

ORIGINAL

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Contract No. 511

**DEVELOPMENT AND FINANCING AGREEMENT**

**THE TOWN OF PROSPER, TEXAS,**

**AND**

**MSW PROSPER 380 LP**

**December 31, 2012**

## DEVELOPMENT AND FINANCING AGREEMENT

This Development and Financing Agreement (this "Agreement") is entered into between the Town of Prosper, Texas (the "Town"), a duly incorporated municipality of the State of Texas, and MSW Prosper 380 LP, a Texas limited partnership ("Company") (Company and the Town are collectively referred to as the "Parties" and singularly as a "Party") acting by and through their respective authorized officers.

### RECITALS

All terms with initial capital letters used in these Recitals without definition have the meanings given to them in Section 1.2.

**WHEREAS**, Company owns or is under contract to purchase approximately 157 acres of real property in the Town at the intersection of the Dallas North Tollway and U.S. Highway 380 and being further described in Exhibit 1 (the "Land"); and

**WHEREAS**, Company intends to construct, or cause to be constructed, on the Land a pedestrian-oriented, mixed-use project consisting of residential, retail, commercial, and office uses (the "Development"); and

**WHEREAS**, the Town has approved an ordinance designating the Land as a Tax Increment Financing Reinvestment Zone in accordance with the Tax Increment Financing Act, Tax Code, Chapter 311 to be known as Tax Increment Financing Reinvestment Zone Number Two, Town of Prosper (the "TIRZ"); and

**WHEREAS**, the Land is zoned "Planned Development-Mixed Use" pursuant to Ordinance No. 08-055, as amended (the "Zoning Ordinance"); and

**WHEREAS** the Development will require the construction of certain public improvements hereinafter defined as the Public Improvements that will enhance and benefit the Town and will enable the use of the Land for the development, retention, and expansion of business enterprises and residential projects; and

**WHEREAS**, the Parties intend that the Construction Costs of the Public Improvements plus Interest will be paid or reimbursed solely from Available TIRZ Revenues or any combination of such revenues up to the Maximum Construction Payment plus Interest; and

**WHEREAS**, Town reserves the right to construct the Public Improvements required for the Private Improvements and otherwise to be constructed by Company and to use the Available TIRZ Revenues, or any combination of such revenues to pay the Construction Costs of the Public Improvements as set forth in this Agreement; and

**WHEREAS**, Town and PEDC intend to enter into an agreement for the PEDC to contribute an amount equal to a percentage of the sales and use tax imposed pursuant to Chapter 501, Texas Local Government Code on behalf of the PEDC, on the sale of Taxable Items Consummated within the TIRZ toward the payment of the construction costs of Infrastructure within TIRZ (the "PEDC Infrastructure Reimbursement Agreement"); and

**WHEREAS** in furtherance of the intent of the Parties to pay for or reimburse the Construction Costs for the Public Improvements plus Interest, the Town intends to: (i) designate the TIRZ and appoint the TIRZ Board; (ii) cause the TIRZ Board to approve a final project and finance plan; (iii) enter into the PEDC Infrastructure Reimbursement Agreement; and (iv) enter into a Participation Agreement that provides County participation in the TIRZ, if the County elects to participate; and

**WHEREAS** in furtherance of the intent of the Parties to pay or reimburse the Construction Costs, for the Public Improvements, plus Interest, the Town intends to provide the Available TIRZ Revenues to pay for, or pay or reimburse Company and/or the Town, as the case may be, for Construction Costs for the Public Improvements, plus Interest; and

**WHEREAS** the Parties intend that all Public Improvements will be constructed on land and easements owned, leased, or licensed by or dedicated to the Town upon terms and conditions approved by the Town Manager; and

**WHEREAS** the Parties intend that all of the costs of the Private Improvements will be paid by Company from private funds; and

**WHEREAS**, the Parties intend that all Construction Costs of the Public Improvements in excess of the Maximum Construction Payment will be paid exclusively by Company from private funds; and

**WHEREAS** to promote local economic development and stimulate business and commercial activity within the Town and to develop and diversify the economy of the state by eliminating unemployment or underemployment and developing or expanding commerce in the state, including the enhancement of the Land, the Town, by executing this Agreement, intends to create the Economic Development Program that will achieve the foregoing economic development objectives and make economic development grants in accordance with such program; and

**NOW THEREFORE**, for and in consideration of the mutual covenants hereinafter set forth, and other valuable consideration the receipt and sufficiency of which are hereby acknowledged the Parties agree as follows:

## **ARTICLE I PURPOSE AND DEFINITIONS**

### **Section 1.1 Purpose**

This Agreement is executed: (a) to provide for the payment or reimbursement to the Company and/or the Town, as the case may be, of, Construction Costs of the Public Improvements up to the Maximum Construction Payment, plus Interest; (b) to establish the Economic Development Program; (c) to implement the Economic Development Program through the payments of economic development grants; (d) to provide to the Available TIRZ Revenues to achieve the foregoing purposes; and (e) to otherwise provide for the development of the Land.

### **Section 1.2 Definitions**

Unless the context requires otherwise, the terms with initial capital letters are defined as follows:

380 Construction Sales Office Revenues means twenty-five percent (25%) of the Town's Sales Tax Receipts from the Comptroller as a result of the sale of Taxable Items by the Retailers Consummated at the Construction Sales Office.

380 Impact Fee Revenues mean fifty percent (50%) of the Impact Fees assessed against the Land and collected by the Town, excluding water and waste water Impact Fees (and the real property located within the TIRZ) that is subject of that certain Water and Sewer Improvement Development Agreement by and among Forest City Prosper Limited Partnership, Prosper Partners L.P. and the Town dated September 15, 2011, as amended by that certain First Amendment to Water and Sewer Improvement Development Agreement dated October 25, 2011.

380 Rollback Revenues means the rollback taxes assessed against the Land and collected by the Town.

Administrative Expenses mean reasonable costs and expenses paid or incurred by the Town and associated with, or incident and allocable to, the organization and administration of the TIRZ, or other funding sources, as applicable, including but not limited to the costs or expenses paid or incurred by the Town as set forth herein. Administrative Expenses include reasonable costs and expenses of the Town and the PEDC in administering the Economic Development Program. Administrative Expenses do not include any costs and expenses incurred by the Company, its contractors, agents and employees.

Agreement means this Development and Financing Agreement, as amended.

Available TIRZ Revenues means TIRZ Revenues less Administrative Expenses.

Bankruptcy or Insolvency means the dissolution or termination of a Party's existence as a going business, insolvency, appointment of receiver for any part of such Party's property and such appointment is not terminated within one hundred eighty (180) days after such appointment is initially made, any general assignment for the benefit of creditors, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against

such Party and such proceeding is not dismissed within one hundred eighty (180) days after the filing thereof.

Captured Appraised Value means the total Taxable Value of all real property taxable by a Taxing Unit, and located within the TIRZ for the year less the Tax Increment Base of the respective Taxing Unit.

Chapter 380 means Chapter 380 of the Texas Local Government Code, as amended.

Chapter 395 means Chapter 395 of the Texas Local Government Code, as amended.

Closing means December 31, 2012, the date the purchase of the Land by Company has been closed and title to the Land transferred to the Company.

Commencement Date means the first June 1 to occur following the Commencement of Construction of any of the Public Improvements.

Commencement of Construction means, for each Development Project, that: (i) plans have been prepared and all approvals required by applicable governmental authorities have been obtained for construction of the Development Project; (ii) all necessary permits pursuant to the approved plans have been issued; and (iii) grading of the applicable portion of the Land has commenced.

Company has the meaning given such term in the introductory paragraph.

Completion of Construction means: (i) for Public Improvements, that the improvements have been completed, inspected by the Town, and accepted by the Town; and (ii) for Private Improvements, that the building or structure has been completed and a certificate of occupancy has been issued by the Town for the applicable building or other structure.

Comptroller means the office of the Texas Comptroller, or its successor.

Construction Agreement means an agreement for the design or construction of Public Improvements as approved by the Town Manager and Company. Whenever possible, Construction Agreements shall be "separated contracts" that divide the contract price into

a stated agreed amount for incorporated materials and a separately agreed amount for skill and labor.

Construction Costs means the costs and expenses paid or incurred as approved by the Town Manager (which approvals shall not be unreasonably withheld or delayed) pursuant to an approved Construction Agreement entered into on or before the 15<sup>th</sup> anniversary of the Effective Date in connection with the design and construction of Public Improvements including, but not limited to, costs for: (i) designing, planning, constructing, acquiring, and installing the Public Improvements, (ii) labor, materials, and payment and performance bonds for Public Improvements, and (iii) architectural, engineering, and insurance premiums related to the Public Improvements. Construction Costs do not include Administrative Expenses, Interest, management fees, right-of-way acquisitions cost, or any expenses of bond issuance, capitalized interest, reserve accounts, or other issuance expenses paid.

Construction Sales Office has the meaning assigned in Section 3.5.

Consummated has the meaning assigned such term by the Texas Tax Code, as amended.

Contractor means the contractors selected by Company or the Town, as the case may be, and jointly approved by the Town and Company to act as a general contractor under any Construction Agreement.

County means Collin County, Texas.

Development has the meaning given such term in the Recitals.

Development Projects means the Private Improvements or the Public Improvements or any portion thereof, as the case may be.

Economic Development Program means the program described in Section 3.2 for the promotion of economic development within the Town, and the Land pursuant to and as authorized by Chapter 380.

Effective Date means the last date of execution hereof by the Parties.

Force Majeure means any contingency or cause beyond the reasonable control of a Party, including, without limitations, acts of God or the public enemy, war, riot, civil commotion, insurrection, adverse weather, government or de facto governmental action or inaction (unless caused by negligence or omissions of such party), fires, explosions, floods, strikes, slowdowns or work stoppages, and shortage of materials and labor.

Impact Fees mean roadway impact fees adopted by the Town pursuant to Chapter 395 or any successor or similar statute.

Impositions mean all taxes, assessments, use and occupancy taxes, charges, excises, license and permit fees, and other charges by public or governmental authority, general and special, ordinary and extraordinary, foreseen and unforeseen, which are or may be assessed, charged, levied, or imposed on Company by any public or governmental authority with respect to the Land or the Private Improvements or with respect to any other land or improvements, tangible personal property, and any other business or property owned by Company and located within the Town.

Infrastructure has the same meaning assigned by Section 501.103, Texas Local Government Code, as amended.

Interest means 3.5% simple interest.

Land has the meaning given such term in the Recitals.

