

**TOURISM DEVELOPMENT FINANCING PROGRAM  
PERFORMANCE AGREEMENT**

By and Among

THE CITY OF HAMPTON, VIRGINIA;

THE ECONOMIC DEVELOPMENT AUTHORITY OF THE CITY OF HAMPTON,  
VIRGINIA;

And

T PENINSULA HOTEL VA, LLC

Date Fully Executed by all Parties: \_\_\_\_\_

**EXHIBITS:**

A – Economic Development Incentive Grant Performance Agreement

B – Project Ordinance

C – Description of the Gap Financing for the Project

## PERFORMANCE AGREEMENT

**THIS PERFORMANCE AGREEMENT** (the “**Agreement**”) is made as of the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and among **THE CITY OF HAMPTON, VIRGINIA**, a municipal corporation of the Commonwealth of Virginia (the “**City**” or “**Locality**”); **THE ECONOMIC DEVELOPMENT AUTHORITY OF THE CITY OF HAMPTON, VIRGINIA**, a political subdivision of the Commonwealth of Virginia (the “**EDA**”), and **T PENINSULA HOTEL VA, LLC** (the “**Developer**”), a Virginia limited liability company (collectively, the “**Parties**”).

### RECITALS

- A. On May 18, 2017, the Developer and EDA entered into a separate Economic Development Incentive Grant Performance Agreement (the “**EDA Performance Agreement**”) to incentivize the Developer’s construction of a new Element hotel, or comparable hotel brand approved by the City and EDA, containing a minimum of 120 hotel rooms and 1,000 square feet of meeting room space, on a site owned by Developer located at 1851 Merchant Lane (LRSN 13004539) within Peninsula Town Center (the “**Project**”), which is more particularly described in the EDA Performance Agreement attached as **EXHIBIT A**.
- B. The EDA Performance Agreement included a commitment by the EDA to work collaboratively with the Developer to obtain additional grants, including the Tourism Development Financing Program administered by the Virginia Tourism Corporation, which if awarded would offset, according to the terms of the EDA Performance Agreement, other EDA grants and incentives.
- C. Section 58.1-3851 *et seq.* of the Code of Virginia and the Commonwealth of Virginia’s Tourism Development Financing Program provides a mechanism by which an eligible tourism project may utilize an amount equal to the revenues generated by a one percent (1%) Virginia Sales and Use Tax and a one percent (1%) local Sales and Use Tax on transactions taking place on the premises of the authorized tourism project, together with a one percent (1%) “Access Fee,” as defined below, to be paid by the Developer, for the purpose of paying principal and interest on the “Qualified Gap Financing,” as defined below, for the tourism project, which would complete the plan of finance for the tourism

project and incentivize the full project implementation.

- D. The Locality has completed the following steps as required by Section 58.1-3851.1 of the Code of Virginia to make the Project eligible to receive tax revenues authorized by Section 58.1-3851.1 of the Code of Virginia: (1) established a Tourism Zone in which the Project is located by ordinance adopted by the City Council on April 8, 2015; (3) adopted an ordinance (the “**Project Ordinance**”) on \_\_\_\_\_, \_\_\_\_\_, 20\_\_\_\_, which is attached hereto as **EXHIBIT B**, endorsing the Project to meet a tourism deficiency identified in the Hampton Marketing Plan, namely the need to increase the number and quality of new hotel keys to Hampton’s inventory; and (4) through adoption of the Project Ordinance, designated an amount equal to the revenues generated by a one percent (1%) Virginia Sales and Use tax on transactions taking place on the premises of the Project to be used for the Qualified Gap Financing described herein.
- E. Pursuant to the Project Ordinance, the Locality confirmed it is willing to provide the required local revenues for the Project pursuant to Section 58.1-3851.1 of the Code of Virginia and authorized the City Manager to enter this Agreement.
- F. Developer has secured a term sheet for a minimum of ninety percent (90%) of funding for the Project through debt and equity. Qualified Gap Financing in the amount of ten percent (10%) of the Project cost will be necessary to meet the shortfall in funding for the Project between the debt and equity secured by the Developer and the expected development costs. The attached **EXHIBIT C** describes the Gap Financing in more particularity.
- G. As required by Section 58.1-3851.1 of the Code of Virginia and in furtherance of the public purposes for the same, the Authority, the Locality, and the Developer agree to enter into this Agreement upon the terms and conditions set forth herein.
- H. The Locality and the Authority have agreed to offer, and the Developer has agreed to accept, the incentives expressed in this Agreement in exchange for the performance promised within and required by the Agreement.
- I. By resolution adopted November 21, 2017, the Authority authorized its Chair or Vice-Chair to enter this Agreement and by ordinance adopted January 10, 2017, the City Council authorized its City Manager to enter into this Agreement.

