

RESOLUTION 2016-05

RESOLUTION TO ADOPT AN ECONOMIC DEVELOPMENT AGREEMENT BETWEEN THE CITY OF FALLS CHURCH, VIRGINIA, THE CITY OF FALLS CHURCH ECONOMIC DEVELOPMENT AUTHORITY, AND SPECTRUM DEVELOPMENT LLC

WHEREAS, the City of Falls Church seeks to have a theater use in a mixed-use project to be located at the corner of West Broad Street and West Street; and

WHEREAS, the City Council believes that the inclusion of the theater use in that project will spur economic development in the City, by attracting consumers to the area and increasing the vibrancy of the streetscape and through other mechanisms as described in the Economic Development Agreement; and

WHEREAS, the cost of development of the theater requires that the City participate in the economic structure as the theater is built out and begins operation; and

WHEREAS, the use of money paid by the theater-goers as an admissions tax will enable the City to so participate without further burdening the taxpayers of the City,

NOW THEREFORE, BE IT RESOLVED by the City Council of the City of Falls Church, that the Economic Development Agreement, as currently before Council is approved, and the City Manager is authorized to sign the Economic Development Agreement, with such changes as he deems necessary that do not adversely affect the City's position.

Attached: Economic Development Agreement

1st Reading: 4-13-15

Adoption: 1-11-16

(TR15-37)

IN WITNESS WHEREOF, the foregoing was adopted by the City Council of the City of Falls Church, Virginia on January 11, 2016 as Resolution 2016-05.



Celeste Heath
City Clerk

ECONOMIC DEVELOPMENT AGREEMENT

THIS ECONOMIC DEVELOPMENT AGREEMENT (this "Agreement") is entered into as of _____, 2016 by and among the CITY OF FALLS CHURCH, VIRGINIA (the "City"), the CITY OF FALLS CHURCH ECONOMIC DEVELOPMENT AUTHORITY (the "Authority") and SPECTRUM DEVELOPMENT LLC, a Virginia limited liability company (the "Developer").

RECITALS:

The City proposes to enter into this Agreement with the Authority and the Developer in order to promote economic development objectives as described herein. The City, the Authority and the Developer propose to facilitate the construction of certain office, retail (including movie theater user), hotel and multi-family uses and transportation, pedestrian, streetscape and landscape improvements, storm water controls, and erosion controls in connection with the development of an approximately 4.3 acre site located on a site bounded by West Broad Street, North West Street and Park Avenue, Falls Church, Virginia (the "Site"). The Site is under contract to be purchased by the Developer and is described on Exhibit A attached hereto and made a part hereof. The Site will be improved with a mixed use project (called "Mason Row") containing retail uses, a hotel, 322 multi-family residences, approximately 5,000 sq. ft. of offices, and a movie theater ("Theater") of about 20,000 to 33,000 sq. ft. The Developer has committed to the City that the movie theater space will be leased to a nationally recognized movie theater company ("Theater Company").

The City, the Authority and the Developer expect that the development and operation of Mason Row by the Developer and the Theater Company will provide necessary or desirable infrastructure and public improvements and result in economic development in the City in the form of increased employment opportunities for the residents of the City, increased tax revenues for the City, a strengthened economic base and other economic benefits to the City which will further the well-being of the City and its residents. The City is authorized pursuant to Section 2.02 of its Charter and Section 15.2-953 of the Code of Virginia of 1950, as amended (the "Virginia Code"), to make donations and appropriations of money to the Authority for the purposes of promoting economic development. The Authority is authorized pursuant to Section 15.2-4905 of the Virginia Code to make grants to businesses for the purpose of promoting economic development.

The City and the Authority have each determined that the incentives provided by this Agreement are required to induce the Developer to develop and construct the Mason Row in the City of Falls Church and acknowledge that the Developer is relying on the incentives described in this Agreement in its decision to continue pursuing the development of Mason Row. The City and the Authority acknowledge that they have determined that payments to be received by the Developer hereunder are reasonable in light of the foregoing and based upon the City staff's independent research and consultation with industry experts.

The City and Authority determinations in the preceding paragraph were made in reliance on certain financial information that was provided by the Developer to the City's consultant, Bolan Smart Associates, Inc, and on that information in determining the need for the incentives provided for herein, the amount of such incentives, and the reasonableness of the payments to be received by the Developer.

