

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

THIRD MODIFICATION OF THE AIR LEASE

By and Between

CITY OF DURHAM,
COUNTY OF DURHAM

and

SHANER HOTEL GROUP PROPERTIES TWO LIMITED PARTNERSHIP

This Third Modification of Lease, entered into as of the date of the last signature of execution hereto, by and between the City of Durham, a municipal corporation having its principal office at 101 City Hall Plaza, Durham, North Carolina 27701, and the County of Durham, a subdivision of the State of North Carolina having its principal office at the Durham County Judicial Building, 201 East Main Street, Durham, North Carolina 27701 (together “Landlord” or “Owners”), and Shaner SPE Associates Limited Partnership, which was assigned all rights under the Air Lease by Shaner Hotel Group Properties Two Limited Partnership, a Delaware limited partnership having its principal office at 1965 Waddle Road, State College, 16870, Pennsylvania 16870 (“Tenant”). Collectively, Shaner, City and County are referred to herein as the “Parties”.

Background. Landlord and Durham Hotel Company, as Tenant, entered into an Agreement of Lease for the Civic Center Hotel dated October 9, 1987 (the “Air Lease”), recorded in Book 1408 commencing at page 63 of the Office of the Register of Deeds for Durham County (the “Registry”). A First Amendment to this Lease dated May 19, 1989 was recorded at the Registry in Book 1535, commencing at page 794. On July 9, 1996, the Durham Hotel Company assigned its interest in the Air Lease to Tenant, with the consent of Landlord. The Second Modification of Lease between the Landlord and Tenant was recorded at the Registry on August 6, 1997, in Book 2348 at pages 264-277.

The Parties now enter into this Third Modification of the Air Lease (“Third Modification”) in order to settle all outstanding legal claims between them and to conform the Air Lease to revised usage and arrangement of the physical facilities on the first floor of the Durham Convention Center and to effectuate

the terms of the Settlement Agreement that references this Third Modification. This settlement of claims, including claims for money owed or held by each of the parties against the other, forms part of the consideration for this Third Modification.

1. (a) Exhibit G, "First Floor Space Designation," is attached to this Third Modification and made part of the Air Lease. It shows the designation of areas, including the Retail Space which is leased by Landlord to the Tenant on the first floor of the Durham Convention Center ("DCC"). The map associated with Exhibit F to the Air Lease, entitled, "Cost Allocation Formula," showing the first floor of the DCC, is deleted. The rest of the Exhibit F shall remain in effect, except as provided in Section 2, below. Exhibit F, less the map, is attached hereto.

The intention of the Parties is that all Retail Space leased to the Tenant will be maintained, cleaned and repaired by Tenant. The proportion that Tenant pays for Repairs and Maintenance of Shared Facilities shall include the square footage of all the Tenant Retail Space. In addition, Tenant shall pay for the maintenance, security and cleaning, but not the Repairs, for the Lobby areas, the bathrooms accessed from the Lobby, and the Foster Street entrance, including the driveway and its sheltering roof (the entrance, driveway and sheltering roof together comprising the "Porte Cochere"). In addition, Landlord will provide Hotel Operator and Operating Personnel access to the Employee Dining Room and the Security Office as an accommodation, with cleaning and maintenance of these two spaces to be as mutually agreed in writing by the Hotel and DCC managers. To effectuate this paragraph, the following revisions are made to the Air Lease, however should conflict or ambiguity be created by the changes in the following subsections of Section 1 below, this Section 1(a) shall control:

- (b) Article I, Section 1.01, entitled, "Definitions" is revised to replace the definition of "Retail Space" with the following:

"Retail Space" means those certain areas labeled as "Retail Space" on Exhibit G, and are the Lounge/Bar, Restaurant, Original Kitchen, Registration Desk, Hotel Administration Offices, Hotel Fitness Center, Hotel Business Center, Bellman's Closet, Hotel Manager's Office, Hotel Stair 1, 2, and 3, the elevator and freight elevator, Hotel Facility of 901 square feet, a 40 square foot closet, a 100 square foot storage area. These areas, as is the entire first floor of the building, are owned in fee simple by the Landlord and provided to the Tenant for its exclusive use."

