

## ATTACHMENT 3

### MEMORANDUM OF UNDERSTANDING

Between  
CITY OF HESPERIA

And  
J.C. PROPERTY INVESTMENTS, LLC

This Memorandum of Understanding (the “**MOU**”) is executed this \_\_\_\_ day of \_\_\_\_\_, 2019, by and between the City of Hesperia, a municipal corporation (the “**City**”), and J.C. Property Investments, LLC, a California Limited Liability Company (the “**Owner**”).

WHEREAS, Owner is interested in purchasing a portion of City owned property located on the northeast corner of E Avenue and Mojave Street, approximately 6.0 acres of APN 0410-031-03 (“**City Property**”) together with approximately 11 acres (APN 0410-031-05) located north of the City Property. The total property consisting of 17.0 acres is referred to as “**Property**” herein. A legal description of the Property is attached hereto as Attachment “A”

WHEREAS, the City desires to construct certain street and drainage improvements along E Avenue within its current right-of-way in the City, which is adjacent to and will also serve the Property (the “**Improvements**”).

WHEREAS, Owner desires to develop the Property to manufacture pipe products (the “**Project**”). Owner desires to dedicate right of way for, and contribute to the costs of the Improvements and, in turn, Owner may be eligible for credits related to fees that Owner will be required to pay due to Owner’s development of the Project.

WHEREAS, the City has requested that Southern California Edison relocate power poles located along the east side of E Avenue between Mojave Street and Mauna Loa Street to accommodate City’s construction of the Improvements.

WHEREAS, E Avenue is included in the City Transportation Development Impact Fee (DIF) project list and Capital Improvement Plan.

WHEREAS, the terms and conditions of this MOU have been found by the City to be fair, just, and reasonable, and prompted by unique considerations presented by the Property, the economic climate, and the public benefits to the City.

NOW THEREFORE, in consideration of the above recitals, the mutual covenants and conditions herein contained, and other good and valuable considerations, the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

1. Recitals. The Recitals set forth above are incorporated herein by this reference.
2. Property. The Property includes all of the approximately 17.0 acres of real property described in Attachment A, attached hereto.
3. Effective Date: This MOU shall become effective upon the City Council’s approval of this MOU (the “**Effective Date**”).

### ATTACHMENT 3

#### 4. Owner's Obligations.

4.1 Owner shall purchase the City Property, approximate 6.0 acres of APN 0410-031-03 in the amount of \$287,496.00 ("**Property Purchase**").

4.2 Owner shall have the ability to terminate this MOU and the Property Purchase if Southern California Edison is unable to pay for the relocation of the power poles. Owner shall not be liable for incurring any costs to relocate the power poles.

4.3 Owner shall deposit with City ten percent (10%) of total estimated project costs upon execution of this MOU and shall provide balance of estimated project costs to City upon bid opening. Costs include coordination with Southern California Edison for power pole relocations, survey, design, environmental compliance processing, permitting, bidding, construction compliance verification and construction costs.

4.4 Owner will review, comment, and approve City prepared construction drawings, specifications, and estimates for public improvements.

4.5 Owner shall comply with the sales tax covenant described in Section 6 below.

4.6 Owner shall use Bear Valley Road for all trucks entering and leaving the Property.

#### 5. City's Obligations.

5.1 The City shall coordinate power pole relocations with Southern California Edison.

5.2 The City shall design the Improvements including preparation of drawings, specifications, and estimates.

5.3 The City shall complete environmental compliance processing and acquire all regulatory permits for construction of the Improvements.

5.4 The City will contract with a qualified construction contractor to complete the Improvements.

5.5 The City will provide monthly accounting of project expenditures and should expenditures exceed deposit amounts, invoice Owner for additional deposits. Upon completion of the Improvements, the City will provide a comprehensive accounting of all project costs to Owner. Any unused deposit amounts will be returned to Owner.

5.6 The City will grant Owner Transportation and Drainage DIF credits for costs associated with the Improvements along E Avenue.

### ATTACHMENT 3

**5.7** The City acknowledges that payment to the City for construction of the Improvements will satisfy Owner's project entitlement obligations related to road and drainage improvements.

## **6. Sales Tax Covenant**

### **6.1 Definitions.**

Unless the context otherwise requires, the terms defined in this Section shall have the meanings defined herein.

(a) "Designated Sales Territory" means the geographical boundaries of the sales, service and distribution area served by the warehouse, shipping point and Sales Office which are located within the jurisdiction of the City. Except as otherwise provided in this MOU, Owner shall have the right in its business discretion to adjust or modify the Designated Sales Territory to correspond to its business needs and requirements.

