

**F.1 Acceptance of work with Marina Landscape, Inc. for Lakeshore Park Irrigation Renovation, Project 753 – from Senior Civil Engineer Fajeau. (RESOLUTION)**

**Background/Discussion** – On March 14, 2013, the City Council authorized award of a contract to Marina Landscape, Inc. for Lakeshore Park Irrigation Renovation, Project 753. The scope of work included installation of a new 6-inch irrigation mainline around the entire park with a new centralized controller, new remote control, isolation, and air relief valves, and other system components. All work on this project was completed within the original approved budget.

**Attachment**

**Action** - It is recommended that the City Council, by resolution, accept the work with Marina Landscape, Inc. for Lakeshore Park Irrigation Renovation, Project 753.

RESOLUTION NO.

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF  
NEWARK ACCEPTING THE WORK WITH MARINA  
LANDSCAPE, INC. FOR LAKESHORE PARK IRRIGATION  
RENOVATION, PROJECT 753

WHEREAS, the City of Newark has entered into a contract with Marina Landscape, Inc., pursuant to Resolution No. 10072, for Lakeshore Park Irrigation Renovation, Project 753, in the City of Newark, in accordance with the plans and specifications for the contract; and

WHEREAS, said work has been completed in conformance with the plans and specifications of the contract hereinabove referred to and the conditions thereof;

NOW, THEREFORE, BE IT RESOLVED that said contract is hereby accepted and the City Council does hereby authorize the release of bonds guaranteeing the completion of the work, the filing of a Notice of Completion, and payment to the contractor pursuant to the contract.

**F.2 Approval of plans and specifications for the 2014 Weed Abatement Program, and award the contract to JJ Landscape Management, Inc. – from Maintenance Supervisor Carey. (MOTION) (RESOLUTION)**

**Background/Discussion** – The annual weed abatement program abates weeds on vacant commercial and industrial properties not maintained by the property owners as directed by the Fire Marshal. The abatement work consists of tractor mowing, supplemented with manual labor to clear weeds abutting wooden fences and debris removal to facilitate the tractor work.

The lowest responsive bid was determined by adding the hourly rate for three items: tractor mowing, manual labor and debris removal.

Bids for this project were opened on Tuesday March 11, 2014, with the following results:

| <u>Company</u>                    | <u>Combined Hourly Rate</u> |
|-----------------------------------|-----------------------------|
| JJ Landscape Management, Inc.     | \$120.00 per hour           |
| Bayscape Landscape Management     | \$135.00 per hour           |
| Solorzanos Landscape Construction | \$167.00 per hour           |
| Mike Davis Landscape Services     | \$167.50 per hour           |
| Los Loza Landscaping              | \$180.00 per hour           |
| Pacheco Brothers Gardening, Inc.  | \$185.00 per hour           |
| Engineer's Estimate               | \$195.00 per hour           |

Funds were retained in the 2013-2014 Biennial Budget and Capital Improvement Plan to complete this project. The Landscape Parks Division recommends awarding the 2014 Weed Abatement Program to JJ Landscape Management, Inc., as they are the lowest responsible bidder.

The contract shall commence on or about April 1, 2014. The contract may be extended for no more than two consecutive one-year period upon mutual consent of both parties.

**Attachment**

**Action** - It is recommended that the City Council, by motion approve the one-year contract for the 2014 Weed Abatement Program, and by resolution award the contract to JJ Landscape Management, Inc.

RESOLUTION NO.

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF  
NEWARK ACCEPTING THE BID AND AWARDING THE  
CONTRACT TO JJ LANDSCAPE MANAGEMENT, INC., FOR  
THE 2014 WEED ABATEMENT PROGRAM

BE IT RESOLVED that the City Council of the City of Newark does hereby find that JJ Landscape Management, Inc., was the lowest responsible bidder for 2014 Weed Abatement Program.

BE IT FURTHER RESOLVED that the City Council does hereby accept said bid of said company and does hereby authorize and direct the Mayor of the City of Newark to sign an agreement with said company for 2014 Weed Abatement Program, according to the plans, specifications, and terms of said bid.

BE IT FURTHER RESOLVED that the City Council does hereby authorize the Public Works Director to sign renewal agreements with said company for Weed Abatement Programs.

**F.3 Accepting the bid of Group Mobile for the purchase of five Panasonic Toughbooks to replace the public safety mobile data computers, Project No. ERB0114 – from Information Systems Manager Towne. (RESOLUTION)**

**Background/Discussion** – As part of the City’s ongoing equipment replacement process five (5) ruggedized public safety mobile data computers (MDCs) were found to be in need of replacement due to one or more of the following reasons: inadequate performance; lack of parts availability, inability to upgrade; or failure.

In February Information Systems staff developed a Request for Quotes (RFQ), Project No. ERB0114, with a specification for the replacement equipment desired. This RFQ was distributed to a number of Panasonic Toughbook (MDC) resellers. As of the deadline of March 7, 2014, three vendors had responded with quotes – CDW Government; Group Mobile; and Mooring Tech.

The total cost of each quote is reflected in the table below.

| CDWG     | GROUP MOBILE | MOORING TECH |
|----------|--------------|--------------|
| \$22,082 | \$21,424     | \$18,942     |

The bid provided by Mooring Tech did not meet the specification required by the RFQ and quoted a system in limited supply that may not be available at the time of purchase. For this reason it is recommended that the second lowest total cost bid, provided by Group Mobile for the Panasonic Toughbook equipment, be accepted as the lowest responsible bid. The Group Mobile quote was for \$21,424, which is available through the City’s existing equipment replacement budget.

**Attachment**

**Action** - It is recommended that the City Council, by resolution, accept the bid of Group Mobile and authorize the purchase of five Panasonic Toughbooks, Project No. ERB0114.

RESOLUTION NO.

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF  
NEWARK ACCEPTING THE BID OF GROUP MOBILE AND  
AUTHORIZING THE PURCHASE OF FIVE PANASONIC  
TOUGHBOOKS, PROJECT NO. ERB0114.

BE IT RESOLVED that the City Council of the City of Newark does hereby find that Group Mobile was the lowest responsible bidder for provision of Panasonic Toughbooks, Project No. ERB0114, in the City of Newark;

BE IT FURTHER RESOLVED that the City Council does hereby accept said bid of said company and does hereby authorize the purchase of five Panasonic Toughbooks in the amount not to exceed \$21,424, Project No. ERB0114, according to the plans, specifications, and terms of said bid.

**F.4 Resolution approving an Economic Incentive Agreement with NewPark Mall, LP, confirming the non-applicability of the California Environmental Quality Act, and authorizing the Mayor to sign the Agreement. – from Assistant City Manager Grindall. (RESOLUTION)**

**Background/Discussion-** NewPark Mall is the major retail center in Newark. It was constructed in the late 1970's and was the preeminent shopping location in Southern Alameda County. Changing shopper trends, increased competition from shopping areas in neighboring cities and lack of maintenance by previous property owners has led to significant reductions in retail sales at the mall. The decline of the mall has also had significant negative impacts on the retail areas that surround the mall. There are now large numbers of vacant buildings on the surrounding parcels, including the former Mervyns parcel, the former Cinedome Theater parcel, and NewPark Plaza (former location of Toys-R-U's and TJ Maxx). The decline of the mall is a major factor in the sluggishness of the reuse of these and other properties surrounding the mall.

General Growth Properties owned the mall for decades and did little to keep the mall current. The mall saw a steady decline in retail sales and occupancy levels. In the "Great Recession", General Growth Properties entered and ultimately emerged from bankruptcy. In 2012, General Growth Properties spun off the NewPark Mall, along with 30 other malls, to create Rouse Properties. Rouse Properties is now a publically traded, independent entity. Since Rouse Properties took over the mall, some improvement in mall maintenance and a reduction in vacancy rates have been seen. However, retail sales continue to decline, driven by shopping trends, negative perceptions, and accelerating competition. It is important to note that Rouse Properties does not own the key anchor stores. Macy's and Sears own their own buildings and parking areas. Burlington and J.C. Penny's have long term leases and control of their parking areas. Rouse Properties controls only the in-line mall stores and the former Target store. The various property owners and tenants have detailed and complicated agreements that govern the operation and improvements to the mall. The separate but entwined property ownership may be a contributing factor to the stagnation at the mall.

