

CITY COUNCIL AGENDA ITEM COVER MEMO

Agenda Item Number: \_\_\_\_\_

Meeting Type: Regular

Meeting Date: Dec 4, 2014

Action Requested By: Legal

Agenda Type: Resolution

Subject Matter:

First Amendment to Option Agreement to Lease Real Estate to Sealy Property Development.

Exact Wording for the Agenda:

Resolution authorizing the Mayor to execute First Amendment to Option Agreement to Lease Real Estate between the City of Huntsville and Sealy Property Development.

Note: If amendment, Please state title and number of the original

Item to be considered for: Action

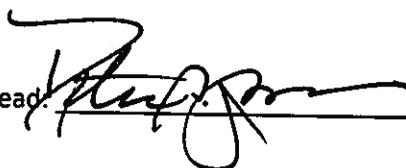
Unanimous Consent Required: No

Briefly state why the action is required; why it is recommended; what council action will provide, allow and accomplish and; any other information that might be helpful.

Associated Cost: \_\_\_\_\_

Budgeted Item: Not Applicable

MAYOR RECOMMENDS OR CONCURS: Yes

Department Head: 

Date: 12 - 3 - 14

RESOLUTION NO. 14-\_\_\_\_\_

BE IT RESOLVED by the City Council of the City of Huntsville, Alabama, that the Mayor be, and he is hereby authorized to enter into a First Amendment to Option Agreement to Lease Real Estate between the City of Huntsville, Avenue Huntsville, LLLP, and Sealy Property Development, LLC, on behalf of the City of Huntsville, a municipal corporation in the State of Alabama, which said agreement is substantially in words and figures similar to that certain document attached hereto and identified as "First Amendment to Option Agreement to Lease Real Estate between the City of Huntsville, Avenue Huntsville, LLLP, and Sealy Property Development, LLC," consisting of fourteen (14) pages including Exhibits, and the date of December 4, 2014, appearing on the margin of the first page, together with the signature of the President or President Pro Tem of the City Council, and an executed copy of said document being permanently kept on file in the Office of the City Clerk-Treasurer of the City of Huntsville, Alabama.

ADOPTED this the 4th day of December, 2014.

\_\_\_\_\_  
President of the City Council of  
the City of Huntsville, Alabama

APPROVED this the 4th day of December, 2014.

\_\_\_\_\_  
Mayor of the City of  
Huntsville, Alabama

STATE OF ALABAMA     §  
                                  § ss.  
MADISON COUNTY     §

**FIRST AMENDMENT TO  
OPTION AGREEMENT TO LEASE REAL ESTATE**

THIS FIRST AMENDMENT TO OPTION AGREEMENT TO LEASE REAL ESTATE (this "First Amendment") is made the \_\_\_\_ day of December, 2014 (the "Effective Date") by and between the City of Huntsville, Alabama, a municipal corporation in the State of Alabama (hereinafter referred to as the "City"), Avenue Huntsville, LLLP, an Alabama limited liability limited partnership (hereinafter referred to as "Project Owner"), and Sealy Property Development, LLC, an Alabama limited liability company (hereinafter referred to as "Sealy") (collectively referred to hereinafter as the "parties").

**RECITALS**

WHEREAS, the City has been involved in planning for the development of certain areas of downtown Huntsville including, without limitation, the RFP Property described below; and

WHEREAS, the RFP Property is located in an area of the City, which the City deems an important location for planned, mixed-use urban development consisting of multi-family housing, commercial and retail enterprises, restaurants, and other businesses and establishments if developed and improved in accordance with elevated standards typical of successful urban redevelopment observed in other areas; and

WHEREAS, cities throughout the United States have adopted codes and undertaken other procedures that go beyond conventional zoning controls in order to advance land development regulatory mechanisms that place primary emphasis on the physical form of the built environment with the goal of producing a special type of place within the urban environment, which codes are based on the scale, character, intensity and form of development rather than solely on differences in land use; and

WHEREAS, absent adequate enabling laws in the State of Alabama, the City desires to achieve similar goals with respect to certain urban settings within its jurisdiction through agreements with developers that impose requirements for construction and development of facilities in accordance with higher standards of construction and design that cannot be achieved through zoning and other regulatory actions by the City; and

WHEREAS, the RFP Property is situated in an area of the City that requires significant public parking improvements to address current and future parking demands; and

WHEREAS, the City published a request for proposal 95-2012-63-3 (the "RFP"), pursuant to which City requested the submission of proposals for the development of certain real property (the "RFP Property") owned by the City; and

WHEREAS, Sealy submitted a response to the RFP, in which Sealy proposed to construct a mixed-use development (the "Project") on the RFP Property and the City selected Sealy to develop the RFP Property; and

