

VILLAGE OF LOMBARD
REQUEST FOR BOARD OF TRUSTEES ACTION
For Inclusion on Board Agenda


 X Resolution or Ordinance (Blue) *Waiver of First Requested*
 Recommendations of Boards, Commissions & Committees (Green)
 Other Business (Pink)

TO: PRESIDENT AND BOARD OF TRUSTEES

FROM: Scott R. Niehaus, Village Manager

DATE: April 7, 2015 (B of T) Date: April 16, 2015

TITLE: PC 12-13; 401 E. North Avenue (Dunkin Donuts): First Amendment to a Cross Access Agreement

SUBMITTED BY: Department of Community Development 

BACKGROUND/POLICY IMPLICATIONS:

The Department of Community Development transmits for your consideration a First Amendment to a Cross-Access Connection Agreement relative to the Dunkin Donuts development at 401 E. North Avenue. This project was previously approved and a part of the zoning and development approvals for the project (PC 12-13). (DISTRICT #4)

Staff recommends approval of the amendment.

Fiscal Impact/Funding Source:

Review (as necessary):
Village Attorney X _____ Date _____

Finance Director X _____ Date _____


Village Manager X _____ Date _____

NOTE: All materials must be submitted to and approved by the Village Manager's Office by 12:00 noon, Wednesday, prior to the Agenda Distribution.



MEMORANDUM

TO: Scott R. Niehaus, Village Manager

FROM: William Heniff, AICP 
Director of Community Development

DATE: April 16, 2015

SUBJECT: **PC 12-13; 401 E. North Avenue (Dunkin Donuts): First Amendment to a Cross Access Agreement**

Attached is a First Amendment to a Cross-Access Connection Agreement relative to the Dunkin Donuts development at 401 E. North Avenue. This project was previously approved and a part of the zoning and development approvals for the project (PC 12-13).

BACKGROUND

The attached original agreement the Village entered into in 2012 was with the original developer (Mallon III, LLC). However, Mallon III never did close on the property. Rishad Rajabali, President of The Rajabali Group, Inc., did acquire the property and established Lombard Plaza LLC, as new owner, in order to proceed with the project. Lombard Plaza, LLC is seeking to execute an amended sales tax sharing agreement that substitutes the new ownership entity and the original dates of approval for construction.

For reference purposes, the purpose of the original cross-access agreement was to offset costs associated with constructing cross access to the property to the east (Casey's). Casey's Restaurant does not have direct access to a signalized intersection and their direct access to North Avenue is limited to a right in/out. In 2002, Casey's installed an access drive out to Joyce Avenue to the east. However, to get to the nearest signal at Grace Street; customers have to circle clockwise around the Lombard Lagoon and the adjacent residential neighborhood.

The cross access connection requires significant engineering, given existing grades. The original petitioner's engineer developed a preliminary engineering plan showing how this connection could be constructed and the current owner is proceeding with the project. The proposed connection would cost approximately \$66,300, which was originally reviewed by staff. As a condition of the 2012 Board approval, the petitioner is responsible for the installation of the cross access drive with the consent of the Casey's property owner, which occurred, and a cross-access easement was recorded by the new owner on June 17, 2014 (R2014-051602).

Other than amending the owner/developer entity and the companion dates for completion, all other provisions would remain in full force and effect. These include:

1. Cross access to the existing Casey's Restaurant to the east shall be constructed as part of the project and prior to the issuance of a Certificate of Occupancy.
2. The total reimbursement costs will be based upon the construction costs for the connection. The up-front costs associated with the project will be borne by the developer. Once the project is completed, the developer will submit their final construction costs for cross access connection to the Village.
3. The agreement provides for reimbursement using the one-percent Retailers' Occupation Tax Act collected by the State generated by future retail tenants to the site. If the property remains vacant or if a non-retail sales tax generating use occupies the building, the Village does not have an obligation to provide any reimbursement. The developer has indicated that Dunkin Donuts will be one of the tenants occupying the space.
4. The agreement caps the total reimbursement as the total accepted construction cost for the cross access connection with the costs to be approved by the Village. Revenues to be reimbursed shall be generated within the first seven years after the agreement is approved. The agreement does not provide any interest reimbursement for the project.

RECOMMENDATION

Please place this item on the April 16, 2015 Village Board agenda for approval. Staff recommends approval of the amendment.

RESOLUTION
R _____ 15

A RESOLUTION AUTHORIZING SIGNATURE
OF PRESIDENT AND CLERK ON AN AGREEMENT

WHEREAS, the Corporate Authorities of the Village of Lombard has received an Agreement between the Village of Lombard and Lombard Plaza, LLC regarding a First Amendment to the Cross-Access Connection Reimbursement Agreement; and

WHEREAS, the Corporate Authorities deem it to be in the best interest of the Village of Lombard to approve such Agreement.

NOW, THEREFORE, BE IT RESOLVED BY THE PRESIDENT AND BOARD OF TRUSTEES OF THE VILLAGE OF LOMBARD, DU PAGE COUNTY, ILLINOIS as follows:

Section 1: That the Village President be and hereby is authorized to sign on behalf of the Village of Lombard said Agreement as attached hereto.

Section 2: That the Village Clerk be and hereby is authorized to attest said Agreement as attached hereto.

Adopted this _____ day of _____, 2015.

Ayes: _____

Nays: _____

Absent: _____

Approved this _____ day of _____ 2015.

