

- City Council
- Successor Agency
- Housing Authority
- Reclamation Authority
- Joint Powers Authority

*City of*  
**IRWINDALE**  
**AGENDA REPORT**

502-40

---

Date: April 12, 2023  
To: Honorable Mayor and Members of the City Council  
From: Julian A. Miranda, City Manager  
Issue: A PUBLIC HEARING REGARDING AN ECONOMIC DEVELOPMENT SUBSIDY REPORT AND OPERATING COVENANT AGREEMENT BETWEEN THE CITY OF IRWINDALE AND HOME DEPOT U.S.A, INC. PURSUANT TO GOVERNMENT CODE SECTION 53083.1; AND CONSIDERATION OF A RESOLUTION ACCEPTING THE ECONOMIC DEVELOPMENT SUBSIDY REPORT, APPROVING THE OPERATING COVENANT AGREEMENT AND MAKING RELATED FINDINGS

---

**City Manager's Recommendation:**

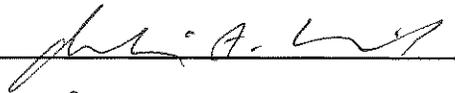
It is recommended that the City Council:

- A. Hold the public hearing and adopt Resolution 2023-24-3402 entitled "A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF IRWINDALE, CALIFORNIA, APPROVING AN OPERATING COVENANT AGREEMENT WITH HOME DEPOT U.S.A., INC, AUTHORIZING THE CITY MANAGER TO EXECUTE THE AGREEMENT, AND APPROVING AND ORDERING THE PUBLICATION OF AN ECONOMIC DEVELOPMENT SUBSIDY REPORT IN ACCORDANCE WITH GOVERNMENT CODE SECTION 53083.1."

**Administrative Action:**

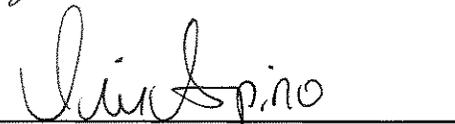
**Submitted by:**

Julian A. Miranda, City Manager



**Prepared by:**

Iris Espino, Assistant to the City Manager



**Reviewed by:**

Adrian R. Guerra, City Attorney

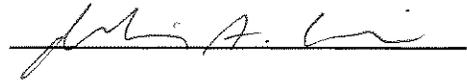


Kambiz Borhani, Finance Director / City Treasurer



**Approved by:**

Julian A. Miranda, City Manager



**Background and Analysis:**

On January 26, 2022, the City Council adopted the Economic Development Incentive Program and Sales and Use Tax Sharing Policy as part of the City's economic development efforts to attract high-caliber businesses that generate a large amount of sales tax for the City. The City has received a request from Home Depot U.S.A., Inc. (Home Depot) to enter into a Sales Tax Agreement ("Agreement") (Attachment "B") with the City for the new Home Depot distribution center located at 13131 Los Angeles Street. Home Depot will establish a local distribution center, designating the City as the point of sale, such that operations will generate taxable retail sales within the City.

The Bradley-Burns Uniform Local Sales and Use Tax Law (the "Sales and Use Tax Law") authorizes counties and cities to impose local sales and use taxes in conformity with its terms. Under the Sales and Use Tax Law, the City of Irwindale receives one percent (1%) of all taxable sales generated within the City. The Agreement proposes that Home Depot receive a rebate on the City's portion of the Bradley Burns sales tax generated at the facility.

Sales and Use Tax revenues. Through a site selection process, Home Depot determined to locate a new e-commerce distribution facility in the City of Irwindale at the property located at 13131 Los Angeles Street. The proposed Agreement provides an economic subsidy by the City to Home Depot to incentivize the leasing of a new 530,000 sq. ft. build-to-suit facility and designate the City as a new point-of-sale location. The incentives provided in this Agreement are intended to ensure that Home Depot expands its operations to Irwindale and remains in the City for no less than 10 years.

Entering into this Agreement will generate substantial revenue for the City and create approximately 45-65 new permanent jobs. Further, the expansion of Home Depot serves the additional public purpose of fostering a positive business and civic environment that may attract additional businesses and investment in the community. The availability of increased public and private services and economic activity resulting therefrom will assist the City in its goal of enhancing economic development in the community. Considering the potential benefits Home Depot will bring to the community, Staff recommends the approval of this Operating Covenant Agreement to incentivize Home Depot to establish its business operations as a point of sale in the City.

Pursuant to the terms of the proposed Agreement, the operating covenant payment between the City and Home Depot is calculated based on Home Depot's sales tax revenue during a computation quarter in an amount equal to the sum of thirty-five percent (35%) of the local sales tax revenue received. Per the Economic Development Subsidy Report, payment to Home Depot is estimated at three hundred fifty thousand dollars (\$350,000) annually for the duration of the agreement- based on an estimated one hundred million dollars (\$100,000,000) in annual revenue generated through sales or use

tax due to the operation of the new Home Depot facility in the City. Over the 10-year term of the Agreement, therefore, the total subsidy will equal up to three million five hundred thousand dollars (\$3,500,000).

The City of Irwindale will receive approximately six hundred and fifty thousand dollars (\$650,000) per year in sales tax revenue, and approximately two thousand three hundred twenty-eight (\$2,328) per year in business license tax revenue, totaling six million five hundred twenty-three thousand two hundred eighty dollars (\$6,523,280) over the initial 10-year term of the agreement. Entering into the Agreement ensures that local sales tax revenue generated by Home Depot will remain in the City for no less than 10 years.

The Parties have negotiated two 5-year options to extend the agreement, which increases the amount of revenue Home Depot would receive, and decreases the amount of revenue the City would receive, by 5% after the Parties' agreement to exercise each option. Home Depot would receive 40% for years 11 through 15; and 45% for years 16 through 20, after the Parties' mutual agreement to exercise each option. The City would receive 60% for years 11 through 15; and 55% for years 16 through 20, after the Parties' mutual agreement to exercise each option.

**Legal Impact:**

Pursuant to the parties' negotiations, Home Depot has represented to the City that the purpose of the Agreement is to provide an economic development subsidy to Home Depot through its creation of local sales tax revenue. Home Depot has represented that an acceptable remedy for default of its obligations is for the City to withhold or rebate revenue as appropriate. Home Depot has therefore stated that it will not agree to additional remedies normally available to contracting parties, such as consequential money damages, or injunctive relief.

Therefore, the Agreement provides that were either Party to breach the Agreement, neither Party would be liable to the other for consequential damages and, in no event shall the City have the right of specific performance or other mandatory injunctive relief to compel Home Depot's operation of the Distribution Facility. This language significantly limits the City's legal remedies in the event of a breach of the agreement by Home Depot.

**Fiscal Impact:**

For the remainder of the 2022-2023 Fiscal Year, there is likely to be no fiscal impact on the City. In accordance with the terms of the Agreement, estimated revenues and expenditures will be calculated in future City budgets.

**Attachment(s):**

"A": RESOLUTION 2023-24-3402

"B": HOME DEPOT OPERATING COVENANT AGREEMENT

"C": HOME DEPOT ECONOMIC DEVELOPMENT SUBSIDY REPORT

**RESOLUTION NO. 2023-24-3402**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF IRWINDALE, CALIFORNIA, APPROVING AN OPERATING COVENANT AGREEMENT WITH HOME DEPOT U.S.A., INC, AUTHORIZING THE CITY MANAGER TO EXECUTE THE AGREEMENT, AND APPROVING AND ORDERING THE PUBLICATION OF AN ECONOMIC DEVELOPMENT SUBSIDY REPORT IN ACCORDANCE WITH GOVERNMENT CODE SECTION 53083.1**

**WHEREAS**, on January 26, 2022, the City of Irwindale adopted an Economic Development Sales and Use Tax Sharing Policy ("Policy") for the purpose of promoting development that will benefit the community as a whole in terms of both jobs and revenue creation; and

**WHEREAS**, in accordance with the Policy, the City of Irwindale and Home Depot U.S.A, Inc. ("Home Depot") have negotiated an Operating Covenant Agreement ("Agreement") with respect to the establishment and retention of an E-Commerce Distribution Facility within the City; and

