



MEMORANDUM

To: Robby Hammond, City Manager

From: Rahim Harji, Assistant City Manager
Suzanne Linneen, Finance Director

Date: March 7, 2023

Subject: Hillsboro Hops Ballpark Project – City of Hillsboro/Hillsboro Hops Interim Cost Allocation Agreement

Requested Action:

Please consider approving the New Ballpark Interim Cost Allocation between the City and Short Season, LLC (Hillsboro Hops).

Background:

The City and the Hops have been working jointly to meet the new requirements of the MLB agreement, as well as other desired amenities and to mitigate any loss use to the community. To that end, the City of Hillsboro awarded M.A. Mortenson Company the design-build contract for the design and construction of the Ron Tonkin Field (RTF) Expansion Project through a competitive request for proposal process. After completing an alternatives analysis it was determined that constructing a new ballpark would be more cost effective. The previous design work has been able to be used for the design of the new ballpark. Without incurring any additional cost beyond what was previously authorized, the project was able to pivot to provide a 35% design for a new ballpark on the same site.. A proposed amendment to the design-build contract, also on tonight's Council agenda, would enable the project team to complete up to 65% design of the ultimate build-out of the facility while the Hops continue pursuing additional financing for the project. A 65% design will include the Guaranteed Maximum Price (GMP) which will allow the Hops to retain their share of the financing for the project.

Due to the considerable costs to be incurred under the design build work, staff is requesting City Council approve a second Interim Cost Allocation Agreement for the New Ballpark. Without this agreement in place, the City would not be able to proceed to the 65% design and develop a GMP. The new interim agreement allocates 80% of the costs to the Hops and 20% to the City based on the overall anticipated funding split of the project once completed. If a new agreement is not

reached by September 1, 2023, the Hops will be invoiced for their share of the work to date as defined in the agreement. This approach provides the City with an opportunity to reduce risk to the City while allowing for flexibility and scalability of the project. This interim cost allocation does not include any construction or early procurement, which will be covered in a future agreement.

Cost:

This interim cost allocation agreement will define the cost allocations for all costs up to the 65% design for the amount of \$8,303,326. A summary of these costs are as follows:

M.A Mortenson Contract Charges:

Conceptual Design:	\$295,000
Design to 35%:	\$4,500,000
35% to 65%:	\$3,508,326

These costs will be split accordingly:

Hillsboro Hops -	\$6,642,662 (80%)
City of Hillsboro -	\$1,660,665 (20%)

The City plans to contribute \$18 million to the project using Transient Lodging Taxes. New or increased TLT's enacted are required to use at least 70% of the net revenue to fund tourism promotion or tourism related facilities. Staff will be in front of City Council at a later date with an authorizing resolution to issue debt up to the \$18 million. The Hops are also actively seeking their funding for the project including private financing and state funds. The total project is estimated not to exceed \$120 million.

NEW BALLPARK COST ALLOCATION AGREEMENT

THIS NEW BALLPARK INTERIM COST ALLOCATION AGREEMENT (the "Agreement") is made and entered into as of _____, 2023, by and between the CITY OF HILLSBORO, an Oregon municipal corporation (the "City"), and SHORT SEASON, LLC (the "Licensee").

RECITALS

A. The City and the Licensee entered into a Non-Exclusive License Agreement dated as of June 29, 2012 (the "License Agreement") to permit the use of Ron Tonkin Field ("RTF") for home baseball games for the minor league baseball team commonly known as the Hillsboro Hops (the "Team").

B. Following the execution of the Agreement, the Parties entered into a First Amendment to the Agreement dated as of June 4, 2013; a Second Amendment, dated as of October 7, 2014; a Third Amendment, dated as of July 7, 2020; and a Fourth Amendment, dated as June 1, 2021.

C. Due to the Team's promotion to the High-A classification, Licensee is required by MLB Professional Development Leagues, LLC ("MLB PDL") to meet certain standards for its home stadium, which would require certain improvements to RTF. Under the License Agreement, Licensee is responsible for all costs associated with any improvements required by MLB PDL.

D. The Parties began the process of designing a remodel of RTF in order to meet the MLB PDL standards as well as to make other improvements desired by Licensee to transform RTF into a regional entertainment attraction.

E. The Parties entered into a cost allocation agreement for the previous design work dated August 17, 2022 ("Previous Interim Agreement"), which set forth the rights and responsibilities of each party as it related to the design work for remodeling RTF.