Keith T. Giagnorio, Village President

Attest:

Sharon Kuderna, Village Clerk
Village Clerk

**FIRST AMENDMENT TO
THE CROSS-ACCESS CONNECTION REIMBURSEMENT AGREEMENT
FOR 401 E. NORTH AVENUE**

THIS FIRST AMENDMENT TO THE CROSS-ACCESS CONNECTION REIMBURSEMENT AGREEMENT FOR 401 E. NORTH AVENUE (hereinafter referred to as the "First Amendment") is entered into on this 3~~rd~~ day of Apr, 2015, by and between the VILLAGE OF LOMBARD, DuPage County, Illinois, an Illinois municipal corporation (hereinafter referred to as the "Village"), and LOMBARD PLAZA, LLC, an Illinois limited liability company (hereinafter referred to as the "Substitute Developer"); (the Village and the Substitute Developer are sometimes referred to herein individually as a "Party" and collectively as the "Parties").

WITNESSETH:

WHEREAS, pursuant to the provisions of Article VII, Section 10 of the 1970 *Illinois Constitution*, and 65 ILCS 5/8-11-20, the Village entered into a Cross-Access Connection Reimbursement Agreement for 401 E. North Avenue, with MALLON III, LLC, dated September 6, 2012, and recorded with the DuPage County Recorder's Office on March 22, 2013, as document number R2013-043293 (hereinafter referred to as the "Original Agreement"); said Original Agreement being in regard to the property legally described in Exhibit 1 attached hereto and made part hereof (said property being referred to in the Original Agreement as, and being hereinafter referred to as, the "Subject Property"); and

WHEREAS, MALLON III, LLC never acquired title to the Subject Property and, therefore, did not undertake any of the obligations set forth within the Original Agreement within the time frames set forth in the Original Agreement; and

WHEREAS, the Substitute Developer is the fee title owner of record of the Subject Property; and

WHEREAS, the Substitute Developer desires to proceed with construction of the Cross-Access Connection in accordance with the Final Plans, as originally approved by the Village and as said terms are defined in the Original Agreement; and

WHEREAS, the Substitute Developer seeks an amendment to the Original Agreement to designate the Substitute Developer as the Developer under the Original Agreement, as amended by this First Amendment; and

WHEREAS, the Substitute Developer intends to meet all of the rights, responsibilities and obligations of the Developer as set forth within the Original Agreement, as amended by this First Amendment; and

WHEREAS, the Substitute Developer and the Village have determined it to be within their respective best interests to enter into this First Amendment;

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties hereto agree as follows:

1. That Sections A, B and C of Article II of the Original Agreement are hereby deleted, and the following language shall be inserted in Section II of the Original Agreement in lieu thereof:

“In that Developer has applied for and received a building permit from the Village for the Cross-Access Connection, and supplied the Village with a certified engineer’s cost estimate for the Cross-Access Connection, and in that the Developer has obtained final approval of its plans from all governmental units, which have jurisdiction or authority over any portion of the Cross-Access Connection and/or plans, with the submitted plans (hereinafter referred to as the “**Final Plans**”, with said term including any and all documents, plans and drawings submitted to the Village in order to obtain any permit required from the Village relative to the Cross-Access Connection) associated with the permit being in accordance with the regulations and ordinances of the Village, by April 2, 2016, Developer must have completed the Cross-Access Connection and delivered to the Village a certified statement in regard to the total cost of the Cross-Access Connection. Said certification shall be over the signature of the chief financial officer of Developer. Developer shall allow the Village Manager or his designee to review a breakdown of, and supporting documentation for, Developer’s costs in regard to the Cross-Access Connection.”

2. That the opening paragraph of Section B of Article III of the Original Agreement, prior to the start of subsection 1), is hereby amended to read in its entirety as follows:

“B. The Village hereby agrees to pay Developer the Quarterly Installment Payments (as defined below), beginning on the date that Developer has leased the Subject Property to its first tenant and the tenant has taken possession of the Subject Property (hereinafter referred to as the “Start Date”), and continuing until the first to occur of: (i) the passage of seven (7) years from the Start Date; or (ii) the Village having paid the Developer, pursuant to this Agreement, Seventy Thousand and No/100 Dollars (\$70,000.00) or the total cost of the Cross-Access Connection as certified pursuant to Article II above, whichever is less, with the first of the Quarterly Installment Payments to be made fifteen (15) days after the Start Date, with subsequent Quarterly Installment Payments being made at three (3) month intervals thereafter, subject to the following calculations, deductions, terms and conditions:”

3. That Section F of Article V of the Original Agreement is hereby amended by revising the reference therein to, “September 6, 2013,” to read, “August 1, 2015.”

4. That Article VII of the Original Agreement is hereby amended by revising the notification name and address for the Developer to read as follows:

“If to Developer: Lombard Plaza, LLC
c/o Rishad Rajabali
3315 Algonquin Road, Suite 440
Rolling Meadows, Illinois 60008

With copy to: Vera Pandev
Berg, Berg & Pandev. PC
5215 Old Orchard Road, Suite 220
Skokie, Illinois 60077”

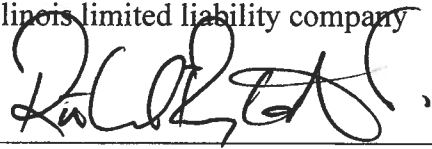
5. That the Substitute Developer is hereby substituted for MALLON III, LLC as the Developer under the Original Agreement.
6. That all other provisions of the Original Agreement, not amended by this First Amendment, shall remain in full force and effect as if set forth herein.
7. That a fully executed original signature copy of this First Amendment shall be recorded with the DuPage County Recorder’s Office.
8. That this First Amendment shall be executed in two (2) counterparts, each of which shall constitute an original, so that each Party hereto retains an original signature copy of this First Amendment.
9. This First Amendment shall be signed last by the Village and the President of the Village shall affix the date on which he signs this First Amendment on Page 1 hereof, which date shall be the effective date of this First Amendment.

