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NIAGARA FALLS
CITY CLERK
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TO: City Council
FROM: Mayor Paul A. Dyster *PD*
DATE: July 2, 2013
RE: Proposed Development Agreement among City of Niagara Falls, USA Niagara Development Corporation, and Hamister Development Company, LLC pertaining to 310 Rainbow Boulevard

The City owns certain real property located in the City of Niagara Falls, New York consisting of a parcel approximately 0.88 acre in size commonly known as **310 Rainbow Boulevard, Tax Parcel No. 158.12-1-4.111**, more particularly described in **Exhibit "A"** attached hereto (the "Property").

The Property is located within the Downtown Development District established by USA Niagara Development Corporation, a subsidiary of New York State Urban Development Corporation ("UDC"), d/b/a Empire State Development ("ESD"), a New York public benefit corporation ("USAN").

By the terms of a Development Agreement dated November 30, 2011 by and among Niagara County Community College, USAN, and the City (the "2011 Development Agreement"), the City granted USAN exclusive development rights with respect to the Property on the terms and conditions specified in the 2011 Development Agreement.

In accordance with the 2011 Development Agreement, USAN issued a Request for Proposal dated October 5th, 2011 (the "Request for Proposal") seeking proposals for development of the Property.

In response to USAN's Request for Proposal, Hamister Development Company, LLC, a Delaware limited liability company (the "Developer") submitted to USAN its proposal dated December 9, 2011 (as thereafter amended, the "Response to Request for Proposal") to serve as designated developer of the Property.

In its Response to Request for Proposal, the Developer proposed developing the Property with a mixed-use project that would include, among other things, a 100-room hotel, 24 apartment units, and street-level retail space.

USAN selected the Developer as its designated developer for the Property, subject to certain terms and conditions.

Anderson ___ Fruscione ___ Grandinetti ___ Walker ___ Choolokian ___

On or about December 21, 2012, ESD, through its subsidiary, USAN, notified the City of Niagara Falls City Council and Planning Board and numerous additional involved and interested agencies of USAN's intent to serve as lead agency for the environmental review process to be carried out under the New York State Environmental Quality Review Act ("SEQRA") and its implementing regulations (6 NYCRR Part 61.7) in connection with a private development of an approximately 119,00 square-foot mixed-use complex at the Property including a 100-room upscale grade hotel; 24 market-rate apartments; 5,000 square feet of street level retail/food-and-beverage uses; and a 10,000 square foot ball room facility (the "General Development Plan").

USAN received no objections to its proposal to serve as SEQRA lead agency and therefore was so designated, and has classified the General Development Plan as a Type I action under the implementing regulations for SEQRA.

The City and USAN are currently negotiating a development agreement (the "Proposed Development Agreement") with the Developer pursuant to which the City would sell the Property to the Developer (or its subsidiary or affiliate) for purposes of the General Development Plan, as modified to increase the street level retail/food-and-beverage space from 5,000 square feet to a maximum of 8,000 square feet (such proposal, as may be amended from time to time, hereinafter referred to as the "Project"); and USAN would provide development incentives, on the terms and conditions outlined in the term sheet attached hereto as **Exhibit "B"** (the "Term Sheet").

USAN has undertaken a detailed review of the potential environmental impacts of the Project through the preparation of a full Environmental Assessment Form and consideration of other relevant facts and circumstances.

USAN has concluded that the minimal impacts identified in connection with the Project are not significant in magnitude or effect, consisting primarily of short-term affects related to the proposed construction activities, and that the impacts that are likely to occur as a result of the Project appear, on the whole, to be beneficial and not significant in magnitude or effect, and will not, either individually or collectively, have a significant impact on the environment.

On or about July 8, 2013, USAN therefore determined that the undertaking of the Project will not constitute an action significantly adversely affecting the quality of the environment and duly adopted a SEQRA Negative Declaration for the Project. USAN's full Environmental Assessment Form and Negative Declaration are incorporated herein by reference in their entirety.

Article IV, §59 of the City Charter authorizes direct sales of City-owned real property when the City Council determines, by majority vote, that the best interests of the City will be subserved by such sale.

