

**THE CITY OF MCKINNEY, TEXAS
AND
McKINNEY SH I, LTD.
CHAPTER 380 ECONOMIC DEVELOPMENT AGREEMENT**

WHEREAS, *MCKINNEY SH I, LTD.*, a Texas Limited Partnership (hereinafter “MSHI”), is entering into this Chapter 380 Economic Development Agreement (this “Agreement”) pursuant to a program initiated by the **CITY OF MCKINNEY, TEXAS** (hereinafter “CITY”) pursuant to Chapter 380 of the Texas Local Government Code, for the primary purpose of constructing, staffing, and operating a retail development center on the south side of U.S. Highway 380 (West University Drive) between Bois D’Arc Road and Hardin Boulevard located entirely within the City of McKinney, Texas that encompasses approximately 150,000 square foot of retail, restaurant, fitness, entertainment, and medical/dental uses including a 55,000 square foot twelve (12) screen Cinemark® Movie Theater with lounge seating and food/drink delivery, a 37,000 square foot fitness center, two (2) Class A retail buildings totaling approximately 20,250 square feet and seven (7) additional pad sites or outparcels (the “Private Development”); and

WHEREAS, the CITY has agreed to a conditional economic development grant to MSHI based on the timely completion of one 55,000 square foot twelve (12) screen Cinemark® Movie Theater with lounge seating and food/drink delivery, and two (2) Class A retail buildings containing a total of approximately 20,250 square feet of improved conditioned retail space, and including but not limited to the construction of certain building and site improvements and other economic development criteria to be funded by the CITY upon the timely performance of MSHI under this Agreement; and

WHEREAS, the CITY has the authority under Chapter 380 of the Texas Local Government Code to make loans or grants of CITY funds for the purposes of promoting local economic development and stimulating business and commercial activity within the CITY; and

WHEREAS, the CITY has determined the “Project”, defined herein below, to be an eligible project for a conditional grant to MSHI of its funds which grant will serve the public purpose of promoting local economic development and enhancing business and commercial activity in the City of McKinney, Texas; and

WHEREAS, the CITY has concluded and hereby finds that this Agreement clearly promotes economic development in the City of McKinney and, as such, meets the requisites under Chapter 380 of the Texas Local Government Code and further, is in the best interests of the CITY and MSHI; and

WHEREAS, the City Council has considered and approved this Agreement authorizing the CITY pursuant to applicable law; and

NOW, THEREFORE, for and in consideration of the agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, CITY and MSHI agree as follows:

SECTION 1. TERM

This Agreement shall be effective from the Effective Date until December 31, 2018, unless terminated sooner under the provisions herein.

SECTION 2. DEFINITIONS

The following words shall have the following meanings when used in this Agreement.

- a. Agreement. The word “Agreement” means this Chapter 380 Economic Development Agreement, together with all exhibits and schedules attached to this Agreement and specifically incorporated herein.
- b. CITY. The word “CITY” means the City of McKinney, Texas. For purposes of this Agreement, CITY’s address is 222 N. Tennessee, McKinney, Texas 75069.
- c. Force Majeure. For purposes of this Agreement, “force majeure” shall mean any contingency or cause beyond the reasonable control of MSHI including acts of God or the public enemy, war, riot, civil commotion, insurrection, governmental or de facto governmental action (unless caused by acts or omissions of MSHI), fires, explosions or floods, and strikes; however specifically excluding normal weather delays and governmental acts of the CITY.
- d. Grant. The word “Grant” means a grant equal to the verified, actual construction costs of the “Public Infrastructure”, defined herein below, up to an amount not to exceed One Million Three Hundred Fifty Thousand Dollars (\$1,350,000.00) made by the CITY to MSHI under the terms of this Agreement payable upon the receipt of a Certificate of Occupancy for certain of the buildings and uses in the Project that are identified herein below.
- e. MSHI. The acronym “MSHI” means McKinney SH I, Ltd., a Texas Limited Partnership, having a registered office address of 1110 Cowan Road, Celina, Texas 75009.

- f. Private Development. The words “Private Development” mean MSHI’s future construction of approximately 150,000 square foot of retail, restaurant, fitness, entertainment, as well as medical and dental uses including a 55,000 square foot twelve (12) screen Cinemark® Movie Theater with lounge seating and food/drink delivery, a 37,000 square foot fitness center, two (2) Class A retail buildings totaling approximately 20,250 square feet and seven (7) additional pad sites or outparcels located wholly within the CITY along the south side of U.S. Highway 380 (West University Drive) between Bois D’Arc Road and Hardin Boulevard.

