

CREDIT PUBLIC IMPROVEMENT FEE AGREEMENT

Among the City of Colorado Springs; Scheels All Sports, Inc.; and Interquest North Business Improvement District

This Credit Public Improvement Fee Agreement (“Agreement”) dated as of _____, 2019 (“Effective Date”), is made by and among the City of Colorado Springs, a home rule city and Colorado municipal corporation (“City”), Interquest North Business Improvement District (“District”), a business improvement district duly formed and existing pursuant to §§ 31-25-1200 *et seq.*, C.R.S., and Scheels All Sports, Inc. (“Employer”), a Colorado corporation. The City, District and Employer may each be referred to individually as a “Party” or collectively as the “Parties.”

RECITALS

A. All capitalized terms used, but not defined in these Recitals, shall have the meaning ascribed to them in Part 13 of Article 7 of Chapter 2 of the Code of the City of Colorado Springs 2001, as amended, but if not defined therein, then as used in this Agreement. The Recitals are incorporated into this Agreement as though fully set forth in the body of this Agreement.

B. Employer is the contract purchaser of the real property described in ***Exhibit A*** (the “Property”) and desires to develop the Property by constructing and occupying a commercial project which will include a 220,000 square foot retail sporting goods store with a Ferris wheel and other unique entertainment or sporting features, which will create approximately 350 net new jobs, together with related amenities and uses on the Property (the “Project”). The Parties acknowledge that the Project constitutes an “Infill Development” within the meaning of the City’s comprehensive plan “Plan COS”. In addition to the creation of new jobs, the construction of the Project will also generate and contribute new sales and property taxes for the City and other taxing bodies. The City therefore finds that the Project benefits the public health, safety and welfare by facilitating construction of necessary public improvements and furthering the City’s overall economic development goals. Employer is scheduled to commence construction of the Project in calendar year 2019.

C. The District has, in anticipation of the execution of this Agreement, heretofore constructed various public improvements benefitting the Property and the City, which enable the construction of the Project, and to which the Employer will contribute a significant amount. Specifically, the Interquest North Business Improvement District has acquired or caused the construction of water, sanitary sewer, storm drainage, streets and traffic improvements for the benefit of the property owners and businesses within the boundaries of the District. These improvements include, but are not limited to, portions of and appurtenances to Rampart Hills

View Drive, Federal Drive, Market Center Point, Interquest Parkway and Voyager Drive along with landscaping, parking areas and several regional storm water facilities.

NOW THEREFORE, in consideration of the foregoing recitals, the mutual covenants and promises of the Parties contained in this Agreement, and other valuable consideration, the receipt and adequacy of which are acknowledged, the Parties hereby agree to the terms and conditions set forth in this Agreement.

AGREEMENT

1. DEFINITIONS

- a. **“City Code”** means the Colorado Springs City Code, as the same may be amended or supplemented from time to time.
- b. **“Credit PIF”** means the public improvement fee in the amount of 1% of the retail sale price imposed upon all Taxable Sales, as set forth in the Credit PIF Covenant, which will be (i) collected in accordance with the terms of the Credit PIF Covenant and (ii) accounted for and spent in accordance with this Agreement.
- c. **“Credit PIF Covenant”** means a contractually enforceable method by which a public improvement fee is imposed and collected upon all retail sales of taxable personal property and services occurring upon the Property, including any declaration of covenants, deed restrictions, lease terms or other lawful means by which the Employer imposes and implements the Credit PIF within the Property. The Credit PIF Covenant shall provide that it terminates upon the earlier to occur of (a) cessation of operations of the Project, or (b) twenty five years from the date of the first retail sale occurring upon any premises located upon the Property (the “Commencement Date”). Sales tax credits shall terminate immediately when the Credit PIF terminates. The Credit PIF Covenant has been recorded against the Property as of the date of this Agreement.
- d. **“Credit PIF Revenue”** means the revenue derived from the imposition of the Credit PIF in accordance with the Credit PIF Covenant and this Agreement.
- e. **“PIF Collection Agent”** means the entity designated, pursuant to the Credit PIF Covenant, to collect, account for and disburse the Credit PIF Revenue in accordance with the Credit PIF Covenant.
- f. **“Project”** means 220,000 square foot Scheels retail store together with parking facilities and related amenities and uses on the Property.

