

ORDINANCE NO. 7,705–N.S.

AMENDMENT AND ASSIGNMENT OF CAPITAL CONTRIBUTION AGREEMENT FOR THE DOUBLETREE HOTEL, TO APPROVE AN ASSIGNMENT OF THE AGREEMENT BY 200 MARINA BLVD, LLC TO APOLLO BRIGHT, LLC AND EXTEND THE DEADLINE FOR PAYMENT OF THE CAPITAL CONTRIBUTION

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. The City Manager, or designee, is hereby authorized to execute an amendment and assignment of the Capital Contribution Agreement among the City, 200 Marina Blvd, LLC, the owner of the Doubletree Hotel located at the Berkeley Marina, and Apollo Bright, LLC pursuant to which 200 Marina Blvd, LLC will assign its obligations under the agreement to its parent company, Apollo Bright, LLC and the parties will extend the deadline for the hotel’s payment of the \$3 million capital contribution payment. Such amendment shall be on substantially the terms set forth in Exhibit A.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

At a regular meeting of the Council of the City of Berkeley held on June 2, 2020, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Bartlett, Davila, Droste, Hahn, Harrison, Kesarwani, Robinson, Wengraf, and Arreguin.

Noes: None.

Absent: None.

FIRST AMENDMENT AND ASSIGNMENT OF  
CAPITAL CONTRIBUTION AGREEMENT

(Marina Streets Work)

THIS FIRST AMENDMENT AND ASSIGNMENT OF CAPITAL CONTRIBUTION AGREEMENT ("**First Amendment**") is made and entered into as of June \_\_, 2020 ("**Date of Amendment**"), by and among the CITY OF BERKELEY, a California municipal corporation ("**City**"), 200 MARINA BOULEVARD, BERKELEY, LLC, a Delaware limited liability company ("**200 Marina**"), and APOLLO BRIGHT LLC, a Delaware limited liability company ("**Apollo**").

RECITALS

A. On or about May 28, 2020, City, as landlord, and 200 Marina, as tenant entered into a new ground lease ("**Ground Lease**") with respect to the Berkeley Marina Doubletree Hotel replacing the prior 2008 ground lease.

B. As additional consideration for the new Ground Lease, 200 Marina and City concurrently entered into a Capital Contribution Agreement dated May 28, 2020 ("**Capital Contribution Agreement**") pursuant to which 200 Marina has agreed to make a \$3,000,000.00 Capital Improvement Contribution to the City to fund a portion of the costs of certain Marina Streets Work, as more particularly set forth therein.

C. In early 2020, a pandemic outbreak of the COVID-19 virus spread globally. In March of 2020, to prevent spread of the viral outbreak, the Alameda County Health and Human Services Department issued a shelter in place order, which has been extended through May 31, 2020. The COVID-19 outbreak has caused extensive economic disruption, including delays to the City's Marina Streets Work project and temporary shutdown of the Doubletree Hotel.

D. In light of the ongoing COVID-19 public health crisis, 200 Marina has requested that City delay the timing of the required Capital Improvement Contribution to match the current anticipated timing of the City's Marina Streets Work project and allow 200 Marina to assign its obligation to make such Capital Improvement Contribution payments to 200 Marina's parent company, Apollo. City is willing to allow such an extension and assignment on the condition (i) that 200 Marina acknowledge and confirm that any uncured default by Apollo under the Capital Contribution Agreement as so assigned will also constitute a default by 200 Marina under the Ground Lease, and (ii) that Apollo deliver an irrevocable standby letter of credit securing its obligation to make such payments.

E. City, 200 Marina and Apollo desire by this First Amendment to (i) provide for assignment and assumption of the Capital Contribution Agreement by 200 Marina to Apollo, (ii) confirm that an uncured default by Apollo under the Capital Contribution Agreement, as so assigned, will also constitute a default by 200 Marina under the Ground Lease per the terms of Section 14.1D. thereof; (iii) extend the date by which

Apollo must make the required Capital Improvement Contribution, (iv) require Apollo to deliver to City an irrevocable standby letter of credit as security for Apollo's payment obligation, and (v) make certain other amendments to the Capital Contribution Agreement, as all set forth below.

NOW, THEREFORE, in consideration of the foregoing recitals and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, City, 200 Marina and Apollo hereby agree as follows:

A G R E E M E N T

1. Recitals; Capitalized Terms. The foregoing recitals are incorporated by reference into this First Amendment. Capitalized terms used herein and not otherwise defined shall have the meanings given to such terms in the Capital Contribution Agreement.

