

BEREA CITY COUNCIL

City of Berea, Ohio

ORDINANCE NO. 2025-40

By: Councilwoman Mary K. Brown Sponsor: Mayor Cyril M. Kleem

AN ORDINANCE

AUTHORIZING THE MAYOR TO ENTER INTO AN AGREEMENT WITH BEREAMIXED USE PROJECT, LLC, OR AN AFFILIATE, TO PROVIDE FOR THE PAYMENT BY THE CITY OF BEREAMIXED USE PROJECT, LLC, OF CERTAIN TAXES CHARGED AND COLLECTED UNDER CHAPTER 196 OF THE CITY'S CODIFIED ORDINANCES AS PROVIDED IN THAT CERTAIN DEVELOPMENT AGREEMENT BETWEEN THE CITY AND BEREAMIXED USE PROJECT, LLC, AND TO EXECUTE ANY AND ALL DOCUMENTS RELATED THERETO, AND DECLARING AN EMERGENCY.

WHEREAS, Ohio Revised Code Section 5739.08(A) authorizes municipal corporations to levy an excise tax not to exceed 3% on transactions by which lodging by a hotel is or is to be furnished to transient guests in addition to the tax levied by Ohio Revised Code Section 5739.02; and

WHEREAS, Ohio Revised Code Section 5739.08(A) permits the proceeds of the excise tax to be used for any lawful purpose and Ohio Constitution, Article VIII, Section 13, grants municipalities the authority to give financial assistance to private industry in order to create new employment within this State; and

WHEREAS, pursuant to Chapter 196 of the City's Codified Ordinances, the City levies such an excise tax at the maximum rate of 3% (the "Bed Tax"); and

WHEREAS, pursuant to Ordinance 2025-17, passed by this Council on March 24, 2025, the City approved the execution and delivery of a Development Agreement (the "Development Agreement") with Berea Mixed Use Project LLC (the "Developer") for the development of a multi-purpose community field, hotel, sports medicine facility, multifamily apartments, restaurants, a parking garage and other mixed uses (the "Project"); and

WHEREAS, the Development Agreement provides for certain incentives including the payment to the Developer of a portion of the Bed Tax received with respect to the Project (the "Developer's Portion") to be paid to the Developer as provided therein and in an agreement between the Developer and the City (the "Bed Tax Agreement"); and

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WHEREAS, this Council has determined that the use of the Developer's Portion to support the Project will promote the welfare of the people of the City, stabilize the economy, provide employment and assist in the development of commercial, recreational, residential, health care and other mixed use activities to the benefit of the people of the City, and preserve, maintain or provide additional opportunities for their gainful employment; and

WHEREAS, an emergency exists in the usual daily operations of the City, that emergency being related to the need to pass this Ordinance as quickly as possible, in order to comply with the provisions of the Development Agreement which will result in the development of the Project and creation and retention of jobs, all of which improve the health, safety and welfare of the residents of the City;

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Berea, County of Cuyahoga, Ohio, that:

SECTION 1. Authorization of Bed Tax Agreement. This Council confirms its prior determination that the Project is in the best interest of the City, that the Project furthers the health, safety and welfare of its residents and has previously authorized the Development Agreement in furtherance thereof. The Mayor is hereby authorized, for and in the name of the City and on its behalf, to execute and deliver the Bed Tax Agreement which shall be and read substantially in the form on file with this Council, with such changes therein as are not inconsistent with this Ordinance and not substantially adverse to the City and that are approved by the Mayor. The approval of such changes, and that such changes are not inconsistent with this ordinance and not substantially adverse to the City, shall be conclusively evidenced by the execution of the Bed Tax Agreement by the Mayor.

SECTION 2. Further Authorizations. This Council hereby authorizes and directs the Mayor, the Law Director, the Director of Finance, Director of Planning and Development or other appropriate officers of the City to prepare and sign all agreements and instruments and to take any other actions as may be appropriate to implement this Ordinance.

SECTION 3. Open Meetings. This Council finds and determines that all formal actions of this Council and any of its committees concerning and relating to the passage of this Ordinance were taken in an open meeting of this Council or any of its committees, and that all deliberations of this Council and any of its committees that resulted in those formal actions were in meetings open to the public, all in compliance with the law including ORC 121.22.

SECTION 4. Declaration of Emergency; Effective Date. This Ordinance is declared to be an emergency measure necessary for the immediate preservation of the public peace, property, health, safety and welfare of the City, and for the further reason that this Ordinance is required to be immediately effective in order to enable the timely development of the Project, wherefore, this Ordinance shall be in full force and effect immediately upon its passage and approval by the Mayor.