g. **“Property”** means the real property described in Exhibit A. Such Property is either owned by Employer, Employer is under contract to purchase such Property, or Employer otherwise has the right or will have the right to further develop the Property.

h. **“Retail”** means a type of business selling goods or services to the general public where such sales are subject to the City’s Sales Tax.

i. **“Sales Tax”** means the general municipal sales tax of the City on sales of goods and services that are subject to municipal sales taxes at such rate and on such terms and conditions as prescribed in the City Code, as amended from time to time.

j. **“Sales Tax Credit”** means the credit against the City’s Sales Tax in an amount equal to the Credit PIF imposed and collected on Taxable Sales, in the amount of 1% of the taxable sales price, as implemented pursuant to the Sales Tax Credit Ordinance.

k. **“Sales Tax Credit Ordinance”** means Part 13 of Article 7 of Chapter 2 of the City Code, as amended.

l. **“Taxable Sales”** means gross sales less any exemptions and deductions specified in Chapter 2 of the City Code.

2. PROJECT, LAND USE APPROVALS

a. The Parties intend for the Project to provide products and services and reflect a design and build quality that will contribute to the stature of the City, create jobs, and generate net new sales and property tax revenues for the City.

3. EMPLOYER

a. Employer agrees to construct, own, operate and maintain the Project in a manner consistent with a best-in-class sporting goods store, commensurate with its other retail stores around the state and country. This Agreement does not constitute a covenant to operate; however, Employer acknowledges that this Agreement and the Sales Tax Credit shall terminate upon Employer’s cessation of operations of the Project as set forth in Section 8 of this Agreement.

b. Employer agrees to collect and account for the Credit PIF as required by the Credit PIF Covenant and consistent with this Agreement and the Sales Tax Credit Ordinance.

c. Employer shall have the right to retain the Credit PIF revenues in furtherance of the purposes of this Agreement, as reimbursement for direct and indirect contributions to the public improvements and as an economic development incentive. Employer shall keep proper and current itemized records, books, and accounts in which complete and accurate entries will be made of the receipt of all amounts of revenue received from the Credit PIF and such other calculations required by this Agreement and any applicable law or regulation. Employer shall on a monthly basis file a report with District and City by the due date(s) required for reporting City Sales Tax collections, which sets forth the full amount of Credit PIF Revenue collected in the same manner as it reports City Sales Tax. Employer hereby specifically authorizes the District, City and any accountant or financial consultant designated by the District or City (collectively, the "Auditor") to audit its books and records with respect to Credit PIF revenues to determine compliance with this Agreement, the Sales Tax Credit Ordinance and the Credit PIF Covenant. Upon request by the Auditor, all books, invoices and accounts shall be made available for inspection by the Auditor during reasonable business hours.

4. DISTRICT.

a. The District shall have the right to audit the books and records of Employer, but only to the extent necessary to ensure compliance with this Agreement, the Credit PIF Covenant, and the Sales Tax Credit Ordinance. The District shall have the right to enforce this Agreement, the Credit PIF Covenant, and the Sales Tax Credit Ordinance.

5. CITY

a. The City shall have the right to audit the books and records of Employer, but only to the extent necessary to ensure compliance with this Agreement, the Credit PIF Covenant, and the Sales Tax Credit Ordinance. The City shall have the right to enforce this Agreement, the Credit PIF Covenant, and the Sales Tax Credit Ordinance.

b. **Regulatory Approvals.** Consistent with all applicable laws, codes and ordinances, the City agrees to cooperate with the Employer and the District in reviewing, scheduling hearings for, and timely acting upon all applications for regulatory approvals necessary for the Project; provided, however, that nothing in this section shall be construed to pre-judge or restrict the regulatory decision-making of the City or of City Council or of any City board or commission.

c. **Sales Tax Credit Ordinance.** The City shall adopt the Sales Tax Credit Ordinance to implement the Sales Tax Credit in substantially the form set forth in Exhibit B. Provided this Agreement is in effect, the City will authorize, grant and implement the Sales Tax Credit pursuant to the Sales Tax Credit Ordinance in order for the Credit PIF to be collected in

accordance with the Credit PIF Covenant and this Agreement. Except as hereinafter provided, the Sales Tax Credit shall terminate twenty five (25) years from the Commencement Date.