**WHEREAS**, Home Depot has executed a 10-year lease with two 5-year options to renew for an approximately 530,000 square foot E-Commerce Distribution Center located at 13131 Los Angeles Street, Irwindale, CA 91706 ("Facility"), to serve as a next-day and same-day delivery center, specializing in big and bulky building material SKUs that are most effectively delivered on the Owner's flatbed trucks (e.g., lumber, building materials, flooring); and

**WHEREAS**, Home Depot has established operations at the Facility, defined as a qualified business location with a stock of goods as defined by State statute, thus allowing the Facility to be a Point of Sale within the City for local tax allocation purposes; and

**WHEREAS**, the City of Irwindale, in consideration of the Local Sales and/or Use Tax Revenues to be collected and remitted by Home Depot for the benefit of City, which City would not otherwise realize, will provide payments to Home Depot as compensation for its establishing operations at the Facility within City, and otherwise satisfying its obligations under the Agreement; and

**WHEREAS**, the City and Home Depot have negotiated in good faith to determine the deal points as set forth within the Agreement, in accordance with the City's Economic Development Sales and Use Tax Sharing Policy; and

**WHEREAS**, on March 10, 2023, the City published a notice of public hearing regarding the City Council's consideration of the economic subsidy and Operating Covenant Agreement; and

**WHEREAS**, all legal prerequisites prior to adoption of this Resolution have occurred.

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF IRWINDALE, CALIFORNIA, DOES HEREBY RESOLVE, DETERMINE, AND ORDER AS FOLLOWS:**

**SECTION 1.** The foregoing recitals are true and correct and are incorporated herein by this reference.

**SECTION 2.** In accordance with the Economic Development Sales and Use Tax Sharing Policy, the City Council hereby makes the following findings with respect to the Operating Covenant Agreement by and between the City of Irwindale and Home Depot:

1. *The net financial benefit to the public is larger than the financial incentive given which shall represent new resources of general fund revenue to the City.*

The City of Irwindale will receive approximately six hundred and fifty thousand dollars (\$650,000) per year in sales tax revenue, and approximately two thousand three hundred twenty-eight (\$2,328) per year in business license tax revenue, totaling six million five hundred twenty-three thousand two hundred eighty dollars (\$6,523,280) over the initial 10-year term of the agreement.

Home Depot U.S.A., Inc. will receive approximately three hundred and fifty thousand dollars (\$350,000) per year in sales tax rebate, totaling three million five hundred thousand dollars (\$3,500,000) over the initial 10-year term of the agreement.

The Parties have negotiated two 5-year options to extend the agreement, which increases the amount of revenue Home Depot would receive, and decreases the amount of revenue the City would receive, by 5% after the Parties' agreement to exercise each option. Home Depot would receive 40% for years 11 through 15; and 45% for years 16 through 20, after the Parties' mutual agreement to exercise each option. The City would receive 60% for years 11 through 15; and 55% for years 16 through 20, after the Parties' mutual agreement to exercise each option.

The net financial benefit to the public is larger than the financial incentive given to Home Depot. The establishment and retention of the Facility within the City will generate substantial general fund revenue for the City that might not otherwise be available to the community for many years.

2. *The agreement provides a direct benefit to the City, including the following:*
  - a. Revenues that will be used to provide for municipal services, public improvements, and/or civic or community programs, including but not limited to, public safety services and facilities, public improvements and recreational opportunities;
  - b. The creation, retention, and/or expansion of full-time, seasonal, or temporary jobs within the City;
  - c. Retention of a local or regional business within the City, which may attract additional businesses and investment in the community due to increased services and economic activity in the area;
  - d. Other ancillary benefits to the community, such as Home Depot's agreement to use commercially reasonable methods to participate in supporting community benefit events and activities.
  
3. *The business establishes the City of Irwindale as its operative location for point of sale and/or use for purposes of the collection of local sales and use tax revenues directly attributable to the business conducted within the City.*

Home Depot has covenanted to operate an E-Commerce Distribution Center at the Facility located within the City, and to ensure that it conducts its operations so that the point of sale for the purposes of collecting local sales and use tax revenues occurs and is designated within the City during the Term of the Agreement.

4. *The business itself is located within the City of Irwindale and will remain located within the City for a minimum of 10 years.*

The E-Commerce Distribution Center ("Facility") is located at 13131 Los Angeles Street, Irwindale, CA 91706, and Home Depot has covenanted to remain in the City for a minimum of 10 years. The Parties have negotiated two 5-year options to extend the agreement, for a maximum of 20 years.

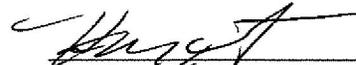
**SECTION 3.** Based on the above findings as incorporated herein, the City Council hereby approves the Operating Covenant Agreement in substantially final form, attached hereto as **Exhibit "A"**. The City Council hereby authorizes the City Manager, with the concurrence of the City Attorney, to make any non-financially substantive changes determined to be appropriate and in the City's interest and execute said Agreement. City Manager is hereby authorized to take any additional steps necessary to facilitate the intent of this Resolution.

**SECTION 4.** The City Council hereby approves the Economic Development Subsidy Report, attached hereto as **Exhibit "B"** and incorporated herein by reference. The City Council further finds the report is in compliance with applicable law and directs staff to publish the report to the public in accordance with Government Code Section 53083.1.

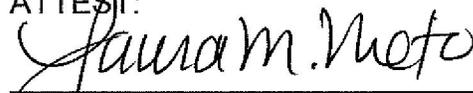
**SECTION 5.** The City Council hereby finds that pursuant to the California Environmental Quality Act ("CEQA") (Pub. Res. Code, § 21000 et seq.) and the State CEQA Guidelines (Cal. Code Regs, tit. 14 § 15000 et seq.), approval of the Operating Covenant Agreement and acceptance of the Economic Development Subsidy Report is not a "project" for purposes of CEQA and therefore is not subject to CEQA review. The Agreement and acceptance of the Economic Development Subsidy Report is not a project pursuant to State CEQA Guidelines section 15378(b)(4), which states that government fiscal activities which do not involve any commitment to any specific project which may result in a potentially significant environmental impact are not subject to CEQA. Further, the Agreement and acceptance of the Economic Development Subsidy Report is not a project under State CEQA Guidelines section 15061(b)(3), which states that CEQA does not apply where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

**SECTION 6.** The Chief Deputy City Clerk shall certify to the adoption of this resolution, which, shall in turn, have immediate effect.

**PASSED, APPROVED, and ADOPTED** this 22<sup>nd</sup> day of March 2023.

  
\_\_\_\_\_  
H. Manuel Ortiz, Mayor

ATTEST:

  
\_\_\_\_\_  
Laura M. Nieto, MMC  
Chief Deputy City Clerk

STATE OF CALIFORNIA        }  
COUNTY OF LOS ANGELES    } ss.  
CITY OF IRWINDALE         }

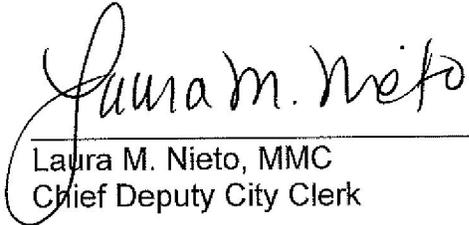
I, Laura M. Nieto, Chief Deputy City Clerk of the City of Irwindale, do hereby certify that the foregoing Resolution No. 2023-24-3402 was adopted at an regular meeting of the Irwindale City Council held on the 22<sup>nd</sup> day of March 2023, by the following vote of the Council:

AYES:           Councilmembers: Ambriz, Breceda, Burrola, Garcia, Mayor Ortiz

NOES:           Councilmembers: None

ABSTAIN:       Councilmembers: None

ABSENT:        Councilmembers: None

  
\_\_\_\_\_  
Laura M. Nieto, MMC  
Chief Deputy City Clerk

**OPERATING COVENANT AGREEMENT**

**between**

**CITY OF IRWINDALE**

**a Municipal Corporation**

**and**

**HOME DEPOT U.S.A., INC.**

**a Delaware Corporation**

March 22, 2023

## **ARTICLE I. PARTIES AND EFFECTIVE DATE.**

**1.1 Parties.** This Location Agreement ("**Agreement**") is entered into by and between the CITY OF IRWINDALE, a charter city and municipal corporation ("**City**"), and HOME DEPOT U.S.A., INC., a Delaware corporation (the "**Owner**"). City and Owner are sometimes referred to individually as a "**Party**" and together as "**Parties**" herein.

