

# DRAFT

## DEVELOPMENT OVERSIGHT AND DELIVERY AGREEMENT

by and between

THE CITY OF POMONA

And

MAYA CINEMAS NORTH AMERICA, INC.

\_\_\_\_\_, 2018

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## DEVELOPMENT OVERSIGHT AND DELIVERY AGREEMENT

THIS DEVELOPMENT OVERSIGHT AND DELIVERY AGREEMENT ("**Agreement**") dated for reference purposes only \_\_\_\_\_, 2018 is entered into by and between the CITY OF POMONA ("**City**" or "**Owner**") and MAYA CINEMAS NORTH AMERICA, INC., a Delaware Corporation, or its designee ("**Developer**"). City and Developer are sometimes hereinafter collectively referred to herein as the Parties. The City and Developer hereby agree as follows:

### SEC. 100 SUBJECT OF AGREEMENT

#### Sec. 101 Purpose of Agreement

(1) The purpose of this Agreement is to provide development oversight, completion of construction and delivery to City by Developer of an approximately 700+ space parking garage structure ("**City Project**" or "**Improvements**") on a portion of Pomona Vehicle Parking District ("**VPD**") Lot No. 10 ("**Parking Property**") and a portion of First Street, with the City Project to be owned and operated by City after delivery of the City Project to City.

#### Sec. 102 The Property

(1) The Parking Property consists of a portion of VPD Lot No. 10 constituting approximately \_\_\_\_\_ square feet and the portion of First Street depicted on **Attachment No. 1** attached hereto. The Parking Property is legally described on **Attachment No. 2**, attached hereto and incorporated herein.

### SEC. 200 PARTIES AND NOTICE

#### Sec. 201 Representatives of the Parties and Service of Notice

(1) The representative of the parties who are primarily responsible for the administration of the Agreement, and to whom formal notice, demands and communications shall be given, are as follows:

- (a) The principal representative of the City shall be:

City Manager  
City of Pomona  
505 South Garey Avenue  
Pomona, California 91766  
Phone: 909-620-2311  
Fax: 909-620- 3707  
Email: [linda\\_lowry@ci.pomona.ca.us](mailto:linda_lowry@ci.pomona.ca.us)  
Email: [kirk\\_pelser@ci.pomona.ca.us](mailto:kirk_pelser@ci.pomona.ca.us)

- (b) The principal representative of the Developer shall be:

Moctesuma Esparza, CEO  
Maya Cinemas North America, Inc.

150 S. Arroyo Parkway, Suite 102  
Pasadena, CA 91105  
Phone: 213-805-5333  
Fax: 213-805-5332

(2) Formal notices, demands and communications to be given hereunder by either party shall be made in writing and may be affected by personal delivery or by mail by FAX or by email.

(3) If the name of the principal representative designated to receive the notices, demands or communications, or the address of such person, is changed, written notice shall be given within five (5) working days of said changes.

## **SEC. 300 DEVELOPER QUALIFICATIONS, RETENTION**

### **Sec. 301 Retention of Developer**

(1) The City retains and engages Developer under this Agreement to provide development oversight, completion of construction and delivery to City by Developer of the City Project in accordance with the terms of this Agreement. Developer accepts the engagement and agrees to render such services as Developer on the terms and conditions herein stated.

### **Sec. 302 Standard of Work**

(1) Developer agrees that the services to be rendered pursuant to this Agreement shall be performed in accordance with the standards customarily provided by an experienced and competent professional organization rendering the same or similar services. Developer shall re-perform any of said services, which are not in conformity with standards as determined by the City. The Developer will be relieved of its obligation to re-perform said services if the City does not notify Developer within 180 days after the completion of the non-conforming service. Compensation for Developer to re-perform said services shall be subject to the approval of the City, but in no event shall such compensation exceed the actual cost of said re-performance services. Except as hereinafter provided in respect of personal injury or property damage, the foregoing are the Developer's entire responsibilities and the CITY'S exclusive remedies for service rendered or to be rendered hereunder, and no other warranties, guarantees, liabilities, or obligations are to be implied.

### **Sec. 303 Familiarity With Work**

- (1) By execution of this Agreement, Developer warrants that:
- (a) It has thoroughly investigated and considered the work to be performed, based on all available information.
  - (b) It carefully considered how the work should be performed.
  - (c) It fully understands the difficulties and restrictions attending the performance of the work under this Agreement.
  - (d) It has the professional and technical competency to perform the work and the production capacity to complete the work in a timely manner.

#### **Sec. 304        Independent Contractor**

Developer is an independent contractor. As such, Developer shall have no power or authority to incur any debt, obligation or liability on behalf of the CITY. Further, Developer is not entitled to any benefit typically associated with an employee such as medical, sick leave or vacation benefit.

##### Sec. 304.1        PERS Eligibility Indemnity.

In the event that Developer or any employee, agent, or subcontractor of Developer providing services under this Agreement claims or is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of the City, Developer shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer contributions for PERS benefits on behalf of Developer or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

Notwithstanding any other agency, state or federal policy, rule, regulation, law or ordinance to the contrary, Developer and any of its employees, agents, and subcontractors providing service under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in PERS as an employee of City and entitlement to any contribution to be paid by City for employer contribution and/or employee contributions for PERS benefits.

#### **Sec. 305        Compensation**

As consideration to Developer for the performance of this Agreement City shall:

- (1) Enter into the City Ground Lease pursuant to Section 404;
- (2) Cooperate with Developer in obtaining New Market Tax Credit financing for the City Project; and
- (3) Deposit funds in an Escrow Account pursuant to Section 405 of this Agreement.

