



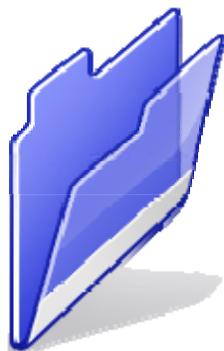
CITY OF MILPITAS

455 EAST CALAVERAS BOULEVARD, MILPITAS, CALIFORNIA 95035-5479
GENERAL INFORMATION: 408-586-3000, www.ci.milpitas.ca.gov

**August 17, 2010
Council Meeting**



ATTACHMENTS AND/OR ADDITIONAL MATERIALS RELATED TO AGENDA ITEM AFTER AGENDA PACKET DISTRIBUTION



***DEVELOPMENT AGREEMENT SUMMARY AND
ORDINANCE NO. 38.796 (AN ORDINANCE OF THE CITY
COUNCIL OF THE CITY OF MILPITAS APPROVING A
DEVELOPMENT AGREEMENT BETWEEN THE CITY OF
MILPITAS AND MILPITAS AUTO PROPERTIES, LLC)***



This summary lists the key provisions of the proposed “Development Agreement By and Between the City of Milpitas and Milpitas Auto Properties, LLC.” Provisions regarding revenue sharing and public service announcements have been clarified. The sign will be constructed and operated by Milpitas Auto Properties (the “Developer”) and its subcontractor. The Ordinance approving the Development Agreement and the agreement itself are attached hereto in full.

1. *Scope.* The Development Agreement outlines the terms and conditions for the construction and operation of an off-site advertising sign at 950 Thompson Street in Milpitas, California. Conceptual designs and site plans are attached as exhibits to the Development Agreement.
2. *Length of the Agreement.* The base term of the Development Agreement is for ten (10) years. The Developer shall have the option to extend the agreement for three additional ten (10) year periods for a total possible contract length of forty (40) years.
3. *Revenue Sharing.* The Developer shall pay to the City ten percent (10%) of the adjusted gross revenues generated by the sign from the sale of advertising time and space. The Developer will make payments to the City on a quarterly basis.
4. *Monetary Advance.* The Developer will provide a one-time, One Hundred Thousand Dollar (\$100,000.00) advance to the City after the completion of sign construction.
5. *Community Announcements.* The Developer will reserve at least five percent (5%) of electronic display time for City-promoted community events, messages and performances (i.e., “public service” type announcements).
6. *Local Sales Tax.* During construction, the Developer and its contractor and subcontractors shall allocate local use taxes to the City to the extent that it is commercially reasonable to do so.

REGULAR

NUMBER: 38.796

TITLE: AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS APPROVING A DEVELOPMENT AGREEMENT BETWEEN THE CITY OF MILPITAS AND MILPITAS AUTO PROPERTIES, LLC

HISTORY: This Ordinance was introduced (first reading) by the City Council at its meeting of August 17, 2010, upon motion by _____ and was adopted (second reading) by the City Council at its meeting of _____, upon motion by _____. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Robert Livengood, Mayor

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney

RECITALS AND FINDINGS:

WHEREAS, on April 11, 2008, an application was submitted by CBS Outdoor, Inc., 1695 Eastshore Highway, Berkeley, CA, 94710, for the construction and operation of a freestanding off-site advertising display (“Project”) to be located at 950 Thompson Street in Milpitas, California (APN: 086-05-026). The property is located within the General Commercial Zoning District; and

WHEREAS, the City and the applicant wish to memorialize the rights to design, construct, install, operate, maintain, manage and market advertising opportunities on said advertising display in the document entitled “Development Agreement By and Between the City of Milpitas and Milpitas Auto Properties, LLC,” (hereinafter referred to herein as the “Development Agreement”), a draft of which is attached hereto as Exhibit A; and

WHEREAS, the environmental effects of the Project were previously considered in the final Supplemental Environmental Impact Report, State Clearinghouse No. 2006082087 (“SEIR”) prepared pursuant to the California Environmental Quality Act (“CEQA”) and certified by the Redevelopment Agency of the City of Milpitas City on November 21, 2006 in connection with the Merger of the Milpitas Redevelopment Project Area No. 1 and the Great Mall Redevelopment Project Area. The terms and conditions of this Development Agreement are consistent with and within the scope of the earlier SEIR. Accordingly, no further environmental analysis is necessary or required under CEQA to enter into the Development Agreement and undertake its terms and conditions; and

WHEREAS, on June 9, 2010, the Planning Commission held a duly noticed public hearing on the subject application, and considered evidence presented by City staff, the applicant, and other interested parties, and unanimously recommended to the City Council execution of the Development Agreement and approval of the environmental assessment performed by City staff; and

