

ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT

Between the City Of Harker Heights, Texas and Market Heights, Ltd.

Background

A. On or about December 19, 2000, the City Council of the City of Harker Heights adopted an "Economic Development Program" as authorized by the City's broad and inherent authority as a home-rule municipality under its Charter and Article 11, Section 5, of the Texas Constitution, as well as Chapter 380 of the Texas Local Government Code (the Program). The Program provides for the City of Harker Heights (the City) to provide economic development incentive funds to promote local economic development and to stimulate business and commercial activity in the City by encouraging businesses that will enhance City sales tax revenues to locate or maintain a place of business within the City of Harker Heights.

B. The Property (hereinafter defined) is presently undeveloped and will require specialized knowledge and experience to develop in a manner which provides the greatest benefits to the citizens of Harker Heights. The City desires to have the Property developed in order to provide additional amenities for its citizens, to attract other prospective residents and businesses to locate in the City, to promote orderly development of the area, and to expand and diversify its tax base.

C. Market Heights, Ltd. (Developer) is in the business of developing high quality retail commercial real estate projects for profit, and has offered its services and expertise in order to assist the City in achieving the objectives outlined above. The City and Developer accordingly enter into this Agreement providing for economic incentive payments by the City to Developer as an inducement for Developer to invest its time, energy, and resources in the City, and by extension to facilitate the City's goals and objectives outlined above.

Agreement

1. **Definitions.** In this Agreement:

- (a) *Agreement* means this Agreement.
- (b) *City* means the City of Harker Heights, Texas, a home rule municipal corporation located in Bell County, Texas.
- (c) *Comptroller* means the Comptroller of Public Accounts of the State of Texas, or whatever person, position, or office is designated by law to administer the collection, reporting, and distribution of sales taxes.
- (d) *Property* means the land described on the attached exhibit.
- (e) *Developer* means Market Heights, Ltd., a Texas limited partnership.

(f) *Sales Tax* means the City's 1.5% sales and use tax consisting of the municipal sales and use tax and the additional municipal sales tax adopted by the City under the authority of the Texas Tax Code, Chapter 321.

(g) *Ad Valorem Taxes* means ordinary real property taxes assessed pursuant to Title 1 of the Texas Property Tax Code, but shall not in any event include any sums constituting fines; penalties; interest; rollback taxes; assessments for water, sewer or road improvements; or impact fees.

2. City Council Findings. By approval of this Agreement, the City Council of the City of Harker Heights finds:

(a) That Developer's business operations will enhance City sales tax revenue by bringing businesses to the City which are expected to generate new Sales Tax revenue within the City; and

(b) That the financial incentives provided in this Agreement will promote economic development and stimulate business and commercial activity within the City.

3. Developer Obligations.

(a) *Target Corporation.* Developer will work diligently to cause a Target Corporation discount retail store to be constructed and operated on the Property not later than March 31, 2008. Because the store is intended to anchor development of additional businesses in the surrounding area and to set the standard for such surrounding development, the store is to be built in a first-class manner consistent with the highest standards of construction and appearance associated with similar retail operations in Texas. Developer shall diligently attempt to secure a written agreement by Target Corporation to earnestly assist with, and to be actively and meaningfully involved in, local philanthropic, charitable, and community service groups and projects.

(b) *Legal Compliance.* All development on the Property shall comply with all applicable rules, orders, laws and regulations, existing at the time of the passage of this Agreement. However, it is expressly agreed and understood that the requirement for such compliance is not intended to define a standard of construction quality or appearance as required by subparagraph (a), above.

(c) *Developer Reimbursement Payments for Breach of Agreement.* If the City terminates this Agreement because of Developer's breach of this Agreement, Developer will, within 60 days following termination, reimburse the City for all incentives offered under this Agreement. The reimbursement payment must include interest on each payment at the City's weighted average yield of its investment portfolio from the date of the incentive to the date of Developer's repayment. Developer's obligations under this paragraph shall survive termination of this Agreement. Irrespective of the above, this subparagraph shall expire within one (1) year after the Commencement Date, as defined in Section 4 (c)(1), below.