**1.2 Effective Date.** This Agreement is dated for reference purposes only. This Agreement will not become effective until the date ("**Effective Date**") on which all of the following conditions precedent are true:

**1.2.1** This Agreement has been approved by the City Council following all legally required notices and hearings;

**1.2.2** This Agreement has been executed by the appropriate authorities of City and Owner;

**1.2.3** Owner has entered into a warehouse lease agreement to operate an E-Commerce Distribution Center within the City. Owner has represented to the City that it has executed a 10-year lease with two 5-year options to renew for the E-Commerce Distribution Center to be located at 13131 Los Angeles Street, Irwindale, CA 91706, in satisfaction of the condition precedent as described in this subsection. Owner understands that the City is materially relying on such representation in entering into this agreement; and

**1.2.4** The E-Commerce Distribution Center is generating Local Sales and/or Use Tax Revenues for the City.

**1.2.5** If all of the foregoing conditions precedent have not been satisfied within five (5) years of the Effective Date of this Agreement, then this Agreement shall not thereafter become effective and any prior signatures and approvals of the Parties will be deemed void and of no force or effect. The Parties shall be able to administratively extend this Section 1.1.5 beyond that initial five (5) year term, annually upon mutual written agreement.

## **ARTICLE II. RECITALS.**

**2.1** Owner has executed a 10-year lease with two 5-year options to renew for an approximately 530,000 square foot E-Commerce Distribution Center located at 13131 Los Angeles Street, Irwindale, CA 91706, to serve as a next-day and same-day delivery center, specializing in big and bulky building material SKUs that are most effectively delivered on the Owner's flatbed trucks (e.g., lumber, building materials, flooring).

**2.2** The purpose of this agreement is to encourage the Owner to establish Operations in the City to be defined as a qualified business location with a stock of goods as defined by State statute, thus allowing the Distribution Center to be a Point of Sale within the City for local tax allocation purposes.

**2.3** City, in consideration of the Local Sales and/or Use Tax Revenues (as defined in Section 3.1.18) to be collected and remitted by Owner for the benefit of City, which City would not otherwise realize, desires to provide City Payments to Owner as compensation for Owner establishing Operations within City through Owner's Distribution Center and otherwise satisfying its obligations under this Agreement.

**2.4** Such City Payment for each Fiscal Quarter will be an amount paid from Local Sales and/or Use Tax Revenues, and shall be measured by a percentage of the Local Sales and/or Use Tax Revenues generated in such Fiscal Quarter, as more particularly set forth in this Agreement.

**2.5** The operations of Owner in City will provide significant community benefits to City, in that the additional revenues will be generated as a result of Owner's efforts, which may be used by City for the funding of necessary public services and facilities. The City has determined that the long-term operation of Owner within the City will result in substantial benefits to the City, and its citizens including, without limitation, the creation of significant new numbers of employment opportunities, property tax revenues, sales tax revenues, community improvements, and other ancillary benefits. Accordingly, the City has also determined that its entry into this Agreement and the performance of the Covenants by Owner serve a significant public purpose, while providing only incidental benefits to a private party.

**2.6** City and Owner desire to enter into this Agreement for the purposes described above.

### **ARTICLE III. DEFINITIONS.**

**3.1 Definitions.** Unless the context otherwise requires, the terms defined in this Article 3 shall, for all purposes, and of any amendment hereof, and of any opinion or report or other document mentioned herein or therein, have the meanings defined herein; the following definitions to be equally applicable to both the singular and plural forms of any of the terms defined herein.

**3.1.1 "Agreement"** shall have the meaning set forth in Section 1.1.

**3.1.2 "Applicable Reporting Period"** means, for purposes of determining the Parties' financial obligations hereunder, the Reporting Period applicable to the Fiscal Quarter for which the financial obligation is being calculated. As an example, the Applicable Reporting Period for determining a financial obligation attributable to Sales occurring in the Fiscal Quarter ending January 31, shall include the then-current Fiscal Quarter ending January 31, and the three immediately prior Fiscal Quarters ending April 30, July 31, and October 31, respectively.

**3.1.3 "Business Day"** means a day which is not a Friday, Saturday, Sunday or legal holiday on which banking institutions in the State of California or City are closed.

**3.1.4 "CDTFA"** means the California Department of Tax and Fee

Administration and any successor agency.

**3.1.5 "City"** shall have the meaning set forth in Section 1.1 and shall include any nominee, assignee or successor to City's rights, powers and responsibilities.

**3.1.6 "City Payment"** means, with respect to a particular Fiscal Quarter within the Term, the sum **total** amount of City's "Location Payment Obligation" (LPO), as defined in Section 3.1.18, for such Fiscal Quarter.

**3.1.7 "Data and Documentation"** shall have the meaning set forth in Section 4.2.2.

**3.1.8 "Designated Sales Territory"** means the geographical boundaries of the sales, service and distribution area served by the Distribution Center which is located within the jurisdiction of the City.

**3.1.9 "Dispute Notice"** shall have the meaning set forth in Section 6.15.

**3.1.10 "Distribution Center"** means the location operated by Owner within the City at which E-Commerce Retail Sales and other sales transactions are consummated pursuant to the Sales Tax Law, which is located at 13131 Los Angeles Street, Irwindale, CA 91706.

**3.1.11 "E-Commerce Retail Sales"** means all Sales of Material conducted electronically on the internet to any person or entity distributed through a Distribution Center, which is subject to the Sales Tax Law and which generates Local Sales and/or Use Tax Revenues in the City.

**3.1.12 "Effective Date"** shall have the meaning set forth in Section 1.2.

**3.1.13 "Enforced Delays"** shall have the meaning set forth in Section 6.12.

**3.1.14 "Event of Default"** shall have the meaning set forth in Section-4.6.

**3.1.15 "Financial Assistance"** shall have the meaning set forth in Section 4.1.

**3.1.16 "Fiscal Quarter"** means one three-month period within the Term and commencing on February 1, May 1, August 1, or November 1, and ending on, as applicable, the immediately following April 30, July 31, October 31, January 31.

**3.1.17 "Location Payment Obligation" or "LPO"** means, as to a particular Fiscal Quarter during the Term, an amount equal to thirty-five percent (35%) of each dollar of Local Sales and/or Use Tax Revenues received by City and attributable to Owner for each Fiscal Quarter for the first ten (10) years beginning on the Effective Date of this Agreement. Owner has executed a 10-year lease with two 5-year options to renew for the Distribution Center. Upon Owner's exercise of their first option to extend the lease term for an additional five (5) years for a minimum total lease term of 15 years, the LPO shall increase to forty

percent (40%) upon commencement of the eleventh (11<sup>th</sup>) year of this Agreement, beginning on the anniversary of the Effective Date, provided that the parties have exercised their option to extend the term of this Agreement in accordance with section 4.7 herein. Upon Owner's exercise of its second five-year lease extension option exercised for a minimum total lease term of 20 years, the LPO shall increase to forty-five percent (45%) upon commencement of the sixteenth 16<sup>th</sup> year of this Agreement, beginning on the anniversary of the Effective Date, provided that the parties have exercised their option to extend the term of this Agreement in accordance with section 4.7 herein.

**3.1.18 "Local Sales and/or Use Tax Revenues"** means that portion of the Sales and/or Use Tax, paid by Owner, which is allocated and paid to City pursuant to the Sales Tax and/or Use Tax Law. Local Sales and/or Use Tax Revenues shall not include: (i) Penalty Assessments, (ii) any Sales Tax levied by, collected for or allocated to the State of California, the County of Los Angeles, or a district or any entity (including an allocation to a statewide or countywide pool) other than City, (iii) any administrative fee charged by the CDTFA, (iv) any Sales Tax subject to any sharing, rebate, offset or other charge imposed pursuant to any applicable provision of federal, state or local (except City's) law, rule or regulation, (vi) any Sales Tax attributable to any transaction not consummated within the Term, or (vii) any Sales Tax (or other funds measured by Sales Tax) required by the State of California to be paid over to another public entity (including the State) or set aside and/or pledged to a specific use other than for deposit into or payment from the City's general fund.

