

MAC02IHP

TYPE OF RECORD: PERMANENT

CATEGORY OF RECORD: **DEVELOPMENT IMPROVEMENTS AGREEMENT**

NAME OF APPLICANT OR DEVELOPER: SDG MACERICH PROPERTIES,
L.P., A DELAWARE LIMITED PARTNERSHIP

PROJECT/SUBDIVISION: INTERNATIONAL HOUSE OF PANCAKES -
PARCEL 2 OUTPARCELS AT MESA MALL

PARCEL NO.: 2945-092-10-025

FILE NO.: VE-2001-204

CITY DEPARTMENT: COMMUNITY DEVELOPMENT

YEAR: 2002

EXPIRATION DATE: NONE

DESTRUCTION DATE: NONE

DEVELOPMENT IMPROVEMENTS AGREEMENT

1. **Parties:** The parties to this Development Improvements Agreement ("the Agreement" or "Agreement") are SDG Macerich Properties, L.P., a Delaware limited partnership ("the Developer") and **THE CITY OF GRAND JUNCTION, Colorado** ("the City" or "City").

FOR valuable consideration, the receipt and adequacy of which is acknowledged, the Parties agree as follows:

2. **Effective Date:** The Effective Date of the Agreement will be the date that this agreement is signed which shall be no sooner than recordation of the final plat or final plan approval whichever first occurs.

RECITALS

The Developer seeks permission to develop property within the City to be known as Parcel 2 outparcels at Mesa Mall, which property is more particularly described on Exhibit A attached and incorporated by this reference ("the Property" or "Property"). The City seeks to protect the health, safety and general welfare of the community by requiring the completion of various improvements in the Property and limiting the harmful effects of substandard developments. The purpose of this Agreement is to protect the City from the cost of completing necessary improvements itself and is not executed for the benefit of materialmen, laborers, or others providing work, services or material to the Developer and/or the Property or for the benefit of the owners, purchasers or users of the Property. The mutual promises, covenants, and obligations contained in this Agreement are authorized by state law, the Colorado Constitution and the City's land development ordinances.

DEVELOPER'S OBLIGATION

3. **Improvements:** The Developer will design, construct and install, at its own expense, those on-site and off-site improvements listed on Exhibit B attached and incorporated by this reference ("the Improvements" or "Improvements"). The Developer agrees to pay the City for inspection services performed by the City, in addition to amounts shown on Exhibit B. The hourly rate of "in-house" City inspection services is \$45.00 per hour. The scope of this project is such that the City may have to engage independent consultant(s) to adequately provide inspection services; Developer agrees to pay such costs, in addition to all others for which Developer is responsible hereunder. The Developer's obligation to complete the improvements is and will be independent of any obligations of the City contained herein.

4. **Security:** To secure the performance of its obligations under this Agreement the Developer shall supply a guarantee in a form and with terms acceptable to the City. A copy of which or a memorandum thereof is attached as Exhibit C.

5. **Standards:** The Developer shall construct the Improvements according to the standards and specifications required by the City Engineer or as adopted by the City.

6. **Warranty:** The Developer warrants that the Improvements, each and every one of them, will be free from defects for a period of twelve (12) months from the date that the City Engineer accepts or approves the last Improvement completed by the Developer.

7. **Commencement, Completion and Abandonment Periods:** The Developer will commence work on the Improvements within 14 days from the Effective Date of this Agreement March 11, 2002 (set date) ("the Commencement Period") and the Improvements, each and every one of them, shall be completed by the end of the sixth month from the Effective Date of this Agreement Sept. 11, 2002 (set date) (the "Completion Period"). The Developer shall not cease construction activities for any period of more than 60 consecutive days ("the Abandonment Period").