The City has initiated the Greater NewPark Master Plan process to develop a vision and tools to lead to the revitalization of the mall area. The plan is in development, but early results of the analysis indicate the critical importance of a vibrant and modern mall to anchor the commercial area, draw shoppers, and create a sense of vibrancy. The analysis indicates that the mall should be repositioned to respond to modern trends and existing demographics by highlighting entertainment and restaurant uses. Therefore, while the Master Plan analysis is proceeding, staff has been concurrently working with the Rouse Properties to encourage major investment in the mall that will return it to vibrancy.

The recently adopted General Plan included key policies to guide the revitalization of the NewPark Mall area. The environmental studies of the General Plan included an analysis of the environmental impacts for more intense development in the greater mall area.

The key General Plan Goals and Policies are:

- LU-9: Strengthen NewPark Mall and its environs as a community showcase and quality environment for shopping and other compatible uses.
- LU 4.4: Greater NewPark Area. Modernize the Greater NewPark Area to create a vibrant regional retail location which provides urban amenities and gathering places. A mixture of higher density housing, office, hotel, entertainment, civic, and other uses should be encouraged, to the extent that these uses enhance regional retail as the primary use and assist in the area's revitalization.
- LU 9.1: Greater NewPark Area Land Use Mix. Diversify the mix of uses in the NewPark Mall vicinity to sustain and expand its role as the premiere shopping and entertainment destination in Southern Alameda County.

After significant discussions with City Staff over the past two years, Rouse Properties is now proposing a comprehensive renovation of the NewPark Mall. Rouse Properties has agreed to complete the renovation, if Newark provides economic incentives.

The renovation is expected to require an investment of between \$40 to \$50 Million Dollars. It would include:

- A high end multi-screen theater
- High end restaurants
- A 60,000 square foot restaurant with family entertainment
- Renovation of the entire in-line portion of the mall
- Modernization of the food court
- Remodeled mall entrances
- Remodeled Signage.

These improvements are to be approved administratively in accordance with our development regulations. Rouse is also contemplating the expansion of the Mall by an additional 30,000 Square Feet. Such expansion would be subject to City review and approval.

This revitalization effort is expected to draw significantly more people to the mall and to lead to national/international chains locating in the mall and to greater sales in the in-line portion of the mall and in the anchor stores as well.

In order to spur this revitalization the City is requested to enter into an Economic Incentive Agreement with the Mall owner. Under the proposed Economic Incentive Agreement, future sales tax revenue increases from the in-line mall stores and the former Target location would be shared with the Property owner. Eighty percent of this increased revenue would be provided as an economic incentive to the mall owner. Under this agreement the City would continue to

receive all of the sales tax presently received from the Mall area and ALL of the increased revenue from the anchor stores. The property tax revenues would be unaffected and would continue to be allocated to the City and other governmental entities.

### **Key Provisions:**

- No upfront City incentives would be provided, only future revenue would be used to incentivize the renovation.
- There would be no sharing of sales tax generated from the anchor stores.
- If a theater is not substantially completed within 3 years, unless delayed by circumstances outside of the control of the property owner, economic incentives would be terminated.
- The sales tax sharing would be triggered by either the opening of a theater or the completion of 75,000 square feet of major renovation. The sales tax sharing would continue for 18 years beyond the triggering event.
- The total amount of sales taxes provided as an incentive would not exceed 75% of the cost of the renovations.
- The City agrees to expeditious processing of the building plans and permits for the renovation project.

Staff believes that this renovation will create new life for the mall and help attract high quality retailers. The renovated in-line stores and theater will create substantial greater retail sales at the mall anchor stores and at stores that surround the mall. Without a major renovation the mall would be expected to continue to decline, dragging the entire area down. Since the sharing is limited to increased revenue on the inline and Target store portion of the mall, it is expected that despite the sharing of future revenue the city would receive a net increase in revenue due to increased sales at the anchor stores and surrounding properties and result in property tax revenue increases.

If the Economic Incentive Agreement is approved, the property owner will proceed with designing, financing and construction of the mall renovation. Construction is proposed to begin on the first elements this year. It is hoped that the movie theater would open in 2015. Staff will work with the property owners to encourage quality tenants in the Mall. The Greater NewPark Master Plan would continue with a focus on the surrounding properties and a long term land use vision for the area.

### **California Environmental Quality Act**

City staff has analyzed the proposed Economic Incentive Agreement in the context of the applicant's proposed revitalization of the Newpark Mall to determine whether the proposed activities would constitute a "project" subject to further or more detailed environmental review under the California Environmental Quality Act ("CEQA") at California Public Resources Code section 21000 et seq., and if so, to recommend the appropriate means of conducting such review. Under the applicable definition of a "project" under CEQA, neither the proposed

Agreement nor the proposed activities on the site (separately or cumulatively) would constitute a "project" requiring further CEQA review, and it is recommended that the Council make a determination to that effect.

CEQA applies to an activity that would be carried out, supported by, or authorized by discretionary acts of public agency which may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. (Pub. Res. Code sec. 21065; CEQA Guidelines sec. 15378.) CEQA applies only to "discretionary projects proposed to be carried out or approved by" public agencies. (Pub. Res. Code sec. 21080(a).)

CEQA is not applicable to governmental fiscal decisions, unless the proposed decision is both "discretionary" and commits the agency to a specific project that may result in a potentially significant physical impact on the environment (CEQA Guidelines 15378(b)(4).) Those factors are not present here. While the proposed Economic Incentive Agreement would require discretionary Council consideration and approval, the Agreement itself is a mere fiscal agreement, and does not obligate the City to undertake any action other than to provide economic incentives or financial assistance for the proposed revitalization program upon certain conditions described in the Agreement, nor does it obligate the City to grant any further discretionary approvals for the revitalization work.

There is no substantial evidence indicating that the revitalization project as presented would cause significant physical changes in the environment that have not already been considered by the City. The revitalization work contemplated by the applicant will take place within the footprint of the existing Mall, will be performed on or within existing structures, and/or will require only ministerial City permits (e.g., demolition, tenant improvement, building permits) for performance of work consistent with City codes and established standards. The proposed revitalization of the existing Mall will continue and enhance the existing and approved uses of the site, consistent with established City land use plans and policies, with no evidence that it would cause a physical change in the environment of the type contemplated by CEQA. The proposed activities would be of the same type as reviewed in previously-certified environmental reviews for the development of the Mall, and there is no substantial evidence of any significant new or different adverse impacts on the environment. Accordingly, the Council may properly determine that no further CEQA review is appropriate or required.

### **Attachments**

**Action** – It is recommended that the City Council, approve a resolution approving the Economic Incentive Agreement with NewPark LP, confirming the non-applicability of the California Environmental Quality Act, and authorizing the Mayor to sign the agreement.

RESOLUTION NO.

