



# CITY COUNCIL STAFF REPORT

DATE: June 1, 2011

CONSENT CALENDAR

SUBJECT: APPROVAL OF AN AGREEMENT AND ESCROW INSTRUCTIONS FOR THE CITY'S SALE OF TWO PARCELS OF REAL PROPERTY, ASSESSOR PARCEL NOS. 508055007 AND 508055008, TOTALING APPROXIMATELY 5.62 ACRES LOCATED AT THE SOUTHEAST CORNER OF ANDREAS ROAD AND CALLE EL SEGUNDO, PALM SPRINGS, CALIFORNIA, TO O & M HR, LLC, A DELAWARE LIMITED LIABILITY COMPANY FOR THE AMOUNT OF \$1.5 MILLION.

FROM: David H. Ready, Esq., Ph.D., City Manager

BY: Thomas J. Wilson, Assistant City Manager

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## SUMMARY

This Agreement provides for the sale of approximately 5.62 acres of property currently improved as a parking lot and commonly known as the Prairie Schooner lot, to a limited liability corporation held by the Nexus Development Corporation. The Agreement provides for the purchase of the property for \$1.5 million for the exclusive development of a "first class" hotel, along with associated retail, within five (5) years of the sale of the property. The Agreement further provides that the City may repurchase the property for the exact sale amount, \$1.5 million, if the property is not developed as a "first class" hotel within five (5) years from its sale.

## RECOMMENDATION:

- 1) Adopt Resolution No. \_\_\_\_\_, "A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, APPROVING AN AGREEMENT AND ESCROW INSTRUCTIONS FOR THE SALE OF TWO PARCELS OF REAL PROPERTY, ASSESSOR PARCEL NOS. 508055007 AND 508055008, TOTALING APPROXIMATELY 5.62 ACRES LOCATED AT THE SOUTHEAST CORNER OF ANDREAS ROAD AND CALLE EL SEGUNDO, TO O & M HR, LLC, A DELAWARE LIMITED LIABILITY COMPANY FOR THE AMOUNT OF \$1.5 MILLION." and
- 2) Authorize the City Manager to execute all documents related and necessary to the agreement.

Item No. 2.L.

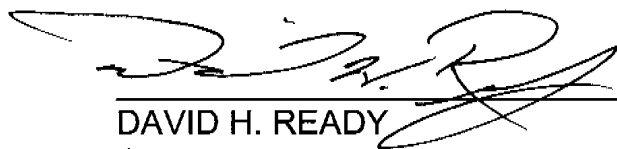
STAFF ANALYSIS:

The proposed sale of the Prairie Schooner property to a limited liability company owned by the Nexus Corporation will provide the opportunity for Nexus to complete the assemblage of 10 acres and develop a proposed "first class", (as defined in the City's Hotel Operations Incentive Program), hotel and associated retail.

The location of the property provides an excellent site which will serve the Convention Center and associated facilities with a premier hotel. The purchase price is fair and reasonable based upon the restricted use of the property by Nexus for the exclusive development of a "first class" hotel and associated retail. Additionally, the Agreement provides that the City may reacquire the property if a "first class" hotel is not developed within five (5) years from the date of the property sale. The repurchase price would be the exact price of the original sale, \$1.5 million.

FISCAL IMPACT:

The sale of the property will potentially stimulate the development of a "first class" hotel and associated retail and will have a positive impact on the City's Convention Center.

  
\_\_\_\_\_  
DAVID H. READY  
City Manager

  
\_\_\_\_\_  
THOMAS J. WILSON  
Assistant City Manager

  
\_\_\_\_\_  
DOUGLAS HOLLAND  
City Attorney

Attachment: Proposed Resolution

RESOLUTION NO.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, APPROVING AN AGREEMENT AND ESCROW INSTRUCTIONS FOR THE SALE OF TWO PARCELS OF REAL PROPERTY, ASSESSOR PARCEL NOS. 508055007 AND 508055008, TOTALING APPROXIMATELY 5.62 ACRES LOCATED AT THE SOUTHEAST CORNER OF ANDREAS ROAD AND CALLE EL SEGUNDO, TO O & M HR, LLC, A DELAWARE LIMITED LIABILITY COMPANY FOR THE AMOUNT OF \$1.5 MILLION.

THE CITY OF PALM SPRINGS DOES HEREBY RESOLVE AS FOLLOWS:

SECTION 1. The Agreement and Escrow Instructions for the sale known as Assessor Parcel Nos. 508055007 and 508055008, totaling approximately 5.62 acres located at the southeast corner of Andreas Road and Calle El Segundo, Palm Springs, California, to O & M H R, LLC, a Delaware limited liability company, for \$1.5 million, is hereby approved.

SECTION 2 Authorize the City Manager or his deignee to execute all documents related and necessary to the agreement.

ADOPTED THIS 1st day of June, 2011.

