

RESOLUTION NO. 35-2014

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MESQUITE, TEXAS, AUTHORIZING A SECOND AMENDMENT TO THE ECONOMIC DEVELOPMENT PROGRAM (CHAPTER 380) AGREEMENT BETWEEN THE CITY OF MESQUITE AND TOWN EAST MALL, LLC, THEREBY AMENDING THE ACCOUNTING PROCEDURES FOR ADVERTISING REVENUE AND REVISING THE REQUIRED OPERATIONAL HOURS OF THE ELECTRONIC VIDEO BOARD SIGN; AND AUTHORIZING THE CITY MANAGER TO EXECUTE THE SECOND AMENDMENT TO THE ECONOMIC DEVELOPMENT PROGRAM AGREEMENT BETWEEN THE CITY OF MESQUITE AND TOWN EAST MALL, LLC, FOR SUCH PURPOSES.

WHEREAS, on March 4, 2013, the City Council approved an economic development incentive agreement with Town East Mall, LLC (the "Economic Development Program Agreement"), for the installation of a Gateway sign to promote economic development and stimulate business and commercial activity; and

WHEREAS, the Economic Development Program Agreement required the purchase and installation of the Gateway sign on or before September 1, 2013, and Town East Mall, LLC, to pay for the Gateway sign within 90 days after the installation date; and

WHEREAS, on July 8, 2013, the City Council approved an amendment to the Economic Development Program Agreement to extend the installation date to November 1, 2013, and to extend the time for payment for the Gateway sign to January 1, 2014; and

WHEREAS, Town East Mall, LLC (the "Owner"), requested the Economic Development Program Agreement be further revised to amend the accounting procedures for advertising revenue received from the sign and to revise the required operational hours of the sign to permit the sign to be non-operational at the Owner's discretion up to a maximum of four hours each day between the hours of midnight and 6:00 a.m.; and

WHEREAS, Staff recommends the City Council approve Town East Mall, LLC's request and approve the proposed revisions to the Economic Development Program Agreement as more fully set forth in the Second Amendment to Economic Development Program Agreement attached hereto as Exhibit "A" and made a part hereof for all purposes (the "Second Amendment to Economic Development Program Agreement"); and

WHEREAS, after holding a public hearing and upon full review and consideration of the Second Amendment to Economic Development Program Agreement and all matters attendant and related thereto, the City Council is of the opinion that the Second Amendment to Economic Development Program Agreement should be approved and that the City Manager shall be authorized to execute it on behalf of the City.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MESQUITE, TEXAS:

SECTION 1. That the City Council finds that the terms of the proposed Second Amendment to Economic Development Program Agreement by and between the City of Mesquite (the "City") and Town East Mall, LLC, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference, are found to be acceptable, in the best interests of the City and its citizens, and are hereby in all things approved.

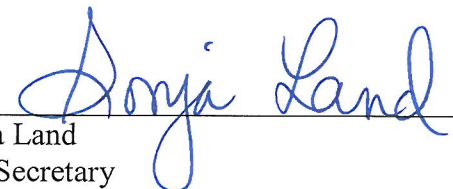
SECTION 2. That the City Manager is hereby authorized to execute the Second Amendment to Economic Development Program Agreement.

DULY RESOLVED by the City Council of the City of Mesquite, Texas, on the 6th day of October, 2014.




John Monaco
Mayor

ATTEST:



Sonja Land
City Secretary

APPROVED:



B. J. Smith
City Attorney

**SECOND AMENDMENT TO ECONOMIC DEVELOPMENT
PROGRAM AGREEMENT**

(Chapter 380 Agreement)

This Second Amendment to Economic Development Program Agreement (this “Second Amendment”) is made and entered into by and between the City of Mesquite, a Texas home rule municipality (the “City”) and Town East Mall, LLC, a Delaware limited liability company (the “Company”).

WHEREAS, the City and the Company have entered into that certain Economic Development Program Agreement dated effective April 8, 2013, relating to, among other things, the terms and conditions of certain economic development incentives in connection with a marquee sign to be installed on the property at Town East Mall (the “Original Agreement”); and

WHEREAS, the Original Agreement has been amended by that certain Amendment to Economic Development Program Agreement executed by the City and the Company dated effective July 15, 2013 (the “First Amendment”); and

WHEREAS, the Original Agreement, as amended by the First Amendment, is hereinafter collectively referred to as the “Agreement”); and

WHEREAS, the term “Effective Date” as used herein shall mean the latter of the two dates this Second Amendment is executed by the Company and the City; and

WHEREAS, all capitalized terms used herein and not otherwise defined herein shall have the meanings set forth in the Agreement; and

WHEREAS, the City and the Company desire to further amend the Agreement as set forth herein.