2. Assignment and Assumption. 200 Marina hereby transfers and assigns to Apollo all rights and obligations of 200 Marina under the Capital Contribution Agreement as amended by this First Amendment. Apollo hereby accepts such assignment and assumes the obligations of 200 Marina under the Capital Contribution Agreement as so amended. City hereby consents to the foregoing assignment and assumption and releases 200 Marina from its obligations under the Capital Contribution Agreement. From and after the Date of Amendment, all references in the Capital Contribution Agreement to "200 Marina" will be deemed to refer to "Apollo".

3. 200 Marina Acknowledgments and Waivers. 200 Marina acknowledges and agrees that the rights of City, as landlord, under the Ground Lease, including City's right under Section 14.D. of the Ground Lease to declare a default under the Ground Lease as a result of Apollo's failure to timely pay the Capital Improvement Contributions to City per the terms of the Capital Contribution Agreement, as amended hereby, shall in no way be affected by (a) the release or discharge of Apollo in any creditor proceeding, receivership, bankruptcy or other similar proceeding, (b) the impairment, limitation or modification of the liability of Apollo or of any remedy for the enforcement of Apollo's liability, resulting from the operation of any present or future provision of Title 11 of the United States Code, as amended, or any other statute or proceeding affecting creditors' rights generally, (c) the rejection or disaffirmance of Apollo's payment obligations or any portion thereof in any such proceeding, or (d) the cessation, from any cause whatsoever, whether consensual or by operation of law, of the liability of Apollo to City under the Capital Contribution Agreement as amended hereby. 200 Marina waives any right to require City to proceed against Apollo or any other party, proceed against or exhaust any letter of credit security held City, or pursue any other remedy in City's power whatsoever. 200 Marina waives any defense arising by reason of any disability or other defense of Apollo, or by reason of the cessation from any cause whatsoever of the liability of Apollo.

4. Representations and Warranties of Apollo. Apollo represents and warrants to City as follows:

a. Apollo is duly organized and validly existing under the laws of Delaware and qualified to do business under the laws of California.

b. Apollo has the legal power, right and authority to enter into this First Amendment and to assume the obligations of 200 Marina under the Capital Contribution Agreement as amended hereby. All requisite action (corporate, company, partnership or otherwise) has been taken by Apollo in connection with the entering into of this First Amendment, and the consummation of the assignment and assumption set forth herein. Except as provided herein, no consent of any partner, shareholder, creditor, investor, judicial or administrative body or other party is required. The individuals executing this First Amendment on behalf of Apollo have the legal power, right and actual authority to bind Apollo to the terms and conditions hereof. The Capital Contribution Agreement as amended by this First Amendment is a valid, legally binding obligations of and enforceable against Apollo in accordance with its terms, subject only to applicable bankruptcy, insolvency, reorganization, moratorium laws or similar laws or equitable principals affecting or limiting the rights of contracting parties generally.

c. No attachments, execution proceedings, assignments for the benefit of creditors, insolvency, bankruptcy, reorganization or other proceedings are pending or, to Apollo's knowledge, threatened against Apollo, nor are any of such proceedings contemplated by Apollo.

5. Amendment of Section 3. Section 3 of the Capital Contribution Agreement (Payment of Capital Improvement Contribution) is hereby amended and restated in its entirety to read as follows:

**“3. Payment of Capital Improvement Contribution; Letter of Credit Security.**

(a) 200 Marina shall pay City the sum of Three Million and no/100th Dollars (\$3,000,000.00) (“**Capital Improvement Contribution**”) as consideration for City’s agreement to enter into the Ground Lease which extends the term of the 2008 Ground Lease. The Capital Improvement Contribution shall be payable in two installments as follows: 200 Marina shall pay City the first installment in the amount of Three Hundred Seventy-Five Thousand and no/100 Dollars (\$375,000.00) on or before October 30, 2020. 200 Marina shall pay City the second installment in the amount of Two Million Six Hundred Twenty-Five Thousand and no/100 Dollars (\$2,625,000.00) within three (3) business days after City’s written demand therefor, which shall be made no earlier than January 20, 2021, and shall be accompanied by City’s written certification that City has selected a general contractor to perform the Marina Streets Work and is ready to enter into a construction contract with the contractor for such work.

(b) Concurrently with its execution of this First Amendment, 200 Marina shall deliver to City an unconditional, irrevocable standby letter of credit (“**Letter of Credit**”) in an amount equal to Three Million and no/100 Dollars (\$3,000,000.00). The Letter of Credit shall be substantially in the form of Exhibit 2 attached hereto

and incorporated herein and shall be issued by Industrial and Commercial Bank of China USA NA or another US chartered national bank with offices in the San Francisco Bay Area acceptable to City in its reasonable discretion. The Letter of Credit shall serve as security for the performance of 200 Marina's obligation to pay the Capital Improvement Contribution as provided herein. The Letter of Credit shall be renewed, or a new Letter of Credit on the same terms shall be delivered to City, at least thirty (30) days prior to its expiration, until the Letter of Credit is no longer required to be posted by 200 Marina or is required to be returned to 200 Marina by City. Following 200 Marina's timely payment of the first installment of the Capital Improvement Contribution, 200 Marina may cause the principal amount of the Letter of Credit to be reduced to equal the remaining unpaid balance of the Capital Improvement Contribution."

