

DEVELOPMENT AGREEMENT NO. [_____]**A DEVELOPMENT AGREEMENT BETWEEN****CITY OF COSTA MESA****AND****TRIANGLE CENTER LLC, A CALIFORNIA LIMITED LIABILITY COMPANY**

This Development Agreement (hereinafter "Agreement") is entered into as of this ____ day of _____, 2020 by and between the City of Costa Mesa, California (hereinafter "CITY"), and Triangle Center LLC, a California Limited Liability Company (hereinafter "OWNER"):

RECITALS

WHEREAS, CITY is authorized to enter into binding development agreements with persons having legal or equitable interests in real property for the development of such property, pursuant to Section 65864 et seq. of the Government Code; and

WHEREAS, This Agreement constitutes a current exercise of CITY's police powers to provide predictability to OWNER in the development approval process by vesting the permitted uses, density, intensity of use, and timing and phasing of development consistent with the Planned Signing Program in exchange for OWNER's commitment to provide significant public benefits to CITY as set forth in Section 4.1, below.

WHEREAS, OWNER has requested CITY to enter into a development agreement and proceedings have been taken in accordance with the rules and regulations of CITY; and

WHEREAS, the best interests of the citizens of the CITY and the public health, safety and welfare will be served by entering into this Agreement; and

WHEREAS, the City Council hereby finds and determines that this Agreement is of major significance because it will enable the development of a reinvigorated Triangle Square outdoor mall with signage that will provide the CITY with additional funds that could be used for CITY facilities and will therefore implement numerous general plan and other public policies of the CITY; and

WHEREAS, the provision by OWNER of these aforementioned public benefits allows the CITY to realize significant economic, and social benefits; and

WHEREAS, the physical effects, if any, of the Project and this Agreement have been analyzed pursuant to the California Environmental Quality Act ("CEQA") (Pub. Res. Code section 21000 et seq.); and

WHEREAS, this Agreement and the Project are consistent with the Costa Mesa General Plan, as amended, and any specific plan, as amended, applicable thereto; and

WHEREAS, all actions taken and approvals given by CITY have been duly taken or approved in accordance with all applicable legal requirements for notice, public hearings, findings, votes, and other procedural matters; and

WHEREAS, development of the Property in accordance with this Agreement will provide substantial benefits to CITY and will further important policies and goals of CITY; and

WHEREAS, this Agreement will eliminate uncertainty in planning and provide for the orderly development of the Property, ensure progressive installation of necessary improvements, provide for public services appropriate to the development of the project, and generally serve the purposes for which development agreements under Section 65864 et seq. of the Government Code are intended.

COVENANTS

NOW, THEREFORE, in consideration of the above recitals and of the mutual covenants hereinafter contained and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

1. DEFINITIONS AND EXHIBITS.

1.1 Definitions. The following terms when used in this Agreement shall be defined as follows:

- 1.1.1 “Advertisement(s)” means the display of commercial on-site and off-site advertising.
- 1.1.2 “Agreement” means this Development Agreement.
- 1.1.3 “CITY” or “City” means the City of Costa Mesa, a California municipal corporation.
- 1.1.4 “City Content Allocation” means the percentage of total annual programming inventory on the Signs allocated to Civic Announcements.
- 1.1.5 “City Council” means the duly elected city council of the City of Costa Mesa.
- 1.1.6 “Civic Announcement(s)” means the display of public service announcements, non-profit and/or non-commercial messaging on the Signs as determined by the City.
- 1.1.7 “Commencement Date” means the date the Term of this Agreement commences.

- 1.1.8 “Development” means the improvement of the Property for the purposes of completing the structures, improvements and facilities comprising the Project including, but not limited to: the construction of infrastructure related to the Project whether located within or outside the Property and the construction of structures. “”
- 1.1.9 “Development Approvals” means all permits and other entitlements for use subject to approval or issuance by CITY in connection with development of the Property including, but not limited to:
- (a) a Planned Signing Program; and
 - (b) building permits.
- 1.1.10 “Director” means the Director of the City’s Development Services Department, including his or her designee.
- 1.1.11 “Effective Date” means the date the ordinance approving and authorizing this Agreement becomes effective.
- 1.1.12 “Land Use Regulations” means all ordinances, resolutions, codes, rules, regulations and official policies of CITY governing signage applicable to the development of the Property. “Land Use Regulations” does not include any CITY ordinance, resolution, code, rule, regulation or official policy, governing:
- (a) the conduct of businesses, professions, and occupations;
 - (b) taxes (special or general) and assessments;
 - (c) the control and abatement of nuisances;
 - (d) the granting of encroachment permits and the conveyance of rights and interests that provide for the use of or the entry upon public property;
 - (e) the exercise of the power of eminent domain.
- 1.1.13 “Mortgagee” means a mortgagee of a mortgage, a beneficiary under a deed of trust or any other security-device lender, and their successors and assigns.
- 1.1.14 “OWNER” means the persons and entities listed as OWNER on page 1 of this Agreement and their successors in interest to all or any part of the Property.
- 1.1.15 “Planned Signing Program” means the plan for development of the Property as set forth in the entitlements listed in Exhibit “C”.

1.1.16 “Project” means the development of the Property contemplated by the Planned Signing Program set forth in Exhibit “C” as such Plan may be further defined, enhanced or modified pursuant to the provisions of this Agreement.

1.1.17 “Property” means the real property described on Exhibit “A” and shown on Exhibit “B” to this Agreement.