**AGREEMENT**

**NOW, THEREFORE**, in and for the mutual promises and covenants contained herein, the receipt and sufficiency of which is hereby acknowledged, the Locality, the Authority, and the Developer do hereby mutually agree as follows:

1. **Term of Agreement.** The term of this Agreement shall be ten (10) years from the date of full execution of this Agreement, or the length of the term of the Qualified Gap Financing, defined below, obtained in connection with the Project, whichever is sooner (the “**Term**”). The Agreement shall end at such time as the Qualified Gap Financing, as defined below, is (i) paid in full at the expiration of the term of the Qualified Gap Financing; or (ii) repaid prior to the expiration of the term of the Qualified Gap Financing; or (iii) refinanced (except to obtain a more favorable interest rate, to extend the term or obtain a new term of the Qualified Gap Financing, and/or obtain other more favorable terms of the loan); or (iv) otherwise paid in full at any time, if any of the aforesaid shall occur prior to ten (10) years from the date of full execution of this Agreement.

2. **Required Capital Investment & Compliance with EDA Performance Agreement.**

a. The required capital investment and the Developer’s obligation to provide 90% of funding for the Project, in an amount expected to be \$15,490,000.00, is described more particularly in **EXHIBIT A** and **EXHIBIT C** attached hereto.

b. The Developer shall expend its capital investment and Qualified Gap Financing only in furtherance of the Project and the Project shall be developed in strict conformance with the EDA Performance Agreement attached as **EXHIBIT A**.

3. **Access Fee.**

a. The Developer will provide an access fee (the “**Access Fee**”) that is an amount equal to the revenues generated by a one percent (1%) Virginia Sales and Use tax on transactions taking place on the premises of the Project. This Access Fee shall be in addition to any other taxes or levies imposed by general law.

b. The calculation of the quarterly amount of the Access Fee will be provided to the Developer by the City upon receipt of the quarterly report of Sales and Use Tax from the

Commonwealth of Virginia. The City will forward said report to the Developer, and the Developer will remit said Access Fee to the City as soon as practicable but not later than 30 days after being in receipt of the report provided by the City. The City will forward the Access Fee to the Authority as required by law.

**4. Performance Incentive Payment.**

a. As detailed in **EXHIBIT C**, the Parties have identified One Million Eight Hundred Fifteen Thousand Seven Hundred Twenty Nine Dollars and No 0/100 Cents (\$1,815,729.00) for the Project as the amount of “**Qualified Gap Financing**” for purposes of this Agreement and expressly subject to the requirements of Section 58.1-3851.1 of the Code of Virginia. Subject to appropriation of such funds for such purposes by the respective governing bodies, the Authority shall receive (1) quarterly payments from the Locality in an amount equal to the revenues generated by a one percent (1%) Virginia Sales and Use Tax on transactions occurring upon the premises of the Project (the “**Locality Contribution**”) and (2) quarterly payments from the Commonwealth of Virginia, by way of the Locality, in an amount equal to the revenues generated by a one percent (1%) Virginia Sales and Use Tax on transactions occurring upon the premises of the Project (the “**State Contribution**,” and together with the Locality Contribution, the “**Public Contribution**”). Additionally, the Authority will receive the Access Fee, by way of the Locality, as provided in the previous section (the Access Fee together with the Public Contribution, the “**Performance Incentive Payment**”).