#### **Sec. 306        Developer Scope of Work and Responsibilities**

(1) Developer shall be responsible for the development oversight of the Design-Build Agreement (as defined in Section 403), the timely construction of the City Project and the delivery of the completed City Project to the City. The Developer's responsibilities shall include, but not be limited to:

(a) Be responsible for the orderly and expeditious performance of the Design-Build Agreement (“**DBA**”), as described in Section 403 of this Agreement, in accordance with the terms of the DBA, cause to be performed all work necessary in connection therewith; be responsible for the proper administration of the DBA and maintain coordination among the Design-Build Entity (“**DBE**”) City and any Project Manager hired by City.

(b) Prepare Project Site organization and lines of authority in order to carry out the DBA on a coordinated basis;

(c) Except as otherwise provided, obtain Owner's written approval of any changes in the Work and any approvals or other documents necessary in connection therewith;

(d) Conduct necessary job and coordination meetings, which job meetings shall be held as required;

(e) Submit to Owner and City's Project Manager each month a "Job Progress Report", which shall include such items as: (i) the financial condition of the Work, including Subcontract awards, Work modifications, anticipated cost summary, Change Order summary and projected cash flow; (ii) construction status, and (iii) progress payments status;

(f) Notify Owner and Project Manager of the progress of the Work, and advise Owner of any delays or potential delays which may affect any one or more of the Project Manager's recommendations regarding such delays;

(g) Use commercially reasonable efforts to resolve disputes between the DBE and any subcontractors relative to the performance of their work or the furnishing of materials, supplies or equipment in connection with the Work;

(h) Coordinate with DBE to provide adequate security and watchmen services for the Work and coordinate and cooperate with Owner to achieve appropriate interfacing of security and watchmen services for safeguarding Owner's property and the safeguarding of the Work;(i) Make recommendations with respect to any changes Project Manager may consider necessary or desirable in connection with the Work; it being agreed that no changes may be made in connection with the Work without the prior written approval of Owner, as reflected in a Change Order;

(j) With respect to portions of the Work to be performed pursuant to a Change Order on a time and material, unit-cost or other similar basis, keep and require the keeping of records and computations thereof, promptly deliver a copy thereof to Owner, and maintain accurate cost accounting records;

(k) Cause to be performed, and supervise all work necessary to complete any applicable incomplete or unsatisfactory Work items (the "**Punch List Items**") set forth on the list (the "**Punch List**") prepared by Project Manager in consultation with Owner, DBE and any Consultants designated by Owner, on a monthly basis and before any completion date; provided, however, that failure to include any element of the Work on such Punch List shall not alter the responsibility of DBE to complete the Work in accordance with the DBA;

(l) Assist Owner's maintenance personnel in the initial start-up, testing and operation of the City Project and all systems comprising a portion of the same, as well as the training of personnel;

(m) Prior to making any progress payment or final payment under the DBA, (i) prepare a payments status summary indicating all payments and portions of work made and completed, complete with a summary of all approved Change Orders and payments made to date and (ii) secure and deliver to Owner all required guarantees, affidavits, releases of liens, waivers, certificates, consent of any surety to progress payments and final payment, and for final payment "as-built" drawings, attic stock, maintenance manuals, operating instructions and other documents required to be delivered under this Agreement in connection with the work in the form required by Owner and Project Manager and



(n) Secure and deliver to Owner all Project Approvals; it being understood that the making of final payment by Owner to DBE hereunder shall be conditional upon the deliverance by DBE of the foregoing to Owner.

**Sec. 307      Ownership of Work Product.**

All reports, documents or other written material developed by Developer in the performance of this Agreement shall be and remain the property of City without restriction or limitation upon its use or dissemination by City and shall constitute a public record pursuant to California Government Code section 6250 *et seq.* Such Material shall not be the subject of a copyright application by Developer. Any re-use by City of any such materials on any project other than the project for which they were prepared shall be at the sole risk of City unless City compensates Developer for such use.

**Sec. 308      Confidentiality.**

Employees of Developer in the course of their duties may have access to financial, accounting, statistical, and personnel data of private individuals and employees of City. Developer covenants that all data, documents, discussion, or other information developed or received by Developer or provided for performance of this Agreement are deemed confidential and shall not be disclosed by Developer without written authorization by City. City shall grant such authorization if disclosure is required by law. All City data shall be returned to City upon the termination of this Agreement. Developer's covenant under this Section shall survive the termination of this Agreement.

**SEC. 400      DESIGN AND CONSTRUCTION OF CITY PROJECT**

**Sec. 401      City Conditions Precedent to Construction of City Project**

(1) The City has the option to elect not to proceed if it determines in its sole discretion that:

(a) The acquisition of approximately fifty-nine feet of right-of-way in First Street adjacent to the project is infeasible or the cost of acquisition render such acquisition infeasible; or

(b) The City is unable to obtain approval of the California Public Utilities Commission and/or the owner of the railroad tracks adjacent to the north of the City Project for pedestrian and vehicular traffic to cross the railroad tracks on Main Street without conditions, improvements or alterations which make the City Project financially or practically infeasible.

(c) The City determines in its sole discretion that all DBE bids are too high.

(d) The City determines in its sole discretion that CEQA determinations and requirements make the City Project infeasible.

(2) If the City elects not to proceed pursuant to this Section 401, then in such event the following shall occur:

(a) The terms of this Agreement shall be null and void;

(b) The City shall have no obligation to deposit any Bond Funds or monies in the Escrow Account;

(c) The Developer is not obligated to coordinate with the City to design or to construct the City Project;

(d) The City shall continue with the development and construction of the City Project as their own separate project apart from the terms of this Agreement; and,

(e) The exercise of any option or election pursuant to this Section 401 shall not constitute a breach of this Agreement and shall not result in liability or damages for any party to this Agreement.