1.1.18 “Public Benefit” refers to those benefits provided to the CITY and the community by OWNER pursuant to Section 4.1 below.

1.1.19 “Reservation of Rights” means the rights and authority excepted from the assurances and rights provided to OWNER under this Agreement and reserved to CITY under Section 3.3 of this Agreement.

1.1.20 “Signs” means the signs as set forth Exhibit “C”.

1.1.21 “City Manager” means the City Manager of the City of Costa Mesa, including his or her designee.

1.2 Exhibits. The following documents are attached to, and by this reference made a part of, this Agreement:

Exhibit “A” – Legal Description of the Property.

Exhibit “B” – Map showing Property and its location.

Exhibit “C” – Planned Signing Program.

2. GENERAL PROVISIONS.

2.1 Binding Effect of Agreement. The Property is hereby made subject to this Agreement. Development of the Property is hereby fully vested and authorized and shall be carried out in substantial accordance with the terms of the Planned Signing Program and this Agreement. OWNER shall have a vested right to operate the Signs in accordance with the Planned Signing Program.

2.2 Ownership of Property. OWNER represents and covenants that it is the owner of the fee simple title to, or has an equitable interest in, the Property or a portion thereof.

2.3 City Council Findings. The City Council finds that:

2.3.1 This Agreement is consistent with the CITY’s General Plan.

2.3.2 This Agreement ensures a desirable and functional community environment, provides effective and efficient development of public facilities, infrastructure, and services appropriate for the development of the Project and enhances effective utilization of resources within the CITY.

2.3.3 This Agreement provides public benefits to the City.

2.3.4 This Agreement strengthens the public planning process, encourages private participation in comprehensive planning and reduces costs of development and government.

2.3.5 The best interests of the citizens of the CITY and the public health, safety, and welfare will be served by entering into this Agreement.

2.4 Term. The term of this Agreement shall commence on the date (the "Commencement Date") that is the Effective Date, and shall continue for a period of thirty (30) years thereafter, unless this term is modified or extended pursuant to the provisions of this Agreement. The Term may be extended for three (3), twenty (20) year options upon mutual agreement of CITY and OWNER.

2.5 Assignment.

2.5.1 Right to Assign. OWNER shall have the right to sell, transfer or assign the Property in whole or in part (provided that no such partial transfer shall violate the Subdivision Map Act, Government Code Section 66410, *et seq.*) to any person, partnership, joint venture, firm or corporation at any time during the term of this Agreement; provided, however, that any such sale, transfer or assignment shall include the assignment and assumption of the rights, duties and obligations arising under or from this Agreement and be made in strict compliance with the following conditions precedent:

- (a) Concurrent with any such sale, transfer or assignment of the Property, OWNER shall notify CITY, in writing, of such sale, transfer or assignment and shall provide CITY with an executed agreement ("Assignment and Assumption Agreement"), in a form reasonably acceptable to CITY, by the purchaser, transferee or assignee and providing therein that the purchaser, transferee or assignee expressly and unconditionally assumes all the duties, obligations, agreements, covenants, waivers of OWNER under this Agreement, including, without limitation, the covenants not to sue and waivers contained in Sections 6.2 and 7.3 hereof.

Any sale, transfer or assignment of the Property not made in strict compliance with the foregoing conditions shall constitute a default by OWNER under this Agreement. Notwithstanding the failure of any purchaser, transferee or assignee to execute the agreement required by Paragraph (b) of this Subsection 2.5.1, the burdens of this Agreement shall be binding upon such purchaser, transferee or assignee, but the benefits of this Agreement shall not inure to such purchaser, transferee or assignee until and unless such agreement is executed.

2.5.2 Release of Transferring Owner. Notwithstanding any sale, transfer or assignment of the Property, a transferring OWNER of the Property shall continue to be obligated under this Agreement with respect to the transferred

Property or any transferred portion thereof, unless such transferring OWNER is given a release in writing by CITY, which release shall be provided by CITY upon the full satisfaction by such transferring OWNER of the following conditions:

- (a) OWNER no longer has a legal or equitable interest in all or any part of the Property subject to the transfer.
- (b) OWNER is not then in default under this Agreement.
- (c) OWNER has provided CITY with the notice and executed agreement required under Paragraph (b) of Subsection 2.5.1 above.
- (d) The purchaser, transferee or assignee provides CITY with security equivalent to any security previously provided by OWNER to secure performance of its obligations hereunder.

2.5.3 Subsequent Assignment. Any subsequent sale, transfer or assignment of the Property after an initial sale, transfer or assignment of the Property shall be made only in accordance with and subject to the terms and conditions of this Section.

2.5.4 Utilities. The Project shall be connected to adequate electric service to serve the Project.

2.6 Amendment or Cancellation of Agreement. This Agreement may be amended or canceled in whole or in part only by written consent of all parties in the manner provided for in Government Code Section 65868. This provision shall not limit any remedy of CITY or OWNER as provided by this Agreement.

2.7 Termination. This Agreement shall be deemed terminated and of no further effect upon the occurrence of any of the following events:

- (a) Expiration of the stated term of this Agreement as set forth in Section 2.4.
- (b) Entry of a final judgment setting aside, voiding or annulling the adoption of the ordinance approving this Agreement.

