

APPROVED 7-0



CITY OF HUNTINGTON BEACH REQUEST FOR CITY COUNCIL ACTION

MEETING DATE: 11/21/2016

SUBMITTED TO: Honorable Mayor and City Council Members

SUBMITTED BY: Fred A. Wilson, City Manager

PREPARED BY: Ken Domer, Assistant City Manager
Kellee Fritzal, Deputy Director, Business Development

SUBJECT: Approve and authorize execution of a Sales Tax Sharing Agreement between the City and McKenna Motors Huntington Beach, Inc., for the opening of a new Subaru Dealership

Statement of Issue:

The City Council is asked to approve a Sales Tax Sharing Agreement with McKenna Motors Huntington Beach, Inc., for the development and opening of a Subaru car dealership at 18711 Beach Boulevard. The Agreement will incentivize McKenna Motors Huntington Beach to construct the car dealership. The Agreement establishes that the sales tax portion of the first \$25 million from McKenna VW in gross car sales is retained by the City and annually after \$25 million, the sales tax is split 55% to the City and 45% to McKenna Motors Huntington Beach, LLC. ("McKenna").

Financial Impact:

The proposed agreement is revenue positive for the City. The base sales tax received from McKenna Volkswagen will 100% remain with the City. The new dealership is estimated to generate \$27 million in annual sales; therefore, annually the City will see an increase (after the base) of \$83,700 of sales tax generated. Based upon this estimate, McKenna is projected to receive approximately \$68,500 per annum and the City a total of \$234,500.

Recommended Action:

A) Approve and authorize the Mayor and City Manager to execute the "Sales Tax Agreement Between the City of Huntington Beach and McKenna Motors Huntington Beach, Inc."; and,

B) Increase appropriation as revenue is received above the base to pay for City's share of the Sales Tax Sharing Agreement; and,

C) Authorize the City Manager or designee to execute any additional documents required to further the Agreement.

Alternative Action(s):

Do not approve Agreement and direct Staff as necessary.

Analysis:

Mr. Danny McKenna owns and operates the McKenna VW on Beach Boulevard. He also owns the property that a majority of the Kia Dealership is located and operated from. Due to concerns over a pending residential project (the proposed Urban Art Lofts on the former McDonald's site) adjacent

to his dealership, the future of both car dealerships (VW and Kia) had been in question. Due to the residential project being in the planning application process, the property was valued much higher than an otherwise vacant parcel. In order to continue his auto dealer business, Mr. McKenna purchased the adjacent land (former Urban Art Lofts project) from the residential developer for \$6.75 million. With the purchase of the land, Mr. McKenna was presented with the opportunity to also purchase a closing Subaru dealership, which he has done. Mr. McKenna would like to expand and use the two parcels adjacent to the McKenna VW lot, of which he is the now the owner, to construct a new showroom/retail store and maintenance facility to meet Subaru's dealership image and space guidelines. The opportunity is expensive and the Agreement provides for assistance. Mr. McKenna will be investing an additional \$4.5 to \$5 million to construct the new dealership in addition to the purchase of the land (\$6.75 million) and the purchase of the Subaru franchise (\$6 million), for a total private investment by Mr. McKenna of over \$17 million.

The proposed economic development subsidy will enable Mr. McKenna to expand the operations of both the VW and Subaru dealerships, with annual combined sales revenues of approximately \$52 million per year and potentially increasing the annual sales tax revenues to the City by an average of \$148,000 per year over the existing base of \$150,800 per year, or approximately by 100%.

In addition, with the Agreement, Mr. McKenna will be signing a long term lease with Kia (Ken Phillips) for the continued operation of the Kia car dealership and will allow Kia to remain in Huntington Beach. Mr. Phillips is in the planning process to build a new showroom representing another large private investment which could result from this deal.

