

CHAPTER 380 ECONOMIC DEVELOPMENT AGREEMENT

This Chapter 380 Economic Development Performance Agreement (this “Agreement”) is entered into this the 29th day of July, 2021, (the “Effective Date”) between the City of Wichita Falls, Texas, a municipal corporation organized and existing pursuant to the laws of the State of Texas (“City”), and OH-Wichita Falls, LLC, a Missouri limited liability company (“Owner”), each acting by and through its duly authorized representatives.

RECITALS

WHEREAS, Owner has entered into a Convention Center and Hotel Development Agreement with City related to the development of a full-service hotel (the “HDA”); and,

WHEREAS, the HDA requires, among other things, Owner to build a Marriott Delta Hotel on an approximately 1.124-acre site in the City with the general layout and location as required by the HDA (the “Project”); and,

WHEREAS, Owner is entering into a Performance Agreement with the Wichita Falls 4B Sales Tax Corporation, a Texas development corporation authorized under the Texas Development Corporation Act of 1979, Section 4A (the “Sales Tax Corp”), relating to the development of a full-service convention center hotel (“Project”); and,

WHEREAS, City finds that, upon successful completion, the Project will promote local economic development and result in stimulating business and commercial activity in the City limits, including but not limited to, a Delta Hotel, as authorized in Texas Local Government Code, Chapter 380 (the “Act”) and Article 3, Section 52-a of the Texas Constitution; and,

WHEREAS, the development of the Project in the city will protect manufacturing and industrial primary jobs in the City by providing suitable lodging for corporate representatives and visitors, retain tax revenue, and protect the tax base and economic vitality of the City; and,

WHEREAS, pursuant to the Act, City is willing to provide Owner with a program of economic development assistance as set forth herein, and Owner is willing to accept the terms and conditions stated in this Agreement; and

WHEREAS, City has determined that granting economic development program incentives in accordance with this Agreement will further the objectives of City, will benefit City and the City's inhabitants, will promote local economic development, and retain employment, business and commercial activity in the City.

NOW THEREFORE, in consideration of the foregoing, and on the terms and conditions hereinafter set forth, the parties agree as follows:

1. Authority.

A. The City's execution of this Agreement is authorized by Chapter 380 of the Texas Local Government Code and Resolution No. 78-2021 , and constitutes a valid and binding obligation of the City. Owner's execution and performance of this Agreement constitutes a valid and binding obligation of Owner in the event Owner proceeds to locate the Project at its site in the desired development zone. The City acknowledges that Owner is acting in reliance upon the City's performance of its obligations under this Agreement in making its decision to invest its funds in Wichita Falls.

2. Economic Development Program for Generating Transient Occupancy Tax.

A. City collects a seven percent (7%) hotel occupancy tax on hotel room uses within the City ("City HOT Tax"). The City collects an additional 2% hotel occupancy tax on hotel rooms, but this collection of taxes is required by law to go toward bond-specific expenditures. Subject to the terms, covenants, and conditions of this Agreement, City agrees to provide economic development program incentives to Owner in an amount equal to one hundred percent (100%) of the 7% City HOT Tax paid by Owner to the City on use of hotel rooms by customers that are part of the Project ("HOT Tax Incentive"); provided, however, to the extent cumulative City HOT Taxes for a calendar year for all hotels located in the City other than the Project are less than the prior calendar year's cumulative City HOT Taxes, Owner shall only be eligible to receive a HOT Tax Incentive for that calendar year for any City HOT Taxes that are in excess of the prior calendar year's City HOT Taxes, provided, however, that if such reduction is reasonably caused by conditions unrelated to the performance of the Convention Center (including but not limited to economic downturn, economic recession or depression, natural disaster, irregular weather, natural disaster or Act of God, or events that detrimentally affect the desirability of Wichita Falls as a meeting or travel destination unrelated to the operations of the Convention Center, then the floor will not apply. ("Annual City HOT Tax Floor Amount"). This HOT Tax Incentive will be granted for twenty (20) years following receipt of a certificate of occupancy for the Project. This rebate only applies to the primary 200-room full-service hotel and not to other hotels owned or operated by Owner.

B. Within thirty (30) days of the end of each calendar quarter, Owner will provide City with the hotel occupancy tax returns filed during such quarter with the City for the Project reflecting City HOT Tax collected by Owner during such quarter ("HOT Tax Information"). Owner will be required to file the HOT Tax Information with City. Within 60 days of the end of the calendar year, City will review and verify City HOT Taxes collected by Owner and described in Owner's HOT Tax Information and the Annual City HOT Tax Floor Amount to determine if any City HOT Tax is due to be paid by the Owner and whether Owner is eligible to receive the HOT Tax Incentive. If the City reasonably and in good faith determines that there is an amount due to the City from the Owner for unpaid City HOT Taxes, City will invoice Owner for the amount due. Payment by Owner for any amount due will be made within thirty (30) days of receiving notification from the City of the unpaid City HOT Tax due. Upon verification by the City that all City HOT Taxes have been paid by Owner, City will pay to Owner the HOT Tax Incentive within ninety (90) days of date City receives the HOT Tax Information.