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David H. Ready, City Manager

ATTEST:

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James Thompson, City Clerk

CERTIFICATION

STATE OF CALIFORNIA )  
COUNTY OF RIVERSIDE ) ss.  
CITY OF PALM SPRINGS )

I, JAMES THOMPSON, City Clerk of the City of Palm Springs, hereby certify that Resolution No. \_\_\_\_ is a full, true and correct copy, and was duly adopted at a regular meeting of the City Council of the City of Palm Springs on June 1, 2011, by the following vote:

AYES:  
NOES:  
ABSENT:  
ABSTAIN:

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James Thompson, City Clerk  
City of Palm Springs, California

## PURCHASE AGREEMENT AND ESCROW INSTRUCTIONS

THIS PURCHASE AGREEMENT AND ESCROW INSTRUCTIONS (“Agreement”) is made as of \_\_\_\_\_, 2011 (the “Effective Date”), by and between THE CITY OF PALM SPRINGS, a California charter city (“Seller”), and O & M HR, LLC, a Delaware limited liability company (“Buyer”), as follows:

1. Purchase and Sale. Upon all the terms and conditions contained herein, Buyer hereby agrees to purchase from Seller and Seller agrees to sell to Buyer the following:

(a) that certain unimproved real property consisting of approximately 5.7 acres located at the south-east corner of Andreas Road and Calle El Segundo, Palm Springs, CA, and more particularly described on Exhibit A attached hereto and incorporated herein by this reference, together with any and all of Seller’s right, title and interest in and to the rights and appurtenances pertaining to such property (collectively, the “Land”); and

(b) any and all of Seller’s right, title and interest in and to any intangible property used in connection with the Land, including, without limitation, (i) all architectural and engineering plans, analyses and specifications relating to the Land, (ii) all existing permits, licenses, approvals and authorizations issued by any governmental authority in connection with the Land, and (iii) all guarantees and warranties relating to the Land, to the extent owned by Seller (collectively, the “Intangibles,” and together with the Land, collectively, the “Property”).

2. Opening of Escrow. Within two (2) business days following the mutual execution and delivery of this Agreement, Seller and Buyer shall open an escrow (the “Escrow”) with First American Title Company, Santa Ana, California; Attn: \_\_\_\_\_ (the “Escrow Holder”) by delivering a fully executed copy of this Agreement to Escrow Holder. Escrow Holder will execute copies of this Agreement and return fully executed copies hereof to Buyer and Seller when Escrow has opened. Escrow shall be deemed open upon Escrow Holder’s execution hereof. Seller and Buyer agree to execute such additional and supplementary escrow instructions as may be appropriate to enable Escrow Holder to comply with the terms of this Agreement; provided, however, that in the event of any conflict or inconsistency between the terms and provisions of this Agreement and the terms and provisions of any supplementary escrow instructions, the terms and provisions of this Agreement shall control.

3. Purchase Price. The total purchase price (the “Purchase Price”) for the Property shall be One Million, Five Hundred Thousand (\$1,500,000.00) Dollars. The Purchase Price shall be payable as follows:

(a) Deposit. Within two (2) business days following the opening of Escrow, Buyer shall deposit into Escrow by wire transfer or cashier’s check cash in the amount of Fifty Thousand Dollars (\$50,000.00) (together with any interest earned thereon, collectively, the “Deposit”). Escrow Holder shall hold the Deposit in an interest-bearing demand account selected by Escrow Holder, with interest accruing thereon, while held by Escrow Holder, to be credited to the Purchase Price upon Closing. Provided this Agreement has not previously been terminated, upon the expiration of the Due Diligence Period, the Deposit shall be non-refundable to Buyer (except as otherwise provided in this Agreement).

(b) Cash at Closing. The remainder of the Purchase Price shall be deposited into Escrow, in cash or by wire transfer of immediately available federal funds, by Buyer no later than the Closing Date.

4. Costs and Prorations.

(a) Escrow and Title Fees. Buyer and Seller shall each pay one-half (1/2) of the Escrow fees. Seller shall bear the cost of (i) all documentary transfer taxes, and (ii) the premium which would be required for an ALTA Standard Coverage Owner's Policy of Title Insurance With Regional Exceptions if issued by the Title Company (as defined below) insuring Buyer in the amount of the Purchase Price. Buyer shall bear the cost of (i) any increased premium attributable to endorsements and the delivery of an extended coverage ALTA Owner's Policy of Title Insurance (and any survey costs in connection therewith), and (ii) the cost of recording the Grant Deed (as defined below). All other costs or expenses not otherwise provided for in this Agreement shall be apportioned or allocated between Buyer and Seller in the manner customary in Riverside County, California. Buyer and Seller shall each pay the cost of its own legal and accounting fees.

(b) Taxes and Assessments. All current real property taxes, recurring assessments, and all payments on general and special bonds and assessments on the Property shall be prorated through Escrow between Buyer and Seller as of Closing based upon the latest available tax information, using the customary escrow procedures. Any taxes levied under the Supplemental Tax Roll and attributable to the period prior to Closing shall be paid by Seller, and any such taxes attributable to the period from and after Closing shall be paid by Buyer. To the extent that information required to compute any prorations or adjustments of real estate taxes, recurring assessments and/or payments on general and special bonds is not available at Closing, Seller and Buyer shall make all necessary adjustments by appropriate payments between themselves within thirty (30) days after such information is available to the parties, which such obligation of Buyer and Seller herein shall survive the Closing.

5. Buyer's Diligence.

(a) Title Review.

