

## LAND USE PERMIT PROCESSING AGREEMENT

This Land Use Permit Processing Agreement ("Agreement") dated and made effective as of September 27, 2016, is entered into by and between the County of Fresno ("County") and Smith Mountain, LLP, a California limited liability partnership ("Applicant") (each of whom is referred to individually as a "Party" or collectively as the "Parties").

### **I. RECITALS**

- A.** Applicant represents that it owns a 20.10 acre parcel ("Parcel 1") and a 37.90 acre parcel ("Parcel 2") of real property located at 11490 Rio Vista Avenue, Reedley, California (together, Parcel 1 and Parcel 2 are referred to as the "Property"). The Property is identified by the Fresno County Assessor's Office as Assessor's Parcel Numbers 393-060-64 and 393-060-65, respectively.
- B.** Applicant represents that it leases an approximate two (2) acre portion of Parcel 1 to Teen Challenge of Southern California, Inc., a California Nonprofit Corporation ("Teen Challenge"), which operates a residential educational facility for high school age children.
- C.** Applicant represents that it leases the remaining portion of Parcel 1 and all of Parcel 2 to a private high school, Immanuel Schools (the "School"), which the School intends to use for a sports complex which will include facilities for baseball, softball, track and field, tennis, football activities, bleachers, restrooms, and a "snack shack" serving refreshments (the "Sports Complex"). Applicant represents that the School would use the Sports Complex for physical education classes and as grounds on which its sports teams would practice and compete.
- D.** The Property is located in the Limited Agricultural Zone District ("AL Zone District") of Fresno County.
- E.** Section 817.2.G of the County Zoning Ordinance permits private schools of an elementary or secondary level to be constructed and operated in the AL Zone District subject to the County's review and approval thereof pursuant to Section 872 of the County Ordinance Code, commonly known as a Director Review and Approval Permit ("DRA").
- F.** Applicant represents that Both Parcel 1 and Parcel 2 have included structures used for elementary or secondary level private schools since at least August 12, 2003, and have been occupied and used by such private elementary or secondary schools continuously since that date with only a short period in 2014 during which one such school abandoned the Property and the process was begun to allow Teen Challenge and the School to take possession of the Property.
- G.** County Department of Public Works and Planning ("Department") staff charged with interpreting and enforcing the County Zoning Ordinance have determined that the Sports Complex is intended to be operated as part of a private secondary school, and therefore, the County should review the construction and operation of the Sports Complex to determine if a DRA should be granted to permit the intended use of the Property, including the Sports Complex.

- H. Prior to such County review of the construction and operation of the Sports Complex for such DRA, Applicant applied for and received twelve (12) building permits from the County, to construct certain facilities that would comprise the Sports Complex. The County has conducted inspections on certain components of these facilities and signed the inspection record accordingly, but the County has not issued occupancy permits for any of the facilities.
- I. The County has determined that these building permits were issued prematurely because they were issued prior to Applicant's filing of a DRA Application (as defined herein) with the County, and County's review thereof and determination thereon whether to grant a DRA.
- J. The Applicant informed the County that Applicant believes that a DRA Application, and DRA, is not required for it to construct and operate the Sports Complex.
- K. To avoid a legal dispute between the Parties regarding the County's determination that a DRA is required for Applicant to construct and operate the Sports Complex, the Parties desire to enter into this Agreement to provide an orderly process set forth herein for the Applicant to file, and for the County to review and act on, the DRA Application regarding the Property, including the Sports Complex.
- L. On September 27, 2016, in anticipation of the Parties' execution of this Agreement, Applicant submitted its DRA Application. That DRA Application is under review by the County.

