




DATE SUBMITTED 10/19/2021
 SUBMITTED BY ACM
 DATE ACTION REQUIRED 10/25/2021

COUNCIL ACTION (X)
 PUBLIC HEARING REQUIRED ()
 RESOLUTION ()
 ORDINANCE 1ST READING ()
 ORDINANCE 2ND READING ()
 CITY CLERK'S INITIALS ()

**IMPERIAL CITY COUNCIL
 AGENDA ITEM**

SUBJECT: DISCUSSION/ACTION: NORTHPOINT HOTEL DEVELOPMENT 1. APPROVAL OF TRANSIENT OCCUPANCY TAX SHARING AGREEMENT BETWEEN CITY OF IMPERIAL AND GAFCON, INC.	
DEPARTMENT INVOLVED: City Manager's Office	
BACKGROUND/SUMMARY: Whereas the City of Imperial has concluded negotiations with Gafcon regarding the Northpoint Hotel Development located at the corner of Neckel Road and SR 86 in the City of Imperial. The terms of the agreement shall be for a cost sharing (not to exceed) \$5.2 million over 20 years. The City has specified that the hotel must operate as a full service, upscale, nationally recognized brand with amenities including a restaurant and bar, meeting rooms, a fitness center, a marketplace and an indoor pool as a minimum standard. According to an independent analysis, the \$22 million-dollar project will generate \$4 million in sales tax revenue and create over 600 jobs at the start of construction, with 275 of those being permanent. Attached for your review, please see the agreement and exhibits.	
FISCAL IMPACT: \$5.2 million of independently generate TOT over the term of 20 years.	ADMIN SERV INITIALS <u></u>
STAFF RECOMMENDATION: Staff recommends approval of the agreement, contingent on Gafcon meeting the terms and conditions as presented.	DEPT. INITIALS <u></u>
MANAGER'S RECOMMENDATION: Consider approval of transient occupancy tax "TOT" agreement which shares TOT paid by hotel guests and establishes upscale hotel.	CITY MANAGER'S INITIALS <u></u>
MOTION:	
SECONDED:	
AYES:	APPROVED ()
NAYES:	DISAPPROVED ()
ABSENT:	REFERRED TO:
	REJECTED () DEFERRED ()

TRANSIENT OCCUPANCY TAX SHARING AGREEMENT

This Transient Occupancy Tax Sharing Agreement (“**Agreement**”) is entered into as of October 25, 2021 (the “**Effective Date**”), by and between the **City of Imperial** (“**City**”), a California municipal corporation, and **Gafcon, Inc.**, a California Corporation (including its successors and assigns, “**Owner**”) (collectively referred to herein as the “**Parties**”), with reference to the following:

RECITALS

A. Owner is the owner in escrow of a fee interest in certain real property identified by Imperial County Assessor Parcel Nos. 063-010-023 and 063-010-065 (“**Property**”);

B. Owner has obtained entitlement approvals to redevelop an existing abandoned 108 key (approximate) hotel on the Property (the “**Project**”), which is expected to generate future transient occupancy tax for the City pursuant to Chapter 21, Article IV the City of Imperial Municipal Code, as the same may be amended from time to time (“**TOT**”);

C. Owner has requested City assistance with the funding of certain public right of way and other infrastructure improvements required of the Project, which are identified more particularly in Exhibit A to this Agreement (“**Improvements**”), and City has agreed to provide such assistance to Owner pursuant to a TOT sharing arrangement regarding the future TOT to be generated by the Project under the terms and conditions set forth in this Agreement;

D. The Parties recognize that the existing abandoned hotel on the Property that would be renovated by the Project constitutes a blight and the City has a strong desire and interest to see this blight resolved through the construction of the Project. The City also recognizes a benefit to the City in the public infrastructure Improvements proposed to be constructed by the Project. The City also has a strong interest in ensuring that the Project provide high quality construction jobs at prevailing wages for all proposed Project construction work, recognizing the current high costs of materials associated with such work;

E. This Agreement was considered and approved by the City Council of the City of Imperial (“**Council**”) at its regularly scheduled meeting on October 25, 2021 and is executed by City pursuant to the authority granted by the Council for such purpose.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, City and Owner hereby agree as follows:

1. **Sharing.** During the term of this Agreement City agrees to pay Owner in the manner set forth in Section 2, below, an amount not to exceed five million, two hundred eighty two thousand and eighty dollars and sixty eight cents (\$5,282,080.68) (“**Owner’s Amount**”).

