

**Tourism Development District Agreement**

**TOURISM DEVELOPMENT DISTRICT AGREEMENT**

**by and between**

**THE WEST VIRGINIA DEVELOPMENT OFFICE**

**and**

**SWAN HILL TOP HOUSE HOTEL LLC**

**Dated \_\_\_\_\_, 2021**

This **TOURISM DEVELOPMENT DISTRICT AGREEMENT** (this “Agreement”) dated as of the \_\_\_ day of \_\_\_\_\_, 2021, is between the **WEST VIRGINIA DEVELOPMENT OFFICE**, a division of the West Virginia Department of Commerce (the “WVDO”), and **SWAN HILL TOP HOUSE HOTEL, LLC**, a Delaware limited liability company (the “Applicant”) (sometimes, collectively, the “Parties”).

#### RECITALS

**WHEREAS**, the WVDO is the state agency vested with the authority to designate and approve a tourism development project pursuant to W. Va. Code §5B-2E-1 *et. seq.* (the “Tourism Development Act”);

**WHEREAS**, the WVDO is the state agency vested with the authority to designate and approve a tourism development district pursuant to W.Va. Code §5B-1-9 and W. Va. C.S.R. §145-16-1 *et. seq.* (collectively, the “Tourism Development District Act”);

**WHEREAS**, the Applicant is the owner of a Tourism Development Project (as defined in the Tourism Development Act) in the Town of Harpers Ferry, West Virginia (the “Town”) in which the Applicant will design, develop, acquire, construct, equip, install, and subsequently operate and maintain, a full-service destination hotel and spa on approximately ten and two-tenths (10.2) contiguous acres situate in the Town and on the former site of the historic Hill Top House Hotel, together with such amenities as are consistent with a destination hotel and spa, as well as all necessary infrastructure, appurtenances, facilities and temporary structures required therefor, specifically including, but not limited to, roads, sidewalks, improvements, street-scaping, utilities, parking, lighting, signage, and landscaping (collectively, the “Tourism Development Project”);

**WHEREAS**, pursuant to the Tourism Development District Act, an owner of a Tourism Development Project which (i) is entirely or partially within the corporate limits of a municipality which, as of the most recent census, a population of 2,000 or less; (ii) has aggregate project costs of \$25,000,000 or more; (iii) has been determined by the WVDO to be an approved company pursuant to the West Virginia Tourism Development Act; and (iv) has entered into an agreement with the WVDO pursuant to W. Va. Code §5B-2E-6 to provide the approved company with a credit against the West Virginia consumers sales and service tax may apply to the WVDO for designation of a tourism development district encompassing the area where the Tourism Development Project is to be acquired, constructed, equipped, installed, developed, and operated and maintained;

**WHEREAS**, the Applicant has applied to the WVDO (the “Application”) to establish the Hill Top House Hotel Tourism Development District (the “Tourism Development District”) within which the Applicant will design, develop, acquire, construct, equip, install, and subsequently operate and maintain, the Tourism Development Project;

**WHEREAS**, the Tourism Development District is within the municipal corporate limits of the Town, which is a municipality in West Virginia with a population of less than 2,000

residents; the estimated aggregate cost to complete the Tourism Development Project exceeds \$25,000,000; the WVDO has notified the Applicant that it is an approved company pursuant to the Tourism Development Act, a copy of which notice dated November 8, 2019 is attached hereto as **Exhibit A**; and the Parties have entered into a Tourism Development Agreement pursuant to W. Va. Code §5B-2E-6 to provide the Applicant with a credit against the West Virginia consumers sales and service tax, a copy of which agreement dated December 17, 2019 is attached hereto as **Exhibit B** (the “TDA Agreement”); and

**WHEREAS**, the Parties desire to enter into this Agreement to govern the duties and obligations of the Parties with respect to the development and operation of the Tourism Development Project in the Tourism Development District during the term of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and obligations contained herein, the investment necessary to develop the Tourism Development Project and establish the Tourism Development District, and the proceeds of the Application fee as further described herein, the Parties hereby agree as follows:

1. **APPLICANT.** The Applicant shall include SWaN Hill Top House Hotel, LLC, a Delaware limited liability company, its affiliates, successors, and assigns, and any other individual or entity with which SWaN Hill Top House Hotel, LLC may contract for the design, development, acquisition, construction, equipping, installation, and subsequent management and operation, of the Tourism Development Project.

2. **TERM OF TOURISM DEVELOPMENT DISTRICT.** The Tourism Development District shall terminate by operation of law Ninety-Nine (99) years from the date the WVDO approves the Application.

