



CITY OF ELK GROVE

ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT

(Costco)

This Economic Incentive Agreement (“Agreement”) is entered into as of this 12th day of April, 2017, by and between the City of Elk Grove, a municipal corporation (“City”) on the one hand, and The RIDGE EG EAST, LP, a California Limited Partnership (“Property Owner”). The City and Property Owner are sometimes collectively referred to herein as “the Parties,” and singularly as a “Party.”

RECITALS

A. WHEREAS, Property Owner is the owner of that certain property in the City of Elk Grove comprised of approximately 17.43 acres located northwest of the intersection of Civic Center Drive and Babylon Drive in the City of Elk Grove and identified as Resultant Parcel G, Boundary Line Adjustment – Certificate of Compliance recorded September 13, 2016, in Book 20160913 page 268, Official Records of Sacramento County (the “Property”); and

B. WHEREAS, Property Owner proposes to enter into a long-term lease (the “Costco Lease”) with Costco Wholesale Corporation, a Washington Corporation (“Costco”) at the Property for the development of a wholesale and retail general merchandise facility owned and operated by Costco (the “Costco Project”); and

C. WHEREAS, Property Owner has requested, and the City has agreed, to provide Property Owner with a contingent economic development incentive in conjunction with Property Owner’s lease to Costco and Costco’s development of the Costco Project, all as set forth herein.

D. WHEREAS, the City finds that the public purpose of this economic development incentive is to promote the general welfare of the City and its residents by creating new jobs, expanding the range and diversity of its retail sector in which it is currently underserved, and to broaden the City’s property tax and sales tax base, as well as generating other City revenues. Specifically the Costco Project is a unique opportunity for the City that would not only significantly promote the public purposes listed above, but is anticipated to be a catalyst for further economic development in a substantially larger area of currently undeveloped properties in the City, which will further promote and enhance the public purposes listed above. But for the economic development incentive, the Costco Project might not be located in the City and its benefits to the City would be lost. This economic development incentive is consistent with and in furtherance of the City’s economic development incentive programs.

E. WHEREAS, inasmuch as this economic development incentive provided for in this Agreement is a material inducement for the Property Owner to enter into the Costco Lease in furtherance of the important public purpose herein stated, this Agreement constitutes a contract, obligation and evidence of indebtedness within the meaning and scope of Government Code section 53511 and the Validation Act (Code of Civil Procedure sections 860 et seq.) in that it provides to the Property Owner assurance that the City can satisfy its financial obligations under this Agreement which benefit the City and the public generally. In approving this Agreement the City Council has found and determined that this Agreement is the best and most appropriate means available to the City of financing the economic development incentives provided herein that will allow the Costco Project to proceed, and it is necessary for the City to promptly settle any questions relating to the validity or enforceability of this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing Recitals and the following mutual covenants, agreements, conditions, and representations, and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Recitals. The above-referenced Recitals are true and correct and incorporated herein by reference.

2. Definitions. In addition to other defined terms in the body of this Agreement, the following terms shall have the following meaning, as used in this Agreement:

a. "Fiscal Year" shall mean the City's fiscal year running from July 1 through June 30 of the following year.

b. "Base Sales Tax" shall mean, for each Fiscal Year during the term of the City's payment obligations hereunder, that portion of sales taxes actually received by the City from the imposition of the Bradley-Burns Uniform Local Sales and Use Tax Law (commencing with Section 7200 of the California Revenue & Taxation Code or any successor sales tax statute thereto) and Chapter 3.04 of the Elk Grove Municipal Code (or any successor sales tax ordinance thereto), as reported to the California State Board of Equalization ("SBOE") by Costco from the operation of the Costco Project on the Property.

c. "Sales Tax" shall mean the Base Sales tax excluding all of the following: (i) any portion of the Base Sales Tax that the City may be required to pay, transfer, assign, or allocate to any other entity or entities by virtue of any law now or hereafter existing, or by virtue of any agreement entered into between City and any other governmental entity under California Government Code Section 53084, if any; (ii) the State Board of Equalization's administrative and processing fee attributable to the City's portion of such taxes (calculated at the same percentage of such taxes as applies city-wide); (iii) any sales tax over-rides for transportation and/or public safety; (iv) any revenues from any supplemental local sales, transactions, and/or use tax approved by the City and/or the electorate beyond the Base Sales Tax; and (v) so long as the Costco Project includes retail sales of gasoline, Base Sales Tax from the retail sale of gas or diesel fuel at the vehicle filling station of the Costco Project based on deemed annual Retail Gas