d. **Post Credit PIF Period.** Notwithstanding any language in any agreement to the contrary, if the City, in its sole determination, determines that termination of the Sales Tax Credit in accordance with the terms and provisions of this Agreement may be precluded by or require a refund of the Sales Tax under Article X, Section 20 of the Colorado Constitution, the City may elect to continue the Sales Tax Credit and submit a written request to Employer to continue to impose the Credit PIF. The Credit PIF Covenant contains provisions necessary to ensure that the Credit PIF shall remain in full force and effect and the full amount derived from imposition of the Credit PIF that is offset by the City's Sales Tax Credit shall be paid to the City as a substitute for the Sales Tax revenue it is unable to collect.

e. **Other PIF Fees.** The City acknowledges and agrees that one or more other covenants may be recorded against the Property, now or in the future, which require payment of public improvement fees other than the Credit PIF. The City does not have and will not acquire any right, claim or interest in any revenues derived from such other public improvements fees under any circumstances.

f. **Extent of Sales Tax Credit.** The City is agreeing that it will grant a credit in the amount of 1% of the amount of taxable retail sales occurring on the Property against the City's Sales Tax otherwise imposed on Taxable Sales within the Property only to the extent that the Credit PIF is imposed and collected.

g. **Change in Sales Tax.** Nothing in this Agreement shall impair the right of the City Council to modify the imposition of sales tax through the City Code including the reduction in the rate of taxation or adding exemptions from taxation provided such modifications shall not have retroactive effect.

h. **Right to Suspend and Rebate.** The City may at any time, on not less than thirty (30) days prior written notice to any affected PIF Collection Agent, suspend the Sales Tax Credit for any given fiscal year of the City within the time period set forth in this Agreement. During a suspension period, the Employer and any other retailers within the designated geographic area covered by a Credit PIF Agreement shall be obligated to collect the full amount of sales tax at the rate set forth in this Chapter and remit the entire sales tax amount to the City. The City shall thereafter, within sixty (60) days of the receipt of the entire sales tax amount, rebate that portion of the sales tax previously subject to the Sales Tax Credit to the PIF Collection Agent. Such rebate shall be disbursed pursuant to the terms of Credit PIF Covenant and this Agreement. During the suspension period the Employer (and any other retailer in the designated geographic area) shall

not collect the Credit PIF. If, for any reason, the Credit PIF should continue to be collected, the rebate described above shall be proportionately reduced.

i. **Compliance with Law.** Nothing set forth in this Agreement is intended or shall be construed to constitute or to require (a) an unlawful delegation of authority by the City; (b) an unlawful restraint on the legislative discretion of future City Councils; or (c) the undertaking of any multiple fiscal year obligation by the City except as permitted by applicable law. Nothing in this Agreement is intended to nor shall be construed to create any multiple-fiscal year direct or indirect debt or financial obligation on the part of the City within the meaning of the Constitution or laws of the State of Colorado, or the City's home rule charter, and any such financial obligation of the City created by this Agreement is expressly subject to annual appropriation by the City.

6. TERM. The Effective Date of this Agreement shall commence upon the date that the City Ordinance approving this Agreement is final. The Agreement shall terminate upon that date which is the earlier of 1) the date on which Employer ceases to operate the Project; or 2) twenty five (25) years from the Commencement Date.

7. CONFLICTS OF INTEREST. None of the following will have any personal interest, direct or indirect, in this Agreement: a member of the governing body of the City or an employee of the City who exercises responsibility concerning the City Requirements, or an individual or firm retained by the City who has performed consulting services to the City or this Agreement. None of the above persons or entities will participate in any decision relating to this Agreement that affects his or her personal interests or the interests of any corporation, partnership or association in which he or she is directly or indirectly interested.