3. **MASTER PLAN.** The Applicant’s Concept Design Plan and Landscape Enhancement Plan, as enhanced and refined, collectively with this Agreement, shall constitute the “Master Plan” for purposes of this Agreement. The Applicant shall design, develop, acquire, construct, install, equip, and subsequently operate and maintain, the Project within the Tourism Development District in general conformance with the Master Plan. The WVDO acknowledges and agrees that it has reviewed the Master Plan and has determined that the Master Plan is consistent with the intent and purposes of the Tourism Development District Act. A copy of the Applicant’s Master Plan is attached hereto as **Exhibit C**. The Parties specifically agree and affirm that the Applicant may amend or modify the Master Plan from time to time following the execution of this Agreement.

The Parties further agree and affirm that the Applicant is only required to notify the WVDO of such amendments and modifications which are “Material,” as defined herein. To be considered a “Material Amendment or Modification,” such amendment or modification to the Master Plan must:

- A. Have an estimated total dollar value in excess of \$15,000,000.00; or

B. Impact more than 25,000 square feet of space either inside structures or of landscaping.

4. **DESCRIPTION OF THE SITE.** The Tourism Development District generally consists of approximately ten and two-tenths (10.2) contiguous acres located at, or in the vicinity of, 400 E. Ridge Street, Harpers Ferry, West Virginia 25425, situate entirely or partially within the corporate limits of the Town, as more particularly delineated by the boundaries set forth on the map or plat attached hereto as **Exhibit D**, and is comprised of all the properties, including any city, county, and street addresses, and the tax map and parcel numbers for each parcel, as set forth on the attached **Exhibit E** (collectively, the "Site").

5. **SINGLE POINT OF CONTACT.** The WVDO shall designate in writing a single point of contact ("SPOC") who will be the Applicant's contact person for all issues which relate to this Agreement and the Tourism Development District. The SPOC shall assist the Applicant to comply with the terms of this Agreement, interface with local officials, and serve as a communication and information resource for the Applicant. The Applicant shall work closely with the SPOC and other relevant WVDO officials with respect to the design, development, acquisition, construction, installation, equipping, and subsequent operation and maintenance, of the Tourism Development Project and establishment of the Tourism Development District. The WVDO shall provide the Applicant with the name and contact information for the SPOC upon execution of this Agreement.

6. **BUILDING CODES.** The Applicant shall design, acquire, construct, install, equip, and operate the Tourism Development Project in accordance with the Standards and Guidelines set forth in Section 4.14.1 of the Applicants Tourism Development District Standards and Guidelines attached hereto as **Exhibit F**, specifically including, but not limited to, the West Virginia Uniform State Building Code as set forth in W. Va. Code §8-12-13, and as promulgated by the West Virginia State Fire Commission in W. Va. C.S.R. §87-4-1 *et. seq.*, as set forth in Section 4.14.1 of **Exhibit F**.

7. **LAND USE AND PERMITTING.** The Applicant shall adhere to Section 4.14.2 of the Applicant's Tourism Development District Standards and Guidelines attached hereto as **Exhibit F** with respect to land use and permitting. The Applicant shall consider the existing Comprehensive Plan for the corporation of Harpers Ferry and any Statements of Conformity which have previously been granted to the Applicant by the Harpers Ferry Planning Commission.

8. **HISTORIC PRESERVATION.** The Applicant shall adhere to Section 4.14.3 of the Applicant's Tourism Development District Standards and Guidelines attached hereto as **Exhibit F** with respect to preserving the historic character of the Tourism Development District. The Applicant shall comply with the Hill Top House Hotel Historic Resource Plan currently on file with SHPO, a copy of which plan is attached hereto as **Exhibit G**.

9. **DEMOLITION PERMITTING.** The Applicant shall adhere to Section 4.14.4 of the Applicant's Tourism Development District Standards and Guidelines attached hereto as **Exhibit F** with respect to demolition activities.

10. **NOISE ORDINANCE.** The Applicant shall adhere to Section 4.14.5 of the Applicant's Tourism Development District Standards and Guidelines attached hereto as **Exhibit F** with respect to noise.

11. **LIGHTING AND/OR "DARK SKIES" ORDINANCE.** The Applicant shall adhere to Section 4.14.6 of the Applicant's Tourism Development District Standards and Guidelines attached hereto as **Exhibit F** with respect to lighting and/or "dark skies".

12. **REGULATION OF ALCOHOLIC LIQUOR, NONINTOXICATING BEER OR WINE FOR CONSUMPTION IN THE TOURISM DEVELOPMENT DISTRICT.** The Applicant shall adhere to Section 4.14.7 of the Applicant's Tourism Development District Standards and Guidelines attached hereto as **Exhibit F** with respect to demolition activities.

13. **INSPECTION DURING ACQUISITION, CONSTRUCTION, INSTALLATION AND EQUIPPING OF THE PROJECT.** The Applicant shall adhere to Section 4.14.8 of the Applicant's Tourism Development District Standards and Guidelines attached hereto as **Exhibit F** with respect to inspections during acquisition, construction, installation and equipping of the Project.