3. Economic Development Program for Building Permit Fees.

As an additional economic development program, the City agrees to waive all application and/or building permit fees for each building permit required to be issued by the City for the Project (the "Fee Waivers"). This waiver only applies to the primary 200-room full-service hotel and not to other hotels owned or operated by Owner.

4. Grant of Money.

As an additional economic development program, City agrees to grant \$1,879,178.00 million required for the Project to buy land.

5. Construction and Operation of Project.

Owner shall complete construction of the Project by April 15, 2023 and continue operating the Project for five years subsequent thereto.

6. City's Obligation to Pay.

In addition to, and notwithstanding, any other requirements stated in this Agreement, the City's and Sales Tax Corp's obligations to begin or continue payments of the sales tax rebate described in the Performance Agreement, the tax abatement described in the Tax Abatement Agreement, the HOT Tax Incentive and/or to continue the Fee Waivers (collectively, the "Program Incentives") is also expressly contingent upon the following material items:

A. Owner shall cause the Project to be constructed in accordance with the ordinances of the City, and any other written agreements with the City and the Sales Tax Corp related to the Project; and

B. No ad valorem real or personal property taxes owed for the Project, project site or any improvements on the project site shall be in arrears, including but not limited to the City ad valorem tax; and,

C. Owner has not (i) made an assignment for the benefit of creditors, (ii) filed a voluntary petition in bankruptcy, or colludes or cooperates with any third party to commence any bankruptcy or insolvency proceedings against Owner, (iii) been adjudged bankrupt or insolvent, or has entered against it an order for relief in any bankruptcy or insolvency proceedings, (iv) consented to or filed a petition or answer seeking for itself any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation, (v) failed to have dismissed within sixty (60) days after the commencement thereof, any proceeding against Owner seeking reorganization, alignment, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation, (vi) failed to have vacated or stayed within ninety (90) days after the appointment thereof without Owner's consent or acquiescence, a trustee, receiver or liquidator of Owner or of all or any substantial part of its properties, or within ninety (90) days after the expiration of any such stay, fails to have the appointment vacated or (vii) taken any action in furtherance of any of the foregoing; and,

D. All HOT Tax Information has been timely filed with the City and amounts due to be paid to the City have been timely paid.

7. Covenants of Owner.

Owner covenants and agrees with City that, while this Agreement is in effect, Owner will comply or cause compliance with the following terms and conditions, which are material terms to this Agreement:

A. Owner shall cause the Project to be constructed in substantial accordance with the ordinances of the City, and any other written agreements with the City or Sales Tax Corp related to the Project; and,

B. Owner shall timely file all sales tax returns required under Texas law to be filed with the Comptroller and timely pay all amounts due as reflected on such tax returns; and,

C. Owner shall timely file all HOT Tax Information required by the City and timely pay all amounts due to the City; and,

D. Owner shall timely pay all ad valorem real or personal property taxes owed for the Project, project site or any improvements on the project site, including but not limited to the City ad valorem tax; and,

E. Owner shall timely perform and comply in all material respects with all terms, conditions, and provisions set forth in this Agreement.

8. Employee Hiring Materials and Supplies Purchase.

Although not a condition to this Agreement, City requests that Owner use commercially reasonable effort to satisfy its needs for all hotel employees from Wichita Falls' residents and, when feasible, to purchase materials, supplies and services from Wichita Falls' merchants and businesses.

9. Verification and Compliance.

Owner will allow City to review Owner's relevant records relating to the Project for the following purposes:

A. to ensure Owner's compliance with the obligations set forth in this Agreement;

B. to determine the existence of a default or breach of the terms of this Agreement;

C. to ensure compliance with the prerequisites for paying any Program Incentives or allowing any Fee Waivers;

D. to determine whether Owner paid and/or remitted the City sales tax amounts upon which the sales tax rebate is based as described in the Performance Agreement;

E. to determine whether Owner paid and/or remitted the City HOT Tax amounts upon which the HOT Tax Incentive is based; or

F. to determine whether Owner paid and/or remitted the City property tax amounts upon which the property tax incentive is based as described in the Tax Abatement Agreement.

City will provide Owner with at least five (5) business days' advance written notice of any requests for a records review and shall cooperate with Owner to schedule any review activities so as to minimize disruption of Owner's normal business operations. This Section 9 shall survive for a period of six (6) months from the date the termination of this Agreement under Section 10.