RESOLUTION APPROVING AN ECONOMIC INCENTIVE AGREEMENT WITH NEWPARK MALL, LP, CONFIRMING THE NON-APPLICABILITY OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT, AND AUTHORIZING THE MAYOR TO SIGN THE AGREEMENT

WHEREAS, NewPark Mall LP intends to undertake over time a significant revitalization of the Mall that is anticipated to include, but not necessarily be limited to, the construction or installation of a new high-end multi-screen movie theater, entertainment venues, leading fashion retail, and restaurants, retail store re-tenanting, signage upgrading, and multiple other interior and exterior upgrades to the Mall; and

WHEREAS, NewPark Mall LP has reported to staff that there will be very substantial capital expenditures and other costs and expenses to plan, develop, construct, install, and lease-up the mall; and

WHEREAS, City has determined that the revitalization has the potential to generate significant new and additional local sales tax and property tax revenues to City from the Mall, and other tangible and intangible benefits for the City and its citizens not limited to the ability of City to continue to maintain and fund appropriate levels of necessary public services to its citizens, such as public safety and public works, and to provide public facilities and amenities and employment opportunities necessary to sustain the quality of life and environment in City; and

WHEREAS, the revitalization of the Mall will serve public purposes through an improved business and civic environment within the City that may attract new and additional businesses, investment and property revitalization in the areas surrounding the site and elsewhere within City; and

WHEREAS, the revitalization of the Mall and the provision of economic incentives such as those contemplated by this Agreement are consistent with and expressly contemplated by the economic development, land use and other applicable goals, policies and action items set forth in City's General Plan and City's Economic Incentive Policy; and

WHEREAS, the revitalization project is a renovation of existing buildings and no discretionary approvals are required for their completion; and

WHEREAS, non-discretionary approvals are not subject to the requirements of the California Environmental Quality Act; and

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Newark, California does hereby approve an Economic Incentive Agreement with NewPark Mall, LP said agreement being on file with the City Clerk and authorizes the Mayor to execute said agreement.

**ECONOMIC INCENTIVE AGREEMENT**  
**(NEWPARK MALL, NEWARK, CALIFORNIA)**

THIS ECONOMIC INCENTIVE AGREEMENT is entered into as of \_\_\_\_\_, 2014 ("Effective Date"), by and between the CITY OF NEWARK, a municipal corporation (hereinafter referred to as "City"), and NEWPARK MALL, LP, a Delaware limited partnership (hereinafter referred to as "Company"). City and Company are hereinafter sometimes referred to individually as a "party" and collectively as the "parties."

**RECITALS**

WHEREAS, as of the Effective Date, there is located upon certain real property located within the City (the "Site") and more particularly described on attached Exhibit A-1, and depicted on attached Exhibit A-2 (the "Site Plan"), a retail shopping mall and related parking and other improvements and facilities commonly and collectively known as the NewPark Mall (the "Mall"); and

WHEREAS, as of the Effective Date, Company is the owner of the "in-line" portion of the Mall, the parking areas, and other portions of the Site identified on the Site Plan as being under Company ownership, and such portions of the Mall and the Site are, or may be, from time to time, leased by Company to various tenants by means of retail space or ground leases; and

WHEREAS, Company intends to undertake over time a significant revitalization of the in-line portion of the Mall and the portion of the Mall formerly containing a Target store that is anticipated to include, but not necessarily be limited to, the construction or installation of a new high-end multi-screen movie theater, entertainment venues, leading fashion retail, and restaurants, retail store re-tenanting, signage upgrading, and multiple other interior and exterior upgrades to the Mall (collectively, the "Mall Renovation"); and

WHEREAS, there will be very substantial capital expenditures and other costs and expenses to Company to plan, develop, construct, install, and lease-up the Mall Renovation; and

WHEREAS, City has determined that the Mall Renovation has the potential to generate significant new and additional local sales tax and property tax revenues to City from the Mall, and other tangible and intangible benefits for the City and its citizens as further described herein, including but not limited to the ability of City to continue to maintain and fund appropriate levels of necessary public services to its citizens, such as public safety and public works, and to provide public facilities and amenities and employment opportunities necessary to sustain the quality of life and environment in City; and

WHEREAS, the revitalization of the Mall will help to foster an improved business and civic environment within City which may attract new and additional businesses, investment and property revitalization in the areas surrounding the Site and elsewhere within City; and

WHEREAS, the revitalization of the Mall and the provision of economic incentives such as those contemplated by this Agreement are consistent with and expressly contemplated by the economic development, land use and other applicable goals, policies and action items set forth in City's General Plan and City's Economic Incentive Policy; and

WHEREAS, City desires to encourage and facilitate the revitalization of the Mall for the salutary purposes described herein by providing certain economic incentives to Company to incur the costs and expenditures for such revitalization.

NOW, THEREFORE, in consideration of the foregoing facts and circumstances, and the mutual covenants and obligations of the parties set forth herein, City and Company hereby agree as follows:

## AGREEMENT

### SECTION 1. INCORPORATION OF RECITALS.

Each of the recitals set forth above is true and correct and is incorporated herein in full by this reference.

### SECTION 2. DEFINITIONS.

The following capitalized terms used in this Agreement shall have the following meanings:

- 2.1 Agreement. The term "Agreement" shall mean this Economic Incentive Agreement, as the same may be modified or amended from time to time in accordance with its terms.
- 2.2 Anchor Tenants. The term "Anchor Tenants" shall mean, individually and collectively, Macy's, Sears, JC Penney and/or Burlington Coat Factory, that, as of the Effective Date, are Big Box Retailers occupying space at the Mall as indicated on the Site Plan, and any other Big Box Retailers that replace or succeed, or take over, the space in the Mall previously occupied by any of the foregoing specifically named occupants.
- 2.3 Base Sales Tax. The term "Base Sales Tax" shall mean an amount equal to Six Hundred Fifty-Seven Thousand Dollars (\$657,000.00), which is the amount that the parties have agreed represents, based upon currently available information, the sales tax revenues attributable to Core Mall Areas that is received by City for 2013.
- 2.4 Big Box Retailer. The term "Big Box Retailer" shall mean a big box retailer as defined in Section 53084 of the California Government Code or any successor statute thereto.
- 2.5 BOE. The term "BOE" shall mean the California State Board of Equalization or any successor agency thereto.
- 2.6 City. The term "City" shall mean the City of Newark, a California municipal corporation and any successor thereof.
- 2.7 City Development Fees. The term "City Development Fees" shall mean any and all in-lieu development fees, impact fees, maintenance fees, taxes, assessments, charges, and other monetary exactions or impositions, whether existing as of the Effective Date or adopted thereafter, whether established for a broad class of projects or on a specific project, and whether established by legislative act or otherwise, and

otherwise applicable to the Mall Renovation or in connection with any City Permits. "City Development Fees" does not include: (i) any utility users tax, business license tax, transient occupancy tax, or any successors to the foregoing taxes, or other similar taxes charged by City on a generally applicable and non-discriminatory City-wide basis to others similarly situated; or (ii) any processing fees charged by City, on a City-wide non-discriminatory basis, for the processing of applications for the City Permits.

- 2.8 City Permits. The term "City Permits" shall mean any and all ministerial, non-discretionary City permits, entitlements, consents, and approvals as may be necessary or appropriate at any time during the Term for the Mall Renovation (subject to Section 5.1).
- 2.9 Company. The term "Company" shall mean NewPark Mall, LP, a Delaware limited partnership, and any permitted successors or assignees of Company as provided herein.
- 2.10 Company Affiliate. The term "Company Affiliate" shall mean any person or entity that controls or is controlled by or under common control with Company. "Control" shall mean the holding or control, directly or indirectly, of more than 50% of the voting power of an entity.
- 2.11 Core Mall Areas. The term "Core Mall Areas" shall mean, collectively, the existing in-line portions of the Mall (excluding those portions owned, leased or occupied by any Anchor Tenants), the portion of the Mall formerly containing a Target store, and the areas included within the Mall Renovation and the Mall Expansion.
- 2.12 Core Mall Sales Tax Revenues. The term "Core Mall Sales Tax Revenues" shall mean any and all one-time and recurring sales tax revenues generated specifically from all or any portion of the Core Mall Areas at any time during the Term and received by City pursuant to the Sales Tax Law at any time with respect to any period during the Term as a result of any sales, services or business activities of any tenants, occupants, vendors or operators at any Core Mall Areas, such as sales tax on retail sales; business to business sales tax; and any other sales tax revenues generated from such activities at the Core Mall Areas at any time during the Term. "Core Mall Sales Tax Revenues" shall not include any sales tax revenues generated specifically from the activities of any Anchor Tenant. "Core Mall Sales Tax Revenues" shall be deemed to commence as of the Sales Tax Revenues Start Date.
- 2.13 County. The term "County" shall mean the County of Alameda.
- 2.14 Default. The term "Default" shall have the meaning set forth in Section 6.1.
- 2.15 Effective Date. The term "Effective Date" shall mean the date first set forth above.
- 2.16 Enforced Delay. The term "Enforced Delay" shall have the meaning set forth in Section 9.3.

