

**INTER-GOVERNMENTAL AGREEMENT BETWEEN THE CITY OF AURORA AND
THE ILLINOIS DEPARTMENT OF TRANSPORTATION REGARDING PHASE 1 AND
PHASE 2 OF THE FOX VALLEY MALL REDEVELOPMENT PROJECT**

THIS INTER-GOVERNMENTAL AGREEMENT (the “Agreement”) is made and entered into as of this ____ day of _____, 2021 (“Effective Date”), by and between the **CITY OF AURORA** (the “City”) and the **ILLINOIS DEPARTMENT OF TRANSPORTATION** (“IDOT” or “State”), who are hereinafter individually referred to as a “Party” and collectively as the “Parties”.

WHEREAS, the City is an Illinois municipality and home rule unit of local government; and

WHEREAS, IDOT is an Illinois State agency responsible for state maintained public roadways; and

WHEREAS, Fox Valley SP, LLC, a Delaware limited liability company (“Owner”), is the owner of a portion of the Fox Valley Mall (the “Mall”) that is located at the southwest corner of New York Street and Route 59, also known as 195 Fox Valley Center Drive, in Aurora, Illinois; and

WHEREAS, the Mall opened in 1975, and, with changes in shopping patterns and an increase in online retail sales, traditional malls need to evolve; and

WHEREAS, the Mall has a number of large vacancies, specifically where two anchor stores previously existed (Sears and Carsons); and

WHEREAS, in an effort to support and strengthen the Mall, Owner approached the City with preliminary plans for the redevelopment of a portion of the Mall; and

WHEREAS, Owner is interested in redeveloping said portion of the Mall in phases with a mix of uses, including open space, restaurants, entertainment, retail, and housing; and

WHEREAS, the specific property Owner is looking to redevelop is depicted on Exhibit “A” attached hereto. This property was formerly occupied by a Sears department store and is identified on DuPage County’s tax rolls as portions of Permanent Index Numbers 07-21-401-088 and 07-21-401-011(the “Subject Property”); and

WHEREAS, Owner intends to redevelop the Subject Property with a two-phase planned development (referred to in this Agreement as “Phase 1” and “Phase 2”) that is consistent with the City’s recently approved Route 59 Corridor Plan (the “Corridor Plan”) and the more detailed Fox Valley Mall Sub-Area Plan (the “Sub-Area Plan”). Phase 1 contemplates the redevelopment of an 11.11-acre portion of the Subject Property and Phase 2 contemplates the redevelopment of a 4.085-acre portion of the Subject Property; and

WHEREAS, the Corridor Plan acknowledges the importance of the Mall on and to the Corridor and the larger region. Specifically, the Mall is a large and unique development in the heart of the Route 59 Corridor and its success strengthens the City’s image and identity, and it provides positive ancillary benefits to its outlots and other local businesses; and

WHEREAS, the Sub-Area Plan recommends the modernization of the Mall and its transition from a traditional commercial center into a mixed-use development that includes a variety of land uses, including multi-family housing; and

WHEREAS, Owner and City staff have been working with Pace to relocate the Mall's existing bus stop (currently located on the south entrance to the Mall) to the Phase 1 development area in furtherance of the construction of a transit-oriented life-style development on this portion of the Subject Property; and

WHEREAS, in furtherance of the construction of the Phase 1 development, the Sears building has been demolished; and

WHEREAS, in November of 2020, the Subject Property was rezoned to R-5A(C) Multiple Family Dwelling District with a Conditional Use Planned Development (previously approved as Special Use Planned Development), and at the same time a Final Plat and Preliminary Plan were approved for the Subject Property; and

WHEREAS, the Aurora City Council approved a Final Plan for Multi-Family Dwelling (1140) Use for Phase 1 at its February 2, 2021 Council meeting. This Final Plan consists of three 3-story multiple family residential buildings with residential units on all floors, at-grade tuck under parking garages, private open space, private amenities, and two associated 1-story covered parking structures; and