WHEREAS, on March 3, 2009, the City Council held a duly noticed public hearing and considered the proposed Development Agreement for compliance with City of Milpitas Resolution No. 6642 and Government Code Section 65864 *et seq.*

NOW, THEREFORE, the City Council of the City of Milpitas does ordain as follows:

SECTION 1. RECORD AND BASIS FOR ACTION

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

SECTION 2. FINDINGS

- A. The City Council finds that the proposed Development Agreement is consistent with the City's General Plan and other applicable plans, policies and regulations of the City currently in effect, is not detrimental to the health, safety and general welfare of the citizens of the City, is entered into and constitutes an appropriate exercise of the City's police power, and is entered into in compliance with applicable state law and City Resolution No. 6642, as amended.
- B. The City Council finds that the proposed Development Agreement complies with all the applicable procedural and eligibility requirements for the approval and execution of development agreements set forth in City of Milpitas Resolution No. 6642 and Government Code Section 65864 *et seq.* A valid

application was submitted to the Planning & Neighborhood Services Director by an applicant with proper legal standing. The proposed Development Agreement would eliminate uncertainty in land use planning and help ensure the orderly development of an advertising display in an appropriate zoning district and location. The proposed Development Agreement would also result in a project which would be significantly superior in terms of its overall effect on the environment and the community than would otherwise result without such a development agreement. The proposed Development Agreement would also be beneficial to the health, safety, and general welfare of the community.

- C. The Development Agreement is consistent with the General Plan in that the advertising display would promote business development, appropriately identify local commercial activity and project a positive image of the City and the community.

SECTION 3. APPROVAL AND AUTHORIZATION

The City Council hereby approves and authorizes the City Manager or his or her designee to execute the Development Agreement between the City of Milpitas and Milpitas Auto Properties, LLC, attached hereto as Exhibit A. Within ten (10) days of the effective date of this Ordinance, the City Clerk shall have the Development Agreement recorded with the Santa Clara County Recorder.

SECTION 4. SEVERABILITY

The provisions of this Ordinance are separable, and the invalidity of any phrase, clause, provision or part shall not affect the validity of the remainder.

SECTION 5. EFFECTIVE DATE AND POSTING

In accordance with Section 36937 of the Government Code of the State of California, this Ordinance shall take effect thirty (30) days from and after the date of its passage. The City Clerk of the City of Milpitas shall cause this Ordinance or a summary thereof to be published in accordance with Section 36933 of the Government Code of the State of California.

EXHIBIT A
DEVELOPMENT AGREEMENT

This document is recorded for the benefit of the City of Milpitas and is entitled to be recorded free of charge in accordance with Section 6103 of the Government Code.

After recordation, mail to:

OFFICE OF THE CITY ATTORNEY
City of Milpitas
455 E. Calaveras Blvd.
Milpitas, CA 95035

DEVELOPMENT AGREEMENT

By and Between

**THE CITY OF MILPITAS,
a municipal corporation,**

and

**MILPITAS AUTO PROPERTIES, LLC,
a California Limited Liability Company**

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT ("Agreement") is made and entered into this 17th day of August, 2010 (the "Effective Date"), by and among Milpitas Auto Properties, LLC, a California Limited Liability Company ("Developer"), and the City of Milpitas, a municipal corporation ("City") pursuant to the authority of Sections 65864 through 65869.5 of the Government Code of the State of California and Ordinance No. 38.796 of the City of Milpitas.

RECITALS

A. To strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic risk of development, the Legislature of the State of California enacted Government Code Section 65864 - 65869.5, authorizing municipalities to enter into property development agreements with persons having a legal or equitable interest in real property.

B. The purpose of Government Code Sections 65864 & 65869.5 is to authorize municipalities, in their discretion, to establish certain development rights in real property for a period of years regardless of intervening changes in land use regulations.

C. Developer is the holder of a long-term Ground Lease in certain real property where the Piercey Toyota dealership is presently located in the City of Milpitas.

D. After issuing a request for proposals, the City at its May 5, 2009 City Council meeting gave approval to Developer to develop, erect and operate up to three (3) electronic advertising display signs along certain freeway locations, as well as at the Developer's auto dealership site in the City of Milpitas, subject to further permitting, licensing, and development applications and land use approvals.

E. In accordance with this Agreement, the Developer wishes to memorialize its rights to design, construct, install, operate, maintain, manage and market advertising opportunities on an electronic advertising display sign ("Project") at the Piercey Toyota dealership site, located at 950 Thompson Street in the City of Milpitas ("Property").