- g. Project. The word “Project” means one 55,000 square foot twelve (12) screen Cinemark® Movie Theater, with lounge seating and food/drink delivery, designed and constructed in accordance with the Site Plan and Elevations attached hereto as Exhibit B and incorporated herein by reference for all purposes allowed by law, and two (2) Class A retail buildings containing a total of approximately 20,250 square feet of improved conditioned retail space located wholly within the CITY being developed by MSHI.

- h. Public Infrastructure. The words “Public Infrastructure” as used in this Agreement for the purpose of the Grant mean the design and construction of Bois D’Arc Road from U.S. Highway 380 (West University Drive) to Crowe Lane including a left-turn lane, right-turn lane and through lane from northbound Bois D’Arc Road onto and across U.S. Highway 380 (West University Drive) as well as a right–turn lane from eastbound U.S. Highway 380 (West University Drive) onto southbound Bois D’Arc Road together with all related appurtenances including, by way of illustration and not limitation, transitions, intersection signalization, street lighting, curb and gutter, sidewalks, and crosswalks as required by the CITY’s Master Thoroughfare Plan, Street Design Standards Manual and as determined or approved by the City Engineer for a completed roadway section; the general location of the roadway component of such Public Infrastructure is more specifically shown on Exhibit A attached hereto and incorporated herein by reference.

SECTION 3. GRANT FUNDING OBLIGATION OF CITY

- a. CITY shall fund a Grant in an amount equal to the verified, actual construction costs of the Public Infrastructure up to an amount not to exceed One Million Three Hundred Fifty Thousand Dollars (\$1,350,000.00).

- b. The Grant shall be payable to MSHI within thirty (30) days following the full and final completion of all of the following requirements on or before December 31, 2018:
- 1) MSHI's dedication of all on-site rights-of-way and easements necessary for the construction of the Public Infrastructure to CITY at no cost to CITY; and
 - 2) MSHI's acquisition and conveyance of all off-site rights-of-way and easements necessary for the construction of the Public Infrastructure to CITY at no cost to CITY; and
 - 3) MSHI's completion of the design and construction of the Public Infrastructure in accordance with the CITY's Code of Ordinances, Street Design Manual, Thoroughfare Plan and all other applicable guidelines, rules, regulations, codes and statutes (collectively "City Specifications") as evidenced by CITY's final acceptance of the Public Infrastructure following MSHI's tender to CITY of any required lien releases, bills paid affidavit, and a Maintenance Bond in the amount of at least fifteen percent (15%) of the cost of the Public Infrastructure; and
 - 4) MSHI's completion of the Project, consisting of at least one 55,000 square foot twelve (12) screen Cinemark[®] Movie Theater, with lounge seating and food/drink delivery, and two (2) Class A retail buildings containing a total of approximately 20,250 square feet of improved conditioned retail space, and receipt of a Certificate of Occupancy for each of the structures and uses comprising the Project and provided the express terms and conditions described in Section 4 below are satisfied.

SECTION 4. OBLIGATIONS OF MSHI

While this Agreement is in effect, MSHI shall comply with the following terms and conditions to be eligible for any Grant(s); as such conditions are described or may apply:

- a. Prior to the commencement of construction on the Public Infrastructure MSHI shall acquire, where necessary, and convey or cause to be conveyed to the CITY all on-site and off-site rights-of-way and infrastructure easements necessary for the construction of the Public Infrastructure as depicted on Exhibit A, attached hereto and incorporated herein by reference for all purposes allowed by law. MSHI shall convey or cause said on-site and off-site rights-of-way and infrastructure easements to be conveyed to the CITY in fee simple by plat dedication or separate instrument in a form that

is acceptable to the CITY (the "ROW Conveyances"). All conveyances shall be at no cost to the CITY. MSHI understands and acknowledges that additional right-of-way and easements from the Property may be required at the time of platting of tracts situated adjacent to the properties conveyed hereunder. The rights-of-way and infrastructure easements conveyed, dedicated or granted to the CITY shall be free and clear of all encumbrances, unless expressly permitted in writing by the CITY, which condition of title shall be approved by the CITY prior to the conveyance or dedication. The CITY shall have the right to terminate this Agreement if the on-site and off-site rights-of-way and infrastructure easements have not been acquired and conveyed or caused to be conveyed by MSHI to CITY in accordance with this paragraph and all obligations between the parties shall terminate. MSHI shall dedicate all on-site rights-of-way and easements necessary for the construction of the Public Infrastructure to CITY at no cost to CITY on or before December 31, 2018, and MSHI shall also cause all off-site rights-of-way and easements necessary for the construction of the Public Infrastructure to be conveyed to CITY at no cost to CITY on or before December 31, 2018.