**3.1.19 "Material"** means any and all tangible personal property offered for sale by Owner to its customers/clients which is subject to the Sales Tax Law.

**3.1.20 "Minimum Annual Revenue Tax Base"** means, in accordance with the City's Sales and Use Tax Sharing Policy, the minimum tax base of one hundred million dollars (\$100,000,000) of annual revenue generated through Sales or Use by Owner within the City of Irwindale that is subject to Sales Tax Law and the Sales and/or Use Tax.

**3.1.21 "Minor Amendment"** means any limited technical correction, or not-substantive modification of this Agreement, as determined by the City Manager and City Attorney.

**3.1.22 "Operations"** means E-Commerce Retail Sales consummated through the Distribution Center located in the City and operated by Owner.

**3.1.23 "Penalty Assessments"** means penalties, assessments, collection costs and other costs, fees or charges resulting from late or delinquent payment of Sales Tax and which are levied, assessed or otherwise collected from Owner.

**3.1.24 "Reporting Period"** means, at any one point in time, the then-current Fiscal Quarter together with the immediately preceding three (3) Fiscal Quarters. As to any Fiscal Quarter, Owner's returns to the State of California under applicable Sales Tax Law are due by the end of the calendar month following a Fiscal Quarter, and accordingly, Owner's reporting for a Reporting Period shall be due to the City by the end of the calendar month following the calendar month in which Owner is obligated to file. For example, for

Fiscal Quarter ending July 31<sup>st</sup>, Owner's Data and Documentation shall be received by the City by September 30<sup>th</sup>.

**3.1.25 "Resolution Period"** shall have the meaning set forth in Section 6.15.

**3.1.26 "Sale" and "Sales"** mean, individually or collectively, E-Commerce Retail Sale(s).

**3.1.27 "Sales and/or Use Tax"** means all sales and use taxes levied under the authority of the Sales Tax Law, excluding Sales Tax which is to be refunded to Owner, because of an overpayment of Sales Tax.

**3.1.28 "Sales Tax Law"** means (i) California Revenue and Taxation Code Section 6001 *et seq.*, and any successor law thereto, (ii) any legislation allowing City or other public agency with jurisdiction in City to levy any form of Sales Tax, and (iii) regulations of the CDTFA and other binding rulings and interpretations relating to (i) and (ii) hereof.

**3.1.29 "Term"** shall mean that period commencing on the Effective Date and ending on the earlier of (i) the date that is ten (10) years after the Effective Date, unless otherwise extended in accordance with section 4.7 herein, or (ii) the date on which this Agreement is terminated pursuant to the specific provisions of this Agreement.

#### **ARTICLE IV. LOCATION AND OPERATION**

**4.1 Location and Operation Covenant.** Owner hereby covenants and agrees that it shall establish its Operations through its Distribution Center within the jurisdictional boundaries of the City and shall thereafter, for the full Term, conduct any E-Commerce Retail Sales Operations for the Designated Sales Territory through the Distribution Center in accordance with this Agreement, Sales Tax Law, and all other applicable provisions of local, state and federal law; provided, however, that a temporary cessation of operations directly resulting from events of force majeure as described in Section 4.11 will not constitute an Event of Default under Section 4.8. Owner's Distribution Center located in the City shall conduct its operations in accordance with all applicable provisions of local, state and federal law.

Owner will not directly or indirectly solicit or accept any "Financial Assistance" from any other public or private person or entity, if such Financial Assistance is given for the purpose of causing or would result in Owner's breach of the covenants set forth in this Section 4.1, failing to establish or to continue for the Term, Operations through its Distribution Center within the City. For purposes of this Section 4.1 the term "**Financial Assistance**" means any direct or indirect payment, subsidy, rebate, or other similar or dissimilar monetary or non-monetary benefit, including, without implied limitation, payment of land subsidies, relocation expenses, public financings, property or Sales tax relief, rebates, exemptions or credits, relief from public improvement obligations, and payment for public improvements to or for the benefit of Owner.

**4.1.1 Covenant to Designate City as Point of Sale.** Owner shall use all commercially reasonable efforts to ensure that it conducts its Operations within the City so that the place of Sale for taxable Sales occurring in the City during the Term of this Agreement will be the City, pursuant to the Sales Tax Law. In all Sales reports filed by Owner with the CDTFA relating to taxable Sales by such Operations, where such a designation is permitted or required under Sales Tax Law, Owner shall use to ensure that its Operations shall specify the City as the place of Sale for all of its taxable Sales that are conducted in the City. Owner shall maintain the appropriate master Sales permits applicable to and required for its Operations. Owner agrees and covenants that it shall not Relocate its Distribution Center, nor shall it redirect its place of Sale to another jurisdiction within the Designated Sales Territory during the term of this Agreement. "Relocate," as used in this Agreement shall mean the closing of the Distribution Center and opening of a substantially similar E-Commerce Distribution Center within the Designated Sales Territory during the Term of this Agreement.

City understands, acknowledges and agrees that Owner has established and may establish other distribution centers outside the City ("Additional Offices"). However, nothing in this Agreement limits Owner's right to conduct sales and other business and operations at or from the Additional Offices, but City makes no representations or warranties with respect to Owner's operations with respect to Additional Offices. Owner covenants and agrees that under no circumstances will Owner's agreements for Additional Offices impact Owner's obligations under this Agreement with respect to City's designation as point of Sale for Owner's Operations consummated at or through the Distribution Center, nor shall the agreements for any Additional Offices impact or negate any other representations, warranties and covenants of Owner contained in this Agreement.

#### **4.2 Payment of City's Location Payment Obligation.**

**4.2.1** Within sixty (60) days following the later of: (i) City's receipt of final reconciliation reports from the CDTFA for a Fiscal Quarter occurring within the Term, or (ii) City's receipt of any and all Data and Documentation for the Reporting Period applicable to such Fiscal Quarter, City will determine and, in accordance with its Location Payment Obligation, pay to Owner the City Payment due for such Fiscal Quarter.

**4.2.2 Conditions Precedent to City Payments.** City's obligations under Section 4.2.2 hereof are contingent on a year-to-year basis and, for each Fiscal Quarter within the Term, City's obligations to make any payments to Owner hereunder are expressly contingent upon the satisfaction of the following conditions precedent in each Fiscal Quarter after Owner has begun E-Commerce Retail Sales in City, and after Owner reaches the Minimum Annual Revenue Tax Base:

- (i) Receipt by the City of the Local Sales and/or Use Tax Revenues derived from the Operation of the Distribution Center for each Fiscal Quarter;
- (ii) Owner will provide the City with the Data and Documentation (as

defined in Section 4.2.3) for each Fiscal Quarter, including Fiscal Quarters prior to achieving the Minimum Annual Revenue Tax Base;

- (iii) Owner's continuation of Operations through its Distribution Center within the City; and
- (iv) City's receipt and reasonable approval of the Data and Documentation, certified as complete and accurate by an authorized Owner officer or an authorized signatory delegate within (30) days following the end of the Reporting Period for each Fiscal Quarter. For example, for Fiscal Quarter ending July 31<sup>st</sup>, Owner's Data and Documentation shall be received by the City by September 30<sup>th</sup>.

Should any one or more of the foregoing conditions precedent not be satisfied for each Fiscal Quarter, then City shall have no obligation to make any City Payment to Owner for such Fiscal Quarter until such conditions precedent are met. If the City elects to delay any payment on account of any such purported noncompliance by the Owner, the City must promptly give the Owner written notice pursuant to Section 6.8 of all such material obligations that the City alleges have not been fulfilled and cooperate with the Owner's efforts to effect a cure or remedy with respect thereto. It is understood and agreed by Owner that, the City's Obligation to make payments and each City Payment is specifically contingent upon receipt by the City of the Local Sale and/or Use Tax Revenues derived from the Operation of the Distribution Center for each Fiscal Quarter.

**4.2.3 Data and Documentation.** For the purposes of this Agreement, the term "**Data and Documentation**" means copies of Owner's quarterly reports to the CDTFA and/or Sales and/or Use Tax Returns for the applicable Fiscal Quarter which sets forth the amount of Sales and/or Use Taxes paid to the CDTFA during the Fiscal Quarter arising from Owners' Operations.