(b) "Local Sales Tax Revenues" means that portion of the Sales Tax, if any, attributable to Taxable Sales, paid by Owner and which is allocated and received by the City pursuant to the Sales Tax Law. Local Sales 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 San Bernardino, 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 SBE, (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, (v) any Sales Tax attributable to any transaction not consummated within the Term, (vi) 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, or (vii) any Sales Tax paid in error or which is subject to correction, adjustment or offset pursuant to an amended return or otherwise where the effect of the error, adjustment or amendment is to change the amount of Sales Tax attributable to Taxable Sales and allocated to the City

(c) "Material" means any and all tangible personal property which is offered for sale or lease by Owner and which is subject to the Sales Tax Law.

(d) "Prohibited Financial Assistance" shall mean 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, financial incentives, public financings, property or sales tax relief or rebates, relief from public improvement obligations, and payment for public improvements to or for the benefit of Owner.

(e) "Sales Office" means the Owner's sales and distribution center which shall be located in the City.

(f) "Sales Tax" means all sales and use taxes levied under the authority of the Sales Tax Law attributable to Taxable Sales, excluding Sales Tax which is to be refunded to Owner because of an overpayment of Sales Tax.

### ATTACHMENT 3

(g) "Sales Tax Law" means (i) California Revenue and Taxation Code Section 6001 et seq., and any successor law thereto, including the Bradley-Burns Uniform Local Sales and Use Tax Law (Rev. \$ Tax Code § 7200 et seq.), and any successor law thereto, (ii) any legislation allowing other public agency with jurisdiction in the City to levy any form of Sales Tax on the operations of Owner and/or the Sales Office, and (iii) regulations of the SBE and other binding rulings and interpretations relating to (i) and (ii) hereof.

(h) "SBE" means the California State Board of Equalization and any successor agency.

(i) "Taxable Sales" means the commercially reasonable business practices and activities associated with Owner's sale or lease of Material within the Designated Sales Territory and which are: (i) subject to the payment of Sales Tax pursuant to the Sales Tax Law and (ii) as to which the reported "point of sale" to the SBE is the City based on the location of the Sales Office in the City. "Taxable Sales" does not include sales or use taxes attributable to sales or leases made and reported for sales territories in California other than the Designated Sales Territory.

#### **6.2 Location and Operation; Applicability to local sales and use taxes.**

(a) Location and Operation Covenant. Owner hereby represents, warrants and covenants that it shall, on or before the commencement of the Term, establish a Sales Office within the jurisdictional boundaries of the City and shall thereafter, for the full Term, conduct its Taxable Sales operations for the Designated Sales Territory from the Sales Office in accordance with this MOU, the Sales Tax Law, and all other applicable provisions of local, state and federal law. Owner shall use commercially reasonable, good faith efforts to market, promote and administer its Taxable Sales activities, with the objective of maximizing the amount of Local Sales Tax Revenues within the Designated Sales Territory.

(b) Sales Office Covenant Not Exclusive; Waiver and Release of Claims. City understands, acknowledges and agrees that Owner has established or will establish other Sales Offices ("Additional Offices"), in addition to the Sales Office referred to in Section 6.2(a), above, for Designated Sales Territories associated with those Additional Offices. Nothing in this MOU limits Owner's right to conduct sales and other business and operations at or from the other locations. In consideration of the mutual promises, conditions and covenants of this MOU, City hereby waives and releases any objections, claims or demands of any kind with respect to (i) the Additional Offices, (ii) the payment of taxes for sales conducted by or through the Additional Offices, (iii) the existence of or course of performance by Owner under agreements similar in concept to this MOU entered into or to be entered into by Owner with any of the cities in which such Additional Offices are located, or (iv) in reference to the allocation of taxable activity to those cities or either of them by Owner in the course of its business and operations in California. City likewise covenants not to sue, and not to commence arbitration proceedings under this MOU or to commence administrative proceedings of any nature before the SBE or otherwise, or to challenge such allocations or activities in any way to the extent of objections, claims or demands of any kind which are waived or released by this Section 6.2(b). The waivers and releases provided in this Section 6.2(b) do not limit City's right to enforce this MOU.

### ATTACHMENT 3

(c) No Prohibited Financial Assistance. Owner covenants and agrees for the Term that Owner will not directly or indirectly solicit, accept or enter into any agreement concerning any Prohibited Financial Assistance from any other public or private person or entity, to the extent such Prohibited Financial Assistance is given for the purpose of causing or would result in either Owner's relocation from the City or a default by Owner.

(d) City as Point-of-Sale. Without limiting the generality of the foregoing, Owner shall obtain, and will maintain throughout the entire Term a retail sales tax permit from the SBE. Owner agrees to conduct its business so that the place of sale for all Taxable Sales consummated at the Sales Office during the Term will be to City pursuant to the Sales Tax Law. In all sales reports filed by Owner with the SBE relating to Taxable Sales consummated at the Sales Office, where such a designation is permitted or required under the Sales Tax Law, Owner shall specify the City as the place of sale. For as long as Owner maintains any facility within City's boundaries for the storage, shipment, distribution or handling of Material, during the Term of this MOU, Owner shall likewise maintain a Sales Office within City's boundaries, but Owner shall retain the discretion granted by this MOU to close its facilities entirely or to reallocate sales territories and sales personnel for commercially reasonable purposes.