- b. MSHI shall design and construct the aforementioned Public Infrastructure, pursuant to City specifications, in the area as generally depicted on Exhibit A. It is agreed that subject to force majeure, all construction shall be completed (to a condition which would satisfy all requisites for final acceptance by the City if such acceptance has not actually occurred) on or before December 31, 2018. All Public Infrastructure contemplated by this Agreement shall be subject to City's inspection and approval upon completion.
- c. As a condition to MSHI's receipt of the Grant for its construction of the Public Infrastructure, MSHI shall provide the following compliance certificates to CITY: compliance certificates specifying the as-built, actual costs of the construction (including any documentation of contractor payments incident thereto), and that construction of the Public Infrastructure has been completed and accepted by CITY in accordance with the terms and conditions of this Agreement and all CITY codes, ordinances and regulations, as verified by CITY, such verification not to be unreasonably withheld or delayed. MSHI shall not be eligible for the Grant for any portion of the Public Infrastructure until the final completion and acceptance of the Public Infrastructure has occurred and MSHI has also submitted any required lien releases, bills paid affidavit, and a two-year Maintenance Bond in the amount of at least fifteen percent (15%) of the cost of the Public Infrastructure.

- d. MSHI shall also complete construction of the Project, consisting of at least one 55,000 square foot twelve (12) screen Cinemark® Movie Theater, with lounge seating and food/drink delivery, and two (2) Class A retail buildings containing a total of approximately 20,250 square feet of improved conditioned retail space together with all appurtenances thereto and receive a Certificate of Occupancy therefor on or before December 31, 2018.
- e. MSHI shall also submit (i) a “Bills Paid Affidavit”, as shown on Exhibit C, satisfactory to the CITY, covering all vendor/contractor payments and draws for the Project; and (ii) any other cost and payment documentation reasonably requested by CITY for the Project. The CITY, or its designee, may verify that the expenditures were made in such amounts prior to the Grant disbursement.
- f. MSHI shall be in compliance with all applicable City of McKinney codes, state and federal laws, and local ordinances applicable to the Project.

SECTION 5. EVENTS OF DEFAULT.

Each of the following shall constitute an event of default under this Agreement:

- a. CITY’s failure to process a Grant payment to MSHI in accordance with Section 3 of this Agreement.
- b. MSHI’s violation or failure to perform any of the covenants contained in Section 4 hereinabove.

SECTION 6. EFFECT OF AN EVENT OF DEFAULT

In the event of default under Section 5, the non-defaulting party shall give written notice to the other party of any default, and the defaulting party shall have thirty (30) days to cure said default. Should said default remain uncured and the non-defaulting party is not otherwise in default, the non-defaulting party shall have the right to immediately terminate this Agreement.

As long as it shall not be in default, MSHI shall further have the power to enforce specific performance to collect amounts owing upon CITY’s default without terminating this Agreement. No action shall lie for punitive damages, and no special or consequential damages shall be recovered by either party. No Grant payment shall be due or owing by CITY to MSHI after termination.

SECTION 7. MISCELLANEOUS PROVISIONS

The following miscellaneous provisions are a part of this Agreement:

- a. **Amendments.** This Agreement constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by all of the parties hereto.
- b. **Applicable Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Collin County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of Collin County, Texas.
- c. **Audit.** MSHI agrees to allow CITY, at its sole cost and expense, and upon reasonable advance written notice, to audit all of MSHI's records, documents, agreements and other instruments related to the construction of the Public Infrastructure at the location where MSHI maintains such items for a period of no more than two (2) years from the date of completion and CITY's final acceptance of the Public Improvements.
- d. **Binding Obligation Only on Effective Date.** This Agreement shall become a binding obligation on the parties on the Effective Date. CITY warrants and represents that the individual executing this Agreement on behalf of CITY has full authority to execute this Agreement and bind CITY to the same. MSHI warrants and represents that the individual executing this Agreement on its behalf has full authority to execute this Agreement and bind it to the same.
- e. **Private Development Conditions.** All of the Private Development shall be consistent with all City codes and ordinances as well as any other regulations or plans relative to the Property, including the CITY's Comprehensive Plan, Subdivision Regulations, Zoning Ordinance and all other applicable development regulations. This Agreement does not constitute a waiver by CITY of any development ordinances or conditions. MSHI acknowledges that by executing this Agreement, no entitlement or agreements concerning zoning or land use shall arise, either implied or otherwise, through or by virtue of this Agreement.

