

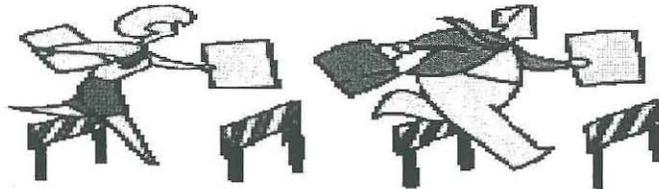


CITY OF MILPITAS

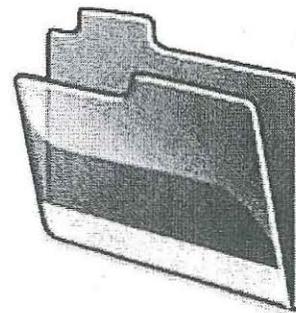
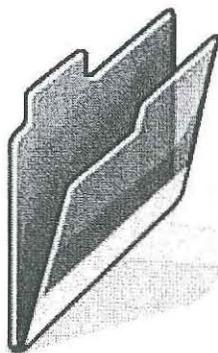
455 EAST CALAVERAS BOULEVARD, MILPITAS, CALIFORNIA 95035-5479
GENERAL INFORMATION: 408-586-3000, www.ci.milpitas.ca.gov

04/16/2013

Agenda Item No. 13



ATTACHMENT RELATED TO AGENDA ITEM AFTER AGENDA PACKET DISTRIBUTION



***13**

REGULAR

NUMBER: 38.807

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

HISTORY: This Ordinance was introduced (first reading) by the City Council at its meeting of April 2, 2013, upon motion by Vice Mayor Polanski 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

Jose S. Esteves, Mayor

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney

RECITALS AND FINDINGS:

WHEREAS, on January 7, 2011, an application was submitted by Milpitas Sign Company, LLC., 555 12th Street, #950, Oakland, CA 94607, for the construction and operation of two freestanding off-site advertising displays ("Project") to be located at 1545 California Circle (APN: 22-37-049) and 1301 California Circle (APN: 22-38-002). The properties are located within the Industrial Park 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 Sign Company, 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 considered in the Final Environmental Impact Report, State Clearinghouse No. 201062083 ("EIR") prepared pursuant to the California Environmental Quality Act ("CEQA") and certified by the Milpitas City Council on April 2, 2013. The terms and conditions of this Development Agreement are consistent with and within the scope of the EIR. 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 January 23, 2013, 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 to approve the accompanying sign proposal and the environmental assessment performed by City staff; and

WHEREAS, on April 2, 2013, 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

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, CA95035

DEVELOPMENT AGREEMENT

by and between

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

and

**MILPITAS SIGN COMPANY, LLC,
a Delaware limited liability company**

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT is made and entered into this ___ day of _____, 2013 (the "Effective Date"), by and between Milpitas Sign Company, LLC, a Delaware 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. _____ 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 a Delaware limited liability company having its principal place of business and authorized to do business in California and engaged in the business of outdoor advertising.

D. Developer has entered into leases or license agreements with the owners of the real property described on Exhibit A (collectively, the "Properties"), for the sole purpose of erecting, maintaining, operating, improving, supplementing, posting, painting, illuminating, repairing, repositioning and/or removing a maximum of three (3) outdoor advertising structures on such Properties, including, without limitation, fixture connections, electrical supply and connections, panels, signs, copy and any equipment and accessories as Developer may place thereon, for purposes of advertising to be visible from U.S. Interstate 880.

E. Developer shall file applications for sign permits to erect and operate at most three (3) outdoor advertising displays on portions of the Properties for consideration by the City at the same time that this Agreement is considered.

F. Developer desires this Agreement with City to assure that Developer will, at the time of application, be issued a sign development permit for each Developer's outdoor advertising displays and may, except as expressly provided herein, proceed to construct and operate Developer's outdoor advertising display on each of the parcels that make up the Properties (each hereinafter described as the "Project Site") within the term of this Agreement in accordance with all applicable laws and regulations in effect at the Effective Date.