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2. **Payment.**

a. Prior to the October 1st immediately succeeding the date upon which: (i) the Project receives a Certificate of Occupancy from City; and (ii) City receives the first transient occupancy tax payment generated by the Project (the “**Commencement Date**”), City has no obligation to make any payment on the Owner’s Amount.

b. Starting on the Commencement Date, City shall pay to Owner an amount equal to eighty-eight percent (88%) of the TOT revenue paid to City by Owner as of the Commencement Date for each of the first five (5) years of Project operations following the Commencement Date. Between the period after the first five (5) years following the Commencement Date and before ten (10) years following the Commencement Date, City shall pay to Owner an amount equal to seventy-five percent (75%) of the TOT revenue paid to City by Owner for the Project. For the period after the first ten (10) years following the Commencement Date and for so long as this Agreement remains in effect, City shall pay to Owner an amount equal to sixty-three percent (63%) of the TOT revenue paid to City by Owner for the Project. The annual date of such payment shall be October 1st, though another annual payment date may be agreed to in writing by the Parties.

c. **Increase in Rate of TOT.** The Parties acknowledge that the current rate of the TOT for the City is eight percent (8%). The Parties agree that if the rate of the TOT increases in the future beyond eight percent (8%), the TOT collected as a consequence of this increased rate of the TOT shall not be subject to or shared pursuant to this Agreement, and that the total portion of increased TOT shall be retained by the City.

3. **Payment of Transient Occupancy Taxes.** The specific and timely performance of all obligations of Owner to pay TOT under the Imperial City Code is a material part of this Agreement., and this Agreement shall not alter any provision of the Imperial City Code or the California Revenue and Taxation Code pertaining to transient occupancy taxes, and all such taxes due and payable at all times according to law. Nothing in this Agreement shall relieve Owner of its obligations to file all returns and other reports in a timely manner, and to remit the full amount of TOT payments lawfully due and payable to the City. The failure of Owner to make all TOT payments lawfully due and payable shall render this Agreement null and void, provided that City shall have first given Owner written notice of such failure and sixty (60) days opportunity to cure. Thereafter, in the event such failure has not been cured to the reasonable satisfaction of City, City shall be under no obligation to make any further payments.

4. **Term.** This Agreement shall terminate on the earlier to occur of: (i) the twentieth (20th) anniversary of the Commencement Date; or (ii) full payment by City to Owner of the Owner’s Amount (“**Expiration Date**”).

5. **Hotel Flag.** Owner shall open and operate the hotel as a full-service hotel with the features and amenities described in **Exhibit A** attached hereto (“**Minimum Hotel Standard**”). Owner shall provide written documentation on an annual basis after the Commencement Date

evidencing compliance with the Minimum Hotel Standard. If at any time after the Commencement Date and prior to the Expiration Date the Project does not meet the Minimum Hotel Standard requirement, Owner shall have a six (6) month period following the vacation from the Property of an operator meeting the Minimum Hotel Standard requirement to secure an agreement with a new operator meeting the Minimum Hotel Standard requirement, during which time the City's obligation to make payments to the Owner hereunder shall not be suspended ("Hotel Flag Cure Period"). Following the end of the Hotel Flag Cure Period, City's obligation to make any payments to Owner hereunder shall be suspended until such time as the Project subsequently achieves a Minimum Hotel Standard, and the Expiration Date shall not be extended as a result of such suspension.

6. **Unsecured Obligation.** Owner acknowledges and agrees that the payments to be made hereunder are an unsecured, special obligation of City payable only out of the TOT generated by the Project. Owner acknowledges and agrees that neither City's TOT from the Project, nor any revenues or asserts of City are, have been or will be pledged or hypothecated by City to or for payment of amounts owing under this Agreement. If and when requested by City, Owner agrees to execute and deliver to City, within five (5) business days after receipt, a certificate acknowledging that City's obligation under this Agreement is an unsecured obligation of City for which no assets or revenues of City are, have been, or will be pledged or hypothecated to or for payment.

7. **Operating Covenant.** Owner shall operate a full-service hotel on the Property in accordance with this Agreement, including without limitation Section 5, from the Commencement Date until the Expiration Date. If Owner fails to operate the Property in a manner which generates TOT (subject to temporary suspension due to government order or repair or rehabilitation of the hotel), the City shall be entitled to recover all previous payments by City to Owner hereunder up to the Owner's Amount.

8. **Default.** Upon the default by City under this Agreement, including, without limitation, a failure to make a payment within sixty (60) days after receiving written notice from Owner that such payment is due, past due amounts shall bear interest at the lesser of ten percent (10%) per annum or the maximum rate allowed by law at the time of the default. In addition, Owner shall be entitled to withhold from future TOT payments to the City any past due amounts not timely paid by City to Owner under this Agreement.