F. The City understands and expects that the Developer will enter into other agreements with the City or, as appropriate, an amendment of this Agreement, for the design, construction, installation, operation, maintenance, management and marketing of signs at two other sign locations. The Developer understands and expects that with regard to other agreements with the City for the design, construction, installation, operation, maintenance, management and marketing of signs at the other two (2) sign locations, such agreements will be on the same or similar terms as this Agreement.

G. Developer desires this Agreement with the City to assure that the Developer will, at the time of application, be issued a building permit and may, except as expressly provided

herein, proceed to construct and complete the Project at any time within the term of this Agreement in accordance with all applicable laws and regulations in effect at the Effective Date.

H. The environmental effects of the Project were previously considered in the final Supplemental Environmental Impact Report, State Clearinghouse No. 2006082087 ("SEIR"), prepared pursuant to the California Environmental Quality Act ("CEQA") and certified by the Redevelopment Agency of the City of Milpitas on November 21, 2006 in connection with the Merger of the Milpitas Redevelopment Project Area No. 1 and the Great Mall Redevelopment Project Area. The terms and conditions of this Agreement are consistent with and within the scope of the earlier SEIR. Accordingly, no further environmental analysis is necessary or required under CEQA to enter into this Agreement and undertake its terms and conditions.

I. After conducting a duly noticed public hearing on June 9, 2010, the Planning Commission for the City considered this Agreement and recommended its approval.

J. In conjunction with the consideration of this Agreement and after conducting a duly noticed public hearing on August 17, 2010, the City Council for the City approved this Agreement by ordinance, authorizing its execution and finding that the provisions of the Agreement are consistent with the City's General Plan, are compatible with the requirements of the Zoning Ordinance, comply with applicable state law and City Resolution No. 6642, as amended, and provide substantial public benefit to persons residing outside the boundaries of the Project, beyond the normal exactions for public benefit imposed in the development review process. The City Council also approved a Project Site Plan (attached hereto as Exhibit B) and a Site Development Permit for the Project.

K. The Developer and the City both understand and acknowledge that the City shall not have physical possession of the Sign or the real property surrounding and underlying it, shall not be responsible for performing any of the obligations nor bear any costs whatsoever that the Developer may have for development, construction, permitting, use, maintenance and marketing of the Sign under this Agreement and shall not be liable for any breach under any other related agreement or arrangement regarding development of the Property.

L. For the reasons recited herein, Developer and City have determined that the Project is a development for which this Agreement is appropriate. City finds and Developer represents that a substantial economic benefit to the City will result in accordance with the public benefit under which the Project has been undertaken and which adds value to the community by the generation of revenue that has been projected by the Developer from the sign advertising and which is to be shared in by the City. In exchange for providing these public benefits, Developer receives assurance that it may proceed with the Project in accordance with ordinances, resolutions and regulations existing as of the date of this Agreement, subject only to the terms and conditions contained herein.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and other considerations, the value and adequacy of which is hereby acknowledged, the parties agree as follows:

SECTION 1

DEFINITIONS

A. Definitions

The following definitions apply to this Agreement:

- (1) Agreement. The term "Agreement" shall mean this entire Development Agreement, including all appendices, exhibits and other documents attached hereto or incorporated herein by reference.
- (2) City. The term "City" shall mean the City of Milpitas, a municipal corporation, having its offices at 455 E. Calaveras Blvd., Milpitas, California 95035.
- (3) Developer. The term "Developer" shall mean Milpitas Auto Properties, LLC, a California Limited Liability Company holding a long-term ground lease on the real property located at 950 Thompson Street, Milpitas, California 95035.
- (4) Adjusted Gross Revenue. The term "Adjusted Gross Revenue" shall mean gross receipts from the sale of advertising time by the Developer and/or its sublessee, CBS Outdoor, Inc. ("CBS"), on the Sign, less advertising agency commissions, which shall not exceed 16.667% on any given advertising sale, and electricity costs related solely to Sign operations.
- (5) Project. The term "Project" shall mean the design, construction, installation, operation, maintenance, management, and marketing of the Sign to be located on the Project Site.
- (6) Project Site. The term "Project Site" shall mean that certain part of the Property more particularly described in Exhibit B attached hereto and as otherwise referred to in Recital E above.
- (7) Sign. The term "Sign" shall mean that one (1) off-site advertising signboard which shall have an electronic screen displaying advertisements and operating on an ongoing basis pursuant to the terms of this Agreement.

SECTION 2

GENERAL PROVISIONS

A. City and State Laws

This Agreement is subject to applicable law pertaining to development agreements, specifically City Resolution No. 6642, and any of its amendments, and Government Code Sections 65864 *et seq.*

B. Term

The term of this Agreement (“Term”) shall commence upon the Effective Date and shall expire on August 17, 2020, unless terminated, modified or extended as provided herein or under City Resolution No. 6642 or Government Code Sections 65864 - 65869.5 or by mutual consent of the parties hereto. Developer shall have the option to extend the initial term for three (3) additional ten (10) year periods at the expiration of the initial term, if not in default, after giving written notice of intent to extend not later than 180 days before, and no sooner than 360 days before the expiration of the initial term.