F. During the previous design work, the Parties determined that it would be more cost effective to build a new ballpark rather than remodeling RTF. The previous design work, however, may be used as part of the design work for the new ballpark.

G. The Parties intend to mutually fund a new ballpark rather than remodeling RTF. The Parties estimate that the new ballpark will cost potentially up to \$120 million and that the City will contribute \$18 million to the new ballpark. The Parties intend for Licensee to pay the remaining cost through private financing and/or grants from other entities.

H. In order to remain in compliance with MLB PDL standards, the Team must be able to play in the new ballpark by the 2025 season. To meet this deadline, the Parties must continue to move forward with design work while financing for the new ballpark is finalized. In addition, such work must continue while the Parties negotiate longer term agreements, such as a lease and development agreement for the new ballpark.

I. The Parties, therefore, desire to enter into this Agreement to replace the Previous Interim Agreement and set forth their mutual roles and responsibilities in moving plans forward

for the new ballpark until such time as the longer-term agreements, such as a lease and development agreement for the new ballpark, are negotiated, drafted and executed.

NOW, THEREFORE, FOR AND IN CONSIDERATION of the mutual promises and covenants herein contained, and other good and valuable consideration, the receipt, sufficiency and adequacy of which are expressly acknowledged, the Parties agree as follows:

ARTICLE 1.
EFFECTIVENESS OF RECITALS/DEFINITIONS

Section 1.1 Recitals. The Recitals set forth above are an integral part of this Agreement and shall have the same contractual and legal significance as any other language in this Agreement.

Section 1.2 Definitions. In addition to any definitions set forth in the Recitals, for purposes of this Agreement, the following definitions shall apply to the terms set forth herein wherever they appear:

A. **“Design/Build Agreement”** means that certain agreement between the City and M.A. Mortenson Company for design and construction services related to the remodel of RTF, as it exists upon execution of this Agreement or as amended thereafter to include services related to the Project.

B. **“Design/Build Contractor”** means M.A. Mortenson Company.

C. **“Development Costs”** means all costs incurred by City under the Design/Build Agreement including costs incurred prior to this Agreement being executed, which were subject to the Previous Interim Agreement.

D. **“Project”** means the work necessary to design and build a new ballpark at the Gordon Faber Recreation Complex in Hillsboro, Oregon (the “Ballpark”), which is intended to satisfy the MLB PDL standards, as well as include any other additional amenities to create a regional entertainment destination as agreed to by the Parties.

ARTICLE 2.
COST ALLOCATIONS/PAYMENTS

Section 2.1 Cost Allocation Between the Parties. The Parties agree that the Development Costs shall be split between them as follows: City shall be responsible for twenty-percent (20%) of all Development Costs; and Licensee shall be responsible for eighty percent (80%) of all Development Costs.

Section 2.2 Development Cost Limit 65% Design. For purposes of this Agreement, in no event shall Licensee be required to pay any amount exceeding \$6,642,662 without Licensee's express, written permission. Similarly, in no event shall the City be obligated to contribute to the Project, beyond staff time, an amount in excess of \$1,660,665 unless a new lease and development agreement and / or third interim cost allocation agreement is entered into by the Parties.

Section 2.3 Timing of Payments. The City is the contracting party in the Design/Build Agreement. As a result, the City will be responsible for all payments to the Design/Build Contractor. Licensee will not be required to start making payments to the City until September 1, 2023. At that time, Licensee agrees to reimburse City for Licensee's share of the Development Costs as set forth in Section 2.1 within thirty (30) days of receiving an invoice from City for such payment. The invoice will include 80% of all development costs actually incurred by the City to date. The parties acknowledge and agree that they intend the provisions of this Agreement to be rendered moot when the parties enter into a new lease and development agreement. If the parties enter into a new lease and development agreement prior to September 1, 2023, then this Agreement shall automatically terminate and the new lease and development agreement shall control.

Section 2.4 Agreement Limitations. This agreement is limited to the 65% design build phase of the Project only, as set forth in the Design/Build Agreement. The City is not required to incur any additional costs unless the Parties execute a new lease and development agreement and / or a third interim cost allocation agreement.