Maximum Construction Payment means \$27,500,000.00, which amount shall be reduced as provided in: (i) Section 3.6 if the Company receives 380 Impact Fee Revenues; (ii) Section 5.2(g) if the County does not contribute to the Tax Increment Fund; ~~and~~ (iii) in Section 5.2(n) and Section 5.2(o) if the Town constructs Public Improvements required for the Private Improvements; *and (iv) shall be further reduced by any credit the Town is required to provide for Impact Fees*

Net Leasable Space means floor area for which a certificate of occupancy has been issued by the Town upon which rental payments are based.

*assessed against the land owned by the Company for any Public Improvements consisting of Roadway Improvements in the Capital Improvement Plan for Roadway Impact Fees which are constructed by the Company.*

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Participation Agreement means an Agreement between the Town and the County pursuant to which the County is expected to contribute up to 50% of the County's Tax Increment to the Tax Increment Fund.

Parties mean the Town and Company.

Payment Request means a written request from Company to the Town for an annual Reimbursement Payment accompanied by: (i) copies of invoices, bills, receipts and such other information as may be reasonably requested by Town to document Construction Costs for Public Improvements, plus Interest; (ii) satisfactory written proof that all amounts owing to Contractors and subcontractors for the Public Improvements have been paid in full evidenced by the customary affidavits executed by Company and/or its Contractors; and (iii) Sales Tax Area Reports and Sales Tax Certificates, as applicable.

PEDC means the Prosper Economic Development Corporation.

PEDC/MSW Economic Development Incentive Agreement means that certain agreement by and between the PEDC and Company pursuant to which the PEDC reimburses Company for the cost of construction of certain Infrastructure constructed by Company within the Town.

PEDC Infrastructure Reimbursement Agreement means that certain agreement by and between the Town and the PEDC pursuant to which the PEDC shall, upon the termination of PEDC/MSW Economic Development Incentive Agreement, pay to the Town for deposit into the Tax Increment Fund as TIRZ Revenues the PEDC Sales Tax Receipts for payment of Construction Costs of Infrastructure within the TIRZ, plus Interest.

Person means an individual, corporation, partnership, trust, estate, unincorporated organization, association or other entity.

Private Improvements means improvements (other than the Public Improvements) to be constructed by the Company within the Land using private funds without reimbursement pursuant to this Agreement.

Project Plan means the project plan for the development or redevelopment of TIRZ, as amended.

Public Improvements means the public improvements described on **Exhibit 2** and which are contained in the Project Plan. Public Improvements do not include any Infrastructure for which the Company is reimbursed under the PEDC/MSW Economic Development Incentive Agreement.

Regulatory Requirements mean the uniformly applicable codes, rules, regulations, and ordinances of the Town (including without limitation the Zoning Ordinance), the requirements and provisions of any state or federal law, and any permits, rules, orders or regulations issued or adopted from time to time by any state or federal regulatory authority having jurisdiction concerning storm water management, drinking water standards, water quality standards, or the discharge of wastewater or effluent or otherwise having jurisdiction over the Land.

Reimbursement Payment means the annual payment to the Company for Construction Costs for Public Improvements, plus Interest, from Available TIRZ Revenues as set forth herein.

Related Agreement means any agreement (other than this Agreement) by and between the Town and/or the PEDC and the Company, or any affiliated or related entities of the Company that is related to the Development of the Land.

Retailers means: (i) with respect to the TIRZ, the Company and any owner/occupants, tenants, and lessees within the Development and each and every entity required by the Comptroller to collect Sales and Use Tax on the sale of Taxable Items Consummated within the TIRZ, (ii) with respect to the 380 Construction Sales Office Revenues, Company, Contractor(s) and each and every entity required by the Comptroller to collect Sales and Use Tax on the sale of Taxable Items Consummated at the Construction Sales Office.

Sales and Use Tax means (i) with respect to the Town, the Town's one percent (1%) general municipal sales and use tax imposed pursuant to Chapter 321, Texas Tax Code, on the sale of Taxable Items by Retailers Consummated within the TIRZ or at the Construction Sales Office, as applicable, excluding any additional sales and use tax imposed by the Town for any purpose, including one-half of one percent (0.5%) sales and use tax imposed by the Town pursuant to the Development Corporation Act of 1979, Chapters 501-501, Texas Local Government Code, on behalf of the Prosper Economic Development Corporation, and the one-half of one percent (0.5%) Sales and Use Tax imposed by the Town for property tax reduction; and (ii) with respect to PEDC, one-half of one percent (0.5%) sales and use tax imposed pursuant to the Development Corporation Act, Chapter 501, Texas Local Government Code, on behalf of PEDC, on the sale of Taxable Items by the Retailers Consummated within the TIRZ pursuant to the PEDC Infrastructure Reimbursement Agreement.

Sales Tax Area Reports means reports provided by the Comptroller pursuant to Texas Tax Code, Section 321.3022, or provision of the Texas Tax Code, with respect to Sales and Use Tax allocations to the Town attributable to sale of Taxable Items by the Retailers Consummated within the TIRZ, or the Construction Sales Office, as applicable, or if such reports are not available from the Comptroller such other documentation in a form reasonably acceptable to the Town setting forth the collection of Sales and Use Tax by the Retailers received by the Town from the Comptroller for the sale of Taxable Items by the Retailers Consummated in the Town within the TIRZ or at the Construction Sales Office as applicable.

Sales Tax Base means with respect to the Town the amount of municipal Sales and Use Tax attributable to the TIRZ for the year in which the TIRZ is designated.

Sales Tax Certificate means one or more Sales Tax Area Reports or a report provided by the Comptroller to the Town in accordance with Section 321.3022, Texas Tax Code (or other applicable provision of the Texas Tax Code), which lists the amount of Sales and Use Tax collected (including any refunds, credits or adjustments) for the applicable period paid by Retailers and received by the Town (and the PEDC) from the Comptroller

from the sale of Taxable Items Consummated within the TIRZ or the Construction Sales Office, as applicable and, in turn, paid by the Comptroller to the Town (and the PEDC) for use by the Town in accordance with this Agreement; or, if such a report is not available, then a certificate or statement in a form reasonably approved by the Town, setting forth the collection of Sales and Use Tax (including any refunds, credits or adjustments) by Retailers received by the Town from the Comptroller, from the sale of Taxable Items Consummated within the TIRZ or the Construction Sales Office, as applicable, including supporting documentation, to be provided by Retailers that provides the same or similar information, as such other information as the Town may reasonable require from time to time.

Sales Tax Increment means the amount of the Town's municipal Sales and Use Tax above the Sales Tax Base that is generated within the TIRZ.

Sales Tax Receipts means (i) with respect to the Town, twenty-five percent (25%) of the Town's receipts of Sales and Use Tax from the Comptroller from the Retailers' collection of Sales and Use Tax (it being expressly understood that the Town's use of the sales and use tax receipts are being used only as a measurement for its use of general funds to make a grant for economic development purposes) as a result of the sale of Taxable Items by Retailers for the applicable period Consummated within the TIRZ or at the Construction Sales Office, as applicable; and (ii) with respect to the PEDC, fifty percent (50%) of the PEDC's receipts of Sales and Use Tax from the Comptroller from the Retailers' collection of Sales and Use Tax (it being expressly understood that the PEDC's use of the sales and use tax receipts are being used only as a measurement for its use of general funds to make a grant for economic development purposes) as a result of the sale of Taxable Items by Retailers for the applicable period Consummated within the TIRZ.

Tax Increment means (i) the total amount of property taxes assessed and collected by a Taxing Unit for the year on the Captured Value of real property taxable by such Taxing Unit and located in the TIRZ (the amount of the Tax Increment contributed by a Taxing Unit shall be limited to any maximum amount or other terms set forth in the respective participation agreement of such Taxing Unit, or ordinance designating the Zone in the

case of the Town; and (ii) for purposes of this Agreement the amount of any Sales Tax Increment to be contributed by the Town to the Tax Increment Fund.

Tax Increment Base means the total Taxable Value of all real property taxable by a Taxing Unit and located within the TIRZ for the year in which the TIRZ is designated.

Tax Increment Fund means the fund by that name required to be created and maintained by the Town in accordance with the TIRZ Act and into which TIRZ Revenues are deposited and from which Construction Costs for Public Improvements, plus Interest, shall be paid as set forth herein.

Taxable Items means both “taxable items” and “taxable services” as those terms are defined by Chapter 151, Texas Tax Code, as amended.

Tax Protest is defined in Section 5.2 (i).

Taxable Value means the appraised value as certified by the appraisal district, or its successor, for a given year.

Taxing Unit means the Town and any taxing unit that taxes real property within the TIRZ and enters into an agreement with the Town to contribute Tax Increment to the Tax Increment Fund.

TIRZ means Reinvestment Zone Number Two, Town of Prosper to be designated by the Town pursuant to the TIRZ Act, the boundaries of which will be coterminous with the Land and which shall have a term of not less than twenty-five (25) years unless extended by the governing body of the Town.

TIRZ Act means Chapter 311, Texas Tax Code, as amended.

TIRZ Board means the Board of Directors of the TIRZ.

TIRZ Obligations has the meaning given such term in Section 3.1.

TIRZ Revenues means: (i) twenty-five (25%) of the Town’s municipal Sales Tax Increment, (ii) seventy percent (70%) of the Town’s municipal ad valorem Tax

Increment, (iii) fifty percent (50%) of the County's ad valorem Tax Increment (or such lesser participation, if any, that the County approves pursuant to the Participation Agreement), (iv) fifty percent (50%) of PEDC's Sales Tax Receipts pursuant to the PEDC Infrastructure Reimbursement Agreement, (v) the 380 Construction Sales Office Revenues, plus (vi) one hundred percent (100%) of the 380 Rollback Revenues.

Town means the Town of Prosper, Texas.

Town Manager means the Manager of the Town or any person appointed by the governing body of the Town to perform the duties of the Town Manager.

Zoning Ordinance has the meaning given such term in the Recitals.

## **ARTICLE II TERM**

The term of this Agreement shall begin on the Effective Date and shall continue until the earlier of: (i) the date of termination of the TIRZ; (ii) the date that the Town has paid the Maximum Construction Payment, plus Interest; or (iii) the date the Town has paid Construction Costs plus Interest totaling \$44,199,000.00. The expiration of the term of this Agreement shall not affect the term of the TIRZ, or any other agreement executed by the Town pursuant to this Agreement.

## **ARTICLE III TIRZ; ECONOMIC DEVELOPMENT PROGRAM**

### **Section 3.1 Tax Increment Reinvestment Zone**

The Town shall use all reasonable efforts to: (i) designate the TIRZ by ordinance; (ii) approve a preliminary project and finance plan for the TIRZ that is consistent with this Agreement; (iii) approve the form of a Participation Agreement with the County; and (iv) enter into the PEDC Infrastructure Reimbursement Agreement. If the actions described in Section 3.1(iii) and Section 3.1(iv) are not completed by December 31, 2012, and if the actions described by Section 3.1(i) and Section 3.1(ii) are not completed by January 22, 2013 (or such later date to which the TIRZ public hearing may be adjourned by the governing body of the Town) (collectively, the "TIRZ Obligations"), either the Company or the Town may terminate this

Agreement by written notice to the other Party. Any costs for the Development or Development Projects incurred by the Company prior to the TIRZ Obligations being completed shall be the sole expense of Company.

