

RESOLUTION NO. 2013-013

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ROHNERT PARK
AUTHORIZING AND APPROVING A DEFERRED PAYMENT PLAN AGREEMENT
WITH K-N-I, LLC FOR SEWER CAPACITY CHARGES FOR
ART'S PLACE (563 ROHNERT PARK EXPRESSWAY WEST)**

WHEREAS, the City Council of the City of Rohnert Park ("City") wishes to support economic development, and in an effort to achieve the desired goal of economic development, the City Council has adopted Resolution No. 2010-89 approving an Economic Development / Job Creation Program ("ED Program");

WHEREAS, the approved ED Program includes provisions for the City to "be a creative partner" to overcome obstacles or hindrances to the use of land for economic benefit in Rohnert Park;

WHEREAS, timing of payment of Sewer Capacity Charges can be an obstacle to development of new restaurants;

WHEREAS, one alternate payment mechanism, which can be utilized when there is a development with a need for a new or increased permanent sewer capacity, is a deferred payment plan, which is memorialized in a written agreement;

WHEREAS, K-n-I, LLC DBA Art's Place ("Developer") desires to re-open an 80-seat restaurant previously occupied by former tenant Taste Tee LLC DBA Season's Pizzeria Sports Bar Grill ("Former Tenant") located at 563 Rohnert Park Expressway West, Rohnert Park, California which is sited on a portion of assessor's parcel number 143-391-048 (the "Project");

WHEREAS, to support economic development within the City, City entered into Deferred Sewer Capacity Charge Payment Plan Agreements ("Original Agreements") with Former Tenant, which among other things, deferred payment of the Former Tenant's sewer capacity charges;

WHEREAS, Former Tenant made payments through August 6, 2012, and there remains an unpaid balance of \$10,736.08 of the total Sewer Capacity Charges of \$43,200.00; and

WHEREAS, Developer desires to enter into a Deferred Sewer Capacity Charge Payment Plan Agreement with the City for the the unpaid Sewer Capacity Charge of \$10,736.08, and the City is willing to defer payment for such amount from the Developer to support economic development on the terms and conditions set forth herein.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE
CITY OF ROHNERT PARK AS FOLLOWS:**

Section 1. The above recitations are true and correct.

Section 2. Environmental Clearance. The adoption of this Resolution and accompanying Amended and Restated Deferred Sewer Capacity Charge Payment Plan Agreement is exempt from review under the California Environmental Quality Act because the activity in question is not a project as defined under CEQA Guidelines Section 15378 in that

there is no potential that the activity will result in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment.

Section 3. The City Manager is hereby authorized and directed to take all actions to effectuate the Deferred Sewer Capacity Charge Payment Plan Agreement for and on behalf of the City of Rohnert Park, including execution if necessary, in substantially similar form to the agreement attached hereto as Exhibit "A," subject to minor modifications by the City Attorney.

DULY AND REGULARLY ADOPTED this 12th day of February, 2013.



CITY OF ROHNERT PARK

Pam Stafford
Pam Stafford Mayor

ATTEST:

JoAnne M. Buerger
JoAnne Buerger City Clerk

Attachment: Agreement

AHANOTU: AYE BELFORTE: AYE MACKENZIE: AYE CALLINAN: AYE STAFFORD: AYE
AYES: (5) NOES: (0) ABSENT: (0) ABSTAIN: (0)

Exhibit A

Deferred Sewer Capacity Charge Payment Plan Agreement

Between the City of Rohnert Park and

K-n-I, LLC (Developer)

This Deferred Sewer Capacity Charge Payment Plan Agreement ("Agreement") is entered into by and between the City of Rohnert Park, a Municipal Corporation of the State of California ("City"), and K-n-I, LLC, DBA Art's Place ("Developer") on this _____ day of February, 2013.