(i) Within five (5) days after the opening of Escrow, Escrow Holder shall deliver to Buyer a current preliminary title report (the "Preliminary Report") for the Property issued by Escrow Holder (in its capacity as the title company, the "Title Company"), including all schedules and exhibits thereto and together with true and correct copies of all instruments giving rise to any exceptions to title to the Property. Buyer shall have until 5:00 p.m. Los Angeles time on that date which is thirty (30) days following the Appraisal Determination Date (the "Title Diligence Period") to review and object to any exceptions to title shown on the Preliminary Report. Buyer shall notify Seller in writing (the "Title Notice") prior to the expiration of the Title Diligence Period which exceptions to title (including survey matters), if any, are not acceptable to Buyer, in its sole discretion. If Buyer fails to notify Seller in writing of any exceptions to title prior to the expiration of the Title Diligence Period, then Buyer shall be deemed to have approved the condition of title to the Property. If Buyer timely notifies Seller in writing that Buyer objects to any exceptions to title, then Seller shall have until

four (4) business days after Seller's receipt of the Title Notice to notify Buyer in writing ("Seller's Title Notice") that Seller (A) will cause such objectionable exceptions to be removed from title on or before the Closing; or (B) elects not to cause such exceptions to be removed. If Seller fails to notify Buyer in writing of its election within said four (4) business day period, then Seller shall be deemed to have elected not to cause such exceptions to be removed from title. If Seller elects (or is deemed to have elected) not to cause such exceptions to be removed from title, then Buyer shall advise Seller in writing within three (3) business days after Seller's election (or deemed election) whether Buyer will (1) nevertheless proceed with the purchase and take title to the Property subject to such exceptions, or (2) terminate this Agreement, in which event the provisions of Section 8 below shall apply. Buyer's failure to timely respond shall be deemed an election to proceed with the purchase and take title to the Property subject to such exceptions.

(ii) Seller shall not be obligated to cause any matters listed as exceptions on the Preliminary Report to be removed, except for (A) such matters as Seller agrees in writing to remove as set forth above and (B) any monetary encumbrances, all of which are hereby specifically disapproved by Buyer, and Seller agrees shall be paid off and removed from title by Seller prior to Closing. If Seller fails to remove any such monetary lien prior to Closing, then Escrow Holder shall apply such portion of the Purchase Price as is necessary to cause the removal of such items at or prior to Closing, and the proceeds of Escrow to be otherwise distributed to Seller upon Closing shall be reduced by the amount so applied. In addition, during the period from the Effective Date until the Closing, Seller shall not, without Buyer's prior written approval, cause or permit any additional liens or encumbrances which would be binding on or affect the Property or any owner thereof after the Closing.

(b) Property Studies.

(i) Buyer shall have until 5:00 p.m. Los Angeles time on that date which is sixty (60) days following the Appraisal Determination Date (the "Due Diligence Period") to enter upon the Property, at reasonable times after the giving of at least forty-eight (48) hours' notice to Seller, for the purpose of conducting soil, engineering and other tests, and to undertake any other inspections or investigations as Buyer may deem necessary and desirable to assess the development of the Property in the manner contemplated by Buyer and the cost of any such tests, inspections or investigations shall be borne solely by Buyer. Buyer hereby agrees to indemnify, defend and hold Seller harmless from any and all claims, causes of action, losses, damages, costs, liabilities and expenses, including, without limitation, reasonable attorneys' fees (and those fees incurred upon any appeals) and court costs incurred or suffered by Seller arising out of, or resulting from, the entry onto or the inspection of the Property by Buyer or its agents or consultants. The foregoing obligation of Buyer shall survive the Closing or earlier termination of this Agreement. Seller shall make available for inspection by Buyer at Seller's offices, during normal business hours after reasonable notice, all materials in Seller's possession relating to the Property (except for any confidential or proprietary materials such as Seller's financial analyses with respect to the Property) including, to the extent any, all soils reports, hazardous materials studies, hydrology studies, grading plans, compact reports, geological studies, existing access and improvement plans and existing surveys (the "Due Diligence Materials").

(ii) Buyer shall have the right to approve or disapprove of its acquisition of the Property, in its sole and absolute discretion, prior to the expiration of the Due

Diligence Period. In the event Buyer approves of the Property, Buyer shall have the right, at any time prior to the expiration of the Due Diligence Period, to give written notice to Seller and Escrow Holder of Buyer's approval of the Property and election to proceed with the Closing (the "Approval Notice"). If Buyer disapproves of the Property or fails to timely provide an Approval Notice prior to the expiration of the Due Diligence Period (which such failure shall be deemed an election by Buyer to disapprove the purchase of the Property), this Agreement shall automatically terminate and the provisions of Section 8 below shall apply.

6. Intentionally Omitted.

7. Conditions to Closing.

(a) Conditions in Favor of Buyer. The Closing is conditioned upon the satisfaction, or waiver in writing by Buyer, of the conditions set forth below in this Section 7(a), which such conditions are for the benefit of Buyer. If any of such conditions are not satisfied (and are not waived in writing by Buyer), Buyer shall have the right to terminate this Agreement, in which event the provisions of Section 8 below shall apply.

(i) All representations and warranties of Seller shall be true and correct in all material respects as of the Close of Escrow;

(ii) Seller shall have performed all of the obligations required to be performed by Seller under this Agreement;

(iii) No material change shall have occurred with respect to the Property since the expiration of the Due Diligence Period; and

(iv) Title Company is prepared or committed to deliver to Buyer an ALTA Standard Coverage Owner's Policy of Title Insurance dated as of Closing, subject to only the matters set forth below. If Buyer requires an extended coverage ALTA Owner's Policy of Title Insurance or endorsements, Buyer shall notify Escrow Holder of such requirement and deliver to Escrow Holder, at Buyer's sole cost and expense and in a timely manner so as to not delay the Closing, an ALTA survey adequate for the issuance of such ALTA extended coverage policy. The title policy shall insure Buyer in an amount equal to the Purchase Price, and show title vested in Buyer subject only to:

(A) The usual printed title company exceptions;

(B) All exceptions shown on the Preliminary Report, other than those exceptions, if any, which Seller has agreed or is required to eliminate or cure on or prior to the Closing Date pursuant to Section 5(a) above (including, all monetary encumbrances);

(C) Any exceptions resulting from Buyer's entry upon the Property or otherwise created by Buyer; and

(D) All other exceptions approved in writing by Buyer.