Environmental Status:

Not Applicable

Strategic Plan Goal:

Strengthen Economic and Financial Sustainability

Attachment(s):

1. Sales Tax Sharing Agreement between the City of Huntington Beach and McKenna Motors Huntington Beach, LLC
2. Letter from Danny McKenna
3. Subsidy Report – Government Code Section 53083

**ECONOMIC DEVELOPMENT SUBSIDY REPORT
PURSUANT TO GOVERNMENT CODE SECTION 53083
FOR A SALES TAX SHARING AGREEMENT
BY AND BETWEEN CITY OF HUNTINGTON BEACH
AND MCKENNA MOTORS HUNTINGTON BEACH, INC.**

Pursuant to Government Code Section 53083, the City Council of the City of Huntington Beach must hold a noticed public hearing and, prior to the public hearing, provide all of the following information in written form and available to the public and through the City's website regarding a proposed economic development subsidy to be provided by the City pursuant to a Sales Tax Sharing Agreement by and between the City of Huntington Beach and McKenna Motors Huntington Beach, Inc. ("Agreement"). Notice was published on the City's website for a public hearing to be held on November 21, 2016.

The purpose of this report is to provide the information required pursuant to Government Code Section 53083 in regards to the Agreement. This report shall remain available to the public and posted on the City's website until the end date of the economic development subsidy, as further described in Number 2 below.

1. The name and address of all corporations or any other business entities, except for sole proprietorships, that are the beneficiary of the economic development subsidy.

The Agreement is with McKenna Motors Huntington Beach, Inc. who will construct, own and operate a new Subaru dealership that will benefit from the economic development subsidy:

McKenna Motors Huntington Beach, Inc.
18711 Beach Boulevard
Huntington Beach, CA 92647

2. The start and end dates and schedule, if applicable, for the economic development subsidy.

If the Agreement is approved by the City Council, the start date of the economic development subsidy will commence on January 1, 2017 and the end date will be no later than 16 years after the start date, on December 31, 2033. The economic development subsidy will be paid quarterly, within 60 days of the end of each quarter.

3. A description of the economic development subsidy, including the estimated total amount of the expenditure of public funds by, or of revenue lost to, the local agency as a result of the economic development subsidy.

The economic development subsidy is equal to forty-five percent (45%) of the sales tax revenue received by the City for the VW and Subaru dealerships in excess of \$150,800 (base year) for each year of the term. The term of the subsidy is 16 years and the estimated total amount of revenue lost to the City is estimated at \$1.94 million (\$121,250 average per year) in nominal dollars or approximately \$987,000 in present value terms, assuming an 8% discount rate.

6. The estimated number of jobs created by the economic development subsidy, broken down by full-time, part-time and temporary positions.

The City anticipates the construction and operation of the new dealership will yield a minimum of 85 full- and part-time jobs and approximately 50 temporary new jobs during the construction.

SALES TAX SHARING AGREEMENT BETWEEN
THE CITY OF HUNTINGTON BEACH
AND
McKENNA MOTORS HUNTINGTON BEACH, INC.

THIS SALES TAX SHARING AGREEMENT ("Agreement") dated as of NOVEMBER 21/2016, is entered into by and between the CITY OF HUNTINGTON BEACH, a Municipal Corporation of the State of California ("City"), and McKENNA MOTORS HUNTINGTON BEACH, INC., a California corporation ("McKenna").

RECITALS

A. McKenna in the business of selling motor vehicles. McKenna's point of sale for purposes of the Uniform Local Sales and Use Tax Law is located at 18711 Beach Blvd., Huntington Beach, California 92648.

B. McKenna is contemplating opening a new Subaru Dealership at 18711 Beach Blvd., in Huntington Beach.

C. City recognizes that the expansion of McKenna to Huntington Beach will contribute to the economic vitality of the City, provide additional jobs, expand the City's tax base and otherwise improve economic and physical conditions in the City.

D. In order to induce McKenna to open a new Subaru Dealership in Huntington Beach, the City is willing to provide incentive to McKenna as described in this Agreement.

E. By its approval of this Agreement, the City Council of the City of Huntington Beach finds and determines that this Agreement serves a valid public purpose through expanding economic opportunities for businesses in the City, expanding the City's employment base, and generating Sales Tax that City can utilize to fund general governmental services such as police, fire, street maintenance, and parks and recreation programs. City and McKenna have agreed that the respective considerations are a fair exchange.

