

Memorandum

City of Lawrence

City Manager's Office

TO: David L. Corliss, City Manager

FROM: Britt Crum-Cano, Economic Development Coordinator
Diane Stoddard, Assistant City Manager

Date: June 16, 2014

CC: Cynthia Wagner, Assistant City Manager
Casey Toomay, Budget Manager

RE: Research on agreement language for restricting nuisance activities/behavior

Introduction

The Oread is a multi-level lodging, hospitality, and business venue located at 1200 Oread Avenue. In addition to its hotel amenities, the facility includes restaurants, bars, banquet facilities, and various retail venues. Public improvements to streets and infrastructure, including a parking garage, were financed initially by the Developer and are reimbursed annually through TIF (Tax Increment Financing) and TDD (Transportation Development District) revenues generated by the project.

Media attention given to recent activities at a nightclub located within the hotel has created questions about incentivizing projects with tenants experiencing customer nuisance behaviors. Consequently, the City Commission has asked staff to review performance requirements regarding the operation of projects receiving city incentives, especially limiting or prohibiting nuisance activities.

Research Review

In consultation with Gilmore & Bell, staff identified the below considerations for restrictions imposed by other communities. In addition, Gilmore & Bell provided sample contract language their firm has used for other communities in addressing related restrictions. (See attached samples.)

1. Restricting nuisance behavior often gets into regulatory issues:
 - Restrictions against specific behavior are often regulatory and enforced through laws specifically designed to prohibit/impede the behavior (e.g. underage drinking).

- Performance agreement language is better used to stipulate that the property owner has an obligation to comply with laws and report illegal activity, if known.
2. Performance agreement is not likely the best vehicle for regulating nuisance behavior:
 - Not only are many nuisance activities already addressed via regulatory laws and codes, restrictions on behavior are difficult to enforce within a performance agreement.
 3. Rather than include language restricting types of behavior/activities within an agreement, most cities restrict uses. (See samples included at the end of this memo.)
 - Restriction language for uses varies by municipality and depends on what the City wants to accomplish with the incentives and what uses they are trying to keep out. For example there might be language restricting non-retail types of uses (investment offices, non-profits) in a project that is trying to generate sales tax revenues (e.g. TIF districts).
 - Some cities have very extensive language that limit uses, while others are more flexible.
 - Most restrictions are tenant restrictions (i.e. use restrictions on the type of tenants allowed in project).
 - With use restrictions, two forms of retribution are available: sue (if city has fronted the improvement expenses) or stop incentive reimbursements (on pay-as-you-go incentivized projects).
 4. Restricting uses is typically a larger, policy issue:
 - City should determine goal(s) of incentives and what they are meant to accomplish, which uses support/don't support that goal, then determine what uses to incent or not incent.
 5. Other considerations:
 - Legal counsel (Gilmore and Bell) advises caution when making decisions based on one situation as circumstances around a particular incident may be more related to unique location and business type. For example, although both serve alcohol, a hotel nightclub typically lends itself to a different customer base than a hotel restaurant. In addition, if the nightclub is somewhat isolated from the main hotel facility (lower-level, separate entrance) and the only (or primary) product served is alcohol, a different set of circumstances exists that could lead to certain customer behaviors. (One limitation that can be utilized within agreements is to limit the percentage of revenue that can be generated from alcohol sales.)

—Sample A—

Section 5.01. Tenants and Land Use Restrictions. At all times while this Agreement is in effect:

A. Sales Tax Revenue Generating Businesses. A minimum of 6,000 square footage of the approximately 9,000 square first floor commercial footage to be constructed as part of the Project shall be leased or sold for use by businesses that generate retail sales tax payable to the Unified Government.

B. No Tax-Exempt Organizations. This Agreement shall be terminated if the Developer sells or leases property within Project Area 2 to a tax-exempt organization, except that this prohibition shall not prevent the granting of any temporary or permanent easements necessary to facilitate the construction of the Project, and further provided, that such sale or lease shall be permitted if the transaction does not impact the tax status of the property or if a payment in lieu of taxes agreement mutually agreeable to the Parties is established.