Sales of \$25,000,000 adjusted for each calendar year following the “Store Opening” (as defined below), all as set forth below (“Annual Retail Gas Sales”). “Sales Tax” shall not be considered to have been received by the City until the City is able to confirm receipt of such taxes from the SBOE. For purposes of this Agreement, Annual Retail Gas Sales shall be determined as follows: (i) for any partial calendar year and the next succeeding full calendar year following the Store Opening, Annual Retail Gas Sales shall be deemed to be \$25,000,000 per year; and (ii) on January 1 of each calendar year thereafter, Annual Retail Gas Sales shall be adjusted (up or down) by the percentage change between the “CPI Index” for September of the immediately preceding year and September of the immediately preceding year before that. For purposes of this Agreement, the “CPI Index” shall mean the Consumers Price Index for All Urban Consumers published from time to time by the United States Bureau of Labor Statistics.

3. Incentive Payment. Subject to the provisions and limitations set forth herein, the City agrees to provide an economic development incentive payment (“Incentive Payment”) to Property Owner in an amount not to exceed the present value of eight million dollars (\$8,000,000), all as discounted, adjusted, and calculated pursuant to the formula set forth at Exhibit A (the “Maximum Payment Amount”). The Maximum Payment Amount shall remain unadjusted and undiscounted until the Costco Store is completed and open to the public for business (the “Store Opening”). Should there never be a Store Opening, no payments from the City shall be required under this Agreement. During the term of this Agreement, should the City Sales Tax Revenues as defined in Section 4 of this Agreement be materially and adversely effected as a result of revisions to the structure of sales and/or use taxes imposed by the State of California or the imposition of a statewide tax that effectively replaces the current form and/or structure of statewide sales and/or use taxes (a “Replacement State Tax”), the parties shall meet and confer in good faith to consider whether and how the terms and conditions of this Agreement should be revised and/or amended to best achieve the purposes of this Agreement in light of such Replacement State Tax, provided, however, that nothing in the foregoing sentence shall be deemed, interpreted or construed to obligate either Party to agree to any change, modification or amendment to this Agreement for such purposes.

4. Manner and Timing of Payments; City’s Right to Prepay. In consideration of Property Owner’s compliance with all other terms of this Agreement, and subject to the Store Opening, in each full or partial Fiscal Year during the term of this Agreement, the City shall make payments to Property Owner in installments as described herein in an amount equal to fifty percent (50%) of the Sales Tax generated by the Costco Project and received by the City (“City Sales Tax Revenues”), until the City has paid the Maximum Payment Amount, or this Agreement otherwise terminates. Payment of the annual payments for each Fiscal Year shall be made by the City to Property Owner in quarterly installments, each installment payable no later than one-hundred and fifty (150) days following the end of each quarter¹ and subject to receipt of all data by the City from the SBOE confirming the City’s share of City Sales Tax Revenues attributable to the Costco Project. On or before the Store Opening, Property Owner shall notify City in writing of the Costco Store’s SBOE retail identification number. To the extent required by law or City procedures, the City Manager shall include in the annual general fund budget

¹ A “quarter” shall be defined as follows: January to March (first quarter); April to June (second quarter); July to September (third quarter); October to December (fourth quarter).

adopted by the City Council, the receipt of funds from Sales Tax proceeds generated by the Costco Project, and the appropriation of and authorization to the City Manager, to make the payments from the general fund required by this section. At any time and from time to time, the City may prepay all or any portion of the total amounts owing to Property Owners under this Agreement; provided that the sum total of all payments (including any such prepayments) shall not be less than the Maximum Payment Amount.

5. Consent/Waiver by Costco to Disclose Tax Information. Prior to any payment being made to Property Owner hereunder, or the disclosure of any Base Sales Tax and/or Sales Tax information to Property Owner hereunder, Property Owner shall provide to the City, and maintain in effect during the term of this Agreement, all in a form acceptable to the City, a written consent from Costco consenting to the disclosure and use of the Base Sales Tax and/or Sales Tax information consistent with this Agreement, and a written waiver from Costco waiving the protections, privilege, and confidentiality provided by California Revenue and Taxation Code section 7056 and any other similar law that would otherwise prevent the disclosure of such Base Sales Tax and/or Sales Tax information. The waiver and consent from Costco shall include, among other things, an express acknowledgment by Costco that the amount of the payments made by the City to Property Owner hereunder may be released to the public upon inquiry.