F. The City has found that it is of benefit to the City and its citizens that certain obligations be imposed upon McKenna's future place of business to ensure Subaru vehicle sales and the resulting sales-tax revenues to the City.

NOW, THEREFORE, based upon the foregoing Recitals and in consideration of the mutual covenants and conditions hereinafter set forth, McKenna and City agree as follows:

DEFINITIONS.

The capitalized terms and words used in this Agreement shall have the following meanings unless expressly provided to the contrary.

1.1 "Commencement Date" means first day of the month following McKenna Motors Huntington Beach, Inc.'s opening of a Subaru Dealership in Huntington Beach.

1.2 "Event of Default" means any event so designated in this Agreement.

1.3 "Fiscal Year" means the City's Fiscal Year of October 1 through September 30.

1.4 "Laws" means all California State Statutes, laws, Ordinances, regulations, orders, writs, judgments, injunctions, decrees or awards of the United States or any state, county, municipality or other Governmental Agency.

1.5 "Operating Period" means the period beginning with the Commencement Date and expiring sixteen (16) years later.

1.6 "Party" means any party to this Agreement. The "Parties" shall be all parties to this Agreement.

1.7 "Penalty Assessments" means penalties, assessments, collection costs and other costs, fees or charges resulting from late or delinquent payment of Sales Tax and which are levied, assessed, or otherwise collected from the business on the Site owning or obligated to pay Sales Tax.

1.8 "Person" means any entity, whether an individual, trustee, corporation, partnership, trust, unincorporated organization, governmental agency or otherwise.

1.9 "Sales Tax Increment" means that portion of taxes derived and received by the City of Huntington Beach from the imposition of the Bradley Burns Uniform Local Sales And Use Tax Law, commencing with Section 7200 of the Revenue and Taxation Code of the State of California, as amended, or its equivalent, arising from all businesses and activities conducted on the Site. Sales Tax Increment shall not include Penalty Assessments, any Sales Taxes levied by, collected for or allocated to the State of California, the County of Orange, a district or any other entity, notwithstanding that such funds received by City are derived or measured by such other entity based upon Sales Taxes. The Sales Tax Increment shall not exceed one percent (1%) upon taxable sales and uses on the Site.

1.10 "Site" refers to 18711 Beach Blvd., Huntington Beach, California 92648, the property within the City of Huntington Beach where McKenna will establish a Subaru Dealership.

1.11 "Sales Tax" means the tax derived from McKenna's business conducted on the Site and a portion of which is allocated to and received by the City pursuant to the Uniform Local Sales and Use Tax Law, commencing with California Revenue and Taxation Code Section 7200, *et seq.*, as amended.

2. THE PARTIES

2.1 McKenna, a California corporation, whose mailing address for purposes of this Agreement is: 18711 Beach Blvd., Huntington Beach, California 92648. Wherever the term McKenna is used in this Agreement, the term shall be deemed to refer to McKenna Motors Huntington Beach, Inc.

McKenna may assign the rights and obligations of this Agreement to any other person, entity, or organization as long as the underlying business operations at the location remain an automobile dealership.

By executing this Agreement, McKenna warrants and represents to City that it has the full power and authority to enter into this Agreement and that all authorizations and approvals required to make this Agreement binding upon McKenna have been duly obtained.

2.2 The City is a Municipal Corporation, duly organized and existing pursuant to its City Charter.

3. OBLIGATIONS OF McKENNA

3.1 Agreement. McKenna hereby covenants and agrees that they have opened a Subaru Dealership and are selling vehicles at the Site within, and to continue to use the Site as its primary Subaru Dealership business location during the Operating Period.

3.2 Site and Restrictions. McKenna shall, within a reasonable time, not to exceed three years from approval of this document by the City Council of the City of Huntington Beach, establish a Subaru Dealership at the Site. The purchase of the Site by McKenna shall result in a deed restriction on the Site, good and lasting for 16 years, which restricts the use of the Site and underlying property for new Auto Sales only. If McKenna is unable to purchase the Site in Huntington Beach, McKenna and the City Manager or his or her designee shall help identify an alternative site within the City of Huntington Beach. If said negotiations are unsuccessful, either party may terminate this Agreement upon thirty (30) days' written notice to the other party.