C. Assignment

Except as to a contemplated sublease agreement with CBS, the rights of the Developer under this Agreement may not be transferred or assigned without the written consent of City which consent will not be unreasonably withheld, delayed or conditioned.

D. Recitals

The recitals set forth above are true and correct and incorporated herein by this reference, and constitute an integral part of this Agreement.

E. Adequacy of Consideration

The City and Developer have determined that the Developer’s performance of its covenants and other obligations, as well as the agreed-upon percentage of Adjusted Gross Revenue that the City will share in as set forth in Section 3.D (1) below that will be generated by the Sign, represents fair and adequate consideration to the City for entering into this Agreement.

SECTION 3

DEVELOPMENT

A. Development of Project Site

City specifically consents to the development of the Property with a Sign at the Project Site, subject to the Developer's compliance with all conditions of approval of the City and the terms and conditions set forth in this Agreement. Development of the Sign at the Project Site and construction of the Sign shall be in accordance with the City Council Economic Development Subcommittee's recommendations of May 17, 2010, the City Council's May 5, 2010 conceptual development approval, the terms of this Agreement and City Laws (as that term is defined herein) in effect on the Effective Date. The design, construction and location of the Project Site (including signage materials and landscaping) shall conform to the conceptual drawings attached hereto as Exhibit C (the "Conceptual Drawings").

B. City Laws

Except as provided herein, City's laws, ordinances, rules, regulations and official policies applicable to the Project shall be those City laws, ordinances, rules, regulations and official policies or amendments thereto in force at the Effective Date or adopted coterminously with this Agreement (herein collectively referred to as "City Laws"). Such City Laws generally govern the allowable maximum height, bulk, size, design and location of the Project. City agrees that under City Laws, the Project can be developed, built, used, maintained, and located on the subject Project Site.

C. Applicable City Laws and Regulations

Notwithstanding Paragraph B. above, City may apply the following City laws that are Project specific to the Project Site as regards the development, design, construction, use, improvement, maintenance, management and marketing of the Sign Parcels:

(1) New City Laws which do not conflict with the existing City Laws or with the General Plan land use designations, permitted uses, density and intensity of use, height, bulk, size or location of the Project, or which do not diminish any of Developer's rights granted herein, or which are not in conflict with any of the terms and conditions hereof;

(2) New City Laws which are specifically mandated and required by changes in state or federal laws and regulations; and

(3) City Laws that are applicable to the following and are in effect at the time Developer submits an application for a building permit for the Project:

(a) Procedural requirements for building permit application submittal and issuance;

(b) Construction standards pursuant to all Uniform Building Codes incorporated by the Milpitas Municipal Code;

(c) Engineering specifications for construction of any public improvements such as curbs, gutters and sidewalks;

(d) Standard Permit Fees;

(e) Impact or linkage fees adopted by ordinance or resolution, applicable to sign projects on a City- or area-wide basis, and payable upon issuance of a building permit;

(f) Any Standard fees payable upon issuance of a building permit for which City acts as a collecting agent for another governing agency; and

(g) Any Standard requirements applicable upon issuance of a building permit for which City acts as an administering agent for another governing agency.

(4) Moratoria adopted by City as an emergency ordinance on the basis of its finding that such action is a health or safety necessity.

D. Developer Obligations

(1) Developer shall pay to the City ten percent (10%) of the Adjusted Gross Revenue generated by the Sign. Payments shall be made on a quarterly basis by the Developer. Along with each quarterly payment, Developer shall provide an accounting demonstrating the breakdown of Adjusted Gross Revenue and payments provided.

(2) After the commencement of power service by Pacific Gas & Electric and concurrent with final inspection approval by the City under the Milpitas Building Code, the Developer shall pay a one-time, One Hundred Thousand Dollar (\$100,000.00) advance to the City. Such advance shall be deducted from future quarterly payments by Developer to the City.

(3) Developer shall be solely responsible for securing all applicable approvals, permits and licenses from non-City regulatory agencies (such as the California Department of Transportation) and landowners (such as the County of Santa Clara), as necessary.

(4) Developer shall prohibit and not display any adult-oriented content or allow the advertisement of any adult-oriented businesses or products on the Sign.

(5) Developer shall reserve at least five percent (5%) of electronic display time for City-promoted community events, messages and performances.

(6) Developer shall maintain and keep in good repair and clean condition the Project Site and the Sign erected thereon at all times during the term of this Agreement.