#### **Sec. 402 Scope of City Project**

(1) The City Project consists of a multi-story public parking structure that will provide approximately 700+ parking stalls at grade level and on elevated decks. Final design and number of spaces shall be determined after selection of the DBE by the City through its procurement process, and acceptance of such DBE entity by the Developer. The structure is anticipated to have:

- 6-8 levels
- Elevator service
- Primary ingress and egress are expected to be on Main Street
- Architectural design consistent with the City's downtown commercial district. Developer shall coordinate with the City to prepare and submit a conceptual depiction of the City Project to the City prior to preparation of the construction plans and specifications.
- Industry standard gating and validation equipment
- The City Project shall be constructed in accordance with the project description contained in the Request for Proposals of the City of Pomona dated \_\_\_\_\_, 2018 and the final design as proposed by the DBE and accepted by the City.

(2) Developer may participate and make recommendations regarding the design and number of parking for the parking structure, but approval of the final design and number of parking spaces shall be made by the City in its sole, absolute and unfettered discretion.

#### **Sec. 403 Design Build Procedures**

(1) The design and construction of the City Project shall be accomplished in accordance with the design-build provisions of City of Pomona Municipal Code Section 2-1006.

(2) Developer shall provide development, oversight and delivery services to the City for the design and construction of the City Project. Developer shall cause to be constructed and delivered to City the City Project in accordance with this Agreement and the Design-Build Agreement.

(3) Developer shall produce/provide a form of Design-Build Agreement consistent with the RFP and sufficient to provide the construction and delivery of the City Project to the City in a first-class and timely manner. Developer shall contract directly with the design-build entity for the design, construction and completion of the City Project. The Design-Build Agreement is subject to written approval by the City. The DBA shall include, but not be limited to, the following terms:

(a) A schedule of performance and completion consistent with the Schedule of Performance attached to this Agreement.

(b) The DBE shall provide general liability insurance of \$5,000,000 per occurrence and \$10,000,000 aggregate which includes loss and replacement coverage for completed work.

(c) An installment payment schedule substantially consistent with the following:

1. 10% distribution upon move-on
2. 20% distribution upon.....
3. 20% distribution upon.....
4. 20% distribution upon.....
5. 20% distribution upon.....
6. 10% retention until any and all lien claims have been resolve and released.

(d) A labor and materials bond and a performance bond both in the amount of the cost of the estimated work, and both made in favor of Developer and City.

(e) A requirement for a Project Labor Agreement in accordance with Section 403(7) of this Agreement.

(4) Developer shall cause to be designed, constructed and delivered to City the City Project in a timely manner in accordance with the Schedule of Performance and the Design-Build Agreement. City and Developer shall make all payments to the DBE for all work related to the City Project from the escrowed funds in accordance with Section 405 of this Agreement. City's sole responsibility for payment to the DBE shall be to deposit funds pursuant to Section 405.

(5) Payments to the design-build entity shall only be made upon the prior joint written authorization of Developer, City and any lender financing the City Project improvements to pay the progress payments to the design-build entity for performance of the work to design and construct the City Project in accordance with the Design-Build Agreement and the Schedule of Performance.

(6) The City Project shall be constructed in accordance with plans and specifications approved by City which have been developed by the DBE.

(7) The City Project and the Design-Build Agreement shall require the payment of Prevailing Wages. The City Project and the Design-Build Agreement shall also require that the City Project shall be subject to a Project Labor Agreement ("PLA") between the applicable union and the City, Developer and Design-Build Entity.

(8) City has prepared a Request for Design-Build Proposals ("RFP"), attached hereto as Attachment No. 3.

(9) If the Developer does not approve the design-build entity chosen by City, then the City may elect, in its sole discretion, to not proceed with the City Project in accordance with this Agreement. In such event the following shall occur:

(a) The City shall have no obligation to deposit any monies in the Escrow Account;

(b) The Developer may continue with the construction of the Developer Project;

(c) The Developer is not obligated to coordinate with the City to design or to construct the City Project;

(d) The City shall continue with the development and construction of the City Project as their own separate project apart from the terms of this Agreement;

(e) The exercise of any option or election pursuant to this subparagraph (9) shall not constitute a breach of this Agreement and shall not result in liability or damages for any party to this Agreement.

(10) City shall reasonably cooperate with Developer to the extent feasible to assist in the City Project qualifying for federal New Market Tax Credit financing.

#### **Sec. 404 City Ground Lease Agreement**

(1) If Developer proceeds to construct the City Project, City shall ground lease to Developer (“**City Project Ground Lease**”) that portion of Vehicle Parking District Lot No. 10 and that portion of First Street depicted on **Attachment No. 4** attached hereto and incorporated herein by reference (“**City Lease Premises**”). The City Project Ground Lease to Developer is issued solely to facilitate the construction of the City Project for the benefit of the City. The term of the lease shall be from the date of commencement of construction of the City Project and ending upon the issuance by the City of a Certificate of Occupancy for the City Project, unless sooner terminated by the provisions of the lease. The City Project Ground Lease shall be approved by the City. At a minimum the lease shall contain the following provisions:

(a) The City Project Ground Lease shall automatically terminate not later than one month after a certificate of occupancy is issued by the City for the City Project.

(b) The City Project Ground Lease shall automatically terminate if Developer fails to construct the City Project in accordance with the Schedule of Performance, unless otherwise agreed to in writing by Developer and the City Manager.

(c) The completed portions of the City Project (parking garage structure) shall become a part of the leased premises as they are physically completed, and until the City Project parking garage improvements are purchased by the City.

(d) Unless otherwise agreed to between the City and Developer, the City Project Ground Lease will require no more than \$10 annually in base rent, and will require the Developer (or its affiliate) to pay all operational, holding and maintenance costs, including taxes and impositions, as additional rent.

(e) The City Project Ground Lease will expressly provide that the improvements comprising the City Project be owned by Developer (or its affiliate, as applicable) from the time such improvements are constructed until sale of the City Project to City upon completion.

(f) A memorandum evidencing the Lease shall be recorded in the official records of Los Angeles County.

