

12-Ora-405 KP R18.2/R18.7
(PM R11.3/R11.6)
Construct Susan Street
Exit Ramp From NB I-405
Distributor Road

REIMBURSEMENT AGREEMENT

THIS AGREEMENT (the "Agreement"), ENTERED INTO EFFECTIVE ON _____, 2007, is between the CITY OF COSTA MESA, a body politic and a municipal corporation of the State of California (referred to herein as "CITY"), and C.J. SEGERSTROM & SONS, a California general partnership (referred to herein as "SEGERSTROM").

RECITALS

1. CITY and STATE OF CALIFORNIA, acting by and through its Department of Transportation (herein referred to as the "STATE"), pursuant to Streets and Highways Code Sections 114 and 130, are authorized to, and are currently entering into a Cooperative Agreement denominated as District Agreement No. 12-567 (the "State Agreement") covering the construction by the CITY of the new Susan Street exit ramp from the northbound I-405 distributor road in Costa Mesa (herein referred to as the "PROJECT").
2. The PROJECT will benefit certain property owned by SEGERSTROM and SEGERSTROM desires that the CITY construct the PROJECT and is willing to fund one hundred percent (100%) of all construction capital outlay and support costs, except that the costs of STATE's Independent Quality Assurance ("IQA") will be borne by STATE. The PROJECT cost estimate is shown on Exhibit A, attached hereto and made an express part of this Agreement. Estimated CITY support costs are listed on Exhibit B, attached hereto and made an express part of this Agreement.
3. The parties agree that the CITY will prepare the contract documents and advertise, award and administer the construction contract for the PROJECT.
4. Project development responsibilities for the PROJECT were covered in a prior Cooperative Agreement executed by CITY and SEGERSTROM on December 18, 2006.

5. The parties now define hereinbelow the terms and conditions under which the PROJECT is to be constructed and paid for.

SECTION I

CITY AGREES:

1. To submit a written request for any "State Furnished Material" ("SFM") identified in the PROJECT Plans, Specifications and Estimates ("PS&E") or as determined during PROJECT construction a minimum of forty-five (45) days in advance of the need for such materials. To then pay STATE, within fifteen (15) days of receipt of STATE's billing, the actual cost invoiced for the requested SFM. CITY may take delivery of the SFM after STATE's receipt of CITY's payment and at the location directed by STATE. Such actual cost for the requested SFM will be reimbursed by SEGERSTROM, as set forth hereinbelow.
2. To advertise, award, and administer the construction contract for the PROJECT in accordance with the requirements of the Local Agency Public Construction Act and the California Labor Code, including its prevailing wage provisions. Workers employed in the performance of work contracted for by CITY, and/or performed under an encroachment permit, are covered by the provisions of the Labor Code in the same manner as are workers employed by STATE's contractors.
3. To construct those portions of the PROJECT as set forth in and in accordance with District Agreement 12-567.
4. CITY's construction contractor shall maintain in force, until completion and acceptance of the PROJECT construction contract, a policy of Contractual Liability Insurance, including coverage of Bodily Injury Liability and Property Damage Liability, that complies with all coverage requirements of Section 7-1.12 of STATE's then effective Standard Specifications. Such policy shall contain an additional insured endorsement naming STATE, CITY, SEGERSTROM and IKEA, and their respective officers, agents, and employees, as additional insureds. This insurance coverage shall be evidenced by a Certificate of Insurance in a form satisfactory to STATE which shall be delivered to

STATE before the issuance of an encroachment permit to CITY's construction contractor.

5. To require the construction contractor to furnish both a payment and a performance bond, naming CITY as obligee with both bonds complying with the requirements set forth in Section 3-1.02 of STATE's current Standard Specifications prior to performing any PROJECT construction work. CITY shall defend, indemnify, and hold harmless STATE and SEGERSTROM and their respective officers, agents, and employees from all claims by stop notice claimants related to the construction of the PROJECT, provided that, as to SEGERSTROM, it has paid or deposited with CITY all funds required of it by this Agreement.
6. To reimburse STATE, for costs incurred by STATE as set forth in the State Agreement. Upon completion of all work on PROJECT and within twenty-five (25) days after receipt of a detailed statement made upon final accounting of costs therefor and promptly after payment from SEGERSTROM to CITY of the amount due, to pay STATE any amounts due to STATE under the State Agreement.
7. To retain or cause to be retained for audit by STATE or other government auditors and by SEGERSTROM for a period of four (4) years from the date of final payment under the State Agreement or payment of the final voucher, whichever is longer, all records and accounts relating to PROJECT construction. CITY shall retain records and accounts longer if required in writing by STATE.
8. Upon completion of PROJECT construction, CITY will operate and maintain at CITY's cost any part of PROJECT located outside of the existing SHS right of way (including CITY underpasses and overcrossings of then existing SHS right of way), until any subsequent acceptance of any part of PROJECT into the SHS, by STATE, approval by FHWA, if required, and conveyance of acceptable title to STATE. During the period of CITY's operation, SEGERSTROM shall reimburse CITY any unusual or unexpected costs incurred by CITY for such operations and maintenance pending conveyance of the new right of way to STATE. The immediately preceding sentence shall not apply to any claims for personal injury or property damage resulting from auto accidents on or about

