

RESOLUTION NO. 2017-08-49

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS, APPROVING A CHAPTER 380 AGREEMENT BY AND BETWEEN THE CITY OF LANCASTER, TEXAS, AND DUKE REALTY LIMITED PARTNERSHIP, AND AUTHORIZING THE CITY MANAGER TO EXECUTE THE AGREEMENT; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the City of Lancaster, Texas, ("City") desires to grant certain incentives to Duke Realty Limited Partnership, an Indiana limited partnership, for the purpose of constructing and leasing a state-of-the-art regional distribution, warehouse, fulfillment, and office center within the City of Lancaster, Texas; and

WHEREAS, the City has adopted programs for promoting economic development, and an Economic Development Agreement ("Agreement") and the economic development incentives set forth herein are given and provided by the City pursuant to and in accordance with those programs; and

WHEREAS, the City is authorized by Chapter 380 of the Texas Local Government Code to issue grants in order to promote local economic development by stimulating the local economy; and

WHEREAS, the Agreement containing the terms of the grant of incentives from the City is appropriate.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS:

SECTION 1. The City Council of the City of Lancaster, Texas approves a Chapter 380 Economic Development Agreement by and between the City of Lancaster and Duke Realty, LP.

SECTION 2. The City Council authorizes the City Manager to execute the Economic Development Agreement between the City of Lancaster and Duke Realty Limited Partnership.

SECTION 3. This Resolution shall take effect immediately from and after the date of passage and is provided by law.

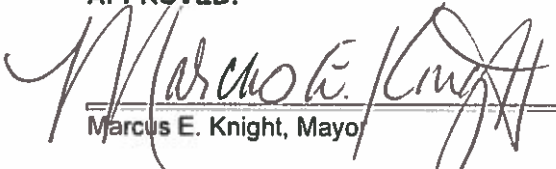
DULY PASSED and approved by the City Council of the City of Lancaster, Texas, on this the 14th day of August, 2017.

ATTEST:



Sorangel O. Arenas, City Secretary

APPROVED:



Marcus E. Knight, Mayor

APPROVED AS TO FORM:



David T. Ritter, City Attorney

ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT

Recipient: **DUKE REALTY LIMITED PARTNERSHIP**
14241 N Dallas Parkway
Dallas, Texas 75254

Grantors: **LANCASTER ECONOMIC DEVELOPMENT CORPORATION**
P.O. Box 940
Lancaster, TX 75146

CITY OF LANCASTER, TEXAS
211 N. Henry Street
Lancaster, TX 75146

THIS ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT ("Agreement") between **DUKE REALTY LIMITED PARTNERSHIP**, an, Indiana limited partnership ("Recipient"); the **LANCASTER ECONOMIC DEVELOPMENT CORPORATION**, a Texas non-profit corporation; and **CITY OF LANCASTER, TEXAS**, a Texas municipal corporation (individually "City" and "LEDC", and each referred to as "Grantor" for purposes of their respective Incentive Payments) is made and executed on the following recitals, terms and conditions.

WHEREAS, Recipient is a leading, NYSE-listed commercial real estate investment trust; and

WHEREAS, Recipient has applied to Grantor for financial accommodations to enable it to locate a major distribution, warehouse, fulfillment, and office center in the City of Lancaster, Texas, for the operations of Wayfair LLC, including those incentives which are described in this Agreement and those which may be described on any exhibit or schedule attached to this Agreement; and

WHEREAS, LEDC approved certain financial Incentives to Recipient at its August 1, 2017 Board meeting, and City approved certain financial incentives to Recipient at its August 14, 2017 City Council meeting which would allow Recipient to construct a commercial real estate development in the City of Lancaster, Texas; and

WHEREAS, Recipient understands and agrees that: (a) in granting, renewing, or extending any financial incentives, Grantor is relying upon Recipient's representations, warranties, and agreements, as set forth and provided for in this Agreement; (b) the granting, renewing, or extending of any incentive by Grantor at all times shall be subject to Grantor's sole judgment and discretion; and (c) all such incentives shall be and shall remain subject to the terms and conditions as set forth in this Agreement.