(g) Developer (or its affiliate, as applicable), shall have the right to assign, transfer or encumber their interest in the City Project Ground Lease, whether through

assignment, mortgage, deed of trust, or otherwise, for the purpose of securing financing for the City Project and securing New Market Tax Credit (“NMTC”) financing.

(h) Except for provisions in section (g) above Developer shall not allow any encumbrances, liens, stop notices, mechanics liens, leases or other encumbrances or title impediments to attach to the leased premises. Developer shall immediately obtain the release of any such liens, encumbrances or impediments or cause bonds to be posted to insure payment of the amount of such liens, encumbrances or impediments.

(i) Upon the expiration or termination of the City Ground Lease, possession of the City Lease Premises shall be delivered to City free of all liens, mortgages, deeds of trust, sub-leases, assignments or any other encumbrance on the title of the City Lease Premises which did not exist prior to the commencement date of the City Ground Lease Agreement. Maya Cinemas North America, Inc. specifically covenants and agrees that the City Lease Premises shall be transferred back to City free and clear of any and all security interests, liens, encumbrances, and deeds of trust related to or affecting the City Lease Premises (including all improvements and alterations to the City Lease Premises made by or for Developer or City). Maya Cinemas North America, Inc., further covenants and agrees to remove any liens, mechanic’s liens, stop notices, assignments, monetary encumbrances, deeds of trust or other encumbrances on the City Lease Premises which attached to the City Lease Premises on or after the commencement of the City Project Ground Lease.

#### **Sec. 405 Escrow Account for City Project**

(1) Not sooner than the execution of the Design-Build Agreement by all parties City shall deposit not less than \$13,000,000 (“City Project Funds”) in an escrow account (“**Escrow Account**”) established with \_\_\_\_\_ (“**Escrow Agent**”). The City Project Funds shall be disbursed from the Escrow Account only upon the joint written authorization of Developer, City and any lender financing the City Project improvements. Disbursements shall be made only to pay the progress payments to the design-build entity for performance of the work to design and construct the City Project in accordance with the DBA to be entered into between the Developer and the approved design-build entity and other City and Developer approved parties.

(2) The Escrow Account shall be in such form as to qualify for federal NMTC for the City Project.

(3) Upon completion of the City Project, payment of all funds due to the DBE, and written demand on Escrow Agent from the City, all remaining funds, if any, shall be distributed to City without any further authorization from any party to the Escrow Account.

#### **Sec. 406 City Purchase of Parking Garage**

(1) Upon issuance by the City of a certificate of occupancy for the City Project, the City shall purchase the right, title and all interests to the City Project, including but not limited to the parking garage structure, and all other improvements, equipment, structures and appurtenances constructed in accordance with the Design-Build Agreement as a part of the City Project, by authorizing release from the Escrow Account payment of any retention amount and any other final payments pursuant to the Design-Build Agreement. Such purchase transaction shall be evidenced by written documentation, bill of sale or such other documents as reasonably required by City.

(2) Title to the City Project shall be delivered to City free of any leases, including the City Project Ground Lease, liens, stop notice claims, mechanics liens, monetary liens or any other liens or encumbrances not approved by City within the sole discretion of City.

(3) City shall reasonably cooperate with Developer to the extent feasible to assist in the City Project qualifying for federal NMTC financing. Any documents required to be signed by City for NMTC approval must be approved by City which approval shall not be unreasonably withheld or delayed.

#### **Sec. 407 City Project Costs**

All costs for engineering, planning, designing, lot consolidation or parcel maps, permits, entitlements and constructing the City Project shall be borne exclusively by the DBE. All costs to perform the Design-Build Agreement shall be paid by the DBE.

#### **Sec. 408 Environmental Compliance**

(1) City shall undertake full and complete California Environmental Quality Act ("CEQA") analysis, noticing, documentation and public review will be undertaken by the appropriate lead agency prior to approval of the Development Entitlements for the City Project. CEQA compliance is a condition precedent to construction of the City Project. The approval of this Agreement shall not limit the scope of CEQA analysis including project mitigation measures and the consideration of project alternatives, including a no-project alternative. The provisions of this Section 408 shall not in any way limit, hinder or affect the discretion of the lead agency to review CEQA documents and impose mitigation measures, alter the project or deny the project in consideration of adverse environmental impacts. All costs associated with the CEQA process for the City Project shall be paid by City.

#### **Sec. 409 Schedule of Performance**

(1) As soon as the Design-Build Agreement has been approved and executed by all necessary parties and Developer receives Development Entitlements and CEQA approval for the City Project, Developer shall begin promptly thereafter to diligently commence and complete the construction of the improvements and the development of the City Project. Developer shall commence grading and construction of the City Project not later than December 31, 2019. Developer shall begin and complete plans, development and construction of the City Project within the time specified in the "**Schedule of Performance**," attached hereto as **Attachment No. 5** and incorporated herein by reference, or such reasonable extension of said dates as may be granted by the City Manager or City Council, which extension shall not be unreasonably withheld. The Schedule of Performance is subject to revision from time to time as mutually agreed upon in writing between Developer, the DBE and the City Manager or City Council.

(2) If Developer does not commence grading and foundation work on the City Project by December 31, 2019, then City shall have the option, in its sole and absolute discretion, to terminate this Agreement and proceed with the construction of the City Project through its own means. The City shall give Developer written notice of the City exercise of this option. (3)

If the City elects not to proceed pursuant to Section 409(2), then in such event the following shall occur:

- (a) The terms of this Agreement shall be null and void;

(b) The City shall have no obligation to deposit any Bond Funds or monies in the Escrow Account;

(c) The Developer is not obligated to coordinate with the City to design or to construct the City Project;

(d) The City may continue with the development and construction of the City Project as their own separate project apart from the terms of this Agreement; and

(e) The exercise of any option or election pursuant to this Section 409(2) shall not constitute a breach of this Agreement and shall not result in liability or damages for any party to this Agreement.