3.3 Maximize Sales Tax. During the Operating Period, McKenna shall use its best efforts, consistent with the requirements of law, to designate the Site as the point of sale in all sales of its products.

3.4 Indemnification. From the Commencement Date of this Agreement through the termination date, McKenna shall indemnify, defend, and hold harmless City and its officers, employees and agents, from and against all liabilities, obligations, claims, damages, penalties, causes of action, judgments, costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) (collectively "Claims") imposed upon or incurred by or asserted against City arising out of any act or omission of McKenna or its business; provided, however, that the aforesaid obligations of McKenna shall not apply to the extent any Claim results from the active negligence or intentional misconduct of City or any of City's officers, employees, agents, or contractors. In the event that any action, suit or proceeding is brought against City by reason of any such occurrence, McKenna, upon City's request, will, at McKenna's expense, defend such action, suit or proceeding at its sole cost.

3.5 Insurance. McKenna shall take out and maintain in effect through the Operating Period, at McKenna's sole cost and expense, the following insurance policies in the minimum amounts specified and in the forms provided below:

(1) Comprehensive General Liability in an amount of not less than One Million Dollars (\$1,000,000) combined single limits for each occurrence for bodily injury, personal injury, and property damage including contractual liability.

(ii) Workers' Compensation as required by the Labor Code of the State of California and Employers' Liability insurance in an amount not less than required by California law.

3.6 Local, State and Federal Laws. McKenna shall carry out the operation of the business in conformity with all applicable local, State and Federal laws.

3.7 Anti-discrimination. McKenna shall not discriminate against any employee or applicant for employment because of age, sex, marital status, race, handicap, color, religion, reed, ancestry, or national origin.

3.8 McKenna's Representations and Warranties. McKenna makes the following representations and warranties as of the date of this Agreement and agrees that such representations and warranties shall survive and continue thereafter but shall not be remade after the date of this Agreement.

3.8.1 No Litigation. There is no litigation, action, suit, or other proceeding pending or threatened against McKenna or the Site that may adversely affect the validity or enforceability of this Agreement or sale of vehicles at the Site. To the best of McKenna's knowledge, McKenna is not in violation of any State Statute, Federal law, regulation or Ordinance, or of any order of any court or governmental entity, the effect of which would prohibit McKenna from performing its obligations hereunder.

3.8.2 Authority. McKenna has complied with all governmental requirements concerning its organization, existence and transactions. McKenna has the right and power to own and operate its business as contemplated in this Agreement.

3.8.3 No Breach. To McKenna's knowledge, none of the undertakings contained in this Agreement violate any applicable governmental requirements, or conflicts with, or constitutes a breach or default under, any agreement by which McKenna is bound or regulated.

3.8.4 Warranty Against Payment of Consideration for Agreement. McKenna warrants that it has not paid or given, and will not pay or give, to any third person, any money or other consideration for obtaining this Agreement, other than normal costs of conducting business and costs of professional services such as accountants and attorneys.

3.9 Release of City Officials. No member, official, agent, employee, or attorney of the City shall be personally liable to McKenna, or any successor in interest of McKenna, in the event of any default or breach by the City or for any amount which may become due to McKenna or its successors, or on any obligations under the terms of this Agreement. McKenna hereby waives and releases any Claim it may have personally against the members, officials, agents, employees, consultants, or attorneys of the City with respect to any default or breach by the City or for any amount that may become due to McKenna or its successors, or on any obligations under the terms of this Agreement.

3.10 Reports. Within ten (10) days of filing each report with the State Board of Equalization, McKenna shall provide to the City true and correct copies of all reports filed by McKenna with the State Board of Equalization in order to allow the City to preliminarily determine the amount of Sales Tax paid by McKenna on account of sales from the Site; provided, however, that the City shall not be deemed to have received any Sales Tax until the City's actual receipt thereof.