G. City has examined the environmental effects of this Agreement and Developer's proposed outdoor advertising displays in the environmental impact report ("EIR") prepared pursuant to the California Environmental Quality Act ("CEQA"). On, April 2, 2013, the City Council for the City reviewed and approved the EIR as adequate to assess the environmental effects of this Agreement and the Project. The terms and conditions of this Agreement are consistent with and within the scope of the EIR. Accordingly, no further environmental analysis is necessary or required under CEQA to enter into this Agreement and undertake its terms and conditions.

H. After conducting a duly noticed public hearing on April 2, 2013, 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 benefits to the community, beyond the normal exactions for public benefit imposed in the development review process.

I. For the reasons recited herein, the City has determined that the construction and operation of Developer's proposed outdoor advertising display is a development for which this Agreement is appropriate. City finds that a substantial public benefit will accrue to City by reason of the advertising revenue that will be generated by Developer's outdoor advertising displays and shared with City, which adds value to the community by enabling City to undertake projects, programs and other activities for the benefit of City and its businesses and residents. In exchange for providing these public benefits, Developer receives assurance that it may proceed with the construction and operation of Developer's outdoor advertising displays and 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:

1. Definitions

The following definitions apply to this Development Agreement:

A. Agreement. The term "Agreement" shall mean this entire Development Agreement, including all appendices, exhibits and other documents attached hereto or incorporated herein by reference.

B. City. The term "City" shall mean the City of Milpitas, a municipal corporation, having its offices at 455 E. Calaveras Blvd., Milpitas, California 95035.

C. City Laws. The term "City Laws" shall have the meaning set forth in Section 3.B.

D. Commencement Date. The term "Commencement Date" shall mean the date of the complete erection and construction of the outdoor advertising display on the Project Site and receipt of the Certificate of Occupancy from the City by Developer. Developer shall provide to the City a Commencement Certificate to confirm the Commencement Date for each outdoor advertising display to insure that all parties have written confirmation of the appropriate Commencement Date to apply to such display.

E. Developer. The term "Developer" shall mean Milpitas Sign Company, LLC, a Delaware limited liability company, with leases or license agreements with the owners of the Properties.

F. Gross Revenue. The term "Gross Revenue" shall mean all money generated by the advertising displays subject to this Agreement, before deductions for expenses.

G. New City Laws. The term "New City Laws" shall have the meaning set forth in Section 3.C.

H. Project. The term "Project" shall mean the design, construction, installation, operation, maintenance, management, and marketing of advertising displays on the Properties.

I. Properties. The term "Properties" shall mean those parcels more particularly described in Exhibit A attached hereto and as otherwise referred to in Recital D above.

2. GENERAL PROVISIONS.

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

B. Vested Rights. The provisions of this Agreement shall create rights which shall vest in Developer. The burdens and benefits hereof shall bind and inure to the benefit of all successors in interest to the parties hereto. Notwithstanding anything to the contrary in this Agreement and for purposes of clarification, City and Developer acknowledge and agree that Developer is the real party in interest under this Agreement and that all rights accruing hereunder shall accrue to Developer and its permitted successors and assigns, notwithstanding the fact that leases and/or license agreements for the Properties have been entered into with third parties, it being the intent of the parties that Developer may place the outdoor advertising structures and accomplish the Project on the Properties or any other real properties to which Developer secures the relevant rights under applicable laws and regulation. Accordingly, any such lessors or licensors shall not be entitled to exercise any of the rights, or receive any of the benefits, granted to Developer under this Agreement.

C. Term. This Agreement shall be effective as of the Effective Date, and shall be for a term of thirty (30) years ("Term") commencing upon the Commencement Date and expiring thirty (30) years from the Commencement Date, 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. Commencement Date for the purposes hereof shall be as defined in Section 1.D above. Developer shall have the option to extend the Term of this Agreement for up to six (6) additional periods of five (5) years each by delivery of written notice to City no later than six (6) months prior to the expiration of the then current Term provided that at the time of such written notice Developer has not received a written notice of default under this Development Agreement which remains uncured.