**4.2.4 Reporting Obligations.** Owner acknowledges and agrees that it is required to provide the City any information necessary to comply with City's reporting obligations in accordance with Government Code section 53803.1 during the Term of this Agreement. The Parties agree that the City's annual Reporting Obligations as set forth in Government Code section 53083.1 shall commence on the Effective Date of this Agreement. Owners shall provide the City any information required by the City to comply with its Reporting Obligations at least forty-five (45) days prior to the anniversary of the Effective Date of this Agreement.

**4.2.5 Adequate Consideration.** Each City Payment due and payable hereunder shall constitute the total payment to Owner for the Fiscal Quarter to which it relates. The Parties hereto have determined and agreed that the City Payment due and payable during each Fiscal Quarter represents fair consideration to Owner for its covenants and obligations hereunder.

Both City and Owner expressly acknowledge and agree that Owner will receive

no compensation under this Agreement other than the City Payment. Owner shall not be entitled to any reimbursement or other compensation from City for any costs incurred by Owner in performing or preparing to perform its obligations under this Agreement. The City Payments shall not be reduced or offset for any costs or expenses incurred by City in performing or preparing to perform its duties under this Agreement.

**4.2.6 No Carry Forward or Back.** City and Owner acknowledge and agree that the calculation and determination of all financial components of the Parties' rights and obligations under this Agreement shall be computed on a Fiscal Quarter-to-Fiscal Quarter basis. Revenues generated in one Fiscal Quarter may not be carried forward or back to any prior or future Fiscal Quarter, it being the express agreement and understanding of the Parties that for each Fiscal Quarter the financial obligations of the Parties and satisfaction of the conditions precedent to such obligations shall be determined and made independently of any other Fiscal Quarter.

**4.2.7 Source of City Payment.** City Payments shall be payable from Local Sales and/or Use Tax Revenues. City covenants to reasonably consider such actions as may be necessary to include all City Payments owed hereunder in each of its annual budgets during the Term and to reasonably consider the necessary annual budgetary appropriations for all such City Payments.

**4.2.8 Recapture of City Payments.** If, at any time during or after the Term of this Agreement, CDTFA makes a final Board determination that all or any portion of the Local Sales and/or Use Tax Revenues received by the City were improperly allocated and/or paid to the City, and if CDTFA requires repayment of, offsets against future Sales and/or Use Tax payments, or otherwise recaptures from the City those improperly allocated and/or paid Local Sales and/or Use Tax Revenues, then Owner shall, within sixty (60) days after written demand from the City, together with reasonable documentation, repay all City Payments (or applicable portions thereof) theretofore paid to Owner which are attributable to such repaid, offset or recaptured Local Sales and/or Use Tax Revenues; provided, however, that the Owner's repayment obligations hereunder shall be limited to the actual amount of City Payments to be repaid. If Owner fails to make such repayment within sixty (60) days after the City's written demand, together with reasonable documentation, then such obligation shall accrue interest from the date of the City's original written demand at the then-maximum legal rate imposed by the California Code of Civil Procedure on prejudgment monetary obligations, compounded monthly, until paid. In addition, to the extent unpaid, City may withhold such amounts from future City Payments. The City will promptly contact Owner regarding any communication from the CDTFA pertaining to tax allocations associated with the Owner's business.

City and Owner agree that, should the CDTFA question the correctness of the allocation or determine that there has been an improper allocation to the City, City will (at the request of Owner) engage legal counsel to use his or her best efforts to defend such allocation in all CDTFA administrative proceedings. Costs associated for such efforts will be borne by both City and Owner in proportion to their respective percentage interests in the Local Sales and/or Use Tax Revenue. For purposes of this paragraph, administrative

proceedings include all CDTFA meetings, conferences and appeals before CDTFA Board members. Owner will cooperate fully with the City and its attorney. Owner shall have the right, but not the obligation, to participate in any such administrative proceedings and may engage its own legal counsel or consultant, at its own cost. In the event that the CDTFA reverses its decision (or is required to reverse its decision) and refunds or credits the City with some or all of the Local Sales and/or Use Tax Revenue previously found to have been misallocated to the City, the City shall refund all amounts previously repaid to the City pursuant to this Section with respect to such Local Sales and/or Use Tax Revenue.

**4.2.9 Underpayment by CDTFA.** In order to further the goals of this Agreement, City hereby authorizes Owner, upon reasonable notice and within the limits of the California Public Records Act, to allow Owner to review records regarding the receipt of Local Sales and/or Use Tax Revenues by City from CDTFA relating to Owner. City and Owner agrees that, in the event of an underpayment of Local Sales and/or Use Tax Revenues by CDTFA, City will (at the request of Owner) engage legal counsel to use his or her best efforts to defend such allocation in all CDTFA administrative proceedings. Costs associated for such efforts will be borne by both City and Owner in proportion to their respective percentage interests in the Local Sales and/or Use Tax Revenue. For purposes of this paragraph, administrative proceedings include all CDTFA meetings, conferences and appeals before CDTFA Board members.

**4.3 Audit of Books and Records.** Either Party shall, within the sixty (60) days following the filing for a Reporting Period, make its books and records relating to the Reporting Period being audited and the calculation and determination of that Party's rights and obligations under this Agreement available at no cost to the requesting Party and/or its designees (including its accountants and/or attorneys) and shall direct its accountants and other consultants and contractors in possession of its books and records to do likewise; provided, however, that nothing herein shall be deemed to abridge or constitute a waiver of any Party's evidentiary rights and privileges arising pursuant to any provision of law, including, without implied limitation, the California Evidence Code, California Government Code (including the Public Records Act), the Code of Civil Procedure, federal statutes and state or federal judicial decisions. Furthermore, Owner may redact or omit confidential information, including but not limited to customer information such as addresses, names and phone numbers. Furthermore, all such non-privileged books and records may be made available and introduced as evidence if ordered by any court of competent jurisdiction. Each Party shall bear the costs of its own auditors, experts and other consultants it may engage to complete its investigation of the other Party's books and records; provided, however, that any audit and/or investigation ordered by the court, may be recovered as an item of litigation expense pursuant to Section 6.14.

**4.4 Reconciliation.** Each City Payment shall be accompanied by a statement setting forth the calculations made to determine the amount of such disbursement and setting forth all disbursements made to date. The City Payment may be subject to any credits or offsets necessary to account for adjustments to Local Sales and/or Use Tax Revenues in accordance with Section 3.1.18 or any other provision of this Agreement. Each Party shall have the right to contest any of the calculations or information contained in said statement

or the determined amount of payment upon written notice to the other Party within sixty (60) calendar days of the date of the statement or City Payment. If the challenging Party can show to the reasonable satisfaction of the other Party, within sixty (60) calendar days of receiving such notice, that the amount of a City Payment was incorrect, either City shall disburse to Owner the correct amount due, or Owner shall reimburse City for any amount received in excess of the correct amount due, as applicable.

**4.5 Employment Outreach for Local Residents.** A goal of the City in entering into this Agreement is to foster employment opportunities for City residents. To that end, Owner shall use commercially reasonable efforts to recruit and hire local City residents for full and part time employment opportunities at its Distribution Center, as determined by Owner in its sole discretion. The City shall be authorized to post and advertise the job recruitment information provided to the City or posted on careers.homedepot.com on the City's website and other jobs available and job recruitment sites within the region and to provide a link to careers.homedepot.com, which reflects Owner's current job postings. If the Owner offers job recruitment events, then Owner will coordinate with the City. Failure by Owner to comply with the outreach initiatives in this Section shall not constitute an Event of Default under Section 4.8 of this Agreement. Any offers of employment shall be at Owner's sole discretion. Nothing in this paragraph shall require Owner to offer employment to individuals who are not otherwise qualified for such employment. Without limiting the generality of the foregoing, the provisions of this Section 4.5 are not intended, and shall not be construed, to benefit or be enforceable by any person whatsoever other than City.

**4.6 Community Improvement.** A material consideration for the City in entering into this Agreement is Owner's agreement to support community and public improvements within the City. Owner agrees to participate in supporting community benefit events and activities consistent with Owner's practices and policies. City staff may submit a request to Owner for Owner's participation in community benefit events at least once per year during the Term of this Agreement. Owner will consider, in its sole discretion and consistent with its practices and policies, whether to participate in specific community benefit events. In the alternative, Owner may consider, in its sole discretion, a deduction of the City's Location Payment Obligation for the purpose of community benefit participation.