The City intends to make economic development incentive payments to the Authority to facilitate the development and operation of the Mason Row, from tax revenues generated by the Theater admissions tax imposed by the City upon each person purchasing a ticket for a movie at the Theater to the extent provided herein ("Admission Tax"). The City shall have no obligation to make any such payments except from Admissions Taxes received by the City and this tax sharing structure represents no upfront cost to the City. The City has determined that there will be no effect on the City's credit rating and there will be no additional tax burden on City residents.

In furtherance of the aforementioned objectives, the City adopted Resolution No. TR___(the "Resolution").

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City, the Authority and the Developer hereby agree as follows:

1. Recitals. The foregoing recitals are incorporated into and made a part of this Agreement as though they were fully set forth in this paragraph 1 and constitute the representations, findings and understandings of the City, the Authority and the Developer.

2. City Undertakings.

(a) Subject to annual appropriation therefore by the City Council of the City of Falls Church, Virginia, and the occurrence of each and all of the Developer Undertakings (as hereinafter defined) the City will to pay an Authority Payment (as hereinafter defined) to the Authority annually as soon as practicable, but no later than September 30 each year over a period of twenty (20) years ("Tax Sharing Term") commencing in the first full fiscal year of the City of Falls Church (Hereafter, "Fiscal Year" shall refer to the fiscal year used by the City for its budgeting) following the year in which Theater opens for business (each an "Authority Payment Date"). Each payment by the City to the Authority shall be an amount equal to a portion of the annual Admission Tax Revenue (as hereinafter defined) generated by Mason Row (each an "Authority Payment"), as set forth below:

Admission Tax revenues generated by or from Mason Row shall be shared as follows:

- (i) In the first full year that following the opening of the Theater, the Developer and the City shall share the

Admissions Tax revenue as follows: The first Twenty Thousand (\$20,000.00) of the Admissions Tax revenue shall be retained by the City (the City Share). The next Three Hundred and Forty Thousand Dollars (\$340,000.00) of the Admissions Tax revenue shall be paid to the Developer. This combined amount (\$360,000.00) is defined as the Cap. The City shall retain all Admission Tax Revenue that exceeds the Cap.

- (ii) For each year of the nineteen (19) years after the first year that the Theater is open the City Share and The Cap shall be increased each year to an amount equal to the preceding year multiplied by 103%. All Admission Tax revenue in excess of the City Share up to the amount of the Cap shall be paid to the Developer and the City shall retain the Admissions Tax revenue that exceeds the Cap.
- (ii) The City shall retain all Admission Tax revenue after the Tax Sharing Term has expired.

(b) The City will cooperate and work with the Authority, as set forth in paragraph 3(b) and 3(c), to calculate the Authority Payments. The City and Authority shall share the final calculation with the Developer.

(c) Because the City's obligation to make Authority Payments is subject to annual appropriation, the Authority Payments shall not constitute debt of the City for purposes of Article VII, Section 10(b) of the Constitution of Virginia.

d) The City acknowledges that it has not relied on any representations of the Developer except as specifically set forth in this Agreement. This Agreement constitutes the entire agreement of the parties relating to Mason Row and the Authority Payments.

(e) The City shall have no obligation to pay to the Authority (for payment to the Developer) any amount above the amounts set forth in subparagraph 2(a)(i) through 2(a)(ii) above, nor shall it have any obligation to pay any amounts not received by it from admissions taxes.

3. Authority Undertakings.

(a) The Authority agrees to cooperate with the City to provide the economic development incentives to facilitate the development and construction of Mason Row on the terms set forth herein.

(b) The Authority, with assistance from the City Treasurer and Commissioner of Revenue, will prepare a report of the Admission Tax Receipts and calculate the share payable to the Developer, with a payment to the Developer no later

than September 30 of each year, for taxes received by the City from ticket sales in the preceding Fiscal Year.

(c) On an annual basis for each Fiscal Year, the Authority shall prepare a report of Admission Tax Revenue and calculate the share of Admission Tax Revenue payable to the Developer in accordance with terms of this agreement schedule. Such annual calculation and payment shall be made as soon as practicable but no later than September 30 of each year, for the preceding City Fiscal Year (July 1 through June 30).