10. Termination and Events of Default.

This Agreement shall terminate twenty years from the date of this Agreement. In addition, this Agreement terminates, either immediately or after the required notice and cure period, upon any one of the following, of which B. through F. shall be considered events of default:

A. by mutual written agreement of the parties; or

B. by City immediately if the Owner intentionally provides City any false documentation relating to the Verification Receipts, or Owner files with the City any false HOT Tax Information; or

C. by City or Owner, respectively, if the other party defaults or breaches any of the terms or conditions of this Agreement and such default or breach is not cured within thirty (30) days after written notice thereof by the non-breaching party; or

D. by City if any sales or uses taxes, ad valorem real or personal property taxes, transient occupancy taxes, fees or other charges owed to Sales Tax Corp, the Comptroller, the City or any ad valorem taxing entity with jurisdiction over the Project by Owner or Developer become delinquent during the term of this Agreement and such default is not cured, or caused to be cured, by Owner within thirty (30) days after written notice thereof; or

E. by City, if any building permits required for the Project and issued by the City are revoked or expire and Owner fails to make continuous reasonable efforts to obtain new permits, as determined by City, and such default is not cured by Owner within thirty (30) days after written notice thereof; or

F. by City or by Owner, respectively, upon written notice if any subsequent federal or state legislation or any decision of a court of competent jurisdiction declares or renders this Agreement invalid or illegal.

11. Existence, Authority.

A. Owner represents and warrants that: (1) it has sufficient legal authority to conduct business in the State of Texas; (2) it has full capacity and authority to grant all rights and assume all obligations that it has granted and assumed under this Agreement; and (3) that the person or persons executing this Agreement on its behalf has been duly authorized to do so.

B. City represents and warrants that it has full capacity and authority to grant all rights and assume all obligations that it has granted and assumed under this Agreement: and that the person or persons executing this Agreement on its behalf has been duly authorized to do so.

12. Limitation of Liability.

Except for City's obligations to pay the incentives provided for in this agreement and apply the fee waivers as set forth in this Agreement, City, and its past, present and future officers, employees, contractors and agents assume no responsibilities or liabilities to Owner, or any third parties in connection with the Project, and Owner hereby waives any and all claims against City for any injury to persons or damage to property in connection therewith. It is acknowledged and agreed by the parties that the terms of this Agreement are not intended to and shall not be deemed to create any partnership or joint venture among the parties. Owner acknowledges and agrees that there shall be no personal recourse to the directors, officers, employees or agents of City, who shall incur or assume no liability in respect of any claims based upon or relating to this Agreement. It is understood and agreed between the parties that Owner, in satisfying the conditions of this Agreement, has acted independently, and City assumes no responsibilities or liabilities to third parties in connection with these actions. Further, this Agreement is not a contract for goods or services.

13. Binding Agreement; Assignment.

This Agreement shall be binding upon and inure to the benefit of the heirs, successors, affiliates, administrators, executors, and permitted assigns of the respective parties. This Agreement is not assignable to any new owner or lessee of all or any portion of the Project without the prior written approval of the City, which approval will not be unreasonably withheld. For purposes of this Section 13, the term "control" means either: (i) the ownership of 50% or more of the beneficial or economic interest or voting power of the appropriate entity or (ii) the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of the controlled entity.

14. Employment of Undocumented Workers.

During the term of this Agreement, Owner agrees not to knowingly employ any undocumented workers. In the event Owner, or Developer, is convicted of a violation under 8 U.S.C. Section 1324a (f), Owner shall repay the amount of the Program Incentives and any other funds received by the Owner from the City as of the date of such violation within one hundred and twenty (120) business days after the date Owner is notified by the City of such violation, plus interest at the rate of 6% compounded annually from the date of violation until paid.

15. Repayment.

If Owner fails to meet any obligation imposed by this Agreement (other than the obligation not to use undocumented workers which is governed by the preceding paragraph) beyond any applicable notice and cure period then future payments of Program Incentives shall cease and Fee Waivers shall cease, except for any portion of Program Incentives paid to Sales Tax Corp under Section 6.B. of this Agreement, or in connection with Sales Tax Corp's enforcement of its rights under its collateral assignment of this Agreement, Owner shall repay the full amount of all Program Incentives previously received from City within sixty (60) days of receiving notice that the repayment is due plus interest at the rate of 6% compounded annually from the date of receipt of each Program Incentive payment.

16. Notice.

Any notice required or permitted to be delivered hereunder shall be deemed received three (3) days thereafter sent by United States Mail. postage prepaid, certified mail, return receipt requested, addressed to the party at the address set forth below or on the day actually received as sent by courier or otherwise hand delivered.