### **Section 3.2 Economic Development Program**

The 157-acre Development is strategically located in one of the fastest growing areas of north Texas at the intersection of the Dallas North Tollway (a major, multi-lane, divided north-south highway that begins in downtown Dallas and will extend northerly through and beyond the Town) and U.S. Highway 380 (a major, multi-lane, east-west divided highway through Denton and Collin Counties connecting the City of Denton with the City of McKinney). The location affords the Development a significant competitive advantage over other locations along the Tollway and US 380 if the public infrastructure necessary to support the Development can be timely constructed. The governing body of the Town has determined that the Development is important to the economic future of the Town and that it is in the best interest of the Town and its current and future residents to provide economic development grants to encourage and accelerate the construction of the public infrastructure at the earliest possible time so that the Town can take maximum advantage of the competitive location of the Development. The governing body of the Town has further determined that the Development will promote local economic development and stimulate business and commercial activity within the Town, will develop and diversify the economy of the state by eliminating unemployment or underemployment, will develop and expand commerce in the Town and the state, will increase ad valorem tax values and sales tax revenues, will create new temporary and permanent jobs, and will give the Town an economic advantage over other nearby cities and towns competing for the same economic development opportunities. Based on such determinations and in consideration for Company's performance of their obligations under this Agreement, the governing body of the Town hereby creates an "Economic Development Program" pursuant to the authority of Chapter 380. The purpose of the Economic Development Program hereby created is to authorize the economic development grants described herein.

### **Section 3.3 380 Rollback Revenues**

To implement the Economic Development Program, the Town hereby agrees during the

term of this Agreement, provided: (i) the TIRZ Obligations have been completed; and (ii) the Company does not have an uncured breach or default of this Agreement or a Related Agreement, to deposit the 380 Rollback Revenues into the Tax Increment Fund.

### **Section 3.4 380 Construction Sales Office Revenues**

(a) The Company may, to the extent allowed by law, establish an office or other facility within the Town but outside the TIRZ at which materials, goods, and other Taxable Items for the construction of Private Improvements shall be purchased by the Contractors and the Retailers (the Construction Sales Office). To implement the Economic Development Program, the Town hereby agrees during the term of this Agreement, provided: (i) the TIRZ Obligations have been completed; (ii) the Company does not have an uncured breach or default of this Agreement or a Related Agreement; and subject to the conditions set forth in this Section, to deposit the 380 Construction Sales Office Revenues into the Tax Increment Fund. The obligation to deposit 380 Construction Sales Office shall terminate without notice thereof: (1) in the event the Construction Sales Office is not established within ninety (90) days after the Effective Date; (2) the date the Construction Sales Office ceases to collect Sales and Use Tax; or (3) the date the Comptroller determines that the Construction Sales Office is not a place of business for the purpose of Sales and Use Taxes being sourced to the Town. To further implement the Economic Development Program, the Town will use all reasonable efforts to obtain an exemption from Sales and Uses Taxes with respect to all Taxable Items related to the construction of the Public Improvements.

(b) In the event Company establishes the Construction Sales Office, the Company shall be responsible for providing a Sales Tax Certificate, which provides information regarding the amount of Sales and Use Tax (including any refunds, credits or adjustments) paid based on the sale of Taxable Items Consummated at the Construction Sales Office and, in turn, remitted by the Comptroller to the Town. The obligation of the Town to deposit the 380 Construction Sales Office Revenues into the Tax Increment Fund shall be conditioned upon the compliance and satisfaction by Company of the terms and conditions of this Agreement and each of the conditions set forth below:

(i) Good Standing. The Company shall not have an uncured breach or default of this Agreement, or a Related Agreement.

(ii) Sales Tax Certificate. The Town shall have received a Sales Tax Area Report from the Comptroller and a Sales Tax Certificate from the Company for the applicable reporting period. For purposes of this Section reporting period shall mean a calendar quarter except that the first reporting period shall begin on date a certificate of occupancy is issued for the Construction Sales Office and continue through and include the following calendar quarter following such date.

(iii) Beginning ninety (90) days following the first reporting period and continuing on each ninety (90) days following the end of each calendar quarter thereafter that this Agreement is in effect, the Company shall provide the Town with a Sales Tax Certificate for the applicable reporting period. The Town shall have no duty to calculate the Sales Tax Receipts for deposit into the Tax Increment Fund during the term of this Agreement until such time as Company has provided the Town a Sales Tax Certificate for the applicable period. The Town may, but is not required to, provide Company with a form for the Sales Tax Certificate required herein. At the request of the Town, Company shall provide such additional documentation as may be reasonably requested by the Town to evidence, support and establish the Sales Tax Receipts (including Sales and Use Tax paid directly to the Comptroller pursuant to a direct payment permit) received by the Town from the Comptroller for the sale of Taxable Items Consummated at the Construction Sales Office. The Sales Tax Certificate shall at a minimum contain, include or be accompanied by the following: (1) a schedule detailing the amount of total sales and the amount of Sales and Use Tax collected and paid to the Comptroller as a result of the sale of Taxable Items by Retailers Consummated at the Construction Sales Office for the applicable reporting period; (2) a schedule detailing the amount of total purchases and the amount of Sales and Use Tax paid directly or through vendors to the Comptroller as a result of the purchase of Taxable Items by the Retailers Consummated at the Construction Sales Office for the applicable reporting period; (3) a copy of all sales and use tax returns and reports, sales and use tax prepayment returns, direct payment permits and reports, including amended sales and use tax returns or reports, filed by the Retailers

for the applicable reporting period showing the Sales Tax Receipts, which returns and reports may be redacted to remove information not relevant to the determination of the Sales Tax Receipts; (4) a copy of all direct payment and self-assessment returns, including amended returns, filed by the Retailers for the applicable reporting period showing the Sales Tax Receipts, which returns and reports may be redacted to remove information not relevant to the determination of the Sales Tax Receipts; (5) documentation adequate to substantiate the amount of any Sales Tax Receipts that are not included in a Sales Tax Area Report or in a Sales and Use Tax return or report filed by the Retailers; and (6) any documentation required by other provisions of this Agreement.

### **Section 3.5 Impact Fees**

To implement the Economic Development Program, the Town shall use all reasonable efforts, to enter into one or more 380 Agreements with Company or Retailers to provide economic development grants from the 380 Impact Fee Revenues assessed against the Land and collected and deposited into a segregated account (380 Impact Fee Revenue). Each such 380 Agreement shall be recommended by the Company and subject to approval by the governing body of the Town on a case-by-case basis. 380 Impact Fee Revenues paid to the Company under this section shall be credited against or reduce on a dollar for dollar basis the Maximum Construction Payment. Any funds remaining in the account upon expiration or termination of this Agreement shall be deposited into the general fund of the Town.

### **Section 3.6 PEDC Infrastructure Reimbursement Agreement**

To implement the Economic Development Program, the Town and the PEDC intend to enter into the PEDC Infrastructure Reimbursement Agreement. The Town, provided: (i) the TIRZ Obligations have been completed; and (ii) the Company does not have an uncured breach or default of this Agreement or a Related Agreement, agrees to deposit into the Tax Increment Fund funds paid by the PEDC to the Town pursuant to the PEDC Infrastructure Reimbursement Agreement. The funds deposited into the Tax Increment Fund from the payments made by the PEDC to the Town pursuant to the PEDC Infrastructure Reimbursement Agreement shall be used solely to pay for, or reimburse Company and/or the Town for, the Construction Costs of the

Public Improvements that meet the definition of Infrastructure, plus related Interest as set forth herein.

## ARTICLE IV IMPROVEMENTS

### Section 4.1 Construction of Private Improvements

(a) The Company agrees at its sole cost and expense to design and construct the Private Improvements described in Section 4.1(b) below. The Company shall construct the Private Improvements in conformance with the Regulatory Requirements and the Zoning Ordinance. The Town may require the Company to submit a preliminary development plan for each phase of the Development. The Company has the right to accelerate the Commencement of Construction of Private Improvements. Whenever possible, contracts for the construction of Private Improvements shall be "separated contracts" that divide the contract price into a stated agreed amount for incorporated materials and a separately agreed amount for skill and labor.

(b) Construction by Company.

(i) Phase 1 Private Improvements. The Company agrees, subject to events of Force Majeure, to: (1) cause Commencement of Construction of at least 200,000 square feet of Net Leasable Space of taxable non-residential Private Improvements and associated parking within four years after the TIRZ Obligations have been completed; and (2) to cause Completion of Construction thereof within five years after the TIRZ Obligations have been completed. The Taxable Value of the Phase 1 Private Improvements added to the Land as of the first January 1<sup>st</sup> to occur after the Completion of Construction of the Phase 1 Private Improvements shall equal or exceed \$26,000,000.00. No residential Private Improvements shall be constructed until Completion of Construction of the Phase 1 Private Improvements.

(ii) Phase 2 Private Improvements. The Company agrees, subject to events of Force Majeure, to: (1) cause Commencement of Construction of at least an additional 200,000 square feet of Net Leasable Space of taxable non-residential Private Improvements and associated parking within seven years after the TIRZ Obligations have been completed; and (2) to cause Completion of Construction thereof within eight years

after the TIRZ Obligations have been completed. The Taxable Value of the Phase 2 Private Improvements added to the Land as of the first January 1<sup>st</sup> to occur after the Completion of Construction of the Phase 2 Private Improvements shall equal or exceed ~~\$26,000,000.00~~<sup>29,000,000.00</sup>. Residential Private Improvements shall not exceed 300,000 square feet until Completion of Construction of the Phase 2 Private Improvements.

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(iii) Phase 3 Private Improvements. The Company agrees, subject to events of Force Majeure, to: (1) cause Commencement of Construction of at least an additional 200,000 square feet of Net Leasable Space of taxable non-residential Private Improvements and associated parking within 10 years after the TIRZ Obligations have been completed; and (2) to cause Completion of Construction thereof within 11 years after the TIRZ Obligations have been completed. The Taxable Value of the Phase 3 Private Improvements added to the Land as of the first January 1<sup>st</sup> to occur after the Completion of Construction of the Phase 3 Private Improvements shall equal or exceed ~~\$26,000,000.00~~<sup>29,000,000.00</sup>. Residential Private Improvements shall not exceed 650,000 square feet until Completion of Construction of the Phase 3 Private Improvements

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#### **Section 4.2 Construction of Public Improvements**

(a) The Company agrees, subject to events of Force Majeure, to cause Commencement of Construction of two southbound service road lanes of the Dallas North Tollway (the "DNT") from Highway 380 to First Street within four years after the TIRZ Obligations have been completed and to cause Completion of Construction thereof within five years after the TIRZ Obligations have been completed.