Termination of this Agreement shall not constitute termination of any other land use entitlements approved for the Property, except for the Development Approvals. Termination of this Agreement shall terminate the Planned Signing Program and the building permits, including, but not limited to any right, authorization or permit to have, maintain and/or display any sign authorized thereunder. Upon the termination of this Agreement, no party shall have any further right or obligation hereunder except with respect to any obligation to have been performed prior to such termination or with respect to any default in the performance of the provisions of this Agreement that has occurred prior to such termination or with respect to any obligations that are specifically set forth as surviving this Agreement

2.8 Notices.

- (a) As used in this Agreement, “notice” includes, but is not limited to, the communication of notice, request, demand, approval, statement, report, acceptance, consent, waiver, appointment or other communication required or permitted hereunder.
- (b) All notices shall be in writing and shall be considered given either: (i) when delivered in person to the recipient named below; or (ii) on the date of delivery shown on the return receipt, after deposit in the United States mail in a sealed envelope as either registered or certified mail with return receipt requested, and postage and postal charges prepaid, and addressed to the recipient named below; or (iii) on the date of delivery shown in the records of the telegraph company after transmission by telegraph to the recipient named below. All notices shall be addressed as follows:

<p>If to CITY:</p> <p>City of Costa Mesa 77 Fair Drive Costa Mesa, CA 92627 (714) 754-5245 Attn: City Manager</p> <p>Copy to:</p> <p>Jones & Mayer 3777 N Harbor Blvd. Fullerton, CA 92835 (714) 446-1400 Attn: Kimberly Hall Barlow</p>	<p>If to OWNER:</p> <p>Triangle Center LLC 10850 Wilshire Boulevard, Suite 1000 Los Angeles, California 90024 (310) 488-9050 Attn: Tyler Mateen</p> <p>Copy to:</p> <p>Allen Matkins LLP 1901 Avenue of the Stars, Suite 1800 Los Angeles, California 90067 (310) 788-2417 Attn: Spencer B. Kallick</p>
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- (c) Either party may, by notice given at any time, require subsequent notices to be given to another person or entity, whether a party or an officer or representative of a party, or to a different address, or both. Notices given before actual receipt of notice of change shall not be invalidated by the change.

3. DEVELOPMENT OF THE PROPERTY.

3.1 Rights to Develop. Subject to the terms of this Agreement including the Reservation of Rights, OWNER shall have a vested right to develop and maintain the signage in accordance with, and to the extent and duration of, this Agreement. Except as expressly provided otherwise herein, the Project shall remain subject to all Land Use Regulations and Development Approvals in effect on the Effective Date that are required to complete the Project as contemplated by the Planned Signing Program. Except as otherwise provided in this

Agreement, the signage shall be as set forth in the Development Approvals in effect on the Effective Date or, if consented to by OWNER, those subsequently adopted or amended.

3.2 Effect of Agreement on Land Use Regulations. Except as otherwise provided under the terms of this Agreement including the Reservation of Rights, the rules, regulations and official policies governing permitted uses of the Property and signage, and the design, improvement and construction standards and specifications applicable to development of the Property shall be the Land Use Regulations and Development Approvals in effect on the Effective Date. CITY shall accept for processing, review and action all applications for subsequent development approvals, and such applications shall be processed expeditiously.

3.3 Future Ministerial Permits. The OWNER may seek additional ministerial permits as required by the City, including, without limitation, building permits, as needed to implement the Planned Signing Program and to operate the Signs. Collectively these ministerial permit applications are called the "Ministerial Permits." The City agrees that it will not unreasonably withhold or unreasonably condition any Ministerial Permits which must be issued by the City in order for the Signs to proceed.

3.4 Reservation of Rights.

3.4.1 Limitations, Reservations and Exceptions. Notwithstanding any other provision of this Agreement, the following regulations shall apply to the development of the Property:

- (a) Processing fees and charges of every kind and nature imposed by CITY to cover the estimated actual costs to CITY of processing applications for Development Approvals or for monitoring compliance with any Development Approvals granted or issued.
- (b) Procedural regulations relating to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals and any other matter of procedure.
- (c) Regulations, policies and rules governing engineering and construction standards and specifications applicable to public and private improvements, including, without limitation, all uniform codes adopted by the City and any local amendments to those codes adopted by the CITY, including, without limitation, the CITY's Building Code, Plumbing Code, Mechanical Code, Electrical Code, and Grading Ordinance.
- (d) Regulations that may be in material conflict with this Agreement but that are reasonably necessary to protect the residents of the project or the immediate community from a condition perilous to their health or safety. To the extent possible, any such regulations shall be applied and construed so as to provide OWNER with the rights and assurances provided under this Agreement.

(e) Regulations that are in material conflict with the Planned Signing Program; provided OWNER has given written consent to the application of such regulations to development of that Property in which the OWNER has a legal or equitable interest.

(f) Regulations of other public agencies imposed by such other public agencies although collected by CITY.

3.4.2 Subsequent Development Approvals. This Agreement shall not prevent CITY, in acting on subsequent development approvals and to the same extent it would otherwise be authorized to do so absent this Agreement, from applying subsequently adopted or amended Land Use Regulations that do not materially conflict with this Agreement and do not impose increased costs on OWNER.

3.4.3 Modification or Suspension by State or Federal Law. In the event that State, County or Federal laws or regulations, enacted after the Effective Date of this Agreement, prevent or preclude compliance with one or more of the provisions of this Agreement, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such State or Federal laws or regulations; provided, however, that this Agreement shall remain in full force and effect to the extent it is not inconsistent with such laws or regulations and to the extent such laws or regulations do not render such remaining provisions impractical to enforce.