D. Assignment. The rights of the Developer under this Agreement may not be transferred or assigned without the written consent of City. Developer may, however, assign its rights and obligations hereunder to (i) Clear Channel Outdoor, Inc. or an affiliate of Clear Channel Outdoor, Inc., or (ii) Sign-Co East, LLC, or a limited liability company or other entity in which Sign-Co East, LLC, or an affiliate of Sign-Co East, LLC, is a member, in each instance upon not less than sixty (60) days prior written notice to City.

E. Recitals. The recitals set forth above are incorporated herein and constitute an integral part of this Agreement.

3. DEVELOPMENT.

A. Development of Project. City hereby grants to Developer the exclusive right to construct and operate a maximum of three (3) outdoor advertising displays on the Properties, with back-to-back digital or static displays of up to 20 feet by 60 feet (collectively, the "Project"), subject to the condition that Developer complies with all conditions of approval issued in connection with Developer's sign permits for such Project Site. Development and construction of the Project shall be in accordance with Site Development Permit issued for each Project Site and the terms of corresponding development approvals, the terms of this Agreement and City Laws (as that term is defined herein) and all applicable State and Federal laws and permit requirements in effect on the Effective Date. The maximum height, size, location and design of Developer's outdoor advertising displays (including materials, color palate, and landscaping) shall be essentially as shown on the approved planning application drawings attached hereto as Exhibit B (the "Approved Planning Application Drawings"). Notwithstanding the foregoing, Developer agrees that the first two (2) outdoor advertising structures for displays constructed under this Agreement shall contain only digital display at the time of construction.

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 in force as of the Effective Date governing uses of the Properties, and the maximum height, size, design and location of Developer's outdoor advertising displays (herein collectively referred to as "City Laws"). City agrees that under City Laws, the Project can be built and operated.

C. Applicable Future Laws and Regulations. Notwithstanding Paragraph 2.B. above, City may apply the following new City laws to the Project (as applied, such laws shall be defined as "New City Laws"):

(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, 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; and

(2) 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) Permit fees applicable to all similar parties and properly approved under the Code then in effect;

(d) Any fees payable upon issuance of a building permit for which City acts as a collecting agent for another governing agency provided such fees are applicable to all similar parties and properly approved under the Code then in effect; and

(e) Any requirements applicable upon issuance of a building permit for which City acts as an administering agent for another governing agency provided such requirement is applicable to all similar parties and properly approved under the Code then in effect.

D. Developer Obligations.

(1) Initial Payment. After the commencement of power service by Pacific Gas & Electric and concurrent with final inspection approval by the City under the Milpitas Building Code of each outdoor advertising structure with at least one digital display, the Developer shall pay a Fifty Thousand Dollar (\$50,000.00) advance to the City as to each digital advertising display. Thus, for example, an outdoor advertising structure with two back-to-back digital displays would require the payment of a One Hundred Thousand Dollar (\$100,000) advance. Such advance shall be deducted from future annual payments by Developer to the City under Section 3.D.2 below.

(2) Revenue Sharing. The following requirements shall apply to each advertising display. For the first three (3) years of this Agreement, Commencing on the date that is one (1) year from the Commencement Date, and continuing thereafter annually on each anniversary of the Commencement Date, Developer shall pay City within forty five (45) days following December 31st of each year during the Term an amount equal to ten percent (10%) of the Gross Revenue generated by Developer's outdoor advertising displays for the prior 12 month period (or in the case of the first partial year such prorated period between the Commencement Date and December 31 of such year). Along with each annual payment, Developer shall provide an accounting demonstrating the breakdown of Gross Revenue and payments provided. For each

