Introduced by: _____

Seconded by: _____

CITY OF HOBOKEN

RESOLUTION NO.: ___

RESOLUTION DECLARING SHG HOBOKEN URBAN RENEWAL ASSOCIATES, LLC IN BREACH OF CONTRACT

WHEREAS, the City of Hoboken is under contract to sell on August 13, 2010 Lot 1 in Block 1 (the "Public Works Garage Site") to **SHG HOBOKEN URBAN RENEWAL ASSOCIATES, LLC** (hereafter "SHG") pursuant to a redevelopment initiative, and a public process by which SHG was chosen purchaser and redeveloper of the Public Works Garage Site at a price of $25,500,000, and protracted litigation in which the choice of SHG was successfully defended by the City; and

WHEREAS, the closing has been put in jeopardy by SHG, which on April 27, 2010 presented to the Mayor and, at the Mayor's urging, to the City Council in May, 2010, followed by SHG's letter to the City Council of June 2, 2010 containing its proposal to significantly reduce the consideration to be paid for the property (which SHG estimated to be valued at $14,000,000±) and which would have dramatically reduced the value of the agreement for the City; and

WHEREAS, since SHG's offer was rejected by the Council, SHG has engaged in a series of actions calculated to sabotage the closing of title, as detailed in the appended chronology, in clear violation of the duty to contract in good faith and deal fairly; and the proscribed and limited role of SHG in the City's environmental approval process; more particularly, improperly interfering with the City's efforts to obtain timely approvals of the environmental remediation plans for the Public Works Garage Site, including by making unauthorized, unilateral and *ex parte* submissions to the New Jersey Department of Environmental Protection; and

WHEREAS, SHG affirmatively refused to rescind such submissions and the adverse effects of same can no longer be cured; and

WHEREAS, SHG failed to exercise due diligence during a six-month contractual period to do its own environmental sampling and testing, ending in August 2008; only expressing the interest in doing so when it had decided that it did not want to close on the original terms of the agreement and using environmental criteria and a deliberate denigration of the City's efforts and personnel as a strategy for avoiding a title closing; and

WHEREAS, the City and SHG are also parties to a Redeveloper's Agreement with respect to the Public Works Garage Site, and said agreement is terminable by the City following termination of the Purchase and Sale Agreement for said property.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Hoboken that it hereby declares **SHG HOBOKEN URBAN RENEWAL ASSOCIATES, LLC** to be in breach of the Purchase and Sale Agreement entered into on May 12, 2008; and

BE IT FURTHER RESOLVED that, said breach can no longer be cured; and

BE IT FURTHER RESOLVED that SHG having defaulted thereunder, Corporation Counsel and special redevelopment counsel shall take the necessary steps to enforce the remedies for breach or default set forth in the Purchase and Sale Agreement, including terminating the Agreement and retaining as liquidated damages the deposit monies; and

BE IT FURTHER RESOLVED that the City Council authorizes the termination of the Redeveloper's Agreement with SHG and directs Corporation Counsel and special redevelopment counsel take the necessary steps to terminate same.

MEETING: August 10, 2010

A TRUE COPY OF A RESOLUTION ADOPTED BY
THE COUNCIL OF THE CITY OF HOBOKEN, N.J.
AT A MEETING HELD ON:
AUG 10 2010

CITY CLERK

APPROVED AS TO FORM:

Michael B. Kates
Corporation Counsel

DATED: 08/10/10

STATEMENT OF FACTS PERTAINING TO ACTIONS TAKEN BY SHG HEKEMIAN URBAN RENEWAL ASSOCIATES, LLC, CONTRACT PURCHASER FOR BLOCK 1, LOT 1

This document was prepared for the review and consideration of the City Council of the City of Hoboken, and does not necessarily contain or reflect the views and/or opinions of the City Council unless and until adopted by resolution.

A. BACKGROUND

1. The City of Hoboken ("the City") is a party to a Purchase and Sale Agreement ("PSA") for Block 1, Lot 1 in Hoboken ("the Property'), and a separate Redeveloper's Agreement with SHG Hoboken Urban Renewal Associates, LLC ("SHG"), which were ratified by the Hoboken City Council on August 13, 2008.

2. Under the PSA, SHG would acquire the Property from the City for a purchase price of $25.5 million and redevelop same in accordance with a redevelopment plan ("the Project") adopted and amended in accordance with the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq..

3. To secure the PSA and SHG's performance thereunder, the City holds in escrow a deposit of $2.55 million paid by SHG. Under the Redeveloper's Agreement, SHG also paid to the City an administrative fee of $200,000.

4. By letter dated May 21, 2010, the closing of title ("the Closing") was scheduled by the City for August 13, 2010.

5. Under the PSA, and as a condition of closing title to the Property, the City is required to obtain, at its own cost and expense, certain approvals ("Environmental Approvals") from the New Jersey Department of Environmental Protection ("DEP").

