

ORDINANCE NO. 2013-11

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF HESPERIA, CALIFORNIA, APPROVING A DEVELOPMENT AGREEMENT BETWEEN THE CITY OF HESPERIA AND COVINGTON GROUP, INC REGARDING THE HESPERIA COMMERCE CENTER PROJECT LOCATED ON THE EAST AND WEST SIDE OF CALIENTE ROAD BETWEEN THE UNION PACIFIC RAILROAD AND CEDAR STREET (DA13-00001)

WHEREAS, Covington Group, Inc. (Applicant) has filed an application requesting approval of Development Agreement DA13-00001, described herein (hereinafter referred to as "Application"). DA13-00001 shall apply to Conditional Use Permit CUP11-10229 (hereinafter referred to as the "Hesperia Commerce Center" project; and

WHEREAS, pursuant to California Government Code Section 65864, the lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public; and

WHEREAS, assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development; and

WHEREAS, pursuant to California Government Code Section 65865, any city, county, or city and county, may enter into a development agreement with any person having a legal or equitable interest in real property for the development of the property as provided in this article; and

WHEREAS, pursuant to California Government Code Section 65865.2, a development agreement shall specify the duration of the agreement, the permitted uses of the property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes. The development agreement may include conditions, terms, restrictions, and requirements for subsequent discretionary actions, provided that such conditions, terms, restrictions, and requirements for subsequent discretionary actions shall not prevent development of the land for the uses and to the density or intensity of development set forth in the agreement. The agreement may provide that construction shall be commenced within a specified time and that the project or any phase thereof be completed within a specified time. The agreement may also include terms and conditions relating to applicant financing of necessary public facilities and subsequent reimbursement over time; and

WHEREAS, The City of Hesperia Development Code regulations provide that conditional use permits expire three years after the effective date of approval; and

WHEREAS, the Application applies to 232 acres of vacant property zoned Commercial Industrial Business Park (CIBP) and Wash Protection Overlay within the Main Street and Freeway Corridor Specific Plan (Specific Plan), located on the east and west side of Caliente Road between the Union Pacific Railroad and Cedar Street and consists of Assessor's Parcel Numbers 3039-311-03 thru 06, 3039-341-01 thru 07, 3039-351-08, and 3039-431-02 & 04; and

WHEREAS, the Application, as contemplated, proposes to allow that the Hesperia Commerce Center be granted an initial expiration date 12 years from its effective date of approval, with a provision enabling an automatic 8-year extension of time, subject to the provisions within this agreement. Additional provisions may be included within the agreement if authorized by the City Council; and

WHEREAS, the Applicant proposes to construct a 3.5 million square foot distribution center / industrial park in five phases on 232 gross acres under Conditional Use Permit CUP11-10229. The proposed use is consistent with the Specific Plan, although approval of a CUP is required to approve the distribution warehouses in excess of 200,000 square feet; and

WHEREAS, the Applicant also proposes to subdivide the 232-acre property into 13 parcels and a remainder as well as to create a non-residential condominium overlay, allowing for ownership of individual units within the development under Tentative Parcel Map TPM11-10230; and

WHEREAS, the subject properties are currently vacant. All surrounding properties are also vacant, except the properties to the east, which are occupied by Hesperia Fire Station 305, Commercial Engine Service, and Interstate 15. The properties to the north are also zoned CIBP. The properties to the south are zoned Automobile Sales Commercial (ASC), the properties to the east are CIBP and Public Institutional Overlay (PIO), and the properties to the west are zoned Rural Estate Residential (RER); and

WHEREAS, on November 14, 2013, the Planning Commission of the City of Hesperia adopted Resolution PC-2013-14, recommending that the City Council adopt the environmental findings pursuant to California Environmental Quality Act (CEQA), adopting a Statement of Overriding Considerations, certifying the Final Environmental Impact Report (SCH # 2012081016), and adopting a Mitigation Monitoring and Reporting Plan; and

WHEREAS, in furtherance of the public purposes of the City, the Applicant and the City desire to enter into a Development Agreement; and

WHEREAS, on November 14, 2013, the Planning Commission of the City of Hesperia conducted a duly noticed public hearing pertaining to the proposed Application, and concluded said hearing on that date; and

WHEREAS, on December 3, 2013, the City Council of the City of Hesperia conducted a duly noticed public hearing pertaining to the proposed Application, and concluded said hearing on that date; and

WHEREAS, all legal prerequisites to the adoption of this Ordinance have occurred.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF HESPERIA DOES ORDAIN AS FOLLOWS:

Section 1. The City Council hereby specifically finds that all of the facts set forth in this Ordinance are true and correct.

Section 2. Based upon substantial evidence presented to the Council, including written and oral staff reports, the Council specifically finds that the proposed Development Agreement is consistent with the goals and objectives of the adopted General Plan.

Section 3. Based on adoption of Resolution 2013-53, the Environmental Findings, Statement of Overriding Considerations, Mitigation Monitoring and Reporting have been adopted and the Final Environmental Impact Report (SCH # 2012081016) has been certified pursuant to the California Environmental Quality Act (CEQA) for this project.

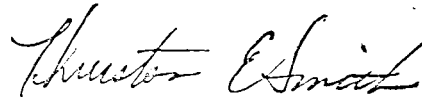
Section 4. Based upon substantial evidence presented to this Council during the above-referenced December 3, 2013, hearing, including public testimony and written and oral staff reports, this Council has determined that the Development Agreement is in the best interest of the City and desires to enter into an agreement with the Applicant as shown on Exhibit "A".

Section 5. Based on the findings and conclusions set forth in this Ordinance, this Council hereby adopts Development Agreement DA13-00001, as shown on Exhibit "A."

Section 6. This Ordinance shall take effect thirty (30) days from the date of adoption.

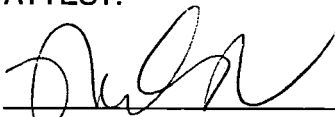
Section 7. The City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be posted in three (3) public places within the City of Hesperia pursuant to the provisions of Resolution No. 2007-101.

ADOPTED AND APPROVED this 17th day of December, 2013.



Thurston Smith, Mayor

ATTEST:



Melinda Sayre-Castro
City Clerk

EXHIBIT "A"

**RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:**

City of Hesperia
9700 Seventh Avenue
Hesperia, CA 92345
Attn: City Clerk

APNs:

Exempt from Recording Fees pursuant to Government Code Section 27383

**DEVELOPMENT AGREEMENT
(Hesperia Commerce Center)**

between

**CITY OF HESPERIA,
a California general law city and municipal corporation**

and

[_____]
a [_____]

Reference dated as of _____, 2013

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DEVELOPMENT AGREEMENT (Hesperia Commerce Center)

This Development Agreement (Hesperia Commerce Center) ("**Agreement**") is entered into between the City of Hesperia, a California general law city and municipal corporation ("**City**"), and _____, a _____ ("**Developer**"). This Agreement is dated as of _____, 2013 for reference only. This Agreement will not become effective until the "**Effective Date**" (defined below). City and Developer are entering into this Agreement in reliance on the facts set forth in the Recitals, below.

RECITALS

A. City is authorized under Government Code Section 65864, et seq. ("**Development Agreement Law**") to enter into binding development agreements with persons having legal or equitable interests in real property for the development of that property.

B. Developer owns or has an equitable interest in real property consisting of the approximately _____ (____) acres of land ("**Property**") described on the attached Exhibit A and depicted on the attached Exhibit B ("**Site Plan**").

C. Developer applied to City for approval and enactment of this Agreement as the primary governing instrument for the development and use of the Property. The City Planning Commission ("**Planning Commission**") and the City Council ("**City Council**") have conducted public hearings and have found that this Agreement is consistent with City's General Plan ("**General Plan**"), including the General Plan Land Use Element.

D. On _____, 2013, the City Council adopted Ordinance No. _____ ("**Enacting Ordinance**"), which approved this Agreement.