- 2.17 Incentive Share. The term "Incentive Share" shall mean an amount equal to eighty percent (80%) of: the difference of Core Mall Sales Tax Revenues minus the Base Sales Tax.
- 2.18 Incentive Share Cap. The term "Incentive Share Cap" shall mean an amount equal to seventy-five percent (75%) of the aggregate total of all capital expenditures and other costs and expenses of Company to plan, design, entitle, permit, develop, construct, install, and lease-up (including any related tenant allowances and buy-outs) the Mall Renovation and the Mall Expansion, as certified and reasonably substantiated. If a Theater (as defined in Section 2.30) is not first opened to the public within the first five (5) years following the Effective Date (subject to any Enforced Delay that may extend such five (5)-year period), then such capital expenditures and other costs and expenses attributable to the Theater shall be excluded (subtracted) from the computation of the Incentive Share Cap. As used herein, "as certified and reasonably substantiated" shall mean the process as described in Section 4.4 of this Agreement.
- 2.19 Mall. The term "Mall" shall have the meaning set forth in the Recitals.
- 2.20 Mall Renovation. The term "Mall Renovation" shall have the meaning set forth in the Recitals. By way of further clarification, "Mall Renovation" shall be limited to modifications of the existing Mall footprints (excluding Anchor Tenants) and up to a ten (10) foot extension around the perimeter thereof.
- 2.21 Mall Expansion. The term "Mall Expansion" shall mean construction of up to thirty thousand (30,000) square feet gross leasable area (as defined within Section 2.25) of new retail, restaurant or entertainment space upon any new parcel(s) located within the current boundaries of the parking areas within the Core Mall Areas; provided however that, notwithstanding any provision herein to the contrary, nothing in this Agreement shall be deemed: (i) to obligate City to approve or issue any City Permits for such construction or in any way limit or constrain the City from exercising the full range of its discretion or its police powers in considering any application or from conducting or requiring environmental review of, or imposing reasonable mitigation measures, or other conditions of approval, upon any application for discretionary permits or approvals for such construction; or (ii) subject to clause (i), to limit the type or square footage of development on such parcel(s) for which Company may make application for any required City Permits or discretionary approvals (provided, however, that to the extent any such development approved by City is in excess of thirty thousand (30,000) square feet gross leasable area, such excess shall be excluded from "Mall Expansion" for purposes of this Agreement).
- 2.22 Quarter or Quarterly. The term "Quarter" or "Quarterly" shall mean any quarter (July 1 through September 30; October 1 through December 31; January 1 through March 31; April 1 through June 30) of any Year.
- 2.23 REA. The term "REA" shall mean that certain document entitled "Construction, Operation an Reciprocal Easement Agreement (New Park Associates - Newark, California," dated May 24, 1979, and recorded against the Site on June 22, 1979, as document 79-121137, Official Records of Alameda County, as thereafter amended in accordance with the terms thereof.

- 2.24 Sales Tax Law. The term "Sales Tax Law" shall mean the Bradley-Burns Uniform Local Sales and Use Tax Law (California Revenue Code Sections 7200 *et seq.*), as may be amended from time to time, and any replacement or successor statute thereto.
- 2.25 Sales Tax Revenues Start Date. The term "Sales Tax Revenues Start Date" shall mean the first to occur of the following: (a) the date upon which a Theater (as defined in Section 2.30) at the Site is open to the public; or (b) the date upon which Company substantially completes construction or renovation of at least 75,000 square feet of gross leasable area within the Mall Renovation to include new entertainment, restaurant and/or leading fashion retail uses. As used herein, "gross leasable area" shall mean "gross leasable area" as defined in the Building Owners and Managers Association (BOMA) "Retail Buildings: Standard Methods of Measurement (ANSI/BOMA Z65.5-2010)."
- 2.26 Site. The term "Site" shall have the meaning set forth in the Recitals.
- 2.27 Starting Quarter. The term "Starting Quarter" shall mean the Quarter in which the Sales Tax Revenues Start Date occurs.
- 2.28 State. The term "State" shall mean the State of California.
- 2.29 Term. The term "Term" shall mean the period commencing the Effective Date and expiring as of the last day of the first Quarter following the expiration of eighteen (18) Years, subject to the provisions of Section 6.5.1.
- 2.30 Theater. The term "Theater" shall mean a new high-end multi-screen (at least ten screens) movie theater on the Site.
- 2.31 Theater Shell. The term "Theater Shell" shall mean the foundation system, enclosed structural shell, exterior walls and roof encompassing space at the Site specifically designed and engineered to accommodate a Theater. "Theater Shell" excludes any furnishings, fixtures and equipment, and any other construction, installation or improvements which, under any lease or other agreement between Company and any Theater tenant or operator, are the responsibility of such tenant or operator.
- 2.32 Year or Yearly. The term "Year" or "Yearly" shall mean each consecutive four (4) Quarter period during the Term, with the first such four (4) Quarter period commencing with the Starting Quarter, and each subsequent four (4) Quarter period thereafter.

### SECTION 3. PURPOSE OF THIS AGREEMENT.

As further set forth in the Recitals to this Agreement, the purpose of this Agreement is to carry out the economic development, land use and other applicable goals, policies and action items of City's General Plan and City's Economic Incentive Policy that encourage the revitalization of the Mall and surrounding areas. The revitalization of the Mall as described in this Agreement implements such goals, policies and action items by helping to sustain the Mall as a regional commercial attraction with leading retail and entertainment destinations, helping to transform the Greater NewPark Area into a dynamic urban center, generating significant sales and property tax

revenues to City, promoting job opportunities within City, helping to maintain on- and off-site public improvements and services, and maintaining and enhancing the overall quality of life and the environment within City for the welfare and benefit of its citizens. For these reasons, City has determined that the revitalization of the Mall for such purposes is a benefit to City for which a financial arrangement such as this Agreement is appropriate. This Agreement is not intended, and shall not be construed, to provide any financial assistance for a Big Box Retailer or vehicle dealer to relocate to City from the territorial jurisdiction of another city or community within the same market area as City.

#### SECTION 4. COVENANTS OF COMPANY.

- 4.1 Condition of Site. Company acknowledges that this Agreement is being entered into by City to help effectuate City's economic incentive to Company, and that City shall not thereby accept, or be deemed to accept, hereunder any obligations for the physical condition of the Site. Company shall use reasonable efforts to realize the Mall Renovation; provided, however, that notwithstanding any provision herein to the contrary, nothing in this Agreement constitutes, or shall be deemed under any circumstance to constitute, any covenant or guaranty by Company of completion or opening of the Mall Renovation by any particular date or any covenant or obligation of Company of continuous operation of all or any portion of the Mall. All costs of use and operation of the Site shall be borne by Company and/or tenants of the Site or otherwise in accordance with the REA; provided, however, that the continued effectiveness of the REA is not a condition to the continued effectiveness of this Agreement. Nothing in this Agreement shall be deemed to obligate Company to take any action in contravention of the provisions of the REA.
- 4.2 City and Governmental Permits. Subject to the provisions of this Agreement, Company shall use reasonable efforts to secure, or cause to be secured, any City Permits and any permits required from any other governmental agency for the Mall Renovation, which Company is responsible for obtaining or causing to be obtained.
- 4.3 Development Fees on Mall Expansion. Nothing herein shall be deemed to relieve Company or its tenants from any Development Fees then in effect and applicable to any application for Mall Expansion.
- 4.4 Obligation to Provide Accounting(s). Within forty-five (45) days following the Sales Tax Revenues Start Date, and thereafter within forty-five (45) days following written request from City during the Term (but not more often than once each Quarter), Company shall submit to City a statement of accounting, certified by Company to be true and correct to the best of its knowledge, of all capital expenditures or other costs claimed by Company to be included within the computation of the Incentive Share Cap under Section 2.18, including supporting receipts and proof of payment, or other evidence supporting the claimed cost items, incurred to date, for review and approval by City. In the event of any question or dispute as to whether an item of cost or expenditure should be allowed under Section 2.18, the parties shall meet and confer in good faith toward an agreement resolving such question or dispute. In the absence of such an agreement, the parties shall mutually select a neutral third party with suitable experience to review and resolve the question or dispute. The costs of such neutral third party shall be shared equally by City and Company.