6. In furtherance of this obligation, and with the assistance of its environmental counsel and its environmental consultant, the City has conducted numerous studies and tests of the property, and made various submissions to DEP, including but not limited to a Remedial Action Report/Remedial Action Work Plan (submitted May 28, 2010) ("RAR/RAWP") and a Supplemental Remedial Action Report (submitted August 2, 2010) ("SRAR").

7. Under the PSA, SHG's role with respect to the City's efforts to obtain said approvals is limited to (1) reviewing the City's prospective submissions to DEP, and (2) participating in any meeting or phone calls between the City and DEP.

B. SHG's ALTERED POSITION

1. On or about June 2, 2010, SHG advised the City Council at a public meeting that the real estate market was in the worst economic downturn since the Great Depression, and the property it purchased for $25.5 million had recently been appraised at approximately $14 million.

2. Purportedly to place the Project "on firm fiscal ground," SHG requested certain and substantial modifications to the Project, including the inclusion of a supermarket, a reduction in PILOT payments (to levels not permitted by the Long Term Tax Exemption Law, N.J.S.A. 40A:20-1 et seq.), and a monetary contribution of $1 million in lieu of the construction of 24 affordable housing units.

3. SHG's proposal was not met with the immediate approval of the City Council (and was later rejected).

C. COURSE OF CONDUCT

1. Ex Parte Call with DEP

a. Shortly thereafter, SHG began to threaten to subsequently engage in conduct that was not permitted by the PSA and that threatened to interfere with the City's efforts to obtain Environmental Approvals in advance of the Closing.

b. In early June, SHG, through its environmental consultant, H2M, contacted and scheduled a telephone conference with the DEP case manager handling the City's application for its Environmental Approvals to critique the City's RAR/RAWP, without first contacting or receiving the permission of the City as required by the PSA.

c. The City's redevelopment counsel, by letter dated June 11, 2010, sent a Notice of Pending Breach of Contract to SHG, advising that H2M's actions in this regard threatened to breach the PSA because the PSA does not allow SHG to have ex parte contacts with DEP concerning the City's application.

d. Thereafter, a teleconference to discuss the DEP's review of the SRAR occurred between DEP and the City, and SHG was allowed to participate in accordance with the PSA.

2. Demand to Test/Study Property

a. On or about June 17, 2010, SHG, through its environmental counsel, Robert H. Crespi, of Wolff & Sampson, advised the City of SHG's intention to conduct "additional due diligence sampling" upon the subject property "pursuant to the Access Agreement" with the City, which had expired on or about August 28, 2008. SHG had no

right to conduct such sampling under the PSA, said right having terminated upon the expiration of the Access Agreement.

b. It is noted that SHG conducted no environmental sampling whatsoever upon the Property prior to the submission of its original proposal, as permitted by the City's Request for Proposals issued in October of 2007, nor when it was permitted to do so prior to the expiration of the Access Agreement. Its desire to conduct such testing materialized only after the City denied its request to modify the PSA as a result of the alleged decline in value of the property.

c. The June 17th letter further advised that SHG intended to submit to DEP its "minutes" of the teleconference between DEP, the City and SHG, even though DEP had not requested that such "minutes" be taken or submitted.

d. The City's redevelopment counsel, by letter dated June 18, 2010, sent a Notice of Additional Pending Breach of Contract to SHG, advising that SHG had no present right to conduct any tests or sampling on the Property, and that SHG is not authorized to make a submission to DEP, minutes or otherwise, under the PSA.

e. Thereafter, SHG did not conduct any additional tests or sampling on the Property and apparently refrained from submitting its minutes to DEP.

3. Interference with Environmental Activities / Threatened Ex Parte Contact

a. As a courtesy, and in the spirit of cooperation and transparency, the City permitted SHG and its representatives to observe and to photograph environmental activities undertaken by the City on June 24-26, and 28, and July 12, 20 and 26, 2010;

b. At the onset of these activities, SHG and/or its representatives:

i. Demanded that soil samples be split and provided to it, notwithstanding no contractual right to same, which demand was made to City representatives as they were performing these activities;

ii. Demanded to be advised of the photo ionization detector ("PID") readings as they were being taken in the field, notwithstanding having no contractual right to same;

iii. Attempted to take PID samples (while the activities were underway), after being told on a prior occasion that it was not permitted to conduct any sampling activities;

iv. Attempted to direct the manner in which the City's representatives were conducting these activities, including by demanding, while onsite, that certain tasks be performed in certain ways, by requesting the right to give technical "suggestions" to the City's environmental consultants and contractors relating to the performance of these activities, and by communicating, directly to

the City's environmental consultant, that the Work be held up until SHG's representatives arrived for scheduled activities; and

v. Engaged in these and other activities to the extent that on June 25, 2010, City representatives had to divert their attention from these activities to meet with SHG's representatives to demand that they stop interfering with these activities.

c. By email dated June 25, 2010, SHG's environmental counsel, Mr.Crespi, advised the City of SHG's intention to contact DEP to critique the remedial activities performed by the City.

d. The City's redevelopment counsel, by letter dated June 25, 2010, sent a Notice of Additional Pending Breach of Contract to SHG (via Mr. Crespi), (1) advising that the above-described conduct has interfered with the City's remedial activities and constitutes a potential breach of the PSA, (2) demanding that SHG cease and desist from further interfering with those activities in any manner whatsoever, and (3) demanding that SHG refrain from making any ex parte communication with DEP concerning these activities.

e. Thereafter, SHG abated the above conduct and, as far as the City is aware, refrained, at that time, from contacting DEP concerning these activities.