4. OBLIGATIONS OF CITY OF HUNTINGTON BEACH

4.1 Tax Rebate. Within thirty (30) days after the City confirms its receipt of Sales Tax paid by McKenna on account of sales from the Site during the Operating Period, the City shall pay to McKenna on a quarterly basis financial assistance in an amount equal to forty-five percent (45%) of annual Sales Tax Increment generated by McKenna within the City of Huntington Beach and actually received by the City, after the first \$150,800.00 in annual gross sales. City retains all sales tax of the first \$150,800.00 in annual gross sales.

4.2 City's Obligation to Provide Assistance Conditional on Sales Tax Increment. The City's obligation to provide McKenna with assistance pursuant to 4.1 is conditioned upon McKenna producing Sales Tax Increment each Fiscal Year. To the extent McKenna does not produce Sales Tax Increment, then the tax rebate obligations herein shall be reduced to zero.

4.3 Annual Adjustment. Promptly after each fiscal year of the City which includes a portion of the Operating Period, the City shall determine with respect to that fiscal year the aggregate amount of Sales Tax received by the City and the aggregate amount of financial assistance payments made to McKenna pursuant to Section 4.1. If for any reason (including but not limited to reporting errors or other adjustments) the aggregate amount of payments by the City with respect to that fiscal year is less than the aggregate amount payable with respect to that fiscal year, the City shall pay to McKenna an adjustment payment equal to the amount of deficiency; if for any reason (including but not limited to reporting errors or other adjustments) the aggregate amount of payments by the City with respect to that fiscal year is more than the aggregate amount payable with respect to that fiscal year, then the amount of the excess shall be applied against the next payments due under Section 4.1, except that if any unapplied excess remains after the Operating Period, McKenna shall pay the amount of the unapplied excess to the City upon demand.

4.4 Legal Challenge. Should any third party successfully challenge the validity of this Agreement through a taxpayer suit or otherwise, either party may terminate this Agreement upon thirty (30) days written notice.

4.5 Contingent Liability and Limitations. The tax rebate obligations of the City of Huntington Beach shall be subject to the provisions of City Charter Section 605, regarding annual budget appropriations, and will not be payable for a period in excess of the twenty-year Operating Period after relocation to the new site.

5. DEFAULTS AND REMEDIES

5.1 Events of Default. The following shall initiate the default sequence:

(a) If McKenna materially breaches any of its obligations under Sections 3.1 through 3.7 of this Agreement.

(b) If McKenna is found by a trier of fact, after hearing, to be in violation of any Local, State or Federal law.

(c) If McKenna is found by a trier of fact, after hearing, in a final, non-appealable order or judgment, either to be in violation of any anti-discrimination regulation or to be liable in a suit for discrimination.

(d) If McKenna fails to provide the City with copies of the quarterly (or, if applicable, monthly) Board of Equalization reports filed by McKenna.

(e) If City fails to timely pay its obligations hereunder.

When any of the initiating events described in this Section 5.1 occur, City or McKenna may give the other written notice to cure. Where such act or omission is not cured by the breaching Party within thirty (30) days after that Party's receipt of written notice that such obligation was not performed, it shall constitute an Event of Default; provided that, if cure cannot reasonably be effected within such 30-day period, such failure shall not be an Event of Default so long as the Party promptly (in any event, within 10 days after receipt of such notice) commences cure, and thereafter diligently (in any event within 10 days after receipt of such notice) commences cure, and thereafter diligently (in any event within a reasonable time after receipt of such notice) prosecutes such cure to completion.

5.2 Remedies Upon Default. Upon the occurrence of any Event of Default, and thirty (30) days after written notice of default, and after a reasonable opportunity to cure such default, City or McKenna, as appropriate, may terminate this Agreement and file any action available in law or equity.

6. GENERAL PROVISIONS

6.1 Time of the Essence. Time is of the essence of this Agreement and all Parties' obligations hereunder.

6.2 Venue. In the event of any litigation hereunder, all such actions shall be instituted in the Superior Court of Orange, State of California, or in an appropriate municipal court in the County of Orange, State of California or an appropriate Federal District Court in the Central District of California.

6.3 Applicable Law. The laws of the State of California shall govern the interpretation and enforcement of this Agreement.