**4.7 Option to Extend Term and Location Payment Obligations.** Upon Owner's exercise of each five (5) year option to extend its lease agreement for the Distribution Center, City and Owner shall retain the option to extend or modify the Term of this Agreement and proportion of Location Payment Obligations as set forth in this Agreement upon mutual written agreement by the parties and in accordance with the City's Sales and Use Tax Sharing Policy.

**4.8 Event of Default.** Each of the following shall constitute an "Event of Default":

**4.8.1** Failure by a Party to comply with and observe any of the material conditions, terms, or covenants set forth in this Agreement, if such failure remains uncured within ninety (90) days after written notice of such failure from the non-defaulting Party to the defaulting Party in the manner provided herein or, with respect to a default that cannot

be cured within ninety (90) days, if the defaulting Party fails to commence such cure within such ninety (90) day period or thereafter fails to diligently and continuously proceed with such cure to completion. However, if a different period, notice requirement, or remedy is specified under any other section of this Agreement, then the specific provision shall control.

**4.8.2** Any representation or warranty contained in this Agreement or in any application, financial statement invoice, certificate, or report submitted pursuant to this Agreement proves to have been incorrect in any material respect when made.

**4.9 Rights and Remedies; Rights and Remedies Not Exclusive.** Unless prohibited by law or otherwise provided by a specific term of this Agreement, the rights and remedies of City and Owner under this Agreement are nonexclusive and all remedies hereunder may be exercised individually or cumulatively. Notwithstanding anything in this Agreement to the contrary, (a) neither Party shall be liable to the other Party for consequential damages and (b) in no event shall the City have the right of specific performance or other mandatory injunctive relief to compel any aspect of the Owner's operation of the Distribution Facility. Upon the other Party's Event of Default, in addition to those remedies expressly granted herein, the Parties shall also have the right to seek all other available legal and equitable remedies.

#### **4.10 Termination.**

**4.10.1** In the event Owner's lease agreement for any Distribution Center in the City expires or terminates, Owner may, at its option, terminate this Agreement upon written notice to the City.

**4.10.2** In the event of the permanent cessation of the entirety of Owner's Operations within the City due to a force majeure event as described in Section 4.11, either Party may terminate this Agreement and all of its obligations hereunder without cost or liability.

**4.10.3 The City's Rights to Terminate its Obligations under Section 4.2.** The City's obligations under Section 4.2 shall automatically terminate without cost, expense, or liability to City, upon the occurrence of any one or more of the following: (i) Owner Default, as to which any applicable notice and cure period provided for herein has expired; (ii) the end of the Term; or (iii) upon the final determination by a court of competent jurisdiction that any one or more of the Covenants are void, voidable, invalid, or even unenforceable for any reason whatsoever, including, without limitation, legal infirmity. Upon termination, all of the City's LPO obligations for future City Payments will be terminated.

**4.10.4 Owner Termination.** Notwithstanding any other provisions of this Agreement, Owner may, at its option, upon written notice to City, terminate this Agreement and/or relocate the Distribution Facility, its Designated Sales Territory or its Distribution Center to any other city or county in California or elsewhere and reallocate Owner's E-Commerce Sales accordingly and in conformance with applicable Sales Tax Law. Owner shall provide at least three (3) months of written notice to the City prior to termination. Upon termination, all of Owner's obligations to comply with the Covenants in Section 4.1 and

4.1.1 shall terminate.

**4.11 Force Majeure.** Neither Party to this Agreement will be liable for failure or delay in its performance of its obligations hereunder due to causes beyond its reasonable control, including, but not limited to fire, flood, war, riot, embargo, labor dispute, strike, earthquake, or other similar acts of God, acts of civil and military authorities, or terrorism.

## **ARTICLE V. REPRESENTATIONS AND WARRANTIES**

**5.1 City Representations and Warranties.** City represents and warrants to Owner that, to City's actual current knowledge:

- (i) City is a municipal corporation exercising governmental functions and powers and organized and existing under the State of California;
- (ii) City has taken all actions required by law to approve the execution of this Agreement;
- (iii) City's entry into this Agreement and the performance of City's obligations under this Agreement do not violate any contract, agreement or other legal obligation of City;
- (iv) There are no pending lawsuits or other actions or proceedings which would prevent or impair the timely performance of City's obligations under this Agreement;
- (v) City has the legal right, power and authority to enter into this Agreement and to consummate the transactions contemplated hereby, and the execution, delivery and performance of this Agreement has been duly authorized and no other action by City is requisite to the valid and binding execution, delivery and performance of this Agreement, except as otherwise expressly set forth herein; and
- (vi) The individual executing this Agreement is authorized to execute this Agreement on behalf of City.

The representations and warranties set forth above are material consideration to Owner and City acknowledges that Owner is relying upon the representations set forth above in undertaking Owner's obligations set forth in this Agreement.

The term "City's actual current knowledge" means, and is limited to, the actual current knowledge of City Manager, as of the Effective Date, without having undertaken any independent inquiry or investigation for the purpose of making such representation or warranty and without any duty of inquiry or investigation. All of the terms, covenants and conditions of this Agreement shall be binding on and shall inure to the benefit of City and

its nominees, successors and assigns.

**5.2 Owner Representations and Warranties.** Owner represents and warrants to City that, to Owner's actual current knowledge:

- (i) Owner is a duly formed Delaware corporation and is in good standing and qualified to do business under the laws of the State of California;
- (ii) The individual(s) executing this Agreement is/are authorized to execute this Agreement on behalf of Owner;
- (iii) Owner has taken all actions required by law to approve this Agreement;
- (iv) Owner's entry into this Agreement and the performance of Owner's obligations under this Agreement do not violate any contract, agreement or other legal obligation of Owner
- (v) There are no pending lawsuits or other actions or proceedings which would prevent or impair the timely performance of Owner's obligations under this Agreement; and
- (vi) Owner has the legal right, power and authority to enter into this Agreement and to consummate the transactions contemplated hereby, and the execution, delivery and performance of this Agreement have been duly authorized and no other action by Owner is requisite to the valid and binding execution, delivery and performance of this Agreement, except as otherwise expressly set forth herein.

The representations and warranties set forth herein are material considerations to City and Owner acknowledges that City is relying upon the representations set forth above in undertaking City's obligations set forth above.

The term "Owner's actual current knowledge" means, and is limited to, the actual current knowledge of the individual(s) executing this Agreement on behalf of Owner as of the Effective Date, without having undertaken any independent inquiry or investigation for the purpose of making such representation or warranty and without any duty of inquiry or investigation.

**5.3** The City has entered into this Agreement with Owner because of the unique qualifications and identity of Owner. No voluntary or involuntary successor-in-interest of Owner shall acquire any rights or powers under this Agreement except as expressly set forth herein. Owner may not assign or transfer all or any part of this Agreement except as provided in Section 6.25.

## ARTICLE VI. MISCELLANEOUS

**6.1 Amendment; Modification.** At any time City and Owner may determine that this Agreement should be amended for the mutual benefit of the Parties, or for any other reason. Any such amendment to this Agreement shall only be by written agreement between City and Owner. City and Owner agree to consider reasonable requests for amendments to this Agreement which may be made by either of the Parties hereto, although neither Party shall be obligated to approve any such amendment. Any amendments to this Agreement must be in writing and signed by the appropriate authorities of both City and Owner. With the concurrence of the City Attorney, the City Manager is authorized on behalf of City to approve and execute Minor Amendments to this Agreement (as defined in Section 3.1.20) on behalf of City. Any amendment that is not a Minor Amendment shall require approval by the City Council. Any such approved amendment shall control over this Agreement.

**6.2 California Law.** This Agreement shall be construed and governed in accordance with the laws of the State of California without regard to its conflict of laws principles.

**6.3 Execution in Counterparts.** This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, and all of which shall constitute but one (1) and the same instrument.

**6.4 Business Days.** Any act or thing required to be done or exist on any date set forth herein which does not constitute a Business Day in any year shall be deemed to be done or to exist on such date if such act or thing is done or exists on the next date which constitutes a Business Day.