(b) The Company agrees, subject to events of Force Majeure, to cause Commencement of Construction of two lanes approved by the Town in accordance with the Town's Thoroughfare Plan connecting the DNT to Highway 380 within seven years after the TIRZ Obligations have been completed and to cause Completion of Construction thereof within eight years after the TIRZ Obligations have been completed.

(c) The Company agrees, subject to events of Force Majeure, to cause Commencement of Construction of two additional lanes approved by the Town in accordance with the Town's Thoroughfare Plan connecting the DNT to Highway 380 within 10 years after

the TIRZ Obligations have been completed and to cause Completion of Construction thereof within 11 years after the TIRZ Obligations have been completed.

(d) Unless otherwise approved in writing by the Town, all Public Improvements shall be constructed and dedicated to the Town in accordance with the Regulatory Requirements, including the provision of payment and performance bonds customarily required by the Town. Except as provided in this Section 4.2, the Public Improvements shall be constructed in phases as determined by the Company to be necessary to support and provide the public infrastructure necessary for the Company's construction of Private Improvements.

(e) Prior to or concurrently with the Commencement of Construction of any Public Improvements, Company shall dedicate or convey right-of-way and site easements by conveyance plat and off-site easements by separate instrument, without cost to the Town and in accordance with the Regulatory Requirements, the rights-of-way and easements on and across the Land that are needed for the construction, operation, and maintenance of the Public Improvements.

(f) The following requirements apply to Construction Agreements:

(i) The Company shall use reasonable efforts to solicit bids from at least three contractors;

(ii) The Company shall provide the Town with true and correct copies of bids within five business days after Company's receipt of same;

(iii) Plans and specifications shall comply with all Regulatory Requirements;

(iv) The Town shall approve the form of all Construction Agreements, which approvals shall not be unreasonably withheld or delayed;

(v) The Town engineer shall review all final bids for each Construction Agreement;

(vi) The Company and the Town shall mutually agree on the lowest responsible bidder prior to Company's award of each Construction Agreement;

(vii) The Town shall approve all change orders to Construction Agreements;

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(xi) Each Construction Agreement shall provide that the Contractor shall indemnify the Town and Company for the negligent acts or omissions of the Contractor. RS KT

(viii) The Company shall provide to the Town fully executed copies of all Construction Agreements, including amendments, supplements, and change orders thereto;

(ix) Each Construction Agreement shall provide that the Contractor is an independent contractor, independent of and not the agent of the Town or the TIRZ Board and that the Contractor is responsible for retaining, and shall retain, the services of necessary and appropriate architects and engineers; and

(x) Each Construction Agreement shall provide that if any provision is in conflict with this Agreement, this Agreement shall control to the extent of the conflict.

(g) Each Construction Agreement shall require the Contractor and its subcontractors to carry the following types of insurance:

(i) Commercial general liability insurance insuring the Town, the TIRZ Board, the Contractor, and Company against liability for injury to or death of a person or persons and for damage to property occasioned by or arising out of the activities of Company, the Contractor, the Town, or the TIRZ Board and their respective agents, contractors, or employees, in the amount of \$1,000,000 Per Occurrence, \$2,000,000 General Aggregate Bodily Injury and Property Damage. The Contractor may procure and maintain a Master or Controlled Insurance policy to satisfy the requirements of this section, which may cover other property or locations of the Contractor and its affiliates, so long as the coverage required in this section is separate;

(ii) Worker's Compensation insurance as required by law;

(iii) Builder's Risk insurance in the amount of the construction values;

(iv) \$10,000,000 Umbrella/Excess insurance;

(v) Automobile insurance covering all operations of the Contractor pursuant to the Construction Agreement involving the use of motor vehicles, including all owned, non owned and hired vehicles with minimum limits of not less than One Million Dollars (\$1,000,000) combined single limit for bodily injury, death and property damage liability

(vi) \$1,000,000 Environmental Insurance.

(h) Each Construction Agreement shall include the following with respect to insurance coverage required by this Agreement:

(i) To the extent available, each policy shall be endorsed to provided that the insurer waives all rights of subrogation against the Town and the TIRZ Board;

(ii) Each policy of insurance with the exception of Workers Compensation and professional liability shall be endorsed to include the Town (including its former, current, and future officers, agents, and employees) and the TIRZ Board (including its former, current, and future officers, agents, and employees) as additional insureds;

(iii) Policies shall be procured from financially sound and reputable insurers licensed to do business in the State of Texas and having an A.M. Best rating of not less than A-8 or, if not rated with A.M. Best, the equivalent of A.M. Best's surplus size of A-8 (or otherwise approved by the Town Manager);

(iv) Each policy, with the exception of Workers Compensation and professional liability, shall be endorsed to provide the Town and Board thirty (30) days' written notice prior to any cancellation, termination or material change of coverage; and

(v) The Contractor shall deliver to the Town the policies and/or certificates of insurance evidencing the required insurance coverage before the Commencement of Construction and within 10 days before expiration of coverage, or as soon as practicable, deliver renewal policies or certificates of insurance evidencing renewal and payment of premium. On every date of renewal of the required insurance policies, the Contractor shall cause a Certificate of Insurance and policy endorsements to be issued evidencing the required insurance herein and delivered to the Town and Board. In addition the Contractor shall within ten (10) business days after written request provide the Town and Board with the Certificates of Insurance and policy endorsements for the insurance required herein (which request may include copies of such policies). The delivery of the Certificates of Insurance and the policy endorsements (including copies of such insurance policies) to the Town and Board is a condition precedent to the payment of any amounts due to Contractor. The failure to provide valid Certificates of Insurance and policy endorsements shall be deemed a default and/or breach of the Construction Agreement.

(i) The Company shall, at its sole cost, acquire all off-site (outside of the Land and the TIRZ) right-of-way and easements necessary for the Public Improvements. The cost of acquisition for any off-site right-of-way and easements for the Public Improvements shall be the sole costs of Company and shall not be paid or reimbursed from the Available TIRZ Revenues. Unless otherwise prohibited by applicable law, the Town agrees to exercise its power of eminent domain to acquire such rights-of-way and easements for Public Improvements when Company is unable to acquire them after the exercise of commercially reasonable efforts, provided Company enters into separate agreements with the Town pursuant to which Company pays or advances all costs of such eminent domain proceedings including but not limited to the Town's legal fees, survey fees, appraisal fees, consulting fees, relocation costs, expert fees, and compensation for the taking and any damages, and including reasonable amounts to compensate the Town for work performed by Town staff.

**Section 4.3 Design and Construction of Projects**

(a) Prior to construction, Company shall make, or cause to be made, application for any necessary permits and approvals required by the Town and any applicable governmental authorities to be issued for the construction of the Development Projects. The Company shall require the design, inspection and supervision of the construction of the Development Projects to be undertaken in accordance with Town standards and regulations.

(b) Prior to Commencement of Construction of the Development Projects Company shall submit, or cause to be submitted, plans and specifications for approval by the Town.

(c) Upon Completion of Construction of any portion of the Public Improvements, Company shall provide the Town with a final cost summary of all costs incurred and paid associated with the construction of that portion of the Public Improvements, and provide proof that all amounts owing to Contractors and subcontractors have been paid in full evidenced by the customary affidavits executed by Company and/or its Contractors with regard to that portion of the Public Improvements.

(d) The Company agrees to cause the Contractors and subcontractors which construct the Public Improvements to provide payment bonds and a performance bonds for the construction of the Public Improvements to ensure completion of thereof in the same manner as

contracts that are subject to Chapter 2253, Texas Government Code, in forms reasonably satisfactory to the Town Manager.

#### **Section 4.4 Liens, Encumbrances, and Charges**

The Company shall not create nor allow or permit any liens, encumbrances, or charges of any kind whatsoever against the Public Improvements arising from any work performed by any Contractor by or on behalf of Company.

#### **Section 4.5 Company's Right to Mortgage**

Notwithstanding any other provisions of this Agreement, Company shall at all times have the right to encumber, pledge, grant, or convey its right, title and interest in and to this Agreement, any portion of the Land, and/or any Development Project, or any portion thereof, by way of a deed of trust or other mortgage instrument to secure the payment of any loan or loans obtained by Company (including any loan obtained from the United States Department of Agriculture or other federal agency). The terms and conditions of such an encumbrance, pledge, grant, or conveyance that apply to the Public Improvements shall be subject to the approval of the governing body of the Town. Any encumbrance, pledge, grant, or conveyance authorized by this section shall be subject and subordinate to liens for taxes, assessments, and other charges duly levied, assessed, or imposed by political subdivisions or taxing jurisdictions as provided by state law or pursuant to this Agreement.

#### **Section 4.6 Maintenance of Common Areas**

Prior to the issuance of the first certificate of occupancy for any Private Improvements, Company shall provide for the maintenance, repair, and capital replacement of common areas of the Private Improvements through one or more of the following: (1) the creation of one or more public improvement districts pursuant to Chapter 372, Texas Local Government Code, as amended, to perform such functions, if the Town approves such following the filing of a petition with the Town requesting the creation of one or more public improvement districts to perform such functions; (2) the creation of one or more property owners association, including recorded covenants, restrictions, and conditions, to perform such functions to be approved by the Town Manager; or (3) the establishment of any other mechanism approved by the Town Manager to perform such functions.

#### **Section 4.7 Zoning Ordinance Control**

Notwithstanding any provision of this Agreement to the contrary, in the event of any conflict or inconsistency between this Agreement and the applicable Regulatory Requirements of the Town with respect to the design or construction of Public Improvements or with respect to the design, construction, occupancy, or use of any Private Improvements, the provisions of the Town's Regulatory Requirements shall control.

#### **Section 4.8 Development**

The Company agrees to design and construct the Development in accordance with the design guidelines of the Zoning Ordinance.

### **ARTICLE V PAYMENT OF CONSTRUCTION COSTS**

#### **Section 5.1 Private Improvements**

The Company shall pay one hundred percent (100%) of the Construction Costs of the Private Improvements without payment or reimbursement from the Town through Available TIRZ Revenues or any other source of funds from the Town or the PEDC.

#### **Section 5.2 Public Improvements**

(a) Reimbursement Payments. (a) Subject to Company's continued satisfaction of all the terms and conditions of this Agreement, the Town agrees to reimburse Company for the Construction Costs for Public Improvements, plus Interest, pursuant to Town approved Construction Agreements from Reimbursement Payments as set forth herein. The Town shall, pursuant to the Reimbursement Payments, reimburse the Company for approved Construction Costs for the Public Improvements up to the Maximum Construction Payment, plus Interest.

