

Council Meeting of
January 11, 2011

SUPPLEMENTAL MATERIAL #2

Honorable Mayor and Members
Of the Torrance City Council
City Hall
Torrance, California

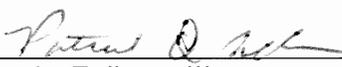
Members of the Council:

SUBJECT: Supplemental Material to Item 8E/Renumbered Item 12D

Following the posting of the agenda, the City received a revised draft of the proposed Wal-Mart Indemnity and Reimbursement Agreement. There are no material changes to the agreement, and notice information is added for Wal-Mart.

The city attorney requests that Your Honorable Body approve the Indemnity and Reimbursement Agreement in the form attached.

Respectfully submitted,


John L. Fellows III

NOTED:


LeRoy J. Jackson
City Manager

Attachment A) Indemnity and Reimbursement Agreement with Wal-Mart

INDEMNITY AND REIMBURSEMENT AGREEMENT

This Indemnity and Reimbursement Agreement (“Agreement”) is made this _____ day of ____, 2011, by and between the City of Torrance, a California municipal corporation (“City”), and Wal-Mart Real Estate Business Trust, a Delaware statutory trust (“Applicant”). The City and the Applicant are sometimes referred to herein individually as “Party” and collectively as “Parties.”

RECITALS

This Agreement is made with respect to the following facts:

A. On or about March 25, 2010, the Applicant filed various building, electrical, plumbing, and other ministerial permit applications with the City (“Applications”) for the purpose of occupying certain real property generally located at 22015 Hawthorne Boulevard within the City of Torrance, County of Los Angeles, California (“Property”) with a Walmart store (“Project”). The Project does not include any discretionary planning applications.

B. The Applicant enters into this Agreement with the City in order to indemnify, defend and hold the City harmless from any legal challenges concerning or arising from the City’s approval of the Applications.

C. To ensure that the necessary resources exist to diligently and efficiently defend the Project, the Applicant hereby enters into this Agreement and commits to pay costs and expenses related to the City’s defense as set forth below.

AGREEMENT

NOW, THEREFORE, in consideration of the following mutual promises and agreements, the City and the Applicant agree as follows:

1. Incorporation of Recitals. The Parties agree that the Recitals constitute the factual basis upon which the City and the Applicant have entered into this Agreement. The City and the Applicant each acknowledge the accuracy of the Recitals and agree that the Recitals are incorporated into this Agreement as though fully set forth at length.

2. Definitions. The following terms in this Agreement shall have the meaning set forth below:

“Project Approvals” shall mean any approvals granted by the City, or any department thereof. Project Approvals required for the Project include, but are not limited to, issuance of building, mechanical, electrical, plumbing, civil, sign, racking, hazardous materials/high-pile storage, and fire protection permits.

“Project Claims” shall mean any actual claims, demands, causes of action, damages, costs, expenses, judgments and liabilities arising from the Project Approvals. Notwithstanding the foregoing, claims, demands, causes of action, damages, costs, expenses, judgments and liabilities arising from the negligence or

willful misconduct of the City are not included in the definition of Project Claims. In addition, claims, demands, causes of action, damages, costs, expenses, judgments and liabilities related to, but not arising from, this Agreement or Project Approvals (hereinafter referred to as "City Claims") are not included in the definition of Project Claims. City Claims may include, but are not limited to, the failure of the City to comply with criminal laws or civil laws with respect to the conduct of public meetings or hearings, or the failure of the City to adopt an adequate General Plan or element of its General Plan.

3. Indemnification. To the extent permitted by law, the Applicant shall indemnify and hold harmless the City, and its elected and appointed officials, officers, employees, consultants, agents and attorneys (collectively referred to as "City Parties") from and against any Project Claims.

4. Defense of Action. The Applicant shall be responsible for the costs to defend the City Parties in any action arising from a Project Claim. The City elects to retain M. Katherine Jenson, John Ramirez and Peter Howell of Rutan & Tucker, LLP as separate legal counsel for the City. The Applicant shall promptly pay Rutan & Tucker's invoices within thirty (30) days of receipt. The Applicant elects to retain Theodora, Oringer, Miller & Richman, PC, as its legal counsel in the matter.

The Applicant shall have the right to defend, or not defend, which election may be made at any time, any Project Claims that seek to invalidate, or would otherwise affect, the Project Approvals, regardless of whether or not the claims arise from the Project Approvals, provided, however, that any election by the Applicant not to defend any Project Claim (a "Decision") shall be deemed a termination of this Agreement. The Applicant shall provide the City with written notification of its Decision as provided in Section 8 of this Agreement. The Applicant's Decision shall not preclude the City from defending any Project Claim. However, in such event, any costs or expenses incurred by the City in defense of any Project Claim incurred after the Applicant's Decision shall be the sole responsibility of the City. The Applicant shall not be responsible for any costs and/or expenses incurred by the City after the City receives written notification of the Decision. If the Applicant makes the Decision as set forth in this paragraph, the City shall have the right to repeal or revoke any or all of the Project Approvals. The Applicant's Decision not to defend any Project Claim shall not preclude the City from retaining, at its own expense, legal counsel to defend against a Project Claim. Any decision by the City to defend a Project Claim shall not result in, or generate an obligation by the Applicant to indemnify the City for its costs and expenses incurred in any such defense. The Applicant shall be responsible for promptly paying any award of costs or attorneys' fees to a third party in any Project Claim, unless the City is solely responsible for the award due to its decision to defend the against the Project Claims after receiving the Applicant's Decision and the City had the opportunity to prevent the award but failed to utilize that opportunity.