(d) *Reports and Inspections.*

- (1) By April 30 of each year during the term hereof, Developer will provide the City with a copy of any Sales Tax returns filed or received by it and any other business located on the Property (together with any other correspondence related to the returns that may affect the amounts paid to the Comptroller) relating to the collection and payment of Sales Tax required to be filed with the Comptroller. Copies of any Sales Tax returns shall be provided to the City within ten days of the date filed with the Comptroller. In addition, Developer will certify to the City that it has complied with the terms of this Agreement in the preceding year and provide sufficient written information, records, and documents, to support its certification of compliance.
- (2) Upon written request of the City, Developer will promptly provide to the City any additional information reasonably necessary to determine if Developer has complied with this Agreement. Developer shall prepare and maintain its records in compliance with good business and accounting practices consistently applied.
- (3) All information required to be provided by Developer to the City shall be sent to the attention of the City's Finance Director at the address specified for giving notice in this Agreement.

(e) *Developer Restrictions.* During the term hereof, Developer shall not, without the City's prior written consent: (1) change its name or jurisdiction of organization; (2) amend its capital structure, liquidate or dissolve, or become a party to any merger, conversion or consolidation, or otherwise transfer control or ownership of the Developer, or form or acquire any subsidiary; (3) make any substantial change to its present executive or management personnel; or (4) change the state in which its place of business (or chief executive office if Developer has more than one place of business) is located. Notwithstanding the foregoing, the Developer shall have the right, power or authority to assign this Agreement without the City's prior consent to any wholly-owned subsidiary of Developer or to any entity which is controlled by Developer.

(f) It shall be an event of default if, during the term hereof: (1) a receiver is appointed for Developer, its general partner or any guarantor hereof; (2) a bankruptcy or insolvency proceeding is commenced against or by Developer, its general partner or any guarantor hereof; or (3) Developer or its general partner is dissolved.

(g) *Notice Required.* Developer shall notify the City immediately of any event of default hereunder or of any material change in: (1) in Developer's name or mailing address, (2) Developer's financial condition; (3) the feasibility of developing the Property as contemplated herein; or (4) any representation or warranty made by Developer in this Agreement.

4. Economic Incentives to Developer.

(a) *Sales Tax Refund.* As consideration for Developer's contractual obligations hereunder and subject to Developer's strict, faithful and timely performance thereof, the City will make economic incentive payments to Developer in an amount equal to one half of one percent (0.50%) of the new Sales Tax received by the City from sales attributed to all businesses operating on the Property as provided in this Agreement, based on the actual amount of Sales Tax actually distributed to the City by the Comptroller (net of any discounts, taxpayer refunds, and administrative fees).

(b) *Ad Valorem Tax Refund.*

(1) As additional consideration for Developer's contractual obligations hereunder and subject to Developer's strict, faithful and timely performance thereof, the City will make economic incentive payments to Developer in an amount equal to fifty percent (50%) of the new Ad Valorem Tax received by the City from increased value of the Property as provided in this Agreement, computed as set forth below, based on the amount of Ad Valorem Tax actually distributed to the City by the Bell County Tax Assessor-Collector (net of any discounts, taxpayer refunds, and administrative fees).

(2) The Ad Valorem Taxes levied against the Property in 2005 and received by the City as of the date hereof total \$2,607.85, and this amount shall constitute the "Base Amount." Each year during the term hereof the parties shall compute the Ad Valorem Taxes levied against the Property (or any portion thereof) and timely received by the City for the preceding tax year according to the records of the Bell County Tax Appraisal District, and this amount shall constitute the "Anniversary Amount," but in no event shall past-due Ad Valorem Taxes be included in the Anniversary Amount. After computing the Anniversary Amount, the Base Amount shall be subtracted therefrom, and the result multiplied by fifty (50%) percent to arrive at the incentive payable to Developer by the City for that year. In the event that the Anniversary Amount is less than the Base Amount, no Ad Valorem Tax refund shall be made by the City to Developer for that year.