(c) Section 35.06 is replaced in its entirety by the following:

“Permitted Use of Retail Space. The Retail Space shall be used solely for the following purposes, in accordance with Requirements and this Lease, and in no other manner, each area to be used in accordance with the activities implied by its name as shown on Exhibit G: restaurant, kitchen, bar and lounge; fitness center; business center; administrative offices, registration desk, bellman’s closet, and storage. The stairs and elevators shown on Exhibit G as Retail Area shall be used by Tenant for ingress and egress. Without the prior written consent of Landlord, there shall be no other occupation or use of the Retail Space by Tenant, Retail Space Operator, any Affiliate of Tenant, or any Subtenant.”

(d) A new Section 36.02(f) is added as follows:

“Tenant’s Easements Limited. The easements provided to Tenant by Landlord herein are each limited to the areas and purposes enumerated, shall be strictly construed, and provide no exclusive use rights.”

(e) Section 36.04(a)(iii), entitled, “Shared Facilities”, is replaced in its entirety with the following:

“Subject to the provisions of Section 36.04(c)(i), the Landlord shall be responsible for carrying out non-emergency Repairs and Maintenance with respect to any Shared Facility located within the Civic Center and the Plaza. The Tenant shall be responsible for carrying out non-emergency Repairs and Maintenance with respect to any Shared Facility located within or on the Hotel, the Hotel itself, the Retail Space, the Lobby and restrooms accessed from the Lobby, and the Porte Cochere.”

(f) Section 36.04(b), entitled, “Responsibility for Emergency Repairs and Maintenance”, is replaced in its entirety by the following:

“(i) Landlord’s Responsibility. Subject to the provisions of Section 36.04(c)(ii), the Landlord shall be responsible for carrying out any Repairs and Maintenance under emergency circumstances with respect to any Facility located within the Civic Center, the Plaza, or a Civic Center component.

(ii) Tenant’s Responsibility. Subject to the provisions of Section 36.04(c)(ii), Tenant shall be responsible for carrying out any Repairs and Maintenance under emergency circumstances with respect to any Facility located within or on the Hotel, a Hotel

Component, the Retail Space, the Lobby and restrooms accessed from the Lobby, and the Porte Cochere.”

(g) Section 36.05 entitled “Costs and Expenses of Repairs and Maintenance” and all subsections thereto remain in full force and effect and apply to all Shared Facilities.

2. The Cost Allocation Formula, Exhibit F, shall remain in effect, except for those provisions allocating the costs for water, sewer, natural gas and electricity charges, which shall be governed by the following provisions:

(a) The cost of natural gas services is currently metered and paid separately by the Landlord and the Tenant, and no allocation agreement is necessary. Therefore, all provisions of Exhibit F which address natural gas cost allocation are deleted.

(b) The Parties agree that the costs of water, sewer and electricity (“Shared Utilities”) should be borne by Landlord and Tenant on a pro rata apportionment, subject to annual adjustment on December 31st of each year to determine the proportion of charges to be paid by each for the coming year, based on the best available and reliable evidence of each party’s relative usage. The Parties agree to use their best efforts to reach agreement on a methodology to determine this pro rata apportionment. Until such an agreement on methodology to determine such pro rata apportionment is reached as to these Shared Utilities the Parties agree to the following pro rata arrangements and process:

(c) The Parties agree that from August 1, 2014, and until the Parties agree otherwise, the costs of water and sewer billings shall be paid two-thirds (2/3) by Shaner and one-third (1/3) by Owners, until outside consultants agreed upon by the Parties determine a just apportionment of billings based upon average water and sewer use and an algorithm to update these proportional charges annually. In the period from August 1, 2014, until the algorithm is agreed to, the charges will be split two-thirds (2/3) by Shaner and one-third (1/3) by Owners, but a rebate shall be made retroactive to August 1, 2014, in accordance with the proportion of the responsibility for water and sewer charges determined by the consultants and agreed to by the Parties.