IN WITNESS WHEREOF, the Parties hereto have caused this First Amendment to be executed by their respective authorized representatives.

VILLAGE OF LOMBARD,
an Illinois municipal corporation

By: _____
Keith T. Giagnorio, Village President

LOMBARD PLAZA, LLC,
an Illinois limited liability company

By:  _____
Rishad, Rajabali, Its Member

ATTEST:

By: _____
Sharon Kuderna, Village Clerk

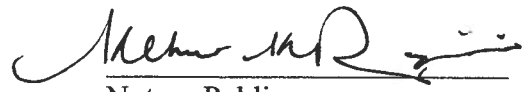
ACKNOWLEDGMENT

STATE OF ILLINOIS)
) SS
COUNTY OF DUPAGE)

I, the undersigned, a Notary Public, in and for the County and State aforesaid, DO HEREBY CERTIFY that Keith T. Giagnorio, personally known to me to be the President of the Village of Lombard, an Illinois municipal corporation (the "Village"), and Sharon Kuderna, personally known to me to be the Village Clerk of said Village, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that, as such President and Village Clerk, they signed and delivered the said instrument, pursuant to authority given by the President and Board of Trustees of said Village, as their free and voluntary act, and as the free and voluntary act and deed of said Village, for the uses and purposes therein set forth.

GIVEN under my hand and official seal, this 2nd day of April, 2015.

Commission expires March 19 2018.



Notary Public



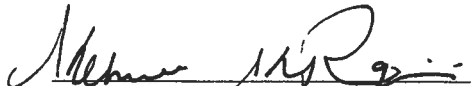
ACKNOWLEDGMENT

STATE OF ILLINOIS)
) SS
COUNTY OF DUPAGE)

I, the undersigned, a Notary Public, in and for the County and State aforesaid, DO HEREBY CERTIFY that the above-named Rishad Rajabali, personally known to me to be the Member of Lombard Plaza, LLC, an Illinois limited liability company (the “Company”), and also personally known to me to be the same person whose name is subscribed to the foregoing instrument as such Member, and that he appeared before me this day in person and acknowledged that, as such Member, he signed and delivered the said instrument, consenting to its recordation, pursuant to authority given by said Company, as his free and voluntary act, and as the free and voluntary act and deed of said Company, for the uses and purposes therein set forth.

GIVEN under my hand and Notary Seal this 2nd day of April 2015,
2015.

Commission expires March 19, 2018


Notary Public

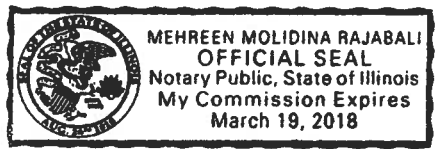


EXHIBIT 1

Legal Description of the Subject Property

That part of the Northeast 1/4 of Section 5, Township 39 North, Range 11, East of the Third Principal Meridian, described as follows: Beginning at a point on the South line of North Avenue (State Route 64), which point is 90 feet East of the West line of Grace Street; thence East on the South line of North Avenue, a distance of 195 feet; thence South and parallel with the West line of Grace Street, a distance of 182 feet; thence West parallel with the South line of North Avenue, a distance of 195 feet; thence North on a line 90 feet East of and parallel to the West line of Grace Street 182 feet to the point of beginning.

Excepting therefrom that part of the Northeast 1/4 of Section 5, Township 39 North, Range 11, East of the Third Principal Meridian, described as follows:

Beginning at a point on the South line of North Avenue (Route 64), which point is 90.0 feet East of the West line of Grace Street; thence on an assumed bearing of North 88 degrees 14 minutes 45 seconds East along the South line of North Avenue, 5.00 feet; thence South 12 degrees 17 minutes 42 seconds West, 25.74 feet to the East line of Grace Street, being 90.0 feet East of and parallel to the West line of Grace Street; thence North 1 degree 06 minutes 28 seconds East along the East line of Grace Street, 25.00 feet to the point of beginning, in DuPage County, Illinois.

PIN: 06-05-200-016.

Common Address: 401 East North Avenue, Lombard, Illinois 60148.

RESOLUTION
R 23-13

A RESOLUTION AUTHORIZING SIGNATURE
OF PRESIDENT AND CLERK ON AN AGREEMENT

WHEREAS, the Corporate Authorities of the Village of Lombard has received a
an Agreement between the Village of Lombard and Mallon III, LLC regarding an
Economic Incentive Agreement for Mallon III, LLC, as attached hereto and marked
Exhibit "A"; and

WHEREAS, the Corporate Authorities deem it to be in the best interest of the
Village of Lombard to approve such Agreement.

NOW, THEREFORE, BE IT RESOLVED BY THE PRESIDENT AND BOARD
OF TRUSTEES OF THE VILLAGE OF LOMBARD, DU PAGE COUNTY, ILLINOIS
as follows:

Section 1: That the Village President be and hereby is authorized to sign on
behalf of the Village of Lombard said Agreement as attached hereto.