(c) *Incentive Funding.*

(1) The economic incentives payable by City to Developer hereunder shall begin on the last day of February next following the City's issuance of a certificate of occupancy for the Target Corporation store on the Property (the Commencement Date), and shall occur on the same day of each year thereafter. The incentives shall terminate when the City has paid Developer an aggregate total of three million dollars (\$3,000,000.00) hereunder, or on the fifth anniversary of the Commencement Date, whichever occurs first.

(2) In the event of any overpayment by City hereunder, Developer will refund the overpayment to the City upon demand. Developer's obligations under this

paragraph shall survive termination of this Agreement. All overpayment claims shall be made within twelve (12) months of alleged overpayment.

- (3) Notwithstanding any contrary provision herein, the City may suspend all incentive payments to Developer hereunder during any period of time that Developer is delinquent in payment to the City of any sums, including without limitation any fees, fines, assessments, taxes, and charges for water, sewer, garbage, drainage improvements, or otherwise. In addition, the City shall have the right (but not the obligation) to deduct any such sums owed to the City by Developer from any sums payable by City to Developer hereunder.
- (4) The City is making the Sales Tax refunds required herein exclusively from the municipal sales and use tax it receives under the provisions of Chapter 321 of the Texas Tax Code. Likewise, the Ad Valorem Tax refunds required herein are to be made exclusively from the Ad Valorem Taxes levied against the Property (or any portion thereof) and actually received by the City. Should any legal impediment arise during the term of this Agreement, including a change in law, that prevents or prohibits the City from complying with or making future incentive payments under this Agreement, the City may terminate the affected refund(s) without further liability to Developer.
- (5) It is the intention of the parties that because no payment will be due to Developer unless the City actually collects the tax funds from which the incentive payments will be made, this Agreement shall not create a debt within the meaning of Article XI, §§ 5 and 7 of the Texas Constitution. However if the City's obligations hereunder should otherwise be determined by a court of competent jurisdiction to constitute an unfunded debt, then the incentives required by this Agreement shall automatically terminate at the beginning of the first day of the City's fiscal year of the Agreement for which the City has not appropriated funds or otherwise provided for funds to make a required payment under the Agreement.

5. **Term.** This Agreement is effective on July 1, 2006, and shall terminate as provided herein unless extended by mutual agreement of the parties.

6. Default, Termination, and Remedies.

(a) *Notice of Default; Termination.* The party alleging a default hereunder will give the other party not less than thirty (30) days' written notice, measured from the date of certified mailing, specifying the nature of the alleged default and, when appropriate, the manner in which the alleged default may be satisfactorily cured. Notwithstanding the foregoing sentence, if the nature of the alleged default is such that the giving of such written notice is impractical due to a threat of harm to life or property then the party alleging the default or breach shall give the other party such notice as may be reasonable under the circumstances. If the defaulting party fails to cure the default within the time allowed, the party giving the notice may terminate this Agreement by written notice specifying the date of termination, or exercise any other available remedy.

(b) *Remedies Cumulative.* The rights and remedies provided in this Agreement or under other laws are cumulative, and the exercise of any particular right or remedy does not preclude the exercise of any other right or remedy.

(c) *Waivers in Writing.* All waivers must be in writing and signed by the party to be bound. Failure or delay in giving notice of default shall not constitute a waiver of any default, nor shall it change the time of default. Except as otherwise expressly provided in this Agreement, any failure or delay by either party to assert any of its rights or remedies as to any default shall not operate as a waiver of the default, nor shall it deprive the party of the right to institute and maintain any actions or proceedings it deems necessary to protect or enforce its rights or remedies.

(g) *Mediation.* Any dispute between the parties related to this Agreement which is not resolved through informal discussion will be submitted to a mutually acceptable mediation service or provider. The parties to the mediation shall bear the mediation costs equally. This paragraph does not preclude a party from seeking equitable relief from a court of competent jurisdiction.