(b) The Town shall make Reimbursement Payments to the Company for completed Public Improvements on an annual basis within thirty (30) days after receipt of a Payment Request following June 1 of each calendar year (the "Annual Payment Date") beginning with June 1 of the calendar year following the Commencement Date.

(c) The amount of each annual Reimbursement Payment shall be the lesser of: (i) the amount of the Construction Costs for Public Improvements, plus Interest, then eligible for

payment that have not been paid to Company; and (ii) the amount of the balance of the Tax Increment Fund after giving effect to the Tax Increment Fund Priorities set forth in below. If there are insufficient funds for an annual Reimbursement Payment, the un-reimbursed Construction Costs for Public Improvements are carried forward, with the accrual of Interest to succeeding Annual Payment Dates until reimbursement has been made in full or termination of this Agreement, whichever occurs first. Beginning June 1 of the 10<sup>th</sup> year following the date the TIRZ obligations have been completed, if the Available TIRZ Revenues for the preceding 12-month period are insufficient to pay the accrued but unpaid Interest for such 12-month period, then Interest on the un-reimbursed Construction Costs shall be suspended until the succeeding June 1.

(d) The Parties agree that the Reimbursement Payments shall be reimbursed solely from funds from the Tax Increment Fund, and only to the extent that such funds are available, giving effect to the Tax Increment Fund Priorities set forth below. The Company acknowledges and agrees that the Town is only obligated to reimburse the Company for Construction Costs for Public Improvements, plus Interest, to the extent that there are available funds in the Tax Increment Fund giving effect to Tax Increment Fund Priorities during the term of this Agreement. The obligation of the Town to pay the Company Construction Costs for Public Improvements, plus Interest, is limited to the funds deposited in the fund for the Tax Increment Fund during the term of this Agreement.

(e) The Company agrees to look solely to funds in the Tax Increment Fund, not the Town general or other funds, for payment of the Reimbursement Payments. Nothing in this Agreement shall be construed to obligate the Town to provide Reimbursement Payments from any other source of funds or to otherwise require the Town to pay the Company for Construction Costs for Public Improvements plus Interest in the event there are insufficient funds in the Tax Increment Fund to pay Construction Costs for Public Improvements, plus Interest, or in the event the TIRZ terminates prior to payment in full of the Construction Costs for Public Improvements, plus Interest; provided the Town shall not adopt an ordinance providing for termination of TIRZ on a date earlier than provided in the ordinance that designated the TIRZ unless this Agreement has been terminated. Upon termination of this Agreement or the TIRZ, any Construction Costs for Public Improvements, plus Interest, under this Agreement that remain un-reimbursed or that

remain unpaid, due to lack of availability of funds in the Tax Increment Fund, or due to the failure of Company to satisfy any precondition of reimbursement under this Agreement, shall no longer be considered obligations of the TIRZ or the Tax Increment Fund, and any obligation of the Town to provide Reimbursement Payments to Company for Construction Costs for Public Improvements, plus Interest, shall automatically expire and terminate on such date. It is the intention and agreement of the Parties that the Construction Costs incurred by the Company for the Public Improvements (not exceeding the Maximum Construction Payment), plus Interest, shall be paid or reimbursed solely from funds in the Tax Increment Fund. In no event shall the Town be liable for, or be responsible for, payment or reimbursement of any Construction Costs for the Public Improvements, plus Interest, except from the Tax Increment Fund. The Company is responsible for all Construction Costs for the Public Improvements, plus Interest, in the event there are insufficient funds in the Tax Increment Fund to pay to, or reimburse, Company for the Construction Costs for the Public Improvements, plus Interest.

If the scope of work performed under any Construction Agreement is increased as a result of any change order that is not approved by the Town, the cost of the work covered by the change order shall be borne solely by Company and not subject to a Reimbursement Payment from funds in the Tax Increment Fund. If the scope of work performed under any Construction Agreement is increased as a result of any change order that is approved by the Town Manager in writing by, the cost of the work covered by the change order shall be subject to a Reimbursement Payment from funds in the Tax Increment Fund.

(f) Tax Increment Fund Priorities. TIRZ Revenues deposited in the Tax Increment Fund shall be applied in the following order of priority:

- (i) amounts pledged or required for payment of bonds issued by the Town, from time to time, to pay Construction Costs, plus Interest, to the Company;
- (ii) reasonable administrative costs of the TIRZ;
- (iii) maintain a Tax Increment Fund minimum balance of \$25,000.00; and
- (iv) Reimbursement Payments to the Company or Town and/or the Board for Construction Costs paid or incurred for Public Improvements in the order in which the costs were paid or incurred.

(g) The Company acknowledges and agrees that the use of Tax Increment contributed by the County and any other Taxing Unit shall be subject to any rules, regulations, restrictions, and limitations set forth in the respective Participation Agreement. The Company acknowledges that the Town shall comply in all respects with the Collin County Policy for County Participation in Tax Increment Financing Reinvestment Zones for use of Collin County Tax Increment for reimbursement of eligible project costs. If the County does not enter into a Participation Agreement in which the County contributes at least fifty percent (50%) of the County's Tax Increment to the Tax Increment Fund, the Maximum Construction Payment shall be reduced by: (1) the amount of the Tax Increment the County would have contributed had the County participated at fifty percent (50%) of its Tax Increment; **less** (2) the amount of the County tax Increment, if any, by which the County does participate. For illustration purposes only, assume the County does not contribute any Tax Increment, then the Maximum Construction Payment would be reduced on an annual basis by an amount equal to fifty percent (50%) of the County's real property taxes imposed for the TIRZ for the given tax year. For further illustration, assume that the County does participate in the TIRZ and contributes ten percent (10%) of its Tax Increment, then the Maximum Construction Payment would be reduced on an annual basis by an amount equal to forty percent (40%) of the County's real property taxes imposed for the TIRZ for the given tax year. The failure by the County to participate shall not, however, entitle the Town to terminate this Agreement.

(h) Current Revenue. The Reimbursement Payments to be provided herein shall be paid solely from lawful available funds in the Tax Increment Fund. Under no circumstances shall obligations of the Town and/or the TIRZ Board hereunder be deemed to create any debt within the meaning of any constitutional or statutory provision.

(i) Tax Protest. In the event Company or any owner or lessee of any real property and/or improvements within the TIRZ ("Protest Property") timely and properly protests or contests (including any motion to correct the appraisal roll) the Taxable Value and/or the taxation of the Protest Property, or any portion thereof, with the applicable appraisal district (or its successor)("Tax Protest") the obligation of the Town to provide the Reimbursement Payments from the Tax Increment Fund with respect to such Protest Property or portion thereof, for such tax year shall be abated with regard to the amount of ad valorem taxes that are in dispute (based

on the amount or portion of taxable value of the Protest Property in dispute) until a final determination has been made of such Tax Protest. In the event of a Tax Protest the Town shall send written notice to Company of the amount of ad valorem taxes that are in dispute (based on the amount or portion of taxable value of the Protest Property in dispute). However in the event a Tax Protest results in a final determination that changes the appraised value and/or the Taxable Value of the Protest Property or the amount of ad valorem taxes assessed and due for the Protest Property, or portion thereof, after a Reimbursement Payment has been paid which includes Tax Increment for such Protest Property for such tax year, the Tax Increment Fund will be adjusted accordingly and the Reimbursement Payment with respect to such tax year shall be adjusted (increased or decreased as the case may be) accordingly on the date of payment of the next payment date for a Reimbursement Payment, or within thirty (30) business days after such determination in the event no further Reimbursement Payments are due under the Agreement. In the event there are no further Reimbursement Payments due under this Agreement and Tax Increment with respect to such Protest Property is reduced Company, shall within thirty (30) days after written demand from the Town, reimburse the Town for such over payment of any such Reimbursement Payments.

(j) Refunds. If the Town determines that the amount by which such Reimbursement Payment was less than the correct amount to which Company was entitled (together with such records, reports and other information necessary to support such determination), the Town shall, within thirty (30) days, pay the adjustment to Company.

(k) Third Party Ownership. No third party purchaser of any portion of the Land shall be deemed an assignee under this Agreement or be entitled to receive any Reimbursement Payments directly hereunder without the execution of an assignment by Company to such third party, approved in writing by the Town Manager. In the absence of any approved and executed assignment that provides otherwise, Reimbursement Payments to Company shall be calculated based on Tax Increment received by the Town from the entire Land regardless of property ownership. Nothing herein shall be construed to limit the ability of Company to pledge or assign Company's rights to Reimbursement Payments following receipt thereof from the Town. The Town shall not be required to provide or direct any Reimbursement Payments to any third party in the absence of an assignment approved by the Town Manager.

(l) The Town's obligation to pay each annual Reimbursement Payment shall be conditioned upon the continued compliance with and satisfaction of each of the terms and conditions of this Agreement by Company and each of the conditions set forth below at the time such annual Reimbursement Payment is due:

(i) Good Standing. The Company shall not have an uncured breach or default of any term of this Agreement, or any Related Agreement.

(ii) Undocumented Workers. The Company has not been convicted of a violation under 8 U.S.C. Section 1324a (f).

(iii) Payment Request. Company shall, as a condition precedent to its eligibility to receive a Reimbursement Payment, have provided the Town with the applicable Payment Request on June 1 of the calendar year in which the Payment Request is made.

(iv) Sales Tax Certificate. The Town shall have received a Sales Tax Area Report and/or Sales Tax Certificate for the applicable reporting period.

(m) Excess Costs. If the Construction Costs of the Public Improvements exceed the Maximum Construction Payment, the excess shall be paid solely by Company, and the Town shall have no obligation to pay such excess.

(n) Alternate Town Funding of Public Improvements. Notwithstanding anything to the contrary contained in this Agreement, the Town reserves the right, to fund all or any portion of the Construction Costs for the Public Improvements that are required for Private Improvements from other funding sources. All costs or expenses paid or incurred by the Town to construct Public Improvements shall reduce (on a dollar-for-dollar basis) the Maximum Construction Payment.

