

Exhibit A



ECONOMIC DEVELOPMENT PROGRAM AGREEMENT (Chapter 380 Agreement)

This ECONOMIC DEVELOPMENT PROGRAM AGREEMENT (“Agreement”) is entered into by and between the CITY OF KELLER, TEXAS (the “City”), a home rule municipal corporation organized under the laws of the State of Texas, and R & K Sales, Inc. dba Penguin Patch (the “Grantee”). The City and Grantee are collectively referred to as the “Parties”.

RECITALS

The City and Grantee hereby agree that the following statements are true and correct and constitute the basis upon which the City and Grantee have entered into this Agreement:

WHEREAS, on January 18, 2022, the City approved Resolution No. 4471 (Resolution) establishing an Economic Development Program pursuant to Section 380.001 of the Texas Local Government Code (Section 380.001) and authorizing this Agreement as part of the Economic Development Program established by City Council Resolution (Program); and

WHEREAS, the City desires to participate in the Program by entering into this agreement; and

WHEREAS, the City Council of the City (City Council) find and determines that this Agreement will effectuate the purposes set forth in the Program, and that Grantee’s performance of its obligations herein will promote local economic development and stimulate Grantee and commercial activity in the City; and

NOW, THEREFORE, in consideration of the mutual benefits and premises contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. INCORPORATION OF RECITALS

The City Council has found at a duly-called and legally-noticed public meeting through the adoption of City Resolution No. 4604 attached hereto as Exhibit “A.1” and hereby made a part of this Agreement for all purposes, and the City and Grantee hereby agree, that the recitals set forth above are incorporated herein and are true and correct and form the basis upon which the Parties have entered into this Agreement.

2. DEFINITIONS

In addition to terms defined in the body of this Agreement, the following terms shall have the definitions ascribed to them as follows:

Affiliate: Any Person directly controlling or controlled by Grantee, or any Person controlling or controlled by the same Person who is controlling or is controlled by Grantee. As used in this definition, the term “control” means ownership or the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise.

Agreement: Shall mean this Chapter 380 Economic Development Grant Agreement, aka Performance Agreement.

Appraisal District: Shall mean the Tarrant Appraisal District.

Base Value: Shall mean the Appraised Value of the Property as of the date of Effective Date of the Agreement.

Building Permit: A permit issued by the City authorizing one to construct, enlarge, alter, repair, move, improve, remove, convert or demolish any building or structure or portion thereof regulated by the City's building, plumbing, electrical, fire, energy, mechanical, and related codes. It does not include earth disturbance permits, tree removal permits or other non-building permits.

Certificate of Occupancy: Shall mean a temporary or permanent Certificate issued by the City and granting Grantee or its tenant(s) the right to occupy the Improvements.

City: Shall mean the City of Keller, Texas.

Commencement of Construction: Approval of the appropriate Building Permits and the commencement of actual on-site physical excavation or site grading required for installation of Improvements, excluding permits for clearing and grubbing.

Commercial Building Permit Fees: Fees paid to the City for review of building construction plans and building inspections.

Concept Plan: The Concept Plan or site plan for the Property, approved or as may be amended by the Council pursuant to the City's zoning regulations.

Construction Costs: The cost of permits, fees, construction materials, surveying and labor to construct the Facility. All other associated costs are deemed excluded, including, but not exclusively, the following costs: land, design, construction document preparation, bidding, and construction financing.

Council: Shall mean the City Council of the City.

Developer Agreement: That certain Developer Agreement (or Agreements) relating to the construction of Public Works Improvements.

Director: Shall mean the representative of the City's Economic Development Department.

Effective Date: The date that all parties have executed this Agreement.

Event of Default: Shall mean any of the Events of Default defined herein.

Facility: Shall mean the building(s), surface parking, structured parking and Site Improvements related to the Project.

Force Majeure: Any acts of God or the public enemy, war, riot, civil commotion, insurrection, governmental or de facto governmental action, (except actions taken by the City pursuant

to or permitted by the terms of this Agreement, and except actions taken as a result of acts or omissions of Grantee), fire, explosion or flood, and strikes or other act beyond the reasonable control of Grantee, or the City, but not including the lack of funds.

Application: Shall mean the Incentives Application as provided by R&K Sales, Inc. dba Penguin Patch.

Building Permit Fee: Any fee related to the review of non-Public Works construction plans and building plans required for the issuance of a building permit.

Grantee: Shall mean R&K Sales, Inc. dba Penguin Patch.