C. Land Use Restrictions. The types of land uses and retailers set forth in **Exhibit H** hereto are prohibited within Project Area 2, unless approved in writing by the Unified Government prior to the execution of a lease or prior to the sale of land.

D. Tenant Qualifications and Pre-Approved Tenants.

1. Subject to the restrictions herein, the Developer shall have exclusive control of leasing and sale of the Project; *provided, however*, the Developer may not lease or sell any portion of the Project without the Unified Government's prior written consent to any retailer and/or restaurant presented by the Developer within 24 months of the Unified Government's receipt of a Certificate of Substantial Completion for the Project, to the extent that such retailer and/or restaurant constitutes a relocation of any retailer and/or restaurant in business in the Restricted Area. The Developer shall give the Unified Government written notice not less than 60 days prior to the execution of any contract for the sale and/or lease of property within Project Area 2 with respect to any such proposed relocation.

2. All retailers and/or restaurants to be located within Project Area 2 shall be consistent with those businesses located in typical first-class retail developments.

3. The hotel portion of the Project shall contain a minimum of 75 units and shall be franchised as part of a first-class national hotel franchise for a minimum term of 10 years from the date of opening. Thereafter for the term of this Agreement the hotel portion of the Project shall be operated as either a first-class national hotel franchise or maintained and operated as a hotel in a first-class manner.

4. The Unified Government shall have the right to expressly waive any condition contained in **Section 5.01(D)**, in writing, provided to the Developer prior to the date such legal obligation for the sale and/or lease of property within Project Area 2 is executed.

5. Notwithstanding any other rights of the Unified Government as otherwise provided in this Agreement, the Unified Government shall have the right to enforce the provisions of this **Section 5.01(D)** by seeking injunctive relief. The Developer expressly agrees to waive any bonding requirements for temporary injunctions as provided by K.S.A. 60-905(b) to the extent the Developer has failed to reasonably consult with the Unified Government or to the extent there is any dispute regarding the requirements contained in paragraph 4 of this **Section 5.01(D)**.

6. The County Administrator or his designee shall have authority to act on behalf of the Unified Government for purposes of making all determinations required of the Unified Government in this **Section 5.01(D)**.

EXHIBIT H

RESTRICTED LAND USES WITHIN PROJECT AREA 2

1. Any use which emits an obnoxious odor, noise, or sound which can be heard or smelled outside of any building in the Project (except that this provision shall not prohibit normal cooking odors which are associated with a first-class restaurant operation).
2. Any operation primarily used as a storage warehouse operation and any assembling, manufacturing, distilling, refining, smelting, agricultural or mining operation;
3. Any "second hand" store" or "surplus" store, thrift shop or other business principally engaged in the sale of used merchandise;
4. Any mobile home park, trailer court, labor campy, junkyard or stockyards (except that this provision shall not prohibit the temporary use of construction trailers during periods of construction, reconstruction or maintenance);
5. Any dumping, disposing, incineration, or reduction of garbage (exclusive of garbage compactors located near the rear of any building);
6. Any fire sale, going out of business sale, bankruptcy sale (unless pursuant to a court order) or auction house operation;
7. Any central laundry, central dry cleaning plant or laundromat (except that this provision shall not prohibit nominal supportive facilities for on-site services oriented to pickup and delivery by the ultimate consumer as the same may be found in first-class shopping centers);
8. Any service station or automobile, truck, trailer or recreational vehicles sales, leasing, display, body shop or repair operation;
9. Any bowling alley or skating rink;
10. Any movie theater, night club or live performance theater;
11. Any veterinary hospital or animal raising facility (except that this prohibition shall not prohibit pet shops or pet supply superstores and veterinary services which are incidental thereto);
12. Any mortuary, funeral home or crematory;
13. Any adult book store, adult video store, adult movie theater or other establishment selling, renting or exhibiting pornographic materials or drug-related paraphernalia (except that this provision shall not prohibit the operation of a bookstore or video store which carries a broad inventory of books or videos and other materials directed towards the interest of the general public [as opposed to specific segment thereof]);