(d) Subject to paragraph 3(d) below, the Authority agrees to pay all monies received from the City as Authority Payments to the Developer within ten (10) business days after the Authority's receipt thereof in accordance with paragraph 2 above.

(e) The Authority shall make the payments to the Developer described in paragraph 3(c) above solely from Authority Payments received from the City. The Authority's obligation to make such payments shall be contingent on sufficient funding from the City in the form of Authority Payments. No payment made by the Authority pursuant to this Agreement shall constitute a general obligation of the Authority or be payable from any monies of the Authority other than Authority Payments. Neither the Developer, the Authority nor the Authority's members assume liability beyond those obligations specifically set forth herein.

(f) The Authority acknowledges that it has not relied on any representations of the Developer except as specifically set forth in this Agreement. This Agreement constitutes the entire agreement of the parties relating to Mason Row and the Authority Payments.

4. Developer Undertakings.

(a) In order to receive the Admission Tax Revenue as described in paragraph 2 above, the Developer shall undertake or cause to be undertaken the following (the "Developer Undertakings"):

(1) Develop the Mason Row, generally as depicted in the approved Conceptual Development Plan for the Special Exceptions for mixed use and bonus height as approved by the City Council for Mason Row, subject to the Voluntary Concessions and all parts of the Special Exception approval, and as further approved by the Planning Commission in the Site Plan for Mason Row.

(2) Lease the Theater space in Mason Row to a nationally recognized theater company, through a lease accepted by the City Manager as provided for in VC number 3.

(3) Cause the Theater Company to execute an agreement that permits the Commissioner of the Revenue and the City Treasurer to disclose to the Authority and the City any information that may be reasonably necessary to perform the Authority Undertakings in section 3 hereof or the City Undertakings in section 2 hereof.

(b) The Developer acknowledges and agrees that the schedule of sharing of Admission Tax Revenues by the Authority to the Developer as provided in Section 2(a) above, represents the full and complete financial contribution from the City and the Authority toward the redevelopment of the Site. Neither the City nor the Authority shall have any obligation to pay any amounts not provided for in paragraph 2(a) above.

(c) The Developer understands and agrees that the development of Mason Row requires a full public Zoning approval (to include required rezoning, Comprehensive Plan amendment, Special Exceptions for Mixed Use and Bonus Height) and site plan approval process. This agreement in no way obligates the City or Planning Commission to approve the zoning or site plan; and

(d) This agreement shall terminate on January 1, 2021, without further action by either party if the Theater Company has not opened its Theater in Mason Row. In such event, neither the City nor the Authority shall have any further obligation hereunder. Provided, however, that the City Manager may approve an extension of the January 1, 2021 deadline for a definite period of time if the Developer provides evidence to him that the Theater Company and the Developer are diligently pursuing opening of the theater and provides reasonable assurances that the Theater will actually open during the extended time period.

5. Notices. Any notice, request, demand, instruction or other document required or permitted by the provisions of this Agreement to be given or served hereunder or under any document or instrument executed pursuant hereto shall be in writing and (i) sent by first class mail, (ii) personally delivered, (iii) faxed or tele copied or (iv) sent by a recognized reputable overnight courier service to the City, the Authority and/or the Developer.

If to the City:

City of Falls Church, Virginia
Attn: City Manager
300 Park Avenue
Falls Church, Virginia 22046
Phone: (703) 248-5004
Fax: (703) 248-5146

If to the Authority:

City of Falls Church Economic
Development Authority
Attn: Economic Development
Director
300 Park Avenue
Falls Church, Virginia 22046
Phone: (703) 248-5491
Fax: (703) 248-5103

If to the Developer:

Spectrum Development LLC

Attn: Peter Batten or Dick Buskell
1866 Amberwood Manor Court
Vienna, Va. 22182

Copies of any notice to be sent to one party above shall be sent to the other parties to this agreement