WHEREAS, the City and Sealy entered into that certain Option Agreement to Lease Real Estate (the "Original Option Agreement") dated December 19, 2013, which the parties desire to modify pursuant to the terms and conditions set forth below (the Original Option Agreement, as amended by this First Amendment, is referred to herein as the "Option Agreement"); and

WHEREAS, Sealy desires to assign its development rights, title and interests under the Option Agreement to Project Owner, an affiliate of Sealy, and the Project Owner desires to accept same; and

WHEREAS, Sealy has agreed to convey to the City, at no cost to the City, a parcel of land (hereinafter referred to as the "Additional Property"), which parcel of land is more particularly described in Schedule "1" attached hereto and incorporated herein by this reference, to be used in connection with the Project, a portion of which shall be used for public capital improvements by the City and for other public purposes; and

WHEREAS, the City has determined, and hereby finds, that a number of public and economic benefits to the City will result from the development and construction of the Project and the agreements of the Project Owner in the Option Agreement, including, but not limited to, the following:

- (a) the conveyance of title to the Additional Property to the City at no charge to the City,
- (b) Project Owner providing, at its own expense, parking to serve the Project in a C-3 zoning district within the City, which zoning district does not require parking facilities be provided,
- (c) Project Owner providing the City at no charge the 24/7 use of forty (40) parking spaces in the Project parking deck,
- (d) Project Owner providing design and aesthetic concessions at the request of the City for the Project, as well as for future development, including but not necessarily limited to building height, materials, massing and arrangement, and ground floor transparency,
- (e) Project Owner agreeing to the City's construction time frame and deadlines,
- (f) The Project will generate construction and retail jobs in the City,
- (g) The Project will provide a housing base to attract professionals for new jobs and industry,
- (h) The Project will generate an increased regional draw to the City's downtown area, and
- (i) The Project is expected to foster additional interest in further development or redevelopment of the City's downtown area and to increase the overall tax base and general welfare of the City; and

WHEREAS, the City finds that the public and economic benefits to the City and its residents resulting from the Project serve as appropriate consideration to the City for the terms of the Option (as defined in the Original Option Agreement),

NOW, THEREFORE, in consideration of the parties' mutual promises, conditions and provisions, the parties hereto agree as follows:

1. **Additional Property.** Sealy will convey, by general warranty deed, the Additional Property to the City contemporaneously with the execution of this First Amendment and shall include with the general warranty deed a Title Opinion suitable in form and content to the City Attorney or his designee. After such conveyance, the City will own the parcel of land (the "City Tract") more particularly described and shown on Schedule "2" attached hereto and incorporated herein by this reference.
2. **Assignment and Assumption.** Except for the rights described in Section 8 of this First Amendment, Sealy hereby assigns all of Sealy's rights, title, interests and obligations under the Option Agreement to Project Owner. Project Owner hereby assumes all such rights, title, interests and obligations. The City consents to such assignment and assumption and hereby waives any notice requirements related to same.
3. **Description of the Option Property.** At the time of execution of the Original Option Agreement, the parties thereto anticipated that Meridian Street would be extended between Jefferson Street and Spragins Avenue over a portion of the City Tract. Instead, the City has elected to construct a public surface parking lot on a portion of the City Tract, which portion is shown and designated as the "Surface Parking Lot Area" on Exhibit "A-1" attached hereto and incorporated herein by this reference. Exhibit "A" to the Original Option Agreement is hereby deleted. The parties agree that the term "Property" as used in the Option Agreement means that parcel of land shown and designated as the "Development Area" on the attached Exhibit "A-1". The parcel of land subject to the Option may be referred to in the Option Agreement as the "Property" or the "Development Area".
4. **Plat.** The City will submit a plat to the City of Huntsville Planning Commission (the "Planning Commission") subdividing the City Tract into two lots, with one lot being the Surface Parking Lot Area and the other lot being the Development Area. The parties hereto agree that upon approval of the final plat of the subdivision (the "Final Plat") by the Planning Commission the City will not record the Final Plat until such time, if ever, as the City and the Project Owner have executed the Development Agreement, now known as the Project Agreement per Section 6 herein below, and the Ground Lease Agreement. The parties hereto acknowledge and agree that pursuant to Section 3.4(5) of the Subdivision Regulations of the City of Huntsville, Alabama, if the Final Plat is not recorded within six (6) months of the date of its approval, then the Planning Commission's approval is deemed to have expired.
5. **Option Period.** The expiration date of the Option Period is extended until January 22, 2015.
6. **Development Agreement/Project Agreement.** The Development Agreement referenced in the Original Option Agreement is re-titled as the "Project Agreement."