14. **NON-BINDING REVIEW BY WVDO OF EXISTING PLANNING AND ZONING ORDINANCES.** Prior to execution of this Agreement, the WVDO has performed a non-binding review of the planning and zoning ordinances of the Town of Harpers Ferry in existence as of the date of this Agreement.

15. **MONITORING COMPLIANCE DURING OPERATION OF TOURISM DEVELOPMENT DISTRICT.**

15.1. The Applicant shall retain, at its sole expense, an independent third-party professional firm (the "Third-Party Inspection Firm") to conduct ongoing inspection of the design, development, acquisition, construction, installation and equipping of the Tourism Development Project to ensure compliance with the Applicant's Tourism Development District Standards and Guidelines attached hereto as **Exhibit F**. The Third-Party Inspection Firm shall have access to the Site during all daylight hours. The Third-Party Inspection Firm shall provide monthly reports to the Applicant and the WVDO of inspection activities. In the event that the Third Party Inspection Firm discovers a material deviation or non-compliance in the design, acquisition, construction, installation and equipping of the Tourism Development Project from the Applicant's Tourism Development District Standards and Guidelines attached hereto as **Exhibit F**, the Third Party Inspection Firm shall notify the Applicant and the WVDO of such material deviation or non-compliance within three business days of becoming aware of the material

deviation or non-compliance and provide a recommendation to correct the material deviation or non-compliance.

15.2. Upon reasonable notice, and during regular business hours, the Applicant shall permit the WVDO or its designee to access the Site in order to inspect the status of Tourism Development Project or the Tourism Development District.

15.3. The Applicant shall provide the SPOC with regular, but not less than quarterly, updates describing the Applicant's progress in constructing the Project, including therein any matters which could materially affect the development schedule for the Project, details concerning regulatory, municipal, or utility delays, or any other items which may impact the Applicant's ability to timely satisfy any obligation under this Agreement.

16. **GOOD FAITH DUTY TO WORK WITH LOCAL OFFICIALS.** The WVDO has determined that the Applicant has attempted to work in good faith with local officials in the design, development, acquisition, construction, installation, equipping and operation and maintenance of the Project.

17. **COMPLIANCE WITH TOURISM DEVELOPMENT ACT.** The Applicant shall have an ongoing duty to comply with the Tourism Development Act and the TDA Agreement and shall file a certification to this effect with the Executive Director of the WVDO on or before December 31 of each calendar year during the Term of this Agreement.

18. **VESTED PROPERTY RIGHT.** Upon the approval of the Application establishing the Tourism Development District, the Applicant, and any successor to the Applicant, shall have a vested property right to undertake and complete the approved elements of the Project, subject to the provisions of the Tourism Development District Act. The vesting period within which the approved elements of the Tourism Development Project must be completed is five (5) years from the date the WVDO approves the Application. The Applicant may request an extension of this five (5) year period for up to thirty-six (36) months by notifying the WVDO in writing of the Applicant's intent to seek such extension. The vesting of the property right described in this section shall become permanent once eighty (80) percent of the buildings in the Project, based on square footage of space, have been completed, unless the Tourism Development District is sooner terminated as provided in the Tourism Development District Act or this Agreement.

19. **DUTIES OF APPLICANT AFTER TOURISM DEVELOPMENT DISTRICT IS ESTABLISHED.** The Applicant, and all concessions and licensees thereof, shall, in the same manner as any other business or commercial venture located within the Town:

19.1. Pay any business and occupation tax;

19.2. Collect and remit any municipal sales and service tax and municipal use tax;

19.3. Pay any *ad valorem* real and personal property tax pursuant to the same millage rates;

19.4. Collect and remit any applicable hotel occupancy tax;

19.5. Pay any municipal service fees, including, but not limited to, fire, police, sanitation, or city service fees;

19.6. Pay any reasonable municipal utility rates, fees, and charges for utilities used or consumed during construction and operation of premises within the Tourism Development District, including, but not limited to, water, sewer, stormwater, and garbage and recycling collection; provided, however, that the WVDO shall ensure that the service provider will not charge rates to the premises within the Tourism Development District which are discriminatory or are not consistent with similarly situated users of such utilities located in other municipalities in Jefferson County.

19.6.1. The WVDO shall ensure that any rates, fees, and charges for such utilities are based on the cost of providing such utility service and are consistent with similarly situated users of such utilities located in other municipalities in Jefferson County. Any contracts for water service or sewer service with the Town shall be subject to review and approval by the Public Service Commission of West Virginia.

19.6.2. The WVDO shall ensure that the Applicant shall only be required to pay any reasonable capacity improvement fee or impact fee to the extent that capital additions, betterments, and improvements must be designed, acquired, constructed, and equipped by the Town to provide such service to the Project. Any such capacity improvement fee or impact fee for water or sewer service may not be discriminatory and shall be subject to review and approval by the Public Service Commission of West Virginia.