6.4 Execution in Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument.

6.5 Attachments Incorporated. The Attachment to this Agreement is incorporated herein by this reference.

6.6 Copies. Any executed copy of this Agreement shall be deemed an original for all purposes.

6.7 Severability. If any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability, unless it affects the substantial rights of a party or defeats the purpose of this Agreement, shall not affect any other provision of this Agreement, but this Agreement shall be construed as if such invalid, illegal or unenforceable provision has not been contained herein.

6.8 Interpretation. The language in all parts of this Agreement shall in all cases be construed as a whole according to its fair meaning, and not strictly for or against any party. When the context of this Agreement requires, the neuter gender includes the masculine, the feminine, a partnership or corporation of joint venture or other entity, and the singular includes the plural.

6.9 No Partnership or Joint Venture. The parties hereto agree that nothing contained in this Agreement shall be deemed or construed as creating a partnership, joint venture, or association between City and McKenna; or cause City or McKenna to be responsible in any way for the debts or obligations of the other, and no other provision contained in this Agreement nor any acts the parties hereto shall be deemed to create any relationship between City and McKenna other than that of contracting parties. Further, nothing herein shall give or is intended to give any rights of any kind to any person not an express party hereto.

6.10 Integration. This Agreement, including the Attachments attached hereto, is the entire Agreement between and final expression of the parties, and there are no agreements or representations between the parties except as expressed herein. All prior negotiations and agreements between City and McKenna with respect to the subject matter hereof are superseded by this Agreement. Except as otherwise provided herein, no subsequent change or addition to this Agreement shall be binding unless in writing and signed by the parties hereto.

6.11 Nonwaiver. None of the provisions of this Agreement shall be considered waived by any party except when such waiver is given in writing. The failure of any party to insist in any one or more instances upon strict performance of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights for the future, but the same shall continue and remain in full force and effect.

6.12 Notices. Any notice, approval, demand or other communication required or desired to be given pursuant to this Agreement shall be in writing and shall be effective upon personal service (including by means of professional messenger service) or, five (5) days after mailing via United States first-class mail or two (2) days after mailing via Federal Express or other similar reputable overnight delivery service. Any notice shall be addressed as set forth below:

If to City:

Kellee Fritzel
Deputy Director of Business Development
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648

If to McKenna:

McKenna Motors Huntington Beach, Inc.
Attn: Daniel J. McKenna III
18711 Beach Blvd.
Huntington Beach, CA 92648

With copies to (which shall not constitute Notice):

Michael E. Gates, City Attorney
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648

and

Fred Wilson, City Manager
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648

Either City or McKenna may change its respective address by giving written notice to the others in accordance with the provisions of this Section.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the dates hereinafter respectively set forth.

McKenna Motors Huntington Beach, Inc., a
California corporation

By: _____

print name

ITS: (circle one) Chairman/President/Vice President

AND

By: _____

print name

ITS: (circle one) Secretary/Chief Financial Officer/Asst.
Secretary - Treasurer

COUNTERPART

CITY OF HUNTINGTON BEACH,
a municipal corporation of the State
of California

Mayor

APPROVED AS TO FORM:

City Attorney DKO 11/8/16 JW

INITIATED AND APPROVED:

Deputy Director of Business Development

REVIEWED AND APPROVED:

City Manager



NO FEE

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RECORDING REQUESTED BY)
AND WHEN RECORDED MAIL TO:)

City of Huntington Beach)
2000 Main Street)
Huntington Beach, CA 92648)
Attn: City Clerk)

(Space above for Recorder's use)

This document is exempt from recording
fees pursuant to Government Code Section
27383.

AGREEMENT DECLARING CONDITIONS, COVENANTS
AND RESTRICTIONS FOR PROPERTY
(NEW AUTO SALES)

This Agreement Declaring Conditions, Covenants and Restrictions for Property -
New Auto Sales (the "Declaration") is made as of November 21, 20 16 by
and between McKENNA MOTORS HUNTINGTON BEACH, INC., a California
corporation (the "Covenantor"), and THE CITY OF HUNTINGTON BEACH, a
California municipal corporation (the "City").