3.5 Regulation by Other Public Agencies. It is acknowledged by the parties that other public agencies not within the control of CITY may possess authority to regulate aspects of the development of the Property separately from or jointly with CITY and this Agreement does not limit the authority of such other public agencies. It is further acknowledged that if the California Department of Transportation permits full motion video on the Signs, CITY shall permit full motion video on the Signs.

3.6 Timing of Development. Because the California Supreme Court held in *Pardee Construction Co. v. City of Camarillo*, 37 Cal. 3d 465 (1984), that the failure of the parties in that case to provide for the timing of development resulted in a later-adopted initiative restricting the timing of development to prevail over the parties' agreement, it is the specific intent of the Parties to provide for the timing of the Project in this Agreement. To do so, the Parties acknowledge and provide that Owner shall have the right, but not the obligation, to complete the Project in such order, at such rate, at such times, and in as many development phases and sub-phases as Owner deems appropriate in its sole subjective business judgment.

4. PROJECT COMMITMENTS

4.1.1 Public Benefits. The Project will provide Signs to attract residents and visitors to the Property. The CITY will receive a City Content Allocation which may be used to advertise civic and non-profit events and opportunities.

The CITY will also receive a revenue allocation which shall be used to improve the health, safety and welfare of CITY residents.

- 4.1.2 City Content Allocation. The CITY shall receive a City Content Allocation up to ten (10) percent of the total annual programming for the Signs. This allocation may be used to advertise events in the CITY'S sole and absolute discretion, including but not limited to non-commercial civic and non-profit events and opportunities. OWNER agrees, at its sole cost and expense, to supply, program, install and display the City Content Allocation. CITY shall supply OWNER with all pertinent details to its City Content Allocation one (1) month prior to its circulation on the Signs. In the event the City Council declares a public emergency, CITY may post non-commercial civic emergency notifications equal to fifty (50) percent of the total programming for the Signs during the pendency of the emergency.
- 4.1.3 Fee. Beginning three (3) years after the Commencement Date and thereafter during the term, OWNER shall pay to CITY a quarterly fee equal to twenty-five percent (25%) of the Gross Advertising Revenue from Advertising on the Signage ("Quarterly Fee"). As used herein, "Gross Advertising Revenue" means direct revenues actually received by OWNER with respect to the ownership, management and operation of the Signage during any operating year. Gross Advertising Revenue shall not include utilities and broker commissions, provided, however, that the combined total of utilities and broker commissions shall not exceed 20% of the Quarterly Fee paid to the City. OWNER shall provide documentation, in a form acceptable to the City, supporting utilities and broker commissions.
- 4.1.4 Reporting and Payment. Beginning on the first quarter after the Commencement Date, OWNER shall furnish the City's Finance Department with a quarterly Gross Advertising Revenue report showing the amount payable to the City along with each payment (if any). The report and fee payment shall be due 30 days from the end of each quarter. A quarter shall be based on the calendar year, and quarter end dates shall be March 31, June 30, September 30, and December 31.
- Payments received more than seven (7) calendar days after the due date shall incur a ten percent (10%) interest per annum.
- 4.1.5 Accounting Records. OWNER shall be required to maintain a method of accounting, to the satisfaction of the City, which correctly and accurately reflects the Gross Advertising Revenue of OWNER in connection with this Development Agreement. The method of bookkeeping, including bank accounts established for the authorized operations, shall be separate from the bookkeeping system used for any other business operated by the OWNER or for recording OWNER's personal financial affairs. Such method shall include the keeping of the following documents:

- (a) Regular books of accounting such as general ledgers;
- (b) Journals including any supporting and underlying documents such as vouchers, checks, tickets, bank statement, etc.;
- (c) State and Federal income tax returns and sales tax returns and checks and other documents providing payment of such sums shown which shall be kept in confidence by the City; and
- (d) Any other reporting records that the City's Finance Director and/or City Manager deems necessary for proper reporting of receipts.

All documents, books, and accounting records shall be open for inspection and re-inspection at any reasonable time for four (4) years following the date of any quarterly or annual statements. In addition, in the event any litigation is commenced pertaining to the matters contained in the records, OWNER shall retain such records until a final judgment, settlement, or other final resolution is reached with respect to such litigation.

The City may from time to time conduct inspection, examination and review of the accounting records and business conducted by OWNER and observe the operation of the business so that accuracy of the above records can be confirmed, provided that the City may conduct only one inspection, examination and review during any given 12-month period. All information obtained in connection with the City's inspection of records shall be treated as confidential information and exempt from public disclosure to the extent permissible under law.

In the event that a review conducted by the Finance Director and/or City Manager finds that due to OWNER's non-compliance with its obligation to report gross receipts in connection with its operations authorized herein, an actual loss of revenue to the City can be determined, the City Manager may, at their option, bill OWNER for said losses payable to the City within thirty (30) days following billing therefore unless otherwise extended by the City Manager.

The full cost of said review, as determined by the City, shall be borne by OWNER if either or both of the following conditions exist:

- (e) The City Manager finds that the quarterly payment due to the City exceeds five percent (5%) of the total amount which should have been paid as determined by such review or examination and observation, and there is no reasonable basis for the failure to report and pay thereon;
- (f) OWNER has failed to maintain true and complete books, records, accounts and supporting source documents in accordance with the terms of this agreement. The adequacy of the records shall be determined at the reasonable discretion of the City's Finance Director. Any payment pursuant to this section shall be in addition to any penalties or fines authorized by Section 4.1.3.