- f. **No Waiver of Sovereign Immunity.** The CITY shall not have waived any statutory or common law right to sovereign immunity by virtue of its execution hereof.
- g. **Execution of Agreement.** The CITY has authorized its City Manager to execute this Agreement on behalf of the CITY.
- h. **Severability.** In the event any provision of this Agreement shall be determined by any court of competent jurisdiction to be invalid or unenforceable, the Agreement shall, to the extent reasonably possible, remain in force as to the balance of its provisions as if such invalid provision were not a part hereof.
- i. **Notices.** Whenever a party to this Agreement is required or permitted under this Agreement to provide the other party with any notice, submittal, request, demand, consent, or approval ("Notice"), the Notice will be given in writing and will be delivered to the other party at the address or facsimile number set forth below: (a) personally; (b) by a reputable overnight courier service; (c) by certified mail, postage prepaid, return receipt requested; or (d) by e-mail or facsimile transmission. Either party may change its address for Notice by written notice to the other party delivered in the manner set forth above. Notice will be deemed to have been duly given: (i) on the date personally delivered; (ii) one (1) business day after delivery to an overnight courier service with next-day service requested; (iii) on the third (3rd) business day after mailing, if mailed using certified mail; or (iv) on the date sent when delivered by facsimile or e-mail (so long as delivered on a business day and the sender receives electronic confirmation of delivery and a copy of the Notice is sent by one of the other means permitted hereunder on or before the next business day).

If to MSHI: McKinney SH I, Ltd.,
Attn: R. Eric Seitz
1110 Cowan Road
Celina, Texas 75009
Telephone: (214) 223-9077
Fax: (_____) _____ - _____
E-mail: eric@seitzgroup.net

[Remainder of page intentionally left blank.]

If to CITY: City of McKinney, Texas
Attn: Paul G. Grimes, City Manager
222 N. Tennessee Street
McKinney, TX 75069
Phone: (972) 547-7520
Fax: (972) 547-2607
E-mail: pgrimes@mckinneytexas.org

- i. **Effective Date.** The effective date (the “Effective Date”) of this Agreement shall be the latter of the dates on which MSHI and CITY have each executed this Agreement.
- j. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same document.

CITY OF MCKINNEY

By: _____
PAUL G. GRIMES
City Manager

Date Signed: _____

ATTEST:

SANDY HART, TRMC, MMC
City Secretary
DENISE VICE, TRMC
Assistant City Secretary

APPROVED AS TO FORM:

MARK S. HOUSER
City Attorney

McKINNEY SH I, LTD.,
a Texas limited partnership

By: McKinney SH I GP, LLC,
a Texas limited liability company,
its General Partner

By: _____
R. ERIC SEITZ
Manager

Date Signed: _____

EXHIBIT A

Depiction of general location and layout of Public Infrastructure

[See following single page.]

EXHIBIT B

Site Plan and Elevations of Cinemark® Movie Theater

[See following _____ pages.]

Exhibit C

“Bills Paid Affidavit”

[See following three pages.]

BILLS-PAID AFFIDAVIT

Date: _____

Project Name: 380 Commons at Headington Heights (55,000 square foot twelve (12) screen Cinemark® Movie Theater with lounge seating and food/drink delivery, and two (2) Class A retail buildings containing a total of approximately 20,250 square feet of improved conditioned retail space)

Owner Name: _____

Owner's Mailing Address:

Contractor Name(s): _____

Contractor's Mailing Address(es):

Affiant's Name: _____

Affiant's Mailing Address:

Phase/Lots and Blocks:

[Signatures begin on following page.]

OWNER:

_____ [INSERT OWNER'S NAME]
a [Insert type of business entity] _____

By: _____
Name:

Title:

SUBSCRIBED AND SWORN TO before me on this ____ day of _____, 20____, by
_____, in his/her capacity as _____, of
_____ a _____ (hereinafter called "Affiant").

Notary Public, State of Texas