(d) *Waiver of Jury and Certain Relief.* DEVELOPER AND CITY EACH WAIVE A TRIAL BY JURY of any or all issues arising in any action or proceeding between the parties hereto or their successors, under or connected with this Agreement, or any of its provisions. DEVELOPER AND CITY EACH WAIVE ALL CLAIMS FOR SPECIAL, INDIRECT, INCIDENTAL AND CONSEQUENTIAL DAMAGES.

(e) *Attorney's Fees & Court Costs.* The prevailing party in any legal proceeding related to this Agreement is entitled to recover reasonable attorney's fees and all costs of such proceeding incurred by the prevailing party.

(f) *Force Majeure.* No party may be deemed to be in breach of this Agreement if performance of this Agreement is delayed, disrupted, or becomes impossible because of any act of God, war, earthquake, fire, strike, accident, civil commotion, epidemic, act of government, its agencies or offices, or any other cause beyond the control of the parties during the time, but only for so long as the event of force majeure reasonably prevents performance.

7. Developer's Representations. As a material inducement to the City to enter into this Agreement, Developer warrants and represents to City that the following are true as of the effective date hereof, and will be true throughout the term hereof:

(a) Developer has full power and authority to execute and deliver this Agreement and to perform its obligations under it. This Agreement constitutes the valid and legally binding obligation of the Developer, and all requisite action has been taken to make this Agreement valid and binding on Developer in accordance with its terms.

(b) Neither the execution and delivery of this Agreement by Developer, nor the performance by Developer of its obligations hereunder, will violate any statute, regulation, rule, judgment, order, decree, stipulation, injunction, charge or other restriction of any government, governmental agency, or court to which Developer is subject or any provision of the Certificate of Formation, Partnership Agreement, or other governing instruments of Developer.

(c) There are no attachments, executions, or assignments for the benefit of creditors or voluntary or involuntary proceedings in bankruptcy or under any other debtor-in-relief laws pending against Developer.

(d) There are no other legal actions, suits, arbitrations, or other legal administrative or other governmental proceedings pending or threatened against the Developer, its properties, assets, or business that, if adversely determined, could have a material adverse effect on Developer's ability to perform its obligations hereunder, and the Developer is not aware of any facts which to its knowledge might result in any such action, suit, arbitration, or other proceedings.

(e) Developer is a limited partnership duly organized, validly existing, and in good standing under the laws of the State of Texas, and having authority to do business in Texas, and with full power to carry on its business as now being conducted.

(f) Developer possesses all permits, registrations, approvals, consents, licenses, trademarks, trademark rights, trade names, trade name rights, and copyrights needed to conduct its business in the manner contemplated by this Agreement.

(g) Developer has the expertise, experience, and resources necessary to perform its obligations hereunder with the highest degree of skill, diligence, efficiency and professionalism normally demonstrated by others engaged in performing similar activities throughout the State of Texas.

(h) All information furnished by or on behalf of Developer to the City is true and correct in all material respects.

Developer acknowledges that the City has justifiably relied upon the foregoing representations and warranties, and that City would not have entered into this Agreement but for Developer's representations as to the truthfulness and accuracy of the same.

8. Miscellaneous Provisions.

(a) *Developer's Undertaking.* Development of the Property is a private undertaking. Developer shall have full power over, and exclusive control of, the specific details of the development, subject only to the general limitations and obligations under this Agreement and applicable local, state and federal statutes and regulations. Nothing contained in this Agreement or in any related document shall be construed as making the

City and Developer joint venturers or partners, nor shall Developer be or represent itself to be a contractor, agent or employee of the City.

(c) *Law Governing and Venue.* The laws of the State of Texas govern this Agreement without regard to any conflict of laws provision and no lawsuit may be prosecuted on this Agreement except in a court of competent jurisdiction located in Bell County, Texas. Developer specifically consents to and waives any objections to *in personam* jurisdiction in Bell County, Texas.