- 4.5 Obligation to Refrain from Discrimination. Company shall comply with all applicable federal, state, and local laws regarding nondiscriminatory employment practices, whether or not said laws are expressly stated in this Agreement. Company shall not discriminate against any employee or applicant because of race, color, religious creed, national origin, physical disability, mental disability, medical condition, marital status, sexual orientation, sex, or age.
- 4.6 Form of Nondiscrimination and Non-segregation Clauses. Company shall refrain from restricting the sale or lease of any portion of the Site, or contracts relating to the Site, on the basis of race, color, creed, religion, sex, marital status, national origin, or ancestry of any person.
- 4.7 Transfers. Company may, without the consent or approval of City, transfer, assign or convey (each a "transfer") this Agreement and any or all of Company's rights and obligations hereunder: (a) to one or more Company Affiliates; (b) to one or more lenders for purposes of security; and (c) to any person or entity who succeeds to Company's interest in all or substantially all of the Mall or the Site. Company may not make any other transfer without the prior written consent of City, which shall not be unreasonably withheld, conditioned or delayed. In the event of any such transfer without City's consent, City may, but shall not be obligated to, terminate this Agreement.

#### SECTION 5. COVENANTS OF CITY.

- 5.1 City Permit Processing for Mall Renovation and Mall Expansion. City shall cooperate and use its best efforts, consistent with any requirements of applicable law, to diligently review, consider, and if deemed appropriate under applicable law, to approve and issue to Company and/or its designee any and all City Permits for the Mall Renovation and Mall Expansion. City acknowledges and agrees that all necessary City Permits for the Mall Renovation are ministerial and non-discretionary. City's processing of and final action upon any application for a City Permit shall be completed no later than twenty (20) days following City's receipt of a complete application unless applicable laws or ordinances specify a shorter time (in which event, City shall comply with such shorter time requirement). The time period set forth in the preceding sentence shall not be extended as a result of the provisions of Section 6.1, but may be extended as a result of the provisions of Section 9.3. Upon request from Company or its designee, City shall promptly inform Company or its designee of all necessary information and submission requirements in connection with each application hereunder and shall review any such application for completeness prior to its submission.
- 5.2 Development Fees for Mall Renovation. During the Term, City shall not impose, charge, or collect any City Development Fees from Company or its tenants with respect to the Mall Renovation. Without limiting the preceding sentence, during the Term, City also shall be responsible for satisfying any obligation imposed by the appropriate school district within the City for payment of school facilities fees, developer fees, Mello-Roos special taxes, or similar charges imposed as mitigation of impacts of development on school facilities, applicable to the Mall Renovation (and without any right of reimbursement from Company for such payment), or shall be

responsible and authorized to pursue relief or exemption from such fees, special taxes, or similar school district charges for the mitigation of impacts of new development on school facilities, whether established for a broad class of projects or on a specific project, and whether established by legislative act or otherwise, and otherwise applicable to the Mall Renovation or in connection with any City Permits for the Mall Renovation.

5.3 Sharing of Core Mall Sales Tax Revenues.

5.3.1 Obligation to Pay; Amount of Incentive Share. City shall pay to Company a Yearly Incentive Share, accounted for and payable on a Quarterly basis pursuant to this Section 5.3. City's obligation to pay the Incentive Share shall commence in any Year at such time the Year-to-date Core Mall Sales Tax Revenues exceed the Base Sales Tax and shall terminate upon the expiration of the Term. Subsequent Quarterly payments of the Incentive Share for any Year shall be determined after subtracting payments of the Incentive Share made for previous Quarters that Year. City's aggregate Quarterly payments of the Incentive Share with respect to any Year shall not exceed the total amount of the Incentive Share calculated and payable hereunder with respect to such Year. An example of the calculation and payment of the Incentive Share is set forth in Schedule 5.3.1 attached hereto.

5.3.2 Timing of Payments. City's payments of the Incentive Share to Company shall be made in each Quarter (following the Starting Quarter), within thirty (30) days after all of the following shall have occurred with respect to the applicable Quarter for which payment is to be made: (i) the aggregate Core Mall Sales Tax Revenues for the Year in which the applicable Quarter occurs shall have exceeded the Base Sales Tax; (ii) actual receipt by City of Core Mall Sales Tax Revenues for the applicable Quarter from the State pursuant to the Sales Tax Law; and (iii) release by BOE to City or City's designee of sales tax data regarding Core Mall Sales Tax Revenues for the applicable Quarter.

5.3.3 Quarterly Reports. Within thirty (30) days following release by BOE to City or City's designee of sales tax data regarding Core Mall Sales Tax Revenues for any Quarter, City shall provide to Company a report, certified by City to be true and correct to the best of its knowledge, containing the following information: (i) the Core Mall Sales Tax Revenues received by City in such Quarter and Year-to-date through such Quarter; (ii) to the extent permitted by law, a list of all tenants and vendors (which may be by business address) that generated such Core Mall Sales Tax Revenues in such Quarter; and (iii) the Incentive Share payable by City for such Quarter (including the calculation and amount thereof) and payments of Incentive Share in such Quarter and Year-to-date through such Quarter.

5.3.4 Limitations on Incentive Share. The sharing of Core Mall Sales Tax Revenues as expressly described herein is limited to the Incentive Share Cap and City shall have no obligation whatsoever to pay the Incentive Share from any sources or funds other than those received by City from Core Mall Sales

Tax Revenues, or to pay any Incentive Share in excess of the Incentive Share Cap.

5.3.5 Maximization of Core Mall Sales Tax Revenues. City shall use reasonable efforts to maximize the capture, and promptly obtain, from the State all Core Mall Sales Tax Revenues due to City from activities at the Core Mall Areas.

5.3.6 Effect of Change in Sales Tax Law. If the Sales Tax Law is amended, terminated or rescinded and, as a result thereof, Core Mall Sales Tax Revenues are calculated in an alternate manner or are replaced by an alternate revenue stream generated from the Core Mall Areas, then Core Mall Sales Tax Revenues shall also mean and include those revenues received by City pursuant to such alternate manner of calculation or alternate revenue stream.

## SECTION 6. DEFAULTS, REMEDIES, AND TERMINATION.

6.1 Default. A party shall be deemed in default hereunder if such party has breached any material covenant, warranty, or obligation under this Agreement, and such breach has not been cured within thirty (30) days following receipt of written notice from the other party of such breach; provided, however, that if such breach is of a nature that cannot reasonably be cured within such thirty-day period, such party shall not be deemed in default if it commences such cure within such thirty-day period and thereafter diligently prosecutes such cure to completion. Notwithstanding the preceding sentence, with respect to any breach of an obligation under this Agreement for the payment of money, a party shall be deemed in default hereunder if such party fails to cure such breach within twenty (20) days following receipt of written notice from the other party of such breach. Any uncured breach under the provisions of this Section 6.1 is herein referred to as a "Default."

6.2 General. Except as otherwise expressly provided in this Agreement, any failure or delay by any party in asserting any of its rights or remedies as to any default shall not operate as a waiver of any default or of any rights or remedies or deprive such party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any rights or remedies.

### 6.3 Legal Actions.

6.3.1 Institution of Legal Actions. In the event of a dispute between the parties arising out of or related to this Agreement, any legal action shall be instituted in the Superior Court of the County of Alameda, State of California, or in the United States District Court for the Northern District of California. Each of City and Company agrees to submit to the personal jurisdiction of such court.