(7) Developer shall not permit any shrubs, trees, vines, buildings, or other signs or billboards to be planted or erected on the Property which would obstruct or materially impair the visibility of the Sign.

(8) Developer shall not permit any other billboards or signs advertising off-site uses to be erected on the Property.

(9) Developer shall comply with all laws, regulations, ordinances and rules, including but not limited to any and all environmental laws, rules and regulations, applicable to the construction, erection, maintenance, replacement and removal of signs, sign structures and equipment used or placed on the Property.

(10) After prior written Notice to cure the condition and except for Force Majeure events as defined in Section 10, Developer shall demolish and remove the Sign in the event that it remains vacant or unused for a period of six (6) months or more or upon the termination or expiration of this Agreement.

(11) In order to assist City in its efforts to receive direct distribution of the local tax on materials associated with the development and operation of the Project, the California Sales and Use Tax (the "Local Tax") shall be allocated to the Project site, within the City, to the maximum extent reasonably possible. The Project, as currently envisioned, has the potential to be a significant source of additional local use tax revenue to the City. The Developer and all of its contractors, subcontractors, and suppliers shall cooperate with the City to the extent reasonably possible to maximize the allocation of the Local Tax to the City. Such cooperation shall include but not be limited to:

(a) Purchases: To the extent commercially reasonable, the Developer and its contractor and sub-contractor shall require equipment and material vendors and suppliers from which they make any individual purchases, which are subject to use tax and are to be used in the City, to allocate the local use tax to the City to the extent authorized by law. The incremental Local Tax generated from the construction of Project shall accrue to the City in accordance with applicable law.

(12) Developer expressly acknowledges and agrees that the obligations set forth herein are reasonable restraints on Owner's right to own, use, maintain and transfer the Property and any estate or interest therein, and are not and shall not be construed to be an unreasonable restraint or alienation.

(13) Developer shall maintain and make available for inspection, audit, and/or copying at any time during regular business hours, upon 48 hours oral or written request

of the City, records or documents relating to the collection and calculation of Adjusted Gross Revenue.

E. City Obligations

(1) The City shall assist the Developer and its Sublessee, CBS, with expeditiously processing the Developer and its Sublessee, CBS required submittals, such as public hearings, site plan and construction approvals, any environmental reviews, permits, etc., in order that Developer may obtain final City action on the Project; provided however that the City does not warrant or represent that such approval shall be obtained.

(2) The City shall not permit any shrubs, trees, vines, buildings or other signs or billboards to be planted or erected on any of their Properties which would obstruct or materially impair the visibility of this Sign; nor permit any other billboards or signs be erected on adjoining property that would negatively impact the Developer's marketing and usage of the Sign.

F. Development Not Required

Notwithstanding anything to the contrary contained herein, Developer is not obligated to develop the Project.

SECTION 4

AMENDMENT

A. Mutual Consent

This Agreement may be amended, or cancelled in whole or in part, at any time and from time to time by mutual consent of the parties or their successors in interest. Notice of, and a public hearing regarding an intention to amend or cancel any portion of this Agreement shall be given and held in the manner provided in City Resolution No. 6642.

B. Conflict with State or Federal Laws and Regulations

In the event that state or federal laws or regulations, enacted after the Effective Date, prevent or preclude compliance with one or more provisions of this Agreement, such provisions of this Agreement shall be modified in accordance with the provisions set forth in this Section or suspended as may be necessary to comply with such state or federal laws or regulations. Notwithstanding the foregoing, Developer shall have the right to challenge, at its sole cost, in a court of competent jurisdiction, the law or regulation preventing compliance with the terms of this Agreement and, if the challenge in a court of competent jurisdiction is successful, this Agreement shall remain unmodified and in full force and effect.

C. Procedure for Modification Due to Conflict with State or Federal Laws

In the event that state or federal laws or regulations enacted after the Effective Date of this Agreement prevent or preclude compliance with one or more provisions of this Agreement or require changes in plans, maps or permits approved by the City, the parties shall meet and confer in good faith in a reasonable attempt to modify this Agreement to comply with such federal or state law or regulation. Any such amendment or suspension of the Agreement shall be approved by the City Council in accordance with Resolution No. 6642.

SECTION 5

DEFAULT, TERMINATION AND REMEDIES

A. General Provisions

Any failure to perform, or any delay in performing, the terms and conditions hereof shall constitute a default under this Agreement. Any party alleging a default under this Agreement shall give the other party not less than sixty (60) days notice in writing, specifying the nature of the alleged default and the manner in which it may be satisfactorily cured. During the period specified in the notice, the alleged default shall not be considered a default for purposes of termination or institution of legal proceedings. If the default is cured within the period specified in the notice, the noticing party shall take no further action.