(b) Conditions in Favor of Seller. The Closing is conditioned upon the satisfaction, or waiver in writing by Seller, of the conditions set forth below in this Section 7(b), which such conditions are for the benefit of Seller. If any of such conditions are not satisfied (and are not waived in writing by Seller), Seller shall have the right to terminate this Agreement, in which event the provisions of Section 8 below shall apply.

(i) All representations and warranties of Buyer shall be true and correct in all material respects as of the Close of Escrow; and

(ii) Buyer shall have performed all of the obligations required to be performed by Buyer under this Agreement.

(iii) Parties will enter into an agreement for the allocation and payment of any outstanding encumbrances or liabilities for parking capital improvements existing on the Property.

8. Effect of Termination. In the event Buyer or Seller shall elect to terminate (or shall be deemed to have elected to terminate) this Agreement in accordance with the terms and provisions hereof where this Section 8 is specifically referred to, the electing party shall send written notice thereof to the other party and Escrow Holder. Upon receipt of such notice, then except as otherwise expressly provided herein (including, without limitation, pursuant to Section 13 below), (i) Seller shall return any disbursed portion of the Deposit to Buyer, (ii) Escrow Holder shall return any undisbursed portion of the Deposit to Buyer and any documents held by Escrow Holder to the parties depositing the same, (iii) all title and Escrow cancellation charges, if any, shall be paid equally by Buyer and Seller, and (iv) upon return of such funds and documents by Escrow Holder and the applicable party, except for such obligations of the parties which expressly survive the termination of this Agreement, the parties hereto shall have no further rights or obligations under this Agreement, which shall be deemed cancelled for all purposes.

9. Closing of Escrow.

(a) The closing (the "Closing" or "Close of Escrow") of the purchase and sale of the Property shall take place through Escrow within sixty (60) days following the expiration of the Due Diligence Period, on a date mutually acceptable to Buyer and Seller (subject to satisfaction or written waiver by the applicable party of the conditions set forth in Sections 7(a) and 7(b) above) (the "Closing Date"). Notwithstanding the foregoing, Buyer shall have two (2) options to extend the Closing Date for a period of thirty (30) days each, by providing Seller with written notice thereof not less than two (2) business days prior to the then-scheduled Closing Date and depositing with Escrow Holder the additional amount of Fifty Thousand Dollars (\$50,000.00) for each option (together with interest earned thereon, collectively, the "Closing Extension Deposits" and each a "Closing Extension Deposit"), which such Closing Extension Deposit(s), when made, shall be non-refundable, except in the event of a default by Seller hereunder or the failure of one or more conditions to Closing, but shall be applied against the Purchase Price at the Closing.

(b) At Closing, Seller and Buyer shall each perform the obligations set forth in, respectively, Sections 10(a) and 10(b) below, the performance of which obligations shall be concurrent conditions. When all required funds and instruments have been deposited into Escrow by the appropriate parties and when all other conditions to Closing have been satisfied (or waived in writing), Escrow Holder shall record the Grant Deed. Immediately after the Closing, Escrow Holder shall (i) deliver to Seller the Purchase Price (less all other sums and charges to be paid by Seller hereunder and the previously released Deposit), and (ii) deliver to Seller and to Buyer conformed copies of the Grant Deed.

10. Documents and Sums Required at Closing.

(a) Seller's Obligations. At or prior to Closing, Seller shall deliver, or cause to be delivered, to Buyer through Escrow:

(i) a duly executed and notarized grant deed (the "Grant Deed") in the form attached hereto as Exhibit B, conveying the Property to Buyer;

(ii) a duly executed Assignment of Intangibles (the "Assignment") in the form attached hereto as Exhibit C;

(iii) if applicable, a FIRPTA certificate along with any applicable State or local law equivalent in the forms customarily used by the Title Company duly executed by Seller;

(iv) an executed closing statement reasonably acceptable to Seller; and

(v) such additional documents as shall be reasonably required by Escrow Holder to consummate the transaction contemplated by this Agreement.

(b) Buyer's Obligations. At or prior to Closing, Buyer shall deliver to Seller through Escrow:

(i) by wire transfer or a cashier's check, funds equal to all sums to be paid by Buyer and delivered to Escrow Holder under this Agreement, including the balance of the Purchase Price and Buyer's share of costs and prorations;

(ii) a duly executed Assignment;

(iii) an executed closing statement reasonably acceptable to Buyer; and

(iv) such additional documents as shall be reasonably required by Escrow Holder to consummate the transaction contemplated by this Agreement.

11. [Intentionally Omitted].

12. [Intentionally Omitted].