6.3.2 Applicable Law. The laws of the State of California, without reference to any conflicts of laws provisions, shall govern the interpretation and enforcement of this Agreement.

6.3.3 Acceptance of Service of Process. In the event that any legal action is commenced by Company against City, service of process on City shall be

made by personal service upon the City Clerk of City, or in such other manner as may be provided by law. In the event that any legal action is commenced by City against Company, service of process on Company shall be made by personal service upon any officer or authorized agent of Company or in such other manner as maybe provided by law.

6.4 Rights and Remedies are Cumulative. Except as otherwise expressly stated in this Agreement, the rights and remedies of the parties are cumulative, and the exercise by either party of one or more of its rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other party.

6.5 Term and Termination.

6.5.1 Term and Early Termination. This Agreement shall expire upon expiration of the Term; provided, however, that City, at its sole discretion, may terminate this Agreement before that date, upon not less than ten (10) days prior written notice to Company, if Company has not entered into a lease of a Theater with a national or regional theater chain operator and substantially completed construction of a Theater Shell within the first three (3) years following the Effective Date; provided, however, that such three (3)-year period shall be extended, and City may not terminate this Agreement, during the period of any Enforced Delay with respect to the construction of a Theater Shell and for which notice has been given as provided in Section 9.3. Notwithstanding any provision herein to the contrary, the expiration or termination of this Agreement shall not relieve or release City from paying to Company any Incentive Share that has accrued prior to such expiration or termination. In the event of any disagreement between the parties regarding whether or not Company has substantially completed construction of a Theater Shell, the determination of such "substantial completion" shall be made consistent with construction industry standards, custom and practice with respect to similar construction projects; provided, however, that in no event shall City's lack of issuance of any temporary or permanent certificate of occupancy with respect to a Theater Shell be considered a factor in such determination.

6.5.2 City's Right to Terminate for Default. City shall have the right to terminate this Agreement, including without limitation its obligations to make the payments to Company described in this Agreement, if Company is in Default hereunder.

6.5.3 Company's Right to Terminate for Default. Company shall have the right to terminate this Agreement if City is in Default hereunder.

## SECTION 7. SPECIAL PROVISIONS.

7.1 No Broker's Commission or Finder's Fee or Other Expenses. City shall not be obligated for the payment of any broker's commission or finder's fee, or for the payment of any other expenses of Company, as a result of this Agreement. Company shall indemnify, defend, and hold harmless City from and against any claim, demand,

action, suit, loss, or damage, including but not limited to attorneys' fees, for payment of any broker's commission, finder's fee, or other expenses, other than any claim, demand, action, suit, loss or damage due to any representation or agreement of City obligating a party to the payment of a commission, finder's fee, or relocation expense.

## SECTION 8. REPRESENTATIONS AND WARRANTIES.

- 8.1 Company Representations and Warranties. Company hereby makes the following representations and warranties for the benefit of City, its successors and assigns, and acknowledges that the execution of this Agreement by City has been made in material reliance by City on such representations and warranties:
- 8.1.1 As of the Effective Date, to Company's actual, current knowledge without independent inquiry, there are no pending or threatened claims, actions, proceedings, or lawsuits of any kind, whether for personal injury, property damages, landlord-tenant disputes, property taxes, or otherwise, that could reasonably be expected to materially and adversely affect Company's ability to enter into and perform under this Agreement.
  - 8.1.2 As of the Effective Date, to Company's actual, current knowledge without independent inquiry, neither the execution and delivery of this Agreement or Company's performance under it will constitute or result in any default or event that with notice or lapse of time, or both, would be a default or breach, or in violation of any agreement under which Company or the Site are bound, or any event which would permit any party to terminate any agreement or accelerate any maturity of any indebtedness or other obligation affecting Company or the Site, which in either case would materially and adversely affect Company's ability to perform its obligations under this Agreement.
  - 8.1.3 Company has not filed or, to Company's actual, current knowledge without independent inquiry, been the subject of any filing of a petition under federal bankruptcy laws, or any insolvency laws, or any laws for the discharge of indebtedness or assignment to creditors.
  - 8.1.4 This Agreement has been duly authorized, approved, and executed by Company and constitutes a valid and enforceable obligation of Company, except to the extent that enforceability may be limited by applicable bankruptcy, insolvency, moratorium, reorganization or other similar laws affecting the enforcement of creditors' rights generally and subject to general equitable principles.
  - 8.1.5 Company understands and acknowledges that the benefits to City described in this Agreement are a material inducement to City in considering this Agreement and without such benefits the City would not consider this Agreement.
- 8.2 City's Representations and Warranties. City hereby makes the following representations and warranties for the benefit of Company, and Company's successors

and assigns, and acknowledges that the execution of this Agreement by Company has been made in material reliance by Company on such representations and warranties:

- 8.2.1 As of the Effective Date, to City's actual, current knowledge without independent inquiry, there are no pending or threatened claims, actions, proceedings, or lawsuits of any kind, whether for personal injury, property damages, landlord-tenant disputes, property taxes, or otherwise, that could reasonably be expected to materially and adversely affect City's ability to enter into and perform under this Agreement.
- 8.2.2 To City's actual, current knowledge, the execution and delivery of, and performance under, this Agreement shall not constitute or result in any default or event that with notice or lapse of time, or both, would be a default or breach, or be in violation of any agreement under which City is bound, or be any event which would permit any party to terminate any agreement or accelerate any maturity of any indebtedness or other obligation affecting the City which in either case would materially and adversely affect City's ability to perform its obligations under this Agreement.
- 8.2.3 City has not engaged any broker or finder with respect to this Agreement or any other matter or document related to Company's use or occupancy of the Site.
- 8.2.4 City has not filed or, to City's actual, current knowledge without independent inquiry, been the subject of any filing of a petition under federal bankruptcy laws, or any insolvency laws, or any laws for the discharge of indebtedness or assignment to creditors.
- 8.2.5 This Agreement has been duly authorized, approved, and executed by City and constitutes a valid and enforceable obligation of City, except to the extent that enforceability may be limited by applicable bankruptcy, insolvency, moratorium, reorganization or other similar laws affecting the enforcement of creditors' rights generally and subject to general equitable principles.
- 8.2.6 City understands and acknowledges that the benefits to Company described in this Agreement are a material inducement to Company in undertaking the Mall Renovation and without such benefits Company would not undertake the Mall Renovation.

## SECTION 9. GENERAL PROVISIONS.

- 9.1 Notices, Demands and Communications Between the Parties. Any notices between City and Company required hereunder or by law shall be in writing, and shall be deemed to have been given (a) upon delivery, if delivered by hand, (b) three (3) days after being mailed first class, certified mail, return receipt requested, postage and registry fees prepaid, or (c) one Business Day after being delivered to a reputable overnight courier service, excluding the U.S. Postal Service, prepaid, marked for next day delivery, if the courier service obtains a signature acknowledging receipt, in each case addressed or sent to such party as follows:

To City: City of Newark  
37101 Newark Blvd.  
Newark, CA 94560  
Attention: Community Development Director

With a copy to: City of Newark  
37101 Newark Blvd.  
Newark, CA 94560  
Attention: City Attorney

To Company: NewPark Mall, LP  
1114 Avenue of the Americas, Suite 2800  
New York, New York  
Attention: General Counsel

With a Copy to: David L. Preiss  
50 California Street, Suite 2800  
San Francisco, CA 94111

## 9.2 Limitations of Liability.

### 9.2.1 Nonliability of City and City Officers and Employees, Conflicts of Interest.

No member, officer, employee, or contractor of City shall be personally liable to Company in the event of any Default by City or for any amount which may become due to Company or for any obligations under the terms of this Agreement.

No member, officer, employee, or agent of City shall have any direct or indirect interest in this Agreement nor participate in any decision relating to this Agreement which is prohibited by law.