(d) The Parties agree that from August 1, 2014, and until the Parties agree otherwise, the costs of electricity service billings shall be paid one-half (1/2) by Shaner and one-half (1/2) by

Owners, until outside consultants agreed upon by the Parties determine a just apportionment of electricity charges based upon average electricity use and an algorithm to update these proportional charges annually. In the period from August 1, 2014, until the algorithm is agreed to, the charges will be split one-half (1/2) by Shaner and one-half (1/2) by Owners, but a rebate shall be made retroactive to August 1, 2014, in accordance with the proportion of the responsibility for electricity charges determined by the consultants and agreed to by the Parties.

- (e) The Party who is not the holder of the Utility Account shall make payment to the other Party within thirty (30) days after receiving an invoice for Shared Utility charges of all undisputed amounts.

- (f) When Landlord and Tenant have agreed on a pro-rata apportionment methodology or formula for Shared Utility charges which replaces the apportionment of costs to be paid by Tenant and by Landlord made by this Third Modification, they shall further amend this Air Lease to memorialize that agreement.

IN WITNESS WHEREOF, the Parties hereto knowingly and voluntarily execute the Agreement.

SHANER SPE ASSOCIATES LIMITED PARTNERSHIP

By: _____

Its _____

ATTEST:

COUNTY OF DURHAM

Clerk to the Board of
Commissioners

Chairman of the Board of Commissioners

ATTEST:

CITY OF DURHAM

City Clerk

Thomas J. Bonfield
City Manager

Name of other parties to the contract:

Shaner SPE Associates Limited Partnership and County of Durham

Title of the contract: Third Modification of Air Lease

State of _____

ACKNOWLEDGMENT BY PARTNERSHIP

County of _____

I, a notary public in and for said county and state, certify that

_____ personally (1) appeared before me this day, (2) stated that he or she is a general partner in Shaner SPE Associates Limited Partnership, a partnership, (3) acknowledged that the foregoing contract or agreement with the City of Durham and County of Durham carries on the partnership's business in the usual way, and (4) acknowledged the due execution, under seal, of the contract or agreement on behalf of the partnership.

This the _____ day of _____, 20_____.

My commission expires: _____

Notary Public _____

STATE OF NORTH CAROLINA

ACKNOWLEDGMENT OF COUNTY

COUNTY of DURHAM

I, a Notary Public in and for the aforesaid County and State certify that

_____ personally appeared before me this day, and acknowledged that he or she is the Clerk to the Board of Commissioners for the County of Durham, a N. C. political subdivision, and that by authority duly given and as the act of the County, the foregoing contract or agreement with the City of Durham and Shaner SPE Associates Limited Partnership was signed in its corporate name by the Chairman of said Board, sealed with its corporate seal, and attested by its said Clerk. This the _____ day of _____, 20_____

My commission expires: _____

Notary Public _____

STATE OF NORTH CAROLINA

ACKNOWLEDGMENT BY CITY

COUNTY OF DURHAM

I, _____, a notary public, certify:(1)

_____ personally appeared before me in Durham County, N. C. on this day; (2) I have personal knowledge of her identity; and (3) she acknowledged that by authority duly given and as the act of the City of Durham, the foregoing document was signed in its corporate name by its _____ City Manager, sealed with its corporate seal, and attested by its said City Clerk or Deputy City Clerk.

This the _____ day of _____, 20_____.

My commission expires: _____

Notary Public _____

NOTES TO THE COST ALLOCATION MODEL

This cost allocation model addresses the need to divide the operating expenses and capital expenditures incurred through the joint occupation of a common facility by two distinct financial entities. In arriving at the means of allocation, each line item was reviewed under the following criteria:

- 1) Respective Utilization
- 2) Original Capital Allocations
- 3) Relative Benefit

Respective Utilization, applied principally to mechanical systems, allocates costs between the two parties based upon their relative use of the line item. This use may be measured by meters and controls in the case of electricity and chilled water; or by a gross measure, such as meals served in the case of kitchen equipment. This criterion is best applied where a direct use can be identified and where this use exacts wear and tear on the line item.

Some of the furniture, fixtures, and building super structure are not subject to direct physical wear by the users, but are to be replaced or maintained on a regular schedule determined by the item's respective life cycle. The costs of maintenance for such items are generally assigned along the same ratio as the Original Capital Allocation. Some modifications to this allocation could occur for items such as floor covering which may wear excessively due to traffic caused predominantly by one occupant in a common space. In such cases, an adjustment was made to the capital cost ratio before applying it to the maintenance or operating cost schedule.