7. **LC&E Approval.** To the extent the City determines it is required by applicable law, the City shall seek to obtain location, character and extent approval (“LC&E”) from the Planning Commission for the improvements to be made and located on and/or immediately adjacent to the City Tract. The City shall submit the application for LC&E approval to the Planning Commission by December 1, 2014, together with the materials or information that is required to be submitted in connection with the application. If LC&E is disapproved, in whole or part, by the Planning Commission, which is required by law to communicate its reasons for disapproval to the City Council, then the City shall, at its option, either seek to have the City Council overrule the disapproval, or revise the application to eliminate the Planning Commission’s reason for disapproval, advise Project Owner of the revisions that would be required to obtain such approval, and resubmit the revised application to the Planning Commission. If the City elects to revise the application and resubmit it to the Planning Commission and the Planning Commission once again disapproves LC&E, then the City shall seek to have the City Council overrule the disapproval, but shall not be required to revise the plans or return to the Planning Commission for further action on the application for LC&E approval. The parties acknowledge and agree that at any time and from time it may be necessary or appropriate to seek to obtain LC&E approval for additions or modifications to the approved plans. To the extent the proposed additions or modifications are located on the Development Area, the City agrees to advise the then-current lease holder of the proposed plans.
8. **Re-Conveyance of Additional Property.** In the event that (a) the City and Project Owner fail to negotiate, approve and execute a mutually agreeable Project Agreement and a mutually agreeable Ground Lease Agreement by the Execution Deadline (as defined below), (b) the Planning Commission does not approve the Final Plat by the Execution Deadline, or (c) the City is unable to obtain any necessary LC&E approval (as defined above) by the Execution Deadline, then, at the option of Sealy and upon written request to the Mayor from Sealy within thirty (30) days after the expiration of the Execution Deadline, the City will convey the Additional Property back to Sealy or its written designee by statutory warranty deed.
9. **Negotiation, Approval and Execution of Agreements.** The first sentence of Section 5 of the Original Option Agreement is deleted in its entirety, and the following is substituted in lieu thereof:

Upon exercise of the Option by the Project Owner, the form of the Project Agreement and the form of the Ground Lease Agreement will be negotiated in good faith by the parties and will be modified as mutually agreeable to address (i) the provisions of this First Amendment, (ii) modifications to the project reflecting discussions between the parties since the execution of the Original Option Agreement, and (iii) the reasonable and necessary requirements of the lender of Project Owner that are deemed acceptable by the City. Subject to extension as provided below, on or before January 22, 2015 (the “Execution Deadline”): (a) the City and Project Owner shall negotiate the final form of, and execute, the Project Agreement, (b) the City and Project Owner shall negotiate the final form of, and execute, the Ground Lease Agreement, and (c) the City and Project Owner shall negotiate, approve, and execute any other agreements necessary to formalize the development of the Development Area. The Mayor

of the City and Project Owner may agree in writing to extend the Execution Deadline, provided however, that in any event, the Execution Deadline shall not be extended beyond May 1, 2015. In the event that the parties are not able to reach mutually agreeable terms, then the re-conveyance of the Additional Property, as set forth in Section 8 above shall be the sole remedy of the Project Owner and Sealy for which the equitable remedy of specific performance shall be applicable. If the City is in default hereunder or under any of the agreements, instruments or other documents executed in connection herewith, the sole and exclusive remedies available to the Project Owner and Sealy shall be specific performance. The Project Owner and Sealy shall not be entitled to any other damages whatsoever, including, without limitation, incidental damages, consequential damages or punitive damages, whether arising at law or in equity.

Except as expressly modified by the above, the remainder of Section 5 of the Original Option Agreement remains in full force and effect.

**10. Facsimile and Counterparts.** This First Amendment may be executed (a) by facsimile or electronic mail transmission, the same of which will be treated as an original and (b) in one or more counterparts, each of which shall be deemed an original and all of which combined shall constitute one and the same instrument.

**11. Approval.** The City, Project Owner and Sealy hereby covenant that the execution of this First Amendment has been duly approved and that the parties executing this First Amendment are authorized to execute the same.