Section 2: That the Village Clerk be and hereby is authorized to attest said
Agreement as attached hereto.

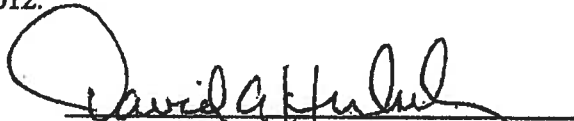
Adopted this 6th day of September, 2012.

Ayes: Trustees Gron, Giagnorio, Wilson, Breen, Fitzpatrick and Ware

Nays: None

Absent: None

Approved this 6th day of September 2012.



David A. Hulseberg
Village Manager
(Pursuant to the Authority Granted by the
Village Board at the September 6, 2012
Village Board Meeting)

Attest:



Brigitte O'Brien, Village Clerk
Village Clerk

**CROSS-ACCESS CONNECTION REIMBURSEMENT AGREEMENT FOR
401 E. NORTH AVENUE**

THIS AGREEMENT (hereinafter referred to as the "Agreement") is entered into on this 6th day of September, 2012, by the **VILLAGE OF LOMBARD**, DuPage County, Illinois, an Illinois Municipal Corporation (hereinafter referred to as the "**Village**"); and **MALLON III, LLC.**, an Illinois Limited Liability Company (hereinafter referred to as "**Developer**"); (the Village and Developer are sometimes referred to herein individually as a "Party" or collectively referred to as the "Parties").

WITNESSETH:

Pursuant to the provisions of Article VII, Section 10 of the 1970 Illinois Constitution, and 65 ILCS 5/8-11-20 (hereinafter referred to as the "Rebate Statute"), and in consideration of the Preliminary Statements, the mutual covenants herein contained and other good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, the Parties agree as follows:

I. PRELIMINARY STATEMENTS

Among the matters of mutual inducement which have resulted in this Agreement are the following:

- A. The Village is a non-home rule municipality lawfully existing under the constitution and laws of the State of Illinois.
- B. The Developer is the developer of record for certain property, located within the boundaries of the Village, which the Developer intends to improve with a retail commercial building, said property being legally described in EXHIBIT "A" attached hereto and made part hereof (hereinafter referred to as the "**Subject Property**"). .
- C. Developer intends to improve the Subject Property with a cross-access connection to service the business establishment located on the Subject Property and the Casey's Restaurant Property (hereinafter referred to as the "**Casey's Property**") located to the East of the Subject Property.
- D. The Village Board approved the zoning actions associated with proposed activity on the Subject Property on September 6, 2012, pursuant to Ordinance 6746.
- E. In order to accommodate the development proposed by the Developer, the Village, as a condition of the approval of Ordinance 6746 requires a cross-access connection between the Subject Property and the Casey's Property, as depicted on EXHIBIT "B" attached hereto and made a part hereof (hereinafter referred to as the "**Cross-Access Connection**").

- F. The Village is desirous of having the Subject Property operated in accordance with the Village Code in order to service the needs of the Village and its residents.
- G. The Cross-Access Connection, if completed, will improve traffic and circulation in the vicinity of the Subject Property.
- H. In light of the foregoing, a portion of the cost of the Cross-Access Connection should properly be paid for by the Village, and, as such, the Village contemplates certain incentives under the terms and conditions hereinafter set forth to assist in the construction of same.
- I. The Parties hereto acknowledge, and Developer represents and warrants, that while the Developer will construct the Cross-Access Connection, the Cross-Access Connection requires economic assistance from the Village in order to complete the same, and, but for the economic assistance to be given by the Village, the Cross-Access Connection as contemplated would not be economically viable nor eligible for the financing necessary for its completion.
- J. Pursuant to the Rebate Statute, the Village finds as follows:
1. The Subject Property has remained vacant for at least one (1) year;
 2. The proposed development of the Subject Property is expected to create job opportunities within the Village;
 3. The proposed development of the Subject Property will serve to further the development of adjacent areas;
 4. Without this Agreement, the proposed development of the Subject Property would not be possible;
 5. The Developer meets/will meet the criteria set forth in 65 ILCS 5/8-11-20(6)(C);
 6. The proposed development of the Subject Property will strengthen the commercial sector of the Village;
 7. The proposed development of the Subject Property will enhance the tax base of the Village; and
 8. This Agreement is made in the best interests of the Village.”
- K. For the purposes of this Agreement, the use of the terms "**Sales Tax**" and "**Sales Tax Revenues**" shall be construed to refer to that net portion of taxes imposed by the State of Illinois (hereinafter referred to as the "**State**") for distribution to the Village pursuant

to the Retailers' Occupation Tax Act, 35 ILCS 120/1 et seq., and the Service Occupation Tax Act, 35 ILCS 115/1 et seq., (as said Acts maybe amended) and which are collected by the State and distributed to the Village (currently such net portion is one percent (1%) of the total amount of gross sales within the Village, which are subject to the aforementioned taxes).

II. CONDITIONS PRECEDENT TO THE UNDERTAKINGS ON THE PART OF THE VILLAGE

All undertakings on the part of the Village pursuant to this Agreement are subject to satisfaction of the following conditions by Developer, on or before the dates hereinafter specified. In the event Developer does not comply in all material respects with the conditions precedent set forth in this Article II, then all obligations on the part of the Village pursuant to this Agreement shall be cancelled, and the Village shall have no further obligations with regard to the Cross-Access Connection and this Agreement, and any right on the part of Developer to demand performance thereof shall be deemed waived and also cancelled and of no force and effect.