6. Liability; Disclaimer of Warranties; Limited Obligations of City and Authority.

(a) Each party to this agreement shall be responsible for their respective actions that result in liability, obligations, losses, claims, damages, actions, suits proceedings, costs and expenses, including reasonable attorney's fees, arising out of, or connected with, their respective actions resulting directly or indirectly from this Agreement, including without limitation, the transactions contemplated by or relating to this Agreement, including claims the City or Authority exceeded their lawful authority. Developer shall not be in any way responsible for the day-to-day costs and expenses of the City or the Authority directly or indirectly related to this Agreement, including, as an example, the wages of any of the employees of the City and/or the Authority or any other daily operating expenses of the City and/or the Authority. Neither the City nor the Authority shall be in any way responsible or liable for any loss, claim, damage, action, suit, proceeding, cost or expense that is covered by the doctrine of sovereign immunity under Virginia law.

(b) The Developer acknowledges that neither the City nor the Authority has designed any of the Developer undertakings described in paragraph 4 (a) , that neither the City nor the Authority has supplied any plans or specifications with respect thereto and that neither the City nor the Authority: (i) is a manufacturer of, or dealer in, any of the component parts of the Developer Undertakings or similar facilities; (ii) has made any recommendation, given any advice or taken any other action with respect to (x) the choice of any lessor, supplier, vendor or designer of, or any other contractor with respect to, the Developer Undertakings or any component part thereof or any property or rights relating thereto, or (y) any action taken or to be taken with respect to the Developer Undertakings or any component part thereof or any property or rights relating thereto at any stage of the construction, leasing or redevelopment thereof, (iii) has at any time had physical possession of the Developer Undertakings or any component part thereof; or (iv) has made any warranty or other representation, express or implied, that the Developer Undertakings or any component part thereof or any property or rights relating thereto (x) will not result in or cause injury or damage to persons or property, (y) has been or will be properly designed or will accomplish the results which the Developer intends therefor, or (z) is safe in any manner or respect.

(c) Neither the City nor the Authority makes any express or implied warranty or representation of any kind whatsoever with respect to: (i) the Developer Undertakings or any component part thereof, including, but not limited to, any warranty or representation with respect to the merchantability or the fitness or suitability thereof for any particular purpose and further including the design or condition thereof, the safety, workmanship, quality or capacity thereof, the compliance thereof with the requirements of any law, rule, specification or contract pertaining thereto; (ii) any latent defect; (iii) the Developer Undertakings suitability to serve any function; or (iv) any other characteristic of the Developer Undertakings, it being agreed that the Developer is to bear all risks relating to the Developer Undertakings and the completion thereof or the transactions contemplated hereby and that the Developer hereby waives the benefits of any and all implied warranties and representations of the City, the Authority or the Developer with respect thereto.

(d) No provision in this Agreement shall be deemed to constitute a pledge of the faith and credit of the Commonwealth of Virginia, the Authority or the City. Neither the faith and credit nor the taxing power of the Commonwealth of Virginia, the Authority or the City is pledged to the payments described herein. The Authority has no taxing power. The Authority's obligation for the payments described herein shall be limited as described in paragraph 3(c),(d) and (e) above. No supervisor, director, officer, employee or agent of the City, the Authority or the Developer shall be subject to any personal liability by reason of this Agreement.

(e) The Developer is not obligated to further document for the benefit of, or disclose to, the City or the Authority, costs and expenses actually incurred in connection with the Site or the Retail Center, or any other records related thereto, beyond what has already been provided.

7. The Developer's Right of Termination; Transfer. At any time prior to (or after) completing the construction and development of Mason Row, the Developer may, by giving written notice to the City and the Authority, abandon such development and terminate this Agreement and the obligations of the Developer hereunder if the Developer determines, in its sole discretion, that such development is no longer economically feasible. Upon such termination, neither the City nor the Authority shall have any obligation to make any further Authority Payments to the Developer. The indemnity provisions in paragraph 6 shall survive termination of this Agreement. The Developer may, but shall not be obligated to, assign or transfer this Agreement in connection with any sale of Mason Row, along with its terms, conditions and obligations.