the Project or to any claims for which SEGERSTROM has no responsibility pursuant to Article 11 of Part III. As to any other claims against SEGERSTROM pursuant to such sentence, SEGERSTROM shall be entitled to credit or reimbursement, as applicable, equal to any recovery thereof by CITY from any other source. For purposes of the immediately preceding sentence, CITY shall diligently and in a commercially reasonable manner seek recovery from any such third party source (such as the general contractor, any insurance carrier, and bonding agent or the like). It is understood that SEGERSTROM may be required to fund such unusual or unexpected costs pending recovery from any third party by CITY.

9. If CITY cannot complete the PROJECT as originally scoped, scheduled and estimated, CITY will, only with STATE's prior written consent, amend the PROJECT contract plans and specifications for suitable resolution to ensure a form of modified PROJECT that will at all times provide a safe and operable SHS.
10. At no cost to SEGERSTROM, to cause the STATE to provide IQA as set forth in the State Agreement to assure that CITY's PROJECT work is performed in full compliance with the approved PROJECT PS&E, and in accordance with STATE's then effective policies, procedures, standards, and practices. This IQA function includes both the obligation and the authority to reject noncompliant PROJECT work and materials accepted by CITY, to order any actions needed for public safety or the preservation of property, and to assure compliance with all provisions of the encroachment permit(s) issued to CITY and CITY's contractor.

SECTION II

SEGERSTROM AGREES:

1. SEGERSTROM understands and agrees that CITY will not use CITY's funds for any PROJECT capital and support costs except as reimbursed by SEGERSTROM pursuant to this Agreement.

2. SEGERSTROM shall reimburse the CITY for all PROJECT capital and support costs incurred by CITY pursuant to this Agreement and the State Agreement. For the purposes of the foregoing reimbursement obligation:
 - (a) “PROJECT capital costs” mean the amount payable by CITY pursuant to the construction contract for the PROJECT entered into by the CITY pursuant to Article 2 of Section I. PROJECT capital costs shall also include all other PROJECT related out-of-pocket costs which the CITY may incur pursuant to District Agreement 12-567, including but not limited to those costs specifically identified in Section I hereinabove.
 - (b) “PROJECT support costs” shall mean those support costs incurred by CITY with respect to the PROJECT identified on Exhibit B, consisting of the allocated costs of CITY personnel engaged to administer the PROJECT (other than the Transportation Services Manager) and certain out-of-pocket PROJECT related costs. Exhibit B sets forth the CITY’s current estimate of the PROJECT support costs for the PROJECT.
3. PROJECT capital costs and PROJECT support costs shall be reimbursed to the CITY by SEGERSTROM as follows:
 - (a) Not later than ten (10) days prior to the date CITY must make the deposit with the STATE called for by Article 5 of Section I hereof and by Article 17 of Section I of the State Agreement, SEGERSTROM shall deliver such deposit to the CITY.
4. PROJECT capital costs arising out of the PROJECT construction contract shall be paid in the amount and in accordance with the PROJECT construction contract as approved by the STATE and CITY. CITY shall not amend the PROJECT construction contract in any manner which increases the total cost thereof by more than \$25,000.00, without, in each instance, the prior approval of SEGERSTROM. If SEGERSTROM does not approve of any amendment to the construction contract, CITY shall be under no duty to complete the PROJECT. Cumulative change orders exceeding ten (10%) of the Construction Contract Price shall be approved in advance by SEGERSTROM. Any change order submitted by

CITY shall be deemed approved by SEGERSTROM if no objection is received from SEGERSTROM in writing within five (5) business days of submission to SEGERSTROM by CITY. SEGERSTROM hereby delegates to CITY its authority to approve any change order on SEGERSTROM's behalf that is issued to pay for emergency work required to be done to preserve life and safety. Should any delay in construction of PROJECT result from SEGERSTROM's failure to approve a change order submitted to it, any damages which may be sought and obtained by Construction Contractor for such delay(s) shall be fully borne by SEGERSTROM, which shall defend and indemnify CITY against any such claims.