- A. By September 6, 2013, Developer shall have applied for a building permit with the Village for the Cross-Access Connection, and have supplied the Village with a certified engineer's cost estimate for the Cross-Access Connection. If the contractor's cost proposal for the Cross-Access Connection exceeds the Engineer's Cost Estimate for the work to be performed, then the Developer shall submit the costs to the Village for approval prior to authorizing the contract to perform the Cross-Access Connection construction activity.
- B. By September 6, 2013, Developer must have obtained final approval of its plans from any other governmental unit or agency, which has jurisdiction or authority over any portion of the Cross-Access Connection and/or plans. The submitted plans (hereinafter referred to as the "**Final Plans**") associated with the permit shall be in accordance with the regulations and ordinances of the Village, it being understood that the Village, in its capacity as a municipal corporation, has sole discretion to approve all plans for development within the Village, and the Village shall not be deemed to have caused a default hereunder or have any liability for its failure to approve the Final Plans for the Cross-Access Connection, except for its willful misconduct. The "Final Plans" shall include any and all documents, plans and drawings submitted to the Village in order to obtain any permit required from the Village relative to the Cross-Access Connection.
- C. By September 6, 2014, Developer must have completed the Cross-Access Connection and delivered to the Village a certified statement in regard to the total cost of the Cross-Access Connection. Said certification shall be over the signature of the chief financial officer of Developer. Developer shall allow the Village Manager or his designee to review a breakdown of, and supporting documentation for, Developer's costs in regard to the Cross-Access Connection.

III. UNDERTAKINGS ON THE PART OF THE VILLAGE

- A. Upon satisfaction by Developer of all the conditions hereinabove stated in Article II, delivery to the Village of a certificate from Developer that all representations and warranties contained in Article V hereof are true and correct, the Village shall begin to make the Quarterly Installment Payments (as defined below).
- B. The Village hereby agrees to pay Developer the Quarterly Installment Payments (as defined below), beginning the last to occur of September 6, 2013 or the date that Developer has leased the Subject Property to its first tenant and the tenant has taken possession of the Subject Property (hereinafter referred to as the "Start Date"), and continuing until the first to occur of, (i) seven (7) years or (ii) the Village paying the Developer Seventy-Thousand Dollars (\$70,000) or the total cost of the Cross-Access Connection as certified pursuant to Article II Section C., whichever is less, with the first of the Quarterly Installment Payments to be made fifteen (15) days after the Start Date, with subsequent Quarterly Installment Payments being made at three (3) month intervals thereafter, subject to the following calculations, deductions, terms and conditions:
- 1) The "**Quarterly Installment Payments**" shall mean an amount equal to the Sales Tax Revenues received by the Village from the State, , which are generated from sales on the Subject Property during the three (3) month period preceding the payment date as referenced above. All amounts paid to Developer will be due and payable, solely from the Sales Tax Revenues received by the Village from the Subject Property, on the dates provided herein.
 - 2) In no event shall the Village be obligated under this Agreement to make Quarterly Installment Payments to Developer, which, in the aggregate over the life of this Agreement, exceed the total certified costs for the Cross-Access Connection.
 - 3) Prior to making each of the Quarterly Installment Payments, the Village shall mail to Developer a letter, itemizing the gross Sales Tax receipts received from the State for the preceding quarter, from retail sales on the Subject Property, any deductions to be retained by the Village, and the net dollar amount to be paid to Developer pursuant to this Agreement.
- C. The Village shall provide for Quarterly Installment Payments required under this Agreement by appropriating an adequate amount therefor in its annual budget ordinance for the fiscal years in which such payments are due. The payments shall be the limited obligation of the Village payable solely out of the Sales Tax Revenues received from retail sales on the Subject Property.

- D. In the event Developer fails to deliver to the Village all of the certifications provided for herein, within the time periods set forth, or otherwise materially violates any term or provision of this Agreement, then in such event, the Village shall have no obligation to make any payment to Developer until such time as any such failure or violation is corrected to the reasonable satisfaction of the Village, and all rights of Developer to demand any current or future payment from the Village shall be deemed waived until such failure or violation is so corrected.

IV. UNDERTAKINGS ON THE PART OF DEVELOPER

- A. Developer shall complete the Cross-Access Connection in accordance with the schedule set forth herein and in accordance with the Final Plans, and all applicable ordinances, rules and regulations of the Village in existence as of the date of such approval, and all rules and regulations thereunder.
- B. Developer recognizes and agrees that the Village has sole discretion with regard to all approvals and permits relating to the Cross-Access Connection, including but not limited to approval of the Final Plans, building permit and occupancy permit, and failure on the part of the Village to grant any required approval or issue any required permit shall not be deemed as the cause of a default by the Village under this Agreement or give rise to any claim against or liability of the Village pursuant to this Agreement, unless such failure arises out of the negligence or misconduct of the Village. Notwithstanding the foregoing the Village shall not exercise its authority under the subsection in an unreasonable manner.
- C. Developer shall provide the Village with a power of attorney letter(s) addressed to, and in a form satisfactory to, the Illinois Department of Revenue, or such other form or documentation as required by the Illinois Department of Revenue, authorizing the Illinois Department of Revenue to release to the Village's Finance Director, for each calendar month, all gross revenue and Sales Tax Revenues information relating to retail sales on the Subject Property, which letter shall authorize such information to be released to the Village and shall be in the form attached hereto as EXHIBIT "C", and made part hereof, or such other or additional forms as required from time to time by the Illinois Department of Revenue in order to release such information to the Village. No payments required under this Agreement shall be made by the Village without receipt of satisfactory information from the Illinois Department of Revenue indicating the Sales Tax Revenues generated from retail sales on the Subject Property for the time period covered by the applicable Annual Installment Payment. All such information received by the Village shall be considered, and is hereby represented to be by the Developer confidential proprietary financial information which, if disclosed, would cause competitive harm to the business entity to which it relates, and shall not be disclosed to any other person or entity by the Village or its Finance Director without the written consent of the business entity paying the Sales Tax Revenues to the Illinois Department of Revenue. For the purposes of this subsection it is the intent of the Parties that such