8. Amendments; Assignment. This Agreement constitutes the full agreement among the parties and may not be amended or assigned without the prior written consent of each of the parties hereto. Subject to the execution of a Theater Lease accepted by the City Manager as provided for in VC number 3, no prior consent shall be required in connection with: (a) the sale of the Site or Mason Row or any

portion thereof that includes the Theater; (b) the right of the Developer to assign or pledge its right to receive Authority Payments hereunder to any affiliate or to any participant in any financing related to the Site or Mason Row; (c) the right of the Developer to encumber or collaterally assign its interest in the Site or Mason Row or any portion thereof that includes the Theater to secure loans, advances or extensions or credit to finance or from time to time refinance all or any part of the costs of development, including the Site, or the right of the holder of any such encumbrance or transferee of any such collateral assignment (or trustee or agent on its behalf) to transfer such interest by foreclosure or transfer in lieu of foreclosure under such encumbrance or collateral assignment; or (d) the right of the Developer to assign its rights, duties and obligations under this Agreement to any party related to the Developer by one of the relationships described in Section 267(b) of the United States Internal Revenue Code of 1986, as amended; provided that in each such event (i) the Developer shall remain liable for its duties and obligations hereunder and shall be released from such liability only in accordance with the terms hereof, and (ii) the Developer provides to the City and the Authority forty-five (45) days' advance written notice of the proposed assignment or transfer.

9. Governing Law; Consent to Jurisdiction and Venue. This Agreement shall be construed in accordance with the laws of the Commonwealth of Virginia. The parties hereto (a) agree that any suit, action or other legal proceeding, as between the parties hereto, arising out of or relating to this Agreement shall be brought and tried only in the Circuit Court of Arlington County, Virginia or federal court in Alexandria, Virginia, (b) consent to the jurisdiction of such court any such suit, action or proceeding, and (c) waive any objection which any of them may have to the laying of venue of any such suit, action or proceeding in such court and any claim that any such suit, action or proceeding has been brought in an inconvenient forum, The parties hereto agree that a final judgment in any such suit, action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

10. WAIVER OF TRIAL BY JURY. THE CITY, THE AUTHORITY AND THE DEVELOPER HEREBY WAIVE A TRIAL BY JURY IN ANY ACTION OR PROCEEDING TO WHICH THE CITY, THE AUTHORITY AND THE DEVELOPER MAY BE PARTIES, ARISING OUT OF OR IN ANY WAY PERTAINING TO THIS AGREEMENT. IT IS AGREED AND UNDERSTOOD THAT THIS WAIVER CONSTITUTES A WAIVER OF TRIAL BY JURY OF ALL CLAIMS AGAINST ALL PARTIES TO SUCH ACTIONS OR PROCEEDINGS, INCLUDING CLAIMS AGAINST PARTIES WHO ARE NOT PARTIES TO THIS AGREEMENT. THIS WAIVER IS KNOWINGLY, WILLINGLY AND VOLUNTARILY MADE BY THE CITY, THE AUTHORITY AND THE DEVELOPER, AND THE CITY, THE AUTHORITY AND THE DEVELOPER HEREBY REPRESENT THAT NO REPRESENTATIONS OF FACT OR OPINION HAVE BEEN MADE BY ANY INDIVIDUAL TO INDUCE THIS WAIVER OF TRIAL BY JURY OR TO IN ANY WAY MODIFY OR NULLIFY ITS EFFECT.

11. Severability. If any clause, provision or section of this Agreement is held to be illegal or invalid by any court, the invalidity of the clause, provision or section will not affect any of the remaining clauses, provisions or sections, and this Agreement will be construed and enforced as if the illegal or invalid clause, provision or section had not been contained in it.

12. Counterparts. This Agreement may be signed in several counterparts, each of which shall be an original and all of which together shall constitute the same instrument.

13. Successors and Assigns. This Agreement will be binding upon, inure to the benefit of, and be enforceable by the parties and their respective successors and assigns.

14. Survival; Conflicts. This Agreement shall survive and remain in full force and effect until all Authority Payments and/or indemnity payments under this Agreement have been made. In the event of any conflict between the Resolution, the MOU or this Agreement, the terms of this Agreement shall control.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

CITY OF FALLS CHURCH, VIRGINIA

By: _____

Its: City Manager

CITY OF FALLS CHURCH ECONOMIC
DEVELOPMENT AUTHORITY

By: _____

Its: Chairman

Spectrum Development LLC

By: _____

Its: Managing Member

Approved as to form:

City Attorney