E. By adopting the Enacting Ordinance, the City Council elected to exercise its governmental powers with regard to the Development of the Property at the present time rather than later. This Agreement binds City and future City Councils and limits the City Council's future exercise of its police powers. This Agreement has been found by the City Council to be fair, just and reasonable and in the best interests of City's citizens and the health, safety and welfare of the public.

F. City has complied with all California Environmental Quality Act (California Public Resources Code Section 21000, et seq.) ("**CEQA**") requirements with respect to the approval of this Agreement and of the Project, through the City Council's approval and certification of *[insert EIR description]* ("**EIR**").

G. Developer proposes to subdivide and develop the Property as a phased industrial business park development project and has obtained City's approval of the following Development Approvals: [Conditional Use Permit; Development Agreement; Tentative Parcel Map No. PM-19339].

H. All of City's prior actions and approvals with regard to this Agreement complied with all applicable legal requirements related to notice, public hearings, findings, votes, and other procedural matters.

I. The development of the Property in accordance with this Agreement will provide substantial benefits to City. This Agreement eliminates uncertainty in planning and provides for the orderly development of the Property, ensures the progressive installation of necessary public improvements to serve the Project, and serves the purposes of the Development Agreement Law.

1. DEFINITIONS AND EXHIBITS.

1.1. Definitions. The following initially capitalized terms used in this Agreement have the following meanings:

(1) With respect to Developer, "**Actual Knowledge**" means the actual knowledge of _____ as of the date such representation is made, without having undertaken any independent inquiry or investigation for the purpose of making such representation or warranty, and without any duty of inquiry or investigation. With respect to City, "**Actual Knowledge**" means the actual knowledge of _____, [Title], as of the date such representation is made without having undertaken any independent inquiry or investigation for the purpose of making such representation or warranty, and without any duty of inquiry or investigation.

(2) "**Agreement**" means this Development Agreement and all attachments and exhibits thereto.

(3) "**Annual Monitoring Report**" has the meaning ascribed to the term in Section 6.1.

(4) "**Backbone Infrastructure**" means the central network system for streets, utilities and drainage within the Project, as specifically shown in the Development Plan. The Backbone Infrastructure includes: _____; and utility infrastructure, including, electrical, natural gas, telephone, water, wastewater and storm drainage facilities.

(5) "**CEQA**" has the meaning ascribed to the term in Recital F.

(6) "**Certificate of Agreement Compliance**" or "**Certificate**" has the meaning ascribed to the term in Section 6.6.

(7) "**Certificate of Occupancy**" means a document issued by City's Building Department, certifying a building's compliance with applicable building codes and other laws, and indicating it to be in a condition suitable for occupancy.

(8) "**City**" means the City of Hesperia, a California general law city and municipal corporation, its successors and assigns, and its related or subordinate boards, commissions, and entities.

(9) "**City Council**" means the City Council of the City of Hesperia.

(10) **“Construct and Dedicate”** means the obligation to acquire all necessary real property interests required for, to construct in accordance with City-approved plans and specifications, and to thereafter dedicate to City in accordance with City’s standards, practices and requirements for the dedication of public improvements, the applicable public improvement to which the term **“Construct and Dedicate”** is made applicable by this Agreement, all at no cost or expense to City. Developer’s obligation to Construct and Dedicate will be fulfilled only upon City’s inspection and acceptance of the dedicated improvement into City’s system of public improvements.

(11) **“Developer”** means _____, a _____, its successors and assigns.

(12) **“Development”** means the subdivision and improvement of the Property for the purposes of constructing or reconstructing the public and private structures, improvements and facilities comprising the Project, including: grading; the construction or reconstruction of infrastructure and public and private facilities related to the Project, whether located within or outside the Property; the construction or reconstruction of buildings and structures; and the installation of landscaping. **“Development”** does not include the maintenance of any building, structure, improvement or facility after its construction and completion.

(13) **“Development Agreement Law”** has the meaning ascribed to the term in Recital A.

(14) **“Development Approvals”** mean all site-specific (meaning specifically applicable to the Property only and not generally applicable to some or all other properties within the City) plans, maps, approvals, permits and other entitlements applicable to the Development of the Property, including: specific plans and specific plan amendments; tentative and final subdivision and parcel maps; conditional use permits, public use permits and site plans; zoning; variances; and grading and building permits. The term Development Approvals does not include (i) rules, regulations, policies, and other enactments of general application within the City authorized to be applicable to the Property pursuant to this Agreement, or (ii) any matter where City has reserved authority under this Agreement.

(15) **“Development Exactions”** mean any monetary or non-monetary exaction or mitigation measure, including a Development Impact Fee, imposed by City in connection with a Development Approval or in connection with the granting of any other right, privilege or approval pertaining to the Project, including requirements for land dedication or for public construction either within or off the Property.

(16) **“Development Impact Fee”** means a monetary payment authorized by Government Code Section 66001, et seq., whether imposed legislatively on a broad class of development projects or on an ad hoc basis to a specific development project.

(17) **“Development Plan”** means the proposed plan for Development of all or a portion of the Property pursuant to the Existing Development Approvals and Subsequent Development Approvals, in accord with the Existing Land Use Regulations and applicable Subsequent Land Use Regulations, subject to the Reservations of Authority.

(18) **“Effective Date”** means the date which is thirty (30) days following the second reading and adoption of the Enacting Ordinance.

(19) **“EIR”** has the meaning ascribed to the term in Recital F.

(20) **“Enacting Ordinance”** has the meaning ascribed to the term in Recital D.

(21) **“Existing Development Approvals”** mean all Development Approvals approved or issued by City prior to or the same day as the second reading and adoption of the Enacting Ordinance, including the Development Approvals described in Recital G. **“Existing Development Approvals”** do not include the EIR.

(22) **“Existing Land Use Regulations”** mean all Land Use Regulations in effect as of the second reading and adoption of the Enacting Ordinance.

(23) **“General Plan”** has the meaning ascribed to the term in Recital C.

(24) **“Land Use Regulations”** mean all ordinances, resolutions, codes, rules, regulations and official written policies of the City and/or any subsidiary district of the City and/or any joint powers authority or council of governments of which the City is a member which affect, govern, or apply to land development and use of the Property, including those governing: the permitted use of land; the density or intensity of use; subdivision requirements; the maximum height and size of proposed buildings; development impact fees; design, improvement and construction standards applicable to the Development of the Property; and the reservation or dedication of land for public purposes, all as may be modified or supplemented pursuant to this Agreement. **“Land Use Regulations”** do not include any ordinance, resolution, code, rule, regulation or official policy governing: the conduct of businesses, professions, and occupations; taxes and assessments; the granting of encroachment permits and the conveyance of rights and interests that provide for the use of or the entry upon public property; or the exercise of the power of eminent domain.

(25) **“Lot”** means any legally subdivided lot of the Property which is intended for commercial or industrial uses.

(26) **“Minor Amendment”** has the meaning ascribed to the term in Section 3.4.A.

(27) **“Mitigation Monitoring and Reporting Program”** or **“MMRP”** means the mitigation monitoring and reporting program for assessing and ensuring compliance with required mitigation measures, which was approved by City Resolution No. _____, on _____ in conjunction with the City Council’s certification of the EIR.

(28) **“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.

(29) **“Notice”** has the meaning ascribed to the term in Section 2.8.A.

(30) **"Parties"** mean City and Developer, collectively.

(31) **"Party"** means either City or Developer, individually.

(32) **"Permitted Delay"** means delays in a Party's performance due to: changes in local, state or federal laws or regulations (other than changes expressly permitted by this Development Agreement); strikes or the inability to obtain materials; delays caused by governmental agencies in issuing permits and approvals; a development moratorium (including, but not limited to, a water or sewer moratorium) or the actions of other public agencies to prohibit Development of the Property; civil commotion, fire, acts of God, war, lockouts, riots, floods, earthquakes, epidemic, quarantine, freight embargoes, failure of contractors to perform; any third-party court action to set aside or modify the Existing Development Approvals; or other circumstances beyond a Party's reasonable control and which substantially interfere with either Party's ability to perform its obligations under this Agreement. **"Permitted Delays"** do not include delays attributable to Developer's inability to obtain funds or financing or due to changes in market conditions or demands, whether or not foreseeable as of the Effective Date.