SECTION 1. TERM.

This Economic Development Incentive Agreement shall be effective as of August 14, 2017 (the "Effective Date") and shall continue thereafter until all obligations of Recipient to Grantor have been performed in full and the parties terminate this Agreement in writing, or on the sooner of the termination of the Lease or August 14, 2029, unless terminated sooner under the provisions hereof. This Agreement will terminate if not executed by all parties within fourteen (14) days of the approval of the Agreement by the later of the City Council and the EDC Board.

SECTION 2. DEFINITIONS.

The following words shall have the following meanings when used in this Agreement. Terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Texas Uniform Commercial Code.

- a. **Agreement.** The word "Agreement" means this Economic Development Incentive Agreement, together with all exhibits and schedules attached to this Agreement from time to time, if any.
- b. **City.** The word "City" means the City of Lancaster, Dallas County, Texas.
- c. **Effective Date.** The words "Effective Date" mean August 14, 2017.
- d. **Event of Default.** The words "Event of Default" mean and include any of the Events of Default set forth below in the section entitled "Events of Default."
- e. **Facility.** The word "Facility" means Recipient's commercial real estate property, leased to Wayfair, LLC, to be constructed at the Interchange 35 property located at 2820 N. I-35 E Interchange, Lancaster, TX 75134. The Facility shall be a build-to-suit distribution facility of \pm 874,566 square feet located on \pm 47.15 acres of land, and shall be constructed to specifications consistent with the July 19, 2017 Final LOI Terms between Recipient and Wayfair, LLC. In order to qualify as the "Facility" under this Agreement, the facility must meet all of the following criteria: (1) when completed and fully assessed, have an ad valorem real property value of not less than \$20,000,000 on the Dallas Central Appraisal District tax rolls; (2) be the site of Wayfair LLC's business personal property with a value of not less than \$6,000,000; (3) be the warehouse/fulfillment site of Wayfair, LLC's inventory with a retail value of not less than \$1,500,000; and (4)

construction of the facility must commence no later than nine (9) months from the Effective Date of this Agreement.

- f. **Incentive Payment.** The words "Incentive Payment" mean any financial payment, benefit, reimbursement, or refund made by City or LEDC to Recipient under this Agreement.
- g. **Grantor.** The word "Grantor" means the *LANCASTER ECONOMIC DEVELOPMENT CORPORATION*, a Texas non-profit corporation, or *CITY OF LANCASTER, TEXAS*, a Texas municipal corporation, for purposes of their respective Incentive Payments made under this Agreement.
- h. **LEDC.** The word "LEDC" means Lancaster Economic Development corporation, a non-profit corporation formed for the purpose of advancing economic development in the City of Lancaster, Texas.
- i. **Real Property Taxes.** The words "Real Property Taxes" shall mean all real estate ad valorem taxes assessed and levied by the City and paid by Recipient on the Facility after completion.
- j. **Recipient.** The word "Recipient" means *DUKE REALTY LIMITED PARTNERSHIP*, an Indiana limited partnership, or a wholly-owned affiliate of Recipient approved by Grantor.

SECTION 3. INCENTIVE PAYMENTS.

The following Incentive Payments shall be available to Recipient under the following conditions and the Recipient Obligations set forth below:

- a. **Construction and Infrastructure Incentive Payment.** Recipient shall be eligible to receive from LEDC a Construction and Infrastructure Incentive Payment in the amount of three hundred thousand and no/100 DOLLARS. (\$300,000.00) to offset construction and infrastructure costs associated with the Facility.
- b. **Real Property Tax Reimbursement Incentive Payment.** The City shall make an Incentive Payment to reimburse Recipient for Real Property Tax paid by Recipient and attributable to the Facility for up to ten (10) years. The first payment shall be made after the calculation, submission and confirmation of the Real Property tax paid for the first full calendar year after completion of the Facility's construction and occupancy by Wayfair, LLC The Incentive Payments shall be based the following criteria:

