

ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT

THIS ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT (the “Agreement”) is made and entered into this 27th day of August, 2019 (the “Effective Date”), by and between the **CITY OF LAKEWOOD**, a Colorado home rule municipal corporation whose principal business address is 480 South Allison Parkway, Lakewood, Colorado 80226 (the “City”), and **WDG BAYAUD LLC**, a Colorado limited liability company whose principal business address is 4201 East Yale Avenue, #140, Denver, CO 80222 (“Developer”).

WHEREAS, the Lakewood City Council (the “City Council”) adopted chapter 3.26 of the Lakewood Municipal Code (the “Code”) to provide funds to further the economic development goals of the City by providing financial assistance to projects that will attract enterprises the City Council has determined will further the City’s economic development goals;

WHEREAS, the City’s economic development goals include the stimulation of economic development through the creation of new employment opportunities, the establishment of a sound tax base, the promotion of business and industry and the provision of permanent jobs and skilled labor availability, services and products within the City, which thereby improves employment opportunities for the residents of the City;

WHEREAS, Developer has acquired fee title to approximately 4.3 acres located at 100 South Wadsworth Boulevard within the City (the “Property”), to add stormwater public improvements across the Property, to build thereon retail establishments, to create jobs and to add impactful tax revenue to the City’s tax base;

WHEREAS, Developer has sold a portion of the Property to LWECW Belmar LLC, but retains the responsibility to construct certain stormwater public improvements to serve that portion of the Property in accordance with the agreement between Developer and LWECW Belmar LLC;

WHEREAS, Developer has requested certain development incentives from the City for the Project;

WHEREAS, the Project is located in an “Enterprise Zone” as defined in C.R.S. § 39-30-101, *et seq.*, and is therefore eligible for certain tax rebate incentives; and

WHEREAS, the City desires to offer certain economic development incentives to the Developer as an inducement to bringing the Project to the City.

NOW, THEREFORE, for and in consideration of the recitals, premises, mutual covenants and agreements herein contained, together with other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

I. DEFINITIONS

Unless the context otherwise clearly indicates, the following words and phrases, as used in the Agreement, shall be defined as follows:

- A. “Certificate of Occupancy” shall have the meaning as set forth in Title 14 of the Code.
- B. “Economic Development Incentive Package” or “Incentives” means the rebate of a portion of Lakewood sales taxes generated by the Project as set forth herein.

- C. “Initial Construction of Project” shall mean the issuance of any and all permits for the construction of the facilities for retail uses related to the Project and for the construction by Developer of improvements necessary to the operation of the Project on the Property, as well as all other infrastructure improvements (including, without limitation, all water and sewer mains, electrical transmission conduits and equipment and other utility facilities not owned by public utilities or that are the obligation or responsibility of a special district or private utility), landscaping, facilities and appurtenances constructed and situated now or hereafter upon the Property as part of the Project and which are specifically set forth on a City-approved site plan.
- D. “Opening Date” shall mean the earlier of: (a) the first day of the second calendar month following issuance of a Certificate of Occupancy for a Pad consisting of Lot 4 or Lot 5, Broad View Acres Filing No. 2, County of Jefferson, State of Colorado, or any amended lot resulting from the combination of Lot 4 or Lot 5; or (b) a date to be selected by Developer in its discretion and established by giving notice thereof to the City (but not sooner than the date on which that notice is delivered to the City).
- E. “Pad” shall mean a parcel on the Project site used for retail operation that generates sales tax revenue to the City.
- F. “Project” shall mean the construction of physical infrastructure improvements, to include approximately 1,900 linear feet of stormwater public improvements for the site and the construction of retail pad establishments on site, the hiring of additional employees and the addition of more than \$2 million in gross sales revenue of businesses located within the City.

II. PUBLIC PURPOSE

The City Council hereby declares that there are particular public purposes for which the Incentives overcome any individual interests incidentally served by the Incentives. It is found that the development by Developer will be a benefit to the residents of the City through infrastructure improvements, increased employment, long-term tax base growth and other related economic development benefits. In addition to these general public purposes:

- A. The Incentives will permit Developer to build and operate the Project, which will contribute to the development of new businesses within the City and will result in substantial and long-term expansion of new employment and the tax base within the City.
- B. The Incentives will provide direct and indirect benefits to the City’s commercial markets. These public purposes outweigh any incidental individual interests and are not a special aid, grant or privilege.

III. ELIGIBILITY

The City has reviewed the Economic Development Incentive Package request in conjunction with the criteria set forth in chapter 3.26 of the Code and finds that the economic benefit to the City by virtue of development of the Project as represented by Developer is clearly demonstrated and that the proposal is eligible for economic incentives, based upon the following:

- A. The proposed Project will put to beneficial use presently underutilized real estate in the City.

