CITY OF WEST DES MOINES
CITY COUNCIL MEETING COMMUNICATION

DATE: **September 16, 2019**

ITEM: Resolution - Approval of Consent of the City to the Collateral Assignment of the Development Agreement between Westfield Building, LLC, R&R Investors and the City of West Des Moines

FINANCIAL IMPACT: None

SYNOPSIS: On January 23, 2017, Westfield Building, LLC, R&R Investors and the City of West Des Moines entered into a Development Agreement in which the City agreed to provide the Developer economic development incentives as consideration for the construction by the Developer of the Westfield Building and the creation or retention of five or more jobs. Bankers Trust Company, as mortgagee of the Westfield Building, has requested that the City consent to the assignment of the economic development incentives provided in the Development Agreement as collateral for the loan made by the Developer and Bankers Trust. The Assignment will only occur upon default by the Developer of the loan and assumption by Bankers Trust of the Development Agreement.

The attached Resolution approves the Consent of the City to the Collateral Assignment of the Development Agreement between Westfield Building, LLC, R&R Investors and the City of West Des Moines.

RECOMMENDATION: Approve the Consent of the City to the Collateral Assignment

Lead Staff Member: Richard J. Scieszinski, City Attorney RJS

STAFF REVIEWS

Department Director	Richard J. Scieszinski, City Attorney
Appropriations/Finance	
Legal	
Agenda Acceptance	

PUBLICATION(S) (if applicable)

Published In	
Dates(s) Published	

SUBCOMMITTEE REVIEW (if applicable)

Committee	None		
Date Reviewed			
Recommendation			

RESOLUTION APPROVING THE CONSENT TO COLLATERAL ASSIGNMENT OF THE DEVELOPMENT AGREEMENT BETWEEN WESTFIELD BUILDING, LLC, R&R INVESTORS AND THE CITY OF WEST DES MOINES, IOWA

WHEREAS, on January 23, 2017, Westfield Building, LLC, R&R Investors and the City of West Des Moines entered into a Development Agreement in which the City agreed to provide the Developer economic development incentives as consideration for the construction by the Developer of the Westfield Building and the creation or retention of five or more jobs; and

WHEREAS, Bankers Trust Company, an Iowa banking corporation, as mortgagee of the Westfield Building, has requested that the City consent to the assignment of the economic development incentives ("Assignment") provided in the Development Agreement as collateral for the loan made by the Developer and Bankers Trust ("Loan"); and

WHEREAS, the Assignment will only occur upon default by Developer of the Loan and assumption by Bankers Trust of the Development Agreement; and

WHEREAS, the parties are currently in compliance with all requirements of the Development Agreement.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WEST DES MOINES, IOWA THAT:

1. The Consent of the City to the Collateral Assignment of the Development Agreement between Westfield Building, LLC, R&R Investors and the City of West Des Moines dated January 23, 2017 is approved.

2. The Mayor Pro Tem is authorized to sign the Consent of the City to the Collateral Assignment of the Development Agreement and the City Clerk is directed to attest to the Mayor Pro Tem's signature.

PASSED AND ADOPTED this 16th day of September, 2019.

_____
Russ Trimble, Mayor Pro Tem

ATTEST:

_____
Ryan T. Jacobson, City Clerk

CONSENT OF CITY TO COLLATERAL ASSIGNMENT OF DEVELOPMENT AGREEMENT

THIS CONSENT OF CITY TO COLLATERAL ASSIGNMENT OF DEVELOPMENT AGREEMENT (the "Consent") is made as of _____, 2019, by the City of West Des Moines, Iowa ("City"), in favor of BANKERS TRUST COMPANY, an Iowa banking corporation ("Bank").

RECITALS

A. Pursuant to that certain Construction and Term Loan Agreement originally dated August 1, 2017 and amended by that First Amendment to Construction Loan and Term Loan Agreement dated September 1, 2019 by and among WESTFIELD BUILDING,, LLC, an Iowa limited liability company (the "Developer"), and Bank (collectively, the "Loan Agreement"), Bank has required that Developer assign, transfer and set over to Bank, and Developer has agreed to assign, transfer and set over to Bank, all right, title and interest of Developer in, to and under, among other collateral, the Development Agreement and the Grant Payments (as those terms are defined in that certain Collateral Assignment of Development Agreement, between Developer and Bank, a copy of which is attached hereto (the "Assignment")) as a first priority security and collateral for the payment and performance by Developer of the Loan (as such term is defined in the Assignment) and all of Developer's obligations under the documents entered by Developer in connection therewith.

B. City, as a party to the Development Agreement, desires to consent to the Collateral Assignment of the Development Agreement and acknowledge that Bank is relying on this Consent in making the Loan to Developer.

NOW, THEREFORE, for and in consideration of good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, City, for the benefit of Bank and its successors and assigns, hereby:

1. Certifies a true, correct and complete copy of the Development Agreement was executed by and between City and Developer on January 23, 2017, which evidences the entire agreement between City and Developer with respect to the development of the Project (as defined in the Assignment). The Development Agreement has not otherwise been amended, supplemented or otherwise modified as of the date hereof.

2. Acknowledges that Developer is assigning and granting a security interest in all of Developer's right, title and interest in and to the Development Agreement to Bank as further security for the Loan, including, any and all other Collateral rights related thereto.

3. Agrees that the assignment of the Development Agreement pursuant to the Assignment is expressly permitted and shall not constitute a Default or Event of Default under the Development Agreement.

4. Represents and warrants to Bank that: (i) the Development Agreement is currently in full force and effect; (ii) City has not given any notice of default to Developer; (iii) the

Development Agreement constitutes the valid and binding agreement of City, enforceable in accordance with its terms; and (iv) City has the full authority under all applicable state and local laws and regulations, to perform all of its obligations under the Development Agreement.