Real Property Tax Assessed Value	Years of Eligibility	Percentage of Real Property Taxes Reimbursed
\$75 million +	10	65%
\$50 million+ to \$75 million	8	60%
\$35 million + to \$50 million	7	50%
\$20 million+ to \$35 million	5	45%
\$10 million + to \$20 million	5	40%
\$5 million+ to \$10 million	3	30%

It is understood that the amount of the Incentive Payment may vary from year to year based on the amount of the Real Property Tax Assessed Value and tax actually paid by Recipient for the Facility. It is also understood that if the Real Property Tax Assessed Value drops to a level for which the number of years of eligibility have already been exhausted, no payment may be received that year – for example, if Real Property Tax Assessed Value has been at the \$50 million + to \$75 million level for seven years, and in year eight, the Real Property Tax Assessed Value drops to \$45 million, no incentive payment would be due that year, as the \$35 million+ to \$50 million level has only seven years of eligibility. If Real Property Tax Assessed Value returned to the \$50 million + level the next year, a payment would be due, as that level has a total of eight years of eligibility. Real Property Tax Incentive Payments shall be available only for up to the first ten (10) years following the payment of Real Property tax for the first full calendar year after completion of the Facility's construction and occupancy by Wayfair, LLC.

Notwithstanding the foregoing, the City shall have no obligation to pay Recipient any Incentive Payment until receipt of the Real Property Tax Report described in Section 4.(b)(2) of this Agreement. The City agrees to provide the Incentive Payment to Recipient within thirty (30) days following receipt and acceptance of the Real Property Tax Report.

SECTION 4. RECIPIENT OBLIGATIONS

- a. Recipient shall comply with the following terms and satisfy the following obligations to be eligible for the Incentive Payments above:
 - (1) **Lease.** Recipient shall lease the Facility to Wayfair, LLC for a term of at least eighty-seven (87) months and which shall commence on September 1, 2018 or upon substantial completion of the Facility, whichever is later, and shall provide Grantor with a fully executed copy of the Lease within fourteen (14) days of the approval of this Agreement by the City Council.

- (2) **Certificate of Occupancy.** Recipient shall aid Wayfair, LLC in obtaining a Certificate of Occupancy for the Facility on or before September 1, 2018.
 - (3) **Wayfair Agreement.** All requirements of the Economic Development Incentive Agreement with Wayfair, LLC regarding the Facility shall be satisfied.
- b. **Compliance Certificates and Reports.** Recipient shall provide Grantor with compliance certificates when requested or required hereunder, such certificates or reports specifying or reflecting:
- (1) an existing and valid Certificate of Occupancy for the Facility (subject to the provisions of Section 4.(a)(2)), *supra*;
 - (2) an annual, detailed verification of the Real Property Tax report including certification by Recipient of Real Property Tax paid to each taxing entity.
- c. **Performance.** Recipient agrees to perform and comply with all terms, conditions, and provisions set forth in this Agreement.

SECTION 5. CESSATION OF INCENTIVE PAYMENTS.

If Grantor has made any commitment to make any Incentive Payment to Recipient, whether under this Agreement or under any other agreement, Grantor shall have no obligation to advance or disburse Incentive Payment funds if:

- a. Recipient becomes insolvent, files a petition in bankruptcy or similar proceedings, or is adjudged bankrupt; or
- b. during the pendency of an Event of Default.

SECTION 6. EVENTS OF DEFAULT.

Each of the following shall constitute an Event of Default under this Agreement.

- a. **Lease, Construction, and Certificate of Occupancy.** Failure of Recipient to complete any of the following: (1) execution and delivery of the Lease described in Section 4.(a)(1), *supra*; (2) failure to construct the Facility in accordance with the specifications set forth in Section 2.(e), *supra*, or (3) failure of Wayfair LLC to obtain a Certificate of Occupancy in accordance with Section 4.(a)(2), *supra*.
- b. **False Statements.** Any warranty, representation or statement made or furnished to Grantor by or on behalf of Recipient under this Agreement or any related document (including but not limit to any applications for economic development funds) that is false or misleading in any material respect, either now or at the time made or furnished.