NOW, THEREFORE, in consideration of the promises and covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and confessed, the City and the Company agree to amend the Agreement effective as the Effective Date as follows:

1. Amendment of Article VI, Paragraph 4. Article VI, Paragraph 4 of the Agreement shall be deleted and replaced with the following, to-wit:

- “4. Maintain the Town East Marquee Sign: (i) in good repair and in proper working condition at all times during the term of this Agreement; and (ii) operational at all times during the Term of this Agreement except the parties agree that at the Company’s discretion, the Town East Marquee Sign may be non-operational up to a maximum of four (4) hours each day between the hours of midnight and 6:00 a.m., and in connection therewith,

the Company covenants and agrees, at the Company's sole cost and expense, to make all repairs, replacements and capital expenditures necessary to keep and maintain the Town East Marquee Sign including without limitation, the dynamic display board and all of its component parts, in good repair, operational and in proper working condition and in compliance with the EVS Variance, the End-User Agreement and all applicable laws at all times during the Term of this Agreement;"

2. Amendment of Article VI, Paragraph 8. Article VI, Paragraph 8 of the Agreement shall be deleted and replaced with the following, to-wit:

"8. Operate the Town East Marquee Sign from the Installation Date and continuously thereafter during the Term of this Agreement in such a manner that the dynamic display board on the Town East Marquee Sign is continuously running advertisements on a twenty-four (24) hour basis except during the following periods: (i) at the Company's discretion, the Town East Marquee Sign may be non-operational up to a maximum of four (4) hours each day between the hours of midnight and 6:00 a.m.; and (ii) such temporary periods of time when the dynamic display board is being repaired or has become non-operational as a result of an Event of Force Majeure, provided, however, in the event the dynamic display board is not functioning because of the need for repairs or has become non-operational due to an Event of Force Majeure, the Company covenants and agrees to repair or replace the dynamic display board and its components within fifteen (15) days after the Event of Force Majeure or other event causing the need for such repairs and notwithstanding anything contained herein to the contrary, the Company covenants and agrees that the dynamic display board portion of the Town East Marquee Sign shall never be non-operational for a period of more than fifteen (15) consecutive days;"

3. Deletion of Definition of "Designated Account". The definition "Designated Account" on Page 3 of the Agreement shall be deleted in its entirety.

4. Amendment of Article VII, Paragraph 1. Article VII, Paragraph 1 shall be amended to read as follows, to-wit:

"1. In consideration of the City's agreement to make the Incentive Payments under the terms and conditions and subject to the limitations set forth herein, the Company covenants and agrees to pay a portion of the Gross Advertising Revenues to the City during the "Revenue Sharing Period" (as defined in Article VII, Section 3 below) in accordance with the following percentages, to-wit: (i) ten percent (10%) of the first One Hundred Thousand and No/100 Dollars (\$100,000.00) of Gross Advertising Revenues; and (ii) Twenty-Five Percent (25%) of all Gross Advertising Revenues in excess of One Hundred Thousand and No/100 Dollars

(\$100,000.00) (hereinafter sometimes singularly referred to as an “Advertising Revenue Payment” and collectively referred to as the “Advertising Revenue Payments”) provided, however, that the Company shall not be obligated to make any Advertising Revenue Payment to the extent that the sum of such payment and all other Advertising Revenue Payments previously made by the Company would be greater than the sum of all Incentive Payments previously made by the City to the Company. All Advertising Revenue Payments shall be payable by the Company to the City at the City’s address set forth in this Agreement or such other address as the City may hereafter notify the Company. All Advertising Revenue Payments shall be due and payable by the Company to the City on or before the fifteenth (15th) day of the calendar month following the month during which the Gross Advertising Revenues are collected by the Company. By way of example only, the Advertising Revenue Payment for the Gross Advertising Revenues collected by the Company during the month of October, 2014 shall be due and payable on or before November 15, 2014. The City shall have the right at all times during the Term of this Agreement to inspect and audit all advertising contracts, invoices, payments, deposits and other records relating in any way to the Gross Advertising Revenues. Additionally, contemporaneously with the payment of each Advertising Revenue Payment paid by the Company to the City pursuant to the terms of this Agreement, the Company shall provide to the City the following, to-wit:

- (i) a report that accounts for 100% of the advertising revenue collected by the Company on the Town East Marquee Sign for the previous calendar month, sorted by advertiser and indicating whether each advertising spot reflected on the report is complimentary or revenue generating (each a “Display Owner Proof of Play Report”). By way of example only, the Advertising Revenue Payment paid by the Company to the City on November 15, 2014 for advertising revenue collected by the Company during the calendar month of October, 2014 shall include a Display Owner Proof of Play Report for the calendar month of October, 2014;
- (ii) a report that lists every tenant or client of the Company that is billed for advertising on the Town East Marquee Sign during the previous calendar month (each a “Digital Advertising Revenue Share Report”). Each Digital Advertising Revenue Share Report shall bring forward any unpaid balances that are due from the previous calendar month and shall also include: (a) the start and end date of each advertising agreement listed in the report; (b) the total digital sign revenue for each advertising agreement listed in the report; (c) the digital sign revenue billed for the previous calendar month for each tenant or client listed in the report; (d) the

digital sign revenue paid by each tenant or client listed in the report for the previous calendar month including the check number and check date information; and (e) a calculation of the amount due by each tenant or client listed in the report. By way of example only, the Advertising Revenue Payment paid by the Company to the City on November 15, 2014 shall include a Digital Advertising Revenue Share Report with the information listed in this subsection for the calendar month of October, 2014; and

- (iii) such additional reports, information and documentation as the City may hereafter request in writing to verify compliance by the Company with the terms and provisions of this Agreement including, without limitation, (a) copies of all license agreements between the Company and the Company's tenants or clients relating to advertising on the Town East Marquee Sign; (b) the Company's internal calculations (together with all information and documentation supporting such calculations) evidencing how the Company allocated advertising revenue collected by the Company from a tenant or client who collectively paid for advertising on the Town East Marquee Sign and on one or more additional signs owned or operated by the Company; and (c) the Company's internal calculations (together with all information and documentation supporting such calculations) evidencing how the Company allocated advertising revenue collected by the Company from a tenant or client who collectively paid for more than one type of advertising (for example, a tenant or client who collectively paid both for digital advertising on the Town East Marquee Sign and for tabletop or skybanner advertising)."

5. Amendment of Article VIII, Paragraph 6. Article VIII, Paragraph 6 of the Agreement shall be deleted and replaced with the following, to-wit:

- "6. As of the date of the Incentive Payment, the Town East Marquee Sign shall be fully functional and operational and the dynamic display board shall be displaying advertisements continually on a twenty-four (24) hour basis (except at the Company's discretion, the Town East Marquee Sign may be non-operational up to a maximum of four (4) hours each day between the hours of midnight and 6:00 a.m.)."

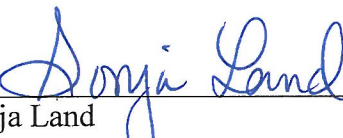
6. Effect of Second Amendment. This Second Amendment amends the Agreement in no other manner except as expressly set forth herein. In the event there is any conflict between this Second Amendment and the Agreement, the terms and provisions of this Second Amendment shall control.

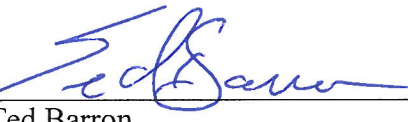
7. Counterparts. This Second Amendment may be executed in any number of counterparts, each of which shall be considered an original and all of which, when taken together, shall constitute one and the same instrument.

8. Signatures. The City and the Company hereby expressly agree that this Second Amendment may be executed by a facsimile, digitally or electronically-scanned signature and that such facsimile, digital or electronically-scanned signature shall constitute an original signature for all purposes.

ATTEST:

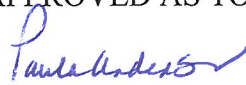
CITY OF MESQUITE,
a Texas home rule municipality

By: 
Sonja Land
City Secretary

By: 
Ted Barron
City Manager

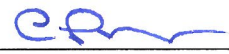
Execution Date: 1-7-15

APPROVED AS TO FORM:


City Attorney or his Designee
Execution Date: January 6, 2015

COMPANY:

TOWN EAST MALL, LLC,
a Delaware limited liability company

By: 
Name: Andrew P. Massmann
Title: Authorized Signatory

Execution Date: December 12, 2014