WHEREAS, the City is interested in promoting economic development and in an effort to achieve this desired goal, on August 24, 2010, the City adopted Resolution No. 2010-89 adopting an Economic Development / Job Creation Program ("ED Program");

WHEREAS, the approved ED Program includes provisions for the City to work with the business community to determine how the City might, in some way, "be a creative partner" with businesses to address and overcome major obstacles or hindrances to the use of land for economic benefit in the City of Rohnert Park;

WHEREAS, timing of payment of Sewer Capacity Charges can be an obstacle to development of new restaurants;

WHEREAS, one alternative payment mechanism, which can be utilized when there is a development with a need for a new or increased permanent sewer capacity, is a deferred payment plan, which is memorialized in a written agreement;

WHEREAS, Developer desires to re-open an 80-seat restaurant previously occupied by former tenant Taste Tee LLC DBA Season's Pizzeria Sports Bar Grill ("Former Tenant") located at 563 Rohnert Park Expressway West, Rohnert Park, California which is sited on a portion of assessor's parcel number 143-391-048 (the "Project");

WHEREAS, to support economic development within the City, on October 13, 2010, via City Council Resolution No. 2010-120, City entered into a Deferred Sewer Capacity Charge Payment Plan Agreement ("Original Agreement") with Former Tenant, which among other things, deferred payment of the Former Tenant's sewer capacity charges over a five-year period;

WHEREAS, on May 24, 2011, City Council Resolution No. 2011-43 was approved authorizing execution of an Amended and Restated Deferred Payment Plan Agreement ("First Amended Original Agreement") with the Former Tenant which changed the terms of the Original Agreement as follows:

1. Changed from a three year term to a five year term.
2. Changed number of seats and corresponding sewer flow from 113 to 80.
3. Changed bi-monthly payments to monthly payments.

WHEREAS, on March 27, 2012, a Second Amended and Restated Deferred Payment Plan Agreement for Sewer Capacity Charges ("Second Amended Original Agreement") with the Former Tenant was approved via City Council Resolution No. 2012-33 changing the terms of the First Amended Original Agreement as follows:

1. Changed from a five year term to a four year term.
2. Changed the sewer capacity from 1,600 gallons per day to 800 gallons per day with a corresponding Sewer Capacity Charge of Forty-Three Thousand Two Hundred Dollars and Zero Cents (\$43,200.00).

WHEREAS, Former Tenant made payments through August 6, 2012, and there remains an unpaid balance of \$10,736.08 of the total Sewer Capacity Charges of \$43,200.00.

WHEREAS, Developer desires to enter into a Deferred Sewer Capacity Charge Payment Plan Agreement with the City for the the unpaid Sewer Capacity Charge of \$10,736.08, and the City is willing to defer payment for such amount from the Developer to support economic development on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual consideration contained in this Agreement and subject to the terms and conditions as stated, it is understood and agreed by the parties as follows:

AGREEMENT

1. Payment Plan Terms.

The Project requires 800 gallons-per-day of Sewer Capacity. The Sewer Capacity Charge for 800 gallons per day is Forty-Three Thousand Two Hundred Dollars and Zero Cents (\$43,200). Former Tenant (i) made a down payment of Twelve Thousand Two Hundred Four Dollars and Zero Cents (\$12,204.00) on October 13, 2010, (ii) made additional payments of Seventeen Thousand Six Hundred Two Dollars and Eighty-Eight Cents (\$17,602.88) through August 6, 2012, of which Fifteen Thousand Nine Hundred Thirty-Eight Dollars and Eleven Cents (\$15,938.11) is applied to principal and One Thousand Six Hundred Sixty-Four Dollars and Seventy-Seven Cents (\$1,664.77) is applied to interest expense, and (iii) received a credit of Four Thousand Three Hundred Twenty-One Dollars and Eighty-One Cents (\$4,321.81) for original sewer capacity. Developer will provide a Promissory Note to the City for the remaining balance due of Ten Thousand Seven Hundred Thirty-Six Dollars and Eight Cents (\$10,736.08), to be paid in forty-three (43) monthly payments commencing April 1, 2013, of TWO HUNDRED SEVENTY-THREE DOLLARS and TWENTY-THREE CENTS (\$273.23) each, which payments are inclusive of principal and interest at the rate of five percent (5.0%) per annum (the "Note"), the form of which is attached to this Agreement as **Exhibit 1**.

2. Purpose of Payment Plan.

Developer desires to operate a restaurant on the Property with capacity of 800 gallons per day.

3. Payments Begin.

Monthly payments shall be paid on the first of each month commencing on April 1, 2013, and shall continue in accordance with the terms and conditions of the Note.