- B. The proposed Project will result in new employment opportunities in the City.
- C. The proposed Project will increase the property tax base previously established within Lakewood.
- D. The proposed Project will provide new retail and service opportunities not currently available within the City.

IV. TERM AND TERMINATION

This Agreement, and the terms and provisions hereof, shall commence on the Effective Date and shall terminate upon the earlier of the following to occur: (a) an Event of Default that is not cured pursuant to Section XI hereof; (b) the date upon which Developer has received the full amount of the Economic Development Incentive Package; or (c) the last day of the fourth (4th) year following the Opening Date. Notwithstanding the foregoing, if termination occurs as a result of the expiration of the time period set forth in clause (c) hereof, any obligations of the City for rebate and/or reduction of any amount of the Economic Development Incentives Package that have accrued on such date but have not yet been paid shall remain due and payable, and such obligation shall not be discharged by such expiration under clause (c) hereof.

V. ECONOMIC DEVELOPMENT INCENTIVES

The City agrees to provide to Developers, upon the terms and conditions set forth herein, the following sales tax rebates:

- A. Subject to the conditions and limitations set forth herein, within thirty (30) days of receipt of such written request from Developer, the City shall rebate to Developer fifty percent (50%) of the City's three percent (3%) sales tax collected across the Project. Four (4) -year estimates based on the projected development of three (3) Pad establishments are as follows:

Year	Pad 1	Pad 2	Pad 3	Total Sales	Generated City Sales Taxes	50% Rebate to Developer*
1	4,000,000	2,000,000	1,035,000	7,035,000	211,050	105,525
2	4,160,000	2,080,000	1,076,400	7,316,400	219,492	109,746
3	4,326,400	2,163,200	1,119,456	7,609,056	228,272	114,136
4	4,499,456	2,249,728	1,164,234	7,913,418	237,403	118,701

*This shall not exceed 4 years or \$400,000, whichever occurs earlier

- B. No interest shall accrue on any sum payable to Developer.
- C. In no event shall the amount of any annual sales tax rebate exceed the amount of sales taxes collected from the Project, and in no event shall the total Incentives exceed four hundred thousand dollars (\$400,000.00) or the expiration of four (4) years from the Opening Date, whichever occurs first, subject to the terms and conditions of this Agreement.
- D. The right to the Incentives shall be personal to Developer and shall not run with the land, except as expressly provided herein.

- E. On or within a reasonable time after the end of every six (6) month period for which sales tax rebates are available, commencing with the Opening Date hereunder, Developer shall submit to the City's Economic Development Director, with a copy to the City's Finance Director, a written request for the rebate for the prior six (6) month period.
- F. Developer shall keep accurate books and records of all Incentives received from the Opening Date until the Incentives have been fully paid. During regular business hours, and upon reasonable advance notice to Developer, the City or its designee is hereby authorized to review Developer's books and records. Such review shall be conducted at the City's expense.

VI. SUBORDINATION TO TAX BONDS

Nothing herein shall be construed to grant to or create in Developer any right, claim, lien or priority in or to the City's tax revenue superior to or on a parity with the rights, claims or liens of the holders of tax revenue bonds, notes, certificates or debentures payable from or secured by any taxes, either existing or hereafter issued by the City. Moreover, nothing herein shall be construed to deny or limit the City's full authority to issue such tax bonds. Accordingly, Developer specifically acknowledges and agrees that all rights to the Economic Development Incentive Package from taxes contemplated under this Agreement are, and at all times shall be, subordinate and inferior to the rights, claims and liens of the holders of any and all such tax revenue bonds, notes, certificates or debentures payable from or secured by any use taxes existing or hereafter issued by the City.

VII. APPROPRIATION

The parties acknowledge and agree that the City has advised and opined that the Economic Development Incentive Package provided pursuant to this Agreement is dependent upon the continuing availability of funds beyond the term of the City's current fiscal period and that such rebate(s) are contingent upon funds for such purpose being budgeted and appropriated annually. In the event the City does not budget and appropriate sufficient funds for any payment herein at any time, the City shall provide written notice to Developer that such payment or payments will not be made. Further, if any court of competent jurisdiction determines that this Agreement violates the multi-fiscal-year contract restriction in Section 20 of Article X of the Colorado Constitution, then the parties agree that the Agreement shall immediately convert to a one-year contract, with automatic annual renewal provisions, subject only to failure by the City to appropriate funds annually. The failure to appropriate or have funds available shall not constitute a breach of this Agreement.