8. **Compliance with Law:** The Developer shall comply with all applicable federal, state and local laws, ordinances and regulations in effect at the time of final approval when fulfilling its obligations under this Agreement. When necessary to protect the public health, safety or welfare, the Developer shall be subject to laws, ordinances and regulations that become effective after final development approval. "See amendment I for additional language"

9. **Notice of Defect:** The Developer's Engineer shall provide timely notice to the Developer, contractor, issuer of security and the City Engineer whenever inspection reveals, or the Developer's Engineer otherwise has knowledge, that an improvement does not conform to City standards and any specifications approved in the development application or is otherwise defective. The Developer will have thirty (30) days from the issuance of such notice to correct the defect. The City may grant reasonable extensions.

10. **Acceptance of Improvements:** ~~The City's final acceptance and/or approval of Improvements will not be given or obtained until the Developer presents a document or documents, for the benefit of the City, showing that the Developer owns the Improvements in fee simple or as accepted by the City Attorney and that there are no liens, encumbrances or other restrictions other than those that have been accepted by the City Attorney on the Improvements. Approval and/or acceptance of any Improvements does not constitute a waiver by the City of any rights it may have on account of any defect in or failure of the Improvement that is detected or which occurs after approval and/or acceptance.~~ "See amendment I for additional language"

11. **Reduction of Security:** After the acceptance of any Improvement, the amount which the City is entitled to draw on the guarantee will be reduced by an amount equal to 90 percent of the estimated cost of such Improvement as shown in Exhibit B. At the written request of the Developer, the City will execute a certificate verifying the acceptance of the Improvement and waiving its right to draw on the guarantee to the extent of such amount. A Developer in default under this Agreement will have no right to such certification. Upon the acceptance of all of the Improvements the remaining balance that may be drawn under the guarantee shall be available to the City for 90 days after the expiration of the warranty period.

AMENDMENT I

8. For clarification purposes, this provision survives only until "Acceptance" as defined in section 10 below.

10. If any such lien, encumbrance or other restriction is filed against the Property arising out of the improvements which are the subject of this Agreement, Developer shall either cause the same to be discharged of record within ten (10) days after the date of filing or, if Developer in it's discretion and in good faith determines that such lien, encumbrance or other restriction should be contested, Developer shall within ten (10) days after the date of filing or recording furnish to the City such security as may be necessary and/or required to (a) prevent any foreclosure proceedings against the Property during the pendency of such contest, and (b) cause the title insurance company or companies insuring the Developer's interest to remove such lien, encumbrance or other restriction as a matter affecting title to the Property.

12. **Use of Proceeds:** The City will use funds deposited with it, drawn or guaranteed pursuant to any written agreement entered into between the parties only for the purpose of completing the Improvements or correcting defects in or failure of the Improvements.

13. **Events of Default:** The following conditions, occurrences or actions will constitute a default by the Developer during the Completion Period:

- a. Developer's failure to complete each portion of the Improvements in conformance with the time schedule provided in paragraph number seven (7.), above;
- b. Developer's failure to demonstrate reasonable intent to correct defective construction of any Improvement within the applicable correction period;
- c. Developer's insolvency, the appointment of a receiver for the Developer or the filing of a voluntary or involuntary petition in bankruptcy respecting the Developer; in such event the City may immediately declare a default without prior notification to the Developer;
- d. Notification to the City, by any lender with a lien on the property, of a default on an obligation; the City may immediately declare a default without prior notification to the Developer;
- e. Initiation of any foreclosure action of any lien or initiation of mechanics lien(s) procedure(s) against the Property or a portion of the Property or assignment or conveyance of the Property in lieu of foreclosure; the City may immediately declare a default without prior notification to the Developer.

Unless specifically provided herein the City may not declare a default until written notice has been sent to the Developer at the address on file with the development application. Notice is and shall be deemed effective two calendar days after ~~mailing thereof by first class United States mail, postage prepaid.~~
 receipt certified mail

14. **Measure of Damages:** The measure of damages for breach of this Agreement by the Developer will be the reasonable cost of satisfactorily completing the Improvements plus reasonable City administrative expenses. Administrative expenses may include but are not limited to contracting costs, collection costs and the value of planning, engineering, legal and administrative staff time devoted to the collection/completion of the Improvements. For Improvements upon which construction has not begun, the estimated costs of the Improvements as shown on Exhibit B will be *prima facie* evidence of the minimum cost of completion, however, neither that amount or the amount of a letter of credit, the subdivision improvements disbursement agreement or cash escrow or other guarantee establish the maximum amount of the Developer's liability.