13. Remedies.

(a) BUYER'S FAILURE. IF ESCROW DOES NOT CLOSE DUE TO BUYER'S FAILURE TO DEPOSIT ANY REQUIRED SUMS BY THE PRESCRIBED TIME OR TO PERFORM ANY OTHER ACT WHEN DUE HEREUNDER, WHICH FAILURE SHALL BE DEEMED A MATERIAL BREACH OF A CONDITION PRECEDENT, AND PROVIDED SELLER IS NOT IN DEFAULT UNDER THIS AGREEMENT, THEN SELLER, AS ITS SOLE AND EXCLUSIVE REMEDY, SHALL HAVE THE RIGHT TO TERMINATE THIS AGREEMENT AND RETAIN THE DEPOSIT THEN HELD BY ESCROW HOLDER OR SELLER PURSUANT TO THE TERMS OF THIS AGREEMENT AS LIQUIDATED DAMAGES, WHICH AMOUNT IS THE BEST ESTIMATE BY THE PARTIES OF THE DAMAGES SELLER WOULD SUFFER FROM SUCH BREACH, IT BEING AGREED THAT IT IS EXTREMELY DIFFICULT, IF NOT IMPOSSIBLE AND IMPRACTICABLE, TO FIX THE EXACT AMOUNT OF DAMAGE WHICH WOULD BE INCURRED BY SELLER AS A RESULT OF SUCH DEFAULT BY BUYER. THEREUPON ESCROW SHALL BE CANCELED AS PROVIDED ABOVE, THIS AGREEMENT SHALL TERMINATE, AND THE PROVISIONS OF SECTION 8 SHALL APPLY; PROVIDED, HOWEVER, BUYER SHALL PAY ALL TITLE AND ESCROW CANCELLATION CHARGES.

\_\_\_\_\_  
Buyer's Initials

\_\_\_\_\_  
Seller's Initials

(b) Seller's Failure. In the event of a breach by Seller of this Agreement, then, provided Buyer is not in default under this Agreement, Buyer may, as its sole and exclusive remedy, either (i) terminate this Agreement by giving Seller and Escrow Holder written notice of such election at any time prior to Closing and seek reimbursement from Seller of Buyer's actual, out-of-pocket costs and expenses in connection with the transaction contemplated by this Agreement, or (ii) enforce specific performance of this Agreement. In the event Buyer elects to terminate this Agreement, then the provisions of Section 8 shall apply, except that all title and Escrow cancellation charges, if any, shall be paid by Seller.

14. Further Documents and Acts. Each of the parties hereto agrees to cooperate in good faith with each other, and to execute and deliver such further documents and perform such other acts as may be reasonably necessary or appropriate to consummate and carry into effect the transactions contemplated under this Agreement.

15. Representations, Warranties and Covenants of Buyer.

(a) Organization and Authority. Buyer has been duly organized and is validly existing under the laws of the State of Delaware. Buyer has the full right and authority to enter into this Agreement, and to consummate or cause to be consummated the transaction contemplated by this Agreement. The persons signing this Agreement on behalf of Buyer are authorized to do so.

(b) Authorization. This Agreement has been, and on the Closing Date, all documents to be executed by Buyer hereunder will have been, duly authorized, executed and delivered by Buyer, and constitute and will constitute the valid and binding obligations of Buyer enforceable against it in accordance with their respective terms.

(c) No Consents Required. No consent, approval or other authorization of, or registration, declaration or filing with, any governmental authority or other third party is required for the due execution and delivery of this Agreement, and/or any of the documents to be executed by Buyer hereunder, or for the performance by or the validity or enforceability thereof against Buyer.

(d) As Is, Where Is. Buyer represents and warrants that it is acquiring the Property "AS IS, WHERE IS" and "WITH ALL FAULTS" without representation or warranty of any kind by Seller (except as expressly set forth in Section 16 below), expressed or implied by Seller, by operation of law, or otherwise, as to the physical, environmental or other condition of the Property.

16. Representations, Warranties and Covenants of Seller.

(a) Organization and Authority. Seller has the full right and authority to enter into this Agreement, and to consummate or cause to be consummated the transaction contemplated by this Agreement. The persons signing this Agreement on behalf of Seller are authorized to do so.

(b) Authorization. This Agreement has been, and on the Closing Date, all documents to be executed by Seller hereunder will have been, duly authorized, executed and delivered by Seller, and constitute and will constitute the valid and binding obligations of Seller enforceable against it in accordance with their respective terms.

(c) No Consents Required. Seller is the fee simple owner of the Property and has the full right and authority to enter into this Agreement, and to consummate or cause to be consummated the transaction contemplated by this Agreement. No consent, approval or other authorization of, or registration, declaration or filing with, any governmental authority or other third party is required for the due execution and delivery of this Agreement, and/or any of the documents to be executed by Seller hereunder, or for the performance by or the validity or enforceability thereof against Seller.

17. Condemnation. If at any time prior to Closing all or any substantial portion of the Land is condemned or legal proceedings are commenced under the power of eminent domain, Seller shall promptly give Buyer written notice of the same ("Condemnation Notice"). In the event of the foregoing, Buyer shall have the right to terminate this Agreement by written notice to Seller and Escrow Holder given no later than five (5) days after Buyer's receipt of such Condemnation Notice (and, if applicable, the Closing Date shall be extended to the extent necessary to provide Buyer with the full five (5) day period to make such election), in which event the provisions of Section 8 shall apply. If Buyer fails to timely terminate this Agreement within such five (5) day period, Buyer shall be deemed to have elected to proceed with the purchase of the Property, in which event the parties shall proceed to Closing and Seller shall assign and turn over and Buyer shall be entitled to receive and keep all of Seller's right, title and interest in and to any proceeds in connection with such condemnation or other legal proceedings to the extent relating to the Land.

18. Broker's Commission. Seller represents and warrants to Buyer and Buyer represents and warrants to Seller that no broker or finder has been engaged by Seller or Buyer, respectively, in connection with any of the transactions contemplated by this Agreement, and that no broker or finder is in any way connected with any of such transactions.