information shall be deemed exempt from public disclosure pursuant to 5 ILCS 140/7(g), or any future recodification thereof.

- D. Developer hereby covenants and agrees to promptly pay or cause to be paid as the same become due, any and all taxes and governmental charges of any kind that it may at any time be lawfully finally assessed with respect to the Subject Property; provided, however, that Developer may withhold any such tax payment for which it has filed a formal protest, with a certified copy forwarded to the Village, pursuant to a prescribed statutory procedure allowing for such nonpayment until the protest has been ruled upon; provided further, however, that any payment required after such protest is ruled upon shall be promptly paid.
- E. Developer shall give the Village notice regarding any defaults on the payment of any Sales Tax due to the Illinois Department of Revenue from retail sales on the Subject Property.

V. REPRESENTATIONS AND WARRANTIES OF DEVELOPER

- A. Developer hereby represents and warrants that the Cross-Access Connection requires economic assistance from the Village in order to complete it in accordance with the approved Final Plans, and, but for the economic assistance to be given by the Village as heretofore stated, the Cross-Access Connection as contemplated would not be economically viable nor eligible for the financing necessary for its completion.
- B. Developer hereby represents and warrants that the Cross-Access Connection shall be constructed and fully completed in a good and workmanlike manner in accordance with the Final Plans approved by the Village.
- C. Developer hereby represents and warrants that it will not knowingly violate any applicable Village zoning ordinance or regulation, building or fire code regulation, or any other applicable Village ordinance, resolution or regulation as they relate to the Subject Property unless they are being contested in a lawful manner.
- D. Developer hereby represents and warrants that it will not knowingly violate any applicable law, rule or regulation of the State, County of DuPage or the United States of America, and all agencies thereof, as they relate to the Cross-Access Connection, unless they are being contested in a lawful manner.
- E. Developer hereby represents and warrants that it is an Illinois Limited Liability Company in good standing.
- F. Developer will begin construction on the Cross-Access Connection on or before September 6, 2013 except in the event Developer is unable to begin said construction due to any strike, lockout, labor dispute, construction delays, civil disorder, riot, war,

casualty or act of God or other similar event beyond the reasonable control of Developer.

- G. Developer hereby represents and warrants that attached as EXHIBIT "A" is the legal description of the Subject Property and that said legal description is accurate and correct.

VI. DEFAULTS

The occurrence of any one of the following shall constitute an event of default by Developer under this Agreement:

- A. Failure to comply with any term, provision or condition of this Agreement within the times herein specified;
- B. Failure of a representation or warranty of Developer contained herein to be materially true and correct when made.
- C. In the event of any non-monetary default and/or breach of this Agreement or any terms or conditions by either Party hereto or bound by this Agreement, such Party shall upon written notice proceed promptly to cure or remedy such default or breach within said sixty (60) days after receipt of such notice; provided, however, that in the event such default is incapable of being cured within the sixty (60) day period and the defaulting Party commences to cure within said sixty (60) day period and proceeds to cure with due diligence, such Party shall not be deemed to be in default under this Agreement. In case such action is not taken or not diligently pursued or the default or breach shall not be cured or remedied within the above time or in the event of a monetary default (time being of the essence with respect to the payment of any sums required hereunder), the aggrieved Party may institute such proceedings as may be necessary or desirable in its opinion to cure and remedy such default or breach including but not limited to proceedings to compel specific performance by the Party in default or breach of its obligations, but not specific performance of any obligations to construct any buildings or other improvements. The rights of the Parties to this Agreement, whether provided by law or this Agreement, shall be cumulative and the exercise by either Party of any one or more of such remedies shall not preclude the exercise by it of any one or more of such remedies in relation to the same default or breach by the other Party. No waiver made by either Party with respect to any specific default by the other Party under this Agreement shall be construed as a waiver of rights with respect to any other default by the defaulting Party under this Agreement or with respect to the particular default except to the extent specifically waived in writing. Notwithstanding anything contained herein to the contrary, all monetary damages resulting from a breach of this Agreement shall be limited to the non-defaulting Party's actual out of pocket costs and expenses resulting from such breach along with all costs and expenses, including reasonable attorneys' fees, incurred by the non-defaulting Party in enforcing this Agreement. In the

event of any litigation between the Parties hereto resulting from a breach of this Agreement, the prevailing Party in such litigation, as determined by final judgment, shall be entitled to an award of its attorneys' fees and costs incurred in such litigation.

