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MEMORANDUM

To: Mayor and City Council

From: Bill Riley, Assistant City Attorney

Date: November 8, 2019

Subject: **Execution of Joint Defense and Common Interest Agreement**

ITEM DESCRIPTION

Common defense for Stonecrest Mall et al. v. DeKalb County et al. class action complaint agreement.

BACKGROUND

Outside counsel requires that we understand and acknowledge that the other cities Mr. Welsh is representing in Dekalb County Superior Court, Civil Action No. 19CV8568 will have a common defense.

RECOMMENDED ACTION

Assistant City Attorney recommends execution of Agreement.

JOINT DEFENSE AND COMMON INTEREST AGREEMENT

This Joint Defense and Common Interest Agreement (the “Agreement”) sets forth in writing the terms and conditions under which documents and information relating to the disputes involving the Class Action Complaint and Petition for Refund of Taxes (the “Complaint”) by and among the City of Chamblee, the City of Doraville, the City of Dunwoody and the City of Stone Mountain may be exchanged between and among the representatives and attorneys of the City of Chamblee, the City of Doraville, the City of Dunwoody and the City of Stone Mountain in matters involving pending litigation and future litigation related to the Complaint (the “Litigation”) and with other interested parties who may hereafter agree in writing to be bound by the terms of this Agreement (individually, a “Signatory,” and collectively the “Signatories”). The purpose of this Agreement is to confirm the existence of a common interest among the Signatories regarding the Litigation and to allow for the exchange of privileged and confidential information among the Signatories and/or their counsel while maintaining each and every privilege that applies to such privileged and confidential information even upon the exchange of such information with other Signatories and/or their agents. Nothing herein is meant to suggest that any of the Signatories’ previous exchanges of information and documents with respect to the Litigation is not privileged and confidential; to the contrary, the Signatories have been subject to an oral joint defense and common interest agreement and this document is intended to memorialize this understanding in writing.

The Signatories agree as follows:

1. With respect to the Litigation, the signatories share a common interest in defending the Class Action Complaint and Petition for Refund of Taxes. The attorney-client privilege and the work product doctrine shall apply to all privileged information and work

product exchanged between and among counsel for the Signatories, and their respective clients, relating to the facts, circumstances, and transactions that are the subject of the Litigation.

2. The Signatories acknowledge that not all communications, information and documents that the Signatories exchange will be protected by the attorney-client privilege and/or the work product doctrine. The Signatories therefore agree, to the extent practical, to mark “Privileged and Confidential” any attorney-client privileged and/or work product protected information that the Signatories may exchange (hereinafter, materials so marked pursuant to this Agreement shall be referred to as “Privileged and Confidential Information”). The designation of any document or information as “Privileged and Confidential” shall not operate as an agreement by any other Signatory that such designation is proper and the designation may be challenged in any appropriate forum. However, the Signatories agree that any document that a Signatory marks “Privileged and Confidential” will continue to be treated as privileged and confidential by all Signatories unless and until a court rules that the document is not protected by the attorney-client privilege and/or work product doctrine. The Signatories further agree that any document exchanged may be subsequently designated as Privileged and Confidential Information based on a good faith determination by a Signatory that such document constitutes Privileged and Confidential Information.

3. Pursuant to the principle that communications remain privileged even if communicated to one outside the privilege but with whom the privilege holder participates in a common defense strategy, any voluntary exchange of information or documents between and among counsel for the Signatories, or their respective clients, relating in any way to any issue, claim, defense or subject in the Litigation is not and shall not deemed to be a waiver of any

applicable privilege or work product claim which may be asserted as to the information and documents exchanged.

4. This Agreement includes the exchange of any privileged, confidential, private, or proprietary documents, correspondence, research memoranda, emails, drafts, notes, witness interview materials, and any other privileged or protected information in any form, including but not limited to communications, facts developed by joint investigative effort, mental impressions and legal theories developed by counsel for the Signatories and any other information governed by an attorney-client, work product, self-evaluation, or other legal privilege.

5. Nothing herein, however, shall be construed as requiring the Signatories or their counsel to provide such information to each other.

6. Information that has been designated as “Privileged and Confidential Information” pursuant to this Agreement may be provided to internal counsel and external counsel for the Signatories and such counsel’s supporting personnel; experts and consultants retained by the Signatories for purposes relating to the Litigation; and such other employees and representatives of the Signatories who need to have access to such information for purposes of the Litigation. Such access shall be conditioned upon each such individual recipient’s agreement to maintain the confidentiality of such Privileged and Confidential Information in the same manner as the individual would maintain the confidentiality of privileged or confidential information generated by the Signatory that employs or retains the individual. Notwithstanding the foregoing, any Signatory may designate any Privileged and Confidential Information as “Attorney’s Eyes Only” prior to providing such information to another Signatory and shall, with such designation, describe to the receiving Signatory the specific individual(s) to whom such “Attorney’s Eyes Only” information is authorized to be provided. The receiving Signatory shall

either decline to receive the “Attorney’s Eyes Only” information or shall comply with the restrictions imposed by the sending Signatory regarding dissemination of such “Attorney’s Eyes Only” information.

7. The Signatories are operating with the understanding that the joint defense and common interest privilege may be invoked by any Signatory to prevent disclosure of Privileged and Confidential Information to persons or entities who are not Signatories to this Agreement, including the Plaintiffs or their counsel in the Litigation. The joint defense and common interest privilege may not, however, be invoked to prevent any Signatory from using Privileged and Confidential Information in a dispute between the Signatories, so long as such use will not result in waiver of any Signatory’s right to assert the attorney-client privilege or work product doctrine to prevent disclosure of Privileged and Confidential Information to individuals or entities that are not Signatories.

8. The existence and terms of this Agreement are Privileged and Confidential Information and shall not be disclosed except as required (1) by law or to comply with an order by a court or other competent authority, (2) to make a limited confidential disclosure to a potential new Signatory to the agreement that shares a common interest, or (3) to enforce the terms of this Agreement.

9. Any Signatory who concludes that its interests are no longer aligned with those of one or more of the other Signatories so as to render a joint defense inappropriate shall so advise the other Signatories immediately in writing. Any communication or exchange of information or documents subject to this Agreement made prior to the date of such notification shall remain privileged and confidential and shall not be disclosed or used by any party, including the withdrawing party.

10. The provisions of this Agreement shall be severable, and if any provision hereof shall be held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remainder of this Agreement shall continue in full force and effect as though such illegal, invalid or unenforceable provision had not been contained herein or therein. Each Signatory may authorize its counsel to enter into this Agreement on such Signatory's behalf. By signing the Agreement, such counsel certifies that it has explained the contents of this Agreement to its client, that its client has authorized it to enter into this Agreement on behalf of the client, and that counsel and its respective client agree to abide by the terms of this Agreement. This Agreement shall inure to the benefit of and be binding on the Signatory and their counsel, and their parent companies, subsidiaries, affiliates, successors, or assigns.

11. This Agreement may be executed in counterparts, each of which shall be deemed an original and all of which shall constitute one agreement.

CITY OF CHAMBLEE:

Mayor R. Eric Clarkson

Attest: _____
City Clerk

Approved as to form:

City Attorney

CITY OF DORAVILLE:

Mayor Donna Pittman

Attest: _____
City Clerk

Approved as to form:

City Attorney

CITY OF DUNWOODY:

Mayor Denis Shortal

Attest: _____
City Clerk

Approved as to form:

City Attorney

CITY OF STONE MOUNTAIN:

Mayor Patricia Wheeler

Attest: _____
City Clerk

Approved as to form:

City Attorney