The best interests of the City will be subserved by this Project because the Project: (a) is a significant multimillion dollar mixed use building that will be constructed on City-owned real estate that is now used primarily as a parking lot, (b) will increase the City's tax base, (c) will provide hotel rooms for use by visitors to the City, (d) will provide apartments for people to live, (e) will provide space for retail businesses to occupy, and (f) will provide numerous jobs during construction as well as permanent jobs after the Project has been completed.

Article XVIII, §504 (6) of the City Charter requires proposed dispositions of City-owned real property to be referred to the City Planning Board for a report and recommendation to the City Council.

The City Planning Board reviewed the proposed sale of the Property at a meeting held on June 26, 2013, and issued its report and recommendation to the City Council, a copy of which is attached hereto as **Exhibit "C"** pursuant to which the Planning Board recommended that the proposed sale of the Property to the Developer be approved by the City Council.

Based on the foregoing, it is requested that the City Council adopt the following resolutions, and that the statements set forth above be incorporated in their entirety as findings of fact upon which the resolutions are adopted by the City Council:

RESOLVED, that the City Council hereby adopts USAN's Negative Declaration for the Project; and it is further

RESOLVED, that the City of Niagara Falls Planning Board and the City Council have concluded that the Project at issue in the attached Term Sheet is consistent with the scope and intent of the General Project Plan; and it is further

RESOLVED, that the Mayor and/or Corporation Counsel be and they each hereby are authorized and directed to negotiate the Proposed Development Agreement providing for the sale of the Property to the Developer for development and construction of the Project, at a purchase price of **\$100,000**, pursuant to the terms, covenants, conditions and provisions outlined in the attached Term Sheet; and it is further

RESOLVED, and that the Proposed Development Agreement may contain such other terms and conditions as the Mayor and Corporation Counsel deem appropriate, and may thereafter be amended from time to time; provided, however, that the purchase price of the Property specified in such Proposed Development Agreement and in any such amendments shall not be less than \$100,000 payable in cash to the City at closing, and provided that the Proposed Development Agreement and any such amendments include a right of reverter in favor of the City (as described in the Term Sheet) in the event the Developer fails to complete the Project; and it is further

RESOLVED, that, upon the completion of such negotiations, the Mayor is authorized and directed to execute, in the name of and on behalf of the City, the Development Agreement for the sale of the Property to the Developer (or its subsidiary or affiliate) containing terms and conditions consistent with these Resolutions, and to exercise all rights and perform all obligations of the City thereunder, including, without limitation, the execution of a proper deed of conveyance and all other documentation required for consummation of the proposed sale of the Property to the Developer (or its subsidiary or affiliate) at the price and on the other terms and conditions described in these resolutions; and it is further

RESOLVED, that, in addition to and without limiting the generality of the foregoing resolutions concerning the negotiation of the Proposed Development Agreement and the proposed sale of the Property and matters related thereto, the Mayor and Corporation Counsel of the City be, and each of them hereby is, authorized and directed to take such further action in connection with said transactions and to execute and deliver such instruments and documents as either of them deems appropriate to carry out the foregoing resolutions; and it is further

RESOLVED, that the adoption of these resolutions shall satisfy any condition or requirement contained in the City Charter or elsewhere for approval of the Proposed Development Agreement and/or the proposed sale of the Property to the Developer (or its subsidiary or affiliate), and that no further approval by the City Council of the fully signed Development Agreement shall be required to authorize the Mayor and/or Corporation Counsel for the City to consummate the transactions contemplated by these resolutions; and it is further

RESOLVED, that notwithstanding anything to the contrary contained in these resolutions, these resolutions shall not constitute a binding offer, agreement, contract, or commitment of any kind whatsoever, and the City shall not be contractually obligated to enter into the Proposed Development Agreement or to sell the Property to the Developer (or its subsidiary or affiliate) unless and until the terms of the Proposed Development Agreement have been fully negotiated and the Proposed Development Agreement has been executed on behalf of the City by the Mayor.