4.2 Advertising Allocation. Subject to the CITY's rights as otherwise stated in this Agreement, OWNER shall have the exclusive right to install and display Advertisements upon the Signs, subject to the limitations set forth herein below.

4.2.1 Advertising Content. Advertising shall be limited to on-site advertising which displays goods or services available on the Property, and off-site advertising, as set forth in 4.2.2, below. Advertising content, whether on- or off-site, shall not include:

- (i) Obscene content, as defined in *Miller v. California*, 413 U.S. 15 (1973);
- (ii) Products and/or services deemed illegal under state, federal and/or local law, rule or regulation;
- (iii) Discriminatory messages, including but not limited to messages that convey animus on the basis of age, disability, ethnicity, gender, marital status, national origin, race, religion, or sexual orientation;
- (iv) Alcohol, tobacco, marijuana and/or cannabis, and/or related goods services or products;
- (v) Illegal drugs and/or related goods, services or products;
- (vi) Weapons, ammunition, or explosives;
- (vii) Matters that constitute copyright infringement;
- (viii) False or misleading content;
- (ix) Payday loans, paycheck advances and/or bail bonds services;
- (x) Prescription medications of all kinds, including but not limited to, products reasonably known to be harmful and/or addictive, including, but not limited to, opioids, stimulants and central nervous system depressants;
- (xi) Addiction treatment recovery and/or counseling businesses or services;
- (xii) Content from adult businesses, as defined in Article 1 (Sexually-Oriented Businesses) of Chapter IX (Special Land Use Regulations) of Title 13 (Planning, Zoning and Development) of the Costa Mesa Municipal Code; or
- (xiii) Specific product advertisements related to sales, discounts, or pricing information for any good, product or service.

4.2.2 Off Site Advertising Content. In addition to the restrictions set forth herein above, off-site advertisements shall be limited to:

- (i) Products and services available for sale in the City that are accretive of the City brand;
- (ii) High end fashion, professional sports organizations, or technology companies that are accretive of the City brand;
- (iii) Corporate headquarters, office parks, and co-working spaces with valid business licenses located within the City;

Shopping centers at least 50,000 square feet in size located within the City, including SOCO and South Coast Plaza;
- (iv) “Major Retail” and “Destination Retail” businesses located within the City with valid business licenses (brick & mortar only);
- (v) Experiential Districts & Major Commercial Corridors (e.g. SoBECA, 17th Street, etc.) located within the City; and
- (vi) Car dealerships, hotels, event centers, experiential restaurants, and tourism uses located within the City.

4.2.3 City Discretion Regarding Advertising Content. Should a dispute arise between the Parties regarding the Advertising Content allowed pursuant to this Agreement, the City Manager may, in his or her sole and absolute discretion, ban or otherwise limit specific advertisements upon a determination that such advertisement is prohibited pursuant to the terms of this Agreement, by providing written notice to OWNER pursuant to Section 2.8. The City Manager’s determination is subject to appeal by OWNER and review by the City Council pursuant to the provisions of Chapter IX of Title II of the Costa Mesa Municipal Code. If appealed, the disputed Advertising Content shall remain in place during the pendency of the appeal. The City Council’s decision following appeal and/or review shall be final and binding on the Parties.

5. REVIEW FOR COMPLIANCE.

5.1 Periodic Review. The CITY may review this Agreement annually, on or before the anniversary of the Effective Date, in order to ascertain the compliance by OWNER with the terms of the Agreement. OWNER shall submit an Annual Monitoring Report, in a form acceptable to the Director, within thirty (30) days after written notice from the CITY. The Annual Monitoring Report shall be accompanied by an annual review and administration fee sufficient to defray the estimated costs of review and administration of the Agreement during the succeeding year. The amount of the annual review and administration fee shall be set annually by resolution of the City Council.

5.2 Special Review. The City Council may order a special review of compliance with this Agreement at any time. The Director, or his or her designee, shall conduct such special reviews.

5.3 Procedure.

- (a) During either a periodic review or a special review, OWNER shall be required to demonstrate good faith compliance with the terms of the Agreement. The burden of proof on this issue shall be on OWNER.
- (b) Upon completion of a periodic review or a special review, the Director, or his or her designee, may submit a report to the Planning Commission setting forth the evidence concerning good faith compliance by OWNER with the terms of this Agreement and his or her recommended finding on that issue.
- (c) If the Planning Commission finds and determines on the basis of substantial evidence that OWNER has complied in good faith with the terms and conditions of this Agreement, the review shall be concluded.
- (d) If the Planning Commission finds and determines on the basis of substantial evidence that OWNER has not complied in good faith with the terms and conditions of this Agreement, the Commission may recommend to the City Council modification or termination of this Agreement. Notice of default as provided under Section 6.3 of this Agreement shall be given to OWNER prior to or concurrent with proceedings under Section 5.4 and Section 5.5.

5.4 Proceedings Upon Modification or Termination. If, upon a finding under Section 5.3, CITY determines to proceed with modification or termination of this Agreement, CITY shall give written notice to OWNER of its intention so to do. The notice shall be given at least ten (10) calendar days prior to the scheduled hearing and shall contain:

- (a) The time and place of the hearing;
- (b) a statement as to whether or not CITY proposes to terminate or to modify the Agreement; and
- (c) such other information that the CITY considers necessary to inform OWNER of the nature of the proceeding.