Impact Fee - Water: Any water Impact Fee charged by the City. This shall not include the “pass-through” Impact Fees owed to any other Agency.

Impact Fee - Wastewater: Any wastewater (aka sanitary sewer) Impact Fee charged by the City. This shall not include the “pass-through” Impact Fees owed to any other Agency.

Impact Fee - Roadway: Any roadway Impact Fee charged by the City.

Improvements: Shall mean the New Construction of the Facility and Site Improvements and though not exclusively, excluding any tenant build-out improvements or Business Personal Property.

Liens and Assessments: Shall mean any lien or assessment owed to the City by any Party to this Agreement, mowing and maintenance liens.

New Construction: Shall mean the first-time construction of Improvements utilizing newly purchased materials, and specifically excluding any remodeling or renovations undertaken after issuance of the first Certificate of Occupancy.

Performance Agreement: A written contract summarizing the performance requirements of Grantee or developer and the Incentives to be provided by the City upon fulfillment of those performance requirements. Also referred to as the Agreement.

Person: An individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

Program: Has the meaning set forth in the recitals to this Agreement.

Program Payments: The annual grant payments to be made by the City in accordance with this agreement.

Project: Shall mean the Improvements and the Property.

Property – Business Personal: Shall mean the tangible Business Personal Property as defined by the Appraisal District and within the Improvements on the Property.

Property - Real: Shall mean the Property and the Improvements constructed on the Property, subject to the limitations of the Appraisal District.

Property: Shall mean the approximately 4.07 acres of land being real property at 721 Chisholm Trail, Keller, Texas, as more particularly described in Exhibit "A.2" attached hereto.

Section 380.001: Has the meaning set forth in the recitals to this Agreement.

Site Improvements: Shall mean the grading, landscaping, irrigation system, lighting, Public Works Improvements and signage affixed to the ground.

Substantial Completion: Shall mean the date a Certificate of Occupancy or equivalent is issued by the City allowing occupancy of the Facilities.

Tax – Ad Valorem: Shall mean the tax collected by the City from the owners of taxable real and tangible business personal property.

Tax – Local Sales and Use: Shall mean the City's 1% local option portion, allocated to the City's general fund, that is received on all taxable sales occurred from the Project.

Taxable Value: Appraised value after the application of any lawful exemptions as determined by the Appraisal District.

3. TERM

This Agreement shall be effective as of the Effective Date and shall terminate upon completion of the Program Payments as provided in Section 5.6, unless earlier terminated pursuant to Section 7.

4. OBLIGATIONS OF GRANTEE

In consideration and as a prerequisite of the City's incentives, Grantee agrees to the following:

4.1. Completion Guidelines

- a. **Building Permit**: Grantee shall obtain a building permit within one year of the Effective Date of the Agreement.
- b. **Substantial Completion**: The Improvements shall be Substantially Complete within two years of the Effective Date of the Agreement.
 - i) **Workmanlike Pursuit**: Grantee agrees and covenants that it will diligently and faithfully in a good and workmanlike manner pursue (or cause to be pursued) the completion of the Improvements as a good and valuable consideration of this agreement.

4.2. Developer Agreement

Grantee agrees to execute the City's Developer Agreement(s).

4.3. Ad Valorem Taxes

Grantee agrees to remain current on payment of ad valorem property taxes for the term of this Agreement; provided, however, Grantee retains the right to timely and properly protest and contest any such ad valorem taxes and so long as Grantee is timely and properly protesting or contesting the same, it shall not constitute an event of default under this agreement. If Grantee becomes delinquent in the payment of ad valorem taxes on Property owned by Grantee, it shall be an event of default under this Agreement.

4.4. Documentation

Grantee shall submit to the City, as a condition of payment of any incentive, reasonably detailed evidence of compliance with Section 4 herein. This shall include detailed invoicing from contractors and payments made sufficient to identify the costs directly related to this Section.

4.5. Compliance

Grantee shall comply with any and all remaining terms and provisions herein.

4.6. Compliance with Laws and Regulations

Grantee covenants and agrees that all construction of the Facility will be in accordance with all applicable local, state and national laws and regulations or valid waiver thereof.

4.7. Liens and Assessments

Grantee shall be free and clear of any Liens and/or Assessments owed to the City and must be in good standing with the City to qualify for and receive any incentives.

5. CITY OBLIGATIONS

Subject to Grantee's performance of its obligations as required by the Agreement, to promote local economic development pursuant to the Program, the City shall grant Grantee the following economic development incentives:

5.1. Building Permit Fee

The City will grant back 100% of Building Permit Fees, not to exceed a total of \$20,938.75.