6. Limited City Obligation. The obligations arising from this Agreement are not a debt of the City, nor a legal or equitable pledge, charge, lien, or encumbrance upon any of its property or upon any of its monies, income, receipts, or revenues, except the revenues from the Sales Tax proceeds as provided herein. Except as expressly provided in Sections 4 and 17 of this Agreement, neither the general fund nor any other fund of the City shall be liable for the payment of any obligations arising from this Agreement. The credit or taxing power of the City is not pledged for the payment of any obligation arising from this Agreement. Nothing herein shall provide the Property Owner any right to compel the forfeiture of any of the City's property to satisfy any obligations arising from this Agreement. The obligations created by this Agreement do not create an immediate indebtedness of the City of the Maximum Payment Amount, but rather create a liability only when a payment becomes due hereunder.

7. Term and Expiration of Agreement. This Agreement shall commence and be effective upon full execution by all parties (the "Effective Date") and shall expire upon the earlier of: (i) the date the City has made payment to Property Owner of the Maximum Payment Amount as provided for herein; or (ii) twenty five (25) years from the Store Opening. Notwithstanding the expiration of this Agreement, the indemnity obligations at paragraphs 11 and 12 below shall survive and remain in full force and effect following the expiration of this Agreement.

8. Maintenance. Property Owner shall cause Costco to maintain and repair the Costco Project, including all improvements and landscaping on the Property in good order, and in the condition (and, as to landscaping, in a healthy condition) and in accordance with all applicable laws, including, without limitation, the City's Nuisance Code. In this regard, Property Owner shall further cause Costco to prevent excessive accumulation of any waste materials, rubbish, graffiti, weeds, or debris on the Property and at the Costco Store and to not permit any unlawful use or unlawful nuisance to occur on the Property, all in accordance with the Costco Lease.

performance of this Agreement including, but not limited to, whether the benefits conferred by the City under this Agreement create a public work for prevailing wage purposes thereby requiring the payment of prevailing wages, and all claims challenging the legality, constitutionality, or enforceability of this Agreement, including, but not limited to, the City's authority to pay the Incentive Payment; provided, however, that Property Owner shall have no obligation to the City under this paragraph to the extent that any such Covered Claim results from the sole negligence or willful misconduct by the City or any of its representatives, as determined by a Court of competent jurisdiction. Unless and until such judicial determination is made, or as otherwise agreed by the Parties, Property Owner shall remain obligated to defend, indemnify, and hold harmless the City, its council members, officers, agents, independent contractors, and employees pursuant to this Agreement. The City's rights under this paragraph shall not depend upon the actual payment of any claim, damage, penalty, loss, cost, expense (including reasonable attorneys' fees and court costs), injury, or liability sustained by Property Owner and/or its contractors, subcontractors, agents, and/or employees. In the event that the City tenders the defense and indemnification of a Covered Claim to Property Owner, Property Owner shall provide the City with regular reports on the status of the proceeding with respect to any such Covered Claim, and the City must consent to the disposition of any such Covered Claim, including, but not limited to, the settlement of any such Covered Claim, provided that such consent shall not be unreasonably withheld, delayed or conditioned.

13. Validation Action. At any time during the term of this Agreement, upon written request of the Property Owner, the City shall consider, in its reasonable discretion, whether to file and prosecute to completion a validation action under Government Code Section 53511 and Code of Civil Procedure Sections 860 et seq. (the "Validation Act"), or such other action at law as the Property Owner may deem appropriate, to obtain a final judgement to validate or enforce the financial obligations and indebtedness of the City under this Agreement as binding and irrevocable obligations of the City beyond further challenge by any person or entity. The Property Owner shall cooperate with the City in any such action and bear the attorneys' fees, and litigation costs of any such action. The City shall bring and maintain any such action with qualified legal counsel selected by the City and reasonably approved by the Property Owner. The City's legal counsel shall consult with the Property Owner's counsel in the preparation and filing of any such action and the prosecution thereof. The Property Owner may join with the City in any such action or appear as an interested person in support of the City; provided that no settlement of such litigation may be negotiated or entered into by the City without the express written consent of the Property Owner. Nothing in this section shall change in any way or provide a waiver of or excuse for failure of any party challenging the validity of this Agreement to comply with the procedure and time requirements set forth in the Validation Act, and the failure of any party to timely file or successfully maintain a challenge to this Agreement shall have the effect on the validity of this Agreement and the obligations of the City therein as set forth in the Validation Act.