WHEREAS, for the construction of Phase 1 to proceed, IDOT must approve a traffic study (“Traffic Study”) and sign a plat of subdivision (“Plat of Subdivision”) that encompasses the Subject Property because the Subject Property abuts the western limits of the Route 59 right-of-way at the planned development’s proposed private drive. The Plat of Subdivision has been prepared by Compass Surveying Ltd., consists of eight pages and is dated most recently October 21, 2020; and

WHEREAS, while IDOT is prepared to approve the Traffic Study Owner has submitted to the City and IDOT prior to the Effective Date of this Agreement, which Traffic Study was prepared by Kimley-Horn, a private consultant, dated February 2021, and while IDOT has signed the Plat of Subdivision the City has approved, IDOT continues to have concerns about the potential future impact of Phase 2 vehicular traffic on Route 59; and

WHEREAS, IDOT, because of those concerns, wants to retain the right and authority to review and approve an updated Traffic Study for Phase 2 once the development plan for Phase 2 is further refined (“Updated Traffic Impact Study”). A traffic impact study is a study which assesses the adequacy of the existing or future transportation infrastructure to accommodate additional trips generated by a proposed development, redevelopment or land rezoning. The Updated Traffic Impact Study will reflect projected future traffic volumes for the Phase 2 development, and, where appropriate, identify needed off-site traffic improvements to Route 59; and

WHEREAS, IDOT has suggested that the City draft an agreement which confirms IDOT’s right and authority to approve the Updated Traffic Impact Study because, absent such an agreement, IDOT would have no authority to review and comment on the Phase 2 development plan and the Updated Traffic Impact Study since the Plat of Subdivision creating the Phase 2 development lot has already been signed and will soon be recorded (unless there is a future resubdivision of the Subject Property which encompasses land abutting Route 59); and

WHEREAS the Parties would like to see the plans and redevelopment continue to progress and advance;

NOW, THEREFORE, in consideration of the mutual promises and undertakings set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. The City's Obligations: The City will:

- a. require Owner, as part of the construction of Phase 1, to complete the agreed-upon signal retiming/re-optimization at McCoy and Route 59;
- b. before it grants final approval to Owner of a development plan for Phase 2 and after the construction of Phase 1 has been substantially completed, direct Owner to prepare and submit to the City and IDOT the Updated Traffic Impact Study reflecting the refined Phase 2 development plan so that the necessary IDOT approvals for the Phase 2 development can be obtained;
- c. take all reasonable steps to ensure that Owner completes the Updated Traffic Impact Study as part of the development review process for Phase 2;
- d. review the Updated Traffic Impact Study in accordance with project schedules and deadlines to be established and agreed upon by the Parties;
- e. seek IDOT approval of the Updated Traffic Study as the Phase 2 development plan is further refined and considered by the City and Owner; and
- f. issue all City permits for off-site improvements as depicted in the approved final engineering plans for Phase 2, upon the City's determination that all applicable development requirements have been met, and after IDOT has acknowledged, in writing, its approval of the Updated Traffic Impact Study and received confirmation from the City that IDOT's requirements for off-site road improvements for Phase 2 have been incorporated into the ordinances the City has adopted in furtherance of the construction of Phase 2.

2. IDOT's Obligations: IDOT will:

- a. defer any potential improvements to Route 59, except the signal timing improvements at McCoy and Route 59, until Phase 2 is studied, and any necessary improvements are identified in the Updated Traffic Impact Study;
- b. promptly issue all permits for off-site improvements to be constructed as part of the construction of Phase 1, as depicted in the approved final engineering plans for Phase 1; and
- c. review and consider the Updated Traffic Impact Study upon its submission by Owner and promptly advise City and Owner of the conditions under which it is

prepared to approve Owner's Phase 2 development plan for the Mall including, any traffic improvements to Route 59 which are specifically attributable to the Phase 2 development and therefore required to be implemented by (and at the expense of) City and/or Owner as a condition to IDOT's approval.