5.2. Commercial Plan Review Fee

The City will grant back 100% of Commercial Plan Review Fees, less the third-party review fee, not to exceed a total of \$7,328.56.

5.3. Impact Fees

The City will grant back 100% of Water, Wastewater and Roadway Impact Fees, not to exceed a combined total of \$63,043.82.

5.4. Grant Payments

Grant Payments described in Section 5 herein, will be paid upon substantial completion of the project. The value of the grants in this section shall not exceed a combined total of \$91,311.13 over the Term of this Agreement.

6. CONFLICT OF INTERSET

The Property is not owned or leased to any member of the City Council, any member of the Planning and Zoning Commission or member of the Keller Economic Development Board. In addition, Grantee agrees to complete a Conflict of Interest Questionnaire as required by Chapter 176 of the Texas Local Government Code.

7. DEFAULT AND TERMINATION

Grantee shall immediately notify the City in writing upon becoming aware of any change in the existence of any condition or event which would constitute a default or, with the giving of notice or passage of time, or both, would constitute a default under this Agreement. Such notice shall specify the nature and the period of existence thereof and what action, if any, the notifying party is taking or proposes to take with respect thereto.

If either party should fail to comply with the terms of this Agreement, or if a bankruptcy or other insolvency proceeding shall be filed by or against either party and such proceeding is not vacated within 30 days, it shall be deemed a default and the party shall have 30 days after delivery of written notice of such default from the other party to cure such default. If the noncompliance is not cured within that period, the non-defaulting party may terminate this Agreement by written notice and shall have no further obligation to the other party; provided that the City shall grant Grantee an extension to cure the default if Grantee demonstrates, to the reasonable satisfaction of the City Council that: the default cannot be cured by the payment of monies and (2) cannot be reasonably cured within 30 days and (3) that Grantee is diligently pursuing cure.

Notwithstanding the foregoing, in the event either party fails to pay the other party any monetary amounts owing under this Agreement when due, and such failure continues for a period of 30 days after delivery of written notice of such default, then such outstanding amounts shall accrue interest from the date owing until paid at the rate in effect on September 1 of the fiscal year in which the payment becomes overdue. That rate in effect on September 1 is equal to the sum of: (1) one percent; and (2) the prime rate as published in the Wall Street Journal on the first day of July of the preceding fiscal year that does not fall on a Saturday or Sunday.

8. KNOWING EMPLOYMENT OF UNDOCUMENTED WORKERS

Grantee acknowledges that effective September 1, 2007, the City is required to comply with Chapter 2264 of the Texas Government Code, enacted by House Bill 1196 (80th Texas Legislature), which relates to restrictions on the use of certain public subsidies. Grantee hereby certifies that Grantee, and any branches, divisions, or departments of Grantee, does not and will not knowingly employ an undocumented worker, as that term is defined by Section 2264.001(4) of the Texas Government Code. In the event that Grantee,

or any branch, division, or department of Grantee, is convicted of a violation under 8 U.S.C. Section 1324a(f) (relating to federal criminal penalties and injunctions for a pattern or practice of employing unauthorized aliens):

- 8.1. Conviction During Term: If such conviction occurs during the Term of this Agreement, this Agreement shall terminate contemporaneously upon such conviction (subject to any appellate rights that may lawfully be available to and exercised by Grantee) and Grantee shall repay, within one hundred twenty (120) calendar days following receipt of written demand from the City, the aggregate amount of the Program Payments by Grantee hereunder, in any, plus Simple Interest.
- 8.2. Conviction After Expiration or Termination: If such conviction occurs after expiration or termination of this Agreement, subject to any appellate rights that may lawfully be available to and exercised by Grantee, Grantee shall repay, within one hundred twenty (120) calendar days following receipt of written demand from the City, the aggregate amount of the Program Payments received by Grantee hereunder, if any, plus Simple Interest.
- 8.3. Applicability: This Section 8 does not apply to convictions of any subsidiary or Affiliate entity of Grantee, by any franchisees of Grantee, or by a person or entity with whom Grantee contracts.
- 8.4. Survivability: Notwithstanding anything to the contrary herein, this Section 8 shall survive the expiration or termination of this Agreement.

9. **FORCE MAJEURE**

Either party may be excused from performance under this Agreement when its performance is prevented as the result of Force Majeure as defined in Section 2. If a party suffers an event of Force Majeure, it shall provide written notice of the event to the other party promptly after its occurrence. Subject to this provision, such nonperformance shall not be deemed an event of default.

