

ORDINANCE 2021-02

AN ORDINANCE OF THE CORPORATION OF HARPERS FERRY AUTHORIZING THE MAYOR AND/OR RECORDER TO EXECUTE NECESSARY DOCUMENTS TO SELL EAST RIDGE STREET (Paved – 50’ ROW), COLUMBIA STREET (Paved – 30’ ROW), COLUMBIA STREET (Paper – 30’ ROW), LANCASTER STREET, NORTH (Paper – 30’ ROW), LANCASTER STREET, SOUTH (Paper – 30’ ROW), AND EAST RIDGE STREET (Paper – 50’ ROW) LOCATED AND SHOWN ON EXHIBIT A TO SWaH HILL TOP OPERATING PARTNERS, LLC.

WHEREAS, The Corporation of Harpers Ferry is a municipal corporation established under the Constitution and laws of the State of West Virginia; and

WHEREAS, West Virginia Code § 8-12-18(b) permits municipalities to sell real or personal municipal property for fair and adequate consideration, only at public auction;

WHEREAS, pursuant to W. Va. Code § 8-1-5a The Corporation of Harpers Ferry made application to the West Virginia Municipal Home Rule Board to become a Home Rule City; and

WHEREAS, The Corporation of Harpers Ferry was accepted into the Municipal Home Rule Pilot Program; and

WHEREAS, pursuant to the authority granted to the Town by its acceptance into the Municipal Home Rule Pilot Program, Phase II, the Town enacted an ordinance to be exempt from the above-stated requirements set forth in West Virginia Code § 8-12-18(b)-(c).

WHEREAS, pursuant to Section 114.01, The Corporation of Harpers Ferry may sell its real or personal property valued in excess of \$1,000.00 for fair market value to private purchasers, without public auction, provided that Town council has made a factual determination

that the property is to be used to facilitate specific economic development projects and/or to provide a specific necessary and convenient resource for the benefit of the citizenry; and

WHEREAS, The Town Council of the Corporation of Harpers Ferry finds that the sale of the subject property to SWaN Hill Top Operating Partners, LLC will be used to facilitate the economic development project and encourage the development, construction and operation of the Hill Top House Hotel: and

WHEREAS, The Town Council of the Corporation of Harpers Ferry finds that it is in the best interest of the public to sell the subject real property; and

NOW, THEREFORE BE IT ORDAINED BY THE TOWN COUNCIL OF THE CORPORATION OF HARPERS FERRY: pursuant to the authority granted to the Town by its acceptance into the Municipal Home Rule Pilot Program, Phase II, and the provisions of Article 114 of the Codified Ordinances of the Corporation of Harpers Ferry:

Section 1. The Corporation of Harpers Ferry is hereby authorized, pursuant to the authority granted to the Town by its acceptance into the Municipal Home Rule Pilot Program, Phase II, and the provisions of Article 114 of the Codified Ordinances of the Corporation of Harpers Ferry to sell to SWaN Hill Top Operating Partners, LLC under the following terms and conditions:

The Corporation of Harpers Ferry (the “Town”) and SWaN Hill Top Operating Partners, LLC (collectively, with its assigns and successors, “SWaN,” and collectively with the Town, the “Parties”), dated as of February 26, 2021, is the agreement between the Parties for the acquisition of certain real property by SWaN from the Town (the “Agreement”) to encourage the development, construction and operation of the Hill Top House Hotel (the “Hotel”) by SWaN within the corporate limits of the Town (the “Hotel Project”) as

reflected on the Gordon TDD Map attached as Exhibit B and further defined herein.