4. Provisional Capacity Rights.

Upon receipt of valid payment, including clearance of checks or wire transfers with appropriate bank, sewer capacity rights will provisionally accrue to the Project at the rate of one (1) gallon per Fifty-Four Dollars and zero cents (\$54.00), not including any interest, per the terms of this agreement. In no case shall the Project accrue more than 800 gallons of sewer

capacity for payments made to satisfy the obligations of this Agreement. Notwithstanding the above, in the event of default of any required payments under the Note, the Project will not be deemed to have accrued any sewer capacity rights and any provisionally accrued sewer capacity rights will be deemed revoked.

5. Disconnection/Termination of Service for lack of payment.

In addition to any other remedy in law or equity, including all remedies provided under Title 13 of the Rohnert Park Municipal Code, Developer agrees that, notwithstanding any other right at law and in consideration of not requiring a specific security interest to protect the loan, if all utility charges are not paid within fifteen (15) calendar days of payment due date published on bill, or if Developer is in default per Section 11, all City-provided utilities to the Property, including water and sewer service, may be disconnected.

6. Prepayment.

The Developers may, at any time, at their option and from time to time, prepay the Note in part or in whole without premium or penalty. Any partial prepayment shall be applied to the outstanding principal and not to the installment next due under the terms of the Note.

7. Prohibition Against Assignment or Change In Ownership of Developer Without Prior Consent of City.

The qualifications and identity of Developer are of particular concern to the City in entering into this Agreement. Therefore, no voluntary or involuntary successor in interest of Developer shall acquire any rights or powers under this Agreement, and there shall be no change in more than fifty-one percent (51%) of the ownership interests in the Developer, except as expressly set forth herein. Developer shall not assign or permit the assignment of all or any of its rights or duties under this Agreement, or permit a change in more than fifty-one (51%) of its ownership interests, without the prior written approval of the City, which consent shall be in the City's sole discretion and shall require that any approved successor specifically agree in writing to be bound by the provisions of this Agreement.

8. Time Frame.

Time is of the essence of this Agreement.

9. Equal Employment Opportunity.

- a. The Developer, its contractors and agents will not discriminate against any employee or person engaged in this project because of their race, religion, color, sex, or national origin;
- b. The Developer shall post in conspicuous places on the Property site notices setting forth the provisions of this non-discrimination clause;
- c. Violation of these provisions shall be cause to terminate this Agreement; and
- d. None of the terms of this provision shall be used to preclude the City from pursuing other remedies available under law or equity for non-compliance with the terms of this Agreement.

10. Disclaimer of Relationship.

The City and Developer agree and acknowledge that nothing contained in this Agreement or any act of the City employees, agents or officers or of the Developer shall be deemed or construed by any of the parties to this Agreement, or by third persons, to create any relationship of any third-party beneficiary, or of principal and agent, or of limited or general partnership, or of joint venture, or of any association or joint relationship.

11. Events of Default.

Any of the following events shall constitute an event of default:

- a. Failure to make payment of the principal or any interest on the Note when due and as the same shall become due and payable;
- b. Failure to perform any obligation contained in this Agreement;
- c. Making a presentation or warranty with regard to the subject of this Agreement that is false or misleading in a material respect;
- d. If the Developer shall:
 - i. Admit in writing their inability to pay their debts as they come due;
 - ii. File a petition in bankruptcy, or a petition to take advantage of any insolvency act or a petition seeking reorganization;
 - iii. Make an assignment for the benefits of their creditors;
 - iv. Consent to the appointment of a receiver of themselves, or of the whole or any substantial part of their Property; or
 - v. On a petition in bankruptcy or insolvency or seeking reorganization filed against themselves, acquiesce in such filing, fail to have the action discharged within ninety (90) days of such filing, be adjudicated bankrupt, or become subject to a receiver; and
- e. Developer assigns or permits the assignment of all or any of its rights or duties under this Agreement, or permits a change in more than fifty-one percent (51%) of its ownership interests, without the prior written approval of the City.