19. Waiver, Consent and Remedies. Each provision of this Agreement to be performed by either party shall be deemed both a covenant and a condition and shall be a material consideration for the other party's performance hereunder, and any breach of this Agreement by either party shall be deemed a material default hereunder. Either party may specifically and expressly waive in writing any portion of this Agreement or any breach thereof, but no such waiver shall constitute a further or continuing waiver of any preceding or succeeding breach of the same or any other provision. A waiving party may at any time thereafter require further compliance by the other party with any breach or provision so waived. The consent by one party to any act by the other for which such consent was required shall not be deemed to imply consent or waiver of the necessity of obtaining such consent for the same or any similar acts in the future. No waiver or consent shall be implied from silence or any failure of a party to act, except as otherwise specified in this Agreement. All rights, remedies, undertakings, obligations, options, covenants, conditions and agreements contained in this Agreement shall be cumulative and no one of them shall be exclusive of any other. Except as otherwise specified herein, either party may pursue any one or more of its rights, options or remedies hereunder or may seek damages or specific performance in the event of the other party's breach hereunder, or may pursue any other remedy at law or equity, whether or not stated in this Agreement.

20. Attorneys' Fees. In the event of any action or proceeding instituted between Seller, Buyer and/or Escrow Holder in connection with this Agreement, then as between Buyer and Seller the prevailing party shall be entitled to recover from the losing party all of its costs and expenses, including, without limitation, court costs, all costs of appeals and reasonable attorneys' fees.

21. Notices. Any notice, request, demand, consent, approval or other communication (collectively, "Notice") required or permitted hereunder or by law shall be validly given or made only if in writing and delivered in person to an officer or duly authorized representative of the other party or deposited in the United States mail, duly certified or registered (return receipt requested), postage prepaid, or delivered by Express Mail or the U.S. Postal Service or Federal Express or any other courier guaranteeing overnight delivery, charges prepaid. Any Notice may also be transmitted by telecopy (provided such notice is also delivered by one of the other methods provided herein). All Notices shall be addressed to the party for whom intended, as follows:

If to Seller:                      City of Palm Springs  
   3200 E. Tahquitz Canyon Way  
   Palm Springs, CA 92263-2743  
   Attn: City Manager  
   Fax No.: 760.323.8207

If to Buyer: c/o Nexus Development Corporation  
1 MacArthur Place, Suite 300  
Santa Ana, CA 92707  
Attn: Ryan A. Vogt-Lowell, Esq.  
Fax No.: (714) 546-5660

If to Escrow Holder: First American Title Company  
2 First American Way, Suite 300  
Santa Ana, California 92707  
Attn: \_\_\_\_\_  
Fax No.: \_\_\_\_\_

Any party may from time to time, by written notice to the other, designate a different address which shall be substituted for that specified above. If any notice or other document is sent by mail as aforesaid, the same shall be deemed fully delivered and received forty-eight (48) hours after mailing as provided above. Any notice or other document sent by overnight service shall be deemed delivered one (1) business day after delivery of the same, charges prepaid, to the U.S. Postal Service or private courier. If any notice is sent by telecopy, the same shall be deemed served or delivered upon confirmation of transmission thereof. Any notice or other document sent by any other manner shall be effective only upon actual receipt thereof.

22. Entire Agreement. This Agreement and its exhibits constitute the entire agreement between the parties hereto pertaining to the subject matter hereof, and the final, complete and exclusive expression of the terms and conditions thereof. All prior agreements, representations, negotiations and understandings of the parties hereto, oral or written, express or implied, are hereby superseded and merged herein.

23. Captions. The captions used herein are for convenience only and are not a part of this Agreement and do not in any way limit or amplify the terms and provisions hereof.

24. Incorporation. The Recitals and Exhibits attached hereto are hereby incorporated in this Agreement.

25. Governing Law. This Agreement and the exhibits attached hereto have been negotiated and executed in the State of California and shall be governed by and construed under the laws of the State of California.

26. Invalidity of Provision. If any provision of this Agreement as applied to either party or to any circumstance shall be adjudged by a court of competent jurisdiction to be void or unenforceable for any reason, the same shall in no way affect (to the maximum extent permissible by law) any other provision of this Agreement, the application of any such provision under circumstances different from those adjudicated by the court, or the validity or enforceability of this Agreement as a whole; provided that the invalidity or unenforceability of such provision does not materially adversely affect the benefits accruing to any party hereunder.

27. Amendments. No addition to or modification of any provision contained in this Agreement shall be effective unless fully set forth in writing by both Buyer and Seller.

28. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute but one and the same instrument.

29. Binding Agreement. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns.

30. Business Days. As used herein, the term “business day” shall mean any day other than a Saturday, Sunday, or any federal or State of California holiday. If any period expires on a day which is not a business day or any event or condition is required by the terms of this Agreement to occur or be fulfilled on a day which is not a business day, such period shall expire or such event or condition shall occur or be fulfilled, as the case may be, on the next succeeding business day.

31. Construction. The parties acknowledge that each party and its counsel have reviewed and approved this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any amendments or exhibits hereto.

32. IRS Form 1099-S. For purposes of complying with Section 6045 of the Internal Revenue Code of 1986 (“Code”), as amended, Escrow Holder shall be deemed the “person responsible for closing the transaction,” and shall be responsible for obtaining the information necessary to file with the Internal Revenue Service Form 1099-S, “Statement for Recipients of Proceeds From Real Estate, Broker and Barter Exchange Transactions.”