9. **Payments.** If requested by Owner, all payments made hereunder shall be made by bank wire transfer of funds to such places, accounts, and in such manner as may be designated in writing from time to time by Owner. All payments due hereunder are payable in lawful money of the United States of America.

10. **Audit of Books and Records.** Owner shall, upon no less that seventy-two (72) hours prior to a written request from City, make its books and records relating to the calculation and determination of Owner's rights and obligations under this Agreement available at no cost to City and/or its designees (including its accountants and/or attorneys) and shall direct its

accountants and other consultants and contractors in possession of its books and records to do likewise; provided, however, that nothing herein shall be deemed to abridge or constitute a waiver of Owner's right to protect sensitive financial and proprietary information from public disclosure, evidentiary rights and privileges arising pursuant to any provision of law.

11. **Authority.** Owner and City (and the undersigned representatives of each) represent that each has full power, authority and legal right to execute and deliver this Agreement and that the respective obligations hereunder constitute valid and binding obligations of Owner and City.

12. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of California.

13. **Jurisdiction and Venue.** Any legal action or proceeding concerning this Agreement shall be filed and prosecuted in the appropriate State of California court in the County of Imperial, California. Both Parties hereto irrevocably consent to the personal jurisdiction of that court. City and Owner each hereby expressly waive the benefit of any provision of federal or state law or judicial decision providing for the filing, removal, or change of venue to any other court or jurisdiction, including, without implied limitation, federal district court, due to any diversity of citizenship between City and Owner, due to the fact that City is a party to such action or proceeding or due to the fact that a federal question or federal right is involved or alleged to be involved. Owner acknowledges that the provisions of this Section 9 are a material consideration to City for its entry into this Agreement, in that City will avoid the potential cost, expense, and inconvenience of litigating in a distant forum.

14. **Assignment.** Owner may not assign, transfer, encumber or hypothecate its rights or obligations under this Agreement to any person or entity, without the express written consent of City, which shall not be unreasonably withheld.

15. **Legal Compliance.** Owner represents and warrants that it will comply with all applicable laws, ordinances, rules and regulations of any applicable governmental entity in conjunction with the performance of its obligations under the Agreement, including all California Labor Code requirements with respect to the payment of prevailing wages for construction work. City affirms that it has complied with all necessary legal obligations pursuant to entering into this Agreement including, without limitation, its obligations under California Government Code Section 53083.

16. **Indemnity Obligation.** Owner agrees to protect, defend (with counsel acceptable to the City), indemnify and hold harmless the City, its council members, officers, agents, independent contractors and employees from any and all claims, damages, penalties, losses, costs, expenses (including reasonable attorneys' fees and court costs), injuries and liabilities of every kind arising out of or caused by any of Owner's negligence, gross negligence or intentional wrong doing under this Agreement, whether such activities or performance thereof be by Owner

or anyone directly or indirectly employed by or contracted with Owner and whether such damage shall accrue or be discovered before or after commencement of construction of the Improvements, including but not limited to all claims that the benefits conferred by the City under this Agreement create a public work for prevailing wage purposes thereby requiring the payment of prevailing wages, and all claims challenging the legality, constitutionality, or enforceability of this Agreement, including but not limited to the City's authority to pay TOT amounts. The City's rights of indemnity, as expressly set forth in this Agreement, shall not depend upon the actual payment of any claim, damage, penalty, loss, cost, expense (including reasonable attorneys' fees and court costs), injury or liability sustained by Owner and/or its contractors, subcontractors, agents and/or employees.

In the event City tenders the defense and indemnification of a claim contemplated by this Agreement to Owner and/or to his/her/its contractors, subcontractors, agents and/or employees, the City shall be entitled to actively participate in the claim and/or the defense of the same, shall be authorized to select and retain its own separate independent counsel, at Owner's and/or his/her/its contractors', subcontractors', agents', and/or employees' reasonable expense, as necessary, which decision shall be made solely and exclusively by the City, and the City must consent to the disposition of any claims made, in whole or part, against the City, including but not limited to, settlement of any such claim.

17. **Relationship Between City and Owner.** It is hereby acknowledged that the relationship between the City and Owner is not that of a partnership or joint venture and that the City and Owner shall not be deemed or construed for any purpose to be the agent of the other. Accordingly, except as expressly provided herein, the City shall have no rights, powers, duties, or obligations with respect to the development, operation, maintenance, or management of the hotel. The Owner agrees to indemnify, hold harmless, and defend the City from any claim made against the City arising from a claimed relationship of partnership or joint venture between the City and the Owner with respect to the development, operation, maintenance, or management of the Property, Project, or hotel.