In determining the Relative Benefit from an item which does not incur wear through mechanical operation, a broader concept of cost/benefit analysis has been applied. The Plaza, for example, while serving as an architectural enhancement to the entire site will be of greatest benefit to the community and should be maintained as a part of the Civic Center. On the other hand, where benefits are mutually derived, as in the case of the Loading Dock, the maintenance costs have been allocated to both beneficiaries.

There are line items which could be justifiably measured by more than one criterion. In such cases, costs have been allocated in order to reflect a representative use of the facility component, and to allow the easiest monitoring and processing for an equitable payment between the occupants. It may be determined that certain administrative criteria for defraying costs require a modification or restructuring of the methods proposed in the Cost Allocation Model.

September 28, 1987

COST ALLOCATION MODEL

Shared System

Revisions: 9/29/87
10/05/87
10/08/87

Criteria	Assessment	Formula	Cost Component Definitions	Area of Formula Application
Central Plant: Chiller	1	$Cc + Ch = Ctot$	$Cc, Ch = \text{Metered Value}$	Civic Center
Pumps	1	$Cc + Ch = Ctot$	$Cc, Ch = \text{Metered Value}$	Civic Center
Coiling Tower	1	$Cc + Ch = Ctot$	$Cc, Ch = \text{Metered Value}$	Civic Center
Electrical Panels	1	$Cc + Ch = Ctot$	$Cc, Ch = \text{Metered Value}$	Civic Center
Electric Utility	1	$Cc + Ch = Ctot$	$Cc, Ch = \text{Metered Value}$	Civic Center
Common Air Handler Units (If Any)**	2,3	$Cc + Ch = Ctot$	$Cc, Ch = \text{Proportional CFPS}$	Civic Center
Plaza Maintenance	3	$1.0(Ctot) = Cc$	Defined by Formula	Civic Center
Elevator	1,3	$1.0(Ctot) = Ch$	Defined by Formula	Civic Center
Fixed Asset Supplies	2	$Cc + Ch = Ctot$	Replace Items under Separate Account	Civic Center
Housekeeping/cleaning Equipment	2	$Cc + Ch = Ctot$	Replace Items under Separate Account	Civic Center
Roof Maintenance and Repair ***	2	$Cc + Ch = Ctot$	$Cc = 0.95(Ctot), Ch = 0.05(Ctot)$	Civic Center
Structure ****	2	$Cc + Ch = Ctot$	$Cc = 0.97(Ctot), Ch = 0.03(Ctot)$	Civic Center
Foundation ****	2	$Cc + Ch = Ctot$	$Cc = 0.97(Ctot), Ch = 0.03(Ctot)$	Civic Center
Furnishings, Fixtures, and Equipment (FF&E)	1,3	$Cc + Ch = Ctot$	$Cc = (Pc/Prot)Ctot; Ch = (Ph/Prot)Ctot$	Shared Public Area
Hotel FF&E (Rest'r., Lounge, Regist'n)	2	$1.0(Ctot) = Ch$	Defined by Formula	Civic Center
Kitchen Equipment	1	$Cc + Ch = Ctot$	$Cc = (Mc/Mtot)Ctot; Ch = (Mh/Mtot)Ctot$	Shared Facility
Loading Dock	3	$0.5(Ctot) = Cc + Ch$	Defined by Formula	Shared Facility
Signage	1,3	$0.5(Ctot) = Cc + Ch$	Defined by Formula	Shared Public Area
Other Shared Systems	1,3	$Cc + Ch = Ctot$	Defined by Criterion	Civic Center

** Notes to Criterion

- 1) Respective Utilization
- 2) Original Capital Allocation
- 3) Relative Benefit

*** Depending on the HVAC Zoning System Air Handler Units may be maintained and serviced under separate accounts.

**** Formula applies only to Roof above Civic Center; Hotel will defray maintenance cost above air cube.

***** Structural and Foundation maintenance incurred under Hotel Tower will be separately assessed by a proportional factor.