15. City's Rights Upon Default: When any event of default occurs, the City may draw on the letter of credit, escrowed collateral, or proceed to collect any other security to the extent of the face amount of the credit or full amount of escrowed collateral, cash, or security less ninety percent (90%) of the estimated cost (as shown on Exhibit B) of all Improvements previously accepted by the City or may exercise its rights to disbursement of loan proceeds or other funds under the improvements disbursement agreement. The City will have the right to complete Improvements itself or it may contract with a third party for completion, and the Developer grants to the City, its successors, assigns, agents, contractors, and employees, a nonexclusive right and easement to enter the Property for the purposes of constructing, reconstructing, maintaining and repairing such Improvements. Alternatively, the City may assign the proceeds of the letter of credit, the improvements disbursement agreement, the escrowed collateral, cash, or other funds or assets to a subsequent developer (or lender) who has acquired the Property by purchase, foreclosure or otherwise who will then have the same rights of completion as the City if and only if the subsequent developer (or lender) agrees in writing to complete the unfinished Improvements and provides to the City reasonable security for the obligation. In addition, the City may also enjoin the sale, transfer, or conveyance of lots within the development, until the Improvements are completed or accepted. These remedies are cumulative in nature and are in addition to any other remedies the City has at law or in equity.

16. Indemnification: The Developer expressly agrees to indemnify and hold the City, its officers, employees, agents and assigns harmless from and against all claims, costs and liabilities of every kind and nature, for injury or damage received or sustained by any person or entity in connection with, or on account of the performance or non-performance of work at the Property or the Property being developed pursuant to this Agreement. The Developer further agrees to aid and defend the City in the event that the City is named as a defendant in an action concerning the performance or non-performance of work pursuant to this Agreement. The Developer further agrees to aid and defend the City in the event that the City is named as a defendant in an action concerning the performance of work pursuant to this Agreement except where such suit is brought by the Developer against the City. The Developer is not an agent or employee of the City.

17. No Waiver: No waiver of any provision of this Agreement by the City will be deemed or constitute a waiver of any other provision, nor will it be deemed or constitute a continuing waiver unless expressly provided for by a written amendment to this Agreement signed by both the City and the Developer; nor will the waiver of any default under this Agreement be deemed a waiver of any subsequent default or defaults of the same type. The City's failure to exercise any right under this Agreement will not constitute the approval of any wrongful act by the Developer or the acceptance of any Improvement.

18. Amendment or Modification: The parties to this Agreement may amend or modify the Agreement only by written instrument executed on behalf of the City by the City Manager or his designee and by the Developer or his authorized officer. Such amendment or modification shall be properly notarized before it may be deemed effective.

19. **Attorney's Fees:** Should either party be required to resort to litigation to enforce the terms of this Agreement, the prevailing party, plaintiff or defendant, will be entitled to costs, including reasonable attorney's fees and expert witness fees, from the opposing party. If relief is awarded to both parties, the attorney's fees may be equitably divided between the parties by the decision maker.

20. **Vested Rights:** The City does not warrant by this Agreement that the Developer is entitled to any other approval(s) required by the City, if any, before the Developer is entitled to commence development or to transfer ownership of the Property being developed.

21. **Integration:** This Agreement, together with the exhibits and attachments thereto constitutes the entire agreement between the parties and no statement(s), promise(s) or inducement(s) that is/are not contained in this Agreement will be binding on the parties.

22. **Third Party Rights:** No person or entity who or which is not a party to this Agreement will have any right of action under this Agreement.