- c. **Insolvency.** Recipient's insolvency, appointment of receiver for any part of Recipient's property, any assignment for the benefit of creditors of Recipient, any type of creditor workout for Recipient, or the commencement of any proceeding under any bankruptcy or insolvency laws by Recipient or against Recipient and not dismissed within sixty (60) days of filing thereof.
- d. **Ad Valorem Taxes.** Failure of Recipient to pay, prior to delinquency, all taxes and assessments levied or assessed upon Recipient's real property improvements or business personal property.
- e. **Undocumented workers.** Recipient certifies that Recipient does not and will not knowingly employ an undocumented worker in accordance with Chapter 2264 of the Texas Government Code, as amended. If during the Term of this Agreement, Recipient is convicted of a violation under 8 U.S.C. § 1324a(f), Recipient shall be in default hereunder.
- f. **Other Defaults.** Failure of Recipient after written notice and thirty (30) days opportunity to cure, to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of related document, or failure of Recipient to comply with or to perform any other term, obligation, covenant or condition contained in any other obligation, covenant or condition contained in this Agreement or in any of related document, or failure of Recipient to comply with or to perform any other term, obligation, covenant or condition contained in any other written agreement between Grantor and Recipient, and specifically, should Recipient sublet or assign any of its interest in any portion of the Facility to any unrelated or unaffiliated entity without Grantor's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed.

SECTION 7. EFFECT OF AN EVENT OF DEFAULT.

If any Event of Default shall occur and upon thirty (30) days written notice and opportunity to cure Recipient has not cured such Event of Default within 30 days of written notice, then all commitments of Grantor under this Agreement immediately shall terminate (including any obligation to make Loan advances), and all amounts previously advanced under the Loan, not otherwise forgiven by action of the LEDC Board or City Council, as applicable, will become immediately due and payable, all without notice of any kind to Recipient, at the option of Grantor, except for an Event of Default described in the "Insolvency" subsection above, in which case such acceleration shall be automatic and not optional. Any Default which may be cured by the payment of money shall not extend beyond the 30-day period referenced herein. Any amounts due and payable shall not accrue interest until they are deemed to be past due as provided in the Note.

SECTION 8. INDEMNIFICATION.

RECIPIENT SHALL INDEMNIFY, SAVE, AND HOLD HARMLESS GRANTOR, ITS DIRECTORS, OFFICERS, AGENTS, ATTORNEYS, AND EMPLOYEES (COLLECTIVELY, THE "INDEMNITEES") FROM AND AGAINST:

- A. ANY AND ALL CLAIMS, DEMANDS, ACTIONS OR CAUSES OF ACTION THAT ARE ASSERTED AGAINST ANY INDEMNITEE IF THE CLAIM, DEMAND, ACTION OR CAUSE OF ACTION RELATES TO TORTIOUS INTERFERENCE WITH CONTRACT OR BUSINESS INTERFERENCE, OR WRONGFUL OR NEGLIGENT USE OF GRANTOR'S INCENTIVE PAYMENTS BY RECIPIENT OR ITS AGENTS AND EMPLOYEES;
- B. ANY ADMINISTRATIVE OR INVESTIGATIVE PROCEEDING BY ANY GOVERNMENTAL AUTHORITY RELATED TO A CLAIM, DEMAND, ACTION OR CAUSE OF ACTION IN WHICH GRANTOR IS A DISINTERESTED PARTY;
- C. ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION WHICH CONTESTS OR CHALLENGES THE LEGAL AUTHORITY OF GRANTOR OR RECIPIENT TO ENTER INTO THIS AGREEMENT; AND
- D. ANY AND ALL LIABILITIES, LOSSES, COSTS, OR EXPENSES (INCLUDING REASONABLE ATTORNEYS' FEES AND DISBURSEMENTS) THAT ANY INDEMNITEE SUFFERS OR INCURS AS A RESULT OF ANY OF THE FOREGOING; PROVIDED, HOWEVER, THAT RECIPIENT SHALL HAVE NO OBLIGATION UNDER THIS SECTION TO GRANTOR WITH RESPECT TO ANY OF THE FOREGOING TO THE EXTENT THAT SUCH CLAIMS OR LIABILITIES ARISE OUT OF THE NEGLIGENCE OR WILLFUL MISCONDUCT OF GRANTOR OR THE BREACH BY GRANTOR OF THIS AGREEMENT.