**6.5 Tax Consequences.** Owner shall be responsible and assume all liability for federal, state and/or local income or other taxes resulting from its receipt of City Payments.

**6.6 Rights Not Granted.** This Agreement is not, and shall not be construed to be, a statutory development agreement under California Government Code Section 65864 *et seq.* or a disposition and development agreement under California Health and Safety Code Section 33000 *et seq.* This Agreement is not, and shall not be construed to be, an approval of or an agreement to issue permits or a granting of any right or entitlement by City concerning any project, development, or construction by Owner in City. This Agreement does not, and shall not be construed to exempt Owner in any way from the requirement to obtain permits and/or other discretionary or non-discretionary approvals as may be necessary for the development, maintenance and operation of any project, development or construction within City.

This Agreement does not, and shall not be construed to exempt Owner from the application and/or exercise of City's power of eminent domain or its police power, including, but not limited to, the regulation of land uses and the taking of any actions necessary to protect the health, safety and welfare of its citizenry.

**6.7 Consent.** Whenever consent or approval of either Party is required under this

Agreement, that Party shall not unreasonably withhold, delay or condition such consent or approval unless a different standard is otherwise provided by a specific provision of this Agreement.

**6.8 Notices and Demands.** All notices or other communications required or permitted between City and Owner under this Agreement shall be in writing, and may be (i) personally delivered, (ii) sent by United States registered or certified mail, postage prepaid, return receipt requested, or (iii) sent by nationally recognized overnight courier service (e.g., Federal Express), and addressed to the Parties at the addresses below subject to the right of either Party to designate a different address for itself by notice similarly given. Any notice so given by registered or certified United States mail shall be deemed to have been received on the fourth (4<sup>th</sup>) Business Day after the same is deposited in the United States mail. Any notice not so given by registered or certified mail, such as notices delivered by courier service (e.g., Federal Express), shall be deemed received upon actual receipt of the same by the Party to whom the notice is given.

To City:

City of Irwindale  
5050 N. Irwindale Avenue  
Irwindale, CA 91706  
Attn: Julian A. Miranda, City Manager

With a copy to:

Aleshire & Wynder, LLP  
18881 Von Karman Avenue Suite 1700  
Irvine, CA 92612  
Attn: Adrian R. Guerra, City Attorney

To Owner:

Home Depot U.S.A., Inc.  
2455 Paces Ferry Rd.  
Atlanta, GA 30339-4024  
Attn: Real Estate Property Manager

With a copy to:

Home Depot U.S.A., Inc.  
2455 Paces Ferry Rd.  
Atlanta, GA 30339-4024  
Attn: Nick Harper, Senior Corporate Counsel

**6.9 Non-liability of Parties' Officials and Employees.** No officer, elected official, contractor, consultant, attorney or employee of City shall be personally liable to Owner, any voluntary or involuntary successors or assignees of Owner, or any lender or other party holding an interest in Owner's property, in the event of any default or breach by City, or for any amount which may become due to Owner or to its successors or assignees, or on any obligations arising under this Agreement.

No officer, official, contractor, consultant, attorney or employee of Owner shall be personally liable to City, any voluntary or involuntary successors or assignees of City in the event of any default or breach by Owner, or for any amount which may become due to City or to its successors or assignees, or on any obligations arising under this Agreement.

**6.10 Conflicts of Interest.** No officer, elected official, contractor, consultant, attorney or employee of City shall have any personal interest, direct or indirect, in this Agreement nor shall any such officer, elected official, contractor, consultant, attorney or employee participate in any decision relating to this Agreement which unlawfully affects his/her personal interests or the interests of any corporation, partnership or association in which he/she is directly or indirectly interested.

**6.11 Entire Agreement; Confidentiality.** This Agreement contains all of the terms and conditions agreed upon by the Parties. No other understanding, oral or otherwise, in direct conflict with this Agreement shall be deemed to exist or to bind any of the Parties hereto. All prior written or oral offers, counteroffers, memoranda of understanding, proposals and the like are superseded by this Agreement. The terms and existence of this Agreement will not be publicized or made public beyond what is required by law. City shall keep any and all proprietary and confidential information and data provided by Owner under this Agreement strictly confidential to the extent permitted by law. City will use information provided by Owner pursuant to this Agreement only for the purposes within the scope of this Agreement. Owner shall clearly mark or otherwise identify in writing all information it considers to be proprietary and confidential at the time it is delivered to City. The confidentiality obligation under this section shall not apply to:

(a) information which is already public information or which is otherwise available to the general public; (b) information received from a third party without a similar confidentiality restriction who is lawfully in possession of the information and who has the lawful right to disclose it; (c) information that is already in City's possession prior to receiving it from Owner; (d) information delivered by Owner to City and not marked or otherwise identified as proprietary and confidential at the time it was delivered; or (e) information required to be disclosed under the California Public Records Act.

**6.12 Extensions and Delays.** Time is of the essence in the performance of the obligations of City and Owner under this Agreement. In addition to specific provisions of this Agreement, providing for extensions of time, times for performance hereunder shall be extended where delays in performance are due to war, insurrection; any form of labor dispute; lockouts; riots; floods; earthquakes; fires; acts of God or of third parties; third party litigation or orders and judgments of courts of competent jurisdiction; acts of a public enemy; acts of governmental authorities; epidemics; quarantine restrictions; freight

embargoes; and other circumstances outside of a Party's reasonable control (collectively, "**Enforced Delays**") provided, however, that the Party claiming the extension shall notify the other Party of the nature of the matter causing the default; and, provided further, that the extension of time shall be only for the period of the Enforced Delays. In no event shall either Party be deemed in default of this Agreement because of an Enforced Delay event.

However, deadlines for performance may not be extended as provided above due to any inability of the Owner to obtain or maintain acceptable financing for the operation of the Distribution Center.

ANYTHING IN THIS COVENANT AGREEMENT TO THE CONTRARY NOTWITHSTANDING, OWNER ASSUMES THE RISK OF UNFORESEEABLE CHANGES IN ECONOMIC CIRCUMSTANCES AND/OR MARKET DEMAND/CONDITIONS AND WAIVES, TO THE GREATEST LEGAL EXTENT, ANY DEFENSE, CLAIM, OR CAUSE OF ACTION BASED IN WHOLE OR IN PART ON ECONOMIC NECESSITY, IMPRACTICABILITY, FRUSTRATION OF PURPOSE, CHANGED ECONOMIC CIRCUMSTANCES OR SIMILAR THEORIES.

OWNER EXPRESSLY AGREES THAT ADVERSE CHANGES IN ECONOMIC CONDITIONS, EITHER OF OWNER SPECIFICALLY OR THE ECONOMY GENERALLY, OR CHANGES IN THE MARKET CONDITIONS OR DEMANDS, SHALL NOT OPERATE TO EXCUSE OR DELAY THE STRICT OBSERVANCE OF EACH AND EVERY OF THE OBLIGATIONS, COVENANTS, CONDITIONS AND REQUIREMENTS OF THIS COVENANT AGREEMENT. OWNER EXPRESSLY ASSUMES THE RISK OF SUCH ADVERSE ECONOMIC OR MARKET CHANGES, WHETHER OR NOT FORESEEABLE AS OF OWNER'S EXECUTION OF THIS COVENANT AGREEMENT.

OWNER'S INITIALS 

**6.13 Indemnification; Offset.** Owner agrees to indemnify City and hold it harmless from and against all third party demands, suits, proceedings, causes of action or claims arising from, in connection with or related to this Agreement or from City's performance of this Agreement, except to the extent such demand, suit, proceeding, cause of action or claim was caused by City's negligence or intentional misconduct, or the negligence or intentional misconduct of any of the City's officials, officers, employees, or agents, with the exception of CDTFA administrative proceedings described in Section 4.2. In the event that a court or administrative body determines that any portion of Local Sales and/or Use Tax Revenues must be shared with another jurisdiction, such amount shall be deducted from Local Sales and/or Use Tax Revenues and shall not be used to calculate the Location Payment Obligation. The City shall fully cooperate in the defense of such demand, suit, proceeding, cause of action or claim and upon written request of Owner shall provide to Owner such documents and records in possession of the City that are relevant to such demand, suit, proceeding or claim and not otherwise protected by law.

