agree Contract, and any subsequent amendments, modifications and/or addendums entered into among the Parties from time to time, contain all the terms and conditions agreed upon by the Parties. No other agreements, oral or otherwise, regarding the subject matter of this Contract shall be deemed to exist or to bind either Party.

Section 13. Remedies for Failure to Perform or Breach of Contract/Dispute Resolution.

13.1 Remedies. The City reserves the right to seek all remedies available under law in the event of a failure to perform or other breach of this Contract by the Consultant, and the failure of the City to employ a particular remedy shall not be regarded by the Parties as a waiver of that or any other available remedy. The Consultant reserves the right to seek all remedies available under law in the event of a failure to perform or other breach of this Contract by the City, and the failure of the Consultant to employ a particular remedy shall not be regarded by the Parties as a waiver of that or any other available remedy.

13.2 Initial Meeting and Mediation. In the event of any claim, dispute, or other matter arising out of or relating to this Contract, the Parties shall attempt to resolve the dispute informally by meeting and conferring. The person representing a party at such meeting shall have absolute authority to resolve any dispute without further consultation. Any resolution of any aspects of the dispute shall be memorialized in writing.

13.3 Proceedings. In the event that issues remain unresolved after the processes described in Section 13.2, the Parties may seek all remedies available under law to resolve the remaining issues.

Section 14. Termination for Convenience. The City or Consultant may terminate this Contract without cause upon thirty (30) days' prior written notice to the other Party. If terminated pursuant to this section, Consultant shall be entitled to payment of all charges incurred prior to the date of termination and consistent with the provisions of subsection 5.2 of this Contract.

Section 15. Public Records Act. The Parties acknowledge that the Florida Public Records Act requires that contractors entering into contracts for services with public agencies and who are acting on behalf of the public agency are required to adhere to the provisions of Section 119.0701, *Florida Statutes*. The Parties acknowledge and agree to fulfill all obligations respecting required contract provisions in any contract entered into or amended after July 1, 2016, in full compliance pursuant to Section 119.0701, *Florida Statutes*, and obligations respecting termination of a contract for failure to provide public access to

public records. The Parties expressly agree specifically that the contracting parties hereto shall comply with the requirements within Attachment A attached hereto and incorporated by reference.

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

CONSULTANT:

CITY OF PENSACOLA, FLORIDA

KUHN REALTY, LLC

By: _____

Name: Larry Kuhn

Title: Manager

Mayor, Grover C. Robinson, IV

Witness:

City Clerk, Ericka L. Burnett

Printed name: _____

Approved as to Substance:

Department Director

Legal in form and valid as drawn:

Susan A. Woolf, City Attorney

Acknowledgement:

I hereby acknowledge and agree that I am acting as an agent for Kuhn Realty, LLC.

Andrew Rothfeder, Agent and in his individual capacity

Attachment A

PUBLIC RECORDS: Consultant shall comply with Chapter 119, Florida Statutes. Specifically, Consultant shall:

- A. Keep and maintain public records required by the City to perform the service.
- B. Upon request from the City's custodian of public records, provide the City with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes, or as otherwise provided by law.
- C. Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the Agreement term and following the completion of the Agreement if Consultant does not transfer the records to the City.
- D. Upon completion of the Agreement, transfer, at no cost, to the City, all public records in possession of Consultant or keep and maintain public records required by the City to perform the service. If Consultant transfers all public records to the City upon completion of the Agreement, Consultant shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If Consultant keeps and maintains public records upon completion of the Agreement, Consultant shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the City, upon request of the City's custodian of public records, in a format that is compatible with the information technology systems of the City.

Failure by Consultant to comply with Chapter 119, Florida Statutes, shall be grounds for immediate unilateral cancellation of this Agreement by the City.

IF CONSULTANT HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE CONSULTANT'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT: THE OFFICE OF THE CITY ATTORNEY, (850) 435-1715, PUBRICRECORDS@CITYOFPENSACOLA.COM, 222 WEST MAIN STREET, PENSACOLA, FL 32502.

EXHIBIT "A"

PROPERTY

The land referred to herein below is situated in the County of Escambia, State of Florida, and is described as follows:

Lots 3, 4, 5, 6, 7, 8 and 9 of VINCE WHIBBS SR. COMMUNITY MARITIME PARK, according to the Plat thereof as recorded in Plat Book 19, Page(s) 23 and 23A, of the Public Records of Escambia County, Florida.

EXHIBIT “B”

PROPOSAL

Andrew E. Rothfeder, as the agent for KUHN REALTY LLC, will perform real property services related to the development of the remaining seven (7) private development parcels at the Community Maritime Park. The scope of services shall include:

1. Research, analysis and strategy for creation of business terms and deal structure for option agreements and ground lease (or sale) terms between the City and the private developers.
2. Participation with the City in negotiations with identified Developers to arrive at mutually acceptable terms and agreements.
3. Serving as City’s representative to enforce compliance with agreements throughout the Option Term, up to and including a lease, development agreement, or equivalent. This includes, but is not limited to:
 - a. Ensuring projects are developed that adhere to all applicable design standards and to the West Main Master Plan, created by DPZ CoDesign and Speck & Associates and dated November 24, 2019, and including the design guidelines dated November 21, 2019 and the project report dated November 24, 2019.
 - b. Ensuring compliance with time periods and payments.
 - c. Ensuring compliance with diversity and community covenant standards as set by the Mayoral Policy #20-01, Covenant with the Community.
 - d. Ensuring compliance with the design, construction, and ultimate operational goals of the City regarding the shared parking facility.
 - e. Serving as City’s “Owner’s representative” throughout the process, being a liaison, and providing coordination between the City, the Developers, and other consultants.