VII. NOTICES

All notices and requests required pursuant to this Agreement shall be sent by personal delivery or certified mail, return receipt requested, and addressed as follows:

If to Developer:	Mallon III, LLC c/o Mallon & Associates, Inc. 1755 S. Naperville Road Wheaton, Illinois 60189
With copies to:	
If to the Village:	Village Manager Village of Lombard 255 E. Wilson Avenue Lombard, IL 60148
With copies to:	
	Finance Director Village of Lombard 255 East Wilson Lombard, Illinois 60148
	Director of Community Development Village of Lombard 255 East Wilson Lombard, Illinois 60148
	Thomas P. Bayer, Village Attorney Klein, Thorpe and Jenkins, Ltd. 20 N. Wacker Dr. Suite 1660 Chicago, IL 60606

or at such other addresses as the Parties may indicate in writing to the other either by personal delivery or by certified or registered mail, return receipt requested, with proof of delivery thereof.

VIII. LAW GOVERNING

This Agreement shall be construed and enforced in accordance with the laws of the State of Illinois, and for the purposes of any lawsuit between the Parties concerning this Agreement, its enforcement or the subject matter thereof, venue shall be in DuPage County, Illinois.

IX. ASSIGNMENT

Developer shall not assign this Agreement to any person or entity without the prior written consent of the Village, which consent shall not be unreasonably withheld. No such assignment shall be effective, even if consented to by the Village, unless and until the assignee assumes in writing the obligations of Developer hereunder, and upon such assumption in writing, Developer shall be released from and no longer be liable for any of its obligations and the performance thereof pursuant to this Agreement.

X. TIME

Time is of the essence unless otherwise stated in this Agreement and all time limits set forth are mandatory and cannot be waived except by a lawfully authorized and executed written waiver by the Party excusing such timely performance.

XI. BINDING EFFECT

This Agreement shall inure to the benefit of and shall be binding upon the Village and Developer and their respective successors and assigns, subject however to the provisions of Articles IX and XII hereof.

XII. LIMITATIONS OF LIABILITY

No recourse under or upon any obligation, covenant or agreement of this Agreement or for any claim based thereon or otherwise in respect thereof shall be had against the Village, its officers, agents or employees, in any amount or in excess of any specific sum agreed by the Village to be paid to Developer hereunder, subject to the terms and conditions herein, and no liability, right or claim at law or in equity shall attach to or shall be incurred by the Village, its officers, agents or employees in excess of such amounts and all and any such rights or claims of Developer against the Village, its officers, agents or employees are hereby expressly waived and released as a condition of and as consideration for the execution of this Agreement by the Village. No recourse under or upon any obligation, covenant or agreement of this Agreement or for any claim based thereon or otherwise in respect thereof shall be had against Developer, its officers, agents or employees, in excess of their obligations to the Village hereunder, subject to the terms and conditions herein, and no liability, right or claim at law or in equity shall attach to or shall be incurred by Developer, its officers, agents and employees in excess of their obligations hereunder.

XIII. CONTINUITY

Notwithstanding any provision of this Agreement to the contrary, including, but not limited to, the assignment by Developer of this Agreement, Developer shall at all times during the term of this Agreement remain liable to Village for the faithful performance of all obligations imposed upon it by this Agreement until such obligations have been fully performed or until the Village, at its sole option, has otherwise released Developer from any or all of such obligations.

XIV. NO WAIVER OR RELINQUISHMENT OF RIGHT TO ENFORCE AGREEMENT

Failure of any Party to this Agreement to insist upon the strict and prompt performance of the terms, covenants, agreements, and conditions herein contained, or any of them upon any other Party imposed, shall not constitute or be construed as a waiver or relinquishment of any Party's right thereafter to enforce any such term, covenant, agreement or condition, but the same shall continue in full force and effect.

XV. FORCE MAJEURE

Whenever a period of time is provided for in this Agreement for either Developer or the Village to perform any act or obligation, and Developer or the Village, as the case may be, is unable to perform or complete such act or obligation because of Force Majeure, ("Force Majeure" being defined as an Act of God or other event or cause not reasonably within the control of Developer or the Village including, without limitation, delays by the State of Illinois or Illinois Department of Revenue, fires or other casualty, strikes, building material supply shortages, vendor problems not caused by Company, embargoes, civil riot, floods, or natural catastrophe) then upon the occurrence of any such Force Majeure, the time period for the performance and completion of such act or obligation shall be extended for a reasonable time to accommodate the delay caused by the Force Majeure. A Party may rely on a Force Majeure event to delay performance of its obligations under this Agreement only after sending notice of such Force Majeure event to the other party, which notice shall be sent not later than ten (10) business days after the discovery of such event. The Parties shall consult during the continuation of any Force Majeure event no less frequently than weekly to exchange a progress report and estimated duration thereof.

XVI. VILLAGE APPROVAL OR DIRECTION

Where Village approval or direction is required by this Agreement, such approval or direction means the approval or direction of the Corporate Authorities of the Village unless otherwise expressly provided or required by law, and any such approval may be required to be given only

after and if all requirements for granting such approval have been met unless such requirements are inconsistent with this Agreement.

XVII. SECTION HEADINGS AND SUBHEADINGS

All Article headings or other headings in this Agreement are for general aid of the reader and shall not limit the plain meaning or application of any of the provisions thereunder whether covered or relevant to such heading or not.