#### **Sec. 410 Insurance; Indemnity, Bonds**

(1) Prior to the commencement or continuation of any construction hereunder occurring after the City approves this Agreement, the Developer shall obtain a general liability insurance policy and maintain such policy in effect until the completion of all of the Developer Project and the City Project (as reasonably determined by the City) providing coverage for bodily injury and property damage in the minimum amount of Two Million Dollars (\$5,000,000.00) per occurrence and \$10,000,000 aggregate. The policy shall name, as additionally assureds, the City of Pomona and their officers and employees in their official capacity and while acting within the scope of their duties, against all claims, suits, or other actions of any nature brought for or on account of any deaths, injuries, damage or loss, arising out of or connected with the construction or oversight of the City Project under this Agreement.

(2) Insurance coverage furnished by Developer, pursuant to this Section 410, may be submitted as one or more policies or part of a blanket policy, but coverage shall conform to this Section 410 and shall pertain to all activities on the Property and shall require approval by the City.

(3) Developer shall furnish City a certificate of insurance from its insurer evidencing compliance with this Section 410 with the provision that the insurer shall endeavor not to cancel or modify the policy without thirty (30) days written notice to City. Developer shall give City prompt and timely notice of any claim made or suit instituted. City and its officers and employees, in their official capacity and while acting within the scope of their duties, shall also be named as additionally insured in any policies of Developer's contractors covering work under this Agreement; and such policies shall comply with this Section 304. Coverage shall be primary and not contributing with any policy or coverage maintained by or obtained by the City, and shall include an appropriate endorsement and waiver of subrogation.

(4) Developer shall comply with all of the provisions of the Workers' Compensation Insurance and Safety Acts of the State of California, the applicable provisions of Division 4 and 5 of the California Labor Code, and all amendments thereto, and all similar State or Federal acts or laws applicable, and arising thereunder. Developer shall furnish to City a certificate of Worker's Compensation insurance providing that the insurer shall endeavor not to cancel or modify the policy without thirty (30) days prior written notice to City. As an alternative, Developer may show proof of a certificate of consent to self-insure issued by the Director of Industrial Relations, pursuant to California Labor Code §3800.

(5) Developer agrees to and shall indemnify, defend and hold harmless the City from and against all claims, wage claims, demands, liabilities, losses, damages, costs, mechanics' liens, or expenses (including reasonable attorneys' fees and court costs) arising from or relating to the death of any person or any accident, injury, loss, or damage whatsoever to person or property which shall occur on the Parking Property and which shall be directly or indirectly caused by any acts, errors or omissions of Developer or its agents, servants, employees, tenants, or contractors. Developer shall not be responsible for, and this indemnity in this subparagraph (5) shall not apply to, such matters to the extent caused by any willful or negligent conduct of the City or their respective agents, servants, employees, or contractors.

(6) Developer shall indemnify, hold harmless and defend the City, its agents, officers, and employees from any claim, wage claims, action, proceeding or damages against the City and/or its agents, officers, or employees arising out of the action, inaction or negligence of the Developer, its employees, officers, agents, contractors, subcontractors, successors or assigns in planning, engineering, constructing or in any manner carrying out the City Project or any improvements required for the City Project. Developer shall not be responsible for, and this indemnity in this subparagraph (6) shall not apply to, any of the foregoing matters to the extent caused by any willful or negligent conduct of the City or its respective agents, servants, employees, or contractors.

(7) In the case of any such defense by Developer, City shall cooperate in the choice of defense counsel, but in the case of disagreement, City shall have the choice of choosing independent defense counsel at the cost of Developer, or in the alternative to defend itself, at the cost of Developer.

(8) Prior to the commencement or continuation of any construction hereunder occurring after the City approves this Agreement, Developer shall provide to City a performance bond guaranteeing the performance of Developer's obligations under this Agreement. The bond shall include City's costs, attorney's fees and expert witness fees incurred in enforcing the Developers obligations under this Agreement. The bond shall be in a form approved by the City Attorney, and shall be issued by an insurer authorized to perform surety business in the State of California.

(9) In the event City proceeds to construct the City Project separate from this Agreement and without Developer, then Developer is relieved of its indemnity and bond obligations and performance under this Agreement as to the City Project only.

#### **Sec. 411 City and Other Governmental City Permits**

(1) Except for City's responsibilities under this Agreement, before commencement of construction or development of any buildings, structures or other work or improvement on any parcel within the Parking Property the Developer shall, at DBE's expense, secure or cause to be secured any normal permits which may be required by the City or any other governmental agency affected by such construction, development or work.

#### **Sec. 412 Rights of Access**

(1) For the purposes of assuring compliance with this Agreement, representatives of City shall have the reasonable right of access to the City Project without charges or fees, at normal construction hours during the period of construction for the purposes of monitoring Developer's compliance with this Agreement.



(2) Additionally, representatives of the City shall have the reasonable right of access to the City Project, without charges or fees, at normal construction hours during the period of construction, for the purposes contained in this Agreement, to inspect the work being performed in constructing the Improvements.

#### **Sec. 413      Local, State and Federal Laws**

(1) The Developer shall carry out the construction of all Improvements and the development of the Parking Property in conformity with all applicable laws, including all applicable federal, state or local laws, rules or standards, provided, however, Developer and its contractors, successors, assigns and transferees, and lessees are not waiving their rights to contest any such laws, rules or standards. Developer agrees to indemnify, hold harmless and defend the City, its officers, employees, contractors and agents against any claim, including prevailing wage claims, action, proceeding, liability, damages, expenses, attorney fees, expert fees or other costs arising out of Developer's obligations under this Section 413, provided the foregoing indemnity shall not apply to any of the foregoing matters to the extent caused by any willful or negligent conduct of the City or its respective agents, servants, employees or contractors.

(2) Notwithstanding any provision of this Agreement to the contrary, Developer shall not be required to contract with or otherwise do business with any contractor that in its sole discretion seems not responsible and/or incapable of adequately performing the construction improvements.