(d) *Notices.* Any notice required to be given by one party to another must be given in writing addressed to the party to be notified at the address set forth below, (1) by delivering the notice in person, (2) by depositing the notice in the U. S. Mail, certified or registered, return receipt requested, postage prepaid, (3) by depositing the notice with Federal Express or another nationally recognized courier service for next day delivery, or (4) by sending the notice by telefax with confirming copy sent by mail. Notice deposited in the U.S. Mail is deemed effective on the date of deposit. Notice given in any other manner is effective when received by the party to be notified. For the purposes of notice, the addresses of the parties to whom notice is to be given, until changed by given notice to the other as provided herein, is as follows:

If to the City: City of Harker Heights
ATTN.: City Manager
P.O. Box 2518
Harker Heights, TX 76548
Fax: (254) 953-5605
hnmgr@harkerheights.com

If to Developer: Market Heights, Ltd.
ATTN.: Jon Andrus
8150 N Central Expressway, Ste. 1515
Dallas, TX 75206
Fax: (214) 891-3223
jon@ddevelopment.com

(e) *Assignment.* Except as stated in Section 3(e) above, Developer may not assign this Agreement to any other person or entity unless the City consents in writing to the assignment, and any attempted or purported assignment in the absence of such consent shall be void.

(f) *City Authority.* The City's City Manager or any employee authorized in writing by the City Manager is authorized to act on behalf of the City in the administration or enforcement of this Agreement.

(g) *Severability.* If any provision hereof shall be finally declared void or illegal by any court or administrative agency having jurisdiction, the entire Agreement shall not be

void, but the remaining provisions shall continue in effect as nearly as possible in accordance with the original intent of the parties.

(h) *Binding Effect.* This Agreement shall be binding upon, and shall inure to the benefit of, the parties' respective successors and permitted assigns.

(i) *Third Party Beneficiaries.* There are no third-party beneficiaries of this Agreement.

(j) *Interpretation.* Each party has carefully read this entire Agreement, understands the meaning and effect of each and every provision contained herein, and acknowledges that it has relied on its own judgment in entering into this Agreement. Each party executes this Agreement only after first having obtained, or having had the opportunity to obtain, competent legal advice. The use of the masculine or neuter genders herein shall include the masculine, feminine and neuter genders. The singular form shall include the plural when the context requires. Headings used throughout this Agreement are for convenience and reference only, and the words contained therein shall in no way be held to explain, restrict, modify, amplify or aid in the interpretation or construction of the meaning of the provisions of this Agreement. The terms "hereof," "hereunder" and "herein" shall refer to this Agreement as a whole, inclusive of all exhibits, except as otherwise expressly provided. This Agreement represents the result of extensive discussion between the parties, and thus should not be construed strictly for or against either party.

(k) *Entire Agreement.* This Agreement is executed in multiple originals, each of which is deemed to be an original. This Agreement, including all exhibits, constitutes the entire understanding and agreement of the parties and supersedes all other agreements, negotiations, and understandings between the parties. The parties acknowledge that neither has made any representation to induce execution of this Agreement, except such representations as are specifically set forth herein. This Agreement may be cancelled or amended by mutual consent of the parties, and to be effective an amendment or agreed cancellation must be in writing and signed by each party in a form suitable for recording in the official records of Bell County. The exhibits, attachments and addenda which are a part of this Agreement are:

- Property Description

{*Signature Page Follows*}

CITY OF HARKER HEIGHTS

By: Steve Carpenter
Steve Carpenter, City Manager

Date: 6-21-06

MARKET HEIGHTS, LTD.

By: Market Heights Developers, Ltd., its General Partner

By: DEVCO GP, Inc., its General Partner

By: Jon Andrus
Jon Andrus, Vice President

Date: 6/30/06

ATTEST:

Patricia Brunson
Patricia Brunson, City Secretary