Pursuant to the terms of this Agreement, the Town will convey the following parcels of real property by **Special Warranty Deed** to SWaN as more fully described in Exhibit A “Streets and Properties for SWaN Street Use Agreement with Harpers Ferry” attached hereto and incorporated herein by reference:

- A. EAST RIDGE STREET (Paved – 50’ ROW)
Sales Price \$86,400
- B. COLUMBIA STREET (Paved – 30’ ROW)
Sales Price \$28,200
- C. COLUMBIA STREET (Paper – 30’ ROW)
Sales Price \$26,400
- D. LANCASTER STREET, NORTH (Paper – 30’ ROW)
Sales Price \$20,700
- E. LANCASTER STREET, SOUTH (Paper – 30’ ROW)
Sales Price \$27,300
- F. EAST RIDGE STREET (Paper – 50’ ROW)
Sales Price \$68,300

G. Collectively, these parcels of real property are referred to herein as the “Streets.” The aggregate (\$257,300) of the Sales Price for each of the Streets is referred to herein as the “Purchase Price,” which the Town has determined to be the Fair Market Value for the conveyance of all of the Streets to SWaN, along with the other consideration provided for herein.

The Streets shall be delivered by the Town to SWaN contemporaneously with the receipt of the above-referenced Purchase Price.

As a result of the Notice of Litigation which has been filed against the West Virginia Development Office contesting the validity of the Tourism Development District Act, SWaN has no assurance that construction may proceed in a reasonable time frame. Accordingly, the Town shall agree that the Purchase Price for the Streets paid by SWaN to the Town shall be escrowed until such time as all litigation over the TDD is resolved and SWaN commences operation of the Hotel. Notwithstanding any provision of this Agreement to the contrary, in the event that such litigation is filed and SWaN elects to cancel the Hotel Project at any time during the pendency of such litigation, upon notification of such decision by SWaN to the Town, the Town shall return the entire Purchase Price to SWaN and the Streets shall revert back to the Town.

In addition to the payment of the Purchase Price, the conveyance of the Streets shall be conditioned by the following restrictions:

1. SWaN in perpetuity shall not build any permanent structures on the surface of the Streets. This restriction does not include landscaping, either vegetative or hard surface, or stone or brick walls which do not exceed three feet in height, or any parking structure, utilities or other necessary appurtenance constructed below the surface of the Streets.
2. SWaN in perpetuity shall not provide, or permit any sub-lessee, franchisee, or licensee to operate, any form of gambling including but not limited to table games, video lottery machines or organized sportsbook anywhere on the Hotel Property, defined as the real property within the TDD boundary shown on the Map titled “Hill Top House Hotel Tourism Development District” by Gordon DC, dated February 26, 2021, attached hereto as Exhibit B and incorporated herein by reference (hereinafter, “Gordon TDD Map”).
3. SWaN in perpetuity agrees not to subdivide, abrogate, or sell the Streets separately from the other real property comprising the Hotel Property.
4. The Town, in perpetuity, reserves all existing public utility easements for potable water and stormwater through the Streets.
5. The conveyance of the Streets to SWaN is subject to a reversionary clause providing that the Streets shall revert back to the Town if construction of the Hotel is not substantially completed by December 31, 2030, unless the Town or its officials are responsible for the project delay.
6. In the event that the subject reversionary clause in Paragraph 5, directly above, is exercised, the Town will retain the Purchase Price for the Streets.

ADDITIONAL CONSIDERATION

As further consideration for the conveyance of the Streets to SWaN, the Town and SWaN agree as follows:

1. SWaN shall grant a conservation easement prohibiting development upon the steep slope portion of the Lancaster Street, South (paper) Right of Way, south of the Armory House. SWaN shall in perpetuity be responsible for the maintenance of the conservation easement. SWaN may, however, install and maintain all such underground utilities as it shall deem necessary.