33. No Third Party Beneficiary. The provisions of this Agreement and of the documents to be executed and delivered at Closing are and will be for the benefit of Seller and Buyer only and are not for the benefit of any third party; and, accordingly, no third party shall have the right to enforce the provisions of this Agreement or of the documents to be executed and delivered at Closing.

34. Independent Contract Consideration. Notwithstanding anything in this Agreement to the contrary, One Hundred and No/100 Dollars (\$100.00) of the Deposit is delivered to the Escrow Holder for delivery to Seller as “Independent Contract Consideration”, and the Deposit is reduced by the amount of the Independent Contract Consideration so delivered to Seller, which amount has been bargained for and agreed to as consideration for Seller’s execution and delivery of this Agreement. Escrow Holder is hereby instructed to release the Independent Contract Consideration to Seller promptly following the opening of Escrow.

35. Seller Repurchase Option. Seller and Buyer hereby acknowledge and agree that, as a material consideration inducing Seller to enter into this Agreement and sell the Property to Buyer, Buyer has notified Seller that Buyer intends to commence construction of a First Class Hotel (as defined below) at the Property on or before the fifth (5<sup>th</sup>) anniversary following the Closing Date (the “Outside Construction Commencement Date”); provided, however, Seller and Buyer acknowledge and agree that Buyer may also construct other improvements (e.g., retail pads) on the Property in addition to the First Class Hotel. For purposes of this Section 35, a

“First Class Hotel” shall mean a hotel providing standards of physical features and operational services which meet or exceed the higher rating criteria established for hotels by the American Automobile Association, J.D. Power & Associates, Mobile Oil Company or Smith’s Travel Research Service (such rating criteria to be determined as of the date Buyer obtain entitlements for such First Class Hotel). Such standards shall include operation of the First Class Hotel on a twenty-four (24) hour per day/seven (7) day a week basis, and the provision of housekeeping services, food and beverage services, room services, banquet and meeting services, concierge and bellman services, and parking services. For the purposes of this Section, the term “commence construction” shall mean that Buyer has completed all pre-construction engineering and design, has received all necessary permits, entitlements, and licenses from all government entities, including the City of Palm Springs, has entered into binding and enforceable agreements with all contractors for major trades (consistent with industry practice) and ordered all essential equipment and supplies (consistent with industry practice) as can reasonably be considered necessary so that physical construction of the First Class Hotel may begin and proceed to completion without foreseeable interruption of material duration, and has completed grading of the Property and commenced the installation of vertical improvements on the Property. Seller and Buyer hereby further acknowledge and agree that if Buyer should fail to commence construction of a First Class Hotel at the Property on or before the Outside Construction Commencement Date, and fails to cure the same within sixty (60) days following written notice thereof by Seller, Seller shall have the option (as its sole and exclusive remedy) to repurchase the Property from Buyer (the “Repurchase Option”), subject to the terms and conditions set forth in this Section 35. Notwithstanding anything to the contrary contained herein, Seller’s Repurchase Option shall vest and come into existence only upon the occurrence of the Outside Construction Commencement Date and only in the event Buyer should fail to commence construction of a First Class Hotel at the Property on or before the Outside Construction Commencement Date and fail to cure the same within sixty (60) days following written notice thereof by Seller. In the event Buyer commences construction of a First Class Hotel at the Property on or before the Outside Construction Commencement Date (or, if applicable, within sixty (60) days following written notice by Seller), the Repurchase Option shall automatically terminate and be of no further force or effect and the provisions of subsection (e) below shall apply.

(a) Exercise of Repurchase Option. In the event Buyer fails to commence construction of a First Class Hotel at the Property on or before the Outside Construction Commencement Date, and fails to cure the same within sixty (60) days following written notice thereof by Seller, Seller shall have the right to exercise the Repurchase Option by written notice to Buyer (the “Seller’s Repurchase Election Notice”) delivered no later than six (6) months after the Outside Construction Commencement Date. In the event Seller fails to timely and properly exercise its Repurchase Option, the Repurchase Option shall automatically terminate and be of no further force or effect and the provisions of subsection (e) below shall apply.

(b) Repurchase Option Price. In the event Seller timely and properly exercises its Repurchase Option, the purchase price payable by Seller to Buyer with respect to the Property shall be an amount equal to the Purchase Price paid by Buyer to Seller hereunder for the Property.

(c) Repurchase Option Exercised. In the event Seller timely and properly exercises its Repurchase Option, then (i) the closing shall occur on the date specified in the



Repurchase Election Notice, which shall be no earlier than ninety (90) days and no later than one hundred twenty (120) days after the date of Buyer's receipt of the Repurchase Election Notice, (ii) Buyer and Seller shall each pay one-half (1/2) of the escrow fees, (iii) Buyer shall pay for (1) any documentary tax stamps; and (2) an ALTA standard Owner's Policy of Title Insurance in the full amount of the purchase price showing fee title vested in Seller; and (iv) Seller shall pay the recording fee for any other instruments which are recorded through such escrow.

(d) Seller's Failure to Close. If Seller fails to timely close the transaction following its exercise of its Repurchase Option (other than solely as a result of a breach of Buyer's obligations with respect to such closing), then the Repurchase Option shall automatically terminate and be of no further force or effect and the provisions of subsection (e) below shall apply.

(e) Termination of Option; Quitclaim Deed. Upon any termination of the Repurchase Option, then (i) Seller shall have no further right, title or interest in the Property, (ii) Seller shall, upon request from Buyer, immediately deliver to Buyer a duly executed and notarized quitclaim deed in favor of Buyer confirming the termination of the Repurchase Option and Seller's relinquishment of any and all further right, title or interest in the Property and (iii) Seller shall have no rights, remedies, claims or causes of action against Buyer on account of, if applicable, Buyer's failure to commence construction of a First Class Hotel at the Property on or before the Outside Construction Commencement Date.

