

ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT

Pursuant to Chapter 380 of the Texas Local Government Code and Section 1.4.4.1 of the City of San Marcos Land Development Code, this agreement (the "Agreement") is entered into this 2nd day of June, 2015 (the "Effective Date") by and between San Marcos 123 and 35 Partners Two, L.L.C. ("Owner"), and the City of San Marcos, Texas (the "City"). The Owner and the City are collectively referred to as the "Parties".

PART 1. RECITALS

Section 1.01. The Owner intends to purchase that certain tract of real property located at Luciano Flores Boulevard and the IH-35 North frontage road (the "Site"). A boundary map of the Site is attached hereto as Exhibit A, and made a part hereof for all purposes.

Section 1.02. The Owner wishes to develop the Site for commercial restaurant uses that will require on-premise commercial signs.

Section 1.03. The Site is located entirely within the San Marcos River Corridor. The City's Land Development Code (the "LDC") provides that no on-premise sign shall be located within the San Marcos River Corridor except for monument signs, community information signs and government signs. The Site is immediately adjacent to an area that is not located within the San Marcos River Corridor and where an on premise free standing pole sign would be permitted under the LDC.

Section 1.04. The Owner seeks a waiver of the restrictions on signs within the San Marcos River Corridor in order to allow a pole sign that will attract restaurants as tenants for the Site.

Section 1.05. The City seeks to promote local economic development and to stimulate business and commercial activity in the City. Granting the waiver requested by the Owner will advance the City's interests by attracting new business, creating jobs, increasing sales and property tax revenues and enhancing the image of the City.

Section 1.06. For these reasons, and in consideration of the mutual benefits and obligations below, the Parties enter into this Agreement which waives certain LDC requirements for signs in the San Marcos River Corridor. The approval of this Agreement shall not be considered to be a precedent for any future request to construct a sign, other than a monument sign, within the San Marcos River Corridor.

PART 2. SITE DEVELOPMENT AND SIGN

Section 2.01. Site Development.

a. Minimum Capital Investment. Within 18 months after the Effective Date, subject to any extensions due to events of *force majeure* as defined below, the Owner will make a total capital investment in real property of no less than \$1,250,000, and total capital investment in new improvements of no less than \$3,000,000 on the Site.

b. Freddy's Restaurant. The Owner shall develop a portion of the Site for commercial occupancy by a restaurant advertised and marketed to the public as "Freddy's Frozen Custard and Steakburger" ("Freddy's") substantially similar in design to that shown in Exhibit B, attached hereto and made a part hereof for all purposes. The building associated with Freddy's may include a single drive-through component.

c. Dine-In Only Restaurant. The Owner shall develop the remaining portion of the Site for commercial occupancy by a dine-in only restaurant with no drive-through component as approved by the City Manager of the City. Examples of restaurants that would be eligible to occupy this portion of the Site are Longhorn Steakhouse, Old Chicago Pizza and Taproom, 54th Street Bar and Grill, Sea Island Shrimphouse and Olive Garden. Examples of restaurants that would not qualify to occupy the Site include traditional quick service or fast food restaurants such as McDonalds, Burger King, KFC, Taco Bell, or Jack in the Box, even if the facilities for such types of restaurants do not include a drive-through component.

Section 2.02. Sign Installation. When the Owner executes a binding lease for occupancy on the Site by Freddy's and a building permit is issued for construction of facilities for Freddy's, the Owner shall be eligible to receive a permit from the City for installation of an on-premise freestanding pole sign along the boundary of the Site that fronts the IH-35 frontage road in accordance with the specifications shown in Exhibit C, attached hereto and made a part hereof for all purposes (the "Pole Sign"). The Pole Sign may advertise Freddy's in either sign face labeled "A" or "B," while the other sign face may advertise the dine-in restaurant on the other portion of the Site approved by the City Manager of the City.

Section 2.03. Sign Location. Except as specifically waived by the City under Part 3 of this Agreement, the installation of the Pole Sign shall comply with the requirements of all City of San Marcos processes, approvals, procedures, ordinances, rules, regulations and standards governing the installation of signs. To the extent that there is no conflict with the provisions of Section 6.3.1.7, the Pole Sign shall be located no more than 150 feet from the property line fronting Luciano Flores Boulevard. The approximate location of the Pole Sign is shown on Exhibit A.

Section 2.04. Compliance with Laws. In connection with the development of the Site, the Owner shall comply with all applicable local, state and federal laws, ordinances, statutes, rules, regulations and standards.

