



## CITY COUNCIL AGENDA REPORT

**Meeting Date:** June 6, 2019

**From:** Director of Public Works/City Engineer

**Subject:** Water Supply Agreement - 100 West Hill

### Community Goal/Result

Economic Development

### Purpose

To approve a water supply agreement that will allow a new business with a significant demand for potable water to begin operations while the city attempts to obtain additional allocations of water.

### Recommendation

Approve the Water Supply Agreement with Ashford Kelton I, LLC and Alpha Flight US, Inc.

### Background

Because of a limited supply of water for new customers or for current customers who require significantly more water than previously used, recently adopted City Ordinance No. 637 revised Chapter 13.12 of the Municipal Code so that any non-residential water connection proposing to increase the average demand of water by more than 10%, when compared to use in the past 2 years, is required to provide a new application for water service with information as required by the Public Works Director.

Alpha Flight US (Tenant) is proposing to operate a food catering business for airlines at 100 West Hill, which is owned by Ashford Kelton (Owner). The proposed business is a 24/7 operation that is open 362 days a year. The estimated annual use of water is 1,673,400 gallons per year. The most recent two-year average from when the building was last occupied was 207,000 gallons per year.

Given current water demands and in current water year conditions (with a significant supply stored in the Sierra Nevada snowpack) the city should be able to supply to the Tenant this increase in water. However, in any drought condition, or in a period when other users of the Hetch Hetchy system take full advantage of their guaranteed supplies, the city would not be able to supply this increase.

Because of this limitation and the Tenant's concern about investing in a business with a high water demand without reasonable assurances of a water supply for the business, City staff,

Tenant and the Owner entered into negotiations to develop an agreement that would provide such assurances to the Tenant but would not, in all cases, represent that the City could guarantee such supply. The product of those negotiations is set forth in the attached Water Supply Agreement.

### **Discussion**

The Agreement commits the city to provide the increased volume only as so long as the City is not prohibited from doing so (see paragraph 1 of the agreement), indicates that the City will pursue additional commitments of water supply (paragraph 2), specifies that any additional cost in the City's obtaining this new supply of water will be paid by Tenant (see paragraph 3), and provides an opportunity in the event of Tenant's early departure for Owner (Ashford Kelton) to retain (and pay for) the additional water or ask the City to attempt to find another user or purchaser for the water (see paragraph 4).

Without this Agreement, the city will be forced to deny Alpha Flight's application for the planned tenant improvements to operate this new business.

### **Fiscal Impact**

The Agreement is written to be generally cost neutral to the city; the only anticipated costs are staff's time in complying with the conditions of the agreement, e.g. time spent seeking additional water from the allocation of water from another member of BAWSCA.

### **Measure of Success**

An agreement that allows a new business to move forward with its improvement plans while the city attempts to secure increased water supplies, and which is cost neutral to the city's utility fund.

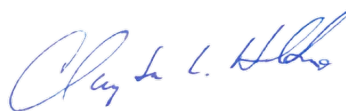
### **Attachments**

1. Water Supply Agreement



---

Randy Breault, Public Works Director



---

Clay Holstine, City Manager

Recorded at the request of  
City of Brisbane

When recorded, return to  
City of Brisbane  
50 Park Place  
Brisbane, CA 94005

Exempt from filing fee:  
Government Code, section 6103

### WATER SUPPLY AGREEMENT

THIS WATER SUPPLY AGREEMENT is made \_\_\_\_\_, 2019 between the City of Brisbane, a municipal corporation ("City"), Ashford Kelton I, LLC, a Delaware limited liability company ("Owner") and Alpha Flight US, Inc., a Delaware Corporation ("Tenant").