#### **Sec. 414      Obligation to Refrain from Discrimination**

(1) There shall be no discrimination against or segregation of any person, a group of persons, on account of race, color, religion, marital status, disability, age, national origin or ancestry in the construction, sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Site, nor shall the Developer itself or any person claiming under or through it establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees of the Site.

### **Sec. 500      SECURITY FINANCING; RIGHTS OF HOLDERS.**

#### **Sec. 501      No Encumbrances Except Mortgages, Deeds of Trust, Sales and Leases Back or Other Financing for Development.**

Mortgages, deeds of trust, sales and leases back or any other form of conveyance required for any reasonable method of financing are permitted with respect to Developer's interest in the City Project Ground Lease but only for the purpose of securing loans of funds to be used for fees, permits, consultants and for the construction of the City Project on the Parking Property and any other expenditures necessary and appropriate to develop the City Project under this Agreement. Developer shall notify the City in writing in advance of any mortgage, deed of trust, sale or lease back or other form of conveyance for financing with respect to the City Project, if Developer proposes to enter into the same for the construction of the City Project.

#### **Sec. 502      Construction Financing.**

1. Developer shall not enter into any such conveyance for financing without the prior written approval of City which approval City agrees to give if any such conveyance for financing is given to a responsible financial or lending institution or other acceptable person or

entity. Such lender shall be deemed approved unless rejected in writing by City within ten (10) days after notice thereof is given to City.

2. The word "mortgage" and "deed of trust," as used herein, include all other appropriate modes of financing real estate acquisition, construction, and land development.

**Sec. 503      Holder Not Obligated to Construct Improvements.**

The holder of any mortgage, deed of trust or other security interest authorized by this Agreement shall in no way be obligated by the provisions of this Agreement to construct or complete the Project Improvements or to guarantee such construction or completion; nor shall any covenant or any other provision in the Grant Deed for the Property or any portion thereof be construed so to obligate such holder. Nothing in this Agreement shall be deemed to construe, permit, or authorize any such holder to devote the Property or any part thereof to any uses, or to construct any improvements thereon, other than those uses or improvements provided for or authorized by this Agreement.

**Sec. 504      Notice of Default to Mortgage, Deed of Trust or Other Security Interest Holders; Right to Cure.**

Whenever City shall deliver any notice or demand to Developer, with respect to any breach or default by Developer in completion of construction of the Project Improvements, the City shall, at the same time, deliver to each holder of record of any mortgage, deed of trust or other security interest authorized by this Agreement who has requested in writing said notices from the City, a copy of such notice or demand. Each such holder shall (insofar as the rights of City are concerned) have the right, at its option within sixty (60) days after the receipt of the notice, to cure or remedy any such default and to add the cost thereof to the security interest debt and the lien on its security interest. The time for Lender to cure shall be extended, if the Lender has undertaken steps to cure, in which case such time will be extended for as long as Lender reasonably needs, providing the Lender is acting diligently. Nothing contained in this Agreement shall be deemed to permit or authorize such holder to undertake or continue the construction or completion of the Project Improvements (beyond the extent necessary to conserve or protect the Project Improvements or construction already made) without first having expressly assumed Developer's remaining obligations to City by written agreement satisfactory to the City. In that event, the holder must agree to complete, in the manner provided in this Agreement, the Project Improvements to which the lien or title of such holder relates, and submit satisfactory evidence to City that it possesses the qualifications and financial resources necessary to perform such obligations. Any such holder properly completing such Project Improvements shall be entitled, upon written request made to City, to a Release of Construction Covenants from the City with respect to the applicable phase of the Project.

**Sec. 505      Failure of Holder to Complete Improvements.**

1. In any case of an uncured sixty (60) day default by Developer in completion of construction of Project Improvements under this Agreement, if the holder of any mortgage, deed of trust or other security interest creating a lien or encumbrance upon the Property or any portion thereof has not exercised the right to construct, or if it has exercised the right and has not proceeded diligently with construction, the City may purchase the mortgage, deed of trust or other security interest by payment to the holder of the amount of the unpaid debt and other amounts incurred by such lender in connection therewith. If the ownership of the Property or

any part has been vested in the holder, the City, if it so desires, shall be entitled to a conveyance of the Property, or any part of the Property, from the holder to the City upon payment to the holder of an amount equal to the sum of the following:

a. Unpaid mortgage, deed of trust or other security interest debt at the time title became vested in the holder (less all appropriate credits, including those resulting from collection by lender and application of rentals and income received during foreclosure proceedings).

b. All reasonable expenses with respect to foreclosure and other amounts evidenced or secured by the loan documents.

c. The net expenses, if any (exclusive of overhead), incurred by the holder as a direct result of the City approved subsequent management of the Property or part thereof.

d. The cost or value, whichever is less, of any City approved improvements made by such holder to the Property.

**Sec. 506      Right of City to Cure Mortgage, Deed of Trust or Other Security Interest Default.**

1. In the event of an uncured default by Developer or breach of a mortgage, deed of trust or other security interest, prior to recordation of a Release of Construction Covenants for the Property Improvements on the Property with respect to any phase, and the holder of any such security interest has not exercised its option to complete the applicable Project Improvements, after an advance written demand to Developer that the default must be cured or curative measures have not commenced within 30 days, the City may cure the default prior to completion of any foreclosure. In such event, the City shall be entitled to reimbursement from Developer of all costs and expenses incurred by the City in curing the default. The City shall also be entitled to a lien upon the Property (to the extent it is owned by Developer) to the extent of such costs and disbursements. Any such lien shall be subject to mortgages, deeds of trust or other security instruments executed for the sole purpose of obtaining funds to purchase and develop the Site as authorized herein.