The City shall notify the Applicant of any Project Claim or City Claim within five (5) business days of receipt of any cause of action or notice of potential cause of action. Such notice shall be provided as set forth in Section 9 of this Agreement.

5. Cooperation and Cost Control. The Parties agree that they, and any legal counsel hired by them, including legal counsel hired independently by the City to assist in the defense of any Project Claim or City Claim, will cooperate with each other in the preparation and defense of any claims or proceedings. This includes, but is not limited to, cooperation in the preparation of the administrative record and consultation with one another in good faith in the preparation of court filings, to ensure that unnecessary and duplicative costs are not incurred in the defense of the claim, action or proceeding.

6. Satisfaction of Judgment. The Parties agree to use best efforts to satisfy in a timely manner any final, non-appealable judgment issued by a judicial or administrative body, or any obligation arising out of any judgment, award or settlement that involves any Project Claims or City Claims for which the Applicant has indemnified the City Parties. This includes, but is not limited to, the payment and satisfaction of any monetary judgment, award, or settlement levied against the City Parties, and the processing of any additional Project Approvals. The Applicant shall be responsible for all monetary obligations except as otherwise provided in this Agreement.

For the purposes of this Section 6, timely manner shall mean within ninety (90) days for the payment of any monetary judgment, award or settlement, and one (1) year for the processing of any additional Project Approvals.

7. Settlement of Claims. The City shall not enter into any settlement or resolution of any Project Claims and/or City Claims without first providing notice of such settlement or resolution to the Applicant. The City shall notify the Applicant of the terms of any proposed settlement within five (5) business days of receiving any proposal pursuant to Section 9 of this Agreement. If requested by the Applicant, the City shall agree to meet and confer with the Applicant in good faith regarding the terms of the proposed settlement.

8. Notices. All notices required or necessary under this Agreement shall be given in writing to the following addresses or such other addresses as the Parties may designate by written notice:

If to the City:	City of Torrance, a California municipal corporation 3031 Torrance Boulevard Torrance, CA 90503-5015 Attention: John L. Fellows III, Esq.
-----------------	---

If to the Applicant:	Wal-Mart Real Estate Business Trust, 2001 Southeast 10 th Street Bentonville, AR 72716-0550 Attention: Gregory L. Tesoro, Sr. Associate General Counsel Real Estate Division – West GBU
----------------------	---

All notices shall be delivered by personal delivery, a recognized overnight carrier that provides proof of delivery, or by US certified mail, return receipt requested, and shall be considered effective upon receipt (or upon the date any addressee refuses delivery).

9. Covenant of Further Assurances. The City and the Applicant shall take all other actions and execute all other documents that are reasonably necessary to effectuate this Agreement.

10. No Oral Modifications. This Agreement represents the entire understanding of the City and the Applicant and supersedes all other prior or contemporaneous written or oral agreements pertaining to the subject matter of this Agreement. All modifications to this Agreement must be in writing and first approved by the City and the Applicant.

11. No Assignment. Neither Party may assign and/or transfer any interest in this Agreement without the prior written consent of the other Party hereto.

12. Binding Upon Successors. To the extent not prohibited by this Agreement, the Agreement and each of its terms shall be binding upon the City, the Applicant and their respective officers, elected officials, employees, agents, contractors, and permitted successors and assigns.

13. Severability. If any term or provision of this Agreement is found to be invalid or unenforceable, the City and the Applicant both agree that they would have executed this Agreement notwithstanding the invalidity of such term or provision. The invalid term or provision may be severed from the Agreement and the remainder of the Agreement may be enforced in its entirety.

14. Waiver. No waiver of any default hereunder shall constitute a waiver of any other breach or default, whether of the same or of any other covenant or condition. No waiver given by either Party shall give the other Party a contractual right by custom, estoppel or otherwise which is in conflict with any written provision of this Agreement.

15. Counterparts. This Agreement may be signed in counterparts, each of which shall constitute an original and which collectively shall constitute one instrument.

16. Captions. The captions of the various articles and paragraphs of this Agreement are for convenience and ease of reference only, and do not define, limit, augment, or describe the scope, content, or intent of this Agreement or any part or parts of this Agreement.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

IN WITNESS WHEREOF, this Agreement has been executed by the Parties as of the date first written above.

CITY OF TORRANCE, a California municipal corporation

WAL-MART REAL ESTATE BUSINESS TRUST, a Delaware statutory trust

Frank Scotto, Mayor

By: _____

Date: _____

Name: _____

Title: _____

Date: _____

ATTEST:

ATTEST:

Sue Herbers, CMC, City Clerk

By: _____
Assistant Secretary

(Corporate Seal)

APPROVED AS TO FORM:
JOHN L. FELLOWS III
CITY ATTORNEY

By: _____
John L. Fellows III