12. Remedies Upon Default.

- a. Automatic Acceleration. In the case of the occurrence of an event of default under paragraph 11 above, the Note shall automatically, without notice to the Developers or any other person, forthwith become due and payable in full, together with interest accrued thereon;
- b. Option Acceleration. In the case of the occurrence of any other event of default and the continuance thereof for more than thirty (30) consecutive days after delivery to the Developers of a written notice issued by the City specifying such event of default and required it be remedied, the City may, by written notice to Developer, declare the principal and accrued interest on the Note and all obligations of the Developers hereunder to be forthwith due and payable. Any written notice shall be deemed delivered when deposited in the U.S. mail; and

- c. Immediate disconnection/termination of utility service as provided for in paragraph 5, above.

13. Notices.

All notices, consents, demands, and other communications hereunder shall be deemed to have been given when personally delivered, mailed by registered or certified mail, postage prepaid or sent by telegram, addressed:

- a. If to Developer:

Managing Member
K-n-I, LLC, DBA Art's Place
563 Rohnert Park Expressway West
Rohnert Park, California 94928; and

Greg Kalemba, CEO
Agent for Service of Process
K-n-I, LLC
4279 Hessel Road
Sebastopol, California 95472.

- b. If to the City:

City Manager
Rohnert Park City Hall
130 Avram Avenue
Rohnert Park, California 94928.

14. Successors and Assigns.

This Agreement shall be binding upon and inure to the benefit of, and be enforceable by, the parties hereto and their respective successors and assigns, and beneficiaries.

15. Governing Law.

This Agreement is executed, and is to be performed, in the State of California and shall be governed by the laws of the State of California.

16. Severability.

If any term contained in this Agreement or in the Note shall be invalid and unenforceable, the remainder of this Agreement and the Note shall not be affected thereby.

17. Attorneys' Fees.

If either party to this Agreement shall bring any action against the other arising out of this Agreement or the exhibit(s) hereto, the prevailing party shall be entitled to recover a reasonable sum for attorneys' fees and costs in such action.

18. Venue.

In the event a claim or action is filed in connection with this Agreement, the parties agree that the proper venue for any such proceeding shall be in the Superior Court of the County of Sonoma, California.

IN WITNESS WHEREOF, the parties have executed this instrument as of the date written above.

DATED: _____

DEVELOPER:

By: _____
Greg Kalemba, CEO
K-n-I, LLC d/b/a Art's Place

DATED: _____

CITY OF ROHNERT PARK:

By: _____
Gabriel Gonzalez, City Manager

APPROVED AS TO FORM:

DATED: _____

By: _____
Michelle Marchetta Kenyon
City Attorney

EXHIBIT 1

PROMISSORY NOTE

City of Rohnert Park, California

\$10,736.08

2/__/2013

For valid consideration duly received and hereby acknowledged, the undersigned K-n-I, LLC, DBA Art's Place ("Maker"), promises and agrees to pay to the order of the City of Rohnert Park, 130 Avram Avenue, Rohnert Park, California 94928, or holder ("City"), in lawful money of the United States of America, the principal sum of TEN THOUSAND SEVEN HUNDRED THIRTY-SIX DOLLARS AND EIGHT CENTS (\$10,736.08), to be paid in forty-three (43) monthly payments of TWO HUNDRED SEVENTY-THREE DOLLARS and TWENTY-THREE CENTS (\$273.23) each commencing April 1, 2013, which payments are inclusive of principal and interest at the rate of five percent (5.0%) per annum, in accordance with the terms the Deferred Sewer Capacity Charge Payment Plan Agreement Between the City of Rohnert Park And K-n-I, LLC dated February _____, 2013, ("Agreement"), which is incorporated herein in full by reference. The payment schedule for this Promissory Note is attached herewith.

Unless otherwise specified in writing by the City, all payments on this Promissory Note shall be paid to the City, by check, made payable to the order of the City of Rohnert Park, 130 Avram Avenue, Rohnert Park, California 94928.

Should default be made in payment of the principal or interest, the whole sum of principal and interest shall, at the option of the holder of this note, become immediately due as provided in the Agreement. Whether or not suit is filed, Maker agrees to pay all attorneys' fees, costs of collection, costs, and expenses incurred by the City in connection with the enforcement or collection of this Promissory Note.

This Promissory Note has been executed and delivered in and shall be construed in accordance with and governed by the laws of the State of California and of the United States of America.

Executed as of the date first written above.