RECITALS

A. Covenantor is the owner of record of that certain real property generally
located at 18711 Beach Blvd., Huntington Beach, California and legally described in the
attached Exhibit "A" (the "Site"); and

B. On NOVEMBER 21, 2016, the City Council approved that certain Sales
Tax Sharing Agreement with Covenantor authorizing a sales tax rebate incentive for the
development of a new Subaru dealership on the Site; and

C. The Sales Tax Sharing Agreement requires that the use of the Site be
restricted to New Auto sales for a period of sixteen (16) years, and the execution and
recordation of this Agreement is intended to fully satisfy these conditions.

NOW, THEREFORE, the parties hereto agree and covenant as follows:

1. Use Restriction. Covenantor agrees for itself and its successors and
assigns, and every successor to Covenantor's interest in the Site, or any part thereof, that
the Site shall be held subject to this Declaration for sixteen (16) years from the first day

of the month following Covenantor's opening of a new Subaru Auto Dealership on the Site as follows:

(a) New Auto Sales Only. Covenantor agrees that the Site will be used for purposes of New Auto sales only. As used in this Declaration, the term "Covenantor" shall mean Covenantor, its successors and assigns, and every successor to Covenantor's interest in the Project, or any part thereof.

(b) Duration. The term of this agreement shall commence on the first day of the month following Covenantor's opening of a new Subaru Auto Dealership on the Site and will continue for sixteen (16) years thereafter (the "Term"). The covenant contained in this Section 1 shall run with the land and shall automatically terminate and be of no further force or effect upon the expiration of the Term.

2. Covenants for Benefit of City. All covenants without regard to technical classification or designation shall be binding for the benefit of the City and such covenants shall run in favor of the City for the entire period during which time such covenants shall be in force and effect, without regard to whether the City is or remains an owner of any land or interest therein to which such covenants relate. The City, in the event of any breach of any such covenants, shall have the right to exercise all the rights and remedies and to maintain any such action at law or suits in equity or other proper legal proceedings to enforce and to cure such breach to which it or any other beneficiaries of these covenants may be entitled during the term specified for such covenants, except the covenants against discrimination which may be enforced at law or in equity at any time in perpetuity.

3. Binding on Successors and Assigns. The covenants and agreements established in this Declaration shall, without regard to technical classification and designation, be binding on Covenantor and any successor to Covenantor's right, title, and interest in and to all or any portion of the Project, for the benefit of and in favor of the City of Huntington Beach. All the covenants contained in this Declaration shall remain in effect for the Term, and shall automatically terminate and be of no further force or effect after such time. Upon expiration of the Affordability Period, City agrees to cooperate with Covenantor, at no cost to City, in removing this Declaration of record from the Site.

4. Counterparts. This Agreement may be executed in a number of counterparts, each of which shall be an original, but all of which shall constitute one and the same document.

5. Applicable Law.

(a) If any provision of this Agreement or portion thereof, or the application of any provision to any person or circumstances, shall to any extent be held invalid, inoperative, or unenforceable, the remainder of this Agreement, or the application of such provision or portion thereof to any other persons or circumstances,

shall not be affected thereby and it shall not be deemed that any such invalid provision affects the consideration for this Agreement; and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

(b) This Agreement shall be construed in accordance with the laws of the State of California and all applicable City Codes.

IN WITNESS WHEREOF, the City and Covenantor have caused this instrument to be executed on their behalf by their respective officers hereunto duly authorized as of the date set forth above.

COVENANTOR:

McKENNA MOTORS HUNTINGTON
BEACH, INC., a California corporation

Danny McKenna

By: _____

[Signature]
print name

ITS: (circle one) Chairman/President/Vice President

AND

Danny McKenna

By: _____

[Signature]
print name

ITS: (circle one) Secretary/Chief Financial
Officer/Asst. Secretary - Treasurer

COUNTERPART

CITY:

CITY OF HUNTINGTON BEACH,
a California municipal corporation

[Signature]
Mayor - James Katapodis

[Signature]
City Clerk - Robin Estanislau

APPROVED AS TO FORM:

[Signature]
City Attorney 11/18/00 DKO:uw

INITIATED AND APPROVED:

[Signature]
Deputy Director of Economic Development

REVIEWED AND APPROVED:

[Signature]
City Manager