ARTICLE 3.
ASSUMPTION OF DEVELOPMENT RISKS/LIMITATION ON DAMAGES

Section 3.1 Assumption of Risk. Each Party shall bear its Development Costs in accordance with the terms of this Agreement, without regard to the success or failure of the ultimate completion of the Project.

Section 3.2 Limitation on Damages. In no event will either Party have any liability for any indirect, incidental, special, exemplary or consequential damages, however caused and on any theory of liability, whether for breach of contract, tort or otherwise, arising out of or related to this agreement, including but not limited to, loss of anticipated profits, loss of data, or loss of use, even if the Party has been advised of the possibility of such damages.

ARTICLE 4.
TERM AND TERMINATION

Section 4.1 Term. This Agreement shall terminate automatically upon the Parties' execution of a new lease and development agreement for the Ballpark.

Section 4.2 Termination for Convenience. This Agreement may be terminated by either Party, for any reason or no reason, by giving the other Party written notice of the termination sixty (60) days in advance. Notwithstanding any other provision of this Agreement, if either party terminates this Agreement for convenience pursuant to this Section 4.2, the terminating party shall be responsible for one hundred percent (100%) of the Development Costs incurred prior to the other party's receipt of notice of termination, as well as one hundred percent (100%) of all costs necessary to terminate the Design/Build Agreement under Section 4.4 below.

Section 4.3 Termination for Cause. This Agreement may be terminated by either Party, if the other Party is in material breach of this Agreement and fails to cure such breach within thirty (30) days following receipt of notice of such breach.

Section 4.4 Effect of Termination. Except as otherwise provided in Section 4.2 above, upon the sending or receipt of a termination notice under this Article 4, City shall, as soon as commercially reasonably possible, direct the Design/Build Contractor to cease all work under the Design/Build Agreement and terminate such agreement(s). Each Party shall remain liable for their respective allocation of any Development Costs pursuant to Article 2, which are incurred until any such agreements are terminated and no other costs are due or owed to the Design/Build Contractor.

ARTICLE 5.
TERMINATION OF PREVIOUS INTERIM AGREEMENT

Section 5.1 The Previous Interim Agreement is terminated and replaced by this Agreement.

ARTICLE 6.
GOOD FAITH OBLIGATIONS

Section 6.1 Good Faith Payment. In consideration of City not requiring payment from Licensee under this Agreement until September 1, 2023, Licensee agrees to pay City an amount of one hundred thousand dollars (\$100,000.00) within five business days of the date listed in the opening paragraph of this Agreement (the "Good Faith Payment"). City will credit against the amount owed by Licensee for its Development Costs under Article 2 an amount equal to the Good Faith Payment.

Section 6.2 Good Faith Retention of Personnel. The City enters into this Agreement based on the good faith and trust it has built in its partnership with Licensee over the previous decade. The foundation for the City's good faith and trust is significantly based on Licensee's current leadership team, and their vision for the Ballpark. The parties therefore recognize and agree that the retention of Licensee's current leadership team is an imperative inducement for the City to enter into this Agreement. As a result, Licensee agrees that KL Wombacher shall remain as Licensee's President and General Manager during the term of this Agreement, unless Licensee terminates Mr. Wombacher's employment for gross negligence, intentional misconduct, or

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bringing disrepute on Licensee. Should Licensee terminate Mr. Wombacher for any reason not outlined in this Section during such term, City may immediately terminate this Agreement in its sole and absolute discretion. Upon such termination, City shall follow the requirements of Section 4.4 of this Agreement. Licensee shall pay City for its allocation of incurred Development Costs pursuant to Article 2, within 30 days of receiving an invoice from City for payment.

ARTICLE 7. MISCELLANEOUS

Section 7.1 Applicable Law. This Agreement shall be governed by Oregon law. The venue for any dispute shall be Washington County, Oregon, or, to the extent applicable, the United States District Court for the District of Oregon.

Section 7.2 Parties Bound. Except as otherwise limited herein, the provisions of this Agreement shall be binding upon and inure to the benefit of the Parties and their heirs, executors, administrators, legal representatives, successors, and assigns.

Section 7.3 Attorneys' Fees. If any lawsuit is commenced to enforce any of the terms of this Agreement, each Party shall be solely responsible for and bear the costs of its own attorneys' fees and costs of suit.

Section 7.4 Severability. If any term of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions shall continue in full force and effect unless the rights and obligations of the Parties have been materially altered or abridged by such invalidation, voiding or unenforceability.