VIII. DEVELOPER OBLIGATIONS; CONDITIONS

- A. This Agreement is specifically subject to and conditioned upon Developer satisfying all the schedule and deadline requirements set forth in this Agreement and completing the Project in its entirety as represented herein. Consequently, Developer shall begin and continuously pursue construction of the Project to completion. Construction of the public improvements associated with the Project and the first Pad is expected to commence on or about Nov 15, 2019, and be completed by October 1, 2020.
- B. This Agreement is further specifically subject to and conditioned upon certain performance obligations by Developer. In particular, Developer shall comply with all City Codes, ordinances, resolutions and regulations, and pay all taxes, fees and

expenses required by the City in connection with the development and construction of the Project in the amounts in effect at the time payment is due. Developer acknowledges and agrees that it is responsible for compliance with the obligations and responsibilities identified in this Agreement.

- C. During the term of this Agreement, Developer shall not seek administrative or judicial review of the constitutionality or applicability of any tax statute or ordinance lawfully determined by any tax official to be applicable to the Property or the Project or raise the unconstitutionality or inapplicability of any such tax statute or ordinance as a defense in any proceedings, including delinquent tax proceedings. The forgoing shall not, however, restrict or preclude any person from challenging by way of protest the real estate tax valuation, assessment or classification, in accordance with proceedings available under applicable laws.

IX. GOOD FAITH

Both parties shall exercise good faith in the performance and enforcement of this Agreement. Developer acknowledges the benefits of this Agreement and agrees to use good faith in interviewing and hiring qualified City residents for positions and the Project, subject to restrictions in existing labor contracts.

X. NO VESTED PROPERTY RIGHTS

The parties acknowledge and agree that no vested property rights are granted hereunder. Developer represents to the City that there are no vested rights to the Property from Jefferson County or any other governmental entity, and Developer hereby waives and releases any rights it may have been so granted.

XI. EVENTS OF DEFAULT; REMEDIES

- A. "Default" or "Event of Default" under the Agreement shall mean that one or more of the following have occurred during the term hereof:
1. Developer assigns or attempts to assign to another this Agreement, the Project or any part of the Property, except as set forth in section XIV(C) hereof and except for sales of Pad sites (provided that the sale of a Pad site shall not transfer to the Pad site purchaser any right to receive Incentives under this Agreement);
 2. Developer fails to commence, diligently pursue and complete construction of the Project as required;
 3. Developer fails to substantially observe or perform any other covenant, obligation or agreement required under this Agreement (including any amendments hereto);
 4. Any of the facts, representations, promises or agreements made by Developer in regard to the Project as justification for the Incentives are not substantiated or completed;
 5. Developer becomes delinquent in its obligation to pay all or any portion of ad valorem real and/or personal property taxes, sales taxes or use taxes when due, provided that Developer retains the right to timely protest such taxes as allowed by law; or

6. Developer files for protection under the United States Bankruptcy Code during the term of the Agreement.
- B. Upon the occurrence of any Event of Default, the City shall provide written notice to Developer, and Developer shall immediately proceed to cure or remedy such Default and shall cure such Default within thirty (30) days after receipt of the notice. If, in the sole discretion and judgment of the City, Developer has commenced to cure such default within said thirty-day period and if, in the sole discretion and judgment of the City Council, Developer thereafter diligently proceeds in good faith with efforts to cure the same, the City Council may, but is not required to, grant Developer additional time to cure such default.
 - C. Whenever any Event of Default occurs and is not cured, the City may cease payments under the Economic Development Incentive Package and may take whatever legal or administrative action or institute such proceedings as may be necessary or desirable in its opinion to enforce observance or performance of this Agreement, including without limitation, specific performance or to seek any other right or remedy at law or in equity, including damages.
 - D. The rights and remedies of the parties as provided herein are cumulative except as otherwise expressly limited, and the exercise by either party of any one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other right or remedy for any other Default by other party. No action or inaction on the part of the City shall be deemed a waiver of the right of the City to declare a breach of this Agreement in an Event of Default by Developer, except pursuant to an express written waiver, and no such express written waiver by the City shall be deemed a waiver of the right to declare a breach of this Agreement in the event of further or subsequent default by Developer, even if such default is of the same kind or character as the waived default.

XII. DELAYS

Any delays in or failure of performance by any party of its obligations under this Agreement shall be excused if such delays or failure are a result of *force majeure*, such as acts of gods, fires, floods, strikes, orders of civil or military authorities, failure to obtain permits, approvals or consents (including building permits and certificates of occupancy) from local, state or federal agencies or other causes beyond the normal control of such parties.

XIII. NOTICES

All notices required or permitted hereunder shall be in writing and shall be effective upon mailing, deposited in the U.S. mail, postage prepaid and addressed to the intended recipient as follows. Any party may change its address by written notice to the other given in accordance with this paragraph.