6. Amendment of Exhibit 1 (Marina Streets Work Schedule). Exhibit 1 to the Capital Contribution Agreement is hereby deleted and replaced with Exhibit 1-A attached hereto and incorporated herein.

7. Amendment of Subsection 7(b) (Force Majeure). Subsection 7(b) of the Capital Contribution Agreement is hereby amended and restated in its entirety to read as follows:

"(b) Force Majeure. Except as to 200 Marina's obligation to pay the Capital Improvement Contribution which shall not be subject to enforced delay, subject to the limitations set forth below, performance by either party hereunder shall not be deemed to be in default, and all performance and other dates specified in this Capital Contribution Agreement shall be extended, where delays are due to: war; insurrection; strikes; lockouts; riots; floods; earthquakes; fires; casualties; acts of God; acts of the public enemy; epidemics; quarantine restrictions; freight embargoes; governmental restrictions or priority; unusually severe weather; acts or omissions of the other party; or acts or failures to act of any public or governmental agency or entity (other than the acts or failures to act of City which shall not excuse performance by City). An extension of time for any such cause shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if notice by the party claiming such extension is sent to the other party within 30 days of the commencement of the cause. Times of performance under this Capital Contribution Agreement may also be extended in writing by the mutual agreement of City and 200 Marina."

8. Addition of New Section 8. A new Section 8 is hereby added to the Capital Contribution Agreement to read as follows:

**"8. Default and Remedies**. Any failure by Apollo to perform fully and timely under this Agreement, or (ii) any representation or warranty made by Apollo under this Agreement, as amended, proves to have been incorrect or misleading in any material respect when made, shall constitute an event of default ("**Event of Default**") hereunder. Upon the occurrence of an Event of Default hereunder, City may exercise any and all remedies available to it under

this Agreement, at law and in equity, including, without limitation, City’s right to draw down the Letter of Credit.”

9. Addition of New Section 9. A new Section 9 is hereby added to the Capital Contribution Agreement to read as follows:

“9. **Notices.** Any notice, demand or other communication required or permitted hereunder shall be in writing and, unless otherwise specified herein, shall be (i) personally served, (ii) deposited in the mail, registered or certified, return receipt requested, postage prepaid, (iii) delivered by reputable overnight courier service, or (iv) transmitted by hand delivery, addressed as set forth below or to such other address as such party shall have specified most recently by written notice. Any notice or other communication required or permitted to be given hereunder shall be deemed effective (a) upon personal service or hand delivery, (b) on the third business day following the date of mailing by certified mail, fully prepaid, or (c) on the next business day if sent by overnight courier. The addresses for such communications shall be:

Apollo: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

City: City of Berkeley  
2180 Milvia Street  
Berkeley, California 94704  
Attention: City Manager  
Telephone: (510) 981-7000  
Facsimile: (510) 981-7099

With a copy to:

City of Berkeley  
2180 Milvia Street  
Berkeley, California 94704  
Attention: City Attorney  
Telephone: (510) 981-6991  
Facsimile: (510) 981-6960

10. Ratification of Capital Contribution Agreement. The Capital Contribution Agreement, as amended by this First Amendment, is hereby ratified, confirmed and approved in all respects. In the event of any inconsistency between the provisions of this First Amendment and the provisions of the Capital Contribution Agreement, the provisions of this First Amendment shall govern.

11. Entire Agreement. This First Amendment, together with the Capital Contribution Agreement and Ground Lease, sets forth the entire understanding of the

parties with respect to the subject matter hereof. There are no agreements between City, 200 Marina and Apollo other than those set forth in writing and signed by the parties. Neither party hereto has relied upon any understanding, representation or warranty not set forth herein, either oral or written, as an inducement to enter into this First Amendment.

12. Successors and Assigns. The provisions contained herein shall bind and inure to the benefit of the heirs, representatives, successors and assigns of the parties hereto.

13. Execution. By their signatures below, each person executing this First Amendment represents that he or she has the authority to execute this First Amendment and to bind the party on whose behalf the execution is made.

IN WITNESS WHEREOF, this First Amendment is made as of the day and year first above written.