digital display installed by the Developer, and commencing on the date that is four (4) full calendar years from the Commencement Date, Developer shall pay City annually an amount equal to the greater of (a) ten percent (10%) of the Gross Revenue generated by Developer's digital outdoor advertising displays, or (b) a minimum quarterly payment of \$10,000.00 per digital advertising display, and such minimum payment shall be increased annually by 2.5%. Notwithstanding the foregoing, if at any time during the Term of this Agreement Developer is not operating any or all of Developer's digital advertising displays in the Project for more than six (6) months in any annual period, then Developer shall only be required to pay City ten percent (10%) of the total Gross Revenue generated by each advertising display per year. Developer shall maintain adequate books and records with respect to the revenue generated by Developer's outdoor advertising displays in the Project, consistent with industry standards. City shall be permitted to review and audit Developer's books and records with respect to the revenue generated by Developer's outdoor advertising displays in the Project at any time during the Term of this Agreement, upon not less than thirty (30) days prior written notice to Developer. Any such review and/or audit shall be conducted during normal business hours at the office of Developer.

(3) Local Tax Issues. 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.

(4) Public Use of Outdoor Advertising Displays. City shall have the right to use a portion of the advertising space available on Developer's outdoor advertising displays in the Project, not to exceed 5% of the total display time, on a space and/or time available basis for advertising non-commercial City sponsored programming. In no event shall City be required to pay Developer or any third party for any such use of the advertising displays on the outdoor advertising displays in the Project for the right to use such advertising space as provided above, provided, however, that City shall be solely responsible for payment of any and all production costs and expenses incurred in connection with creating the advertising copy or material in a format acceptable to Developer. The City shall be responsible for providing Developer with approved advertising copy which may be updated by the City at any time. By January 1st of each year City shall provide stock advertising copy or copies with artwork in acceptable format which may be utilized by Developer for that calendar year. City's use is subject to the following conditions and parameters: all copy must be submitted to Developer at least five (5) days before

the proposed display date and will be subject to Developer's standard advertising copy rejection and removal policies, which allow Developer, in its sole discretion, to approve or disapprove copy and remove copy once posted or displayed. If new copy is not provided by the City within such five (5) day period, Developer shall be entitled to substitute any stock copy provided to Developer. Developer may grant additional display time to the City as the sole discretion of Developer.

(5) Preference to City Businesses. In the course of the marketing and sales of available advertising space for all users in any given month, Developer shall give preference to businesses located in the City of Milpitas, so long as such users pay the rate of the competitive market for that sign space or such sign space as is sold by Developer in package offerings.

(6) Maintenance of Signs. Upon written notification by City of any sign or project element requiring maintenance, such required maintenance shall begin no more than 15 calendar days from receipt of said notice.

(7) No Offensive or Lewd Material. No Sign display shall contain "obscene matter," as that term is defined in California Penal Code section 311 or may advertise an adult business as defined in the Municipal Code for the City, section III-4-2.010.

E. City Obligations.

No Additional Sign Rights. City and Developer acknowledge that Developer has been granted the exclusive right to construct and operate a maximum of three (3) outdoor advertising displays within the non-landscaped sections of U.S. Interstate 880 within the City limits north of State Route 237, subject to the contingencies set forth in this Agreement. This exclusive right excludes any area of land which falls within the Piercey Automotive property and an advertising display on Assessor's Parcel Number 086-03-019, bordered on its western side by Barber Lane and on its eastern side by a freeway interchange connecting the Interstate 880 Freeway and the Montague Expressway ("Barber Lane Property"). Furthermore, this exclusive right shall be reduced or extinguished in its entirety, in the event of removal or inactivity of Developer-operated displays or termination of this Agreement pursuant to Section 3.F.

Subject to such contingencies, during the Term of this Agreement, City shall not grant any additional rights to construct and operate outdoor advertising displays within the non-landscaped sections of U.S. Interstate 880 within the City limits, other than any rights which may be granted to (a) a third party to construct and operate a single outdoor advertising display on the Piercey Automotive property or some other location in lieu of said site, (b) a third party to construct and operate an advertising display at the Barber Lane Property or some other location in lieu of said site, and (c) a third party to construct and operate displays to replace inactive or removed displays of the Developer in accordance with this Agreement.