b. The Performance Incentive Payment shall be paid by the Authority to the financial institution from which the Developer acquired its gap financing, T Mortgage Lending, LLC, as depicted on **EXHIBIT C**. The Authority will not pay the Public Contribution to the financial institution unless and until it receives the Access Fee from the Developer. The Performance Incentive Payment shall not be provided to the Developer directly. The Performance Incentive Payment shall only pay principal and interest upon the Qualified Gap Financing and shall not be directed to pay any fees or charges of any kind. The Performance Incentive Payment will be subject to all restrictions and limitations set forth in Section 58.1-3851.1 of the Code of Virginia. The Performance Incentive Payment shall

cease at the time the Qualified Gap Financing has been paid.

**5. Non-Recourse to Authority, Locality, and State.** As provided by Section 58.1-3851.1 of the Code of Virginia, the Developer is responsible for the repayment of the Qualified Gap Financing, and there is no recourse for this debt against the Authority, the Locality, or the Commonwealth of Virginia.

**6. Non-Appropriation.** It is understood and agreed between the Parties to this Agreement that the Locality and the Authority shall only be bound and obligated hereunder to the extent that funds required to be paid or remitted by the Locality or the Authority are appropriated and budgeted by the appropriate governing body.

**7. Project Information and Right to Audit.**

a. The Developer shall provide any information required or needed to assist in obtaining certification by the State Comptroller and the Secretary of the Authority, for entitlement to the revenues generated by a one percent (1%) Virginia Sales and Use tax, from the both the Locality and the Commonwealth of Virginia, on transactions taking place or arising from the Project, including but not limited to release of Developer's tax filing submitted to the Hampton Commissioner of the Revenue. The Developer shall file with the Secretary of the Authority, an annual Performance Report by March 1 of each year, which will contain sufficient documentation to establish compliance with all criteria of this Agreement. The Authority will submit an annual certification of the Developer's performance under this Agreement to the Commonwealth of Virginia.

b. The Authority shall have the right to audit books and records (in whatever form they may be kept, whether written, electronic or other) specifically pertaining to gross sales figures of the Project as relevant to this Agreement (including any and all documents and other materials, in whatever form they may be kept, which support or underlie those books and records), kept by or under the control of the Developer, including, but not limited to, those kept by the Developer, its employees, agents, assigns, successors and sub-users. Any Authority requested audit will be at the expense of the Authority and will be conducted after reasonable advance written notification is given to the Developer. The Developer

shall maintain such books and records, together with such supporting or underlying documents and materials, for the duration of this Agreement and for at least five years following the completion of this Agreement, including any and all renewals thereof. The books and records, together with the supporting or underlying documents and materials, shall be made available, upon request, to the Authority, through their employees, agents, representatives or other designees, during normal business hours at the Developer's office or place of business in Hampton, Virginia. In the event that no such location is available, then the books and records, together with the supporting or underlying documents and records, shall be made available for audit at a time and location in Hampton, Virginia, which is convenient for the Authority. This paragraph shall not be construed to limit, revoke, or abridge any other rights, powers, or obligations relating to audit which the Authority may have by State, Locality or Federal statute, ordinance, regulation or agreement, whether those rights, powers or obligations are express or implied.

**8. Default; Right to Cure.** In the event of any default by the Developer under this Agreement, the Authority or the Locality will provide written notice of default and the Developer shall have a period of thirty (30) days to cure such default, except that if the default cannot be cured within such thirty (30) day period, then the Authority or the Locality in its reasonable discretion may permit the Developer to continue to cure such default until completed. If such default is not cured, then the Authority or the Locality shall notify the State Comptroller and as its sole and exclusive remedy against the Developer under this Agreement the Authority or the Locality may revoke or terminate this Agreement. Upon any termination or similar event, any Performance Incentive Payment earned to the date of such notice of default shall be processed and provided in accordance with this Agreement.