Section 7.5 Force Majeure. In addition to specific provisions of this Agreement, performance by either Party shall not be deemed to be in default where delays or defaults are due to war; insurrection; strikes; riots; floods; earthquakes; fires; quarantine restrictions; freight embargoes; lack of transportation; or court order; or any other similar causes (other than the lack of funds of the Party) beyond the control or without the fault of the Party claiming an extension of time to perform. An extension of time for any cause will be deemed granted only if notice by the Party claiming such extension is sent to the other within thirty (30) days from the commencement of the cause and such extension of time is not rejected in writing by the other Party within thirty (30) days of receipt of the notice. The failure to timely deliver such notice by a Party shall be deemed a waiver of such Party's rights hereunder. In no event shall the City be required to agree to a cumulative delay in excess of thirty (30) days in connection with Licensee's obligation to pay the Fees set forth herein, and in no event shall the City or Licensee be required to agree to cumulative delays in excess of one hundred eighty (180) days.

Section 7.6 Waivers. Any waiver by a Party of any obligation or condition in this Agreement must be in writing. No waiver will be implied from any delay or failure by a Party to take action on any breach or default of the other Party or to pursue any remedy allowed under this Agreement or under Applicable Laws. Any extension of time granted to a Party to perform any obligation under this Agreement shall not operate as a waiver or release from any of its obligations under this Agreement. Consent by a Party to any one act or omission by the other Party shall not be construed to be a consent to any other or subsequent act or omission or to waive the requirement for the Party's written consent to future waivers. Any efforts by a Party to mitigate the damages

caused by the other Party's breach of this Agreement shall not be construed to be a waiver of the first Party's right to recover damages, or seek any other available remedy, under this Agreement.

Section 7.7 Title of Parts and Sections. Any titles of the sections or subsections of this Agreement are inserted for convenience of reference only and shall be disregarded in interpreting any part of the Agreement provisions.

Section 7.8 Entire Understanding of the Parties. This Agreement constitutes the entire understanding and agreement of the Parties with respect to the interim cost sharing of the Project. This Agreement and the other agreements referred to in this Agreement constitute the entire understanding and agreement of the Parties about obligation to pay for the Project. This Agreement shall not be construed as if it had been prepared by one of the Parties, but rather as if both Parties had prepared it. The Parties to this Agreement and their counsel have read and reviewed this Agreement and agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply to the interpretation of this Agreement.

Section 7.9 Further Assurances. The City and Licensee shall execute, acknowledge and deliver, without additional consideration, such further assurances, instruments and documents, and shall take such further actions, as the City or Licensee shall reasonably request of the other in order to fulfill the intent of this Agreement and the transactions contemplated hereby. Both Parties further covenant to deal fairly and cooperate with each other and to act in good faith to accomplish the purposes of this Agreement and to carry it into effect.

Section 7.10 Time of Essence. Time is of the essence of this Agreement and of each and every provision contained in the Agreement.

Section 7.11 No Third Party Beneficiaries. There shall be no third party beneficiaries to this Agreement.

Section 7.12 Relationship of Parties. Nothing contained in this Agreement shall be interpreted or understood by any of the Parties, or by any third persons, as creating the relationship of employer and employee, principal and agent, landlord or tenant, limited or general partnership, or joint venture between the City and the Licensee or its agents, employees or contractors. The Licensee has and retains the right to exercise full control of employment, direction, compensation, and discharge of all persons assisting in the performance of services under the Agreement. The Licensee shall be solely responsible for its own acts and those of its agents and employees.

Section 7.13 Amendments. No alteration or variation of the terms of this Agreement shall be valid unless made in writing by the Licensee and the City, and, to the extent applicable, approved by the City Council in accordance with all Applicable Laws and approved by the MLB PDL.

Section 7.14 Counterparts; Multiple Originals. This Agreement may be executed in counterparts each of which shall constitute one complete, and the same, instrument.

IN WITNESS WHEREOF, the Parties have executed this First Amendment as of the date first written above.

CITY:

CITY OF HILLSBORO, an Oregon municipal corporation

By: _____
Robby Hammond, City Manager

ATTEST: _____
City Recorder

LICENSEE:
SHORT SEASON, LLC, an Oregon limited liability company

By: _____
Michael McMurray
President & Manager