F. Development Not Required. Developer is not obligated to develop any part or all of the Project on the Project Site. In addition, Developer is the owner of the outdoor advertising display in the Project to the extent they are developed in whole or in part and has the right to

remove any or all of the outdoor advertising displays in the Project at any time during the Term of this Agreement or at the expiration thereof, subject to any rights that the fee simple owners or tenants of the Properties may have under California law which have not been otherwise waived or modified in accordance with agreements relating to the Project Site. But in the event that the Developer does not perform and commence operations of at least one (1) display within twenty-four (24) months of the Effective Date, the Agreement shall be terminated as to all the Project Sites and the City shall be free to grant land use entitlements and other approvals for the development and operation of alternative advertising display by a third party. Once Developer meets the requirements of commencing operation under one (1) display within twenty-four months of the Effective Date, then Developer shall have up to five (5) years from the Effective Date of this Agreement to commence operation of the remaining displays under this Agreement. If any Project Sites have not commenced operation of a display within five (5) years following the Effective Date of this Agreement, the Agreement shall be terminated as to such Project Sites and the City shall be free to grant land use entitlements and other approvals for the development and operation of alternative advertising display by a third party.

Furthermore, in the event that once constructed, any outdoor advertising display that is removed or goes inactive for a period of twenty four (24) months or more, the Agreement shall be terminated as to only the display which shall have been inactive or removed for such period. Such terminations shall be automatically incorporated into the Agreement and notices of termination of the Agreement shall be recorded on respective Properties at the Developer's expense. Furthermore, for each advertising display that is removed or goes inactive for a period of twenty four (24) months or more, the competing display restrictions of Section E.1. of this Agreement shall be automatically modified so as to allow third parties to develop a commensurate number of competing signs, if permitted by law. Any advance payment made by the Developer pursuant to Section 3.D.1. shall be considered non-refundable and the sole property of the City.

4. AMENDMENT/RELOCATION.

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. Procedure for Modification or Termination 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. If any such state or federal laws or regulations enacted after the Effective Date of this Agreement prohibit or prevent Developer from operating any of its outdoor advertising displays on the Properties and/or the parties are unable to reach a good faith accord and understanding as to the amendment of the Agreement, then Developer or the City shall have the right to terminate this Agreement upon not

less than thirty (30) days prior written notice to any or all of its outdoor advertising displays in the Project. Upon such termination, no further payments shall be due to City under Section 3.D.2. of this Agreement other than any payments which may be due with respect to Project revenue earned through the date of termination. If, however, Developer or City elects to terminate this Agreement with respect to less than all of Developer's outdoor advertising displays, then any payments due to the City under Paragraph 3.D.2. of this Agreement shall be reduced as provided therein. In no event shall Developer be entitled to reimbursement for payments made to City under this Agreement.

C. Relocation; Damage; Destruction. If at any time during the Term of this Agreement or prior to commencement of construction, Developer determines that (1) the location of any or all of the outdoor advertising displays in the Project is or has become visually impaired, or (2) the location of any or all of the outdoor advertising displays in the Project is no longer beneficial for, or is adversely affecting or limiting, the actual or prospective revenue generation of the other outdoor advertising display(s) in the Project, or (3) the economic benefit of the location of any or all of the locations that the outdoor advertising structures are diminished, Developer and City may agree to allow Developer to relocate the outdoor advertising display(s) to another location in the City of Milpitas and/or terminate this Agreement with respect to the applicable outdoor advertising display, subject to Developer's receipt of any necessary approvals from the City and the California Department of Transportation. Upon any such relocation, this Agreement shall continue in full force and effect in accordance with its terms. If for any reason any of the outdoor advertising displays, are removed, materially damaged or destroyed, then Developer, at its sole election, may reduce any guaranteed payments due to the City under Section 3.D.2. of this Agreement as provided therein until such time as the applicable outdoor advertising display(s) are fully operable and/or terminate this Agreement with respect to the applicable outdoor advertising display. If Developer elects to terminate this Agreement with respect to less than all of Developer's outdoor advertising displays, then any payments due to the City under Section 3.D.2. of this Agreement shall be reduced as provided therein. In the event the owner of the real property for any Project Site requests that Developer relocate a display on such Project Site in order to assist with development of the Project Site by such owner of real property, the City shall permit such relocation hereunder if requested by Developer and following such relocation, subject to Developer's receipt of any necessary approvals from the City and the California Department of Transportation, this Agreement shall continue in full force and effect in accordance with its terms.