**NOW THEREFORE**, in consideration of the mutual covenants, agreements, representations, and warranties contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

## **II. PURPOSE OF THIS AGREEMENT**

The intent of the Parties in entering into this Agreement is to provide for an orderly process by which the Applicant will file, and the County will review and act on, the DRA Application for a DRA that would, if granted, govern the permitted use of the Property, including the Sports Complex. To that end, the County's review of the DRA Application will, as set forth below, concern the construction and operation of the Sports Complex. The Parties acknowledge and agree that this Agreement does not bind the County to reach any particular determination on the DRA Application, and that the County will determine, based on the facts in the record and applicable legal requirements, including but not limited to, County Ordinance Code sections 817.2.G and 872, whether to grant the DRA Application and issue a DRA, grant the DRA Application and issue a DRA subject to conditions, if any, of approval, or deny the DRA Application and not issue a DRA.

## **III. APPLICANT'S OBLIGATIONS.**

- A. Applicant had, heretofore, completed, signed, and filed application for a Director Review and Approval Permit ("DRA Application") for the Sports Complex with:

Division Manager  
Development Services Division  
County of Fresno  
Department of Public Works and Planning  
2220 Tulare Street, Suite A  
Fresno, California 93721

- B.** The DRA Application shall include a written operational statement which shall include, but not necessarily be limited to, a description of the:
1. Structures and facilities which Applicant proposes to comprise the Sports Complex;
  2. Daily hours of operation of the Sports Complex;
  3. Use of any outdoor lighting;
  4. Use of sound amplification equipment;
  5. Use of water;
  6. Use of septic systems; and
  7. Parking for visitors to the Property.
- C.** Applicant shall cooperate with County staff during the County's processing of the DRA Application. This obligation shall include providing information, data, and technical studies, as County staff determines to be necessary to complete an Initial Study for the Sports Complex and any subsequent environmental studies for the Project. Applicant shall bear all costs of providing such information, data, and technical studies to the County. In addition, except for those fees specifically set forth in Section IV.A of this Agreement, Applicant shall timely remit payment for all fees required by County to process the DRA Application and any required environmental studies or determinations.
- D.** During the period of time that this Agreement is in effect, Applicant shall not initiate a lawsuit in any court against the County related to the use and enjoyment of the Property, including the Sports Complex by Applicant, Teen Challenge, or School.

#### **IV. COUNTY'S OBLIGATIONS.**

- A.** County shall waive the following filing fees associated with Applicant's DRA Application:
1. Department of Public Works and Planning: \$6,561.00;
  2. Department of Public Health: \$770.00; and
  3. Agricultural Commissioner: \$67.00.

- B. County shall process the DRA Application filed by Applicant in accordance with the legal requirements applicable to DRA applications, including but not limited to County Ordinance Code section 872, and the County's normal staffing and resources; County will not be required to accelerate its processing of the DRA Application, including expenditure of any overtime by County staff.
- C. During the period of time that that this Agreement is in effect, the County shall not initiate a lawsuit in any court to seek an injunction against the following activities conducted by Applicant or the School on the Property, so long as such activities are typically, both in type and duration, undertaken by the School:
1. Football games and practices;
  2. Tennis matches and practices;
  3. Track and field meets and practices;
  4. Baseball games;
  5. Softball games and practices; and
  6. Such other athletic activities usually and customarily conducted by the School, provided that no such athletics activities shall occur until Applicant has filed an amended operational statement that describes such athletic activities.
- V. **Term.** The term of this Agreement shall commence September 27, 2016, and shall continue through and including December 31, 2018, unless sooner terminated as provided herein.
- VI. **Termination.** County may immediately terminate this Agreement if Applicant fails to comply with its obligations under Section III. Applicant may immediately terminate this Agreement if County fails to comply with its obligations under Section IV. The provisions of this Section VI are subject to the provisions of Section VII, below, of this Agreement.
- VII. **Enforcement of Agreement.** The Parties desire to strive for a harmonious relationship under this Agreement. To that end, the Parties acknowledge and agree that a cooperative approach to the extent provided in this Section VII, reduces the potential for conflicts, and maximizes a positive result for mutual benefit of the Parties, and for the benefit of the public. The Parties will make good faith, reasonable efforts toward a mutually-satisfactory resolution, as provided in this Section VII. Prior to a Party enforcing any rights under this Agreement, the Parties shall use good faith efforts to meet, either in person, or through other means, including, but not limited to teleconferencing, to attempt to resolve any dispute through negotiation by their designated representatives. If such efforts are not successful within a 30 day period from commencement, the nonbreaching Party may proceed to the following provisions of this Agreement. No action for breach of this Agreement shall be brought or maintained until: (a) the non-breaching Party provides written notice to the breaching Party which sets forth with particularity the nature of the claimed breach; and (b) within thirty (30) days after receipt of said notice, the breaching Party fails to cure the claimed breach or, in the case of a claimed breach which cannot be reasonably remedied within a thirty (30) day