The period of a **"Permitted Delay"** will not commence to run until the date of the Notice by which the Party alleging the Permitted Delay informs the other Party of the existence of the Permitted Delay and the circumstances giving rise to it. The period of the Permitted Delay will end when the circumstances giving rise to the Permitted Delay are eliminated or mitigated. The Party alleging the Permitted Delay will exercise commercially reasonable efforts to eliminate or mitigate the circumstances giving rise to the Permitted Delay.

(33) **"Person"** means and refers to any association, corporation, governmental entity or agency, individual, joint venture, joint-stock company, limited liability company, partnership, trust, unincorporated organization, or other entity of any kind, including City and Developer.

(34) **"Planning Commission"** has the meaning ascribed to the term in Recital C.

(35) **"Project"** means the Development of the Property in accord with the Development Plan, as the Development Plan may be further defined, enhanced or modified in accordance with this Agreement.

(36) **"Property"** means the real property described on Exhibit A and depicted on Exhibit B.

(37) **"Reservations of Authority"** mean the rights reserved to City under Section 3.5.

(38) **"Site Plan"** has the meaning ascribed to the term in Recital B.

(39) **"Special District"** has the meaning ascribed to the term in Section 5.1.

(40) “**Subsequent Development Approvals**” mean all Development Approvals approved by City subsequent to the Effective Date.

(41) “**Subsequent Land Use Regulations**” mean all Land Use Regulations adopted and effective after the Effective Date.

(42) “**Term**” has the meaning ascribed to the term in Section 2.2. and includes any extension authorized by Section 2.3.

(43) “**Transfer**” has the meaning ascribed to the term in Section 2.4.A.

(44) “**Transferee**” has the meaning ascribed to the term in Section 2.4.A.

(45) “**Transferor**” has the meaning ascribed to the term in Section 2.4.A.

Other initially capitalized terms used in this Agreement but not otherwise set forth in Paragraph A, above, will have the meaning given to those terms where they first appear in this Agreement.

1.2. Exhibits. The following documents are attached to a part of this Agreement:

<u>Exhibit A</u>	Legal Description of Property
<u>Exhibit B</u>	Map of Property

2. **GENERAL PROVISIONS.**

2.1. Binding Effect of Agreement. The Property is made subject to this Agreement and the Development of the Property may be carried out in accordance with this Agreement. The benefits and burdens of this Agreement touch and concern the Property and bind Developer and all future owners of all or any portion of the Property.

2.2. Term. The term (“**Term**”) of this Agreement will commence on the Effective Date and will expire on the twelfth (12th) anniversary of the Effective Date, unless terminated sooner by operation of some other provision of this Agreement or extended in accord with Section 2.3 or Section 9.2.

2.3. Extension of Term.

A. Upon Developer’s request made by Notice given no earlier than six (6) months, but no later than two (2) months, prior to expiration of the original Term, the Term of this Agreement will be extended for one (1) additional eight (8) year period beyond the original Term, so long as:

(1) Developer is not, as of the giving of the Notice, in material uncured breach of this Agreement, as determined by City following a special review pursuant to

Article 6, so long as City undertakes the special review on its own initiative and completes the special review no later than six (6) months prior to expiration of the original Term; and

(2) Commencement of Construction has occurred on no less than fifty percent (50%) of the total enclosed square footage authorized by the Development Plan, as it may be modified by one or more Subsequent Development Approvals. "Commencement of Construction" means the pouring and certification of building foundations.

Upon extension of the Term in accord with this Section 2.3, City will execute, in recordable form, any instrument which Developer may reasonably require to evidence the extension.

2.4. Assignment and Transfer.

A. Developer may sell, lease, license, hypothecate, transfer, or assign (any or all of the foregoing, individually and collectively, "**Transfer**") the Property in whole or in part (provided that no partial Transfer may violate the Subdivision Map Act, Government Code Section 66410, et seq.) to any Person at any time; provided that those Transfers described in Section 2.4.E will be subject to City's reasonable review and approval in accord with the procedures described in Section 2.4.E. As used in this Agreement, the term "**Transferor**" means the Person (including Developer) making the Transfer and the term "**Transferee**" means the Transfer recipient. No Transfer of any right or interest in this Agreement may be made unless made together with the Transfer of all or a part of the Property.

B. Any voluntary subsequent Transfer after an initial Transfer may be made only in accordance with this Section 2.4.

C. Upon a Transferor's Transfer of the entirety of the Property (or the entirety of so much of the Property as then-owned by the Transferor), the Transferor will also assign to the Transferee all obligations arising under this Agreement which, as of the date of the Transfer, had not been previously assigned or satisfied, including obligations related to the Backbone Infrastructure. Concurrently with the Transfer, the Transferor will be fully and unconditionally released and discharged from all obligations assigned to the Transferee, including assigned obligations related to the Backbone Infrastructure.

D. Upon a Transferor's Transfer of less than the entirety of the Property (or the entirety of so much of the Property as then-owned by the Transferor), such as if the Transferor Transfers individual parcels to end users, the Transferor may, but is not obligated to, assign to the Transferee some or all of the obligations arising under this Agreement attributable to the portion of the Property being Transferred and which, as of the date of the Transfer, had not been previously assigned or satisfied, including obligations related to the Backbone Infrastructure. Concurrently with the Transfer and City's approval of an assignment and assumption agreement if required under Section 2.4.E, the Transferor will be fully and unconditionally released and discharged from all obligations assigned to the Transferee, including assigned obligations related to the Backbone Infrastructure.

E. With respect to Transfers:

(1) City may review and approve any Transfer which includes an assignment of the obligation to complete all or some portion of the Backbone Infrastructure. City's approval may not be unreasonably withheld or delayed and must be based on the proposed Transferee's financial capability and qualifications to complete the obligations assigned to the Transferee. City's approval or disapproval must be by Notice and must be given within forty-five (45) days after the Transferor submits Notice to City describing the proposed Transfer and the Transferee, which Notice must include reasonable documentation demonstrating the Transferee's financial capability and qualifications to complete the obligations assigned to the Transferee and a copy of an assignment and assumption agreement executed by the Transferee by which the Transferee expressly and unconditionally assumes those obligations (if any) under this Agreement assigned to the Transferee to complete all or some portion of the Backbone Infrastructure in accord with Section 2.4.C or Section 2.4.D, as applicable. Any disapproval must state the reasons for disapproval with reasonable specificity. If City fails to provide Notice within the forty-five (45) day period, then City's approval will be deemed to be irrevocably given and the Transferor and the Transferee may rely on City's deemed approval. If City holds security given by the Transferor with respect to any obligations assigned to the Transferee, then the Transferee must provide City with replacement security reasonable acceptable to City.

F. City will execute (in recordable form, if necessary) and deliver those releases, consents, and other instruments as may be requested by a Transferor, a Transferee, or any Mortgagee to evidence the assignments and releases described in this Section 2.4.

2.5. Voluntary Amendment or Cancellation of Agreement. This Agreement may be voluntarily amended or cancelled in whole or in part only with the written consent of City and all Persons holding fee title to that portion of the Property to which the amendment or cancellation will apply. The amendment or cancellation process must comply with Government Code Section 65868. This Section 2.5 does not limit the operation of Government Code Section 65869.5.

2.6. Termination. This Agreement will automatically terminate upon the occurrence of any of the following events:

- (1) The expiration of the Term.
- (2) The entry of a final judgment setting aside, voiding or annulling the City Council's adoption of the Enacting Ordinance.
- (3) The adoption of a referendum measure overriding or repealing the Enacting Ordinance.
- (4) The completion of the Project, as evidenced by the issuance of all required Certificates of Occupancy and the acceptance of all required public dedications.
- (5) Upon a Party's election to terminate this Agreement under Section 8.4 and Section 8.5. If the terminating Party under Section 8.5 does not own the entirety of the Property, then the termination will apply only to that portion of the Property owned by the terminating Party.