(o) Town Construction of Public Improvements. Notwithstanding anything to the contrary contained in this Agreement, the Town reserves the right, to construct all or any portion of the Public Improvements that are required for Private Improvements that would otherwise be constructed by the Company and to be paid or reimbursed for the Construction Costs for such from the funds in the Tax Increment Fund, so long as the construction schedule does not result in an unreasonable delay to the Company's construction of the Private Improvements. If the Town

elects to construct any such Public Improvements, written notice of the election shall be given to the Company. The written notice shall identify the Public Improvements to be constructed and the estimated commencement and completion dates. The Company shall have 30 days after receipt of the written notice from the Town within which to provide written notice to the Town that the Company agrees to cause the construction of such Public Improvements consistent with the Town proposed construction schedule (the "Notice of Acceptance"). The failure of the Company to timely deliver Notice of Acceptance shall constitute the consent of the Company to the Town's construction of such Public Improvements. All costs or expenses paid or incurred by the Town to construct such Public Improvements will be paid or reimbursed to the Town from the funds in the Tax Increment Fund, based on the order in which such costs or expenses were paid or incurred relative to Construction Costs paid or incurred by the Company. All costs or expenses paid or incurred by the Town to construct Public Improvements shall reduce (on a dollar-for-dollar basis) the Maximum Construction Payment for the Public Improvements that otherwise that may be payable or reimbursable to Company.

### **Section 5.3 Sales and Use Tax Information**

(a) The Town intends to seek and enter into an agreement with the Comptroller (pursuant to the provisions of Section 311.0123 of the TIRZ Act) with respect to the computation and collection of Sales and Use Tax within the TIRZ.

(b) The Company shall require its tenants, land purchasers, and transferees of property within the Land and the Retailers to cooperate with the Town to calculate and collect, and provide information with respect to, Sales and Use Tax within the TIRZ, and for the Construction Sales Office. The Company shall cause Retailers to provide the Town a copy of the sales tax permit each Retailer receives from the Comptroller legibly showing the sales tax number/tax identification number of the Retailer, and the location number. The Parties agree that such information should allow the Town to obtain from the Comptroller's office an area report that identifies Sales and Use Tax information within the TIRZ. The Town agrees, to the extent allowed by law, to maintain the confidentiality of all such information provided by Retailers. In the event the Town is unable to obtain an area report from the Comptroller's office, Company shall cause a Sales Tax Certificate to be provided by the Retailers to the Town on an annual basis or other basis as reasonably required by the Town.

(c) The Town hereby designates this Agreement as Revenue Sharing Agreement thereby entitling the Town to request Sales and Use Tax information from the Comptroller pursuant to Section 321.3022, Texas Tax Code, as amended.

(d) The Town agrees to develop and institute appropriate accounting and auditing programs and practices that will assure and permit verifications of all Sales Tax Receipts deposits into the Tax Increment Fund and into any other fund created pursuant to this Agreement. The Town shall provide to Company a periodic (but not less frequently than quarterly) written accounting of all such deposits. If the Company or such persons or entities fail to object to any periodic accounting within 60 days, the accounting shall be final.

#### **ARTICLE VI INDEMNIFICATION**

**THE TOWN SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE, OR INJURY OF ANY KIND OR CHARACTER TO ANY PERSON OR PROPERTY ARISING FROM THE ACTS OR OMISSIONS OF THE COMPANY PURSUANT TO THIS AGREEMENT. THE COMPANY HEREBY WAIVES ALL CLAIMS AGAINST THE TOWN, ITS OFFICERS, AGENTS AND EMPLOYEES (COLLECTIVELY REFERRED TO IN THIS ARTICLE AS “THE TOWN”) FOR DAMAGE TO ANY PROPERTY OR INJURY TO, OR DEATH OF, ANY PERSON ARISING AT ANY TIME AND FROM ANY CAUSE OTHER THAN, AND TO THE EXTENT OF, THE NEGLIGENCE OR WILLFUL MISCONDUCT OF THE TOWN, OR THE TOWN’S BREACH OF ANY OF THE TERMS AND CONDITIONS OF THIS AGREEMENT. THE COMPANY HEREBY INDEMNIFIES AND SAVES HARMLESS THE TOWN FROM AND AGAINST ANY AND ALL LIABILITIES, DAMAGES, CLAIMS, SUITS, COSTS (INCLUDING COURT COSTS, ATTORNEYS’ FEES AND COSTS OF INVESTIGATION) AND ACTIONS OF ANY KIND BY REASON OF INJURY TO OR DEATH OF ANY PERSON OR DAMAGE TO OR LOSS OF PROPERTY ARISING FROM SUCH COMPANY’S BREACH OF ANY OF THE TERMS AND CONDITIONS OF THIS AGREEMENT, OR BY REASON OF ANY ACT OR OMISSION ON THE PART OF COMPANY, ITS OFFICERS, DIRECTORS, <sup>Contractors</sup> OR EMPLOYEES IN THE PERFORMANCE OF THIS AGREEMENT (EXCEPT WHEN, AND TO THE EXTENT THAT, SUCH LIABILITY, CLAIMS, SUITS, COSTS, INJURIES, DEATHS OR DAMAGES ARISE FROM OR ARE ATTRIBUTED TO THE NEGLIGENCE OR WILLFUL MISCONDUCT OF THE TOWN OR THE TOWN’S BREACH OF ANY OF THE TERMS AND CONDITIONS OF THIS AGREEMENT). IN THE EVENT OF JOINT OR CONCURRENT NEGLIGENCE OF**

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**BOTH THE TOWN AND THE COMPANY, THE RESPONSIBILITY, IF ANY, SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, AND THE COMPANY'S INDEMNIFICATION OBLIGATION SHALL BE REDUCED ACCORDINGLY, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE TOWN AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW. IF ANY ACTION OR PROCEEDING SHALL BE BROUGHT BY OR AGAINST THE TOWN IN CONNECTION WITH ANY SUCH LIABILITY OR CLAIM, OR IF ANY ACTION OR PROCEEDING SHALL BE BROUGHT IN CONNECTION WITH THE ISSUANCE OF BONDS UNDER THE TERMS OF THIS AGREEMENT, THE COMPANY SHALL BE REQUIRED, ON NOTICE FROM THE TOWN, TO DEFEND SUCH ACTION OR PROCEEDINGS AT THE COMPANY'S EXPENSE, BY OR THROUGH ATTORNEYS REASONABLY SATISFACTORY TO THE TOWN AND SHALL FULLY INDEMNIFY THE TOWN AGAINST ALL COSTS RESULTING THEREFROM. THE PROVISIONS OF THIS SECTION ARE SOLELY FOR THE BENEFIT OF THE PARTIES HERETO AND NOT INTENDED TO CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, TO ANY OTHER PERSON OR ENTITY.**

THE COMPANY FURTHER AGREES TO DEFEND, INDEMNIFY AND HOLD THE TOWN HARMLESS FROM AND AGAINST ANY AND ALL REASONABLE LIABILITIES, DAMAGES, CLAIMS, LAWSUITS, JUDGMENTS, ATTORNEY FEES, COSTS, EXPENSES, AND CLAIMS OR DEMANDS BY THE STATE OF TEXAS THAT THE TOWN HAS BEEN ERRONEOUSLY OR OVER-PAID OR INCORRECTLY ALLOCATED SALES AND USE TAX ATTRIBUTED TO THE SALE OF TAXABLE ITEMS BY THE RETAILERS AT THE CONSTRUCTION SALES OFFICE FOR ANY PERIOD DURING THE TERM OF THIS AGREEMENT OR DURING ANY REPORTING PERIOD INCLUDING THE INTIAL REPORTING PERIOD OR AS THE RESULT OF THE FAILURE OF THE COMPANY TO MAINTAIN A PLACE OF BUSINESS AT THE CONSTRUCTION SALES OFFICE, OR AS A RESULT OF ANY ACT OR OMISSION OR BREACH OR NON-PERFORMANCE BY COMPANY UNDER THIS SECTION EXCEPT THAT THE INDEMNITY PROVIDED HEREIN SHALL NOT APPLY TO ANY LIABILITY RESULTING FROM THE ACTIONS OR OMISSIONS OF THE TOWN. THE PROVISIONS OF THIS SECTION ARE SOLELY FOR THE BENEFIT OF THE PARTIES HERETO AND NOT INTENDED TO CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR

OTHERWISE, TO ANY OTHER PERSON OR ENTITY. IT BEING THE INTENTION OF THE PARTIES THAT THE COMPANY SHALL BE RESPONSIBLE FOR THE REPAYMENT OF ANY SALES TAX RECEIPTS FROM THE CONSTRUCTION SALES OFFICE DEPOSITED INTO THE TAX INCREMENT FUND AND PAID TO THE COMPANY THROUGH REIMBURSEMENT PAYMENTS HEREIN COMPUTED WITH RESPECT TO SALES AND USE TAX RECEIPTS THAT THE STATE OF TEXAS HAS DETERMINED WAS ERRONEOUSLY PAID, DISTRIBUTED, OR ALLOCATED TO THE TOWN. THE COMPANY SHALL NOT BE RESPONSIBLE FOR THE PAYMENT OR REPAYMENT TO THE TOWN OF ANY SALES TAX RECEIPTS THAT THE TOWN IS REQUIRED TO REPAY TO THE STATE OF TEXAS IN EXCESS OF ANY CONSTRUCTION SALES OFFICE REVENUE AMOUNTS RECEIVED BY THE COMPANY ATTRIBUTABLE TO SALES TAX RECEIPTS THAT THE STATE OF TEXAS DETERMINES WERE ERRONEOUSLY PAID, DISTRIBUTED, OR ALLOCATED TO THE TOWNE. PROVISIONS OF THIS SECTION SHALL SURVIVE TERMINATION OF THIS AGREEMENT.

**ARTICLE VII  
REPRESENTATIONS AND WARRANTIES**

**Section 7.1 Representations and Warranties of Company**

In order to induce the Town to enter into this Agreement, Company represents and warrants as follows:

(a) Company is a duly organized and validly existing limited partnership under the laws of the State of Texas and has the power and authority to own the Private Improvements and other assets and to transact the business in which it is now engaged or proposed to engage.

(b) Company has the power and authority to execute, deliver and carry out the terms and provisions of this Agreement and all other instruments to be executed and delivered by Company in connection with its obligations hereunder. The execution, delivery, and performance by Company of this Agreement have been duly authorized by all requisite action by Company, and this Agreement is a valid and binding obligation of Company enforceable in accordance with its respective terms, except as may be affected by applicable bankruptcy or insolvency laws affecting creditors' rights generally.

(c) Company is not in default in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any evidence of indebtedness of Company or contained in any instrument under or pursuant to which any such evidence of indebtedness has been issued or made and delivered. Neither the execution and delivery of this Agreement, nor the consummation of the transactions herein contemplated, will conflict with or result in a breach of or default under (1) any terms, conditions or provisions of any agreement or instrument (A) to which Company is now a party or is otherwise bound, or (B) to which any of its properties or other assets is subject, (2) any order or decree of any court or governmental instrumentality, or (3) any arbitration award, franchise, or permit.

(d) To its best knowledge, Company is not a party to or otherwise bound by any agreement or instrument or subject to any other restriction or any judgment, order, writ, injunction, decree, award, rule or regulation which could reasonably be expected to materially and adversely affect Company's ability to perform its obligations under this Agreement.