B. Default and Remedies

Developer shall be in default under this Agreement upon the happening of one or more of the following events:

(1) If a warranty, representation or statement as relates to the Piercey Toyota dealership sign parcel made or furnished by Developer to the City subsequent to the Request for Proposals process is false or proves to have been false in any material respect when it was made; or,

(2) A finding and determination by the City made following an annual or special review under the procedure provided for in Resolution No. 6642 and Government Code Section 65865.1 that, upon the basis of substantial evidence, Developer has not complied in good faith with the terms and conditions of this Agreement; or,

(3) Developer fails to fulfill any of its obligations set forth in this Agreement and such failure continues beyond any applicable cure period provided in this Agreement. This provision shall not be interpreted to create a cure period for any event of default where such cure period is not specifically provided for in this Agreement; provided, however, that if such default is not capable of being cured within such 30 day period, Developer shall have such additional time to cure as is reasonably necessary.

C. Procedure upon Default

(1) Upon the occurrence of an event of default, City may terminate or modify this Agreement in accordance with the provisions of Government Code Section 65865.1 and Resolution No. 6642.

(2) The City shall not be deemed to have waived any claim of defect in Developer's performance if, on annual or special review, the City does not propose to terminate this Agreement.

(3) No waiver or failure by the City or Developer to enforce any provision of this Agreement shall be deemed to be a waiver of any provision of this Agreement or of any subsequent breach of the same or any other provision.

(4) Any actions for breach of this Agreement shall be decided in accordance with California law. The remedy for breach of this Agreement shall be limited to specific performance.

(5) The City shall give Developer written notice of any default under this Agreement, and Developer shall have thirty (30) days after the date of the notice to cure the default or to reasonably commence the procedures or actions needed to cure the default.

D. Enforceability

Except as otherwise provided herein, the rights of the parties under this Agreement shall be enforceable notwithstanding any change subsequent to the Effective Date in any applicable General or Specific Plan or building, zoning, subdivision or other land use ordinance.

SECTION 6

INDEMNIFICATION

City and Developer shall defend, hold harmless and indemnify each other and their respective officials, employees, agents, and representatives, as appropriate, from and against any and all claims, suits, demands, liability, loss, costs, damages, and other expenses of litigation arising from or relating to the negligence or willful misconduct of the City or the Developer.

SECTION 7

NOTICES

Any notice or communication hereunder must be in writing and may be given either by personal service or by registered or certified mail, return receipt requested. Any notice or communication personally served shall be deemed given and received on the date of personal service on the party noticed at the appropriate address designated below, and any notice or communication sent by registered or certified mail, return receipt requested, properly addressed

to the appropriate address designated below, with postage prepaid, shall be deemed given and received on the fifth (5th) day after the date appearing on the signed return receipt. Any party hereto may at any time and from time to time, in the manner provided herein, designate any other address in substitution of the address to which such notice or communication shall be given. All such notices or communications shall be given to the parties at their addresses hereinafter set forth:

IF TO CITY:
City Manager, City of Milpitas
City Hall
455 E. Calaveras Blvd.
Milpitas, CA 95035

IF TO DEVELOPER:
Tom Chadwell, Member
Milpitas Auto Properties, LLC
13600 Beach Blvd.
Westminster, CA 92638

IF TO CBS OUTDOOR, INC.:
Robert H. Harbin, III, Director
CBS Outdoor
1695 Eastshore Hwy.
Berkeley, CA 94710

SECTION 8

NO WAIVER

No failure, delay or omission by a party in exercising or asserting any right, power or remedy hereunder shall impair such right, power or remedy, and no failure, delay or omission by a party occurring upon the other party's noncompliance with or failure to perform the terms and conditions of this Agreement shall be construed as a waiver thereof. A waiver by either party of any failure on the part of the other party to perform any of the terms or conditions to be performed by such other party shall not be construed as a waiver of any succeeding failure of the same or other terms or conditions hereof, nor shall any failure, delay or omission by a party in asserting any of its rights or remedies hereunder deprive such party of its right to institute and maintain any action or proceeding which it may deem necessary to protect, assert or enforce any such rights or remedies.

SECTION 9

RECORDING

After this Agreement is approved and executed by the parties hereto, either party may submit it to the Santa Clara County Recorder to be recorded. Such recording shall occur with ten (10) days of the effective date of the ordinance adopting this Agreement.

SECTION 10

MISCELLANEOUS

A. No Joint Venture or Partnership

Nothing contained herein or in any document executed in connection herewith shall be construed as making City and Developer joint venturers or partners.

B. Severability

If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions of this Agreement shall continue in full force and effect.