9.2.2 Nonliability of Company Officers and Directors. No officer, director, shareholder, employee, contractor, tenant, or agent of Company shall be personally liable to City in the event of any Default by Company or for any amount which may become due to City or for any obligations under the terms of this Agreement. In no event shall Company be liable to City hereunder for any indirect, special or consequential damages.

9.3 Enforced Delay, Extension of Times of Performance. Notwithstanding any provision herein to the contrary, neither party shall be deemed in Default where delays or defaults in such party's performance (excluding any Default for non-payment) ("Enforced Delay") are due to: war; insurrection; strikes, stoppages, lock-outs or such other similar actions affecting labor; riots; floods; earthquakes; fires; casualties; supernatural causes; acts of the public enemy; epidemics; quarantine restrictions; freight stoppages or embargoes; lack of transportation; governmental restrictions or priority; litigation; bankruptcy, insolvency, breach or default of any tenants; unusually severe weather; inability to secure necessary labor, materials, equipment or tools; acts, failure to act or any delays of any contractor, subcontractor, supplier, tenant or any other third party; acts of the other party; acts or failure to act of City or

any other public or governmental agency or entity (except that any act or failure to act of City shall not excuse performance by City); or any other causes beyond the reasonable control or without the fault of the party claiming an extension of time to perform; provided that the party claiming an extension of time to perform exercises, reasonable and practicable good faith efforts to substantially reduce or eliminate the particular delay. An extension of time for performance by such party due to any such cause shall be given for the period of the Enforced Delay and shall commence to run from the time of the commencement of the cause, if notice by the party claiming such extension is sent to the other party within thirty (30) days of knowledge of the commencement of the cause. In no event shall either party be obligated hereunder to commence suit, litigation, arbitration, mediation or other proceeding against any third party in an effort to reduce or eliminate the period of any Enforced Delay. Notwithstanding the preceding provisions of this Section 9.3 to the contrary, in no event shall period(s) of Enforced Delay, individually or cumulatively, operate so as to extend the time set forth in Section 6.5.1 for substantial completion of a Theater Shell by more than ten (10) years from the Effective Date of this Agreement.

Times of performance under this Agreement also may be extended by mutual written agreement by City and Company. The City Manager of City shall have authority on behalf of City to approve such extensions of time for performance by Company not to exceed a cumulative total of one hundred eighty (180) days with respect to any particular performance obligation.

- 9.4 Interpretation. The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either party by reason of the authorship of this Agreement. The Section headings are for purposes of convenience only, and shall not be construed to limit or extend the meaning of this Agreement. As used herein, the singular shall include the plural (and vice versa); "herein," "hereto," "hereunder" and similar terms shall refer to this Agreement in its entirety; "include," "including" and similar terms shall be construed as if followed immediately by "but not limited to;" "shall," "will" and "must" means mandatory and "may" means permissive; and "or" is not exclusive.
- 9.5 Entire Agreement, Waivers and Amendments. This Agreement integrates all of the terms and conditions stated herein, or incidental hereto, and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the subject matter hereof, including but not limited to any exclusive negotiating agreement entered into between the parties. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the party to be charged, and all amendments and modifications hereto must be in writing and signed by the appropriate authorities of City and Company.
- 9.6 No Agency or Joint Venture. This Agreement shall not be deemed to create any agency, employment, partnership or joint venture relationship between the parties.
- 9.7 No Third Party Beneficiary. Except as otherwise expressly provided herein, this Agreement is made for the benefit of the parties and their respective successors and assigns, and no other person, agency, or entity shall have or acquire any rights or remedies under this Agreement.

- 9.8 Time. All references herein to "days" shall mean calendar days unless expressly referred to as "business days." If the day for performance of an obligation under this Agreement falls on a Saturday, Sunday, legal holiday, or a day upon which City offices are closed, then the time for performance of that obligation shall be extended to the first following day that is not a Saturday, Sunday or legal holiday.
- 9.9 Further Cooperation. The parties agree to execute and deliver all further documents and to take all such further action as may be reasonably necessary to fully effectuate the provisions of this Agreement.
- 9.10 Cooperation, Defense, & Indemnity in Event of Third Party Legal Challenge. In the event of any administrative, legal or equitable action or other proceeding instituted by any person, agency, or entity not a party to this Agreement challenging the validity or enforceability of this Agreement, or any portion thereof, or any of the actions leading to the adoption of this Agreement, or the issuance of any City Permit or other approval for the Mall Renovation, the parties shall cooperate with one another in defending against such action or proceeding. Company agrees to defend, indemnify, and save harmless City, its Council, boards, commissions, officers, employees and agents, from and against any and all claims, suits, action, liability, loss, damage, expense (including any claims for recovery of the third party's litigation expenses or attorneys' fees), cost (including, without limitation, reasonable attorneys' fees, costs and fees of litigation, but excluding City staff time) of every nature, kind or description, which may be brought by a third party against, or suffered or sustained by, City, its Council, boards, commissions, officers, employees or agents in the event of any such administrative, legal or equitable action or other proceeding. City shall select legal counsel of its choice for any defense of City, and Company shall pay reasonable compensation for such legal counsel; provided, however, that such compensation shall include only reasonable compensation paid to counsel not otherwise employed as City staff and shall exclude, without limitation, City attorney time and overhead costs and other City staff overhead costs and normal day-to-day business expenses incurred by City.
- 9.11 Expenses. Except as otherwise expressly provided herein, each party shall bear its own costs and expenses incurred in connection with the preparation, execution and performance of this Agreement.
- 9.12 Severability. If any term or provision of this Agreement is ever determined to be invalid or unenforceable for any reason, such term or provision shall be severed from this Agreement without affecting the validity or enforceability of the remainder of this Agreement.
- 9.13 Successors and Assigns. Subject to the provisions of Section 4.7, this Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.
- 9.14 Execution. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, and such counterparts shall constitute one and the same instrument. The parties shall be entitled to rely upon facsimile or electronic copies of the parties' signatures to this Agreement and any instrument executed in connection

therewith. Notwithstanding the preceding sentence, promptly after sending a facsimile or electronic copy of its signature thereon, such party shall provide the other party with an executed original counterpart, although the failure to provide such counterpart shall not limit the effectiveness of this Agreement or such instrument. Each party has executed this Agreement following review with its own independent counsel.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date.

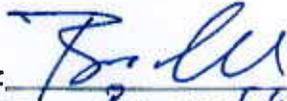
“City”

CITY OF NEWARK,  
a municipal corporation

By: \_\_\_\_\_  
Name: Alan Nagy  
Title: Mayor

“Company”

NEWPARK MALL, LP,  
a Delaware limited partnership

By:  \_\_\_\_\_  
Name: Benjamin Schmitt  
Title: Chief Operating Officer

APPROVED AS TO FORM:

By: \_\_\_\_\_  
David Benoun, City Attorney

ATTEST:

By: \_\_\_\_\_  
Sheila Harrington, City Clerk

EXHIBIT A-1  
TO  
ECONOMIC INCENTIVE AGREEMENT

LEGAL DESCRIPTION OF SITE

(See Attached)

## **LEGAL DESCRIPTION OF SITE**

### **LEGAL DESCRIPTION OF THE PROPERTY OWNED BY NEWPARK MALL, LP**

All that certain real property situated in the City of Newark, County of Alameda, State of California, and more particularly described as follows:

All of Parcels A-1, A-3, A-4, A-6, and A-7, Parcel Map No. 6078, Filed August 8, 1991, in Book 198, Pages 34 through 36, of Parcel Maps, Inclusive, Alameda County, California Records; plus all of Parcel D-4, Parcel Map No. 3632, Filed June 15, 1982, in Book 135, Pages 2 through 4, of Parcel Maps, Inclusive, Alameda County Records.

Parcel A-6, Parcel Map No. 6078, Filed August 8, 1991, in Book 198, Pages 34 through 36, of Parcel Maps, Inclusive, Alameda County Records.