Exhibit A
(Legal Description of Property)

ALL THAT TRACT OR PARCEL OF LAND, situate in the City of Niagara Falls, County of Niagara and State of New York, being part of Lots 42 and 43 of the New York Mile Reserve, being the westerly portion of Lots 8, 9 and 10 on the east side of Main Street and a portion of Main Street as abandoned according to a Map of the Village of Niagara Falls and lands adjacent made for the proprietors by J. P. Haines, Surveyor, in 1861 and filed in the Niagara County Clerk's Office on December 20, 1861 under Cover No. 389, and is now bounded and described as follows:

BEGINNING at the intersection of the westerly line of Rainbow Boulevard South and the southerly line of Mayor Michael O'Laughlin Drive; running thence southerly, along the westerly line of Rainbow Boulevard South, a distance of 274.50 feet to a point in the northerly line of Rainbow Mall (formerly Falls Street); thence westerly, along the north line of Rainbow Mall (formerly Falls Street), a distance of 139.11 feet to a point; thence northerly, at an interior angle of $89^{\circ} 42' 01''$, a distance of 274.46 feet to a point in the southerly line of Mayor Michael O'Laughlin Drive; thence easterly, along the southerly line of Mayor Michael O'Laughlin Drive, a distance of 139.44 feet to the point or place of beginning.

Exhibit B
(Term Sheet)

Term Sheet

The following is an outline of the terms to be negotiated for the proposed development agreement (the "Development Agreement") by and among the City of Niagara Falls (the "City"), USA Niagara Development Corporation ("USAN"), and Hamister Development Company, LLC or its subsidiary or affiliate (the "Developer"):

- 1) **Development Agreement.** The Development Agreement would provide for the sale of the real property located in the City of Niagara Falls, New York consisting of a parcel approximately 0.88 acre in size commonly known as **310 Rainbow Boulevard, Tax Parcel No. 158.12-1-4.11** (the "Property").
- 2) **Developer.** The proposed Development Agreement will prohibit the Developer from assigning its rights under the Development Agreement to any person or entity other than a subsidiary or affiliate of the Developer approved by the City and USAN. The Development Agreement shall also provide that certain transfers of equity interests (except for estate planning purposes) in the Developer or in any such subsidiary or affiliate will constitute assignments requiring approval by the City and USAN.
- 3) **Parent Company Guaranty.** In the event the Development Agreement is entered into with subsidiary or affiliate of the Developer, a guaranty of the Developer will be required for the purpose of guaranteeing performance of the subsidiary or affiliate of the obligations under the Development Agreement.
- 4) **Project Description.** Developer proposes to develop the Property with a mixed-use project that would include, among other things, a 100-room hotel, 24 apartment units, and up to 8,000 square feet of street-level retail space (collectively, the "Project").
- 5) **Projected Time Frames.** The Developer proposes to complete its due diligence and identify the national hotel franchisor within 60 days after execution of the Development Agreement; Construction bids and building permit applications are expected to be completed within eight months after completion of the due diligence, and construction is expected to be completed within 14 months thereafter (or by the summer of 2015).
- 6) **Project Approvals.** The proposed Development Agreement would provide that the Project will be subject to compliance with applicable City of Niagara Falls Zoning Ordinance provisions and all of the usual requirements for site plan review and approval, building code compliance, requirements for issuance of building permits and certificates of occupancy, and all other legal requirements and design requirements, including any applicable USAN Design Requirements, subject to franchisor approval.

- 7) **Time of the Essence and Liquidated Damages Provisions.** The proposed Development Agreement would provide that time is of the essence with respect to the commencement and completion of the Project, and liquidated damages would be payable by the Developer in the event the Project is delayed for purposes other than *force majeure*.
- 8) **Purchase Price.** The Developer proposes to pay a purchase price to the City of \$100,000 which would be payable in cash at closing.
- 9) **Property to be Sold "AS IS".** The City would sell the property to the Developer "AS IS". – City would make no representations or warranties regarding the condition of the Property, and the Developer would release the City and USAN from liability regarding the condition of the Property.
- 10) **City's Right of Reverter.** The proposed Development Agreement would contain a right of reverter in favor of the City pursuant to which title to the Property would revert to the City in the event the Developer defaults in its obligations to develop the Property. (The City's right of reverter, however, would necessarily be subordinated to the lien of any construction mortgage which the Developer places on the Property in connection with its development financing.) The right of reverter would be terminated upon satisfactory completion of the Project.
- 11) **Developer's Contingencies.** The Developer's obligation to close the purchase would be contingent upon the satisfaction of the following contingencies:
 - a) Approval of USAN Grant;
 - b) SEQRA Compliance;
 - c) Labor Peace Agreement Waiver (§2879-b (2) of the Public Authorities Reform Act;
 - d) City of Niagara Falls Zoning Ordinance compliance, including issuance of site plan, building permit and any other necessary zoning approvals;
 - e) Developer shall have entered into a hotel franchise license agreement with a national chain acceptable to USAN and the City;
 - f) Negotiation of Parking Agreement;
 - g) Approval by City and USAN of Plans and Specifications for Project, subject to franchisor approval;
 - h) Submission by Developer of Design and Construction Contracts;
 - i) Satisfaction of SHPO requirements under §1409 of the New York State Parks, Recreation and Historic Preservation Law;
 - j) Approval of New York State Comptroller;
 - k) Approval of economic development incentives, including, but not limited to, a PILOT through the Niagara County Industrial Development Agency; and
 - l) Termination of existing License Agreement affecting the Property.
- 12) **City's Contingencies.** The City's obligations under the Development Agreement would be contingent upon:

- a) Approval of USAN Grant;
- b) SEQRA Compliance;
- c) Labor Peace Agreement Waiver (§2879-b (2) of the Public Authorities Reform Act;
- d) City of Niagara Falls Zoning Ordinance compliance, including issuance of site plan, building permit and any other necessary zoning approvals;
- e) Developer shall have entered into a hotel franchise license agreement with a national chain acceptable to USAN and the City;
- f) Negotiation of Parking Agreement;
- g) Approval by City and USAN of Plans and Specifications for Project
- h) Submission by Developer of Design and Construction Contracts;
- i) Satisfaction of SHPO requirements under §1409 of the New York State Parks, Recreation and Historic Preservation Law;
- j) Approval of New York State Comptroller; and
- k) Termination of existing License Agreement affecting the Property.

10) **USAN Indemnification.** Pursuant to the proposed Development Agreement, USAN would indemnify the Developer (up to the negotiated maximum amount) against losses suffered in the event the City is unable to perform its obligations under the Development Agreement.

13) **USAN Grant.** USAN proposes to make a grant for development of the project of up to \$2.75 million for the Project.

14) **Economic Development Incentives.** In addition to the USAN Grant, the Developer would be free to apply for such other economic development incentives as may be available for the Project, including, without limitation, sales tax exemption and PILOT benefits through the Niagara County Industrial Development Agency.

15) **Payment and Performance Bonds Required.** Payment and performance bonds would be required to be provided by the Developer at its expense, or, alternatively, by any construction manager retained by Developer, at its expense.

16) **Other terms, Conditions, and Provisions.** This Term Sheet summarizes only the basic terms of the proposed Development Agreement, and is not intended to describe all of the terms, covenants, and provisions that are to be negotiated and included in the proposed Development Agreement.

17) **Term Sheet Is Nonbinding.** This Term Sheet is not intended to be binding on any party, nor is it intended as an enforceable offer, contract, commitment, or agreement of any kind. No party shall be bound by any of the terms contained in this Term Sheet unless and until a formal Development Agreement is fully negotiated and executed by the City, USAN, and the Developer (or its subsidiary or affiliate).



City of Niagara Falls, New York

P.O. Box 69, Niagara Falls, NY 14302-0069

June 26, 2013

NIAGARA FALLS PLANNING BOARD

**RECOMMENDATION TO CITY COUNCIL:
APPROVAL OF SALE / CONVEYANCE PROPOSAL OF VACANT LOT**

Pursuant to action taken by the Niagara Falls Planning Board on the 26th day of June 2013, your request is hereby granted.

NAME OF OWNER: City of Niagara Falls

ADDRESS OF ACTION: 310 Rainbow Blvd.

PURPOSE: The sale and conveyance to Hamister Development Group LLC pursuant to a proposed Development Agreement between it, the City and USA Niagara