23. **Time:** For the purpose of computing the Abandonment and Completion Periods, and time periods for City action, such times in which war, civil disasters, or acts of God occur or exist will not be included if such times prevent the Developer or City from performing its obligations under the Agreement.

24. **Severability:** If any part, term, or provision of this Agreement is held by a court or courts of competent jurisdiction to be illegal or otherwise unenforceable, such illegality or unenforceability will not affect the validity of any other part, term, or provision and the rights of the parties will be construed as if the part, term, or provision was never part of the Agreement.

25. **Benefits:** The benefits of this Agreement to the Developer are personal and may not be assigned without the express written approval of the City. Such approval may not be unreasonably withheld, but any unapproved assignment is void. Notwithstanding the foregoing, the burdens of this Agreement are personal obligations of the Developer and also will be binding on the heirs, successors and assigns of the Developer and shall be a covenant(s) running with the Property. There is no prohibition on the right of the City to assign its rights under this Agreement. The City will expressly release the original Developer's guarantee or obligations if it accepts new security from any developer or lender who obtains the Property, however, no other act of the City will constitute a release of the original Developer from his liability under this Agreement. When the Improvements are completed and approved by the City, the City agrees to state same in writing, with appropriate acknowledgments. The City will sign a release only after all warranty periods, as extended by litigation, repair or alteration work, have expired.

26. **Notice:** Any notice required or permitted by this Agreement will be deemed effective two calendar days after ~~deposit with the United States Postal Service, first class, postage prepaid~~ and addressed as follows: receipt via certified mail

If to Developer: Mr. Paul Peterson
c/o Mesa Mall
2424 Highway 6 and 50
Grand Junction, CO 81505

cc: Macerich General Counsel
401 Wilshire Blvd.
Suite # 700
Santa Monica, CA 90401

If to City: City of Grand Junction
Community Development Director
250 N. 5th Street
Grand Junction, Colorado 81501

27. **Recordation:** Developer will pay for all costs to record this Agreement or a Memorandum thereof in the Clerk and Recorder's Office of Mesa County, Colorado.

28. **Immunity:** Nothing contained in this Agreement constitutes a waiver of the City's sovereign or other immunity under any applicable law.

29. **Personal Jurisdiction and Venue:** Personal jurisdiction and venue for any action commenced by either party to this Agreement whether arising out of or relating to the Agreement, letter of credit, improvements disbursements agreement, or cash escrow agreement or any action to collect security will be deemed to be proper only if such action is commenced in Mesa County, Colorado. The Developer expressly waives his right to bring such action in or to remove such action to any other court whether state or federal.

30. a. **Conditions of Acceptance:** The City shall have no responsibility or liability with respect to any street, or other improvement(s), notwithstanding the use of the same by the public, unless the street or other improvements shall have been finally accepted by the City.

b. **Phased Development:** If the City allows a street to be constructed in stages, the Developer of the first one-half street opened for traffic shall construct the adjacent curb, gutter and sidewalk in the standard location and shall construct the required width of pavement from the edge of gutter on his side of the street to enable an initial two-way traffic operation without on-street parking. That Developer is also responsible for end-transitions, intersection paving, drainage facilities, and adjustments to existing utilities necessary to open the street to traffic.

c. Prior to requesting final acceptance of any street, storm drainage facility, or other required improvement(s), the Developer shall: (i) furnish to the City engineer as-built drawings in reproducible form, blue-line stamped and sealed by a professional engineer and in computer disk form and copies of results of all construction control tests required by City specification; (ii) provide written evidence to the City Engineer under signature of a qualified expert that the earth, soils, lands and surfaces upon, in and under which the improvements have been constructed, or which are necessary for the improvements, are free from toxic, hazardous or other

regulated substances or materials: (iii) provide written evidence to the City Attorney that the title to lands underlying the improvements are free and clear from all liens and encumbrances, except those items and encumbrances which may be approved in writing by the City Attorney.