PART 3. ECONOMIC DEVELOPMENT INCENTIVE PROVIDED BY THE CITY

Section 3.01. Waiver of Certain Land Development Code Requirements. Subject to the Owner's compliance with this Agreement, the City waives the requirement that no on-premise sign shall be located within the San Marcos River Corridor except for monument signs, community information signs and government signs under Section 6.3.3.3(a)(9) in order to allow the Pole Sign. The Owner acknowledges and agrees that the Pole Sign is a substitute for one monument sign that would normally be allowed under the LDC and that the Owner is not

allowed to install both a monument sign and the Pole Sign.

Section 3.02. Waiver Limited. The above waiver applies only for purposes of allowing the Pole Sign. Except as specifically stated above, the City grants no other waivers of requirements under the LDC, and all signs installed by the Owner and any tenants in connection with the development of the Site, shall conform in every other respect to the requirements of the LDC and other applicable ordinances, rules, regulations and standards of the City.

PART 4. DURATION, DEFAULT AND TERMINATION

Section 4.01. Duration. The Pole Sign shall be allowed to remain on the Site for as long as Freddy's continuously operates its business on the Site. If Freddy's ceases to operate its business on the Site, but a dine-in restaurant on the other portion of the Site approved by the City Manager is still actively operating its business when the cessation occurs, the Pole Sign may remain on the Site for purposes of advertising such remaining dine-in restaurant. When both Freddy's and any dine-in restaurant on the other portion of the Site both cease to conduct business on the Site, the waiver shall automatically expire.

a. Status of Pole Sign Upon Expiration. Within 90 days after the date of expiration of the waiver as provided under Section 4.01, the Owner shall completely remove or modify the Pole Sign as necessary to meet the City's then applicable ordinances governing signs.

Section 4.02. Default. The City Manager may declare a default under this Agreement if the Owner:

- a.** fails to comply with the obligations and requirements under Part 2;
- b.** made or makes any representation relied upon by the City in entering into this Agreement or in any request or submission to the City relating to this Agreement that is false or misleading in any material respect;
- c.** allows ad valorem taxes payable to the City on property owned by the Owner to become delinquent; or
- d.** fails to comply with any other terms of this Agreement.

Section 4.03. Default Termination. If the City Manager determines that the Owner is in default under Section 4.02, the City Manager may notify the Owner in writing of such default, and if the default is not cured within 30 days from the date of the notice, the City Manager may terminate this Agreement, unless said default cannot reasonably be cured within 30 days and reasonably and commercially diligent efforts are being made to cure said default. For any default incapable of being cured, the City Manager may terminate this Agreement upon sending 30 days' prior written notice of termination to the Owner.

a. Status of Pole Sign on Default Termination. Upon termination of this

Agreement under Section 4.03, the Owner agrees that the waiver granted by the City under Section 3.01 shall automatically expire and no signs may be installed after the effective date of termination except as normally allowed under the provisions of the LDC or successor ordinances and regulations then in effect. **If the effective date of termination occurs after the Owner has fully or partially installed the Pole Sign, the fully or partially installed Pole Sign shall be completely removed or modified by the Owner within 90 days after such date, as necessary to meet the City's then applicable ordinances governing signs.**

Section 4.05. Remedies not Exclusive. In the event of default by the Owner, the City may exercise its remedies hereunder, together with any other statutory or common law remedies, including applicable penal and civil enforcement provisions of the Land Development Code or successor ordinances or regulations. Any failure by the City to enforce this Agreement with respect to one or more defaults by the Owner will not waive City's ability to enforce the Agreement after that time. In the event litigation is commenced under the terms of this Agreement, the prevailing party shall be entitled to recover from the other reasonable attorney fees and costs.

PART 5. MISCELLANEOUS

Section 5.01. Notices. All notices required by this Agreement will be delivered to the following by certified mail or electronic mail transmission:

R.W. McDonald, IV	City Manager
CGM Interests	City of San Marcos
750 E. Mulberry Ave., No. 305	630 East Hopkins
San Antonio, TX 78212	San Marcos, Texas 78666
E-mail: rwmcdona@yahoo.com	E-mail: citymanagerinfo@sanmarcostx.gov

Each party will notify the other party in writing of any change in information required for notice under this paragraph.

Section 5.02. Assignment. The Owner may not assign this Agreement or any of its rights, or delegate or subcontract any of its duties under this Agreement, in whole or in part, except as part of a sale of the Site to a third party. Such assignment, however, shall not be effective until at least 30 days' advance written notice thereof is provided to the City.