2. SWaN shall grant a conservation easement upon the steep slope portion of the East Ridge Street (paper) Right of Way, providing an open viewshed to the public. SWaN shall in perpetuity be responsible for the maintenance of the conservation easement. SWaN may, however, install and maintain all such underground utilities as it shall deem necessary.
3. SWaN shall grant a conservation easement upon the steep slope portion of the Columbia Street (paper) Right of Way, providing an open viewshed to the public. SWaN in perpetuity shall be responsible for the maintenance of the conservation easement. SWaN may, however, install all such underground utilities as it shall deem necessary.
4. SWaN shall grant a 24/7 pedestrian easement on the “paper” portion of Columbia Street Right of Way, for the public. SWaN shall design, build, and maintain, in perpetuity, this scenic viewpoint in a park like setting and attempt to expand the footprint of the viewing area to: offer maximum views of the river and mountain ridge, be harmonious with the natural surroundings, be ecologically sensitive and minimize the impact of construction. SWaN shall submit designs of the scenic viewpoint to the Town Recorder for non-binding public review and comment, which submission will include files that are fully illustrated and may be made publicly available electronically. All comments shall be provided to SWaN within fourteen (14) days of submission of the designs to the Town Recorder by SWaN. SWaN shall have the right to restrict such access to the public for reasons of security, life-safety, maintenance, or excessive noise/disturbances. SWaN shall provide the Town Recorder with at least 24-hour notice of the intent to restrict access when practicable.
5. SWaN in perpetuity shall design, build and maintain a new overlook scenic viewpoint with a flagpole near the current elevation and location (located on the existing East Ridge Street Paper Right of Way) with similar landscaping which: maintains an intimate and secluded experience that is similar to what is currently in place at the overlook, maintains the scenic viewpoint near its current location, is in keeping with the historic nature of the Town, and offers maximum views of the confluence of the rivers and mountain ridge, all in a manner harmonious with nature, ecologically sensitive and minimizing the impact of construction on the land. SWaN shall submit designs of the overlook to the Town Recorder for non-binding public review and comment, which submission will include files that are fully illustrated and may be made publicly available electronically. All comments shall be provided to SWaN within fourteen (14) days of submission of the plans to the Town Recorder by SWaN. SWaN in perpetuity shall grant a 24/7 pedestrian easement, with ADA-compliant access to the overlook, open to the

public as provided, however, SWaN shall have the right to restrict such access to the public for reasons of security, life-safety, maintenance, or excessive noise/disturbances. SWaN shall provide the Town Recorder with at least 24-hour notice of the intent to restrict access when practicable.

6. SWaN in perpetuity shall conserve and promote the planting and maintenance of native and/or native hybrid tree and plant species wherever and whenever possible and shall not intentionally introduce invasive species into the landscape. This restriction will not be applicable to a “chef’s garden” that will be used for the preparation of food and meals within the Hotel Property. Said “chef’s garden” shall be maintained in a way to prevent the non-native plants from being introduced into the native landscape.

7. SWaN shall operate the Hotel in a manner to abide by acceptable noise levels, as prescribed by Harpers Ferry Ordinance Article 527 in effect as of January 1, 2021 and attached hereto as Exhibit C and incorporated herein by reference, for the mutual benefit of hotel guests and the neighboring residential community, along the western edge of the TDD, with the exception of July 4th, New Year’s Eve, Federal holidays and five other evening events per year as designated by SWaN. Otherwise, SWaN shall operate the Hotel in a manner that noise shall not exceed 75dB to be measured along the northern, southern, and eastern boundaries of the proposed TDD, as shown on the Gordon TDD Map, after 11:00 p.m., prevailing time, with the exceptions of New Year’s Eve, Fourth of July, Federal Holidays and five other evening events per year as designated by SWaN.

8. SWaN in perpetuity agrees to the following covenants with respect to Lot 31 as reflected on the Gordon TDD Map:

a) SWaN shall agree to design, build, and maintain a switchback trail for pedestrian access to the Promontory Overlook which shall supplement the East Ridge access on either Lot 31 or other real property which permits access to the “Lower Town,” as SWaN shall determine in its sole discretion (either option hereinafter referred to as the “Trail”), for the most part in the style proposed and presented in the 2018 Concept Plan (hereinafter defined), upon satisfaction of the following precedents:

1. The one-year anniversary of the commencement of operations at the Hotel;

2. Receipt by SWaN of an up to \$125,000 cash contribution by the Town towards up to 50% of the cost of design and construction of the Trail, not to exceed \$250,000.00;