#### Recitals

- A. City supplies water to residents and businesses within the City of Brisbane.
- B. The City's water system obtains 100% of its water from the San Francisco Public Utilities Commission ("SFPUC") through a water supply agreement between the SFPUC and all 26 members of the Bay Area Water Supply & Conservation Agency ("BAWSCA") and in individual water supply contracts between the SFPUC and the City and the Guadalupe Valley Municipal Improvement District ("GVMID").
- C. The City's combined individual water supply guarantee through the above referenced agreements is 0.98 million gallons per day ("MGD").
- D. City Ordinance No. 637 requires every non-residential use who requires a water service connection to submit an application to the City whenever there is a change in occupancy or activity that proposes to increase the average daily demand by more than 10% when compared to the average daily demand for the most recent 24 months.
- E. Owner is the owner of certain improved real property in the City of Brisbane located at 100 West Hill Drive, more particularly described in Exhibit A, attached hereto and incorporated herein by reference ("the Property").
- F. The average demand for the Property is 207,000 gallons of potable water per year.
- G. Owner has leased the Property to Tenant for the purpose of operating an inflight catering facility ("the Project").
- H. Tenant has informed the City that the Project will need 1,673,400 gallons of potable water per year.
- I. The City's most recently completed water supply assessment indicates the projected water demands on the City's water system from that proposal could not be met during single or multi-year droughts, which assessment is applicable to the Project.
- J. City intends to obtain additional allocations of water.
- K. As set forth in this Agreement, City is willing to provide the requested water supply to the Property and to the Project.

NOW, THEREFORE, in consideration of the following promises, the parties agree as follows:

1. City will provide 1,673,400 gallons of potable water to the Property and the Project until such time as the City is required through the SFPUC Agreement with BAWSCA, through its individual contracts with SFPUC, and/or as required by other regulatory agencies such as the State Water Resources Control Board, to reduce the number of gallons of potable water to the Property and the Project to 227,000 gallons per year, or such other volume as required by such Agreement, individual contract, or order.
2. City will pursue additional potable water supplies for the Property and the Project to provide water to the Property and the Project during drought year or other contractually required situations that would otherwise trigger a reduction in potable water to the Property and the Project. At the request of Tenant and Owner, City will pursue commitments for such supplies on a 9-year term, provided that Tenant, Owner and City shall cooperate to determine the most economical and mutually-beneficial terms upon which such supply can be obtained.
3. If the City obtains additional water supplies and there is a cost to the City to do so, Tenant shall pay its pro-rata share of such cost of the City's obtaining such supplies, including the ongoing costs of providing this additional water. City shall present the terms of purchasing such additional water supplies to Tenant for its approval prior to incurring any such costs which would be passed on to Tenant. For example, in order to ensure a water supply to the Property and the Project, as set forth in this Agreement, during drought years or other situations that would otherwise require a reduction of potable water to the Property and the Project, City may purchase from another member of BAWSCA a portion of that member's water supply under the SFPUC's Agreement with BAWSCA, or the City may revise its individual contract with the SFPUC to increase the City's water supply. In either event or both events, to the extent such purchase or revision is necessary for purposes of providing a water supply as provided in this Agreement, Owner and Tenant shall pay the pro-rata share (which could be 100%) of all costs associated with such purchase or revision, including, but not limited to, a one-time payment to effect the purchase, and the incremental costs between the water rate charged to the City by the SFPUC without the revision and the water rate charged to the City by the SFPUC after the revision. City shall make commercially reasonable efforts to keep Owner and Tenant apprised of these costs as they are known, in order for Owner and Tenant to (a) budget for such costs, and (b) allocate the risk of such costs in the event Tenant no longer leases the Property (as described in Paragraph 4 below).
4. If (a) City obtains additional water supplies for which there is a cost as set forth in paragraph 3 above, (b) Tenant is no longer leasing the Property and (c) Owner wishes to keep some or all of the gallons of potable water in excess of 227,000 gallons per year, Owner (or any subsequent tenant of the Property) shall pay its pro-rata share (which could be 100%) of such costs; provided, however, that if the cost to the City to obtain the additional water for the Project is on a "take or pay" basis by which the City is contractually obligated to pay for the water whether it is used or not, Owner shall pay its pro-rata share of such costs, regardless whether the Property or any subsequent tenant needs the additional water supply. Notwithstanding any provision in this Agreement to the contrary, City shall make commercially reasonable efforts to either (i) find another user or users for such additional water among the occupants of City, such that City is compensated for the costs thereof; or (ii) sell or otherwise transfer the additional water to another jurisdiction (e.g., another member of BAWSCA) such that City no longer has to bear the cost of such additional water; provided, however, that if the City is unable to accomplish (i) or (ii) of this sentence in a reasonable period of time, not to exceed six months, the City shall cease

such efforts and the remainder of this paragraph 4 shall apply. Upon the termination of additional water supplies to the Property and the Project pursuant to this Agreement, the parties agree to execute a commercially reasonable form of termination agreement to be recorded against the Property and reflecting the termination of the obligations under this Agreement.