Section 5.03. Applicable Law and Venue. This Agreement will be construed under the laws of the State of Texas. This Agreement is performable in Hays County, Texas. Mandatory venue for any action under this Agreement will be in the state court of appropriate jurisdiction for the action in Hays County, Texas. Mandatory venue for any matters in federal court will be in the United States District Court for the Western District of Texas.

Section 5.04. No Liability. The Owner agrees that City assumes no liability or responsibility by approving plans, issuing permits or approvals or making inspections related to any matter arising under this Agreement.

Section 5.05. Force Majeure. A *force majeure* event means an event beyond the reasonable control of a party obligated to perform an act or take some action under this Agreement including, but not limited to, acts of God, earthquake, fire, explosion, war, civil insurrection, acts of the public enemy, act of civil or military authority, sabotage, terrorism, floods, lightning, hurricanes, tornadoes, severe snow storms or utility disruption, strikes, lockouts, major equipment failure or the failure of any major supplier to perform its obligations.

Section 5.06. No Waiver of Immunity or Liability. Nothing in this Agreement, and no action of the City under this Agreement, will constitute a waiver of any immunity of the City to suit or to liability or of any limitations on liability granted by law or the Texas Constitution.

Section 5.07. No Joint Venture. It is understood and agreed between the parties that the City and the Owner, in executing this Agreement, and in performing their respective obligations, are acting independently, and not in any form of partnership or joint venture.

Section 5.08. Third Party Beneficiaries. This Agreement is for the exclusive benefit of the Parties and no third party may claim any right, title or interest in any benefit arising under this Agreement. Among other things, no third party may pursue any claim against the City asserting the right to allow the continued the Pole Sign or any claim against the City for lost revenues due to the removal of any such sign under this Agreement. **THE CITY ASSUMES NO RESPONSIBILITIES OR LIABILITIES TO ANY THIRD PARTIES IN CONNECTION WITH THIS AGREEMENT, AND THE OWNER AGREES TO INDEMNIFY, DEFEND AND HOLD THE CITY, ITS OFFICERS, AGENTS AND EMPLOYEES, HARMLESS FROM ANY SUCH LIABILITIES OR CLAIMS BY THIRD PARTIES.**

Section 5.09. Severability. If any provision of this Agreement is held to be illegal, invalid or unenforceable under present or future laws effective while this Agreement is in effect, such provision shall be automatically deleted from this Agreement and the legality, validity and enforceability of the remaining provisions of this Agreement shall not be affected thereby, and in lieu of such deleted provision, there shall be added as part of this Agreement a provision that is legal, valid and enforceable and that is as similar as possible in terms and substance as possible to the deleted provision.

Section 5.10. Sole Agreement. This Agreement constitutes the sole and only Agreement of the Parties hereto respecting the subject matter covered by this Agreement, and supersedes any prior understandings or written or oral agreements between the parties.

Section 5.11. Amendments. No amendment, modification or alteration of the terms hereof shall be binding unless the same shall be in writing and dated subsequent to the date hereof and duly executed by the parties hereto.

Section 5.12. Agreement not a Permit. The Owner acknowledges and agrees that this Agreement, and the waivers granted herein, do not constitute a permit under Chapter 245 of the Texas Local Government Code. For any signs proposed to be installed under this Agreement,

the Owner shall be required to apply for such permits from the City as are required under applicable ordinances of the City.

Section 5.13. Binding on Successors; Recording. This Agreement is binding on all successors and assigns of the Owner. The Owner hereby grants its consent to the City to record this Agreement, a memorandum of this Agreement or other instrument providing notice of the waiver granted and other terms under this Agreement in the Official Public Records of Hays County, Texas.

EXECUTED to be effective as of the Effective Date.

CITY OF SAN MARCOS:

By: _____
Jared Miller, City Manager

SAN MARCOS 123 AND 35 PARTNERS TWO, L.L.C.:

By: _____

Name: _____

Title: _____

ACKNOWLEDGMENTS

THE STATE OF TEXAS §
 §
COUNTY OF HAYS §

This instrument was acknowledged before me on the ____ day of May, 2015, by Jared Miller, City Manager of the City of San Marcos, in such capacity, on behalf of said municipal corporation.

Notary Public, State of Texas

THE STATE OF TEXAS §
 §
COUNTY OF BEXAR §

This instrument was acknowledged before me on the ____ day of May, 2015, by _____, _____ of San Marcos 123 and 35 Partners, L.L.C., in such capacity, on behalf of said entity.

Notary Public, State of Texas

EXHIBIT A
Site Map
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EXHIBIT B
Freddy's Concept
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EXHIBIT C
Pole Sign
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