3. A determination by SWaN that the total cost of design and construction of the Trail shall not exceed \$250,000, including the Town's cash contribution up to \$125,000.00; and
4. SWaN shall provide the Town with a dawn to dusk pedestrian easement for the Trail, provided that SWaN shall have the authority to restrict such public access for reasons of security, life safety, maintenance, or excessive noise/disturbance. SWaN shall provide the Town Recorder with at least 24-hour notice of the intent to restrict access when practicable.
5. Except as provided herein, SWaN in perpetuity shall agree to prohibit any permanent structures on the surface of Lot 31 with the goal of maintaining a conservation easement. This restriction does not include landscaping, both vegetative and hard surfaces, footbridge, or stone or brick walls which do not exceed three feet in height, or wing walls. SWaN may also, however, install and maintain all such underground utilities as it shall deem necessary.
6. SWaN in perpetuity shall agree not to subdivide, abrogate, or sell Lot 31 separately from the other real property comprising the Hotel Property.
7. SWaN in perpetuity shall grant a conservation easement upon Lot 31, provided however, that the construction, operation and maintenance of the Trail, any landscaping, both vegetative and hard surfaces, provided in paragraph 8.b. above, and any underground utilities shall be expressly permitted. SWaN in perpetuity will be responsible for the maintenance of the conservation easement on Lot 31, including the Trail if built.
8. SWaN in perpetuity shall conserve and promote the planting and maintenance of native tree and plant species wherever and whenever possible and will not intentionally introduce invasive species into the landscape.
9. SWaN in perpetuity agrees to the following covenants with respect to Lots 14 and 16 as reflected on the Gordon TDD Map:
 - a. SWaN in perpetuity shall construct a realigned Columbia Street, similar in the design and manner proposed and presented in the 2018 Concept Design Plan and Conceptual LEP (collectively, the "2018 Concept Plan"), with all traffic to the Hotel (with exception for emergency vehicles) directed to use the realigned Columbia Street and to stay off of the residential section of East Ridge Street. The realigned Columbia Street shall be well maintained by SWaN in perpetuity.

- b. SWaN in perpetuity shall agree to prohibit any above ground permanent structures on Lot 14. This restriction does not include landscaping, either vegetative or hard surface, or stone or brick walls which do not exceed three feet in height.
- c. SWaN in perpetuity agrees not to sell Lot 14 and 16 separately from the other real property comprising the Hotel Property.
- d. SWaN shall grant in perpetuity a public access easement for vehicular traffic to use the realigned Columbia Street.
- e. SWaN in perpetuity shall agree that western boundary of Lot 14 shall be heavily landscaped as a natural, park-like setting, to create a buffer between the Hotel Property and the residential area. Lot 14 shall be landscaped with heritage, native or improved native hybrid plants species wherever and whenever practicable and shall not intentionally introduce any invasive species.
- f. SWaN may install and maintain all such underground utilities as it shall deem necessary under Lots 14 and 16.

OTHER CONDITIONS AGREED TO BY SWAN

- 1. SWaN to the extent physically, architecturally, mechanically, operationally, and financially practicable, shall agree to construct the Hotel Project for the most part as proposed and presented in the 2018 Concept Plan.
- 2. SWaN agrees to pay fees for metes & bounds descriptions of street conveyances and all associated reasonable closing costs that cannot exceed 5% of Purchase Price and an additional twenty-five thousand dollars for professional fees provided, however, SWaN will not reimburse the Town for legal fees related to the lawsuit threatened against the West Virginia Development Office with respect to the Tourism Development District Act.
- 3. SWaN shall agree to ensure that the historic armory houses listed on the National Register of Historic Places are rehabilitated and maintained in a manner so as to retain those historic designations and further agrees to architecturally restore the exterior of the historic double armory house.
- 4. SWaN shall agree to adhere to a lighting policy driven by Leadership in Energy and Environmental (LEED) guidelines for light pollution in effect as of January 1, 2021, that promotes the preservation of the night sky, restricts nighttime light pollution to the extent possible, minimizes light trespass from the building and site, reduces sky-glow to increase night sky visibility, improves nighttime visibility through glare reduction, reduces impact from

lighting on nocturnal environments, and reduces the consequences of impact on wildlife and people, including possibly implementing lighting restrictions after certain hours, within the ability of SWaN to provide for the safety and security of hotel guests and/or property.