5. States that it has no knowledge of any notice of any prior assignment, sale, hypothecation or pledge of Developer's interest under the Development Agreement.

6. Upon an Event of Default, agrees to make any future payments, including the Grant Payments, due to Developer under the Development Agreement, if any, to Bank. Upon the occurrence and continuation of any Event of Default, City shall issue payments to the Bank at the address set forth in Section 12, below, or if payment is made by wire transfer, the funds shall be wired to Bank by instructions given by Bank to City.

7. Upon receipt of demand of Bank during an Event of Default, agrees to yield to the direction of or action of Bank on behalf of Developer under the Development Agreement.

8. Agrees that unless Bank declares an Event of Default under the Loan Agreement and assumes the Developer's obligations under the Development Agreement, Bank neither assumes nor has any obligations to City to exercise Developer's rights as provided in the Assignment or to declare an Event of Default (as defined in the Assignment), but that the option to exercise such rights or declare an Event of Default rests in the sole and absolute discretion of Bank.

9. Represents that as it relates to the Project, it has no counterclaim, right of set-off, defense or like right against Developer except for those rights contained within the Development Agreement or provided at law.

10. Agrees that it will provide Bank with a copy of any notice of default required under the Development Agreement at the same time and in the same manner as it is to be provided to Developer pursuant to the Development Agreement, and that Bank shall have the right, but not the obligation, to cure any such default on behalf of Developer within the cure periods in favor of Developer set forth in the Development Agreement.

11. Agrees that it will not terminate any portion of the Development Agreement or cease to perform its obligations thereunder for any reason, including Developer's failure to make any payments to City, without giving written notice as provided in the Development Agreement and thirty (30) days' prior written notice to the Bank as is provided in this Consent to Bank of such intention to terminate or cease performing its obligations and allowing Bank to cure any defaults.

12. Agrees that all notices, requests and demands required hereunder or as may be desired to be given from one party to the other shall be in writing and shall be deemed to have been validly served, given or delivered upon the earlier of (a) personal delivery to the address set forth below, (b) in the case of electronic or facsimile transmission, when transmitted, and (c) in the case of mailed notice, three (3) days after deposit in the United States mail, with proper postage for certified mail, return receipt requested, prepaid, or in the case of

notice by Federal Express or other reputable overnight courier service, one (1) business day after delivery to such courier service when sent to the following addresses:

Each notice to Bank shall be addressed as follows:

Bankers Trust Company
453 7th Street
Des Moines, Iowa 50309
Attention: Jennifer A. Cooper

With a copy to:

Bankers Trust Company
453 7th Street
Des Moines, Iowa 50309
Attention: Emily Stork, General Counsel

If to City:

City of West Des Moines
4200 Mills Civic Parkway
P.O. Box 65320
West Des Moines, Iowa 50265
Attention: City Clerk

or at such other address as the party may designate in writing given to all other parties.

13. Agrees, upon request from Bank and at Bank's sole cost, to furnish Bank with copies of such information as Developer is entitled to receive under the Development Agreement.

14. Agrees the statements herein made shall be binding upon and inure to the benefit of City, its successors and permitted assigns, and shall be binding upon and inure to the benefit of Bank and Bank's successors and assigns.

15. Agrees the person executing this Consent on behalf of City is duly empowered to do so on behalf of City.

16. AGREES THIS CONSENT SHALL BE GOVERNED BY, AND INTERPRETED AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF IOWA, WITHOUT REGARD TO CHOICE OF LAW PROVISIONS. ANY ACTION BROUGHT IN CONNECTION WITH THIS CONSENT SHALL BE BROUGHT IN THE IOWA FEDERAL OR STATE DISTRICT COURT SITTING IN POLK COUNTY, IOWA. TO THE MAXIMUM EXTENT PERMITTED BY LAW, CITY HEREBY EXPRESSLY WAIVES ANY RIGHT IT MAY HAVE TO ASSERT THE DOCTRINE OF FORUM NON CONVENIENS OR TO OBJECT TO VENUE TO THE EXTENT ANY PROCEEDING IS BROUGHT IN ACCORDANCE WITH THIS SECTION AND HEREBY KNOWINGLY, INTENTIONALLY AND VOLUNTARILY, WITH AND

UPON THE ADVICE OF COMPETENT COUNSEL, SUBMITS TO PERSONAL JURISDICTION AND VENUE OF SUCH IOWA COURTS AND AGREES NOT TO BRING ANY ACTION, SUIT OR PROCEEDING IN ANY OTHER FORUM. NOTHING HEREIN SHALL AFFECT BANK'S RIGHT TO (I) COMMENCE LEGAL PROCEEDINGS OR OTHERWISE SUE CITY IN ANY OTHER COURT HAVING JURISDICTION OVER CITY; OR (II) SERVE PROCESS ON CITY IN ANY MANNER AUTHORIZED BY THE LAWS OF SUCH JURISDICTION, UNLESS CITY AND BANK HAVE AGREED OTHERWISE.

17. Agrees all terms not otherwise defined herein shall have the respective meanings given to such terms in the Assignment.

18. Agrees, upon termination or expiration of the Development Agreement or payment in full of the Loan by Developer, City's obligations under this Consent will terminate.

This Consent is executed by City, intending reliance hereon by Bank and its successors and assigns.

IN WITNESS WHEREOF, City, intending to be legally bound hereby, has executed this Consent as of the day and year above written.

[One Signature Page Follows]

CITY OF WEST DES MOINES, IOWA

By: _____
Print: _____
Mayor Pro Tem

ATTEST:

By: _____
Ryan T. Jacobson, City Clerk