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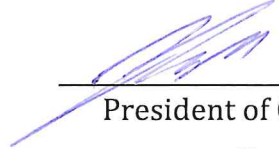
ORDINANCE NO. 2025-40


PASSED: June 2, 2025

ATTEST: 
Clerk of Council

APPROVED AS TO FORM:


Director of Law


President of Council

APPROVED: June 3, 2025

Mayor

BED TAX AGREEMENT

This Bed Tax Agreement (this “Agreement”), is made and entered into as of this ____ day of _____, 2025, by and between the CITY OF BERE A, OHIO (the “City”), a municipal corporation duly organized and validly existing under the Constitution and the laws of the State of Ohio and the Charter of the City, and BERE A MIXED USE PROJECT LLC, a Delaware limited liability company, having its principal office in Brecksville, Ohio (the “Developer” and, together with the City, the “Parties” and each individually a “Party”).

WITNESSETH:

WHEREAS, pursuant to Ordinance No. 20__-25 (the “Development Ordinance”), the City and the Developer have entered into that certain Development Agreement dated _____, 2025 (the “Development Agreement”) under which the Developer has agreed to construct certain improvements to the Site (as further described and defined in the Development Agreement) and other real property owned and/or leased by Developer and located in the City which is further depicted on the attached ***Exhibit A***, including but not limited to a multi-purpose community field, hotel, office, multifamily apartments, restaurants, and other mixed-uses (the “Phase I Development”) and a possible recreation complex or other mixed-uses (the “Phase II Development” and, together with the Phase I Development, the “Development”); and

WHEREAS, the City levies a three percent (3%) excise tax on lodging pursuant to Ohio Revised Code Section 5739.08(A) and City Ordinance No. 2019-28 (the “Bed Tax Ordinance”) passed on April 1, 2019 (the “Bed Tax”) on the Development, which Bed Tax will be remitted by the City to the Developer in accordance with the terms of the Development Agreement and this Agreement; and

WHEREAS, pursuant to Ordinance No. 20__-25 (the “Bed Tax Agreement Ordinance”), the City has determined that the Development will preserve, maintain or provide additional opportunities for gainful employment of the people of the City, has further determined to provide an Bed Tax payment to the Developer and to further authorize the execution and delivery of this Agreement; and

WHEREAS, the parties now desire to enter into this Agreement in order to supplement the agreements with respect to the use of the Bed Tax as set forth in the Development Agreement on the terms as hereinafter provided;

NOW, THEREFORE, in consideration of the premises and covenants contained herein the parties hereto agree to the foregoing and as follows:

Section 1. Bed Tax Payments to the Developer. The City hereby agrees to pay to the Developer in accordance with the terms of this Agreement and the Development Agreement an amount equal to one hundred percent (100%) of the Bed Tax received by the City from the Development (such payments to the Developer hereinafter referred to as the “Bed Tax Payments”).

The City agrees to make such Bed Tax Payments, (i) with respect to the Phase I Development, for a period beginning on January 31, 2028 and ending on December 31, 2057, and (ii) with respect to the Phase II Development, for a period beginning on January 31, 2030 and ending on December 31, 2059. On or before April 15th, July 15th, October 15th, and January 15th (each, a “Payment Date”), the City will make the required Bed Tax Payments to the Developer, which Bed Tax Payment amounts will be based on the amount of Bed Tax received by the City for the Development for the immediately preceding three months (for example, January through March, April 15th, April through June, July 15th, July through September, October 15th and October through December, January 15th). On each such Payment Date, the City shall deliver to the Developer a statement showing the total monthly amount of Bed Tax for the Development received by the City, the amount of Bed Tax Payments due to the Developer under this Agreement, along with a brief description of the basis and calculations for the same; provided, however, that failure by the City to deliver this statement shall not excuse the City from its payment obligation. Any such Bed Tax Payments are referred to herein as “Available Funds”.

All payments to the Developer hereunder on each Payment Date must be made pursuant to written instructions provided by the Developer.

Notwithstanding any other provision of this Agreement to the contrary, the City’s payment obligations hereunder are limited to Available Funds and do not constitute an indebtedness of the City within the provisions and limitations of the laws and the Constitution of the State of Ohio, and the Developer does not have the right to have other taxes or excises levied by the City for the payment of Bed Tax Payments or any other of the City’s obligations hereunder. Nothing herein will be deemed to prohibit the City from using, of its own volition, any other lawfully available resources for the fulfillment of any of the City’s obligations hereunder.

Unless otherwise agreed in writing by the Parties, neither Party shall have the right to set off any amount due under this Agreement against any amounts that may be due from the other Party, whether under this Agreement or any other agreement.

Section 2. Collection Process. The City agrees to perform such acts as are reasonably necessary or appropriate to collect the Bed Tax Payments, including, without limitation, the execution of all documentation and providing any necessary certificates required in connection with the Bed Tax Payments. In addition, the City agrees to deposit the Bed Tax Payments for the Development received by the City in a segregated fund within its own accounting system.

