

Staff Summary Report



Council Meeting Date: September 18, 2008

Agenda Item Number: _____

SUBJECT: Approval of a Development Agreement with Clear Channel regarding the disposition of three existing billboards within the City of Tempe.

DOCUMENT NAME: 20080918cdcm02 COMM DEV/REDEVELOPMENT ADM (0403-01)

SUPPORTING DOCS: No

PREPARED BY: Chris Messer, Principal Planner (350-8562)

REVIEWED BY: Chris Salomone, Community Development Manager (350-8294)

LEGAL REVIEW BY: Cynthia McCoy, Assistant City Attorney (350-2187)

FISCAL NOTE: No Fiscal impact.

RECOMMENDATION: Approval of the Development Agreement as proposed.

ADDITIONAL INFO: With this agreement, Clear Channel will remove two billboards and replace one. The billboard, located on McClintock south of Broadway, will be removed by the end of this year. The billboard at Apache and Price will be removed once a permit has been issued to Clear Channel for the replacement of the billboard on Baseline Rd and the I-10. The billboard at Baseline and I-10 will be replaced with a digital billboard.

Clear Channel will make the Baseline billboard available to the City and its various departments for use during emergency situations. The replacement billboard will have a dimmer that will operate from sunset to 11:00 p.m and will be off from 11:00 p.m. every evening until sunrise on the following day, except for emergency messaging requested by the City.

WHEN RECORDED, RETURN TO:
City of Tempe Basket

DEVELOPMENT AGREEMENT
No. C 2008-_____

THIS DEVELOPMENT AGREEMENT (this "Agreement") is made and entered into as of the ____ day of _____, 2008, between the City of Tempe, an Arizona municipal corporation (the "City"), and Clear Channel Outdoor, Inc., an Arizona corporation ("Clear").

RECITALS

WHEREAS, Clear desires to redesign several conventional billboards that it maintains within the City of Tempe; and

WHEREAS, City and Clear desire to set forth herein their understandings and agreements with respect to the redesign of the billboards; and

WHEREAS, this Agreement is a development agreement pursuant to the provisions of A.R.S. §900.05.

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

AGREEMENT

1. Definitions. The following terms shall have the meanings set forth below whenever used in this Agreement, except where the context clearly indicates otherwise.

1.1 "City" shall mean the City of Tempe, an Arizona municipal corporation, and any successor public body or entity.

1.2 "Clear" shall mean Clear Channel Outdoor, Inc., an Arizona corporation.

1.3 "Parties" and "Party" shall mean all of the parties to this Agreement collectively or each of the parties individually, as the context may require.

2. Development Issues.

2.1 Duration of Development Agreement. The term of this Agreement shall commence on the date it is executed by all of the Parties and continue for a period of ten (10) years, unless sooner terminated as provided herein.

2.2 Project; Completion of Project. Clear shall perform the following activities:

2.2.1 Remove the existing billboard at McClintock and Broadway on or before December 31, 2008; and

2.2.2 Remove the existing billboard at Apache and Price within thirty (30) days after receipt of the requisite building permit for construction and installation of the Baseline Billboard (as hereafter defined); and

2.2.3 Remove the existing billboard at Baseline and the I-10 Freeway and replace it with a digital billboard with a monopole structure having an overall face size of 14' x 48' and a height not more than 54' (the "Baseline Billboard"). The Baseline Billboard shall also have a decorative pole cover and landscaping at the base, and shall be subject to review as set forth in Section 2.5. Clear shall submit for the requisite building permits for the Baseline Billboard on or before December 31, 2008.

2.3 Public Safety Access. Clear shall make the Baseline Billboard available to the City and its various departments for use during emergency situations, the exact parameters of which shall include: (a) messaging that overrides advertising copy for one (1) hour and repeats for at least 8 seconds every minute until City notifies Clear that the emergency has passed; (b) the Baseline Billboard shall not change messaging more frequently than every 8 seconds, shall be enabled only with static messages and shall not include flashing, blinking or moving lights; (c) the Baseline Billboard shall change copy instantaneously with no sense of movement during the transition from one ad to the next; (d) the Baseline Billboard shall include a dimmer that will operate to reduce the Nit level to 300 Nits every evening from sunset to 11:00 p.m.; (e) the Baseline Billboard shall be extinguished from 11:00 p.m. every evening until sunrise on the following day, subject to emergency messaging requested by the City. City and Clear shall review the operation of the Baseline Billboard each year during the term of this Agreement for compliance with current industry standards.

2.4 Duration of Billboard. The Baseline Billboard may remain at that location for a period of 10 years from the date this Agreement is executed (the "Term"), subject to extension on terms mutually acceptable to City and Clear.

2.5 Design Approvals. The Baseline Billboard shall be consistent from a design standpoint with City standards, and the final location and design shall be reviewed and approved in writing by the City Architect prior to its construction and installation. The City Architect shall not unreasonably withhold such review and/or approval.

2.6 Compliance with Laws. Clear shall comply with all laws, rules and regulations applicable to the Baseline Billboard.

2.7 General Cooperation. City and Clear acknowledge and agree that they shall cooperate in good faith with each other and use their respective good-faith and commercially reasonable efforts to perform their respective obligations under this Agreement.