period, the breaching Party fails to commence to cure the claimed breach within such thirty (30) day period, and thereafter diligently complete the activities reasonably necessary to remedy the claimed breach.

- VIII. Notices.** Any notice, request, or communication required to be given to either Party under this Agreement shall be given in writing and shall be personally delivered or mailed by prepaid registered or certified mail to the addresses below:

County of Fresno	Clerk to the Board of Supervisors 2281 Tulare Street, Room 301 Fresno, CA 93721-2198  County Counsel 2220 Tulare Street Suite 500 Fresno, California 93721
Applicant	Smith Mountain, LP P.O. Box 456 Kingsburg, California 93631-0456  Stephen W. Reed, Esq. 301 East Colorado Boulevard Suite 501 Pasadena, CA 91101

- IX. No Third Party Beneficiaries.** Notwithstanding anything else to the contrary herein, the Parties acknowledge and agree that no other person, firm, corporation, or entity (including the School or Teen Challenge) shall be deemed an intended third-party beneficiary of this Agreement.
- X. Relationship Between Parties.** Nothing contained in this Agreement shall create, or be deemed to create, any relationship of principal-agent, master-servant, employer-employee, partnership, joint venture, or association between the Parties. The relationship between the Parties under this Agreement is that of independent contractors, with each Party at all times acting in an independent capacity from the other.
- XI. Non-Assignment.** Neither Party hereto shall assign, transfer, or subcontract this Agreement nor their rights or duties under this Agreement without the prior written consent of the other party hereto.
- XII. Amendments, Modifications, and Waivers.** This Agreement may only be amended or modified through writing executed by all the Parties. No waiver of any provision of this Agreement will be valid unless and until it is in writing and signed by the Party making

the waiver. Waiver by either Party at any time of a breach of this Agreement shall not be deemed a waiver of or consent to a breach of the same or any other provision of this Agreement.

- XIII. **Governing Law and Forum.** The Parties agree that for the purposes of venue, performance under this Agreement is to be in Fresno County, California. The rights and obligations of the parties and all interpretation and performance of this Agreement shall be governed in all respects by the laws of the State of California.
- XIV. **Construction of Agreement.** The Parties agree that this Agreement is clear and unambiguous, and agree that it was drafted by the respective counsel for the Parties at arms-length. Each Party, and counsel for each Party, has reviewed and revised, or has had the opportunity to review and revise, this Agreement, and accordingly, any rules of construction of this State, to the effect that any ambiguities are to be resolved against the drafting party, shall not be employed in the interpretation of this agreement or any amendment of it.
- XV. **Equitable relief.** The Parties agree (i) that the performance of the obligations of this Agreement are paramount, (ii) that, in the event of a breach, legal remedies may provide inadequate relief, and (iii) that each may seek equitable relief to enforce such obligations. In the event of litigation to enforce this Agreement, each party shall bear their own costs and attorney's fees.
- XVI. **Hold Harmless and Indemnification.** Applicant shall save, indemnify, hold harmless and, at the County's request, defend the County, its officers, agents, and employees from and against all expenses, demands, liabilities, claims, costs (including but not limited to court costs and attorney's fees), or damages for the injury to any person or damage to any personal property occurring or resulting to County, its officers, agents, and employees, or to the person, organization or entity bringing the cause of action, or their officers, agents, or employees, arising or resulting from, or in connection with, the following:
- A. any negligent or wrongful act or omission by Applicant, its officers, agents, or employees, or Applicant's lessee(s), or its officers, agents, employees, or invitees on the Property, or
  - B. any use of the Property by Applicant, its officers, agents, or employees, or Applicant's lessee(s), or its officers, agents, employees, or invitees that is inconsistent with this Agreement.