2.7. Representations and Warranties.

A. City represents and warrants to Developer, to City's Actual Knowledge, as follows:

(1) City is a public body, corporate and politic. City is authorized to enter into this Agreement pursuant to Government Code Section 65864, et seq., and the execution and delivery of this Agreement by City has been fully authorized by all requisite actions on the part of City.

(2) City's execution and delivery of this Agreement and City's performance of its obligations under this Agreement will not constitute a default or a breach under any contract, agreement or order to which City is a party or by which it is bound.

(3) City has not received any notice of, or knows of any basis for, any actual or pending litigation or proceeding by any Person against City with respect to the Property or this Agreement.

B. Developer represents and warrants to City, to Developer's Actual Knowledge, as follows:

(1) Developer is a duly organized _____ established within and in good standing under the laws of the State of _____, and is authorized to do business in the State of California. The execution and delivery of this Agreement by Developer has been fully authorized by all requisite actions on the part of Developer.

(2) Developer is either the owner of fee simple title to the Property or has an equitable interest in the Property.

(3) Developer's execution and delivery of this Agreement and Developer's performance of its obligations under this Agreement will not constitute a default or a breach under any contract, agreement or order to which Developer is a party or by which it is bound.

(4) Developer is not the subject of bankruptcy or receivership proceedings and is not insolvent.

(5) Developer has not received any notice of, or knows of any basis for, any actual or pending litigation or proceeding by any Person against Developer with respect to the Property or this Agreement.

2.8. Notices.

A. As used in this Agreement, the term "Notice" means any request, demand, approval, statement, report, acceptance, consent, waiver, appointment or other required or permitted communication.

B. All Notices must be in writing and will be considered given:

- (1) When delivered in person to the recipient named below.
- (2) On the date of delivery shown on the return receipt, after deposit in the United States mail in a sealed envelope, postage prepaid, as either registered or certified mail, return receipt requested.
- (3) On the date of delivery shown in the records of a reputable delivery service (e.g. UPS or Federal Express).

C. All Notices must be addressed as follows:

If to City:

**City of Hesperia
9700 Seventh Avenue
Hesperia, CA 92345-3493
Attn: City Manager**

with a copy to:

**Aleshire & Wynder, LLP
18881 Von Karman Avenue, Suite 1700
Irvine, CA 92612
Attn: Eric L. Dunn**

If to Developer:

**Covington Group, Inc.
3535 E. Inland Empire Boulevard
Ontario, CA 91764
Attn: _____**

with a copy to:

**Gresham Savage Nolan & Tilden
550 E. Hospitality Lane, Suite 300
San Bernardino, CA 92408-4205
Attn: Kevin K. Randolph**

D. Either Party may, by Notice given at any time, require subsequent Notices to be given to another Person or to a different address, or both. Notices given before receipt of Notice of change of address will not be invalidated by the change.

E. Transferees will be entitled to Notices sent by City which pertain to that portion of the Property owned by the Transferee only if the Transferee has complied with Section 2.4.D.

3. DEVELOPMENT OF THE PROPERTY.

3.1. Vested Right to Develop. Subject to the terms of this Agreement, Developer has the legally vested right to develop the Property in accordance with, and to extent of, the Development Plan, the Development Approvals, applicable Subsequent Development Approvals, applicable Subsequent Land Use Regulations, and this Agreement.

3.2. Effect of Agreement on Land Use Regulations; Development Exactions; Development Plan; Submittal of Subsequent Development Approvals.

A. Except as otherwise provided under the terms of this Agreement, including the Reservations of Authority, the rules, regulations, and official policies governing permitted uses of the Property, the density and intensity of use of the Property, the maximum height and size of proposed buildings, and the design, improvement and construction standards and specifications applicable to the Development of the Property shall be the Existing Land Use

Regulations. In connection with any Subsequent Development Approval, City will exercise its discretion in accordance with the Development Plan and this Agreement, including, but not limited to, the Reservations of Authority.

B. The Development Plan for the Project may require the processing of Subsequent Development Approvals. The City will accept for processing, review and action all applications for Subsequent Development Approvals, and such applications will be processed in the normal manner for processing such matters in accordance with the Existing Land Use Regulations. The Parties acknowledge that City is not obligated in any manner to approve any Subsequent Development Approval, or to approve any Subsequent Development Approval with or without any particular condition, except that City's actions concerning Subsequent Development Approvals must be consistent with the Development Plan and Existing Land Use Regulations, subject to the Reservations of Authority. Unless otherwise requested by Developer, City may not amend or rescind any Subsequent Development Approvals applicable to the Property after those Approvals have been granted by the City. Processing of Subsequent Development Approvals or changes in the Development Approvals or Development Plan made pursuant to Developer's application will not require an amendment to this Agreement; however, upon their approval by the City, all Subsequent Development Approvals or changes in the Development Approvals or Development Plan will be subject to and covered by this Agreement.

3.3. Timing of Development; Public Improvements Phasing.

A. Nothing in this Agreement is a covenant to develop or construct the Project. The Parties acknowledge that Developer cannot predict if, when, or the rate at which phases of the Project will be developed. The California Supreme Court held in Pardee Construction Co. v. City of Camarillo (1984) 37 Cal.3d 465, that the failure of the litigants 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 litigants' agreement. The Parties intend to cure that deficiency by providing that Developer has the right to develop the Project in the order, at the rate, and at the times that Developer, in its sole and absolute discretion, determines to be appropriate, subject only to any Development Plan timing or phasing requirements.

B. Required public improvements may be tied to certain phases of the Project. The schedule for provision of these improvements, as they relate to a particular phase, will be governed by the Existing Development Approvals, Subsequent Development Approvals, the EIR, the MMRP, and this Agreement.

3.4. Changes and Amendments to Existing or Subsequent Development Approvals.

A. The Parties acknowledge that the passage of time may demonstrate that changes to the Existing or Subsequent Development Approvals may be necessary or appropriate. If the Parties determine that changes are necessary or appropriate, such changes may be made by mutual consent of the Parties in accord with Government Code Section 65868, and may be approved on behalf of City as follows:

(1) By the City Manager or designee ("City Manager") in the case of minor changes which would qualify as a "**Minor Amendment**" under Municipal Code

Section 16.12.130 or 405, as determined by the City Attorney, and in any other case where the City Manager is authorized by this Agreement to act.

(2) By the City Council in the case of any other changes not subject to paragraph (1), above, or if otherwise legally required.

(3) The City Manager and City Attorney will determine whether a proposed change is subject to approval by the City Manager or the City Council, as the case may be.

(4) No modification, amendment or other change to this Agreement will be effective for any purpose unless specifically set forth in a writing that refers expressly to this Agreement and is signed by both Parties' authorized representatives.

3.5. Reservations of Authority.

A. Any contrary provision in this Agreement notwithstanding, the following Subsequent Land Use Regulations will apply to the Project:

(1) Processing fees and charges of every kind and nature imposed by City to cover the estimated actual costs to City of processing applications for Subsequent Development Approvals or for monitoring compliance with any Subsequent Development Approvals granted or issued.

(2) Regulations relating to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals and any other procedural matter.

(3) Regulations governing construction standards and specifications, including City's Building Code, Plumbing Code, Mechanical Code, Electrical Code, Fire Code and Grading Code, including fees thereunder, which are applied uniformly to all similar development projects within in City.

(4) Regulations which do not conflict with the Development Plan or this Agreement. To the greatest extent possible, these regulations must be applied and construed to provide Developer with all of the rights and assurances provided under this Agreement. For all purposes pursuant to this Agreement generally, and this paragraph (4) specifically, an ordinance, resolution, initiative, referendum, moratorium or other regulation will be deemed to conflict with the Development Plan and this Agreement if the ordinance, resolution, initiative, referendum, or regulation seeks to, whether as part of a specific or general enactment that applies to the Property or Project: (i) limit or reduce the density, intensity, height or size of structures or type of development on the Property; (ii) regulate the timing or sequencing of the development of the Property in any manner; (iii) require any additional on-site or off-site improvements not required by the applicable Land Use Regulations or Development Approvals to be constructed or paid for by Developer or a subsequent owner of the Property; or (iv) restricting the use of the Property in any manner or degree other than as set forth in the applicable Land Use Regulations and Development Approvals.