14. Any bar or tavern without a full service kitchen.
15. Any flea market, amusement or video arcade, pool or billiard hall, car wash, tattoo parlor or dance hall (except that this provision shall not prohibit a restaurant from including video games as an incidental use to its operations);
16. With respect to spaces over 5,500 square feet, any training or educational facility, including, but not limited to, beauty schools, barber colleges, reading rooms, places of instruction or other operations catering primarily to students or trainees rather than to customers (except that this provision shall not prohibit on-site employee training [whether for employment at the Project or at another business location of such occupant] by an occupant incidental to the conduct of its business at the Project);
17. Any church, school, day care center or related religious or educational facility or religious reading room;
18. Any massage parlor (except that this provision shall not prohibit massages in connection with a beauty salon, health club or athletic facility); and
19. Any casino or other gambling facility or operation, including but not limited to, off-track or sports betting parlors, table games such as black-jack or poker, slot machines, video gambling machines and similar devices, and bingo halls (except that this provision shall not prohibit government sponsored gambling activities or charitable gambling activities if such activities are incidental to the business operation being conducted by the occupant).
20. More than one fast food restaurant with a drive-thru.

Section 5.02. Land Uses and Land Use Restrictions.

A. In addition to the land use restrictions that are established pursuant to the City's zoning and subdivision regulations, unless approved in writing by the City prior to the execution of a lease or prior to the sale of land in the Redevelopment Area, the types of land uses set forth in the attached **Exhibit I** shall not occur as the primary use of Property in the Redevelopment Area.

B. Developer shall at all times while tax increment financing is in effect maintain leases with Tenants that meet the following criteria:

1. No less than eighty percent (80%) of the leasable square footage within the Redevelopment Area shall be occupied by Tenants operating retail stores, fast food or sit-down restaurants, hotels, pharmacies, gas stations, or other businesses whose primary revenue-generating activity generates sales tax revenues;
2. Beginning two (2) years after the City's adoption of the Project Ordinance, one anchor Tenant that operates a grocery store.

If an anchor Tenant that operates a grocery store in the Redevelopment Area ceases to operate the grocery store, the absence of such Tenant shall not constitute a Developer Event of Default during the period in which the Developer seeks another grocery store Tenant.

Section 5.03. Covenants, Conditions and Restrictions. Within sixty (60) days after the execution of this Agreement, Developer shall prepare and submit to the City redacted Covenants, Conditions and Restrictions evidencing a plan for maintenance of the Property and the list of restricted land uses as established by **Section 5.02** of this Agreement ("**CC&Rs**"). The CC&Rs shall be a permanent encumbrance covering the entirety of the Redevelopment Area. The form and substance of the maintenance portion of the CC&Rs shall be acceptable to the City, and the CC&Rs shall not be recorded until the City has approved the maintenance portion of the CC&Rs in writing. After approved by the City, Developer shall file the CC&Rs for record in the Clay County Recorder of Deeds and shall provide proof of such recording to the City.

Section 6.01. Tenants and Land Use Restrictions. At all times while this Agreement is in effect:

A. Land Use Restrictions. The types of land uses and retailers set forth in **Exhibit N** hereto are prohibited within the STAR Bond Tract, unless approved in writing by the City prior to the execution of a letter of intent, lease or prior to the sale of land.