5.5 Hearing on Modification or Termination. At the time and place set for the hearing on modification or termination, OWNER shall be given an opportunity to be heard. OWNER shall be required to demonstrate good faith compliance with the terms and conditions of this Agreement. The burden of proof on this issue shall be on OWNER. If the City Council finds, based upon substantial evidence, that OWNER has not complied in good faith with the terms or conditions of the Agreement, the City Council may terminate this Agreement or modify this Agreement and impose such conditions as are reasonably necessary to protect the interests of the CITY. The decision of the City Council shall be final.

5.6 Certificate of Agreement Compliance. If, at the conclusion of a Periodic or Special Review, OWNER is found to be in compliance with this Agreement, CITY shall, upon request by OWNER, issue a Certificate of Agreement Compliance ("Certificate") to OWNER stating that after the most recent Periodic or Special Review and based upon the information known or made known to the Director and City Council that: (1) this Agreement remains in effect; and (2) OWNER is not in default. The Certificate shall be in recordable form, shall contain information necessary to communicate constructive record notice of the finding of compliance, shall state whether the Certificate is issued after a Periodic or Special Review and shall state the anticipated date of commencement of the next Periodic Review. OWNER may record the Certificate with the County Recorder.

Whether or not the Certificate is relied upon by assignees or other transferees or OWNER, CITY shall not be bound by a Certificate if a default existed at the time of the Periodic or Special Review, but was concealed from or otherwise not known to the Director or City Council.

6. DEFAULT AND REMEDIES.

6.1 Remedies in General. It is acknowledged by the Parties that neither CITY nor OWNER would have entered into this Agreement if either were to be liable in damages under this Agreement, or with respect to this Agreement or the application thereof. In general, each of the parties hereto may pursue any remedy at law or equity available for the breach of any provision of this Agreement, except damages.

6.2 Release. Except for non-monetary remedies, OWNER, for itself, its successors and assignees, hereby releases CITY, its officers, agents and employees from any and all claims, demands, actions, or suits of any kind or nature arising out of any liability, known or unknown, present or future, including, but not limited to, any claim or liability, based or asserted, pursuant to Article I, Section 19 of the California Constitution, the Fifth and Fourteenth Amendments to the United States Constitution, or any other law or ordinance which seeks to impose any other liability or damage, whatsoever, upon CITY because it entered into this Agreement or because of the terms of this Agreement. OWNER hereby acknowledges that it has read and is familiar with the provisions of California Civil Code Section 1542, which is set forth below:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

By initialing below, OWNER hereby waives the provisions of Section 1542 in connection with the matters that are the subject of the foregoing waivers and releases.

Owner's Initials

6.3 Termination or Modification of Agreement for Default of OWNER. CITY may terminate or modify this Agreement for any failure of OWNER to perform any material duty or obligation of OWNER under this Agreement, or to comply in good faith with the terms of this Agreement (hereinafter referred to as "default"); provided, however, CITY may terminate or modify this Agreement pursuant to this Section only after providing written notice to OWNER of default setting forth the nature of the default and the actions, if any, required by OWNER to cure such default and, where the default can be cured, OWNER has failed to take such actions and cure such default within sixty (60) days after the effective date of such notice or, in the event that such default cannot be cured within such sixty (60) day period but can be cured within a longer time, has as determined by the Director failed to commence the actions necessary to cure such default within such sixty (60) day period and to diligently proceed to complete such actions and cure such default.

6.4 Termination of Agreement for Default of CITY. OWNER may terminate this Agreement only in the event of a default by CITY in the performance of a material term of this Agreement and only after providing written notice to CITY of default setting forth the nature of the default and the actions, if any, required by CITY to cure such default and, where the default can be cured, CITY has failed to take such actions and cure such default within sixty (60) days after the effective date of such notice or, in the event that such default cannot be cured within such sixty (60) day period but can be cured within a longer time, has failed to commence the actions necessary to cure such default within such sixty (60) day period and to diligently proceed to complete such actions and cure such default.

7. LITIGATION.

7.1 Third Party Litigation Concerning Agreement. OWNER shall defend, at its sole expense, including attorneys' fees, indemnify, and hold harmless CITY, its agents, officers and employees from any claim, action or proceeding against CITY, its agents, officers, or employees to attack, set aside, void, or annul the approval of this Agreement, or the approval of any permit granted pursuant to this Agreement. CITY shall promptly notify OWNER of any claim, action, proceeding or determination included within this Section 7.1, and CITY shall cooperate in the defense. If CITY fails to promptly notify OWNER of any such claim, action, proceeding or determination, or if CITY fails to cooperate in the defense, OWNER shall not thereafter be responsible to defend, indemnify, or hold harmless CITY. CITY may in its discretion participate in the defense of any such claim, action, proceeding or determination.

7.2 Reservation of Rights. With respect to Section 7.1 herein, CITY reserves, the right to either (1) approve the attorney(s) that the indemnifying party selects, hires or otherwise engages to defend the indemnified party hereunder, which approval shall not be unreasonably withheld, or (2) conduct its own defense; provided, however, that the indemnifying party shall reimburse the indemnified party forthwith for any and all reasonable expenses incurred for such defense, including attorneys' fees, upon billing and accounting therefor.