**9. Assignment.** This Agreement is binding upon and shall inure to the benefit of the Parties and their respective successors and assigns. The Developer may assign this Agreement, with the prior written consent of the Authority and the Locality, which consent shall not be unreasonably withheld provided any such assignment is in accordance with the terms of the EDA Performance Agreement.

**10. Nondiscrimination; Drug-Free Workplace.**

- a. During the Term of this Agreement, the Developer agrees as follows:
- (i) The Developer will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification/consideration reasonably necessary to the normal operation of the Developer. The Developer agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
  - (ii) The Developer in all solicitations or advertisements for employees placed by or on behalf of the Developer, will state that the Developer is an equal opportunity employer.
  - (iii) Notices, advertisements and solicitations placed in accordance with federal law, rule, or regulation shall be deemed sufficient for the purpose of meeting the requirements herein.
  - (iv) The Developer will include the provisions of the foregoing subsections (i), (ii) and (iii) in every contract, subcontract, or purchase order of over Ten Thousand Dollars (\$10,000.00), so that the provisions will be binding upon each contractor, subcontractor or vendor.
- b. During the performance of this Agreement, the Developer agrees as follows:
- (i) The Developer will provide a drug-free workplace for the Developer's employees.
  - (ii) The Developer will provide in its employee handbook, available to employees and applicants for employment, a statement notifying employee to the effect that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the Developer's workplace and specifying the actions that will be taken against employees for violations of such prohibition.



(iii) The Developer will include the provisions of the foregoing subsections (i), (ii) and (iii) in every contract, subcontract or purchase order of over Ten Thousand Dollars (\$10,000.00), so that the provisions will be binding upon each contractor, subcontractor or vendor.

(iv) The Developer will state in all advertisements or solicitations for employees that the Developer maintains a drug free workplace.

**11. Notification by Authority.** The Authority agrees to notify the State Comptroller and the State Tax Commissioner when the debt from the Qualified Gap Financing is retired and the Project is no longer eligible to receive tax revenues to repay such Qualified Gap Financing.

**12. Entire Agreement.** This Agreement contains the entire understanding of the Parties with respect to the matters covered by this Agreement and no conflicting agreement, statement, or promise made by any party or to any employee, officer, or agent of any party which is not contained in this Agreement shall be binding or valid.

**13. Amendments.** This Agreement may be modified only by a writing signed by the Parties.

**14. Notices.** All payments, sums, notices, demands, reports, or requests from one party to another may be personally delivered or sent by mail, certified or registered, return receipt requested, postage prepaid to the addresses below, and shall be deemed to have been given at the time of personal delivery or at the time of receipt.

All notices, demands, or requests from a Party to the Authority shall be given as follows:

**Authority:** Chair  
Economic Development Authority  
1 Franklin Street  
Hampton, VA 23669

**With copy to:** City Attorney  
City of Hampton, Virginia

22 Lincoln Street  
Hampton, VA 23669

All notices, demands, or requests from a Party to the Locality shall be given as follows:

**Locality:** City Manager  
City of Hampton, Virginia  
22 Lincoln Street  
Hampton, VA 23669

**With copy to:** City Attorney  
City of Hampton, Virginia  
22 Lincoln Street  
Hampton, VA 23669

All notices, demands, or requests from a Party to the Developer shall be given as follows:

**Developer:** T Peninsula Hotel VA, LLC  
Attention: Zaffar S. Tabani  
16600 Dallas Parkway, Suite 300  
Dallas, Texas 75248

**With copy to:** O'Dowd Law Firm, PC  
Attn: London S. O'Dowd, Esq.  
1400 Preston Road, Suite 400  
Plano, Texas 75093

Any party may change its address for notices from time to time by giving notice of its new address to the other Parties pursuant to this paragraph.