Section 3. Certain Representations, Warranties and Covenants of City. The City hereby represents, warrants and covenants as of the date of delivery of this Agreement that:

(a) It is a municipal corporation and political subdivision duly organized and validly existing under the Constitution and laws of the State of Ohio and its Charter.

(b) It will have duly accomplished all conditions necessary to be accomplished by it prior to the execution and delivery of this Agreement and to constitute this Agreement as a valid and binding obligation of the City enforceable in accordance with its terms.

(c) It is not in violation of or in conflict with any provision of the laws of the State of Ohio that would impair its ability to observe and perform its covenants, agreements and obligations under this Agreement.

(d) It has and will have full power and authority (a) to execute, deliver, observe and perform this Agreement and all other instruments and documents executed and delivered by it in connection herewith and (b) to enter into, observe and perform the transactions contemplated by this Agreement and those other instruments and documents.

(e) It has duly authorized the execution, delivery, observance and performance of this Agreement.

(f) The Development Ordinance and the Bed Tax Agreement Ordinance have each been duly passed by the City, have not been amended, modified or repealed, and are in full force and effect.

(g) It will not amend, modify or repeal the Bed Tax rate in any way, or take any other legislative or administrative action, which would negatively affect the amount or timing of Bed Tax Payments except as approved by the Developer in writing or required by law.

(h) It will not transfer, encumber, spend or use any moneys comprising Bed Tax Payments other than as provided in this Agreement unless a modification to this Agreement is agreed to by both parties in writing.

(i) To its knowledge, there are no actions, suits, proceedings, inquiries or investigations pending, or threatened, against or affecting it in any court or before any governmental authority or arbitration board or tribunal that challenges the validity or enforceability of, or seeks to enjoin performance of, this Agreement, or if successful would materially impair its ability to perform its obligations under this Agreement.

Section 4. Certain Representations and Warranties of the Developer. The Developer hereby represents and warrants as of the date of delivery of this Agreement that:

(a) It (a) is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware, and (b) has all requisite power and authority and all necessary licenses and permits to own and operate the Development and to carry on its business as now being conducted and as presently proposed to be conducted in the State of Ohio, except for such licenses and permits that are not currently available until the commencement, construction or completion of the Development, as applicable.

(b) The execution and delivery by it of this Agreement and the compliance by it with all of the provisions hereof (i) are within the authority and powers of the Developer, (ii) will not conflict with or result in any breach of any of the provisions of, or constitute a default under, any agreement, its certificate of formation or operating agreement, or other

instrument to which it is a party or by which it may be bound, or any license, judgment, decree, law, statute, order, rule or regulation of any court or governmental agency or body having jurisdiction over it or any of its activities or properties, the effect of which, individually or in the aggregate, is reasonably likely to have a material adverse effect on the Developer's ability to perform its obligations under this Agreement, and (iii) have been duly authorized by all necessary action on its part.

(d) There are no actions, suits, proceedings, inquiries or investigations pending, or to its knowledge threatened, against or affecting it in any court or before any governmental authority or arbitration board or tribunal that challenges the validity or enforceability of, or seeks to enjoin performance of, this Agreement, or if successful would materially impair its ability to perform its obligations under this Agreement.

Section 5. Successors; Amendments; City Consents; Assignment. This Agreement will be binding upon the parties hereto and their successors and assigns. This Agreement may only be amended by written instrument executed by all parties to this Agreement. Unless otherwise noted, any consent of the City to be given under this Agreement must be given in writing.

The Developer shall not have the right to assign this Agreement to any successor or assign without the prior written consent of the City, which may not be unreasonably withheld; provided, however, the Developer shall have to right, without obtaining the prior written consent of the City, to assign this agreement to an affiliate of Developer or its members or any other third party that agrees to assume Developer's rights and obligations hereunder and thereafter, Developer shall be released from all obligations and liabilities under this Agreement. Additionally, Developer may, without obtaining the consent of the City: (i) collaterally assign this Agreement to one or more lenders for the Development or to a bond trustee or purchaser of securities issued in connection with the Development, provided that any such assignment shall not relieve the Developer of its obligations hereunder or (ii) assign or transfer its rights to receive Bed Tax Payments from the City hereunder to one or more lenders for the Development or to a bond trustee or purchaser of securities issued in connection with the Development. Nothing in this Agreement shall be construed to require consent of the City for the Developer's transfer of title or all or portion of the Development.

Section 6. Extent of Covenants; No Personal Liability. All covenants, stipulations, obligations and agreements of the parties contained in this Agreement are effective and enforceable to the extent authorized and permitted by applicable law. The obligations of the City may be enforced to the extent permitted by law by mandamus or any suit or proceeding in law or equity. No such covenant, stipulation, obligation or agreement will be deemed a covenant, stipulation, obligation or agreement of any present or future member, officer, agent or employee of any of the parties hereto in their individual capacity, and neither the members of the City Council nor any City official executing this Agreement, or any individual person executing this Agreement on behalf of the Developer, will be liable personally by reason of the covenants, stipulations, obligations or agreements of the City or the Developer contained in this Agreement.