18. **Notices and Demands.** All notices or other communications required or permitted between City and Owner under this Agreement shall be in writing, and may be (i) personally delivered, (ii) sent by United States registered or certified mail, postage prepaid, return receipt requested, (iii) sent by electronic mail, delivery receipt requested; or (iv) sent by nationally recognized overnight courier service, and addressed To the Parties at the addresses below subject to the right of either Party to designate a different address for itself by notice similarly given.

To City:

City of Imperial
Attn: City Manager
420 South Imperial Ave.
Imperial, CA 92251
dmorita@cityofimperial.org

To Owner:

Paul Najar
General Counsel
Gafcon, Inc.
5960 Cornerstone Court West, Suite 100
San Diego, CA 92121
Email: pnajar@gafcon.com

19. **Insolvency.** This Agreement and all of City's obligations hereunder shall terminate in the event a court shall have made or entered any decree or order: (i) adjudging Owner to be bankrupt or insolvent; (ii) approving as properly filed a petition (unless such petition is dismissed within ninety (90) days) seeking reorganization of Owner or an arrangement under the bankruptcy laws or any other applicable debtor's relief law or statute of the United States or any state thereof; (iii) appointing a receiver, trustee or assignee of Owner in bankruptcy or insolvency or for its property, unless such appointment is dismissed within ninety (90) days; (iv) directing the winding up or liquidation of Owner unless such decree or order is dismissed within ninety (90) days; or (v) Owner shall have voluntarily submitted to or filed a petition seeking any such decree or order.

20. **Use of Terms.** In all matters of interpretation, whenever necessary to give effect to any provision of this Agreement, the singular shall include the plural, the plural shall include the singular, each gender shall include the other, and the terms "City" and "Owner" shall include their respective heirs, successors, and assigns.

21. **Severability.** If any provision or any word, term, clause or other part of any provision of this Agreement shall be invalid for any reason, the same shall be ineffective, but the remainder of this Agreement and the provisions hereof shall not be affected and shall remain in full force and effect.

22. **Further Assurances.** Each of the Parties hereto agrees to execute and deliver such further documents, instruments and agreements, and to take any and all such other actions and undertakings as may be reasonably necessary to effectuate and carry out the provisions of this Agreement. Such reasonably necessary actions shall include, without limitation, incorporating in this Agreement, by suitable amendment, any provision which may be reasonably requested by any proposed secured lender ("Mortgagee") for the purpose of: (i) adding commercially reasonable mortgagee protections; (ii) allowing such Mortgagee reasonable means to protect or preserve its security interest in the collateral, including its lien on the Property and the collateral assignment of this Agreement; and/or (iii) clarifying terms or restructuring elements of the transactions contemplated hereby; provided, however, in no event shall City be obligated to materially modify any of Owner's obligations or City's rights under this Agreement in any manner not already contemplated in this Agreement.

23. **Entire Agreement; Amendments; Successors.** This Agreement constitutes the entire agreement between the Parties and supersedes all proposals, oral or written, and all other communications between the Parties respecting the subject matter hereof. To be binding on either party, any modifications to the terms contained in this Agreement must be in writing and be executed by an authorized signatory of each party. This Agreement shall inure to the benefit of, and be binding upon, the successors, executors, administrators, legal representatives and assigns of the Parties hereto.

24. **Tax Consequences.** Owner shall be responsible and assume all liability for federal, state, and/or local income or other taxes resulting from its receipt of payments under this Agreement.

25. **Electronic Signatures; Counterparts.** This Agreement shall be effective and enforceable against the Parties hereto if executed by facsimile, “.pdf”, DocuSign or other electronically transmitted signature and/or in multiple counterparts, each of which shall be deemed an original and all of which, when taken together, shall constitute one and the same binding agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the Effective Date.

City of Imperial,
a California municipal corporation

By: _____

Name: _____

Title: _____

Gafcon, Inc.,
a California Corporation

By: _____

Name: _____

Title: _____

EXHIBIT A

- 1) A National Flag/Brand with a minimum 3-Star level of service to include amenities such as:
 - a. Upscale hotel rooms with en suite bathrooms.
 - b. Spacious lobby & public area is approximately 1000 square feet.
 - c. A lounge area adjacent to the lobby approximately 1,400 square feet in size featuring multiple seating areas.
 - d. An attractive outdoor patio/seating area.
 - e. A full-service bar and restaurant that will be open to the public and guests during normal business hours a minimum of six (6) days a week
 - f. 24 Hour Access to on-site Hotel Staff and property with key.
 - g. The following amenities:
 - i. Marketplace;
 - ii. Flexible Conference Space and Meeting Rooms;
 - iii. Business Center with printing service station;
 - iv. Fitness Center;
 - v. Indoor pool and spa with dedicated restrooms.

These amenities shall be maintained to industry standards throughout the term of this Agreement.