- (a) PROJECT capital costs other than those arising out of the PROJECT construction contract shall be paid as and when incurred. For this purpose, CITY shall not incur any PROJECT capital costs without, in each instance, the prior approval of SEGERSTROM.
- (b) PROJECT support costs shall be paid as and when incurred up to the estimate thereof set forth in Exhibit B. The aggregate amount of such PROJECT support costs to be reimbursed by SEGERSTROM to CITY shall not be increased except by mutual agreement of CITY and SEGERSTROM to amend Exhibit B.
- (c) SEGERSTROM shall deposit with the City the full amount of the estimated construction costs, which shall be the amount of the Construction Contract Bid award for the PROJECT, within ten (10) days of award of the Construction Contract to the lowest responsible bidder. Such deposit shall be placed in an interest bearing account to be used solely for the purpose of paying PROJECT capital costs. Within ten (10) days of approval of any change order to the Construction Contractor, SEGERSTROM shall deposit with the City any net additive amount provided for in such change order. If any amounts remain in the interest bearing account following release of retention on the PROJECT Construction Contract, the remaining amount shall be returned forthwith to SEGERSTROM.

- (d) Costs to be paid by CITY and reimbursed by SEGERSTROM pursuant to subsections (c) and (d) above shall be reimbursed not more frequently than once per calendar month. Such reimbursement shall be within fourteen (14) days after delivery by CITY to SEGERSTROM of a statement of the monthly reimbursement due, together with reasonable supporting documents itemizing the payment requested among the cost categories in subsections (c) and (d) and itemizing within (c) and (d) as to particular cost components.
5. Prior to commencement of CITY's work on the PROJECT, SEGERSTROM shall deliver to CITY:
- (a) Easement deeds in favor of CITY, executed by SEGERSTROM and IKEA Property, Inc. ("IKEA"), granting to CITY the right to use for road purposes the portion of Susan Street to the south of South Coast Drive.
 - (b) An access agreement in favor of CITY, executed by SEGERSTROM and IKEA permitting CITY to enter upon their properties for the purpose of constructing the PROJECT.
6. Notwithstanding Articles 25 and 26 of Part I of the State Contract, CITY shall not modify the scope of or terminate the PROJECT without, in each case, the prior agreement of SEGERSTROM, except as otherwise set forth herein.

SECTION III

IT IS MUTUALLY AGREED:

1. All STATE obligations under the terms of the State Agreement are subject to the appropriation of resources by the Legislature in the annual State Budget Act and the action of the California Transportation Commission ("CTC") allocating resources to the STATE for the purposes of fulfilling STATE's obligations therein. Neither STATE nor the CITY, other than the STATE duty to provide IQA for which the resources must be appropriated and then allocated, have funds obligated to this PROJECT and SEGERSTROM will have no right, under any circumstance, to seek a STATE or CITY contribution of funds directly under the terms of this Agreement or indirectly as damages

for some perceived or alleged breach of this Agreement by the CITY or the State Agreement by the CITY or STATE.

2. The parties to this Agreement understand and agree that STATE's IQA is defined as providing STATE policy and procedural guidance through to completion of the PROJECT construction phase administered by the CITY. This guidance includes prompt reviews by STATE to assure that all work and products delivered or incorporated into the PROJECT by the CITY conform to STATE standards. IQA does not include any PROJECT related work deemed necessary to actually develop and deliver the PROJECT, nor does it involve any validation by the verification and rechecking of any work performed by the CITY and/or its consultants and no liability will be assignable to STATE by SEGERSTROM under the terms of this Agreement or by third parties by reason of STATE's IQA activities. All work performed by STATE that is not direct IQA shall be chargeable against PROJECT funds as a service for which STATE will invoice its actual costs and the CITY will pay or authorize STATE to reimburse itself from the available PROJECT funds, subject to reimbursement from SEGERSTROM.
3. During PROJECT construction, representatives of SEGERSTROM and CITY will cooperate and consult with each other and with STATE to assure that all PROJECT work is accomplished according to the PROJECT PS&E and STATE's applicable policies, procedures, standards, and practices. Satisfaction of these requirements shall be verified by STATE's quality assurance representatives who are authorized to enter CITY and SEGERSTROM property during construction for the purpose of monitoring and coordinating construction activities.
4. Any hazardous material or contamination of an HM-1 category found within the existing SHS right of way during construction requiring remedy or remedial action (as defined in Division 20, Chapter 6.8 *et seq.* of the Health and Safety Code) shall be the responsibility of STATE as provided for in the State Agreement. Any hazardous material or contamination of an HM-1 category found within the local road right of way during construction requiring the same defined remedy or remedial action shall be the responsibility of SEGERSTROM. For the purpose of the Agreement, hazardous material