Economic Development Director
City of Lakewood
480 South Allison Parkway
Lakewood, Colorado 80226

WDG BAYAUD LLC
4201 East Yale Avenue Suite 140
Denver, Colorado 80222
Attn: James D. Wall, Manager

XIV. GENERAL PROVISIONS

- A. INTEGRATED AGREEMENT; BINDING EFFECT. This Agreement contains the entire agreement of the parties relating to the subject matter hereof and, except as provided herein, may not be modified or amended except by written agreement of the parties. This Agreement shall be binding upon, and shall inure to the benefit of, the parties and their respective heirs, personal representatives, successors and assigns.
- B. CONTROLLING TERMS. In the event of any conflict between the provisions of this Agreement and those contained in any attachments or exhibits hereto, or any document referenced therein, the terms and conditions of this Agreement shall prevail, and as such, shall supersede the conflicting provisions of such attachments, exhibits or referenced document.
- C. ASSIGNMENT. Developer shall not assign this Agreement without the City's prior written consent; provided, however, that no consent shall be required for an assignment by Developer to a successor entity in the event of a sale of all or substantially all of Developer's assets or stock or a reorganization within Developer's existing ownership structure.
- D. NO THIRD-PARTY BENEFICIARIES. It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement and all rights of action relating to such enforcement shall be strictly reserved to the parties. It is the express intention of the parties that any person other than the City and Developer shall be deemed to be only an incidental beneficiary under this Agreement.
- E. GOVERNING LAW AND VENUE; RECOVERY OF COSTS. This Agreement shall be governed by the laws of the State of Colorado. Venue shall be in Jefferson County, Colorado, or in the United States District Court for the District of Colorado, as applicable. In the event legal action is brought to resolve any dispute among the parties related to this Agreement, the prevailing party in such action shall be entitled to recover from the non-prevailing party reasonable court costs and attorney fees.
- F. GOVERNMENTAL IMMUNITY. No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections or other provisions of the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101, *et seq.*
- G. CONFIDENTIALITY; PUBLIC DOCUMENT. Developer hereby acknowledges that the City is a public entity subject to the Colorado Open Records Act, C.R.S. §§ 24-72-201, *et seq.* (the "Act"), and as such, this Agreement may be subject to public disclosure thereunder. In the event the provisions of any exhibit or attachment hereto, or of any other document, including any electronic document, prohibit public disclosure of any so-called "confidential" or "proprietary" information or data, including this Agreement or any exhibit or attachment hereto, such provisions shall be null and void to the extent inconsistent or in conflict with the Act, and the City's good faith disclosure of any such information or data pursuant to the Act shall not constitute a breach of this Agreement.

- H. NO BINDING DISPUTE RESOLUTION. Any exhibit or attachment hereto, or any other document, including any electronic document, which requires binding arbitration, or any other binding extra-judicial dispute resolution process in which the final resolution is not determined by the City, shall be void and unenforceable.
- I. HEADINGS. Paragraph headings used in this Agreement are for convenience of reference and shall in no way control or affect the meaning or interpretation of any provision of this Agreement.
- J. SEVERABILITY. In the event a court of competent jurisdiction holds any provision of this Agreement invalid or unenforceable, such holding shall not invalidate or render unenforceable any other provision of this Agreement.
- K. COUNTERPARTS; ELECTRONIC DISPOSITION. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all such counterparts taken together shall be deemed to constitute one and the same instrument. The parties acknowledge and agree that the original of this Agreement, including the signature page, may be scanned and stored in a computer database or similar device, and that any printout or other output readable by sight, the reproduction of which is shown to accurately represent the original of this Agreement, may be used for any purpose as if it were the original, including proof of the content of the original writing.
- L. AUTHORITY. The parties represent and warrant that they have taken all actions necessary to legally authorize the undersigned signatories to execute this Agreement on behalf of the parties and to bind the parties to its terms.

[Remainder of page intentionally blank – signatures follow]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date.

CITY OF LAKEWOOD

Kathleen E. Hodgson, City Manager

ATTEST:

Margy Greer, City Clerk

Approved as to form:

Gregory D. Graham, Deputy City Attorney

Recommended for approval:

Approved as to funding (if \$5,000 or greater):

Robert Smith, Economic Development Director

Larry Dorr, Finance Director

WDG BAYAUD LLC

Signature [must be notarized or attested]

Printed Name & Title

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing Agreement was signed before me this ____ day of _____, 2019, by James D. Wall as Manager of WDG Bayaud LLC, a Colorado limited liability company.

Witness my hand and official seal.

My Commission Expires _____

Notary Public