(5) Regulations that conflict with the Development Plan if Developer has given its written consent to those regulations.

(6) Federal, State, County, and multi-jurisdictional laws and regulations which City is required to enforce against the Property or the Development of the Property.

(7) Subsequent Land Use Regulations applicable to local or regional Development Impact Fees.

The Parties acknowledge that City is restricted in its authority to limit its police powers by contract. This Agreement will be construed, contrary to its stated terms if necessary, to reserve to City all those police powers that cannot be restricted by contract.

3.6. Subsequent Development Approvals.

A. When acting on Subsequent Development Approvals, City may apply only the Existing Land Use Regulations and those Subsequent Land Use Regulations that are permitted under the Reservations of Authority. Any Subsequent Development Approval will be automatically vested under this Agreement.

B. Upon Developer's request, City will accept and diligently process applications for Subsequent Development Approvals. City will exercise reasonable good faith efforts to expedite the processing of the Subsequent Development Approvals applications to ensure that those applications are promptly considered by the approving authority. City will ensure that all applications are processed and considered within the timing requirements of all applicable law, including the Permit Streamlining Act (Govt. Code § 65920, et seq.).

3.7. Modification or Suspension by State or Federal Law. If a State or Federal law or regulation which is enacted after the Effective Date prevents the Parties' compliance with any of this Agreement's provisions, then that provision will be modified or suspended to the extent and for the time necessary to achieve compliance with the conflicting State or Federal law. This Agreement's remaining provisions will continue unaffected. The Parties will amend this Agreement to preserve, to the greatest extent possible, the benefits that would arise to the Parties under this Agreement but for the conflicting State or Federal law. Upon the repeal of the conflicting State or Federal law or upon the occurrence of any circumstance that removes their effect upon this Agreement, this Agreement's provisions will be automatically restored to their full original form and any amendment that the Parties may have entered into under this Section 3.7 will terminate.

3.8. Future Use of EIR. The Parties understand that the EIR is intended to be used in connection with each of the Existing Development Approvals and Subsequent Development Approvals needed for the Project. City agrees to use the EIR in connection with the processing of any Subsequent Development Approval, except as may be otherwise required by the Reservations of Authority or state or federal law, including CEQA.

3.9. Third Party Permits and Approvals and Utilities.

A. The Parties acknowledge that this Agreement does not bind any governmental agency other than City and its related or subordinate boards, commissions, and entities. City will use reasonable good faith efforts to assist Developer in obtaining all permits and approvals, at no cost to City, which are necessary for the Project, including permits, approvals and rights of way which are required for the installation of public improvements, driveways and utility connections, and utility services such as electrical, gas, water, sewer, storm drain, telephone and cable television.

B. The Parties acknowledge that, in connection with the installation of utility facilities which will be owned by private utility companies, it may lower the overall cost of the utility installation for it to be constructed by City. Upon Developer's request, City agrees to reasonably consider undertaking construction of the private utility company project, so long as Developer bears City's entire direct and indirect cost of the same.

4. **PUBLIC BENEFITS.**

4.1. Development Impact Fees.

A. City has adopted a Development Impact Fee program designed to offset the costs of mitigating environmental and other impacts caused by development upon public facilities and improvements. The Development Impact Fees which will be applicable to the Project shall be those existing at the time of development. Development Impact Fees shall be paid at such time as payment of such Fees is due and payable in accordance with the Land Use Regulations in effect at the time of development as set forth in City fee ordinances or resolutions or policies, for the portion of the Property to which such fees apply. This Section shall not preclude City from adopting any new development impact fees in the future applicable to the Property or to other Development in the City.

B. Paragraph A, above, notwithstanding, City is commencing a review of its Development Impact Fee program to include separate components for commercial, residential, and different types of industrial projects.

C. Nothing in this Section 4.1 will limit the right of any other local, regional, state, or federal agency or district to impose upon the Project otherwise lawful fees, including non-City fees imposed by such agencies or districts and collected by City for the benefit of such agencies or district.

4.2. Credit for Construction. The Parties acknowledge and agree that in accordance with policies adopted from time to time by City, Developer may be entitled to a credit and/or reimbursement to offset Developer's Development Impact Fee obligation.

5. **PUBLIC FINANCING.**

5.1. Financing. Upon either Party's written request, the Parties will meet and confer in good faith for the purposes of discussing the formation of a financing mechanism, including but not limited to a special assessment district, community facilities district, or alternate

financing mechanism (collectively, a “**Special District**”) to pay for the construction or maintenance of those public improvements required by the Development Plan. If a Special District is formed, Developer will be reimbursed from the proceeds of any debt financing issued by the Special District to the extent that Developer spends funds for the construction and/or maintenance and operation of qualified public improvements. Tax rates or assessments of the Special District may not exceed City’s then-current policies regarding public financing districts.

This Section 5.1 is not a commitment by City to adopt a resolution of formation to form a Special District or to approve Special District debt financing. Developer acknowledges that the adoption and approval of a resolution of formation is a legislative act within City’s unencumbered discretion. Likewise, Developer is not obligated to approve the formation of a Special District and Developer reserves all of its legal rights in that regard.

6. **REVIEW FOR COMPLIANCE.**

6.1. Periodic Review.

A. The City Manager will review this Agreement annually, on or before each anniversary of the Effective Date, as required by California Government Code Section 65865.1. The purpose of the review will be to ascertain Developer’s good faith compliance with the terms of this Agreement. Developer will submit an annual monitoring report (“**Annual Monitoring Report**”), in a form prepared and approved by the City Manager within thirty (30) days after the City Manager’s written request. The Annual Monitoring Report must be accompanied by the then-current annual review and administration fee set by the City Council, which may not exceed the City’s actual costs of reviewing Developer’s compliance with the terms of this Agreement.

B. The City Council may order a special review of Developer’s compliance with this Agreement at any time. The City Manager will conduct the special review, which will be conducted at City’s sole expense.

6.2. Procedure.

A. During either a periodic review or a special review, Developer will be required to demonstrate good faith compliance with this Agreement.

B. Upon completion of a periodic review or a special review, the City Manager will submit a report to the City Council setting forth the City Manager’s conclusions concerning Developer’s good faith compliance with this Agreement.

C. If the City Council finds that Developer has complied in good faith with this Agreement, then the review will be concluded.

D. If the City Council makes a preliminary finding that Developer has not complied in good faith with this Agreement, then, following Notice and opportunity to cure as provided under Section 8.4, the City Council may modify or terminate this Agreement in accordance with Section 6.4 and Section 6.5.

6.3. No Waiver. Failure of City to conduct an annual review will not constitute a waiver by City of its rights to otherwise enforce the provisions of this Agreement nor will Developer have or assert any defense to such enforcement by reason of any such failure to conduct any annual review(s).

6.4. Proceedings for Modification or Termination.

A. If Developer fails to cure, or to commence to cure, as applicable, the matters constituting the basis for the City Council's preliminary finding under Section 6.2.D as required by Section 8.4, then City may proceed to modify or terminate this Agreement following the procedures set forth in this Section 6.4 and in Section 6.5. City must hold a noticed public hearing concerning the modification or termination and provide Developer with Notice of the hearing. The Notice must include the following:

(1) The time and the place of hearing, which must be no less than thirty (30) days following the date of the Notice;

(2) The specific action, whether amendment or termination, which City proposes to take; and

(3) Such other information as is reasonably necessary to inform Developer of the nature of the proceeding and the facts supporting City's preliminary finding under Section 6.2.D.