**7. Term.** The term of this MOU shall commence upon the Effective Date and shall be effective so long as Owner owns the Property and operates the Project in the City (the "**Term**") unless terminated, modified, or extended by mutual agreement of the City and the Owner.

**8. Reservation of Power.** Notwithstanding any other provision of this MOU, the parties acknowledge and agree that the City is restricted in its authority to limit its police power, and that the foregoing limitations, reservations, and exceptions are intended to reserve to the City all of its police power, which cannot be so limited. This MOU shall be construed to reserve to City all such power and authority that cannot be restricted by this MOU.

**9. Assignment.** Owner shall have the right to sell, ground lease, transfer, or assign the Property in whole or in part to any person, partnership, joint venture, firm, or corporation at any time during the Term with the City's consent, which shall not be unreasonably withheld. This MOU shall inure to the benefit of Owner's successors and assigns. Owner shall notify the City of any sale of the Property.

**10. Notices.** All notices or other communications required hereunder shall be in writing and shall be personally delivered or sent by certified mail or electronic transmission, and shall be deemed received on the date of receipt personally or by electronic transmission. Notices shall be sent addressed as follows:

**If to the City:**

City of Hesperia  
9700 Seventh Avenue  
Hesperia, CA 92345  
Attn: City Manager

### ATTACHMENT 3

**With a copy to:**

Aleshire & Wynder, LLP  
3880 Lemon Street, Suite 520  
Riverside, CA 92501  
Attn: Eric L. Dunn

**If to Owner:**

Chris Cartwright  
11041 Vicksburg Ct.  
Alta Loma Ca. 91737

**11. Indemnification.** Owner shall indemnify, defend and hold harmless the City, its officers, employees and agents from and against any liability (including liability for claims, suits, actions, losses, expenses or costs of any kind, whether actual, alleged or threatened, including attorneys' fees and costs, court costs, defense costs and expert witness fees), where the same arise out of, are a consequence of, or are in any way attributable to, in whole or in part, the performance of this MOU by Owner or by any individual or entity for which Owner is legally liable, including but not limited to officers, agents, employees or subcontractors of Owner.

**12. No Third Party Beneficiaries.** This MOU is made and entered into for the sole protection and benefit of the parties and their successors and assigns. No other person shall have any right of action based upon any provision of this MOU.

**13. Not Applicable to Other Property within Specific Plan.** This MOU is applicable only to the Property as defined herein, and not to any other property within the Specific Plan.

**14. Governing State Law.** This MOU shall be construed in accordance with the laws of the State of California. Legal actions concerning any dispute, claim or matter arising out of or in relation to this MOU shall be instituted in the Superior Court of the County of San Bernardino, State of California, or any other appropriate court in such county, and Owner agrees to submit to the personal jurisdiction of such court in the event of such action.

**15. Severability.** Invalidation of any of the provisions contained in this MOU by judgment of court order shall in no way affect any of the other provisions hereof or the application thereof to any other person or circumstance, and the same shall remain in full force and effect, unless enforcement of this MOU, as so invalidated, would be unreasonable or inequitable under all the circumstances or would frustrate the purpose of this MOU or the rights and obligations of the parties thereto.

**16. Entire MOU.** This MOU constitutes the entire understanding and agreement of the parties.

**ATTACHMENT 3**

IN WITNESS WHEREOF, the parties have executed this MOU on the date first written above.

Owner:

J.C. Property Investments, LLC

By: \_\_\_\_\_,  
Chris Cartwright

Its: \_\_\_\_\_

City:  
City of Hesperia, a Municipal Corporation

By: \_\_\_\_\_  
Nils Bentsen, City Manager

ATTEST:

\_\_\_\_\_  
Melinda Sayre, City Clerk

APPROVED AS TO FORM:  
ALESHIRE & WYNDER, LLP

\_\_\_\_\_  
Eric L. Dunn  
City Attorney

**ATTACHMENT 3**

**ATTACHMENT A**  
**Property Legal Description**

APN: 0410-031-03 (Westerly 6 acre Portion)

(e) TOWN HESPERIA LOT B BLK 172 EX WATER RTS AND EX 1/2 INT MNL RTS  
WITHOUT SE 11 ACM/L

APN: 0410-031-05

(f) TOWN HESPERIA LOT A BLK 172 EX WATER RTS AND EX 1/2 INT MNL RTS  
WOSE 11 AC M/L