

INCENTIVE AGREEMENT

THIS INCENTIVE AGREEMENT (“**Agreement**”) is made and entered into by and between the CITY OF COMMERCE CITY, a Colorado home rule municipality (“**City**”), and PETER DEFRIES CORPORATION, a New Mexico corporation (“**Business**”), (collectively, “**Parties**”), as of the date of attestation by the City’s Clerk (“**Effective Date**”).

WHEREAS, Business wishes to establish a new restaurant at 15150 East 104th Avenue in the City, including the construction of approximately 5,400 square feet new restaurant facility with a capital investment of approximately \$2,450,000, and plans on creating approximately eighty new full or part time jobs with Business in the City;

Business desires to construct, or cause to be constructed, an estimated \$2,450,000 in capital improvements in the City to be used by Business as a new fast-casual restaurant, including a new facility of approximately 5,400 square feet with seating for approximately 168 and the purchase or installation of new furniture, fixtures, and equipment associated with the restaurant for use by Business in the City (“**Capital Investments**”);

WHEREAS, the City deems it to be in the best interests of the residents of the City for Business to construct and locate its restaurant in the City, for Business to create new jobs in the City, and for the City to receive revenues related to construction, equipment, and sales in connection with Business; and

WHEREAS, the City has agreed to provide incentives to Business subject to the terms and conditions of this Agreement, Resolution No. 2016-45, and Commerce City Economic Development Incentives Program, effective January 1, 2015, and established by Resolution No. 2014-56 (“**Program**”), Resolution No. 2014-56.

NOW, THEREFORE, in consideration of the mutual promises and conditions contained in this Agreement, the Parties agree as follows:

I. INCENTIVES & CONDITIONS.

A. Capital Investment Incentives & Conditions. As an incentive for the Capital Investments, the City will rebate to Business the following amounts derived from sales and use taxes and building permit fees and building plan review fees paid to the City by the Business or its vendors or contractors in connection with the Capital Investments during the period between the issuance of the building permit for the Capital Investments and the earlier of the completion and operation of the Capital Investments or July 31, 2017:

1. **Fifty percent (50%)** of building permit fees and building plan review fees payable and remitted to the City in connection with the Capital Investments; and

2. **Ten percent (10%)** of the City’s non-dedicated sales and/or use taxes (at the 3.5% rate) payable and remitted to the City in connection with the Capital Investments.

B. Sales Tax Incentives & Conditions. As an incentive for the continued operation of the Business in the City, the City will rebate to the Business **forty percent (40%)** of the City’s non-dedicated sales and use taxes (at the 3.5% rate) generated from the sales of the Business in the City during the first twenty-four (24) months of restaurant operation and timely remitted to the City.

C. Payment. The City will provide accrued and payable incentives annually, subject to any conditions of this Agreement, unless the City requires further review of the incentive. If the City

determines that the City has paid any amounts not properly payable to Business, Business will reimburse the City for any overpayment within sixty (60) days of written notice by the City.

D. Conditions. These conditions are in addition to conditions applicable to specific incentives and conditions provided elsewhere in this Agreement.

1. Deadline. All incentives otherwise payable under this Agreement shall be limited to the following percentages based on the date by which the Capital Investments are completed and opened for regular business:

<u>Incentive Percentage</u>	<u>Completion/Operation Date</u>
100%	February 15, 2017
75%	March 31, 2017
50%	June 30, 2017
0%	After June 30, 2017

No incentives will be payable based on any fees or taxes collected after the earlier of twenty-four (24) months after the commencement of restaurant operation or June 30, 2019.

2. Continuation of Business. Business will maintain a business presence in the City for three (3) years from the receipt of any incentive, subject to reimbursement to the City of any incentive provided under this Agreement.

3. Use by Business. The Capital Investments must be occupied and used by Business.

4. Support for Incentives. Business must submit documentation for any incentives no later than January 5 of the year following any period for which payment of incentives is claimed, identifying all sales and use taxes, building permit fees, and building plan review fees for which incentives are claimed and the accrued incentives within the period covered by the documentation. As requested, Business will provide data and documentation to the City and will cooperate with any City review to confirm any request for payment. Business waives any claim to any incentives from the period covered by the documentation but not identified at that time.

5. Debts to City. The City will not be obligated to provide any incentives at any time Business owes obligations and debts to the City, whether monetary or otherwise, including, but not limited to, any and all fees, fines, taxes, assessments, penalties, judgments, liens and dedications, whether or not related to the Capital Investments or sales of the Business, and will provide incentives when such obligations and debts are satisfied.

6. Deficiency Reporting. Business must report any claimed deficiencies or errors in any incentives provided under this Agreement or data provided by the City within thirty (30) days of the provision of such incentives or data. Failure to report any such deficiencies or errors will relieve the City of any obligation to pay incentives related to such claimed deficiencies or errors.

7. Adequate Fees and Taxes. Because incentives are provided from building permit fees, building plan review fees, and sales and use taxes (at the 3.5% rate) paid in connection with the Capital Investment and sales of the Business in the City, the City will not be obligated to provide incentives if, at any time,

the incentives exceed such fees and taxes and the City will not be obligated to provide incentives until such fees and taxes are equal to or exceed the incentives payable to Business.

8. Limitation of Incentives. Incentives are limited to building permit fees, building plan review fees, and sales and use taxes (at the 3.5% rate) paid in connection with the Capital Investment and sales of the Business in the City. No other fees or amounts (including development or impact fees) will be subject to any incentives. The City's obligation to pay any incentives is subject to all commitments to pay any City bonds and any restrictions in such bonds.

9. Interest. No interest shall accrue on any incentives during any period of non-payment during any dispute as the City's obligation to provide any incentive.