**Sec. 507      Rights of City to Satisfy Other Liens on the Property.**

After Developer has had reasonable time to challenge, cure or satisfy any liens or encumbrances on the Parking Property, or any part thereof, the City shall have the right to satisfy any such liens or encumbrances, provided however, that nothing in this Agreement shall require Developer to pay or make provision for the payment of any tax, assessment, lien or charge as long as the Developer shall in good faith contest the validity or amount thereof, and provided such delay in payment shall not subject the Property, or part thereof, to forfeiture or sale.

**SEC. 600      DEFAULTS AND REMEDIES**

**Sec. 601      Defaults—General**

(1) Subject to the extensions of time set forth in Section 703, unexcused and uncured failure or delay by either party to perform any material term or provision of this Agreement constitutes a default under this Agreement. The party who so fails or delays must immediately cure, correct, or remedy such failure or delay.

(2) The injured party shall give written notice of default to the party in default, specifying the default complained of by the injured party. Except as required to protect against further damages, and except as otherwise expressly provided in Section 603 of this Agreement, the injured party may not institute proceedings against the party in default until at least thirty (30) days after giving such notice. Delay in giving such notice shall not constitute a waiver of any default, nor shall it change the time of default.

(3) Except as otherwise expressly provided in this Agreement, any failures or delays by either party in asserting any of its rights and remedies as to any default, shall not operate as a waiver of any default or of any such rights or remedies, or deprive either such party of its rights to institute and maintain any actions or proceedings which it may deem necessary to protect, assert, or enforce any such rights or remedies.

(4) In the event that the default is not timely cured or curative measures have not commenced, the non-defaulting party shall have the right, notwithstanding any other provision of this Agreement, to terminate this Agreement without further notice and without prejudice to any other remedy to which it may be entitled at law, in equity or under this Agreement.

#### **Sec. 602      Limitation of Damages**

Damages to City or Developer arising out of breach of this Agreement are limited to direct damages and out of pocket costs. Recoverable damages do not include, lost time, lost productivity, delay damages, overhead, lost profits, costs of processing and obtaining zoning, CEQA determinations and building entitlements for the City Project or any other indirect damages. Due to the complexity of the methodology for procurement of services, the City shall have no liability for failing to properly comply with the provisions of any public works procurement or prevailing wage laws, statutes or ordinances, provided the City uses good faith efforts to comply with such laws.

#### **Sec. 603      Legal Actions**

##### Sec. 603.1      Resolution of Disputes

Disputes regarding the interpretation, application or performance of any provisions of the Agreement shall, to the extent reasonably feasible, be resolved through good faith negotiations between the parties prior to the institution of legal action or administrative proceedings.

##### Sec. 603.2      Institution of Legal Actions

(1) Any legal actions in connection with the enforcement or interpretation of this Agreement must be instituted in the Superior Court of the County of Los Angeles, State of California, East District, or in the Central Federal District Court of California.

##### Sec. 603.3      Applicable Law

(1) The laws of the State of California shall govern the interpretation and enforcement of this Agreement.

##### Sec. 603.4      Acceptance of Service of Process

(1) In the event that any legal action is commenced by Developer against the City, service of process on the City shall be made by personal service upon the City Manager or in such other manner as may be provided by law.

(2) In the event that any legal action is commenced by the City against the Developer, service of process on Developer shall be made by personal service and shall be valid whether made within or without the State of California or in such other manner as may be provided by law.

#### **Sec. 604 Rights and Remedies Are Cumulative**

(1) Except as otherwise expressly stated in this Agreement, the rights and remedies of the parties are cumulative, and the exercise by either party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other party.

### **SEC. 700 GENERAL PROVISIONS**

#### **Sec. 701 Notices, Demands and Communications Between the Parties**

(1) Written notices, demands and communications between the City and the Developer shall be sufficiently given if delivered by hand (and a receipt thereof is obtained or is refused to be given), if dispatched by registered or certified mail, postage prepaid, return receipt requested, addressed to the designated person or persons at the principal offices of the City and the Developer, as set forth at Section 201, or be given by any nationally recognized overnight delivery service. Such written notices, demands and communications may be sent in the same manner to such other addresses as either party may from time to time designate by mail as provided in this Section 701.

(2) Any written notice, demand or communication shall be deemed received immediately if delivered by hand or messenger; three (3) business days from certification of date received if delivered by registered or certified mail; and the next business day if sent by Federal Express or other nationally recognized overnight delivery service.

#### **Sec. 702 Conflicts of Interest**

(1) No member, official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any member, official or employee participate in any decision relating to the Agreement which affects his personal interests or the interests of any corporation, partnership or association in which he is directly or indirectly interested. No member, official or employee of the City shall be personally liable to Developer, or any successor in interest, in the event of any default or breach by the City, or for any amount which may become due to the Developer or successor or on any obligations under the terms of this Agreement. The Developer warrants that it has not paid or given, and will not pay or give, any third person any money or other consideration for obtaining this Agreement.

#### **Sec. 703 Enforced Delay; Extension of Times of Performance**

(1) In addition to specific provisions of this Agreement, performance by either party hereunder shall not be deemed to be in default, and all performance and other dates specified in this Agreement shall be extended, where delays or defaults are due to: war; insurrection; strikes; lockouts; riots; floods; earthquakes; fires; casualties; acts of God; acts of the public enemy; epidemics; quarantine restrictions; freight embargoes; lack of transportation; governmental restrictions or priority; litigation; unusually severe weather; inability to secure necessary labor, materials or tools; delays of any contractor, subcontractor or supplier; acts of omissions of the other party; acts or failures to act of the City of Pomona or any other public or governmental City

or entity (except acts or failures to act of the City which shall not excuse performance by the City); or any other causes beyond the control or without the fault of the party claiming an extension of time to perform. Notwithstanding anything to the contrary in this Agreement, an extension of time for any such cause shall be for the period of the enforced delay and shall commence to run from the time of cessation of the cause, if notice by the party claiming such extension is sent to the other party within sixty (60) days of the commencement of the cause or if the other party had actual notice of the delay. Times of performance under this Agreement may also be extended in writing by the mutual agreement of the City and Developer.