20. **APPLICATION FEE.** The Applicant has, prior to the execution of this Agreement, submitted to the WVDO an Application Fee in the amount of \_\_\_\_\_ (\$\_\_\_\_.00) made payable to the West Virginia Development Office which the WVDO has determined to be sufficient for the review and approval of the Application.

21. **NOTICES.** Any notice, payment or instrument required or permitted by this Agreement to be given or delivered to any Party shall be deemed to have been received when personally delivered or transmitted by electronic or facsimile transmission (which shall be followed by mailing an original of the same within 24 hours after such transmission) or 72 hours following deposit of the same in any United States Post Office, registered or certified mail, postage prepaid, addressed as follows:

If to the <b>WVDO</b> :	West Virginia Development Office 1900 Kanawha Boulevard, East Charleston, West Virginia 25305 Attention: Executive Director
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If to the **Applicant:** SWaN Hill Top House Hotel, LLC  
108 Loudoun St. SW  
Leesburg, Virginia 20175  
Attention: Managing Member

*With copy to:*

Steptoe & Johnson PLLC  
P.O. Box 1588,  
Charleston, WV 25326-1588  
Attention: John C. Stump, Esq.

22. **FURTHER ASSURANCES.** The Applicant shall furnish the WVDO such further information or assurances, execute and deliver such additional documentation, agreements, or instruments, and take such other actions and do such other things, as may be reasonably necessary in the opinion of counsel to the WVDO, to satisfy the provisions of the Tourism Development Act, Tourism Development District Act, and this Agreement.

23. **FORCE MAJEURE.** Whenever performance is required of a Party hereunder, that Party shall use all due diligence and take all necessary measures in good faith to perform, but if completion of performance is delayed by reasons of floods, earthquakes or other acts of God, war, civil commotion, pandemic, riots, strikes, picketing or other labor disputes, damage to work in progress by casualty or by any other cause beyond the reasonable control of the Party, then the specified time for performance shall be extended by the amount of the delay actually so caused.

24. **COMPLIANCE WITH LAWS.** Each Party shall be responsible for complying with all laws and regulations that may apply to all actions required by that Party in connection with fulfilling that Party's obligations, representations, warranties, and commitments under this Agreement.

25. **APPLICABLE LAW.** This Agreement shall be governed by and enforced in accordance with the laws of the State of West Virginia applicable to contracts made and performed in the State of West Virginia

26. **INCORPORATION OF RECITALS.** The Parties acknowledge and agree that the recitals hereto are true and correct and are incorporated herein by reference and made a part hereof.

27. **AMENDMENTS.** This Agreement may be amended, from time to time, by written supplement hereto and executed by the Parties.



28. **SEVERABILITY.** If any part of this Agreement is held to be illegal or unenforceable by a court of competent jurisdiction, the remainder of this Agreement shall be given effect to the fullest extent possible and such part which is held to be illegal or unenforceable shall be interpreted, and this Agreement thus amended, in a manner which renders such portion legal and enforceable.

29. **PARTIES IN INTEREST.** Nothing in this Agreement, expressed or implied, is intended to or shall be construed to confer upon or to give to any person or entity other than the Applicant and the WVDO any rights, remedies or claims under or by reason of this Agreement or any covenants, conditions or stipulations hereof, and all covenants, conditions, promises and agreements in this Agreement contained by or on behalf of the Applicant or the WVDO shall be for the sole and exclusive benefit of the Applicant and the WVDO to the extent set forth herein.

30. **COUNTERPARTS.** This Agreement may be executed in counterparts, each of which shall be deemed an original.

31. **EFFECTIVE DATE.** This Agreement shall be effective as of date of execution by the last Party to do so.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, the Parties have executed this Tourism Development District Agreement as of the day and year first above written.

**WEST VIRGINIA DEVELOPMENT OFFICE**

By: \_\_\_\_\_  
Its Executive Director

**SWAN HILL TOP HOUSE HOTEL, LLC**

By: \_\_\_\_\_  
Its Authorized Representative

**EXHIBIT A**  
**WVDO LETTER RECOGNIZING APPLICANT AS AN APPROVED COMPANY**

**EXHIBIT B**  
**TDA AGREEMENT**

**EXHIBIT C**  
**MASTER PLAN**

**EXHIBIT D**  
**MAP OF TOURISM DEVELOPMENT DISTRICT**

**EXHIBIT E**  
**STREET ADDRESS AND TAX MAP AND PARCEL INFORMATION**

**EXHIBIT F**  
**APPLICANT'S TOURISM DEVELOPMENT DISTRICT STANDARDS AND**  
**GUIDELINES**



**EXHIBIT G**  
**HILL TOP HOUSE HOTEL HISTORIC RESOURCE PLAN**