**6.14 Attorneys' Fees.** In the event of the bringing of an action or suit by a Party

hereto against another Party hereunder by reason of any breach of any of the covenants or agreements or any intentional inaccuracies in any of the representations and warranties on the part of the other Party arising out of this Agreement or any other dispute between the Parties concerning this Agreement then, in that event, the prevailing Party in such action or dispute, whether by final judgment or arbitration award, shall be entitled to recover from the other Party all costs and expenses of suit or claim, including actual attorneys' fees and expert witness fees. Any judgment, order or award entered in any final judgment or award shall contain a specific provision providing for the recovery of all costs and expenses of suit or claim, including actual attorneys' fees and expert witness fees (collectively, "**Costs**") incurred in enforcing, perfecting and executing such judgment or award. For the purposes of this Section 6.14, Costs shall include, without implied limitation, attorneys' and experts' fees, costs and expenses incurred in the following: (i) post judgment motions and appeals, (ii) contempt proceedings, (iii) garnishment, levy and debtor and third party examination; (iv) discovery; and (v) bankruptcy litigation. This Section 6.14 shall survive any termination of this Agreement.

**6.15 Informal Dispute Resolution.** The Parties shall attempt in good faith to resolve any differences, controversy or claim arising out of or relating to this Agreement promptly by negotiations between senior officials of the Parties who have authority to settle the difference or controversy. The disputing Party may give the other Party written notice ("**Dispute Notice**") that a dispute exists between them. Within twenty (20) days after receipt of a Dispute Notice, the receiving Party shall submit to the disputing Party a written response. The Dispute Notice and response shall include (a) a statement of each Party's position and a summary of the evidence and arguments supporting its position, and (b) the name and title of the official who shall represent that Party. The senior officials shall meet at a mutually acceptable time and place or by telephone conference within thirty (30) days of the date of the Dispute Notice, and thereafter as often as they reasonably deem necessary to exchange relevant information and to attempt to resolve the dispute, up to a maximum of ninety (90) days of the date of the Dispute Notice ("**Resolution Period**"). In the event any Party fails to provide a response to a Dispute Notice in accordance with this section or fails to cooperate in the scheduling of, or to attend, the meetings, described above, to resolve the dispute, then, with respect to that Party, the Resolution Period shall be deemed to have run so that the dispute may immediately be subject to legal action.

**6.16 Jurisdiction and Venue.** Any legal action or proceeding concerning this Agreement shall be filed and prosecuted in the appropriate State of California court in the County of Los Angeles, California. Both Parties hereto irrevocably consent to the personal jurisdiction of that court. City and Owner each hereby expressly waive the benefit of any provision of federal or state law or judicial decision providing for the filing, removal, or change of venue to any other court or jurisdiction, including, without implied limitation, federal district court, due to any diversity of citizenship between City and Owner, due to the fact that City is a party to such action or proceeding or due to the fact that a federal question or federal right is involved or alleged to be involved. Without limiting the generality of the foregoing, City and Owner specifically waive any rights provided to it pursuant to California Code of Civil Procedure Section 394. Owner acknowledges that the provisions of this Section 6.16 are material consideration to City for its entry into this Agreement, in that City

will avoid the potential cost, expense and inconvenience of litigating in a distant forum.

**6.17 Interpretation.** City and Owner acknowledge that this Agreement is the product of mutual arms-length negotiation and drafting and that both Parties have been represented by legal counsel in the negotiation and drafting of this Agreement. Accordingly, the rule of construction which provides that ambiguities in a document shall be construed against the drafter of that document shall have no application to the interpretation and enforcement of this Agreement. In any action or proceeding to interpret or enforce this Agreement, the finder of fact may refer to any extrinsic evidence not in direct conflict with any specific provision of this Agreement to determine and give effect to the intention of the Parties with respect to any ambiguities in this Agreement.

**6.18 No Waiver.** Failure to insist on any occasion upon strict compliance with any of the terms, covenants or conditions hereof shall not be deemed a waiver by any Party of such term, covenant or condition, nor shall any waiver or relinquishment of any rights or powers hereunder at any one time or more times be deemed a waiver or relinquishment by any Party of such other right or power at any other time or times.

**6.19 Successors and Assigns.** The terms, covenants and conditions of this Agreement shall be binding upon and inure to the benefit of the Parties hereto and their voluntary and involuntary successors and assigns.

**6.20 No Third Party Beneficiaries.** The performance of the respective obligations of City and Owner under this Agreement are not intended to benefit any party other than City or Owner. No person or entity not a signatory to this Agreement shall have any rights or causes of action against any Party to this Agreement as a result of that Party's performance or non-performance under this Agreement.

**6.21 No Effect on Eminent Domain Authority.** Nothing in this Agreement shall be deemed to limit, modify, or abridge or affect in any manner whatsoever City's eminent domain powers with respect to any property.

**6.22 Warranty Against Payment of Consideration.** Owner warrants that it has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Agreement. Third parties, for the purposes of this Section 6.22, shall not include persons to whom fees are paid for professional services if rendered by attorneys, financial consultants, accountants, engineers, architects and the like when such fees are considered necessary by Owner.

**6.23 Severability.** City and Owner declare that the provisions of this Agreement are severable. If it is determined by a court of competent jurisdiction that any term, condition or provision hereof is void, voidable, or unenforceable for any reason whatsoever, then such term, condition or provision shall be severed from this Agreement and the remainder of the Agreement enforced in accordance with its terms.

**6.24 Further Acts.** City and Owner each agree to take such additional acts and execute such other documents as may be reasonable and necessary in the performance of

their obligations hereunder. The foregoing shall not, however, be deemed to require City to exercise its legislative discretion in any particular fashion or to provide to Owner any remedy or claim for damages against City based on the lawful exercise of City's discretion.

**6.25 No Assignment, Transfer, Pledge or Hypothecation.** Owner may not assign, transfer, encumber or hypothecate its rights or obligations under this Agreement to any person or entity, without the express written consent of City, which may be withheld in City's sole and absolute discretion. Any unpermitted assignment, transfer, pledge, encumbrance, or hypothecation, or any attempt to do so, shall not confer any rights upon the purported assignee or transferee and shall constitute Owner's immediate and incurable material default of this Agreement, and City may, without providing Owner notice or opportunity to cure, exercise those remedies available to City pursuant to Sections 4.7 and 4.8.3. Notwithstanding the foregoing, Owner shall have the right to assign this Agreement or any right or obligation hereunder to its immediate or ultimate parent, or to an affiliate, by providing advance written notice to City. An "affiliate" shall mean any legal entity that, at the applicable time, directly or indirectly controls, is controlled with or by, or is under common control with, Owner.

**6.26 Relationship of Parties.** The Parties shall not be deemed in a relationship of partners or a joint venture by virtue of this Agreement, nor shall either Party be an agent, representative, trustee or fiduciary of the other. Neither Party shall have any authority to bind the other to any agreement.

**6.27 Non-Dedication of Property.** The execution of this Agreement by Owner does not result in the dedication of any Owner property for public use.

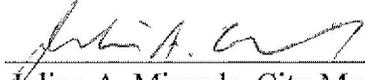
**[Signatures on following pages]**

SIGNATURE PAGE  
TO  
LOCATION AGREEMENT

CITY:

CITY OF IRWINDALE  
a California Municipal Corporation

Dated: April 12, 2023

By:   
Julian A. Miranda, City Manager

ATTEST:  
By:   
Laura M. Nieto, Chief Deputy City Clerk

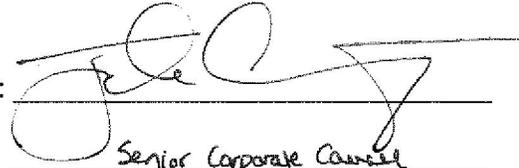
APPROVED AS TO LEGAL FORM:  
By:   
Adrian R. Guerra, City Attorney

SIGNATURE PAGE  
TO  
LOCATION AGREEMENT

OWNER:

Home Depot U.S.A., Inc.,  
a Delaware corporation

Dated: 4/10/23

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

Its: Senior Corporate Counsel

65404181.v11  
67469187.v1