If to City

City of Wichita Falls
1300 Seventh Street
Wichita Falls, TX 76301
Attn: Blake Jurecek, Assistant City Manager
Facsimile: 940-761-8833

If to Owner:

Tim O'Reilly
Manager
OH-Wichita Falls, LLC
4045 E. Sunshine Street
Springfield, MO 65809

17. Entire Agreement.

This Agreement, the Performance Agreement, and the Tax Abatement Agreement is the entire Agreement between the parties with respect to the Program Incentives and Fee Waivers.

18. Agreement Not a Debt.

The Parties hereto intend that this Agreement comply with the provisions of Article III, Section 52a of the Texas Constitution and Chapter 380 of the Local Government Code and thereby not create a debt of the City. If a court of competent jurisdiction holds that such an agreement does create a debt for the purposes of Article XI, Section 5 or other provisions of the Texas Constitution, the Parties hereby agree to reform or amend this Agreement to add such provisions necessary to make the City's payment obligations payable solely from current revenue and subject to annual appropriations.

19. Governmental Immunity Preserved.

This agreement is not intended to waive and does not waive the City's immunity from suit. In the event any legal action or proceeding is commenced between the City and Owner to enforce provisions of this Agreement and recover damages for breach, neither party in such legal action shall be entitled to recover its attorneys' fees.

20. Governing Law.

This Agreement shall be governed by the laws of the State of Texas, and venue for any action concerning this Agreement shall be in the State District Court of Wichita County, Texas. The parties agree to submit to the personal and subject matter jurisdiction of said Court.

21. Amendment.

This Agreement may be amended by the mutual written agreement of the parties herein.

22. Recitals.

The recitals to this Agreement are incorporated as if fully set forth.

23. Counterparts.

This Agreement may be executed in counterparts. Each of the counterparts shall be deemed an original instrument, but all of the counterparts shall constitute one and the same instrument.

24. Survival of Covenants.

Any of the representations, warranties, covenants, and obligations of the parties, as well as any rights and benefits of the parties, pertaining to a period of time following the termination of this Agreement shall survive termination.

25. Open Records.

If any person requests City to disclose any information of a confidential, proprietary or trade secret nature relating to Owner, the Verification Receipts, the Tax Information, this Agreement or the Project under the Texas Public Information Act (Tex. Gov't. Code Ann. Sec. 551.001, et seq.) or any equivalent or successor statute (the "Open Records Act") and such information is subject to, or potentially subject to, an exception under the Open Records Act, then prior to making any such disclosure and to the extent permitted under applicable law, City shall send notice to Owner of such request within ten (10) business days after the Owner's receipt of such request. Within three (3) business days after the Owner's receipt of such notice from City, Owner shall notify City in writing whether Owner opposes the release and desires City to request a determination from the Texas Attorney General (an "Opinion Request") as to whether the requested information must be disclosed pursuant to the Open Records Act. Contingent upon Owner's timely cooperation, City shall submit a timely request to the Texas Attorney General identifying the basis for any claimed exception;

provided, however, that City shall only be required to comply with the foregoing to the extent that City, in good faith, believes there is a reasonable basis for claiming that the requested information is subject to an exception under the Open Records Act and the Open Meetings Act permits City to make an Opinion Request in the circumstance in question. Owner shall bear the burden of establishing to the Attorney General the applicability of any sections of the Open Meetings Act claimed as an exception to disclosure in the Opinion Request by timely submitting written comments to the Attorney General.

[Signature Page to Follow]



OH-Wichita Falls, LLC

By:


Tim O'Reilly, Manager

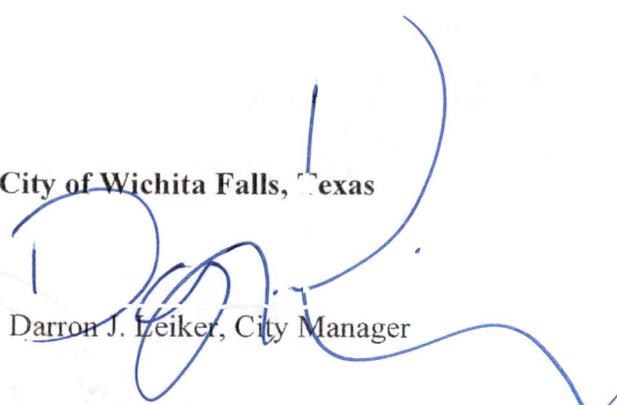
(seal)

ATTEST:

By:

City of Wichita Falls, Texas

By:


Darroon J. Leiker, City Manager

(seal)

ATTEST:

By:


Marie Balthrop, City Clerk

FORM APPROVED:

By:


R. Kinley Heggland, Jr.
City Attorney