3. Indemnification of City. Clear shall indemnify, protect, defend and hold harmless the City, its council members, officers, employees and agents, from any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and clean-up actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorneys' fees and costs of defense, arising directly or indirectly, in whole or in part, out of the performance of this Agreement by Clear or City, except to the extent resulting from the negligence or intentional misconduct of the City or any of its employees, contractors or agents.

4. Default; Remedies; Termination.

4.1 Default. It shall be a default hereunder if either party fails to perform any of its obligations hereunder and such failure continues for a period of thirty (30) days after written notice from the non-defaulting party specifying in reasonable detail the nature of the failure; provided that if the nature of the default is such that it cannot reasonably be cured within the thirty-day period, no default shall be deemed to exist if the defaulting party commences a cure within that thirty-day period and diligently and expeditiously pursues such cure to completion within ninety (90) days.

4.1.1 Additional Defaults. In addition to the foregoing, it shall be a default hereunder if: (a) any petition or application for a custodian, as defined by Title 11, United States Code, as amended from time to time (the "Bankruptcy Code") or for any form of relief under any provision of the Bankruptcy Code or any other law pertaining to reorganization, insolvency or readjustment of debts is filed by or against Clear or any partnership of which it is a partner, their respective assets or affairs, and such petition or application is not dismissed within ninety (90) days of such filing; (b) Clear makes an assignment for the benefit of creditors, is not paying material debts as they become due, or is granted an order for relief under any chapter of the Bankruptcy Code; (c) a custodian, as defined by the Bankruptcy Code, takes charge of any property of Clear or any property of any partnership of which it is a partner; or (d) the dissolution or termination of existence of Clear or the sale of all or substantially all of the assets, equity or member interests, or stock of Clear, unless its obligations hereunder have been assumed by an entity whose financial capacity has been approved in advance by City (such approval not to be unreasonably withheld or delayed).

4.2 City's Remedies; Right to Terminate Agreement. If, after the passage of any applicable cure period, Clear remains in default under this Agreement, then the City shall have the right and option, without obligation, to (a) terminate this Agreement immediately upon written notice to the Clear, in which event Clear shall remove the Baseline Billboard within 60 days after termination, and (b) exercise such other remedies as are available at law or in equity for breach of contract. On any such termination, this Agreement shall be of no further force or effect other than the indemnification provisions which shall survive the expiration or termination of this Agreement.

4.3 Developer's Remedies. If the City is in default under this Agreement and the parties do not resolve the City's default pursuant to the nonbinding mediation described in this Agreement, Clear shall have the right to terminate this Agreement upon written notice to the City. Within 60 days after any such termination, Clear shall remove the Baseline Billboard.

5. General Provisions.

5.1 Notices. All Notices which shall or may be given pursuant to this Agreement shall be in writing and may be given in person or transmitted by registered or certified mail, return receipt requested, addressed as follows:

TO Clear:

With a copy to:

TO THE CITY:

City Manager
City of Tempe
P. O. Box 5002
31 East 5th Street
Tempe, Arizona 85281

With a copy to:

City Attorney
Tempe City Attorney's Office
P. O. Box 5002
21 E. Sixth Street, Suite 201
Tempe, Arizona 85281

Any Party hereto shall have the right to change its designated notice address by providing to the other Parties written notice of such change in the manner described above.

5.2 Dispute Resolution. In the event that there is a dispute hereunder which the parties cannot resolve between themselves, the parties agree that there shall be a forty-five (45) day moratorium on litigation during which time the parties agree to attempt to settle the dispute by nonbinding mediation before commencement of litigation. The mediation shall be held under the commercial mediation rules of the American Arbitration Association. The matter in dispute shall be submitted to a mediator mutually selected by Clear and the City. In the event that the parties cannot agree upon the selection of a mediator within seven (7) days, then within three (3) days thereafter, the City and Clear shall request the presiding judge of the Superior Court in and for the County of Maricopa, State of Arizona, to appoint an independent mediator. The mediator selected shall have at least five (5) years experience in mediating or arbitrating disputes relating to commercial property development. The cost of any such mediation shall be divided equally between the City and Clear. The results of the mediation shall be nonbinding on the parties, and any party shall be free to initiate litigation subsequent to the moratorium.

5.3 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona. This Agreement has been made and entered into in Maricopa County, Arizona.

5.4 Successors and Assigns. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

5.5 Waiver. No waiver by either party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

5.6 Attorneys' Fees. In the event of any litigation between the parties in connection with this Agreement, excluding the mediation process pursuant to Section 5.2, the party prevailing in such action shall be entitled to recover from the other party all of its costs, expenses and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury.

5.7 Severability; No Merger. In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law, to the extent the material provisions of this agreement are not vitiated.

5.8 Schedules and Exhibits. All schedules and exhibits attached hereto are incorporated herein by this reference as though fully set forth herein.

5.9 Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.

5.10 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

5.11 Recordation of Agreement. This Agreement shall be recorded in the Official Records of Maricopa County, Arizona, within ten (10) days after its approval and execution by the City.

5.12 No Partnership or Joint Venture. Under no circumstances shall the parties hereto be considered partners or joint venturers.

5.13 Conflict. This Agreement is subject to cancellation per ARS 38-511.

{Signature Pages Follow}