Section 7. Notices. Except as otherwise specifically set forth in this Agreement, all notices, demands, requests, consents or approvals given, required or permitted to be given hereunder must be in writing and will be deemed sufficiently given if actually received or if hand-delivered or

sent by recognized, overnight delivery service or by certified mail, postage prepaid and return receipt requested, addressed to the other Party at the address set forth in this Agreement or any addendum to or counterpart of this Agreement, or to such other address as the recipient has previously notified the sender of in writing, and will be deemed received upon actual receipt, unless sent by certified mail, in which event such notice will be deemed to have been received when the return receipt is signed or refused. The Parties, by notice given hereunder, may designate any further or different addresses to which subsequent notices, certificates, requests or other communications must be sent. The present addresses of the Parties follow:

- (i) To the Developer: Berea Mixed Use Project LLC
5720 Independence Drive, Suite 400
Brecksville, Ohio 44141
Attention: Kevin DiGeronimo
- With a copy to: Karla M. Rogers, Esq.
Calfee, Halter & Griswold LLP
1405 East Sixth Street
Cleveland, OH 44114
- And: Ted Tywang, Esq.
HSG Berea Development, LLC
76 Lou Groza Boulevard
Berea, OH 44017
- (ii) To the City: City of Berea, Ohio
11 Berea Commons
Berea, Ohio 44017
Attention: Mayor
- With a copy to: Director of Law
City of Berea
11 Berea Commons
Berea, Ohio 44017
- And: Michael L. Sharb, Esq.
Squire Patton Boggs (US) LLP
1000 Key Tower, 127 Public Square
Cleveland, OH 44114

Section 8. Severability. If any provision of this Agreement is held to be illegal, invalid or unenforceable, said provision will be fully severable. This Agreement will be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this Agreement and the remaining provisions of this Agreement will remain in full force and effect and will not be affected by the illegal, invalid or unenforceable provision or by its severance from this Agreement. Furthermore, in lieu of such illegal, invalid or unenforceable provision, there will be added automatically as a part of this Agreement a provision as similar in terms to such illegal,

invalid or unenforceable provision as may be possible that is and will be legal, valid and enforceable.

Section 9. Separate Counterparts. This Agreement may be executed by the Parties in one or more counterparts or duplicate signature pages, each of which when so executed and delivered will be an original, with the same force and effect as if all required signatures were contained in a single original instrument. Any one or more of such counterparts or duplicate signature pages may be removed from any one or more original copies of this Agreement and annexed to other counterparts or duplicate signature pages to form a completely executed original instrument.

Section 10. Entire Agreement. Except as described below, this Agreement constitutes the entire agreement between the Parties with respect to the matters covered herein and supersedes prior agreements and understandings between the Parties. Notwithstanding the foregoing, this Agreement supplements the agreements with respect to the use of the Bed Tax as set forth in the Development Agreement.

Section 11. Governing Law and Choice of Forum. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio. All claims, counterclaims, disputes and other matters in question between the City, its employees, contractors, subcontractors and agents, and the Developer, its employees, contractors, subcontractors and agents arising out of or relating to this Agreement or its breach will be decided in a court of competent jurisdiction within the State of Ohio.

IN WITNESS WHEREOF, the City and the Developer have caused this Bed Tax Agreement to be executed in their respective names by their duly authorized officers as of the date hereinabove written.

CITY OF BEREHA, OHIO

Date: June 3, 2025

By: _____

Cyril Kleem, Mayor

Approved as to Form:

Barbara Jones
Barbara Jones, Director of Law

BEREA MIXED USE PROJECT LLC

By: HSG Berea Development, LLC,
a Delaware limited liability company

Its: Manager

By: _____

Name: David A. Jenkins

Title: COO

Date: _____, 2025

DIRECTOR OF FINANCE CERTIFICATE

The undersigned, Director of Finance of the City of Berea (the "City") under the foregoing Agreement, certifies hereby that the monies required to meet the obligations of the City during the year 2025 under the foregoing Agreement, being \$0.00, have been appropriated lawfully for that purpose, and is in the Treasury of the City or in the process of collection to the credit of an appropriate fund, free from any previous encumbrances. This Certificate is given in compliance with O.R.C. Sections 5705.41 and 5705.44.

Dated: June 3, 2025

A handwritten signature in black ink, appearing to read "Andrea Morris", written over a horizontal line.

Andrea Morris, Director of Finance
City of Berea, Ohio

Exhibit A
The Site