C. Attorneys' Fees

(1) Prevailing Party. In the event a lawsuit is filed to resolve any dispute between the parties involving the covenants or conditions contained herein, the prevailing party in such suit shall be entitled to recover its reasonable expenses, including attorneys' fees and all costs of suit.

(2) Action by Third Party. If any person or entity not a party to this Agreement initiates an action at law or in equity to challenge the validity of any provision of this Agreement or the Project Approvals, the parties shall cooperate in defending such action. Developer shall bear its own costs of defense as a real party in interest in any such action, and shall reimburse City for all reasonable court costs and attorneys' fees expended by City in defense of any such action or other proceeding.

D. Further Assurance; Covenant to Sign Documents

Each party covenants, on behalf of itself and its successors, heirs and assigns, to take all actions and do all things, and to execute, with acknowledgment or affidavit if required, any and all documents and writings that may be reasonably necessary or proper to achieve the purposes and objectives of this Agreement.

E. Time

Time is of the essence to this Agreement and to each and every term and condition hereof.

F. Force Majeure

Notwithstanding anything to the contrary contained herein, either party shall be excused for the period of any delay in the performance of any of its obligations hereunder, except the payment of money, when prevented or delayed from so doing by certain causes beyond its control, including, and limited to, major weather differences from the normal weather conditions for the South San Francisco area, war, acts of God or of the public enemy, fires, explosions, floods, earthquakes, invasions by non-United States armed forces, failure of transportation due to no fault of the parties, unavailability of equipment, supplies, materials or labor when such unavailability occurs despite the applicable party's good faith efforts to obtain same (good faith includes the present and actual ability to pay market rates for said equipment, materials, supplies and labor), strikes of employees other than Developer's, freight embargoes, sabotage, riots, acts of terrorism and acts of the government (other than the City). The party claiming such extension of time to perform shall send written notice of the claimed extension to the other party within thirty (30) days from the commencement of the cause entitling the party to the extension.

G. Bankruptcy

The obligations of this Agreement shall not be dischargeable in bankruptcy.

H. Governing Law and Venue

The laws of the State of California shall govern this Agreement. In the event that either party brings any action against the other under this Agreement, the parties agree that trial of such action shall be vested exclusively in the state court of California in the County of Santa Clara.

I. Incorporation of Exhibits

Each of the exhibits attached hereto are incorporated herein by this reference and made a part hereof for all purposes.

J. Counterparts

This Agreement may be executed in counterparts and each counterpart will have the same force and effect as an original.

IN WITNESS WHEREOF, Developer and City have executed this Agreement as of the day and year first written above.

CITY OF MILPITAS
A Municipal Corporation

MILPITAS AUTO PROPERTIES,LLC
A California Limited Liability Company

By: _____
Robert Livengood, Mayor

By: _____
Tom Chadwell, Member

ATTEST:

By: _____
Mary Lavelle, City Clerk

APPROVED AS TO FORM:

By: _____
Michael J. Ogaz, City Attorney

EXHIBIT A

Legal Description

All that certain real property situated in the City of Milpitas, County of Santa Clara, State of California, commonly described as Piercey Toyota, 950 Thompson Street, Milpitas, CA 95035, and being more particularly described as follows:

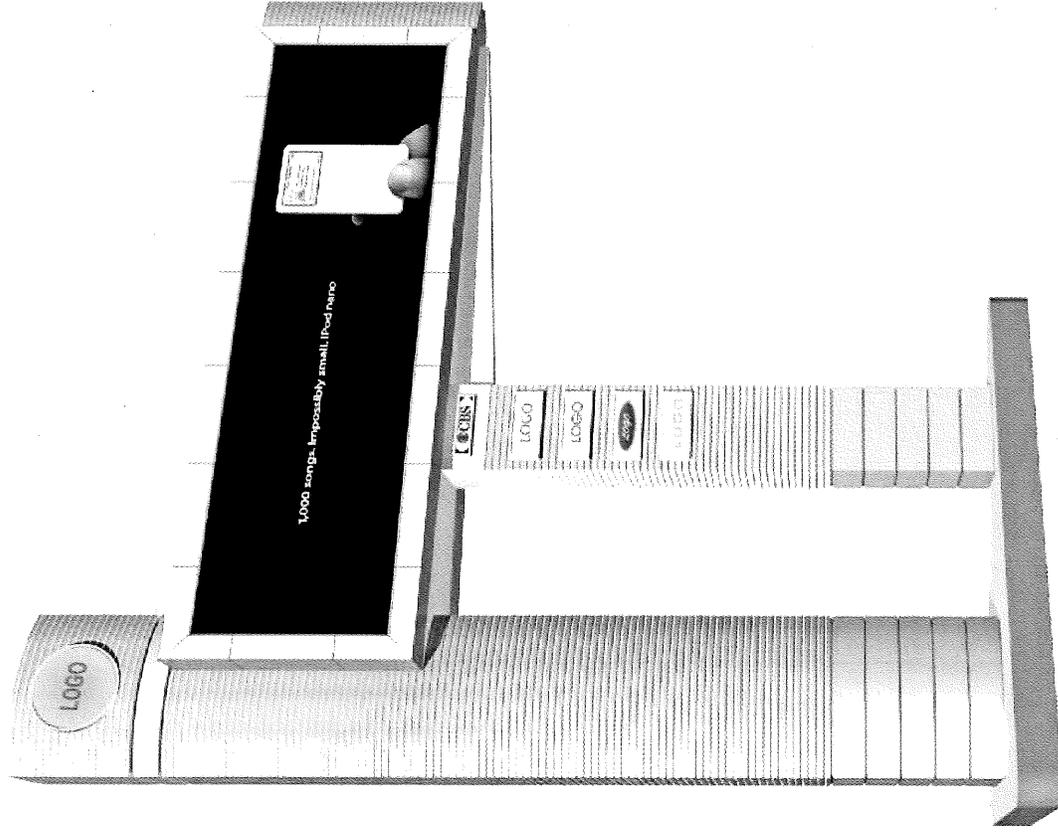
APN: 086 – 05 – x021

EXHIBIT B

PROJECT SITE PLAN

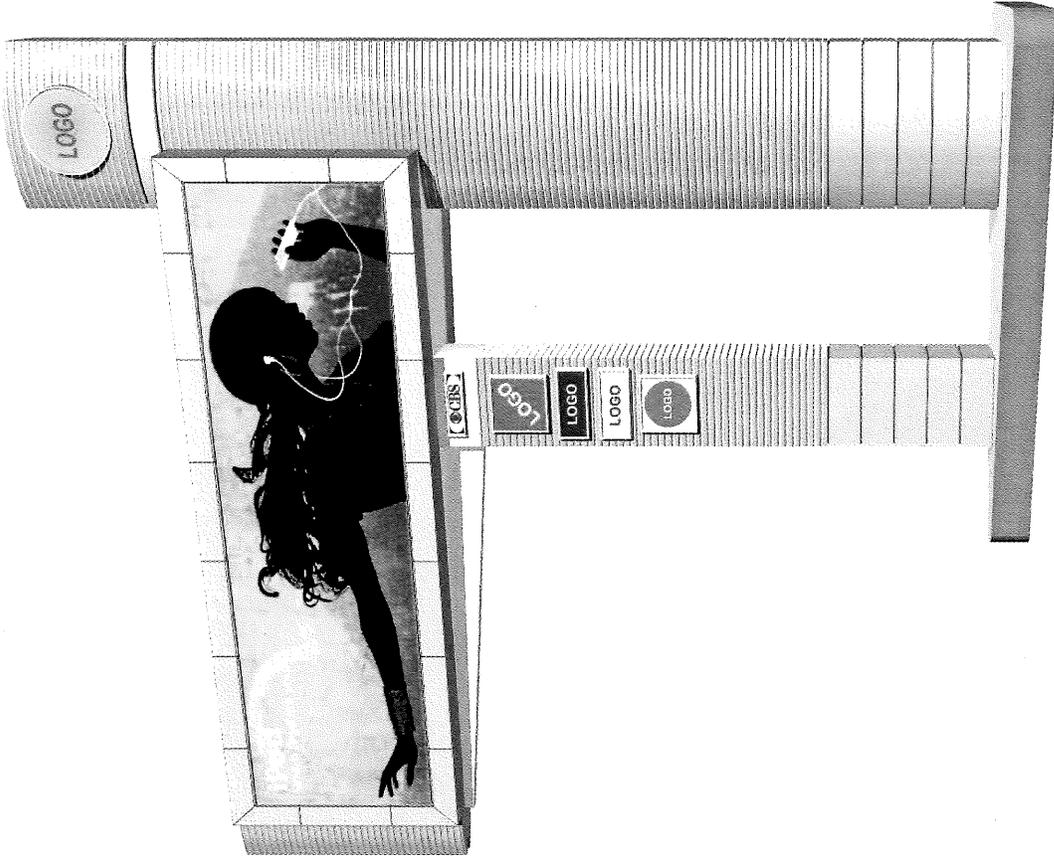
EXHIBIT C

CONCEPTUAL DRAWINGS



Design Concept - 14 x 48 LED Display
City of Milpitas Outdoor Signage Project





Design Concept - 14 x 48 LED Display
City of Milpitas Outdoor Signage Project