### **LEGAL DESCRIPTION OF SEARS PROPERTY:**

All that certain real property situated in the City of Newark, County of Alameda, State of California, and more particularly described as follows:

All of Parcel B as shown on Parcel Map No. 2891, Filed March 15, 1979, in Book 109, Pages 36 through 37 of Parcel Maps, Inclusive, Alameda County Records

### **LEGAL DESCRIPTION OF MACY'S PROPERTY:**

All that certain real property situated in the City of Newark, County of Alameda, State of California, and more particularly described as follows:

All of Parcel C as shown on Parcel Map No. 4572, Filed July 10, 1986, in Book 161, Pages 71 through 74 of Parcel Maps, Inclusive, Alameda County Records.

EXHIBIT A-2  
TO  
ECONOMIC INCENTIVE AGREEMENT

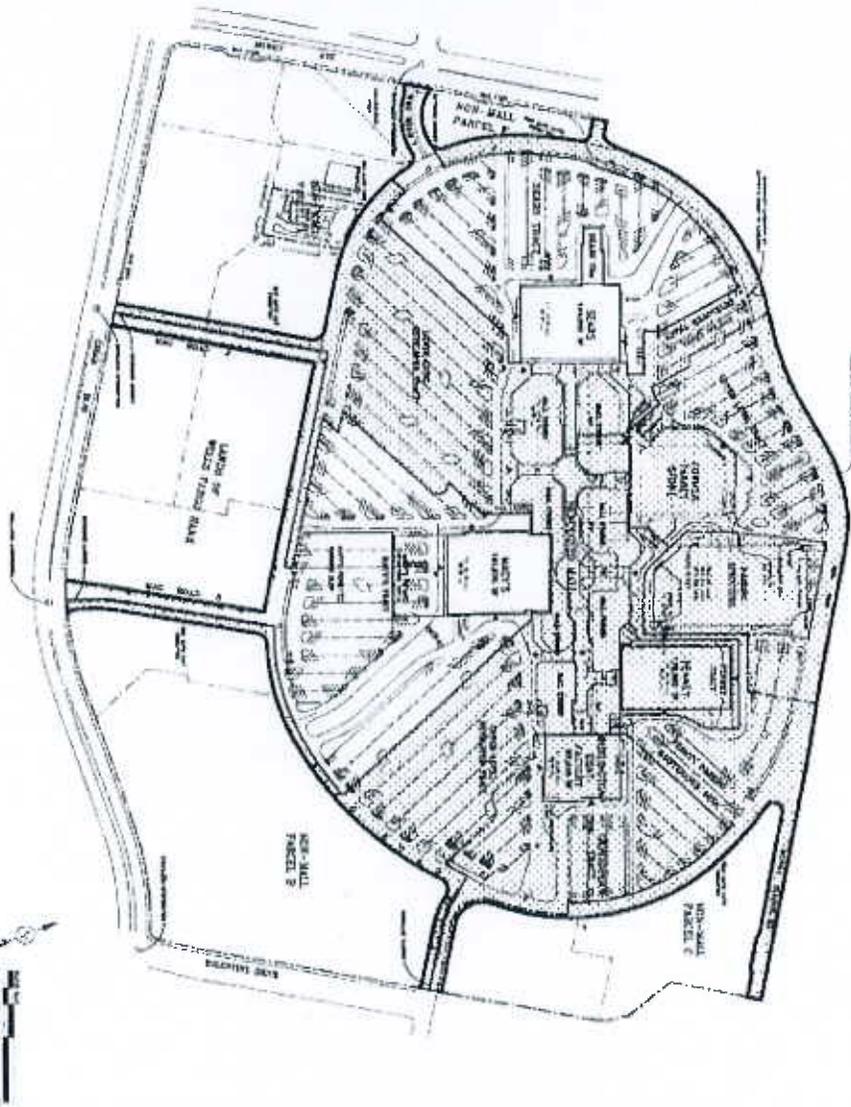
DIAGRAM OF SITE

(See Attached)

NOTES: SEE STORE FRONT AND WALL'S STOP MARKS ON SHEET A-1

NOTE: STORE FRONT MARK AND WALL'S STOP MARKS ON SHEET A-1

— SITE BOUNDARY  
▨ PORTIONS OF SITE OWNED BY NEWPARK MALL, LP



DATE: 08/11/05  
A-2  
SITE PLAN

PROJECT NO.:  
SHEET NO.:  
SCALE:  
DATE:

**NEWPARK MALL**  
2088 NEWPARK MALL  
NEWPARK, CALIFORNIA 94580-2011

**ROUSE**  
ARCHITECTS  
1000 AVENUE OF THE STARS, SUITE 2000  
REDWOOD CITY, CA 94063  
(650) 345-4000

SCHEDULE 5.3.1  
TO  
ECONOMIC INCENTIVE AGREEMENT

EXAMPLE OF CALCULATION AND PAYMENT OF INCENTIVE SHARE

(See Attached)

**Schedule 5.3.1**

This is an example of a calculation for the first two Years as required under this Agreement. This example does not contain any actual data, as it is merely used for illustrative purposes.

|                                       |                  |
|---------------------------------------|------------------|
| <u>Sales Tax Revenues Start Date:</u> | May 15, 2015     |
| <u>Starting Quarter:</u>              | April-June, 2015 |

| <u>Agreement Year 1:</u>           |                    | April 2015-March 2016 |                     | April 2016-March 2017 |  |
|------------------------------------|--------------------|-----------------------|---------------------|-----------------------|--|
|                                    | April to June 2015 | July to Sept 2015     | Oct to Dec 2015     | Jan to March 2016     |  |
|                                    | Qtr 1              | Qtr 2                 | Qtr 3               | Qtr 4                 |  |
| Quarter Core Mall Sales Tax        | 210,000            | 260,000               | 220,000             | 310,000               |  |
| YTD Core Mall Sales Tax            | 210,000            | 470,000               | 690,000             | 1,000,000             |  |
| <u>Base Sales Tax</u>              | <u>657,000</u>     | <u>657,000</u>        | <u>657,000</u>      | <u>657,000</u>        |  |
| Core Mall Sales Tax-Base Sales Tax | -                  | -                     | 33,000              | 343,000               |  |
| Incentive Share (80%)              | -                  | -                     | 26,400              | 274,400               |  |
| Incentive Share Paid to date       | -                  | -                     | -                   | 26,400                |  |
| <b>Current Quarter Payment</b>     | <b>\$ -</b>        | <b>\$ -</b>           | <b>\$ 26,400.00</b> | <b>\$ 248,000.00</b>  |  |
| <i>Estimated Payment Date</i>      | October 2015       | January 2016          | April 2016          | July 2016             |  |

| <u>Agreement Year 2:</u>           |                    | April 2016-March 2017 |                     | April 2017-March 2018 |  |
|------------------------------------|--------------------|-----------------------|---------------------|-----------------------|--|
|                                    | April to June 2016 | July to Sept 2016     | Oct to Dec 2016     | Jan to March 2017     |  |
|                                    | Qtr 1              | Qtr 2                 | Qtr 3               | Qtr 4                 |  |
| Quarter Core Mall Sales Tax        | 220,000            | 280,000               | 260,000             | 340,000               |  |
| YTD Core Mall Sales Tax            | 220,000            | 500,000               | 760,000             | 1,100,000             |  |
| <u>Base Sales Tax</u>              | <u>657,000</u>     | <u>657,000</u>        | <u>657,000</u>      | <u>657,000</u>        |  |
| Core Mall Sales Tax-Base Sales Tax | -                  | -                     | 103,000             | 443,000               |  |
| Incentive Share (80%)              | -                  | -                     | 82,400              | 354,400               |  |
| Incentive Share Paid to date       | -                  | -                     | -                   | 82,400                |  |
| <b>Current Quarter Payment</b>     | <b>\$ -</b>        | <b>\$ -</b>           | <b>\$ 82,400.00</b> | <b>\$ 272,000.00</b>  |  |
| <i>Estimated Payment Date</i>      | October 2016       | January 2017          | April 2017          | July 2017             |  |