6.5. Hearing on Modification or Termination. At the time and place set for the public hearing described in Section 6.4, Developer must be given an opportunity to be heard and present witnesses and evidence on its behalf. If, following the conclusion of the public hearing, the City Council finds, based upon substantial evidence in the record of the public hearing, that Developer has not complied in good faith with this Agreement, then the City Council may terminate or modify this Agreement and impose any conditions it determines as are reasonably necessary to protect City's interests. The City Council's decision will be administratively final and subject to judicial review under Code of Civil Procedure Section 1094.5.

6.6. Certificate of Agreement Compliance. If, at the conclusion of a special or periodic review, Developer is found to be in compliance with this Agreement, then, upon Developer's written request, City will issue a "**Certificate of Agreement Compliance**" ("**Certificate**") to Developer stating that, after the most recent periodic or special review, this Agreement remains in effect and Developer is not in default of this Agreement. The Certificate must be in recordable form, contain information necessary to communicate constructive record notice of the finding of compliance, state whether the Certificate is issued after a periodic or special review, and state the anticipated date of the next periodic review. Developer may record the Certificate with the San Bernardino County Recorder.

6.7. No Cross-Defaults. City acknowledges that Developer may Transfer all or portions of the Property to other Persons in accordance with Section 2.4. City further acknowledges that title to all or portions of the Property may become vested in Mortgagees or a Mortgagee's successor as a result of foreclosure, or the acceptance of a deed in lieu of foreclosure, by a Mortgagee. City agrees that defaults under this Agreement by an owner of a

portion of the Property will not be a default as to any other portion of the Property. In other words, a default by Developer with respect to its obligations pertaining to that portion of the Property retained by Developer following a Transfer will not constitute a default as to any Person other than Developer or permit City to exercise any remedy under this Agreement or otherwise with respect to any other portion of the Property other than that portion owned by Developer. Similarly, a default by a Transferee with respect to its obligations pertaining to the portion of the Property owned by that Transferee will not constitute Developer's default or permit City to exercise any remedy under this Agreement or otherwise as to any portion of the Property other than the portion owned by the defaulting Transferee. City agrees that, if more than one Person holds title to the Property, then the rights and obligations of the Persons holding title to the Property are the distinct and several obligations of each Person.

7. INTENTIONALLY OMITTED

8. DEFAULT AND REMEDIES.

8.1. Remedies in General.

A. The Parties acknowledge that neither Party would have entered into this Agreement if it were to be liable for monetary damages under this Agreement. In general, and subject to those procedural prerequisites required under the Development Agreement Law or this Agreement, each of the Parties may pursue any remedy at law or equity available for the breach of this Agreement, except that neither Party will be liable in monetary damages (other than attorneys' fees under Section 12.20) to the other Party, or to any successor in interest of that Party, or to any other Person. Each Party covenants not to sue for monetary damages or claim any monetary damages related to any of the following:

(1) Any breach of this Agreement or for any cause of action that arises out of this Agreement; or

(2) Any taking, impairment or restriction of any right or interest arising under this Agreement; or

(3) Any dispute regarding the application or interpretation of this Agreement.

8.2. Specific Performance.

A. The Parties acknowledge that specific performance and other non-monetary relief are particularly appropriate remedies for the enforcement of this Agreement for the following reasons:

(1) Money damages are unavailable against the Parties.

(2) Due to the size, nature and scope of the Project, it may not be practical or possible to restore the Property to its natural condition once Developer has begun to implement this Agreement. After such time, Developer may be precluded from other options it may have had with regard to the Property. Moreover, Developer has invested significant time

and resources in the planning and processing of the Project. Developer will be investing even more time and resources in implementing the Project in reliance upon this Agreement and it is not possible to determine the sum of money that would adequately compensate Developer if City were to breach its obligations.

8.3. Release. Except for the right to recover attorneys' fees under Section 12.20, Developer, for itself, its successors and assignees, releases City, its officials, officers, agents and employees from any and all monetary claims, demands, actions, or suits of any kind or nature arising out of any liability, known or unknown, present or future, including, any claim or liability based upon Article I, Section 19 of the California Constitution, the Fifth Amendment of the United States Constitution, or any other law or ordinance that seeks to impose any monetary liability whatsoever upon City because it entered into this Agreement or because of the terms of this Agreement.

8.4. City's Termination of Agreement or Exercise of Other Remedies Upon Developer's Default. Subject to compliance with Sections 6.4 and 6.5, City may terminate or modify this Agreement upon Developer's failure to perform any material duty or obligation under this Agreement. City may terminate or modify this Agreement or exercise its other remedies only after providing Notice of default to Developer setting forth the nature of the default and the actions, if any, required to cure the default and only if Developer has failed to take the actions and materially cure the default within sixty (60) days after its receipt of the Notice. If a default is of a type that cannot be cured within sixty (60) days but can be cured within a longer time, then Developer must within sixty (60) days commence the actions necessary to cure the default and thereafter diligently proceed to cure the default.

8.5. Developer's Termination of Agreement or Exercise of Other Remedies Upon City's Default. Developer may terminate this Agreement or exercise its other remedies upon City's failure to perform any material duty or obligation under this Agreement. Developer may terminate this Agreement or exercise its other remedies only after providing Notice of default to City setting forth the nature of the default and the actions, if any, required by City to cure the default and only if City has failed to take such actions and materially cure the default within sixty (60) days after its receipt of the Notice. If a default is of a type that cannot be cured within sixty (60) days but can be cured within a longer time, then City must within sixty (60) days commence the actions necessary to cure the default and thereafter diligently proceed to cure the default.

8.6. Informal Resolution. During the administration and implementation of this Agreement, the Parties recognize that good faith disagreements may arise between City staff and Developer. In the event that a dispute arises, the Parties will meet and confer in a good-faith attempt to resolve the dispute.

9. **THIRD PARTY LITIGATION.**

9.1. Defense of Third Party Litigation. City shall promptly notify Developer in writing of any claim, action or proceeding filed and served against City to challenge, set aside, void, annul, limit or restrict the approval and continued implementation and enforcement of this Agreement, including but not limited to challenges of the environmental review of the Project

and this Agreement conducted pursuant to the California Environmental Quality Act. Developer and City agree to use good faith, commercially reasonable efforts to confer and cooperate with one another with respect to such third party litigation. Developer shall defend (with legal counsel of Developer's selection, reasonably acceptable to City), indemnify and hold harmless City, its agents, officers and employees from any such claim, action or proceeding, and shall indemnify City for all costs of defense and/or judgment obtained in any such action or proceeding; provided, however, if Developer elects, in its sole discretion, not to defend the action (preferring to either allow judgment to be entered or to enter into a settlement with plaintiff(s) which declares this Agreement to be void, annulled, or which limits or restricts this Agreement), Developer shall so notify City in writing and City shall then have the option, in its sole discretion, of defending the action at its cost. In the event this Agreement, as a result of a third party challenge, is voided or annulled, or is limited or restricted such a manner that the intent and purposes of this Agreement cannot be implemented as mutually desired by the parties hereto, this Agreement shall terminate and be of no further force or effect as of the date such judgment or settlement so voids, annuls, limits, or restricts the intent and purpose of this Agreement.

9.2. Extension of Term. Anything in this Agreement to the contrary notwithstanding, the Term (and any extension thereof under Section 2.3) will automatically be extended by the number of days in the period commencing on the date of filing of any claim, action, or proceeding of the type described in Section 9.1 and ending on the date that the claim, action, or proceeding is either settled or fully and finally resolved in City's and Developer's favor, as evidenced by the expiration of all appeal periods with no further appeal being filed or the issuance of a full, final, and non-appealable judgment or decision. City will execute, in recordable form, any instrument which Developer may reasonably require to evidence the extension.

10. MORTGAGEES.

10.1. Mortgagee Protection.

A. This Agreement does not prevent or limit Developer, in its sole discretion, from encumbering the Property or any portion or any improvement thereon with any mortgage, deed of trust or other security device. City acknowledges that a Mortgagee may require Agreement interpretations and modifications. City will meet with Developer and the Mortgagee's representatives to negotiate in good faith with regard to any requested interpretation or modification. City may not unreasonably withhold its consent to any requested interpretation or modification. All Mortgagees will be entitled to the following rights and privileges:

(1) Developer's breach of this Agreement will not defeat, render invalid, diminish or impair the lien of any mortgage made in good faith and for value.