City of Grand Junction
250 North Fifth Street
Grand Junction CO 81501

Scott V. Brown, Acting Development Services Director
Director of Community Development date 7/19/02

Attest:

Stephanie Turin 7/19/02
City Clerk date



By: David J. Contis 3/11/02
Developer date

Name (printed): DAVID J. CONTIS

Its (position): CHIEF OPERATING OFFICER

Attest:

Steph L. Spert 3/11/02
Asst. Secretary date

EXHIBIT "B"

MESA MALL
Lift Station and Sanitary Sewer

DATE: 2/5/02
 NAME OF DEVELOPER: MESA MALL
 PRINTED NAME OF PERSONS PREPARING: JIM LANGFORD

CONSTRUCTION COST ESTIMATE:

NO.	DESCRIPTION	UNITS	EST. QTY.	UNIT PRICE	TOTAL AMOUNT
1	Connection to lift station	LS	1	675.00	675.00
2	Lift Station	LS	1	28725.00	28725.00
7	6" PVC San Sewer Line	LF	146	10.80	1576.80
8	Manholes	EA	5	2170.00	10850.00
6	8" PVC San Sewer Line	LF	1111	13.45	14942.95
4	Concrete encasement	LF	57.00	30.50	1738.50
5	Existing manhole removal	EA	1.00	345.00	345.00
6	Pavement, remove and replace	SY	1613	20.85	33631.05
				TOTAL COSTS :	\$92,484.30
				20% Contingency:	\$18,496.86
				TOTAL COSTS :	\$110,981.16

SIGNATURE OF DEVELOPER

DATE

I HAVE REVIEWED THE ESTIMATED COSTS AND TIME SCHEDULE SHOWN ABOVE AND, BASED ON THE PLAN LAYOUTS SUBMITTED TO DATE AND THE CURRENT COSTS OF CONSTRUCTION TAKE NO EXCEPTION TO THE ABOVE.

Daniel R. Donohue

CITY ENGINEER

3/7/02

DATE

Lee V. Bowen, Acting

COMMUNITY DEVELOPMENT
Development Services Director

July 19, 2002

DATE

WELLS FARGO BANK, N.A.
TRADE SERVICES DIVISION, NORTHERN CALIFORNIA
525 MARKET STREET, 25TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
Contact Phone: 1-800-798-2815 (Option No. 1)

IRREVOCABLE LETTER OF CREDIT

Letter of Credit No.: NZS441300

Date: May 16, 2002

City of Grand Junction, Colorado
250 N. 5TH Street
Grand Junction, Colorado 81501

Attention: Dave Donohue, Development Engineer

Ladies and Gentlemen:

At the request and for the account of The Macerich Partnership, L.P., a Delaware Limited Partnership, 401 Wilshire Blvd., Suite 700, Santa Monica, CA 90401, ("Applicant"), we hereby establish our Irrevocable Letter of Credit in your favor in the amount of One Hundred Eleven Thousand United States Dollars (**US\$111,000.00**) available with us at our above office located at 1740 Broadway, MAC C7300-013, Denver, CO 80274, Phone 303-863-6925 (the "Paying Bank") by sight payment of your signed and dated demand(s) worded as follows with the instructions in brackets therein complied with:

"The undersigned, [insert either "the City Attorney" or "an authorized designee of the City Attorney"] of the City of Grand Junction, Colorado, hereby demands US\$[insert amount of drawing] under Wells Fargo Bank, N.A. Letter of Credit No. NZS441300 and certifies that The Macerich Partnership, L.P., a Delaware Limited Partnership has failed to perform or is in default with respect to Improvements required on or before [insert date]."

Partial demands are permitted under this Letter of Credit.

Each demand must also be accompanied by the original of this Letter of Credit for the Paying Bank's endorsement on this Letter of Credit of their payment of such demand.

If any instructions accompanying a demand under this Letter of Credit request the payment is to be made by transfer to an account with us or at another bank, we and/or such other bank may rely on an account number specified in such instructions even if the number identifies a person or entity different from the intended payee.