When defending the County, Applicant shall pay all attorneys' fees and costs related to the defense in any action brought against the County or Applicant, except for any fees and costs incurred by the County in defense of any action. Applicant shall defend the County through counsel selected by Applicant (including but not limited to in-house counsel) and shall keep the County fully informed as to the progress of such defense. The County shall cooperate fully with Applicant in the defense of the claim.

Applicant represents to County that Applicant carries adequate liability insurance to secure its obligations under this Section XVI.

The provisions of this Section XVI shall survive the termination of this Agreement.

- XVII. Authorized Signatory.** Each Party represents and warrants to each other Party that its signature to this Agreement has the authority to bind the Party, and this Agreement does in fact bind the Party.
- XVIII. Effective Date.** This Agreement is effective as of the effective date written in the first paragraph. Each Party hereby approves and ratifies each and every action taken by its representatives upon and after the effective date of this Agreement continuing until its execution by the Party.
- XIX. Severability.** In the event any provisions of this Agreement are held by a court of competent jurisdiction to be invalid, void, or unenforceable, the Parties will use their best efforts to meet and confer to determine how to mutually amend such provisions with valid and enforceable provisions, and the remaining provisions of this Agreement will nevertheless continue in full force and effect without being impaired or invalidated in any way.
- XX. Counterparts.** This Agreement may be executed in counterparts and when so executed by the Parties, shall become binding upon them and each such counterpart will be an original document.
- XXI. Binding Effect.** This Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto.
- XXII. No Conflict Intended.** The headings used in this Agreement are intended for the convenience of the reader only and shall not affect the meaning or interpretation of this Agreement.
- XXIII. Entire Agreement.** The Parties acknowledge that this Agreement is signed and executed without reliance upon any actual or implied promises, warranties or representations made by any of the Parties or by any representative of any of the Parties, other than those which are expressly contained within this Agreement. This Agreement, including the true and correct Recitals above, inclusive of all definitions contained therein, that are incorporated by reference herein as operative covenants and specifically relied upon by the Parties in executing this Agreement, constitutes the entire agreement and understanding among and between the Parties concerning the use of the Property by Applicant, including School, during the County's processing of the DRA under this Agreement.

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The parties hereto have executed this Agreement, which is effective as of the day and year first written above.

**SMITH MOUNTAIN, LP**

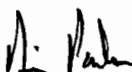
**By: RMGK, LLC, Its General Partner**



By: Michael Jackson, Manager

Dated: 12-8-16

**COUNTY OF FRESNO**

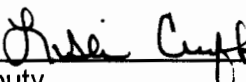


By ~~Ernest Rudy Mendez~~, Chairman  
Brian Pacheco


Dated: February 28, 2017

ATTEST

Bernice E. Seidel, Clerk  
Board of Supervisors

By   
Deputy

REVIEWED AND RECOMMENDED FOR  
APPROVAL


  
Steven E. White, Director  
Department of Public Works and Planning

~~APPROVED AS TO LEGAL FORM  
ON BEHALF OF SMITH MOUNTAIN, LP~~

~~Stephen W. Reed, Esq.~~

APPROVED AS TO LEGAL FORM  
ON BEHALF OF COUNTY OF FRESNO

Daniel C. Cederborg, County Counsel

By   
Deputy