7.3 Challenge to Existing Land Use Approvals. By accepting the benefits of this Agreement, OWNER, on behalf of itself and its successors in interest, hereby expressly agrees and covenants not to sue or otherwise challenge any land use approval affecting the Property and in effect as of the Effective Date. Such agreement and covenant includes, without limitation, the

covenant against any direct suit by OWNER or its successor in interest, or any participation, encouragement or involvement whatsoever that is adverse to CITY by OWNER or its successor in interest, other than as part of required response to lawful orders of a court or other body of competent jurisdiction. OWNER hereby expressly waives, on behalf of itself and its successors in interest, any claim or challenge to any land use approval affecting the Property and in effect as of the Effective Date. In the event of any breach of the covenant or waiver contained herein, CITY shall, in addition to any other remedies provided for at law or in equity, be entitled to:

- (a) impose and recover (at any time, including after sale to a member of the public or other ultimate user) from the party breaching such covenant or waiver, the full amount of Development Impact Fees that the breaching party would have been required to pay in the absence of this Development Agreement; and
- (b) impose any subsequently adopted land use regulation on those land use approvals for which the breaching party had not, as of the time of such breach, obtained a building permit.

OWNER hereby acknowledges that it has read and is familiar with the provisions of California Civil Code Section 1542, which is set forth below:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.”

By initialing below, OWNER hereby waives the provisions of Section 1542 in connection with the matters that are the subject of the foregoing waivers and releases.

Owner's Initials

7.4 Survival. The provisions of Sections 7.1 through 7.4, inclusive, shall survive the termination of this Agreement.

8. MORTGAGEE PROTECTION.

The parties hereto agree that this Agreement shall not prevent or limit OWNER, in any manner, at OWNER's sole discretion, from encumbering the Property or any portion thereof or any improvement thereon by any mortgage, deed of trust or other security device securing financing with respect to the Property. CITY acknowledges that the lenders providing such financing may require certain Agreement interpretations and modifications and agrees upon request, from time to time, to meet with OWNER and representatives of such lenders to negotiate in good faith any such request for interpretation or modification. CITY will not unreasonably withhold its consent to any such requested interpretation or modification provided

such interpretation or modification is consistent with the intent and purposes of this Agreement. Any Mortgagee of the Property shall be entitled to the following rights and privileges:

- (a) Neither entering into this Agreement nor a breach of this Agreement shall defeat, render invalid, diminish or impair the lien of any mortgage on the Property made in good faith and for value, unless otherwise required by law.
- (b) The Mortgagee of any mortgage or deed of trust encumbering the Property, or any part thereof, which Mortgagee, has submitted a request in writing to the CITY in the manner specified herein for giving notices, shall be entitled to receive written notification from CITY of any default by OWNER in the performance of OWNER's obligations under this Agreement.
- (c) If CITY timely receives a request from a mortgagee requesting a copy of any notice of default given to OWNER under the terms of this Agreement, CITY shall provide a copy of that notice to the Mortgagee within ten (10) days of sending the notice of default to OWNER. The Mortgagee shall have the right, but not the obligation, to cure the default during the remaining cure period allowed such party under this Agreement.
- (d) Any Mortgagee who comes into possession of the Property, or any part thereof, pursuant to foreclosure of the mortgage or deed of trust, or deed in lieu of such foreclosure, shall take the Property, or part thereof, subject to the terms of this Agreement. Notwithstanding any other provision of this Agreement to the contrary, no Mortgagee shall have an obligation or duty under this Agreement to perform any of OWNER's obligations or other affirmative covenants of OWNER hereunder, or to guarantee such performance; provided, however, that to the extent that any covenant to be performed by OWNER is a condition precedent to the performance of a covenant by CITY, the performance thereof shall continue to be a condition precedent to CITY's performance hereunder, and further provided that any sale, transfer or assignment by any Mortgagee in possession shall be subject to the provisions of Section 2.5 of this Agreement.

9. MISCELLANEOUS PROVISIONS.

9.1 Recordation of Agreement. This Agreement and any amendment or cancellation thereof shall be recorded with the Orange County Recorder by the Clerk of the City Council within ten (10) days after the City enters into the Agreement, in accordance with Section 65868.5 of the Government Code. If the parties to this Agreement or their successors in interest amend or cancel this Agreement, or if the CITY terminates or modifies this Agreement as provided herein for failure of the OWNER to comply in good faith with the terms and conditions of this Agreement, the City Clerk shall have notice of such action recorded with the Orange County Recorder.

9.2 Entire Agreement. This Agreement sets forth and contains the entire understanding and agreement of the parties, and there are no oral or written representations, understandings or ancillary covenants, undertakings or agreements that are not contained or

expressly referred to herein. No testimony or evidence of any such representations, understandings or covenants shall be admissible in any proceeding of any kind or nature to interpret or determine the terms or conditions of this Agreement.

9.3 Severability. If any term, provision, covenant or condition of this Agreement shall be determined invalid, void or unenforceable, the remainder of this Agreement shall not be affected thereby to the extent such remaining provisions are not rendered impractical to perform taking into consideration the purposes of this Agreement. Notwithstanding the foregoing, the provision of the Public Benefits set forth in Section 4.1 of this Agreement are essential elements of this Agreement and CITY would not have entered into this Agreement but for such provisions, and therefore in the event such provisions are determined to be invalid, void or unenforceable, this entire Agreement shall be null and void and of no force and effect whatsoever.

9.4 Interpretation and Governing Law. This Agreement and any dispute arising hereunder shall be governed and interpreted in accordance with the laws of the State of California. This Agreement shall be construed as a whole according to its fair language and common meaning to achieve the objectives and purposes of the parties hereto, and the rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in interpreting this Agreement, all parties having been represented by counsel in the negotiation and preparation hereof.