8. NOTICES. Any notice required or permitted by this Agreement will be in writing and will be deemed to have been sufficiently given for all purposes if delivered in person, by prepaid overnight express mail or overnight courier service, by certified mail or registered mail, postage prepaid return receipt requested, addressed to the Party to whom such notice is to be given at the address set forth on the signature page below or at such other or additional addresses as may be furnished in writing to the other Parties. Additionally, the Parties agree to provide concurrent notice via electronic mail.

9. EVENTS OF DEFAULT. The following event shall constitute an Event of Default under this Agreement: any Party fails in the performance of any covenant in this Agreement, (except for those events allowing the termination of this Agreement as set forth herein) and such failure continues for thirty (30) days after written notice specifying such default and requiring the same to be remedied is given by a non-defaulting Party to the defaulting Party.

If such default is not of a type which can be cured within such thirty (30) day period and the defaulting Party gives written notice to the non-defaulting Party or Parties within such thirty (30) day period that it is actively and diligently pursuing such cure, the defaulting Party shall have a reasonable period of time given the nature of the default following the end of such thirty (30) day period to cure such default, provided that such defaulting Party is at all times within such additional time period actively and diligently pursuing such cure in good faith.

10. REMEDIES. Upon the occurrence and continuation of an Event of Default, the non-defaulting Party's remedies will be limited to the right to enforce the defaulting Party's obligations by an action for injunction, specific performance, or other appropriate equitable remedy or for mandamus, or by an action to collect and enforce payment of sums owing hereunder, and no other remedy (unless otherwise expressly authorized by this Agreement), and no Party will be entitled to or claim damages for an Event of Default by the defaulting Party, including, without limitation, lost profits, economic damages, or actual, direct, incidental, consequential, punitive or exemplary damages. In the event of any litigation or other proceeding to enforce any of the terms, covenants or conditions of this Agreement, the prevailing party in such litigation or other proceeding will receive, as part of its judgment or award, its reasonable attorneys' fees and costs.

11. NONLIABILITY OF OFFICIALS, AGENTS, MEMBERS, AND EMPLOYEES.

Except for willful or wanton actions, no trustee, board member, commissioner, official, employee, consultant, manager, member, shareholder, attorney or agent of any Party, nor any lender to any Party or to the Project, will be personally liable under this Agreement or in the event of any default or for any amount that may become due to any Party.

12. ASSIGNMENT. This Agreement shall not be assigned in whole or in part by any Party without the prior written consent of the other Parties; provided, however, Employer may assign, pledge, collaterally assign, or otherwise encumber all or any part of this Agreement, including its right to receive any payment or reimbursement, without any Party's consent but not until thirty (30) days' advance written notice is given to the City and District containing the name and address of the assignee, and certification that the assignment meets the requirements of this section: (a) to any lender or other party that provides acquisition, construction, working capital, tenant improvement or other financing to Employer in connection with development of the Property, acquisition of the Property, and/or construction of public improvements; or (b) to one or more special purpose entities or joint venture entities formed by Employer or with its investors or partners created to develop, own, and/or operate all or a portion of the Property or of public improvements to be constructed thereon, provided that the Property continues to include the operation of a sporting goods store occupying 220,000 square feet of retail space with unique amenities including a Ferris wheel. In the event the District or City determines, based upon the information submitted by

Employer and District's or City's independent investigation, if any, that the assignment appears not to comply with the requirements of this Section, such Party shall notify Employer that consent is not granted and the Agreement shall not be assigned.