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. Periodic Reviews. During the Term of this Agreement, the City may conduct annual reviews of Developer's good faith compliance with the terms and conditions of this Agreement in accordance with the procedures set forth in Section 8.0 of Resolution 6642. Failure of the City to conduct an annual review shall not constitute a waiver by the City of its rights to otherwise enforce the provisions of this Agreement, nor shall Developer have or assert any defense to such enforcement by reason of any such failure to conduct an annual review.

C. Default and Remedies. Developer shall be in default under this Agreement upon the happening of one or more of the following events:

(1) A finding and determination by the City is 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 following all applicable notice and cure periods; or

(2) 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 60 day period, Developer shall have such additional time to cure as is reasonably necessary.

D. Procedures upon Default

(1) Upon the occurrence of an event of default after the expiration of all applicable notice and cure periods provided herein, 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 Parties shall give written notice of any default under this Agreement as provided in Section 3.D(1) herein.

E. 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, including any ordinance governing or relating to signs or outdoor advertising displays. The City shall not attempt to enforce any ordinance against Developer if such ordinance became effective following the Effective Date, except as provided herein. Any attempt by the City to enforce such subsequent ordinances contrary to the provisions of this Agreement shall result in an event of default by the City hereunder.

6. INDEMNIFICATION.

To the fullest extent permitted by law, Developer shall indemnify, defend with counsel of the City's reasonable choosing that is mutually acceptable to both parties, and hold harmless City, its City Council, its boards and commissions, officials, officers, employees, from and against any and all claims, demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs and expenses (including without limitation, reasonable attorney's fees, disbursements and court costs) of every kind and nature whatsoever which may arise from or relate (directly or indirectly) to the construction, operation, maintenance, repair and/or removal of the outdoor advertising displays at the Properties. This indemnification shall include, but not be limited to, damages awarded against the City, if any, costs of suit, attorneys' fees, and other expenses incurred in connection with such claim, action, causes of action, suit or proceeding incurred by, City, its City Council, its boards and commissions, officials, officers, employees. The Developer shall indemnify the City for all of City's costs, attorneys' fees, and damages which City incurs in enforcing the indemnification provisions set forth in this condition. The Developer shall pay to the City upon demand or, as applicable, to counsel of City's choosing, any amount owed pursuant to the indemnification requirements prescribed in this condition. City shall promptly notify the Developer of any claim, action, or proceeding and engage in reasonable efforts to cooperate with Developer in the defense against the claim, demand, obligation, damage, action, or suit. If City fails to so promptly notify the Developer, then the Developer's indemnification obligations as set forth in this condition of approval shall thereafter terminate. The Developer shall not be required to pay or perform any settlement unless the settlement is approved by the applicant.

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 Clerk, City of Milpitas
City Hall
455 E. Calaveras Blvd.
Milpitas, CA 95035
ATTN: City Manager

IF TO DEVELOPER:

Milpitas Sign Company, LLC
c/o Clear Channel Outdoor, Inc.
555 12th Street, Suite 950
Oakland, CA 94607
Attn: President - San Francisco Division
With a copy to:

McCarthy Ranch
15425 Los Gatos Blvd., Suite 102
Los Gatos, CA 95032-2541
Attn: Joey McCarthy

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.