(2) Upon a Mortgagee's written request, City will provide a copy of any Notice of default given to Developer concurrently with the Notice to Developer. The Mortgagee will have the right, but not the obligation, to cure the default within any remaining cure period allowed Developer under this Agreement.

(3) Any Mortgagee who comes into possession of the Property or any portion of it pursuant to foreclosure of the Mortgagee's security instrument or its acceptance of a deed in lieu of foreclosure will take the Property or portion subject to this Agreement. Any other provision of this Agreement to the contrary notwithstanding, no Mortgagee will have any obligation to perform any of Developer's obligations or to guarantee their performance. However, if any of Developer's obligations are conditions precedent to City's obligations, then Developer's obligations will continue to be conditions precedent to City's performance of its obligations.

11. INSURANCE; INDEMNIFICATION .

11.1. Insurance.

A. Types of Insurance.

(1) Public Liability Insurance. Prior to commencement and until completion of construction by Developer on the Property, Developer shall at its sole cost and expense keep or cause to be kept in force for the mutual benefit of City and Developer broad form commercial general public liability insurance against claims and liability for personal injury or death arising from the use, occupancy, disuse or condition of the Property, improvements or adjoining areas or ways, affected by such use of the Property or for property damage, providing protection of a least Five Million Dollars (\$5,000,000) per occurrence for bodily injury, death or property damage combined for any one accident or occurrence, which limits shall be subject to reasonable increases in amount as City may reasonably require from time to time.

(2) Builder's Risk Insurance. Prior to commencement and until completion of construction by Developer on the Property, Developer shall procure and shall maintain in force, or caused to be maintained in force, "all risks" builder's risk insurance including vandalism and malicious mischief, covering improvements in place and all material and equipment at the job site furnished under contract, but excluding contractor's, subcontractor's, and construction manager's tools and equipment and property owned by contractor's or subcontractor's employees, with the replacement cost value of the Project, or on a project by project basis.

(3) Worker's Compensation. Developer shall also furnish or cause to be furnished to City evidence reasonably satisfactory to it that any contractor with whom Developer has contracted for the performance of any work for which Developer is responsible hereunder carries workers' compensation insurance as required by law.

(4) Other Insurance. Developer may procure and maintain any insurance not required by this Agreement, but all such insurance shall be subject to all of the provisions hereof pertaining to insurance and shall be for the benefit of City (to the extent applicable) and Developer.

(5) Insurance Policy Form, Sufficiency, Content and Insurer. All insurance required by express provisions hereof shall be carried only by responsible insurance companies licensed and admitted to do business by California, rated "A" or better in the most recent edition of Best Rating Guide, The Key Rating Guide or in the Federal Register, and only

if they are of a financial category Class VIII or better, unless waived by City. All such policies shall be nonassessable and shall contain language, to the extent obtainable, to the effect that (i) any loss shall be payable notwithstanding any act of negligence (excepting willful and intentional violations of law) of City or Developer that might otherwise result in the forfeiture of the insurance, (ii) the insurer waives the right of subrogation against City and against City's agents and representatives; (iii) the policies are primary and noncontributing with any insurance that may be carried by City; and (iv) the policies cannot be canceled or materially changed except after thirty (30) days' written notice by the insurer to City or City's designated representative. Developer shall furnish City with copies of all such policies promptly on receipt of them or with certificates evidencing the insurance. City shall be named as an additional insured or loss payee on all policies of insurance (other than Workers' Compensation) required to be procured by the terms of this Agreement. The City's Risk Manager acknowledges and agrees that the insurance requirements above have been established based on anticipated use, activities, and conditions of the Property. In the event the City's Risk Manager reasonably determines that a new or unreasonable use, activity, or condition of the Property, improvements or adjoining areas or ways, affected by such use of the Property under this Agreement creates an increased or decreased risk of loss to the City than what the Parties hereby acknowledge to be duly satisfied by the insurance requirements above, Developer agrees that the minimum limits of the insurance policies required by this Section 11.1 may be changed accordingly upon receipt of written notice from the City's Risk Manager; provided that Developer shall have the right to appeal a determination of increased coverage to the City Manager of City within twenty (20) days of receipt of notice from the City's Risk Manager.

(6) Failure to Maintain Insurance and Proof of Compliance.

Developer shall deliver to City, in the manner required for notices, copies of certificates of all insurance policies required hereunder together with evidence satisfactory to City of payment required for procurement and maintenance of each policy within the following time limits:

(A) For insurance required above, within thirty (30) days after the Effective Date.

(B) For any renewal or replacement of a policy already in existence, at least ten (10) days before the expiration or replacement of the existing policy.

(C) If Developer fails or refuses to procure or maintain insurance as required hereby or fails or refuses to furnish City with required proof that that insurance has been procured and is in force and paid for, such failure or refusal shall be a default hereunder.

11.2. Indemnification.

A. General. Each Party shall indemnify the other Party and its officers, employees, and agents against, and will hold and save them and each of them harmless from, any and all actions, suits, claims, damages to persons or property, losses, costs, penalties, obligations, errors, omissions, or liabilities (herein "claims or liabilities") that may be asserted or claimed by any person, firm, or entity arising out of or in connection with the work, operations, or activities

by any or all of the indemnifying Party or its agents, employees, or contractors (including subcontractors), upon the Property and relating to this Agreement;

(1) The indemnifying Party will defend any action or actions filed in connection with any of said claims or liabilities and will pay all costs and expenses, including reasonable legal costs and attorneys' fees incurred in connection therewith.

(2) The indemnifying Party will promptly pay any judgment rendered against the indemnified Party or its officers, agents, or employees for any such claims or liabilities arising out of or in connection with its foregoing indemnity and will save and hold the indemnified Party, its officers, agents, and employees harmless from any failure to so pay any such judgment.

(3) In the event the indemnified Party, its officers, agents, or employees is made a party to the action or proceeding filed or prosecuted against for such damages or other claims arising out of or in connection with the work, operations, or activities of the indemnifying Party under this Agreement, the indemnifying Party agrees to pay the indemnified Party, its officers, agents, or employees any and all reasonable out-of-pocket costs and expenses actually incurred by the indemnified Party, its officers, agents, or employees in such action or proceeding, including by not limited to reasonable legal costs and attorneys' fees.

B. Exceptions. The indemnities and releases of this Section 11.2 shall not include claims or liabilities to the extent and degree arising from the negligence or willful misconduct of any or all of the indemnified Party and its officers, agents and employees.

C. Loss and Damage. Except as otherwise set forth in this Agreement, City shall not be liable for any damage to property of Developer or of others located on the Property, nor for the loss of or damage to any property of Developer or of others by theft or otherwise. Except as otherwise set forth in this Agreement, City shall not be liable for any injury or damage to persons or property resulting from fire, explosion, steam, gas, electricity, water, rain, dampness or leaks from any part of the Property or from the pipes or plumbing, or from the street, or from any environmental or soil contamination or hazard, or from any other latent or patent defect in the soil, subsurface or physical condition of the Property, or by any other cause of whatsoever nature.

D. Period of Indemnification. The obligations for indemnity under this Section 11.2 shall begin upon the Effective Date and shall terminate upon termination of this Agreement, provided that indemnification shall apply to all claims or liabilities arising during that period even if asserted at any time thereafter. In all events, however, these indemnity obligations shall expire on the fifth (5th) anniversary of the termination date of this Agreement, except that the indemnities shall survive beyond that date with respect to any claims pending at the expiration date for which timely and proper submission has occurred pursuant to the applicable indemnity provisions.