(2) Notwithstanding the foregoing portion of this Section 703, Developer is not entitled, pursuant to this Section 703, to an extension of time to perform because of past, present, or future difficulty in obtaining suitable temporary or permanent financing for the development of the Site, unless such delay is caused by City's refusal to amend this Agreement or accept the reasonable and customary requests of the Developer's lender.

#### **Sec. 704      Non-Liability of Officials and Employees of the City**

(1) No member, official or employee of the City or the City shall be personally liable to Developer or any successor in interest, in the event of any default or breach by the City (or the City) or for any amount which may become due to Developer or its successors, or on any obligations under the terms of this Agreement.

#### **Sec. 705      Assignment and Subcontracting**

Neither party shall assign or subcontract the rights or responsibilities under this agreement without the express, written consent of the other party, which may be withheld for any reason or for no reason.

#### **Sec. 706      Severability**

If any provision of this agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions nevertheless will continue in full force and effect without being impaired or invalidated in any way.

### **SEC. 800      SPECIAL PROVISIONS**

#### **Sec. 801      Submission of Documents to the City for Approval**

(1) Wherever this Agreement requires any party to approve any contract, document, plan, specification, drawing or other matter, such approval shall be given in a prompt and timely manner in writing and shall not be unreasonably withheld. If a disapproval is given, the reasons for such disapproval must also be given in writing.

#### **Sec. 802      Amendments to this Agreement**

(1) Developer and City agree to mutually consider reasonable requests for amendments to this Agreement, which may be made by lending institutions or City's bond counsel or financial consultants, provided said requests are consistent with this Agreement and would not substantially alter the basic business terms included herein.

#### **Sec. 803      Operating Memoranda**

(1) It is recognized that performance under this Agreement will require a considerable degree of cooperation between the City and Developer. It is further realized that

subsequent events may demonstrate that revisions will be required in the performance hereunder, and that a certain degree of flexibility will be required. It is to preserve such flexibility that certain provisions may have been delineated in this Agreement in general terms only, with the understanding that more precise details may be set forth in "Operating Memoranda" as may be required from time to time. Operating Memoranda includes only those agreements, modifications or changes which are deemed by the City Manager in consultation with the City Attorney to be non-substantive and non-material modifications of this Agreement. Each operating memorandum shall be approved by the City Attorney and the City Manager and Developer's designated representative and shall be attached hereto as an addendum, and become a part hereof, and may be further changed and amended from time to time as necessary upon approval by the City Attorney, City Manager and Developer.

#### **Sec. 804        Costs and Attorneys' Fees.**

(1) In any action between the Parties to interpret, enforce, reform, modify, rescind, or otherwise in connection with any of the terms or provisions of this Agreement, the prevailing party in the action shall be entitled, in addition to damages, injunctive relief, or any other relief to which it might be entitled, reasonable costs and expenses including, without limitation, litigation costs and reasonable attorneys' fees.

#### **Sec. 805        Counterparts**

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which shall together constitute one and the same document.

### **SEC. 900        ENTIRE AGREEMENT, WAIVERS**

(1) This Agreement is executed in four (4) duplicate originals, each of which is deemed to be an original. This Agreement constitutes the entire Agreement and the understanding of the parties. The Attachments shall be a part of this Agreement, but if the Attachments conflict with this Agreement, then the provisions of this Agreement shall prevail.

(2) This Agreement integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the parties or their predecessors in interest with respect to all or any part of the subject matter hereof.

(3) The waivers of the provisions of this Agreement must be in writing and executed by the appropriate authorities of the City and Developer, and all amendments hereto must be in writing, approved by the City and executed by the appropriate authorities of the City and Developer.

(4) Developer acknowledges that it has had ample opportunity for review and approval of this document by its attorney, and that any waiver of representation is a result of independent decision. Developer further acknowledges that City Attorney is acting solely on behalf of the City.

### **SEC. 1000       TIME FOR ACCEPTANCE OF AGREEMENT**

(1) This Agreement shall be executed by Developer prior to approval by City.

(Signatures appear on next page)

**IN WITNESS WHEREOF**, the City and the Developer have signed this Agreement on the date set forth herein below.

CITY OF POMONA

"DEVELOPER"

By: \_\_\_\_\_  
Linda C. Lowry, City Manager

Maya Cinemas North America, Inc., a Delaware corporation

By: \_\_\_\_\_

Date: \_\_\_\_\_

ATTEST

Date: \_\_\_\_\_

\_\_\_\_\_  
City Clerk

By: \_\_\_\_\_

APPROVED AS TO FORM:

Date: \_\_\_\_\_

\_\_\_\_\_  
City Attorney



**ATTACHMENT NO. 1**  
**DEPICTION OF PARKING PROPERTY**

**ATTACHMENT NO. 2**

**LEGAL DESCRIPTION OF PARKING PROPERTY**

**ATTACHMENT NO. 3**  
**REQUEST FOR PROPOSALS**

**ATTACHMENT NO. 4**

**DEPICTION OF CITY LEASE PREMISES**

**ATTACHMENT NO. 5**

**SCHEDULE OF PERFORMANCE**

EVENT	TIME	ACTUAL DATE
Developer commences construction of the City Project	Not later than December 31, 2019	
Developer completes construction and obtains certificate of occupancy for City Project	Not later than twenty-four months after commencement of construction	
Developer transfers title of City Project to City and terminates City Project Ground Lease	Not later than one month after certificate occupancy issued for City Project	

\*\* All dates in the Schedule of performance may be amended by a mutually signed Operating Memorandum.

**Developer initial here:** \_\_\_\_\_ **City initial here:** \_\_\_\_\_