**200 MARINA:**

200 MARINA BOULEVARD, BERKELEY, LLC, a Delaware limited liability company

By: Junson Assets Management, LLC, a Delaware limited liability company

Its: Manager

By: \_\_\_\_\_  
Bingdong Zhao

Its: Manager

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

**APOLLO BRIGHT, LLC**, a Delaware limited liability company

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

Print Name: \_\_\_\_\_

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

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

**CITY:**

CITY OF BERKELEY, a public body corporate and politic

By: \_\_\_\_\_  
Dee Williams-Ridley  
City Manager

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

**Approved as to form:**

\_\_\_\_\_  
Farimah Brown, City Attorney

**Registered by:**

\_\_\_\_\_  
Jenny Wong, City Auditor

**Attest:**

\_\_\_\_\_  
Mark Numainville, City Clerk

EXHIBIT 1-A

**MARINA STREET WORKS SCHEDULE**

This project report will be updated monthly and posted to the City's website at <https://www.cityofberkeley.info/MeasureT1Updates.aspx>.



[LETTERHEAD]

EXHIBIT 2

**FORM OF IRREVOCABLE STANDBY LETTER OF CREDIT**

\_\_\_\_\_  
[Name of Issuing Bank]  
\_\_\_\_\_  
[Address]  
\_\_\_\_\_  
[Address]

\_\_\_\_\_  
[Date]

IRREVOCABLE STANDBY LETTER OF CREDIT

BENEFICIARY: City of Berkeley  _____ _____ Attn: _____	APPLICANT: Apollo Bright, LLC  _____ _____ Attn: _____
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LETTER OF CREDIT NUMBER: \_\_\_\_\_

INITIAL EXPIRY DATE: June \_\_, 2021

AMOUNT: USD THREE MILLION NO/100 Dollars (\$3,000,000.00)

We hereby issue this irrevocable standby letter of credit available by payment by draft(s) drawn at sight on \_\_\_\_\_ Bank and accompanied by a certificate signed by the City Manager or other authorized representative of the Beneficiary indicating either (1) or (2) below:

(1) "This certifies that the City of Berkeley ("City") has properly made demand upon Apollo Bright, LLC ("Applicant") for amounts payable by Applicant to the City under that certain Capital Contribution Agreement dated May \_\_, 2020, as amended and assigned by the First Amendment and Assignment of Capital Contribution Agreement dated June \_\_, 2020, by and among City, 200 Marina Boulevard, Berkeley, LLC, and Applicant (as amended and assigned, the "Agreement") and that Applicant has failed to pay such amounts to the City within the required time period."

OR

(2) "This certifies that the City of Berkeley ("City") has received notice from \_\_\_\_\_ Bank that letter of credit number \_\_\_\_\_ will not be extended beyond its current expiration date and that the amount of the draft accompanying this certificate does not exceed the amounts payable by 200 Marina Boulevard, Berkeley, LLC ("Applicant") under that certain Capital Contribution Agreement dated May \_\_, 2020, as amended and assigned by the First Amendment

and Assignment of Capital Contribution Agreement dated June \_\_\_\_, 2020, by and among City, 200 Marina Boulevard, Berkeley, LLC, and Applicant (as amended and assigned, the "Agreement")."

Beneficiary is to return the original letter of credit to \_\_\_\_\_ Bank after Applicant's payment, in full, of all amounts payable by Applicant as set forth in the Agreement.

Drafts drawn under this letter of credit must bear the clause: "Drawn under \_\_\_\_\_ Bank Irrevocable Standby Letter of Credit Number \_\_\_\_\_." Partial and multiple drawings are allowed. Beneficiary must approve any reductions in the amount of this letter of credit if any such reduction request is submitted to our bank by Applicant.

This letter of credit initially expires on June \_\_\_\_, 2021, but shall be automatically extended, without amendment, for consecutive one (1) year periods unless we have provided written notice to you by courier at your address above that we elect not to renew this letter of credit beyond the date specified in the notice, which date shall be at least thirty (30) calendar days after the date of the notice.

Each draft and certificate presented hereunder shall be dated the date of its presentation and each such draft and certificate shall be presented at the \_\_\_\_\_ Bank office as stated below and shall be presented on a business day. We hereby engage with you that documents drawn in compliance with the terms of this letter of credit will be duly honored upon presentation to us at \_\_\_\_\_ on or before the close of business on the expiration date, as such date may be automatically extended as provided above. Payment against a complying presentation shall be made within three business days after presentation at the place for presentation or by wire transfer to a duly requested account of Beneficiary.

To the extent not inconsistent with the express terms of this letter of credit, this letter of credit shall be governed by, and construed in accordance with, the International Standby Practices 1998, ICC Publication No. 590.

\_\_\_\_\_ BANK

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

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