14. Authority to Execute Agreement. Each individual signing this Agreement represents and warrants that he or she has full authority to execute the same on behalf of the Party on whose behalf he or she so signs, and that he or she is acting within the scope of his or her authority.

15. Advice of Legal Counsel. Each of the Parties hereto has received the advice of independent legal counsel prior to signing this Agreement. Each of the Parties hereto acknowledges that neither Party, or agent or attorney of a Party, has made a promise, representation, or warranty whatsoever, express or implied, not contained herein concerning the subject matter herein to induce the other Party to execute this Agreement.

16. Entire Agreement. It is expressly understood and agreed that this Agreement contains the entire agreement and understanding concerning the subject matter thereof, and supersedes and replaces all prior negotiations and agreements between the Parties, whether written or oral. It is expressly understood and agreed that there have been no promises, agreements, warranties, or inducements, not herein expressed. The Parties acknowledge that they have read this Agreement and have executed it without relying upon any statements, representations, or warranties, whether written or oral, not expressly set forth herein.

17. Governing Law. All questions with respect to the enforcement, interpretation, or construction of this Agreement and the rights and liabilities of the Parties hereto shall be governed by the laws of the State of California. Should any judicial proceeding be brought relating to this Agreement, venue shall lie exclusively in a court of competent jurisdiction located in Sacramento County. Subject to the foregoing, City agrees that among remedies available to the Property Owner for City's failure to perform the provisions of this Agreement, shall be an action in mandamus, injunctive relief, or other suitable remedy to compel the payments, required to be paid by the City to the Property Owner under this Agreement; provided that nothing herein shall be deemed, interpreted or construed to constitute a waiver of any of Property Owner's rights or remedies under law or in equity.

18. Joint Drafting. Each Party fully understands each term contained herein. Each party knowingly and voluntarily enters into this Agreement and knowingly and voluntarily agrees to each term contained herein. All of the undersigned Parties agree that they and their legal counsel have reviewed and have had an opportunity to revise this Agreement, that no single Party shall be deemed to have drafted this Agreement or any portion thereof, and that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement.

19. Further Assurances. The Parties shall at their own cost and expense execute and deliver such further documents and instruments, and shall take such other actions, as may be reasonably required or appropriate to carry out the intent and purposes of this Agreement.

20. Amendment/Modification. This Agreement shall not be amended except by a written instrument signed by all Parties or their respective successors and assigns.

21. Waiver/Estoppel. No waiver by any party of any breach of any term or provision of this Agreement shall be construed to be, nor be, a waiver of any proceeding, concurrent or succeeding breach of the same, or any other term or provision thereof. No waiver shall be binding unless in writing and signed by all Parties to this Agreement. Delay or failure of any party to enforce any right provided by this Agreement shall not constitute a waiver or estoppel of said right. Any waiver by any party of any term or provision of this Agreement shall not be deemed a waiver of any other term or provision of this Agreement.

22. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns, provided, however, that Property Owner shall not assign this Agreement to any other person, entity, or successor without the express written approval of the City, which approval shall not be unreasonably withheld; provided further that no such consent shall be required if Property Owner conveys all of its interest in the Property and, concurrently with such conveyance, assigns this Agreement to the transferee(s).

23. Severability. If any provision of this Agreement or the application thereof to any person or entity is held to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and shall continue to be in full force and effect and be binding on the Parties hereto.

24. Time. Time is of the essence of this Agreement.

25. Captions. Sections, titles, and captions contained in this Agreement are inserted only as a matter of convenience and for reference and shall in no way be construed to define, limit, or extend the scope of this Agreement or the intent of any of its provisions.

26. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of which shall constitute one and the same instrument. Such executed counterparts may be delivered by facsimile or email which, upon transmission to the other parties, shall have the same force and effect as delivery of the original signed counterpart.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date the last Party signs this Agreement, as indicated below.