Following the occurrence of any event of Force Majeure, Grantee shall have such additional time to complete the applicable portion of the Improvements as may be reasonably required if Grantee is diligently and faithfully pursuing the completion of the same.

10. **INDEMNIFICATION**

GRANTEE EXPRESSLY AGREES TO FULLY AND COMPLETELY DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY, AND ITS OFFICERS, AND EMPLOYEES, AGAINST ANY AND ALL CLAIMS, LAWSUITS, LIABILITIES, JUDGMENTS, COSTS, AND EXPENSES FOR PERSONAL INJURY (INCLUDING DEATH), PROPERTY DAMAGE OR OTHER HARM, DAMAGES OR LIABILITY FOR WHICH RECOVERY OF DAMAGES IS SOUGHT, SUFFERED BY ANY PERSON OR PERSONS, THAT MAY ARISE OUT OF OR BE OCCASIONED BY ANY NEGLIGENT, GROSSLY NEGLIGENT, WRONGFUL, OR STRICTLY LIABLE

ACT OR OMISSION OF GRANTEE OR ITS AGENTS, EMPLOYEES, OR CONTRACTORS, ARISING OUT IN THE PERFORMANCE OF THIS AGREEMENT, REGARDLESS OF WHETHER OR NOT THE NEGLIGENCE, GROSS NEGLIGENCE, WRONGFUL ACT, OR FAULT OF THE CITY OR ITS OFFICERS, AGENTS, OR EMPLOYEES, CONTRIBUTES IN ANY WAY TO THE DAMAGE, INJURY, OR OTHER HARM. Nothing in this paragraph may be construed as waiving any immunity available to the City under state law. This provision is solely for the benefit of Grantee and the City and is not intended to create or grant any rights, contractual or otherwise, in or to any other Person.

11. NO INDEPENDENT CONTRACTOR OR AGENCY RELATIONSHIP

It is expressly understood and agreed that Grantee shall not operate as an independent contractor or as an agent, representative or employee of the City. Grantee shall have the exclusive right to control all details and day-to-day operations relative to the Eligible Improvements, Subject Site and any improvements thereon and shall be solely responsible for the acts and omissions of its officers, agents, servants, employees, contractors, subcontractors, licensees and invitees in connection therewith. Grantee acknowledges that the doctrine of *respondeat superior* will not apply as between the City and Grantee, its officers, agents, servants, employees, contractors, subcontractors, licensees, and invitees. Grantee further agrees that nothing in this Agreement will be construed as the creation of a partnership or joint enterprise between the City and Grantee.

12. MISCELLANEOUS MATTERS

- 12.1.** Section or Other Headings: Section or other headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.
- 12.2.** Attorney's Fees: The prevailing party in the adjudication of any proceeding relating to this Agreement shall be authorized to recover its reasonable and necessary attorney's fees pursuant to Section 271.159 of the Texas Local Government Code.
- 12.3.** Entire Agreement: This Agreement (with all referenced exhibits, attachments, and provisions incorporated by reference) embodies the entire agreement of both Parties, superseding all oral or written previous and contemporary agreements between the Parties relating to matters set forth in this Agreement.
- 12.4.** Amendment: This Agreement may only be amended, altered, or revoked by written instrument signed by the Grantee and the City.
- 12.5.** Successors and Assigns: This Agreement shall be binding on and inure to the benefit of the Parties, their respective successors and assigns. Grantee may assign all or part of its rights and obligations hereunder (a) to any Grantee Affiliate effective upon written notice to the City, provided the Grantee Affiliate agrees in writing to comply with each and every obligation of Grantee in this Agreement or (b) to any Person other than a Grantee Affiliate with the prior written approval of the City, which approval shall not be unreasonably withheld or delayed and the assignee is financially able to perform this Agreement. Nothing in this Section shall release Grantee from Grantee's obligations under Section 4 hereof unless the City

gives its express written consent.

- 12.6. Notice:** Any notice and / or statement required and permitted to be delivered shall be deemed delivered by hand delivery, depositing same in the United States mail, certified with return receipt requested, postage prepaid, addressed to the appropriate party at the following addresses, or at such other addresses provided by the parties in writing:

City:

City of Keller
Attn: City Manager
P.O. Box 770
Keller, Texas 76244

Grantee:

R&K Sales, Inc. dba
Penguin Patch
Attn: Jennifer Randklev
3553 Loddick Ln.
Keller, TX 76244

With Copies to (which shall not constitute notice):

Boyle & Lowry, L.L.P.
Attn: L. Stanton Lowry
4201 Wingren Dr., Suite 108
Irving, Texas 75062