IF ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION IS ASSERTED AGAINST ANY INDEMNITEE, SUCH INDEMNITEE SHALL PROMPTLY NOTIFY RECIPIENT, BUT THE FAILURE TO SO PROMPTLY NOTIFY RECIPIENT SHALL NOT AFFECT RECIPIENT'S OBLIGATIONS UNDER THIS SECTION UNLESS SUCH FAILURE MATERIALLY PREJUDICES RECIPIENT'S RIGHT TO PARTICIPATE IN THE CONTEST OF SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION, AS HEREINAFTER PROVIDED. IF REQUESTED BY RECIPIENT IN WRITING, AS SO LONG AS NO DEFAULT OR EVENT OF DEFAULT SHALL HAVE OCCURRED AND BE CONTINUING, SUCH INDEMNITEE SHALL IN GOOD FAITH CONTEST THE VALIDITY, APPLICABILITY AND AMOUNT OF SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION AND SHALL PERMIT RECIPIENT TO PARTICIPATE IN SUCH CONTEST. ANY INDEMNITEE THAT PROPOSES TO SETTLE OR COMPROMISE ANY CLAIM, DEMAND, ACTION, CAUSE OF ACTION OR

PROCEEDING FOR WHICH RECIPIENT MAY BE LIABLE FOR PAYMENT OF INDEMNITY HEREUNDER SHALL GIVE RECIPIENT WRITTEN NOTICE OF THE TERMS OF SUCH PROPOSED SETTLEMENT OR COMPROMISE REASONABLY IN ADVANCE OF SETTLING OR COMPROMISING SUCH CLAIM OR PROCEEDING AND SHALL OBTAIN RECIPIENT'S CONCURRENCE THERETO.

SECTION 9. RECIPIENT'S REPRESENTATIONS.

By execution hereof, the signatories warrant and represent that they have the requisite authority to execute this Agreement and any related documents and that the representations made herein, and in the related documents, are true and accurate in all respects.

SECTION 10. MISCELLANEOUS PROVISIONS.

The following miscellaneous provisions are a part of this Agreement:

- a. **Amendments.** This Agreement, together with any related documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.
- b. **Applicable Law and Venue.** This Agreement has been delivered to Grantor and accepted by Grantor in the State of Texas. Recipient agrees to submit to the jurisdiction of the courts of Dallas County, State of Texas, and that venue is proper in said County. This Agreement shall be governed by and construed in accordance with the laws of the State of Texas and applicable federal laws.
- c. **Employee Hiring, Materials and Supplies Purchase.** Although not an Event of Default or a condition to any disbursement or advance of the Loan or any portion thereof, Grantor requests that Recipient use good faith efforts to satisfy its need for all additional employees from City residents and purchase all materials, supplies and services necessary to affect the construction and subsequent occupancy of the Property from City merchants and businesses.
- d. **Community Involvement.** Although not an Event of Default or a condition to any disbursement or advance of the Loan or any portion thereof, Recipient agrees to use good faith efforts to actively participate in community and charitable organizations and/or activities, the purpose of which are to improve the quality of life in City, and to actively encourage its employees to be involved in such organizations and/or activities.
- e. **Recipient Audit.** Recipient agrees to allow Grantor, at a time mutually acceptable to Grantor and Recipient, to audit at Grantor's expense all of

Recipient's records, documents, agreements and other instruments in furtherance of the following purposes: (i) to ensure Recipient's compliance with the affirmative covenants and duties set forth in Sections 3 and 4 herein; (ii) to determine the existence of an Event of Default set forth in Section 6 herein; and (iii) to ensure compliance with any other term or condition of this Agreement or any related document.