5. If Tenant, Owner or City fails to perform any obligation under this Agreement and fails to cure the default within 30 days after any other Party has notified the other Parties in writing of the alleged default, the non-breaching Party or Parties shall have the right to enforce this Agreement by bringing an action at law or in equity to compel the breaching Party's performance of its obligations under the Agreement, for damages, restitution and reimbursement and any other remedy as provided by law.
6. In any action to enforce this Agreement the prevailing Party shall be entitled to all costs and expenses of suit, including reasonable attorneys' fees. This paragraph shall be interpreted in accordance with California Civil Code section 1717 and judicial decisions interpreting that statute.
7. The obligations of this Agreement shall run with the land and be binding on the Parties, their successors and assigns.
8. Formal notices, demands and communications between the Parties shall be given by registered or certified mail, return receipt requested, or delivered by express delivery service, return receipt requested, or delivered personally, to the principal office of the parties as follows:

City: City Manager, City of Brisbane, 50 Park Place, Brisbane, CA 94005

Owner: Bill S. Kim, Ashford Kelton I, LLC, 337 Selby Lane, Atherton, CA 94027

Tenant: David Loft, Alpha Flight US, Inc. 45 Rason Road, Inwood, NY 11096
9. This Agreement shall be governed by the laws of the State of California. Venue for any action to enforce or interpret this Agreement shall be in the Superior Court of the State of California, County of San Mateo. Any ambiguity shall not be construed against one of the Parties in favor of another.
10. This Agreement constitutes the entire agreement between the Parties and supersedes and cancels any prior agreements or understandings, whether oral or written, regarding the subject matter of this Agreement.
11. This Agreement may be amended only by a written instrument executed by the Parties or their successors in title.
12. Any of the requirements of this Agreement may be expressly waived in writing by the Parties but no waiver of any requirement of this Agreement shall, or shall be deemed, to extend or effect any other provision of this Agreement.

13. If any provision of this Agreement is invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining portions of this Agreement shall not in any way be affected or impaired thereby.
14. Each of the individuals executing this Agreement represents and warrants that he or she has been authorized to do so and has the power to bind the Party for whom they are signing.
15. This Agreement may be executed in counterparts. Each counterpart shall have the same force and effect as an original and shall together constitute an effective, binding agreement on each of the Parties.

CITY OF BRISBANE


\_\_\_\_\_  
Madison Davis, Mayor

ASHFORD KELTON I, LLC

\_\_\_\_\_  
Bill S. Kim, Chairman

ALPHA FLIGHT US, Inc.


ALPHA FLIGHT US, Inc.

  
\_\_\_\_\_  
David Loft, Authorized Signatory

Attest:

\_\_\_\_\_  
Ingrid Padilla, City Clerk

Approved as to form:

  
\_\_\_\_\_  
Thomas R. McMorrow, Interim City Attorney

13. If any provision of this Agreement is invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining portions of this Agreement shall not in any way be affected or impaired thereby.
14. Each of the individuals executing this Agreement represents and warrants that he or she has been authorized to do so and has the power to bind the Party for whom they are signing.
15. This Agreement may be executed in counterparts. Each counterpart shall have the same force and effect as an original and shall together constitute an effective, binding agreement on each of the Parties.

CITY OF BRISBANE

\_\_\_\_\_  
Madison Davis, Mayor

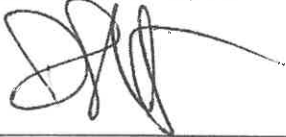
ASHFORD KELTON I, LLC



\_\_\_\_\_  
Bill S. Kim, Chairman

ALPHA FLIGHT US, Inc.