3. Obligations of the Parties: The Parties will:
 - a. Review the Updated Traffic Impact Study in accordance with project schedules and deadlines to be established and agreed upon by the Parties;
 - b. Comply with all relevant and applicable state and local laws, ordinances, rules, regulations, codes and requirements; and
 - c. exercise good faith and work together in cooperation for the advancement and completion of both Phases 1 and 2.
4. Breach. In the event of a material breach of this Agreement by either Party, the other Party shall give notice of the default to the breaching Party and the breaching Party shall have 30 days to cure the breach or such additional time as is reasonably necessary to cure the breach.
5. Third Party Beneficiaries. Nothing in this Agreement, whether expressed or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any other person or organization other than the City and IDOT; nor is anything in this Agreement intended to relieve or discharge the obligations or liabilities of any third parties to either of the Parties; nor shall any provision give any person or organization any rights of subrogation or actions over or against either of the Parties. This Agreement is not intended to and does not create any third-party beneficiary rights whatsoever.
6. No Joint Venture. Nothing in this Agreement, or any actions of the Parties, shall be construed by the Parties or any third parties to create the relationship of a partnership, agency or joint venture between the Parties.
7. Limitation of Liability Regarding Governmental Officials. No covenant or agreement contained in this Agreement shall be deemed to be the covenant or agreement of the corporate authorities, any elected official, officer, partner, member, director, agent, employee or attorney of the City or the State, or her/his individual capacity, and no elected official, officer, partner, member, director, agent, employee or attorney of the

City or the State shall be liable personally under this Agreement or be subject to any personal liability or accountability by reason of or in connection with or arising out of the execution, delivery and performance of this Agreement, or any failure in that connection.

8. Entire Agreement. This Agreement constitutes the entire agreement of the Parties. Exhibits identified to be included in this Agreement, whether attached hereto or later delivered, shall be deemed incorporated herein by this reference to them.
9. Modification of Agreement. This Agreement may only be amended, modified, or supplemented by an agreement in writing duly executed by both Parties.
10. Applicable Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of Illinois. This Agreement shall be interpreted liberally to affect the intention of the Parties. Any legal action or proceeding relating to this Agreement (other than an action against IDOT, which shall only be brought in the Illinois Court of Claims) shall be brought exclusively in the 16th Judicial Circuit Court in Kane County, Illinois.
11. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original and, when taken together, shall constitute but one and the same Agreement.
12. Severability. If any provision of this Agreement, or any section, sentence, clause, phrase or word, or the application thereof, in any circumstance, is held to be invalid, the remainder of this Agreement shall be construed as if such invalid part was never included herein, and this Agreement shall be and remain valid and enforceable to the fullest extent permitted by law.
13. Authority to Execute. The Parties represent and warrant the individuals executing this Agreement on their behalf have been duly authorized to do so and that all necessary actions, authorizations, resolutions, and approvals have been secured prior to the Effective Date of this Agreement.
14. Notices: Each Notice (“Notice”) provided for under this Agreement must comply with the requirements of this paragraph. Each Notice shall be in writing and sent by (a) depositing it with the United States Postal Service, certified mail, return receipt requested, with adequate postage prepaid, or (b) reputable overnight courier, or (c) hand

delivery, addressed to the appropriate Party (and marked to a particular individual's attention if so indicated) as hereinafter provided, or, (d) electronic mail, if an e-mail address is provided for such Party below. Each Notice shall be effective upon delivery. The addresses of the Parties shall be those set forth as follows:

If to the City:

City of Aurora
City Hall
44 E. Downer Place
Aurora, IL 60505
Attention: Richard C. Irvin, Mayor
MayorsOffice@aurora.il.us

With a copy to:

City of Aurora
City Hall
44 E. Downer Place
Aurora, IL 60505
Attention: Corporation Counsel

If to IDOT:

Illinois Department of Transportation
201 West Center Court
Schaumburg, IL 60196-1096
Attention: Jose Rios, Region One Engineer

15. Termination. This Agreement shall automatically terminate and become null and void as of the date the City issues a certificate of occupancy for the Phase 2 development.

Executed by the Parties on the dates set forth below, to be effective as of the Effective Date:

CITY OF AURORA:

By: _____
Richard C. Irvin, Mayor

Attest: _____
Jennifer Stallings, City Clerk

Date: _____

ILLINOIS DEPARTMENT OF TRANSPORTATION:

By: _____
Jose Rios,
Region One Engineer

Date: _____

EXHIBIT A

FOX VALLEY MALL REDEVELOPMENT PHASING PLAN