5. SWaN shall agree, to the extent possible, to limit deliveries to normal business hours promoting early-morning and late-night quiet hours.

6. SWaN shall agree to replace the existing stone wall on Columbia Street along Lot 17 on the Gordon TDD Map if such wall must be either partially or wholly moved for the realigned Columbia Street along the new property boundary. Such replacement shall be in the same style as the existing stone wall. Swan shall, to the extent practicable, preserve the landmark historic pecan tree.

7. SWaN shall delineate historic existing Columbia Street with special landscaping and special paving and pave the realigned new Columbia Street on Lot 16 and Lot 17 as shown on the Gordon TDD Map differently so there is a distinct difference between the two, providing a physical recognition of the historic street grid.

8. SWaN shall require that any excavation or construction contractor working on the Hotel shall carry sufficient liability insurance to cover damage to surrounding properties from construction and excavation.

9. SWaN shall work with the Town during the construction of the Hotel Project to comply with Appendix B Part 13 of the Codified Ordinance of the Town in effect as of January 1, 2021, to the extent possible, pursuant to the highlighted text in Appendix B sections titled Requirements Of The Site Logistics Plan, Standards For The Maintenance Of The Project Site, Permitted Hours For Exterior Work., Standards For Compliance With Local, State, And Federal Regulations, Standards For Compliance With Local Safety Requirements and Standards for the Preservation of Trees, attached hereto as Exhibit D and incorporated herein by reference, and/or as mutually agreed upon.

10. SWaN agrees that, if Lots 3,4 and 17 as shown on the Gordon TDD Map are no longer utilized in connection with the Hotel they will revert to a residential use.

11. SWaN agrees to not expand the hotel project beyond the proposed TDD boundary as reflected on the Gordon TDD Map attached as Exhibit B.

12. SWaN agrees that, in the absence of an express written irrevocable offer of public dedication of such property to such use, made by SWaN in the manner prescribed by law, which has been accepted by the county, city, or other public body to which SWaN made the offer of dedication, no use of the easements by the public under and after the effective date of this Agreement shall ever ripen to constitute a dedication or confer upon the public or any

governmental body or unit a vested right to its use the easements in a manner inconsistent with SWaN's right of dominion and control of the same except to the extent provided in this Agreement.

OTHER CONDITIONS AGREED TO BY THE TOWN

1. The Town and SWaN shall, in perpetuity, maintain casualty and liability insurance in amounts not less than \$1,000,000 per event, \$3,000,000 in aggregate, for all public access to any portion of the Hotel Property through easements provided for in this Agreement. The Parties agree to name the other as an "additional insured" under all such policies of insurance.

2. The Town shall, as a condition precedent to the effectiveness of the covenants and representations in this Agreement, convey good and marketable title to the Streets to SWaN and all covenants and representations of SWaN are contingent upon conveyance of such good and marketable title. If the Town does not convey good and marketable title to each of the Streets to SWaN, this Agreement, and all covenants and representations herein, shall immediately be void.

3. This Agreement, together with all attachments hereto, constitutes the entire agreement of the Parties hereto and cannot be amended or varied without the express written agreement of the Parties.

4. This Agreement shall be governed and construed according to the laws of the State of West Virginia.

5. This Agreement and the terms and provisions hereof shall inure to the benefit of and be binding upon the Parties hereto and their respective legal representatives, successors and assigns wherever the context so requires or admits.

6. All representations, warranties, covenants and agreements of the Parties contained herein, or made in writing in connection herewith, shall, with respect to the Streets, survive the conveyance of the Streets, to the extent not merged therein.

Section 2. The Mayor and/or Recorder is hereby authorized and directed to enter a contract, attend closing thereon and execute all other documents as may be required or appropriate to accomplish the above purpose.

Introduced:

Adopted:

Mayor

Attest:

Recorder