B. Tenant Qualifications and Pre-Approved Tenants.

1. The Developer will reasonably consult with the City to sell and/or lease property within the STAR Bond Tract to retailers, restaurants, and/or destination attractions which are reasonably acceptable to the City. The Developer shall present a written description of potential retailers, restaurants, and/or destination attractions to the City within thirty (30) days prior to the date when the Developer expects to enter into any legal obligation for the sale and/or lease of property within the STAR Bond Tract. The City Representative shall respond to the Developer within fifteen (15) business days of the receipt of any such communication. If the City Representative does not respond to Developer within fifteen (15) business days, such non-response shall constitute a waiver of any objection to Developer's proposed sale or lease. The Developer shall promptly notify the City Representative upon the execution of any such legal obligation for the sale and/or lease of property within the STAR Bond Tract. The City Representative or its designee shall have authority to act on behalf of the City for purposes of making all determinations required of the City in this **Section 6.01(B)**. The rights and obligations of this paragraph shall only be effective for the five (5) year period during which Developer shall act as Master Developer of the Project, and only for the initial sale, lease, and/or disposition by Developer.

2. From the date of this Agreement until twenty-four (24) months of the City's receipt of a Certificate of Full Completion for the Project, the City shall have the absolute right to refuse any retailer and/or restaurant presented by the Developer in accordance with the provisions of **Section 6.01(B)(1)** to the extent that such retailer and/or restaurant is duplicative of any existing retailer and/or restaurant already located within the city limits of the City or constitutes a relocation of any retailer and/or restaurant in business in the City.

Exhibit N – Restricted Land Uses in the District

1. Adult Book and Video Stores
2. Community Correctional Facilities
3. Half-way Houses
4. Drug or Alcohol Rehabilitation Facilities
5. Used Car Lots
6. Multi-game, Casino-style Gambling Facilities
7. Commercial Billboards

Section 6.03. Tenant Requirements. The Developer affirms that the Redevelopment Plan was approved by the City based on specific and public representations by the Developer that the Project will consist of retail stores and restaurants. Not less than 95% of the total square footage of buildings and structures in the Redevelopment Area shall be occupied by occupants which engage primarily (greater than 50%) in sales or services that are subject to Missouri sales taxes. Prior to entering into a letter of intent or lease with respect to any “non-sales tax space” that would cause the minimum square footage to be occupied by retail stores whose sales are subject to Missouri sales tax not to be met, the Developer shall meet with the City to discuss the impact of any such potential tenant on the operating performance of the Redevelopment Project and the generation of TIF Revenues.

Section 6.04. Relocation within the City. Prior to the third (3rd) anniversary of the acceptance and approval of the Certificate of Substantial Completion in accordance with **Section 6.02**, no Tenant may be relocated from other space located within the City limits of the City unless the sales tax base for such Tenant is transferred as provided under the TIF Act. For purposes of this Section, “**relocation**” shall mean (a) the relocation of a store, office or business within the City or (b) the location of a store, office or business within the boundaries of the Redevelopment Area and the closing of the same store, office or business, or the same chain or name-brand of retail store (either corporate or franchise), within the City within **365** days after such store is opened in the Redevelopment Area.

Example of (b): Two “Brand Name” pharmacy stores exist in the City, both located outside the Redevelopment Area. A “Brand Name” pharmacy store opens in the Redevelopment Area. Within **365** days after the opening of such “Brand Name” store in the Redevelopment Area, one of the two pre-existing “Brand Name” stores closes in the City. This will be treated as a “relocation” pursuant to this Section.

Adult Entertainment Establishment

Automobile / ATV / Boat sales or repair, service or leasing

Bank, except that one bank use not to exceed 3,000 square feet shall be allowed within another building

Bars or tavern as a primary use

Car wash

Cellular or other towers which are not approved by the City (this restriction does not apply to tenants' communication devices)

Church

Day Care

Laundromats

Home Improvement Stores

Hospital

Hotel/Motel

Liquor store as a primary use

Manufacturing or assembly use

Medical Uses, including medical offices and clinics, except that one medical use not to exceed 3,000 square feet shall be allowed within another building

Non-profit institutions, except for permitted Medical Uses as set forth above

Pawn shop

Preschool

Residential Uses

Title loan, check cashing or pay-day loan service.