- 12.7. Interpretation:** Regardless of the actual drafter of this Agreement, this Agreement shall, in the event of any dispute over its meaning or application, be interpreted fairly and reasonably, and neither more strongly for or against any party.
- 12.8. Applicable Law and Venue:** This Agreement is made, and shall be construed and interpreted under the laws of the State of Texas and is fully performable in Tarrant County, Texas, and venue of any dispute relating to this Agreement shall lie in Tarrant County, Texas.
- 12.9. Counterparts:** This Agreement may be executed in multiple counterparts, each of which shall be considered an original, but all of which shall constitute one instrument.
- 12.10. Limitation on Liability:** Grantee agrees that City shall not be liable to Grantee or any other party for any special or consequential damages, direct or indirect, punitive damages, interest, or cost of court or expenses related to litigation other than reasonable and necessary attorney's fees, as provided in Section 12.2 hereof for any act of default by City under this Agreement.
- 12.11. Representations:** Grantee represents and warrants to the City that it has the requisite authority to enter into this Agreement and that its representations in the Agreement are true.
- 12.12. No Joint Venture:** The parties agree that the terms hereof are not intended to and shall not be deemed to create a partnership or joint venture among the parties. The City, its elected officials, directors, employees and agents do not assume any

responsibility to any third party in connection with Grantee's construction or operation of the Project.

12.13. Conflicting Agreements: Where conflicts might arise between this Agreement and the Developer's Agreement or other agreements between the City and Grantee, this Agreement shall prevail. Grantee agrees to comply with the City's normal development regulations while developing the Property, except where those regulations conflict with the provisions of this Agreement.

12.14. Severability: In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision thereof and this Agreement shall be considered as if such invalid, illegal, or unenforceable provision had never been contained in this Agreement.

12.15. Source of Funds: All payments required to be made by the City hereunder shall be made by the City from current revenues available to the City.

12.16. Governmental Powers: It is understood that by execution of this Agreement, the City does not waive or surrender any of its governmental powers or immunities that are outside of the terms, obligations, and conditions of this Agreement.

13. REMEDIES CUMULATIVE

The rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy by either party shall not preclude or waive its rights to use any or all other remedies. Said rights and remedies are given in addition to any other rights the parties may have by law, statute, ordinance or otherwise.

14. WAIVER

No waiver by a party in any event of default, or breach of any covenant, condition or stipulation herein contained shall be treated as waiver of any subsequent default or breach of the same or any other covenant, condition or stipulation hereof.

15. RIGHT TO OFFSET

City may, at its option, offset any amounts due and payable to Grantee under this Agreement against any debt (including taxes) lawfully due to City from Grantee and which are delinquent under applicable law or by agreement, regardless of whether the amount due arises pursuant to the terms of this Agreement or otherwise and regardless of whether or not the debt due to City has been reduced to judgment by a court, provided that if Grantee is in good faith challenging the validity of any debt, in accordance with applicable laws, the City may not offset unless and until such challenge is finally resolved.

16. ROUGH PROPORTIONALITY

Grantee agrees that all property dedicated to the City and all public facilities constructed pursuant to this Agreement are reasonably necessary to serve the Project and are roughly proportional to the need generated by the subdivision for such land and

facilities. Grantee acknowledges its right to seek a variance to the dedication and/or construction requirements and that it has voluntarily chosen not to pursue such remedies and waives any claim for a taking of property, or any other constitutional or statutory claim, that it may have under either the Texas or United States Constitutions or statutes.


17. NO THIRD PARTY RIGHTS


The provisions and conditions of this Agreement are solely for the benefit of the City and Grantee, and any lawful assign or successor of Grantee, and are not intended to create any rights, contractual or otherwise, to any other person or entity.

EXECUTED and effective as of the date of the last authorized signature below:

The City of Keller, Texas

GRANTEE: R&K Sales, Inc. dba Penguin Patch

By: 
Mark Hafner, City Manager

By: 
Name: Jennifer Randklev

Date: 1/13/2023

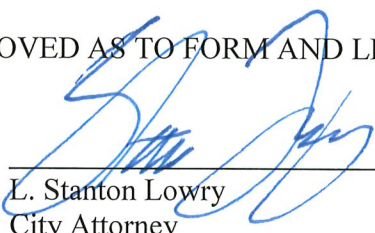
Title: CEO/President

Date: December 26, 2022

Attest:


City Secretary

APPROVED AS TO FORM AND LEGALITY:

By: 
L. Stanton Lowry
City Attorney