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 within ten (10) days of the effective date of the ordinance adopting this Agreement. Upon the earlier of the expiration or sooner termination of this Agreement or any applicable lease/license agreement, Developer shall promptly execute and deliver to the applicable lessor/licensor a quitclaim deed or other appropriate documentation to release this Agreement from record title to the Properties.

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. 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. 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. Each party shall be responsible for its own court costs and attorneys' fees expended by such party 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 or results therefrom, 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. Incorporation of Exhibits. Each of the exhibits attached hereto are incorporated herein by this reference and made a part hereof for all purposes.

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

CITY OF MILPITAS,
Municipal Corporation

By: _____
Jose Esteves, Mayor

ATTEST:

By: _____
Mary Lavelle, City Clerk

APPROVED AS TO FORM:

By: _____
Michael J. Ogaz, City Attorney

MILPITAS SIGN COMPANY, LLC, A
a Delaware limited liability company

By: Clear Channel Outdoor, Inc.,
a Delaware corporation,
Manager

By: _____

Its: _____

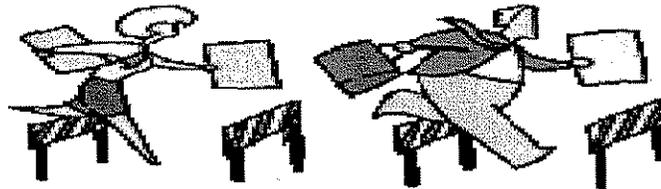


CITY OF MILPITAS

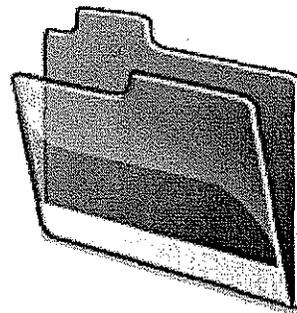
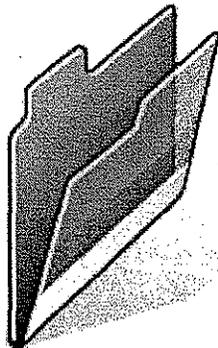
455 EAST CALAVERAS BOULEVARD, MILPITAS, CALIFORNIA 95035-5479
GENERAL INFORMATION: 408-586-3000, www.ci.milpitas.ca.gov

04/16/2013

Agenda Item No. 14



ATTACHMENT RELATED TO AGENDA ITEM #14 AFTER AGENDA PACKET DISTRIBUTION





April 15, 2013

Mayor Jose Esteves
Milpitas City Council
455 East Calaveras Boulevard
Milpitas, CA 95035

Re: City Council Donation and Fee Waiver/Reduction Policy

Honorable Mayor and City Council:

In keeping with the spirit of the purpose of the Donation and Fee Waiver/Reduction Policy of recognizing the value of partnerships with other agencies and organizations in providing services that benefit the community and its residents. The Milpitas Chamber of Commerce would like to make the following suggested changes to the proposed Standard Operating Procedure:

1. Delete item 3(f). We feel this is too limiting of a statement. There may be several times an organization might bring forward an event that could benefit the City and its community, but still be under the maximum annual fee waiver amount. Why limit the benefits to the community by making this limitation.
2. Re-word item 3(g). The fee waiver or donation is subject to a maximum annual amount of \$2000 for each organization. (Again, why limit the purpose of the amount to either a donation or fee waiver? The new wording would give the Council the limitation of the amount, but not limit the choice between fee waiver or donation. If your choices become too constrained, the City may miss out on a valuable opportunity for its community. You still have the choice of limiting the amount up to the maximum. And that is the magic wording "up to" the maximum.

Limiting the annual amount of funding to organizations would be a natural limitation, without placing undo additional limitations on the Council. We feel that this would better serve the intent of this Standard Operating Procedure.

Thank you for your consideration.

Best regards,

Carol Kassab, CEO
Milpitas Chamber of Commerce