9.5 Section Headings. All section headings and subheadings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

9.6 Singular and Plural. As used herein, the singular of any word includes the plural.

9.7 Joint and Several Obligations. If at any time during the Term of this Agreement the Property is owned, in whole or in part, by more than one OWNER, all obligations of such OWNERS under this Agreement shall be joint and several, and the default of any such OWNER shall be the default of all such OWNERS. Notwithstanding the foregoing, no OWNER of a single lot that has been finally subdivided and sold to such OWNER as a member of the general public or otherwise as an ultimate user shall have any obligation under this Agreement except as expressly provided for herein.

9.8 Time of Essence. Time is of the essence in the performance of the provisions of this Agreement as to which time is an element.

9.9 Waiver. Failure by a party to insist upon the strict performance of any of the provisions of this Agreement by the other party, or the failure by a party to exercise its rights upon the default of the other party, shall not constitute a waiver of such party's right to insist and demand strict compliance by the other party with the terms of this Agreement thereafter.

9.10 No Third-Party Beneficiaries. This Agreement is made and entered into for the sole protection and benefit of the parties and their successors and assigns. No other person shall have any right of action based upon any provision of this Agreement.

9.11 Force Majeure. Neither party shall be deemed to be in default where failure or delay in performance of any of its obligations under this Agreement is caused by floods,

earthquakes, other Acts of God, fires, wars, riots or similar hostilities, strikes and other labor difficulties beyond the party's control, (including the party's employment force), government regulations, court actions (such as restraining orders or injunctions), or other causes beyond the party's control. If any such events shall occur, the Term of this Agreement and the time for performance by either party of any of its obligations hereunder may be extended by the written agreement of the parties for the period of time that such events prevented such performance, provided that the Term of this Agreement shall not be extended under any circumstances for more than five (5) years.

9.12 Mutual Covenants. The covenants contained herein are mutual covenants and also constitute conditions to the concurrent or subsequent performance by the party benefited thereby of the covenants to be performed hereunder by such benefited party.

9.13 Successors in Interest. The burdens of this Agreement shall be binding upon, and the benefits of this Agreement shall inure to, all successors in interest to the parties to this Agreement. All provisions of this Agreement shall be enforceable as equitable servitudes and constitute covenants running with the land. Each covenant to do or refrain from doing some act hereunder with regard to development of the Property: (a) is for the benefit of and is a burden upon every portion of the Property; (b) runs with the Property and each portion thereof; and (c) is binding upon each party and each successor in interest during ownership of the Property or any portion thereof.

9.14 Counterparts. This Agreement may be executed by the parties in counterparts, which counterparts shall be construed together and have the same effect as if all of the parties had executed the same instrument.

9.15 Jurisdiction and Venue. Any action at law or in equity arising under this Agreement or brought by a party hereto for the purpose of enforcing, construing or determining the validity of any provision of this Agreement shall be filed and tried in the Superior Court of the County of Orange, State of California, and the parties hereto waive all provisions of law providing for the filing, removal or change of venue to any other court.

9.16 Project as a Private Undertaking. It is specifically understood and agreed by and between the parties hereto that the development of the Project is a private development, that neither party is acting as the agent of the other in any respect hereunder, and that each party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement. No partnership, joint venture or other association of any kind is formed by this Agreement. The only relationship between CITY and OWNER is that of a government entity regulating the development of private property and the owner of such property.

9.17 Further Actions and Instruments. Each of the parties shall cooperate with and provide reasonable assistance to the other to the extent contemplated hereunder in the performance of all obligations under this Agreement and the satisfaction of the conditions of this Agreement. Upon the request of either party at any time, the other party shall promptly execute and file or record such required instruments and writings and take any actions as may be reasonably necessary under the terms of this Agreement to carry out the intent and to fulfill the

provisions of this Agreement or to evidence or consummate the transactions contemplated by this Agreement.

9.18 Eminent Domain. No provision of this Agreement shall be construed to limit or restrict the exercise by CITY of its power of eminent domain.

9.19 Agent for Service of Process. In the event OWNER is not a resident of the State of California or it is an association, partnership or joint venture without a member, partner or joint venturer resident of the State of California, or it is a foreign corporation, then in any such event, OWNER shall file with the Director and the City Clerk, upon its execution of this Agreement, a designation of a natural person residing in the State of California, giving his or her name, residence and business addresses, as its agent for the purpose of service of process in any court action arising out of or based upon this Agreement, and the delivery to such agent of a copy of any process in any such action shall constitute valid service upon OWNER. If for any reason service of such process upon such agent is not feasible, then in such event OWNER may be personally served with such process and such service shall constitute valid service upon OWNER. OWNER is amenable to the process so served, submits to the jurisdiction of the Court so obtained and waives any and all objections and protests thereto.

9.20 Authority to Execute. The person or persons executing this Agreement on behalf of OWNER warrants and represents that he or she/they have the authority to execute this Agreement on behalf of his or her/their corporation, partnership or business entity and warrants and represents that he or she/they has/have the authority to bind OWNER to the performance of its obligations hereunder.

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IN WITNESS WHEREOF, the parties hereto have executed this Development Agreement on the last day and year set forth below.

OWNER

Triangle Center, LLC
a California Limited Liability Company

Tyler Mateen, General Partner

Dated: _____

CITY

CITY OF COSTA MESA, a California municipal corporation

Katrina Foley, Mayor

Dated: _____

ATTEST:

Brenda Green, City Clerk

APPROVED AS TO FORM FOR THE CITY:

Kimberly Hall Barlow, City Attorney