36. At all times after the Close of Escrow and until the Buyer commences construction, the Buyer shall allow the Property to be used as a parking lot, available to the public at no cost.

*[Signature Page Follows]*

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date.

SELLER:

CITY OF PALM SPRINGS,  
a California charter city

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
ts: \_\_\_\_\_

Approved as to form:

\_\_\_\_\_  
City Attorney

BUYER:

O & M HR, LLC, a Delaware limited liability  
company

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

Escrow Holder hereby certifies that Escrow opened as of the \_\_\_\_ day of \_\_\_\_\_,  
2011 as Escrow Number \_\_\_\_\_.

FIRST AMERICAN TITLE COMPANY

By: \_\_\_\_\_  
Its: \_\_\_\_\_

## **LIST OF EXHIBITS**

EXHIBIT A LAND

EXHIBIT B FORM GRANT DEED

EXHIBIT C FORM ASSIGNMENT OF INTANGIBLES

**EXHIBIT A**

**LEGAL DESCRIPTION OF LAND**

*[See Attached]*

**EXHIBIT B**

**FORM OF GRANT DEED**

RECORDING REQUESTED BY AND  
WHEN RECORDED MAIL TO,  
AND MAIL TAX STATEMENTS TO:

---

(Space Above Line for Recorder's Use Only)

The undersigned grantor declares:  
Documentary Transfer Tax not shown  
pursuant to Section 11932 of the  
California Revenue and Taxation Code

**GRANT DEED**

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,  
THE CITY OF PALM SPRINGS, a California charter city ("Grantor"), hereby GRANTS to O &  
M HR, LLC, a Delaware limited liability company ("Grantee"), the following described real  
property (the "Property") in the City of Palm Springs, County of Riverside, State of California:

See legal description attached hereto at Exhibit A.

**SUBJECT TO:**

1. Nondelinquent real property taxes and all unpaid, nondelinquent general and special bonds or assessments.
2. All covenants, conditions, restrictions, reservations, rights, rights of way, easements, encumbrances, liens and title matters of record or which would be discovered by an accurate survey or physical inspection of the Property as of the date hereof.

*[Signatures on Following Page]*

IN WITNESS WHEREOF, the undersigned has executed this document as of the day and year indicated.

Dated: \_\_\_\_\_

GRANTOR:

CITY OF PALM SPRINGS,  
a California charter city

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

STATE OF CALIFORNIA        )  
  ) ss.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, before me, \_\_\_\_\_, a Notary  
Public personally appeared \_\_\_\_\_, who proved  
to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to  
the within instrument and acknowledged to me that he/she/they executed the same in  
his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the  
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the  
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

\_\_\_\_\_  
Notary Public

(SEAL)

**EXHIBIT A TO GRANT DEED**

**LEGAL DESCRIPTION**

[To be attached.]

**SEPARATE STATEMENT OF DOCUMENTARY TRANSFER TAX**

County Recorder  
Riverside County

Dear Sir:

In accordance with California Revenue and Taxation Code Section 11932, it is requested that this Statement of Documentary Transfer Tax due not be recorded with the attached deed, but be affixed to the deed after recordation and before return as directed on the deed.

The deed names THE CITY OF PALM SPRINGS, a California charter city, as Grantor, and O & M HR, LLC, a Delaware limited liability company, as Grantee. The land and improvements being transferred are located in the City of Palm Springs, County of Riverside, State of California.

The amount of the documentary transfer tax due on the attached deed is \_\_\_\_\_ Dollars (\$ \_\_\_\_\_), computed on the full value of the property described.

Very truly yours,

\_\_\_\_\_  
a \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_



**EXHIBIT C**

**FORM OF ASSIGNMENT OF INTANGIBLES**

THIS ASSIGNMENT OF INTANGIBLES (the "Assignment") is made as of the \_\_\_\_ day of \_\_\_\_\_, 2011 between THE CITY OF PALM SPRINGS, a California charter city ("Assignor"), and O & M HR, LLC, a Delaware limited liability company ("Assignee").

Assignor hereby assigns, without representation or warrant of any kind whatsoever, any and all of Assignor's right, title, and interest in and to all intangible personal property used in connection with the land described in Exhibit A attached hereto and hereby made a part hereof (the "Land"), including, without limitation, any and all (i) architectural and engineering plans, analyses and specifications (ii) all existing permits, licenses, approvals, and authorizations issued by a governmental authority in connection with the Land and (iii) all guarantees and warranties relating to the Land (hereinafter collectively referred to as "Intangible Property").

This Assignment shall not become effective as to any parking capital improvements until the Buyer has commenced construction as that phrase is defined in Section 35 of the Purchase Agreement and Escrow Instructions. Once it becomes effective, this Assignment shall be binding upon and inure to the benefit of Assignor and Assignee and their respective heirs, executors, administrators, successors and assigns.

This Assignment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

*[Signature Page Follows]*

IN WITNESS WHEREOF, Assignor and Assignee have each executed this Assignment as of the date first written above.

ASSIGNOR:

CITY OF PALM SPRINGS,  
a California charter city

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

ASSIGNEE:

O & M HR, LLC, a Delaware limited liability  
company

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

EXHIBIT A  
LEGAL DESCRIPTION