of HM-1 category is defined as that level or type of contamination which State or Federal regulatory control agencies having jurisdiction have determined must be remediated by reason of its mere discovery regardless of whether it is disturbed by the PROJECT or not. STATE shall sign the HM-1 manifest and pay all costs for remedy or remedial action within the existing SHS right of way, except that if STATE determines, in its sole judgment, that STATE's cost for remedy or remedial action is increased as a result of CITY's decision to proceed with the PROJECT, that additional cost identified by STATE shall be borne by CITY but reimbursed by SEGERSTROM pursuant to this Agreement. As between CITY and SEGERSTROM, SEGERSTROM shall sign the HM-1 manifest and pay all costs for required remedy or remedial action outside of SHS right of way. While STATE has committed to exert every reasonable effort to fund the remedy or remedial action for which STATE is responsible, in the event STATE is unable to provide funding, SEGERSTROM will have the option to either delay further construction of PROJECT until STATE is able to provide funding, or SEGERSTROM may proceed with the remedy or remedial action as a PROJECT expense without any subsequent reimbursement by STATE or CITY. Should any delay in construction of PROJECT result from SEGERSTROM's exercise of its option herein, any damages which may be sought and obtained by Construction Contractor for such delay(s) shall be fully borne by SEGERSTROM.

5. Any remedy or remedial action with respect to any hazardous material or contamination of an HM-2 category found both within and outside the existing SHS right of way during construction shall be the responsibility of SEGERSTROM, at SEGERSTROM's expense, as a consequence of proceeding with PROJECT construction. For the purpose of this Agreement any hazardous material or contamination of HM-2 category is defined as that level or type of contamination which said regulatory control agencies would have allowed to remain in place if undisturbed or otherwise protected in place had PROJECT not proceeded. SEGERSTROM shall sign any HM-2 manifest if construction of PROJECT proceeds and HM-2 material is removed in lieu of being treated in place.
6. If hazardous material or contamination of either HM-1 or HM-2 category is found during construction on new right of way acquired by or on account of CITY for PROJECT,

SEGERSTROM shall be responsible, at SEGERSTROM's expense, for all required remedy or remedial action and/or protection in the absence of a generator or prior property owner willing and prepared to perform that corrective work. Nothing herein shall preclude SEGERSTROM from seeking contribution, indemnification, participation or other remedy from any generator, prior property owner or other potentially responsible party for such corrective work. SEGERSTROM shall hold CITY free and harmless from any liability, costs, expenses or other relief relating to any such contamination, remedial action or corrective work.

7. If SEGERSTROM is the party responsible for funding any hazardous material cleanup, it shall cooperate with the CITY in the development of the necessary remedy and/or remedial action plans and designs. Remedial actions proposed by CITY and SEGERSTROM on the SHS right of way shall be pre-approved by STATE and shall be performed in accordance with STATE's standards and practices and those standards and practices mandated by those Federal and State regulatory agencies.
8. Upon satisfactory completion of all PROJECT work under the State Agreement, as determined by STATE, actual ownership and title to materials, equipment, and appurtenances installed within the SHS right of way will automatically be vested in STATE, and materials, equipment, and appurtenances installed outside of the SHS right of way will automatically be deemed to be under the control of CITY or an appropriate third party as determined by CITY. No further agreement will be necessary to transfer ownership as hereinbefore stated. As to the new right of way area to be dedicated to the State by SEGERSTROM or by IKEA to allow construction of the PROJECT, actual ownership and title to materials, equipment, and appurtenances installed in these areas will automatically be vested in STATE as soon as deeds in favor of state for such new right of way areas are recorded.
9. Nothing within the provisions of this Agreement is intended to create duties or obligations to or rights in third parties not a party to this Agreement or to affect the legal liability of either party to this Agreement by imposing any standard of care with respect

to the development, design, construction, operation, or maintenance of SHS and public facilities different from the standard of care imposed by law.