(e) Company fully intends, subject to the conditions set forth in this Agreement, to commence and complete the Public Improvements and Private Improvements.

## **Section 7.2 Representations and Warranties of the Town**

In order to induce Company to enter into this Agreement, the Town represents and warrants as follows:

(a) The Town is an incorporated municipality and political subdivision of the State of Texas, duly organized and validly existing under the laws of the State of Texas.

(b) The Town has the power and authority to execute, deliver and carry out the terms and provisions of this Agreement and all other instruments to be executed and delivered by it in connection with its obligations hereunder. The execution, delivery and performance by the Town of this Agreement have been duly authorized by all requisite action by the Town, and this Agreement is a valid and binding obligation of the Town enforceable in accordance with its terms, except as may be affected by applicable bankruptcy or insolvency laws affecting creditors' rights generally.

(c) Neither the execution and delivery of this Agreement, nor the consummation of the transactions herein contemplated, will conflict with or result in a breach of or default under (i) any terms, conditions or provisions of any agreement or instrument (A) to which the Town is now a party or is otherwise bound, or (B) to which any of the Town's properties or other assets is subject, (ii) any order or decree of any court or governmental instrumentality, or (iii) any law.

(d) To its best knowledge, the Town is not a party to or otherwise bound by any agreement or instrument or subject to any other restriction or any judgment, order, writ, injunction, decree, award, rule or regulation which could reasonably be expected to materially and adversely affect the ability of the Town to perform its obligations under this Agreement.

## **ARTICLE VIII TERMINATION; REMEDIES**

### **Section 8.1 Default; Remedies**

(a) If a Party breaches and of the terms or conditions of this Agreement or if any Impositions become delinquent or a Party suffers an event of Bankruptcy or Insolvency (after notice of such delinquency and opportunity to cure), any non-defaulting Party may exercise any remedies available at law or in equity, including, but not limited to, injunctive relief and specific performance against the defaulting Party. Notwithstanding the foregoing, however: (1) no defaulting Party shall be liable for consequential, special, or punitive damages; (2) no default by a Company shall affect the right of Company to receive payments or reimbursements of Construction Costs plus Interest to which the Company is otherwise entitled under this Agreement.

(b) The Parties find that this Agreement is entered into subject to and in accordance with the provisions of Subchapter I of Chapter 271 of the Texas Local Government Code.

(c) Cure. No Party shall be in default under this Agreement until notice of the alleged failure of such Party to perform has been given to the non-performing Party and to any lender(s) to the non-performing Party that has been identified to the Town, including notice information for such lender(s), which notice shall set forth in reasonable detail the nature of the alleged failure, and until such Party or its lender(s) has been given ninety (90) days to cure.

(d) Right of Offset. The Town may, at its option, offset any amounts due and payable under this Agreement against any debt (including taxes) lawfully due to the Town from the Company, regardless of whether the amount due arises pursuant to the terms of this Agreement or otherwise and regardless of whether or not the debt due the Town has been reduced to judgment by a court.

**Section 8.2 Termination of Agreement for Failure to Private Improvements Construction**

(a) If the Company is in default (after notice and cure as provided in Section 8.1) of its obligations under Sections 4.1 and 4.2 to cause the Commencement or Completion of Construction of the Private Improvements and/or Public Improvements, the Town may terminate this Agreement; however, such termination shall not affect the right of the Company to receive payments or reimbursements for Construction Costs for Public Improvements (but without Interest) to which the Company would otherwise be entitled under a Construction Agreement executed prior to the 15<sup>th</sup> anniversary date of the Effective Date and prior to the date of termination unless such Construction Agreement is in default.

**ARTICLE IX  
MISCELLANEOUS PROVISIONS**

**Section 9.1 Assignment**

(a) This Agreement is binding upon and shall inure to the benefit of the Parties and their respective successors and permitted assigns.

(b) The Company may assign this Agreement, in whole or in part, with the prior written approval of the governing body of the Town provided the assignee expressly assumes, in a written agreement approved by the governing body of the Town, all of the obligations of the Company under this Agreement that are related to the assignment. Such assignment shall not relieve the Company of any liability hereunder unless expressly stated otherwise in the assignment agreement.

**Section 9.2 Entire Agreement**

This Agreement incorporates all prior negotiations and discussions between the Parties regarding the subject matter hereof and represents the entire agreement of the Parties relating to

the subject matter of this Agreement. This Agreement may only be modified by written instrument executed by the Parties.

**Section 9.3 Notices**

(a) A notice, communication, or request required by or contemplated by this Agreement shall be deemed to have been “given,” “delivered,” or “provided”: (i) five (5) business days after being deposited in the United States mail, certified mail or registered mail, postage prepaid, return receipt requested, or (ii) when delivered to the notice address by a nationally recognized, overnight delivery service as evidenced by the signature of any person at the notice address (whether or not such person is the named recipient for purposes of the notice), or (iii) when otherwise hand delivered to the notice address as evidenced by the signature of any person at the notice address (whether or not such person is the named recipient for purpose of the notice) and addressed to the applicable parties as follows:

If to Company:

MSW Prosper 380 LP  
Attn: Kristian T. Teleki  
1660 Stemmons Freeway  
Suite 100  
Lewisville, Texas 76102

With a copy to:

Shupe Ventura Lindelow & Olson  
Attn: Ike Shupe  
500 Main Street, Suite 800  
Forth Worth, Texas

If to the Town:

Attn: Town Manager  
Town of Prosper  
P.O. Box 307  
Prosper, Texas 75078

With a copy to:

Peter G. Smith  
Nichols, Jackson, Dillard, Hager and Smith  
500 North Akard

1800 Lincoln Plaza  
Dallas, Texas 75201

(b) Any Party to this Agreement may at any time change the place of receiving notice by at least 10 days' written notice of such change of address to the other Parties in accordance with the manner of giving notice described above.

#### **Section 9.4 Partial Invalidity**

If any term, covenant, condition, or provision of this Agreement, or the application to any person or circumstance shall, at any time or to any extent be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby (except to the extent such result is clearly unreasonable), and under such circumstances each term, covenant, condition, and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law, insofar as such enforcement is not clearly unreasonable.

#### **Section 9.5 Counterparts**

This Agreement may be executed in counterparts, each of which shall be deemed to be an original, and such counterparts shall constitute one and the same instrument.

#### **Section 9.6 No Partnership, Joint Venture or Joint and Several Liability**

Nothing contained in this Agreement is intended or shall be construed in any manner or under any circumstances whatsoever as creating or establishing the relationship of co-partners or creating or establishing the relationship of a joint venture between the Parties or as constituting Company as an agent or representative of the Town or the TIRZ Board for any purpose or in any manner under this Agreement, it being understood that Company is an independent contractor hereunder.

#### **Section 9.7 Representatives Not Individually Liable**

The Parties agree that no member, official, representative, or employee of the Town or the TIRZ Board shall be personally liable to Company or any successor in interest in the event of any default or breach by the Town or the TIRZ Board for any amount which may become due to

Company or successor or for any obligations under the terms of the Agreement. No partner, member, representative, or employee of Company or any of its members or any institutional lender providing financing to Company shall be personally liable to the Town or the TIRZ Board in the event of any default or breach by the Company for any amount which may become due to the Town or the TIRZ Board or for any obligations under the terms of this Agreement.

### **Section 9.8 Compliance with Laws**

The Company shall, at all times, be subject to all applicable laws pertinent to the Development Projects, this Agreement, and Company's actions in connection with the Development Projects and this Agreement. Nothing in this Section or any other part of this Agreement, however, shall be construed to limit or prevent Company from challenging at law or in equity the applicability of any applicable law and/or pursuing their rights in furtherance thereof through appropriate judicial proceedings, or to constitute a waiver of due process. Notwithstanding anything to the contrary contained in this Agreement, no provision of this Agreement shall be construed to require Company to comply with any applicable law during the period that such Company may be pursuing a bona fide challenge of the applicability, lawfulness, and/or enforceability of such applicable law (unless such law requires compliance during any such challenge). If Company's challenge is successful, the Company shall not be required by the provisions of this Agreement to comply with such applicable law.

### **Section 9.9 Venue**

This Agreement shall be governed by the laws of the State of Texas. Venue for any action concerning this Agreement shall be in the State District Court of Collin County, Texas. The Parties agree to submit to the personal and subject matter jurisdiction of said Court.

### **Section 9.10 Survival of Covenants**

The representations, warranties, covenants, and obligations of the Parties, as well as any rights and benefits of the Parties, pertaining to a period of time following the termination of this Agreement shall survive termination.

**Section 9.11 Town Attorney Fees.**

Developer agrees to pay or cause to be paid to the Town any attorney fees charged to the Town for legal review of this agreement in an amount not to exceed Ten Thousand Dollars (\$10,000.00) representing the legal fees and expenses of the Town in negotiating and preparing this Agreement within ten (10) days upon receipt of an invoice of same from the Town.

**Section 9.12 Conditions Precedent**

This Agreement is subject to and conditioned on completion of the TIRZ Obligations as set forth in Section 3.1.

**Section 9.13 Recitals**

The recitals to this Agreement are incorporated herein.

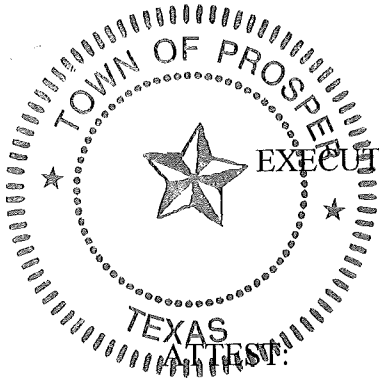
**Section 9.14 Employment of Undocumented Workers**

During the term of this Agreement Company agrees not to knowingly employ any undocumented workers and if convicted of a violation under 8 U.S.C. Section 1324a (f), Company shall repay the amount of the Reimbursement Payments and any other funds received by Company from the Town as of the date of such violation within 120 business days after the date Company is notified by the Town of such violation, plus interest at the rate of 6% compounded annually from the date of violation until paid. The Company is not liable for a violation of this section in relation to any workers employed by a subsidiary, affiliate, or franchisee of Company or by a person with whom the Company contracts.

**Section 9.15 Exhibits**

The following exhibits are made part of this Agreement for all purposes:

- Exhibit 1 Description of Land
- Exhibit 2 Description of Public Improvements



EXECUTED this 31st day of December, 2012.