**12. Notices.** The address for Notices to Project Owner or Sealy under the Option Agreement shall be as follows:

If to Project Owner: Avenue Huntsville, LLLP  
500 Eustis Avenue  
Huntsville, AL 35801  
Attention: Mr. Charlie O. Sealy, III  
Facsimile: (256) 489-9121

With a copy to J. Marland Hayes  
J. Marland Hayes, LLC  
P. O. Box 1346  
505 Energy Center Blvd., Suite 604 (35473)  
Northport, AL 35476  
Facsimile: (205) 764-9216

If to Sealy: Sealy Property Development, LLC  
500 Eustis Avenue  
Huntsville, AL 35801  
Attention: Mr. Charlie O. Sealy, III  
Facsimile: (256) 489-9121

With a copy to: J. Marland Hayes  
J. Marland Hayes, LLC  
P. O. Box 1346  
505 Energy Center Blvd., Suite 604 (35473)  
Northport, AL 35476  
Facsimile: (205) 764-9216

**13. Conforming Amendments/Balance Affirmed.** Any and all terms and provisions of the Original Option Agreement are hereby amended and modified wherever necessary, even if not specifically addressed herein, so as to conform to the amendments set forth in this First Amendment. Except as expressly modified and amended hereby, all other terms and conditions of the Original Option Agreement shall continue in full force and effect.

**[THE REST OF THIS PAGE LEFT INTENTIONALLY BLANK]**

**IN WITNESS WHEREOF**, the parties have caused this First Amendment to be duly executed and delivered the day and year first above written.

CITY OF HUNTSVILLE, ALABAMA

By: \_\_\_\_\_  
Tommy Battle, Mayor

ATTEST:

\_\_\_\_\_  
Charles E. Hagood  
City Clerk-Treasurer

STATE OF ALABAMA     §  
                                  § ss.  
MADISON COUNTY     §

I, the undersigned, a Notary Public in and for the State of Alabama at Large, hereby certify that Tommy Battle, whose name as Mayor of the City of Huntsville, Alabama, a municipal corporation under the laws of the State of Alabama, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of the instrument, he, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation on the day the same bears date.

GIVEN under my hand and official seal this the \_\_\_\_\_ day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
Notary Public  
My Commission Expires: \_\_\_\_\_

IN WITNESS WHEREOF, the parties have caused this First Amendment to be duly executed and delivered the day and year first above written.

SEALY PROPERTY DEVELOPMENT, LLC

By: Charlie O. Sealy III  
Charlie O. Sealy, III, Its Manager

STATE OF ALABAMA §  
§ ss.  
MADISON COUNTY §

I, the undersigned authority, a notary public in and for the State of Alabama at Large, hereby certify that Charlie O. Sealy, III, whose name as Manager of Sealy Property Development, LLC, a limited liability company, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of the instrument, he, as such representative and with full authority, executed the same voluntarily for and as the act of said company.

GIVEN under my hand and official seal this the 3<sup>rd</sup> day of Dec, 2014.

Charlie O. Sealy III  
Notary Public  
My Commission Expires:

**MY COMMISSION  
EXPIRES 6-17-2017**

**IN WITNESS WHEREOF**, the parties have caused this First Amendment to be duly executed and delivered the day and year first above written.

AVENUE HUNTSVILLE, LLLP

By: Avenue Huntsville GP, LLC  
Its General Partner

By:   
Charlie O. Sealy, III, As Manager of Avenue Huntsville GP, LLC

STATE OF ALABAMA     §  
                                  § ss.  
MADISON COUNTY     §

I, the undersigned authority, a notary public in and for the State of Alabama at Large, hereby certify that Charlie O. Sealy, III, whose name as Manager of Avenue Huntsville GP, LLC, a limited liability company, in its capacity as General Partner of Avenue Huntsville, LLLP, a limited liability limited partnership, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of the instrument, he, as such representative and with full authority, executed the same voluntarily for and as the act of said company in such capacity.

GIVEN under my hand and official seal this the 3rd day of Dec, 2014.

  
Notary Public  
My Commission Expires: **MY COMMISSION**

**EXPIRES 6-17-2017**

**Description of Additional Property**

All that part of Block 301 according to the plat of the Quigley Map of the City of Huntsville, Alabama, as on file in the Tax Assessor's Office of Madison County, Alabama, more particularly described as commencing at the Northeast corner of Lot 29, of said Block 301. Said beginning point is further described as being on the West right of way of Jefferson Street; thence South 58 degrees 11 minutes 44 seconds West 226.85 feet to the point of beginning; thence from the point of beginning, South 58 degrees 11 minutes 44 seconds West a distance of 69.80 feet to a point on the East right of way of Spragins Street; thence along the said East right of way, North 28 degrees 35 minutes 18 seconds West a distance of 127.36 feet to a point; thence leaving said right of way, North 63 degrees 07 minutes 09 seconds East a distance of 69.66 feet to a point; thence South 28 degrees 37 minutes 01 seconds East a distance of 121.37 feet to the point of beginning.

**Description of City Tract**

**Schedule "2"**

[see attached]



**Exhibit "A-1"**

**Description of Surface Parking Lot Area and Development Area**

[see attached]