**15. Relevant Law- Venue.**

- a. This Agreement shall be deemed to be a Virginia contract and shall be governed as to all matters whether of validity, interpretations, obligations, performance or otherwise exclusively by the laws of the Commonwealth of Virginia, and all questions arising with

respect thereto shall be determined in accordance with such laws. Regardless of where actually delivered and accepted, this Agreement shall be deemed to have been delivered and accepted by the Parties in the Commonwealth of Virginia.

b. The Developer shall comply with all federal, state and local statutes, ordinances, and regulations now in effect or hereafter adopted, in the performance of its obligations set forth herein. The Developer further expressly represents that it is a Virginia limited liability company duly organized and existing under the laws of Virginia, will so remain throughout the term of this Agreement and is authorized to transact business in the Commonwealth of Virginia.

c. Any and all suits for any claims or for any and every breach or dispute arising out of this Agreement shall be maintained in the appropriate court of competent jurisdiction in the Locality or in the United States District Court for the Eastern District of Virginia, Norfolk Division.

**IN WITNESS WHEREOF**, this Agreement has been executed on behalf of the Authority, the Locality, and the Developer as of the date first set forth above.

[SIGNATURES ON FOLLOWING PAGES;  
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**ECONOMIC DEVELOPMENT AUTHORITY**  
**OF THE CITY OF HAMPTON, VIRGINIA:**

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

Chair/Vice-Chair/designee

Date: \_\_\_\_\_

COMMONWEALTH OF VIRGINIA

CITY OF HAMPTON, to-wit:

I, \_\_\_\_\_, a Notary Public in and for the City and State aforesaid do hereby certify that \_\_\_\_\_, as \_\_\_\_\_ of the Economic Development Authority of the City of Hampton, whose name is signed to the foregoing writing, has this day acknowledged the same before me in my City and State aforesaid. She/he is personally known to me.

Given under my hand this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

\_\_\_\_\_

Notary Public

My commission expires: \_\_\_\_\_

Notary Registration Number: \_\_\_\_\_

[SIGNATURES CONTINUE ON FOLLOWING PAGES]

**THE CITY OF HAMPTON:**

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

City Manager/designee

Date: \_\_\_\_\_

COMMONWEALTH OF VIRGINIA

CITY OF HAMPTON, to-wit:

I, \_\_\_\_\_, a Notary Public in and for the City and State aforesaid do hereby certify that \_\_\_\_\_, as \_\_\_\_\_ of the City of Hampton, whose name is signed to the foregoing writing, has this day acknowledged the same before me in my City and State aforesaid. She/he is personally known to me.

Given under my hand this \_\_\_\_\_ day of \_\_\_\_\_, 2018/

\_\_\_\_\_

Notary Public

My commission expires: \_\_\_\_\_

Notary Registration Number: \_\_\_\_\_

**Approved as to Content:**

**Approved as to Legal Sufficiency**

\_\_\_\_\_

Director of Economic Development

\_\_\_\_\_

City Attorney

**Certified as to Availability of Funds:**

\_\_\_\_\_

Director of Finance

[SIGNATURES CONCLUDE ON FOLLOWING PAGE]

**T PENINSULA HOTEL VA, LLC:**

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

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

Date: \_\_\_\_\_

COMMONWEALTH OF VIRGINIA

CITY OF HAMPTON, to-wit:

I, \_\_\_\_\_, a Notary Public in and for the City and State aforesaid do hereby certify that \_\_\_\_\_, as \_\_\_\_\_ of the City of Hampton, whose name is signed to the foregoing writing, has this day acknowledged the same before me in my City and State aforesaid. She/he is personally known to me.

Given under my hand this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

\_\_\_\_\_

Notary Public

My commission expires: \_\_\_\_\_

Notary Registration Number: \_\_\_\_\_

**EXHIBIT A**

**EDA Performance Agreement**

**EXHIBIT B**  
**Project Ordinance**



**EXHIBIT C**

**Qualified Gap Financing**