*Amy L. [Signature]*  
Town Secretary

APPROVED AS TO FORM:

*Peter G. Smith*  
Peter G. Smith

TOWN:

TOWN OF PROSPER, TEXAS

By: *Ray Smith*  
Ray Smith, Mayor

COMPANY

MSW PROSPER 380 LP,  
a Texas limited partnership

by: MSW Prosper GP, LLC,  
a Texas limited liability company,  
as General Partner

by: Matthews Holdings Southwest, Inc.  
a Texas corporation, Manager

By: *Kristian T. Teleki*  
Kristian T. Teleki,  
Senior Vice President

Exhibit 1  
Description of the Land

**TRACT 1**

BEING a parcel of land located in the Town of Prosper, Collin County, Texas, a part of the Collin County School Land Survey No. 12, Abstract Number 147, and being a part of a tract of land described in a deed to M.A.H.G. Partnership as recorded in Document Number 20100601000545080, Collin County Deed Records, and being further described as follows:

BEGINNING at a one-half inch iron rod found at the southeast corner of said M.A.H.G. Partnership tract of land, said point being the intersection of the west right-of-way line of the Dallas North Tollway (a variable width right-of-way) with the north right-of-way line of U. S. Highway 380 (a variable width right-of-way);

THENCE along the north right-of-way line of U. S. Highway 380 as follows:

South 89 degrees 58 minutes 56 seconds West, 737.62 feet to a highway monument found for corner;

North 87 degrees 12 minutes 21 seconds West, 100.05 feet to a highway monument found for corner;

North 89 degrees 58 minutes 51 seconds West, 577.36 feet to a one-half inch iron rod found at the most southerly southwest corner of said M.A.H.G. Partnership tract of land, said point being the southeast corner of a tract of land described in a deed to F.L. Partners, Ltd. as recorded in Document Number 20111216001360700, Collin County Deed Records;

THENCE North 00 degrees 10 minutes 18 seconds East, 1582.40 feet to a one-inch iron pipe found at the northeast corner of said F.L. Partners, Ltd. tract of land;

THENCE South 89 degrees 43 minutes 30 seconds West, 927.35 feet to a one-inch iron pipe found at the most northerly southwest corner of said M.A.H.G. Partnership tract of land, said point being the northwest corner of a tract of land described in a deed to Y-C Nurseries, Inc. as recorded in Volume 4917, Page 2974, Collin County Deed Records, said point being in the east line of a tract of land described in a deed to 110 Prosper Property, L.P. as recorded in Document Number 20091221001521410, Collin County Deed Records;

THENCE along the west line of said M.A.H.G. Partnership tract of land and along the east line of said 110 Prosper Property, L.P. tract of land as follows:

North 00 degrees 23 minutes 24 seconds East, 638.49 feet to a one inch iron pipe found for corner;

North 00 degrees 27 minutes 38 seconds East, 335.80 feet to a one-half inch iron rod found for corner;

North 89 degrees 28 minutes 46 seconds West, 38.28 feet a one-half inch iron rod found for corner;

North 00 degrees 00 minutes 43 seconds West, 695.33 feet to a one-half inch iron rod set for corner;

THENCE North 89 degrees 22 minutes 23 seconds East, 1352.30 feet to a one-half inch iron rod set for corner in the east line of said M.A.H.G. Partnership tract of land, said point being in the

Exhibit 1  
Description of the Land

west line of a tract of land described in a deed to Southern Star Concrete, Inc. as recorded in Volume 5468, Page 5436, Collin County Deed Records;

THENCE along the east line of said M.A.H.G. Partnership tract of land as follows:

South 00 degrees 34 minutes 52 seconds East, 51.73 feet to a one-half inch iron rod found at the southwest corner of said Southern Star Concrete, Inc. tract of land, said point being the northwest corner of a tract of land described in a deed to Lattimore Materials Company, L.P. as recorded in Volume 5380, Page 5848, Collin Deed Records Collin County;

South 00 degrees 31 minutes 42 seconds East, 651.92 feet to a one-half inch iron rod found for the southwest corner of said Lattimore Materials Company, L.P.;

North 89 degrees 39 minutes 24 seconds East, 1117.44 feet along the south line of said Lattimore Materials Company, L.P. to a one-half inch iron rod found in the west right-of-way line of the Dallas North Tollway (a variable width right-of-way);

THENCE along the west right-of-way line of the Dallas North Tollway as follows:

South 04 degrees 37 minutes 34 seconds West, 705.31 feet to a one-half inch iron rod found for corner;

Southwesterly, 507.85 feet a curve to the left having a central angle of 02 degrees 30 minutes 00 seconds, a radius of 11,639.16 feet, a tangent of 253.97 feet, and whose chord bears South 03 degrees 19 minutes 26 seconds West, 507.81 feet to a one-half inch iron rod found for corner;

South 02 degrees 04 minutes 26 seconds West, 587.13 feet to a one-half inch iron rod found for corner;

Southwesterly, 250.65 feet along a curve to the left having a central angle of 02 degrees 30 minutes 00 seconds, a radius of 5744.58 feet, a tangent of 125.34 feet, and whose chord bears South 00 degrees 49 minutes 26 seconds West, 250.63 feet to a one-half inch iron rod set for corner;

South 00 degrees 25 minutes 34 seconds East, 523.30 feet to the POINT OF BEGINNING and containing 5,544,727 square feet or 127.289 acres of land.

Exhibit 1  
Description of the Land

**TRACT 2**

BEING a tract of land situated in the Collin County School Land Survey, Abstract No. 147, City of Prosper, Collin County, Texas, the subject tract being a portion of a tract of land conveyed to 110 Prosper Property, L.P. according to the deeds recorded in Document Numbers 20091218001516510 (herein referred to as "Tract A") and 20091221001521410 (herein referred to as "Tract B") of the Deed Records, Collin County, Texas (DRCCT), the subject tract being more particularly described as follows;

BEGINNING at 1/2" capped iron rod found on the north line of U.S. Highway 380 for the southwest corner of Tract A, said rod being the southeast corner of that certain tract described in deed to Prosper Partners, LP, recorded in Document Number 20080303000247320 DRCCT;

THENCE N 00°26'20" E, 1144.83 feet along the common line thereof to a 1/2" iron rod with a plastic cap stamped "SPIARSENG" set, from which a 3/4" iron pipe found for the northeast corner of said Prosper Partners tract and an inset corner of Tract A bears N 00°26'20" E, 1414.82 feet;

THENCE N 89°56'56" E, 1140.81 feet departing said line, passing the common line between Tracts A and B, to a 1/2" iron rod with a plastic cap stamped "SPIARSENG" set on the east line of Tract B and being on the west line of that certain tract described in deed to Y-C Nurseries, Inc., recorded in Document Number 20090825001068300 DRCCT, from said rod a 3/4" iron pipe found for the northwest corner of said Y-C Nurseries tract bears N 00°10'04" E, 438.93 feet;

THENCE S 00°10'04" W, 295.15 feet along the common line thereof to the southwest corner of said Y-C Nurseries tract, and for the northwest corner of that certain tract described in deed to Five SAC Self-Storage Corporation, recorded in Volume 4762, Page 1011 DRCCT;

THENCE S 00°10'33" W, 844.65 feet along the common line thereof, to a 1/2" capped iron rod found on the north line of U.S. Highway 380 for the common corner thereof;

THENCE along the north line of U.S. Highway 380, the following courses:

S 89°56'56" W, 395.06 feet

S 87°05'11" W, 100.12 feet

And S 89°56'56" W, 651.07 feet to the PLACE OF BEGINNING with the subject tract containing 1,306,810 square feet or 30.000 acres of land.

Exhibit 2  
Description of Public Improvements

ENGINEER'S OPINION OF PROBABLE COST  
 PREPARED BY JBI PARTNERS, INC.  
 NORTHWEST CORNER OF US380 AND DNT  
 PROSPER, TEXAS JBI PROJECT NO. ATH003  
 REVISED DECEMBER 28, 2012

| INFRASTRUCTURE              |  | PUBLIC IMPROVEMENTS | DEVELOPER            | TOTAL                |
|-----------------------------|--|---------------------|----------------------|----------------------|
| A.                          | STREETS AND DRAINAGE SYSTEMS                                 | \$11,146,567        | \$2,001,748          | \$13,148,315         |
| B.                          | STREET ENHANCEMENTS  | \$0                 | \$1,775,577          | \$1,775,577          |
| C.                          | WATER SYSTEM   | \$1,367,721         | \$1,116,778          | \$2,484,499          |
| D.                          | SANITARY SEWER SYSTEM  | \$641,669           | \$358,204            | \$999,873            |
| E.                          | OFFSITE SANITARY SEWER SYSTEM                                | \$1,479,282         | \$0                  | \$1,479,282          |
| F.                          | DETENTION/RETENTION PONDS & MASS EXCAVATION                  | \$0                 | \$2,882,560          | \$2,882,560          |
| G.                          | SITENWORK FOR DEVELOPMENT PARCELS                            | \$0                 | \$15,750,000         | \$15,750,000         |
| H.                          | PARKING DECKS  | \$0                 | \$73,497,600         | \$73,497,600         |
| I.                          | STREET LIGHTS  | \$174,000           | \$210,000            | \$384,000            |
| J.                          | TRAFFIC SIGNALS (4 budgeted)                                 | \$850,000           | \$0                  | \$850,000            |
| K.                          | LOVERS LANE LOOP OFFSITE - STREET K6                         | \$1,174,992         | \$0                  | \$1,174,992          |
| L.                          | PRIMARY ELECTRIC SERVICE LOOP                                | \$0                 | \$3,600,000          | \$3,600,000          |
| M.                          | ELECTRIC   | \$0                 | \$640,150            | \$640,150            |
| N.                          | GAS  | \$0                 | \$448,105            | \$448,105            |
| O.                          | STREET N2 - WESTSIDE NTW SERVICE RD. LOVERS LN. TO FIRST ST. | \$1,687,005         | \$0                  | \$1,687,005          |
| P.                          | BRAIDED RAMP @ US 380 (1)                                    | \$4,000,000         | \$0                  | \$4,000,000          |
| Q1.                         | CIVIL ENGINEERING & SURVEYING (10%)                          | \$1,852,124         | \$10,228,072         | \$12,080,196         |
| Q2.                         | CONSTRUCTION STAKING (2%)                                    | \$370,425           | \$2,045,614          | \$2,416,039          |
| Q3.                         | CONSTRUCTION MANAGEMENT (3%)                                 | \$533,667           | \$3,068,422          | \$3,602,089          |
| Q4.                         | GEOTECHNICAL STUDY (1%)                                      | \$185,212           | \$1,022,807          | \$1,208,019          |
| Q5.                         | LEGAL (1%)   | \$185,212           | \$1,022,807          | \$1,208,019          |
| P.                          | CONTINGENCY (10%)  | \$1,852,124         | \$10,228,072         | \$12,080,196         |
| <b>TOTAL INFRASTRUCTURE</b> |  | <b>\$27,500,000</b> | <b>\$129,896,516</b> | <b>\$157,396,516</b> |