K-n-I, LLC DBA ART'S PLACE

By: _____
Greg Kalembe, CEO
Its: Managing Member

EXHIBIT 1

Payment Schedule for Promissory Note (Amortization Schedule) Sewer Capacity Charge Payment Plan for Art's Place, 563 Rohnert Park Expressway West

Due	Number	Amount	Interest	Balance	Due	Number	Amount	Interest	Balance
4/1/2013		0		\$ 10,736.08					
4/1/2013	1	\$ (273.23)	\$ -	\$ 10,462.85	2/1/2015	23	\$ (273.23)	\$ 23.08	\$ 5,185.34
5/1/2013	2	\$ (273.23)	\$ 43.00	\$ 10,232.62	3/1/2015	24	\$ (273.23)	\$ 19.89	\$ 4,932.00
6/1/2013	3	\$ (273.23)	\$ 43.45	\$ 10,002.84	4/1/2015	25	\$ (273.23)	\$ 20.94	\$ 4,679.71
7/1/2013	4	\$ (273.23)	\$ 41.11	\$ 9,770.72	5/1/2015	26	\$ (273.23)	\$ 19.23	\$ 4,425.71
8/1/2013	5	\$ (273.23)	\$ 41.49	\$ 9,538.98	6/1/2015	27	\$ (273.23)	\$ 18.79	\$ 4,171.28
9/1/2013	6	\$ (273.23)	\$ 40.51	\$ 9,306.26	7/1/2015	28	\$ (273.23)	\$ 17.14	\$ 3,915.19
10/1/2013	7	\$ (273.23)	\$ 38.24	\$ 9,071.27	8/1/2015	29	\$ (273.23)	\$ 16.63	\$ 3,658.59
11/1/2013	8	\$ (273.23)	\$ 38.52	\$ 8,836.57	9/1/2015	30	\$ (273.23)	\$ 15.54	\$ 3,400.89
12/1/2013	9	\$ (273.23)	\$ 36.31	\$ 8,599.65	10/1/2015	31	\$ (273.23)	\$ 13.98	\$ 3,141.64
1/1/2014	10	\$ (273.23)	\$ 36.52	\$ 8,362.94	11/1/2015	32	\$ (273.23)	\$ 13.34	\$ 2,881.75
2/1/2014	11	\$ (273.23)	\$ 35.51	\$ 8,125.22	12/1/2015	33	\$ (273.23)	\$ 11.84	\$ 2,620.36
3/1/2014	12	\$ (273.23)	\$ 31.17	\$ 7,883.16	1/1/2016	34	\$ (273.23)	\$ 11.13	\$ 2,358.26
4/1/2014	13	\$ (273.23)	\$ 33.48	\$ 7,643.41	2/1/2016	35	\$ (273.23)	\$ 10.01	\$ 2,095.05
5/1/2014	14	\$ (273.23)	\$ 31.41	\$ 7,401.59	3/1/2016	36	\$ (273.23)	\$ 8.32	\$ 1,830.14
6/1/2014	15	\$ (273.23)	\$ 31.43	\$ 7,159.79	4/1/2016	37	\$ (273.23)	\$ 7.77	\$ 1,564.68
7/1/2014	16	\$ (273.23)	\$ 29.42	\$ 6,915.98	5/1/2016	38	\$ (273.23)	\$ 6.43	\$ 1,297.88
8/1/2014	17	\$ (273.23)	\$ 29.37	\$ 6,672.12	6/1/2016	39	\$ (273.23)	\$ 5.51	\$ 1,030.16
9/1/2014	18	\$ (273.23)	\$ 28.33	\$ 6,427.22	7/1/2016	40	\$ (273.23)	\$ 4.23	\$ 761.17
10/1/2014	19	\$ (273.23)	\$ 26.41	\$ 6,180.41	8/1/2016	41	\$ (273.23)	\$ 3.23	\$ 491.17
11/1/2014	20	\$ (273.23)	\$ 26.25	\$ 5,933.42	9/1/2016	42	\$ (273.23)	\$ 2.09	\$ 220.02
12/1/2014	21	\$ (273.23)	\$ 24.38	\$ 5,684.58	10/1/2016	43	\$ (220.93)	\$ 0.90	\$ (0.00)
1/1/2015	22	\$ (273.23)	\$ 24.14	\$ 5,435.49					