4. Delaying the Submission of the Supplemental Remedial Action Report

a. While actively attempting to obtain its Environmental Approvals in advance of the August 13th Closing date, on July 19, 2010, the City asked SHG for its comments on its draft SRAR the following day (July 20th).

b. As the SRAR covered one 600-sq. foot Area of Concern (AOC-10) and was a supplement to the prior RAR/RAWP, the City's environmental consultant advised that SHG was being afforded sufficient time to provide any comments.

c. SHG's environmental counsel, initially demanded that SHG be given 10 days to respond to same, notwithstanding the pending Closing date and without stating a practical reason for same. The PSA provides that the City will employ "reasonable efforts" to provide SHG with any prospective submissions to DEP at least 10 days in advance.

d. After some negotiation, the City agreed to accept SHG's comments on the SRAR at the close of business on Friday, July 23, 2010, thereby delaying the City's filing by a number of days.

5. Demanding a Teleconference with DEP

a. By letter dated August 3, 2010, SHG's environmental counsel, Mr. Crespi, "demanded" that the City schedule a meeting or teleconference with the DEP to provide SHG the opportunity to critique the City's SRAR, notwithstanding the lack of any contractual right to make such a demand.

b. In his August 3, 2010, Mr. Crespi further threatened that SHG would arrange for its own call if the City failed to acquiesce to this demand.

c. In accordance with the PSA, the City, its environmental consultant and its environmental counsel, in good faith reviewed SHG's comments (as contained in a 46-point memo prepared by its environmental consultant, H2M) to the draft SRAR and incorporated those it deemed appropriate into the final SRAR. Many of H2M's comments pertained to a minimal amount of "dark" liquid observed by the City's environmental consultant during the dewatering process. As that process continued, the "dark" liquid did not reemerge and the water ran clear. After a break of over an hour, no dark liquid had reemerged and the water in the bottom of the excavation remained clear. SHG and H2M contend that additional steps were necessary, but we believe that all proper procedures were followed.

d. While not expressly required by the PSA, the City's environmental consultant, responded in writing to each of H2M's 46 comments. The City's environmental consultant noted that some of H2M's comments (1) were based upon factual assertions inconsistent with his observations, (2) pertained to issues already resolved with DEP, and (3) represented a difference of professional judgment.

e. Having reviewed, considered and addressed each of H2M's comments, the City advised SHG that it would not request such a conference and further that any ex parte contact may be regarded as a potential breach of contract.

f. Although SHG did not ultimately request a conference with DEP (as far as the City is aware), SHG did act in a manner that was apparently detrimental to the City, as described below.

6. Submitting its Critique of the City's SRAR to DEP

a. On August 5, 2010, SHG, through its environmental counsel, Mr. Crespi, filed H2M's 46-point memo regarding the City's SRAR, and other documents, with DEP. This filing was not permitted under the PSA;

b. Such submission was made unilaterally and ex parte, without the prior knowledge or consent of the City, and is not permitted under the PSA.

c. Such submission was made notwithstanding the efforts of the City to review, consider, incorporate and respond to said comments prior to the filing of its SRAR.

e. The August 5th submission was made notwithstanding letters of June 11th, 15th, 18th, 25th and 30th, July 13th and August 4th from the City's redevelopment counsel to SHG advising it had no right to interfere with the City's application for its environmental approvals, including through ex parte communications and/or unilateral submissions.

f. The City's redevelopment counsel, by letter dated August 5, 2010, sent a Notice of Breach of Contract to SHG advising that the August 5th submission, constituted "a serious breach of contract, and in the event that the City's environmental approvals are not issued by DEP in a timely manner, the City reserves all of its rights with respect thereto." The letter further demanded the immediate rescission of the offending communication.

g. SHG affirmatively refused to rescind its August 5th submission in a letter from its environmental counsel.

h. The City's environmental consultant and environmental counsel have now advised the City that in their professional judgments, as a result of the interference by SHG the City will not be able to obtain its Environmental Approvals in a timely manner. Additionally, the City's environmental counsel and environmental consultant advise that any efforts to obtain the outstanding approvals will be hampered by the continued participation of SHG in the approval process (as provided by the PSA), given the above pattern of conduct.

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