ALPHA FLIGHT US, Inc.



\_\_\_\_\_  
David Loft, Authorized Signatory

Attest:

\_\_\_\_\_  
Ingrid Padilla, City Clerk

Approved as to form:



\_\_\_\_\_  
Thomas R. McMorrow, Interim City Attorney

**STATE OF NEW YORK** :  
**COUNTY OF QUEENS** :

On this, the 9<sup>th</sup> day of May, 2019, before me, a Notary Public for the State of New York, residing in the said County and State, the undersigned Officer, personally appeared David Loft, who acknowledged himself/herself to be, the Authorized Signatory of Alpha Flight US, Inc., a corporation, and that he/she as such Authorized Signatory, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the limited liability company by himself/herself as Authorized Signatory.

IN WITNESS WHEREOF, I hereunder set my hand and official seal.

  
\_\_\_\_\_  
Notary Public  
{SEAL}

MY COMMISSION EXPIRES:





CLAUDIA E. FERNANDEZ  
Notary Public, State of New York  
No. 01FE6095395  
Qualified in Nassau County  
Commission Expires July 07, 2019



**WRITTEN RESOLUTIONS OF THE DIRECTORS**

Resolution in writing of the directors of Alpha Flight US, Inc. ("Alpha Flight"), dated this \_\_ day of April, 2019.

1. Alpha Flight is a corporation organized, in good standing, and doing business under the laws of the State of Delaware.
2. The directors have resolved that the execution of the Water Supply Agreement (the "WSA") between Alpha Flight and Ashford Kelton I LLC and the City of Brisbane, by the authorized signatories set forth below and the performance of Alpha Flight's obligations under the WSA have been duly authorized by Alpha Flight in a manner consistent with Alpha Flight's articles of incorporation and bylaws, and any action required to be taken thereunder by Alpha Flight's board of directors or shareholders to approve Alpha Flight's entry into and performance under the WSA has been taken.
3. Each of the persons whose signature appears below has been duly authorized to execute on behalf of Alpha Flight and deliver the WSA and any further agreements, certificates, papers, documents, and other instruments as may be necessary to fully perform the obligations of Alpha Flight as contemplated by thereunder.

Name (printed or typed)	Title	Signature
David Loft	Authorized Signatory	
		
		Carlo Posta
		
		David Loft
		
		Aaron Taylor

**CALIFORNIA ACKNOWLEDGMENT**

**CIVIL CODE § 1189**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California }  
County of Riverside

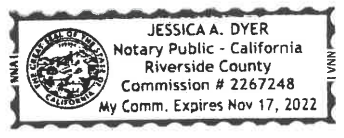
On May 9<sup>th</sup>, 2019 before me, Jessica A. Dyer - Notary Public  
Date Here Insert Name and Title of the Officer

personally appeared Bill S. Kim  
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Place Notary Seal and/or Stamp Above

Signature [Handwritten Signature]  
Signature of Notary Public

**OPTIONAL**

Completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

**Description of Attached Document**

Title or Type of Document: Water Supply Agreement  
Document Date: 5/9/2019 Number of Pages: \_\_\_\_\_  
Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: \_\_\_\_\_ Signer's Name: \_\_\_\_\_  
 Corporate Officer – Title(s): \_\_\_\_\_  Corporate Officer – Title(s): \_\_\_\_\_  
 Partner –  Limited  General  Partner –  Limited  General  
 Individual  Attorney in Fact  Individual  Attorney in Fact  
 Trustee  Guardian or Conservator  Trustee  Guardian or Conservator  
 Other: \_\_\_\_\_  Other: \_\_\_\_\_  
Signer is Representing: \_\_\_\_\_ Signer is Representing: \_\_\_\_\_

EXHIBIT A

Parcel 3, as shown on the Parcel Map filed March 11, 1971 in Book 12 of Parcel Maps, Page 7, Official Records, San Mateo County, California.

APN: 005-300-090