- f. **Caption Headings.** Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of the Agreement.
- g. **Notices.** All notices required to be given under this Agreement shall be given in writing and shall be effective when actually delivered or deposited in the United States mail, first class, postage prepaid, addressed to the party to whom the notice is to be given at the address shown above. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Recipient agrees to keep Grantor informed at all times of Recipient's current address.
- h. **Severability.** If a court of competent jurisdiction finds any provision of this Agreement to be invalid or unenforceable as to any person or circumstance, such finding shall not render that provision invalid or unenforceable as to any other persons or circumstances. If feasible, any such offending provision shall be deemed to be modified to be within the limits of enforceability or validity; however, if the offending provision cannot be so modified, it shall be stricken and all other provisions of this Agreement in all other respects shall remain valid and enforceable.
- i. **Survival.** All warranties, representations, and covenants made by Recipient in this Agreement or in any certificate or other instrument delivered by Recipient to Grantor under this Agreement shall be considered to have been relied upon by Grantor and will survive the payment of any Incentive Payments under this Agreement regardless of any investigation made by Grantor or on Grantor's behalf.
- j. **Attorneys' Fees and Costs.** In the event of any action at law or in equity between the parties to enforce any of the provisions hereof, to the extent allowed by law any unsuccessful party to such litigation shall pay to the successful party all costs and expenses, including reasonable attorneys' fees (including costs and expenses incurred in connection with all appeals) incurred by the successful party, and these costs, expenses and attorneys' fees may be included in and as part of the judgment. A successful party shall be any party who is entitled to recover its costs of suit, whether or not the suit proceeds to final judgment.

- k. **Time is of the Essence.** Time is of the essence in the performance of this Agreement.
- l. **Counterparts.** This Agreement may be executed in counterparts, and such counterparts together shall constitute but one original of the Agreement. Each counterpart shall be equally admissible in evidence, and each original shall fully bind each party who has executed it.
- m. **Waiver.** No failure or delay by a party to insist upon the strict performance of any term, condition or covenant of this Agreement, or to exercise any right, power or remedy hereunder shall constitute a waiver of the same or any other term of this Agreement or preclude such party from enforcing or exercising the same or any such other term, conditions, covenant, right, power or remedy at any later time.
- n. **No Interpretation Against Drafter.** Recipient and Grantor have participated in negotiating and drafting this Agreement, and agree that the Agreement is to be construed as if drafted jointly. The parties agree that the Agreement will not be interpreted or construed against either party should a need for interpretation or resolution of any ambiguity arise.

RECIPIENT ACKNOWLEDGES HAVING READ ALL OF THE PROVISIONS OF THIS LOAN AGREEMENT, AND RECIPIENT AGREES TO ITS TERMS.

THIS AGREEMENT SHALL BE EFFECTIVE AS OF AUGUST 14, 2017.

RECIPIENT:

DUKE REALTY LIMITED PARTNERSHIP
an Indiana limited partnership

By: Duke Realty Corporation, an Indiana corporation, its general partner

By: 

JEFF THORNTON
Senior VP, Texas Region

Date Signed: 8/24/17

GRANTOR:

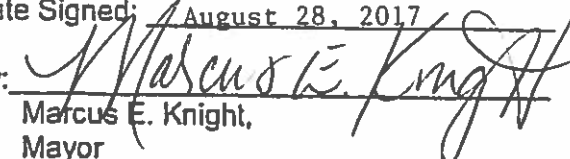
CITY OF LANCASTER, TEXAS a Texas
municipal corporation,

By:


Opal Mauldin-Jones,
City Manager

Date Signed: August 28, 2017

By:


Marcus E. Knight,
Mayor

Date Signed: August 28, 2017

PREPARED IN THE OFFICES OF:

BROWN & HOFMEISTER, L.L.P.
740 E. Campbell Road, Suite 800
Richardson, Texas 75081
214/747-6100
214/747-6111 Fax