10. Neither the CITY nor any officer or employee thereof is responsible for any injury, damage or liability occurring by reason of anything done or omitted to be done by SEGERSTROM under or in connection with any work, authority or jurisdiction conferred upon SEGERSTROM and arising under this Agreement. It is understood and agreed that SEGERSTROM shall fully defend, indemnify and save harmless the CITY and all of its officers and employees from all claims, suits or actions of every name, kind and description brought forth with respect to the work hereunder, including, but not limited to, tortious, contractual, inverse condemnation and other theories or assertions of liability occurring by reason of anything done or omitted to be done by SEGERSTROM under this Agreement.
11. Neither SEGERSTROM nor any officer or employee thereof is responsible for any injury, damage or liability occurring by reason of anything done or omitted to be done by the intentional misconduct, gross negligence or sole negligence of CITY or its employees, under or in connection with any work, authority or jurisdiction conferred upon the CITY and arising under this Agreement. It is understood and agreed that the CITY shall indemnify and save harmless SEGERSTROM and all of its partners, officers and employees from all claims, suits or actions of every name, kind and description for such injury, damage or liability. This indemnification provision expressly does not require CITY to indemnify SEGERSTROM for the acts of STATE, its officers, employees, agents or contractors or for the acts of the Construction Contractor, its officers, employees, agents or subcontractors.
12. Prior to the commencement of any construction activity within the SHS right of way or in the area which will become SHS right of way during construction of or upon completion of the PROJECT, SEGERSTROM and CITY may terminate this Agreement by mutual written agreement. Prior to award and execution of a Construction Contract for the PROJECT, Segerstrom may terminate this Agreement and the PROJECT at any time,

subject to its obligation to reimburse CITY for any CITY or STATE costs incurred to and including that date.

13. No alteration or variation of the terms of this Agreement shall be valid unless made by a formal amendment executed by the parties hereto and no oral understanding or agreement not incorporated herein shall be binding on any of the parties hereto. For the purposes of this Article, the CITY shall not agree to any termination of the State Agreement, or to any amendment thereof which significantly affects the rights and/or obligations of SEGERSTROM with respect to the PROJECT, without the written concurrence of SEGERSTROM, except as otherwise provided herein. This Agreement must terminate concurrently with any termination of the State Agreement, except that any obligations with respect to actions which have already occurred shall remain fully enforceable notwithstanding such termination.
14. Those portions of this Agreement pertaining to the completion of the PROJECT shall terminate upon completion and acceptance of the construction contract for the PROJECT by CITY and STATE, the satisfactory completion of all post-construction obligations of CITY, and delivery of required PROJECT construction documents, with concurrence of STATE, or on December 31, 2008, whichever is earlier in time. However, all obligations of SEGERSTROM to reimburse the CITY for PROJECT expenses of any kind, and the ownership, operation, maintenance, indemnification, and claims clauses shall remain in effect until terminated or modified, in writing, by mutual agreement. Should any construction-related or other claims arising out of PROJECT be asserted against one of the parties, the parties agree to extend the termination date of this Agreement as may be necessary.

CITY of COSTA MESA

C.J. SEGERSTROM & SONS,
a California general partnership

By Henry T. Segerstrom Management LLC,
a California limited liability company,
Manager

Mayor

By: _____
Manager

OR

By: _____

By: _____
Alternate Manager

AND

ATTESTED:

By HTS Management Co., Inc.,
a California corporation, Manager

By: _____
JULIE FOLCIK
City Clerk

By: _____
Title: Sr. Vice President

APPROVED AS TO FORM

APPROVED AS TO FORM

By: _____
KIMBERLY HALL BARLOW
City Attorney

By: _____

EXHIBIT A

COST ESTIMATE BREAKDOWN

Phase of Work	Total Estimate	CITY
CON Support	\$200,000	\$200,000 (100%)
RW Capital	\$0	\$0 (100%)
CON Capital	\$1,400,000	\$1,400,000 (100%)
State Furnished Materials (SFM)	Actual Cost	Actual cost (100%)
STATE's Quality Assurance	\$100,000	\$0 (0%)
TOTAL	\$1,700,000 + SFM	\$1,600,000 + SFM

EXHIBIT B
PROJECT SUPPORT COSTS
(City to Supply)