This Letter of Credit expires at the office of the Paying Bank on **March 31, 2003**.

All charges under this Letter of Credit are for the Applicant's account.

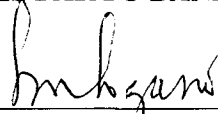
As used herein the term "Business Day" shall mean a day of the year on which the Paying Bank is open for business. We hereby agree with you that all demand(s) made under and in compliance with the terms of this Letter of Credit will be duly honored no later than the 3rd (third) Business Day after presentation to the Paying Bank as specified herein.

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (1993 revision), International Chamber of Commerce Publication No. 500, and engages us in accordance therewith.

Very truly yours,

WELLS FARGO BANK, N.A.

BY:



(Authorized Signature)
SOCCHI LOZANO

WELLS FARGO BANK, N.A.
TRADE SERVICES DIVISION, NORTHERN CALIFORNIA
525 MARKET STREET, 25TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
Contact Phone: 1-800-798-2815 (Option No. 1)

IRREVOCABLE LETTER OF CREDIT

City of Grand Junction, Colorado
250 N. 5TH Street
Grand Junction, Colorado 81501

Letter of Credit No. **NZS432721**
Date: March 12, 2002

Attention: Dave Donohue, Development Engineer

Ladies and Gentlemen:

At the request and for the account of The Macerich Partnership, L.P., a Delaware limited partnership, 401 Wilshire Blvd., Suite 700, Santa Monica, CA 90401, ("Applicant"), we hereby establish our Irrevocable Letter of Credit in your favor in the amount of One Hundred Eleven Thousand United States Dollars (US\$111,000.00) available with us at our above office located at 1740 Broadway, MAC C7300-013, Denver, CO 80274, Phone 303-863-6925 (the "Paying Bank") by sight payment of your signed and dated demand(s) worded as follows with the instructions in brackets therein complied with:

"The undersigned, **[insert either "the City Attorney" or "an authorized designee of the City Attorney"]** of the City of Grand Junction, Colorado, hereby demands US\$**[insert amount of drawing]** under Wells Fargo Bank, N.A. Letter of Credit No. NZS432721 and certifies that The Macerich Partnership, L.P. has failed to perform or is in default with respect to Improvements required on or before **[insert date]."**

Partial demands are permitted under this Letter of Credit.

Each demand must also be accompanied by the original of this Letter of Credit for the Paying Bank's endorsement on this Letter of Credit of their payment of such demand.

If any instructions accompanying a demand under this Letter of Credit request the payment is to be made by transfer to an account with us or at another bank, we and/or such other bank may rely on an account number specified in such instructions even if the number identifies a person or entity different from the intended payee.

This Letter of Credit expires at the office of the Paying Bank on **May 10, 2002**.

All charges under this Letter of Credit are for the Applicant's account.

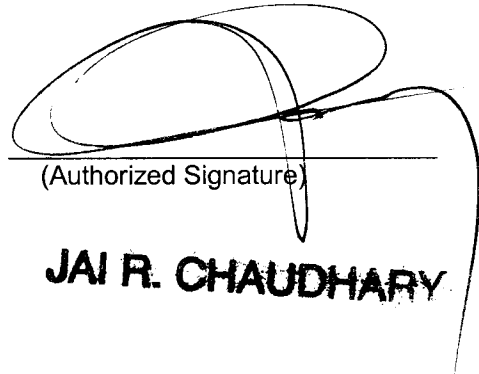
As used herein the term "Business Day" shall mean a day of the year on which the Paying Bank is open for business. We hereby agree with you that all demand(s) made under and in compliance with the terms of this Letter of Credit will be duly honored no later than the 3rd (third) Business Day after presentation to the Paying Bank as specified herein.

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (1993 revision), International Chamber of Commerce Publication No. 500, and engages us in accordance therewith.

Very truly yours,

WELLS FARGO BANK, N.A.

BY:



(Authorized Signature)

JAI R. CHAUDHARY