XVIII. AUTHORIZATION TO EXECUTE

The manager of the Developer, who has executed this Agreement, warrants that he/she has lawful authority to execute this Agreement on behalf of the Developer. The President and Clerk of the Village hereby warrant that they have been lawfully authorized by the Corporate Authorities of the Village to execute this Agreement. Developer and the Village shall deliver, upon request, to each other, at the respective time such entities cause their authorized agents to affix their signatures hereto, copies of all articles of incorporation, bylaws, resolutions, ordinances or other documents required to legally evidence the authority to so execute this Agreement on behalf of the respective Parties.

XIX. AMENDMENT

This Agreement sets forth all the promises, inducements, agreements, conditions and understandings between Developer and the Village relative to the subject matter thereof, and there are no promises, agreements, conditions or understandings either oral or written, expressed or implied, between them, other than are herein set forth. No subsequent alteration, amendment, change or addition to this Agreement shall be binding upon the Parties hereto unless authorized in accordance with law and reduced in writing and signed by them.

XX. COUNTERPARTS

This Agreement may be executed in two or more counterparts, each of which taken together, shall constitute one and the same instrument.

XXI. CONFLICT BETWEEN THE TEXT AND EXHIBITS

In the event of a conflict in the provision of the text of this Agreement and the Exhibits attached hereto, the text of the Agreement shall control and govern.

XXII. SEVERABILITY

If any provision of this Agreement is held invalid by a court of competent jurisdiction or in the event such a court shall determine that the Village does not have the power to perform any such provision, such provision shall be deemed to be excised here from and the invalidity thereof shall not affect any of the other provisions contained herein, and such judgment or decree shall relieve the Village from performance under such invalid provision of this Agreement; provided, however, if the judgment or decree relieves the Village of any of its monetary obligations under Section III of this Agreement, then this Agreement shall terminate.

XXIII. DEFINITION OF VILLAGE

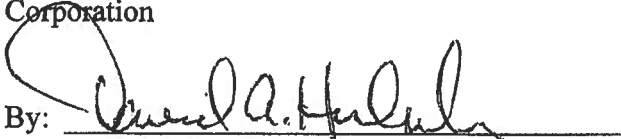
When the term Village is used herein it shall be construed as referring to the Corporate Authorities of the Village unless the context clearly indicates otherwise.

XXIV. EXECUTION OF AGREEMENT

This Agreement shall be signed last by the Village and the President of the Village shall affix the date on which he signs this Agreement on Page 1 hereof which date shall be the effective date of this Agreement.

IN WITNESS WHEREOF, this Agreement as of the date and year first written above.

VILLAGE OF LOMBARD, an Illinois Municipal Corporation

By: 
David A. Hulseberg, Village Manager
(Pursuant to the Authority Granted by the Village Board at the September 6, 2012 Village Board Meeting)

ATTEST:

By: 
Brigitte O'Brien, Village Clerk

DEVELOPER: MALLON III, LLC

By: _____

Name: _____
Manager

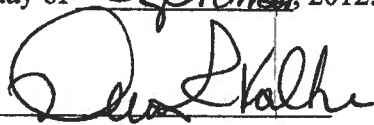
ACKNOWLEDGMENTS

STATE OF ILLINOIS)
) SS
COUNTY OF DUPAGE)

I, the undersigned, a Notary Public, in and for the County and State aforesaid, DO HEREBY CERTIFY that David A. Hulseberg, personally known to me to be the Village Manager (Pursuant to the Authority granted by the Village Board at the September 6, 2012 Village Board Meeting)VILLAGE of Lombard, and Brigitte O'Brien, personally known to me to be the Village Clerk of said municipal corporation, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that as such President and Village Clerk, they signed and delivered the said instrument and caused the corporate seal of said municipal corporation to be affixed thereto, pursuant to authority given by the Board of Trustees of said municipal corporation, as their free and voluntary act, and as the free and voluntary act and deed of said municipal corporation, for the uses and purposes therein set forth.

GIVEN under my hand and official seal, this 6th day of September 2012.

Commission expires 2/18/15, _____.


Notary Public

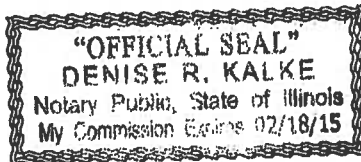


EXHIBIT A
Legal Description for Subject Property

That part of the northeast 1/4 of section 5, township 39 north, range 11 east of the third principal meridian, described as follows: beginning at a point on the south line of north avenue, (state route 64) which point is 90 feet east of the west line of grace street; thence east on the south line of north avenue, a distance of 195 feet; thence south and parallel with the west line of Grace Street, a distance of 182 feet; thence west parallel with the south line of north avenue, a distance of 195; thence north on a line 90 feet east of and parallel to the west line of grace street 182 feet to the point of beginning.

Excepting therefrom that part of the northeast 1/4 of section 5, township 39 north, range 11, east of the third principal meridian, described as follows:

Beginning at a point on the south line of north avenue (route 64) which point is 90.0 feet east of the west line of grace street; thence on an assumed bearing north 88 degrees 14 minutes 45 seconds east along the south line of north avenue 5.00 feet; thence south 12 degrees 17 minutes 42 seconds west, 25.74 feet to the east line of grace street, being 90.0 feet east of and parallel to the West line of grace street; thence north 1 degree 06 minutes 28 seconds east along the east line of grace street, 25.00 feet to the point of beginning, in DuPage county, Illinois.

Parcel Number: 06-05-200-016; (the "Subject Property").

EXHIBIT B
Cross-Access Connection Exhibit