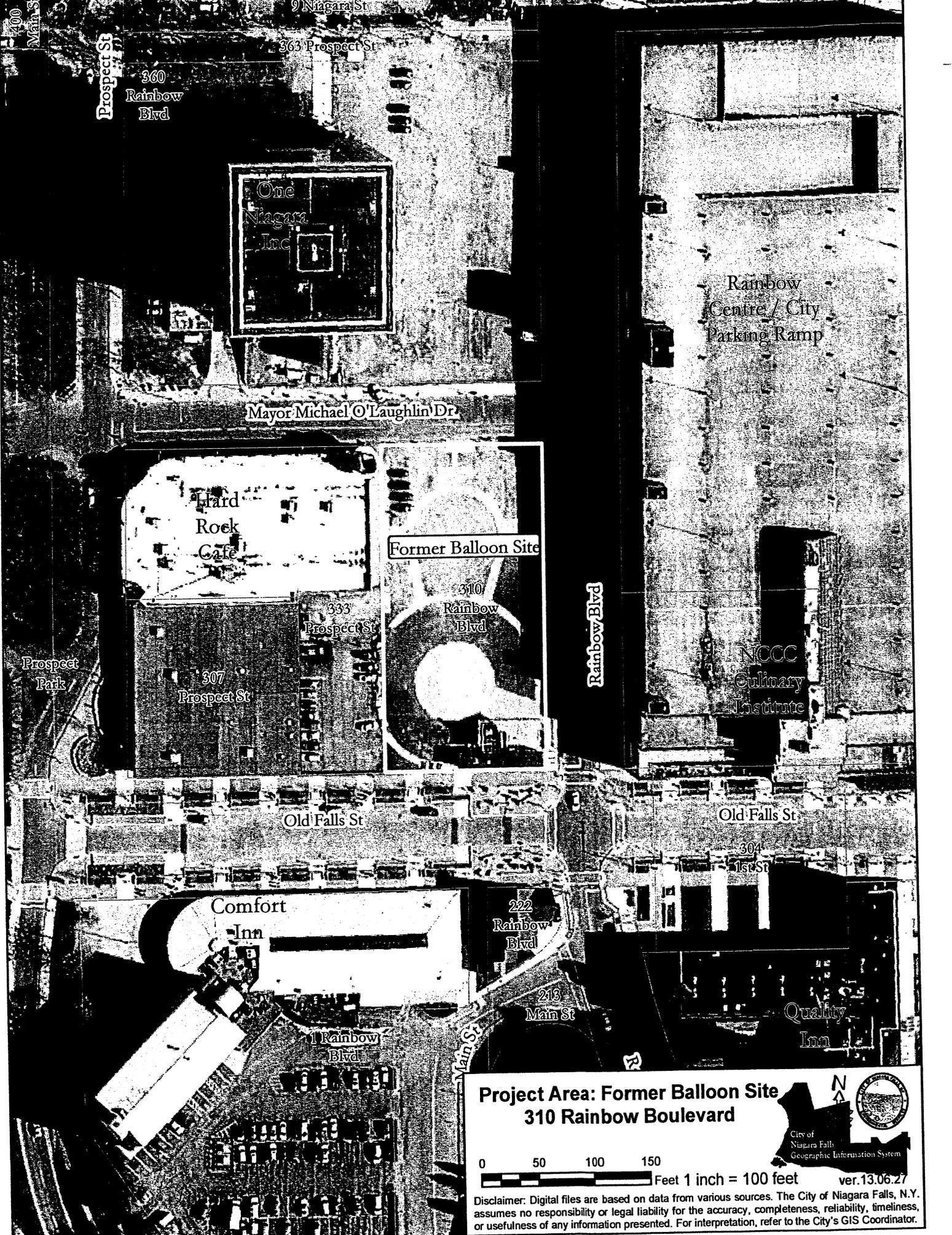
This application is hereby granted.

DATE: June 26, 2013

Richard D. Smith, Chairman
Niagara Falls Planning Board

13 JUN 27 PM 2:17
CITY CLERK

EXHIBIT C



100
Main St

Prospect St

360
Rainbow
Blvd

One
Niagara
Inc

Mayor Michael O'Laughlin Dr.

Rainbow
Centre / City
Parking Ramp

Hard
Rock
Cafe

Former Balloon Site

310
Rainbow
Blvd

333
Prospect St

Rainbow Blvd

NCCC
Culinary
Institute

Prospect
Park

307
Prospect St

Old Falls St

Old Falls St

Comfort
Inn

222
Rainbow
Blvd

304
1st St

1 Rainbow
Blvd

213
Main St

Quality
Inn

Project Area: Former Balloon Site
310 Rainbow Boulevard

0 50 100 150

Feet 1 inch = 100 feet

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Disclaimer: Digital files are based on data from various sources. The City of Niagara Falls, N.Y. assumes no responsibility or legal liability for the accuracy, completeness, reliability, timeliness, or usefulness of any information presented. For interpretation, refer to the City's GIS Coordinator.