E. Waiver of Subrogation. Each Party agrees that it shall not make any claim against, or seek to recover from other Party or its agents, servants, or employees, for any loss or damage to the Party or to any person or property, except as specifically provided hereunder and

each Party shall give notice to any insurance carrier of the foregoing waiver of subrogation, and obtain from such carrier, a waiver of right to recovery against the other Party, its agents and employees.

12. MISCELLANEOUS PROVISIONS.

12.1. Recordation of Agreement. This Agreement and any amendment or cancellation of it will be recorded with the San Bernardino County Recorder by City Clerk in accordance with Government Code Section 65868.5.

12.2. Entire Agreement. This Agreement contains the entire understanding and agreement of the Parties. There are no oral or written representations, understandings or ancillary covenants, undertakings or agreements that are not contained or expressly referred to in this Agreement. Parol evidence will not be admissible to interpret this Agreement.

12.3. Estoppel Certificates. Within ten (10) days following a Party's written request, and at no cost to the requesting Party, the other Party will certify in writing that, to its Actual Knowledge:

(a) This Agreement is in full force and effect and is binding upon the certifying Party.

(b) This Agreement has not been amended or modified, except as expressly described in the estoppel certificate.

(c) The requesting Party is not in default of its obligations under this Agreement, and that there have been no events that with the passage of time, the giving of notice, or both, would constitute the requesting Party's default under this Agreement, except as expressly described in the estoppel certificate.

12.4. Severability. Every provision of this Agreement is a separate and independent covenant. If any provision is, or the application of the provision in certain circumstances is, to any extent, found to be invalid or unenforceable for any reason whatsoever, then the remainder of this Agreement, or the application of that provision to circumstances other than those to which it is invalid or unenforceable, will not be affected. The Parties will negotiate in good faith any amendments or operating memoranda necessary to cure any invalidity or unenforceability.

12.5. Interpretation and Governing Law. This Agreement and any dispute concerning it will be governed and interpreted in accordance with California's procedural and substantive laws, without regard to its conflicts of laws principles. This Agreement will be construed as a whole according to its fair language and common meaning. The rule of construction that ambiguities in a document are to be resolved against the drafting party may not be employed in interpreting this Agreement. Each Party acknowledges that it was represented by counsel in this Agreement's negotiation and preparation.

12.6. Section Headings. All section headings and subheadings are inserted for convenience only and do not affect this Agreement's construction or interpretation.

12.7. Singular and Plural. The singular of any word includes the plural.

12.8. Including. Unless the context requires otherwise, the term “including” means “including, but not limited to.”

12.9. Time of Essence. Time is of the essence as to the performance of any obligation as to which time is an element.

12.10. Calendar Periods. All references to “years”, “quarters”, “months” and “days” are references to calendar years, quarters, months and days.

12.11. Waiver. A Party’s failure on any one or more occasions to insist upon strict compliance by the other Party, or a Party’s failure on any one or more occasions to exercise its rights upon the other Party’s default, is not a waiver of that Party’s right to demand strict compliance by the other Party on any future occasion.

12.12. No Third Party Beneficiaries. This Agreement is entered into for the sole protection and benefit of the Parties and their successors and assigns. Except as provided in Section 9, no other person or entity has any right of action based upon this Agreement.

12.13. Permitted Delays. Neither Party will be in default of an obligation if that Party’s inability to perform or delay in performing that obligation is caused a Permitted Delay.

12.14. Successors in Interest. The burdens of this Agreement are binding upon, and the benefits of this Agreement inure to, the Parties’ permitted successors in interest. All provisions are enforceable as equitable servitudes and constitute covenants running with the land. Each covenant to do or refrain from doing some act with regard to the Development of the Property:

(a) Is for the benefit of and is a burden upon all portions of the Property.

(b) Runs with the Property and all portions.

(c) Is binding upon each Party and its successors in interest during the term of that Party’s or its successors’ ownership of the Property or any portion.

12.15. Counterparts. This Agreement will be executed in three (3) counterparts, which will be construed together and have the same effect as if the Parties had executed the same instrument.

12.16. Jurisdiction and Venue. All legal actions and proceedings to enforce or interpret this Agreement must be filed and tried in San Bernardino County Superior Court or other legally appropriate court and venue.

12.17. Project as a Private Undertaking. The Project is a private development and neither Party is acting as the agent of the other in any respect. Each Party is an independent contracting entity with respect to this Agreement. No partnership, joint venture or other association of any kind is formed by this Agreement. The only relationship between City and

Developer is that of a government entity regulating the development of private property by a private party.

12.18. Further Actions and Instruments. Each Party must cooperate with the other and provide reasonable assistance to the other in the performance of the other Party's obligations. Upon a Party's request, the other Party must promptly execute (with notary acknowledgment if required) those instruments, and take any reasonable actions, necessary to evidence or consummate the transactions expressly described, or which are a logical extension of the transactions described, in this Agreement.

12.19. Eminent Domain. No provision of this Agreement expands, limits, or restricts City's exercise of its eminent domain powers.

12.20. Attorneys' Fees. If either Party files any action or brings any action or proceeding against the other pertaining to the interpretation or enforcement of this Agreement, then the prevailing Party will recover as an element of its costs of suit and not as damages its costs of suit, expert fees, consultant costs, and reasonable attorneys' fees as fixed by the Court.

12.21. Authority to Execute. Each natural person executing this Agreement on behalf of a Party represents that he or she has the authority to execute this Agreement on behalf of that Party and that he or she has the authority to bind that Party to this Agreement.

[Signature pages follow]

**SIGNATURE PAGE
TO
HESPERIA COMMERCE CENTER
DEVELOPMENT AGREEMENT**

“CITY”

**City of Hesperia, a California general law city and
municipal corporation**

ATTEST:

By: _____
Name: _____
Title: Mayor

City Clerk

APPROVED AS TO FORM:

By: _____
City Attorney

**SIGNATURE PAGE
TO
HESPERIA COMMERCE CENTER
DEVELOPMENT AGREEMENT**

“DEVELOPER”

By: _____
Name: _____
Title: **Manager**

STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

On _____, 2013, before me, _____,
Notary Public, personally appeared _____,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are
subscribed to the within instrument and acknowledged to me that he/she/they executed the same
in his/her/their authorized capacity(ies), and that by his/her/their signatures(s) on the instrument
the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature

(seal)

**EXHIBIT A
TO
HESPERIA COMMERCE CENTER
DEVELOPMENT AGREEMENT**

Legal Description of Property

[to be attached]

**EXHIBIT B
TO
HESPERIA COMMERCE CENTER
DEVELOPMENT AGREEMENT**

Map of Property

[to be attached]

Exhibit B

STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO
CITY OF HESPERIA

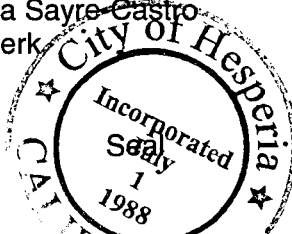
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I, Melinda Sayre-Castro, City Clerk of the City of Hesperia, California, do hereby certify that Ordinance No. 2013-11 was introduced at a Regular Meeting of the City of Hesperia City Council held on the 3rd day of December, 2013 by the following vote to wit:

AYES: Smith, Schmidt, Holland, Leonard, and Blewett
NOES: None
ABSTAIN: None
ABSENT: None



Melinda Sayre-Castro
City Clerk



I, Melinda Sayre-Castro, City Clerk of the City of Hesperia, California, do hereby certify that Ordinance No. 2013-11 was duly and regularly adopted at a Regular Meeting of the City of Hesperia City Council held on the 17th day of December, 2013 by the following vote to wit:

AYES: Blewett, Holland, Schmidt, Leonard, and Smith
NOES: None
ABSTAIN: None
ABSENT: None



Melinda Sayre-Castro
City Clerk



I, _____, City Clerk of the City of Hesperia, California, do hereby certify that the foregoing Ordinance No. 2013-11 is a full, true and correct copy of that now in file in this office.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED THE SEAL OF THE City of Hesperia, California, this _____ day of _____.

Melinda Sayre-Castro
City Clerk

Seal