CITY:

City of Elk Grove, a municipal corporation

By: Laura S. Gill
Laura S. Gill
City Manager

Dated: April 18, 2017

Approved as to Form:

Elk Grove City Attorney's Office

By: Jonathan P. Hobbs
Jonathan P. Hobbs
City Attorney

PROPERTY OWNER:

THE RIDGE EG EAST, LP, a California Limited Partnership

By: John Papagiannopoulos
John Papagiannopoulos
Its: Manager

Dated: April 14, 2017

Approved as to Form:

Murphy Austin Adams Schoenfeld LLP

By: Russell J. Austin
Russell J. Austin
Attorney for Property Owner

Attest:

By: *Jason Lindgren*
Jason Lindgren, City Clerk

Date: April 19, 2017



**EXHIBIT A
CITY OF ELK GROVE**

**ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT
CALCULATIONS AND PROCEDURES AND DEFINITIONS FOR PAYMENTS**

The Payment due Property Owner shall be paid quarterly and within one-hundred and fifty (150) days following the end of each quarter and subject to receipt of all data by the City from the State Board of Equalization confirming the City's share of City Sales Tax Revenues attributable to the Costco Project, all as set forth in the Agreement. The Payment Amount due Property Owner from the City shall be calculated as set forth herein. Any subsequent sales tax distribution corrections made by the State Board of Equalization shall be reflected in the calculations of the next Payment

1. General Statement

The Payment Amount due Property Owner shall be an amount equal to 50% of the Sales Tax (as defined in Section 2(b) of the Agreement) revenue generated by the Project Parcel.

2. Maximum Discounted Present Value

After the Payment Amount has been calculated, its discounted present value shall be calculated as follows:

- 2.1 The number of years shall be determined by subtracting 2018 from the calculation year.
- 2.2 The Calculated Discount Factor shall be the number 1.06 raised to a power equal to the number of years calculated above.
- 2.3 The Current Discount Present Value of the Payment shall be equal to the Payment Amount divided by the Calculated Discount Factor from above.
- 2.4 The Cumulative Discounted Present Value of the Payment Amount shall be the sum of the prior Cumulative Discounted Present Value of the Payment Amount plus the Current Discounted Present Value of the Payment Amount.

In no event may a payment be made which would cause the Cumulative Discounted Present Value to exceed \$8 million. Eight million dollars (\$8,000,000) is the Maximum Payment Amount of the cumulative Payment Amounts.

3. Example Calculation

3.1 Calculation Format

Presented below is an example calculation format for the second full calendar year - 2019, assuming a Store Opening sometime in 2018.

Calculations and adjustments will actually be made at the time each quarterly payment is made by the City during the Calendar Year.

| | | | |
|----|---|------------|-----------------|
| A. | Actual 2019 Sales Tax Revenue Generated by Project | | \$1,000,000 |
| B. | 2019 Percentage Allocation to Property Owner | | 50% |
| C. | 2019 Payment Amount | A * B | \$500,000 |
| D. | 2019 Base Discount Factor | | 1.06 |
| E. | Power to Raise Discount Factor (Current Year – 2018) | 2019-2018= | 1 |
| F. | 2019 Calculated Discount Factor | | $1.06^1 = 1.06$ |
| G. | 2019 Current Discounted Present Value | C / F | \$471,698 |
| H. | Prior Year Cumulative Discounted Value (2018) (Assumes 2018 Payment Amount is \$500,000, no discount applies in first year) | | \$500,000 |
| I. | Cumulative Discounted Present Value | G + H | \$971,698 |
| J. | Maximum Cumulative Discounted Present Value | | \$8,000,000 |

Under the above example, the City will have paid Property Owner \$1,000,000 in Sales Tax proceeds for 2018 and 2019, and the City will have received a credit towards the \$8,000,000 Maximum Payment Amount of \$971,698, due to the discount factor. These payments shall continue until the earlier of: (1) the Cumulative Discounted Present Value paid equals \$8,000,000, which could result in a payment of less than 50% of the Sales Tax revenues in the last year of payment (see Limitation, below); or (2) twenty-five (25) years from Store Opening.

Limitation – Cumulative Discounted Present Value (I) cannot exceed Maximum Cumulative Discounted Present Value. In the year in which, Cumulative Discounted Present Value exceeds Maximum Cumulative Discounted Present Value, reduce Payment Amount until Cumulative Discounted Present Value Equals Maximum Cumulative Present Value.