- 13. COOPERATION REGARDING DEFENSE.** In the event of any litigation or other legal challenge involving this Agreement or any material part or provision of this Agreement or the ability of any Party to enter into this Agreement, the Parties will cooperate and jointly defend against such action or challenge, to the extent permitted by law.
- 14. SECTION CAPTIONS.** The captions of the sections are set forth only for the convenience and reference of the Parties and are not intended in any way to define, limit, or describe the scope or intent of this Agreement.
- 15. ADDITIONAL DOCUMENTS OR ACTION.** The Parties agree to execute any additional documents or take any additional action, including but not limited to estoppel documents requested or required by lenders, that is necessary to carry out this Agreement or is reasonably requested by any Party to confirm or clarify the intent of the provisions of this Agreement and to effectuate the agreements and the intent. Notwithstanding the foregoing, however, no Party shall be obligated to execute any additional document or take any additional action unless such document or action is reasonably acceptable to such Party. If all or any portion of this Agreement, or other agreements approved in connection with this Agreement are asserted or determined to be invalid, illegal or are otherwise precluded, the Parties, within the scope of their powers and duties, will cooperate in the joint defense of such documents and, if such defense is unsuccessful, the Parties will use reasonable, diligent good faith efforts to amend, reform or replace such precluded items to assure, to the extent legally permissible, that each Party substantially receives the benefits that it would have received under this Agreement.
- 16. AMENDMENT.** This Agreement may be amended only by an instrument in writing signed by the Parties.
- 17. WAIVER OF BREACH.** A waiver by any Party to this Agreement of the breach of any term or provision of this Agreement must be in writing and will not operate or be construed as a waiver of any subsequent breach by any Party.
- 18. GOVERNING LAW AND JURISDICTION.** The laws of the State of Colorado govern this Agreement. Court jurisdiction shall exclusively be in the District Court for El Paso County, Colorado.

- 19. BINDING EFFECT, ENTIRE AGREEMENT.** This Agreement will inure to the benefit of and be binding upon the Parties and their respective legal representatives, successors, heirs, and assigns, provided that nothing in this paragraph permits the assignment of this Agreement except as set forth in Section 14. This Agreement, together with all the exhibits, represents the entire Agreement between the Parties and supersedes any prior written or oral agreements or understandings with regard to the Property or Project not specifically set forth in this Agreement.
- 20. EXECUTION IN COUNTERPARTS.** This Agreement may be executed in several counterparts, each of which will be deemed an original and all of which will constitute but one and the same instrument.
- 21. LIMITED THIRD-PARTY BENEFICIARIES.** This Agreement is intended to describe the rights and responsibilities only as to the Parties to this Agreement. This Agreement is not intended and shall not be deemed to confer any rights on any person or entity not named as a Party to this Agreement.
- 22. NO PRESUMPTION.** The Parties and their attorneys have had a full opportunity to review and participate in the drafting of the final form of this Agreement. Accordingly, this Agreement will be construed without regard to any presumption or other rule of construction against the Party causing this Agreement to be drafted.
- 23. SEVERABILITY.** If any provision of this Agreement as applied to any Party or to any circumstance is adjudged by a court to be void or unenforceable, the same will in no way affect any other provision of this Agreement, the application of any such provision in any other circumstances or the validity, or enforceability of this Agreement as a whole.
- 24. MINOR CHANGES.** This Agreement has been approved in substantially the form submitted to the governing bodies of the Parties. The officers executing this Agreement are authorized to make and may have made, minor changes to this Agreement and attached exhibits as they have considered necessary. So long as such changes were consistent with the intent and understanding of the Parties at the time of approval by the governing bodies, the execution of this Agreement will constitute the approval of such changes by the respective Parties.
- 25. GOOD FAITH OF PARTIES.** In the performance of this Agreement or in considering any requested approval, consent, acceptance, or extension of time, the Parties agree that each will act in good faith and will not act unreasonably, arbitrarily, capriciously, or unreasonably withhold, condition, or delay any approval, acceptance, or extension of time required or requested pursuant to this Agreement.

26. PARTIES NOT PARTNERS. Notwithstanding any language in this Agreement or any other agreement, representation, or warranty to the contrary, the Parties will not be deemed to be partners or joint venturers, and no Party is responsible for any debt or liability of any other Party.

27. GOVERNMENTAL IMMUNITY. Nothing in this Agreement shall be interpreted to limit or prevent the protections afforded to the City or the District pursuant to the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*

[Remainder of page intentionally left blank.]

IN WITNESS WHEREOF, this Agreement is executed by the Parties as of _____, 2019.

CITY OF COLORADO SPRINGS:

John Suthers, Mayor

Date

Approved as to Form:

Wynetta Massey, City Attorney

EMPLOYER

Scheels All Sports, Inc.

By: _____

Name: _____

Title: _____

DISTRICT

Interquest North Business Improvement District

By: _____

Name: _____

Title: _____

EXHIBIT A

Description of the Property

EXHIBIT B

Sales Tax Credit Ordinance