10. Sales and Use Tax Restriction. Because a portion of the City's tax rate of 4.5% is dedicated to the construction of identified parks, recreation amenities, and roads, no portion of the 1.0% sales and use tax approved by voters on November 5, 2013, or any future increase will be used to provide any incentive. All sales and use taxes must be remitted to the City at the current rate, as amended. Incentives related to sales and use taxes will be calculated based on a tax rate of 3.5%. Further, incentives derived from sales and use taxes will be provided only from the sales and use taxes remitted to the City pursuant to the City's 3.5% tax rate.

11. TABOR; Agreement Subject to Appropriations. The Parties acknowledge that the City is prohibited from incurring any multiple fiscal year debt or financial obligations to pay the incentives or reimburse taxes to any person or entity without prior City-wide voter approval. Therefore, to avoid obtaining City-wide voter approval, the City's obligations to provide any incentives are subject to annual appropriations that are a legislative decision of the City Council for the City.

E. No Obligation by Business. This Agreement sets forth only the terms and conditions by and under which the City will provide incentives to Business. Nothing in this Agreement will constitute or be deemed an agreement by or obligation on the part of Business to meet or comply with the terms and conditions except as a condition to the provision of incentives. The failure by Business to meet or comply with terms and conditions of this Agreement will relieve the City of its obligation to pay any incentives related to such failure.

II. NOTICES.

Except for routine communications, notices required under this Agreement and all other correspondence between the parties shall be directed to the following addresses (unless changed by written notice) and shall be deemed received when hand-delivered or three (3) days after being sent by certified mail, return receipt requested:

To the City:

Michelle Claymore
Economic Development Director
City of Commerce City
7887 E. 60th Avenue
Commerce City, Colorado 80022

To Business:

Doug Morse
Director of Real Estate
Peter DeFries Corp.
8525 Jefferson St NE
Albuquerque, NM 87113

III. GENERAL PROVISIONS.

A. Remedy for Erroneous Payment. Business will refund immediately any Incentives provided on the basis of erroneous information or clerical errors. The City may offset any such erroneous payments from any other Incentives payable to Business. This remedy is in addition to any remedies available at law or in equity.

A. Recitals Incorporated. The recitals to this Agreement are incorporated in this Agreement.

B. No Third-Party Beneficiaries. The Parties expressly understand and agree 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. The Parties expressly intend that any person other than the City and Business shall be deemed to be only an incidental beneficiary under this Agreement, and will not have any right to seek payment of any Incentive or enforce any right under this Agreement.

C. Governing Law; Jurisdiction and Venue; Recovery of Costs. This Agreement shall be governed by the laws of the State of Colorado without regard to its conflicts of laws provisions. For all claims arising out of or related to this Agreement, Business consents to the exclusive jurisdiction of and venue in the state courts in the County of Adams, State of Colorado. Business waives any exception to jurisdiction because of residence, including any right of removal to federal court based on diversity of citizenship. If 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.

D. Acknowledgement of Open Records Act. Business acknowledges that the City is a public entity subject to the Colorado Open Records Act, C.R.S. § 24-72-201, et seq., and as such, this Agreement and related documents may be subject to public disclosure.

E. Governmental Immunity Act. 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.

F. No Partnership or Agency. Notwithstanding any language in this Agreement or any representation or warranty to the contrary, neither the City nor Business shall be deemed or constituted a partner or joint venture of the other. Neither of the Parties shall be the agent of the other, and any actions taken pursuant to this Agreement shall be deemed actions as an independent contractor of the other.

G. Rules of Construction. Neither party will be deemed to have drafted this Agreement. This Agreement has been reviewed by all Parties and shall be construed and interpreted according to the ordinary meaning of the words used so as to fairly accomplish the purposes and intentions of all Parties. No term of this Agreement will be construed or resolved in favor of or against the City or Business on the basis of which party drafted the uncertain or ambiguous language. Where appropriate, the singular includes the plural and neutral words and words of any gender will include the neutral and other gender. 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.

H. No Waiver. The waiver of any breach of a term, provision or requirement of this Agreement, including the failure to insist on strict compliance or to enforce any right or remedy, shall not be construed or deemed as a waiver of: any subsequent breach of such term, provision or requirement or of any other term, provision or requirement; any right to insist on strict compliance with any term, provision

or requirement; or any right to enforce any right or remedy with respect to that breach or any other prior, contemporaneous, or subsequent breach.

I. Severability. A holding by a court of competent jurisdiction that any provision of this Agreement is invalid or unenforceable shall not invalidate or render unenforceable any other provision.

J. Authority. Each party represents and warrants that it has taken all actions that are necessary or required by its procedures, bylaws or applicable law to legally authorize the undersigned signatory to execute this Agreement on behalf of the Parties and to bind the parties to its terms.

K. Counterparts. 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.

L. No Assignment. Neither this Agreement nor any rights to receive payment under this Agreement shall be assigned by Business. Any attempted assignment in violation of this provision will be void, will not obligate the City to provide any Incentives to any other person or entity, and will relieve the City of any obligation to provide any Incentives to Business.

M. Entire Agreement; Modification. This Agreement, including the recitals, which are incorporated by reference, contains the entire agreement of the Parties relating to the subject matter of this Agreement and, except as expressly provided in this Agreement, may not be modified or amended except by a validly executed written agreement. All prior and contemporaneous agreements and understandings, whether oral or written, are superseded by this Agreement and are without effect to vary or alter any terms or conditions of this Agreement.

[Remainder of this page intentionally left blank – signature page(s) follow(s).]

IN WITNESS WHEREOF, the City and Business have caused this Agreement to be duly executed as of the Effective Date.

CITY OF COMMERCE CITY

Brian McBroom, City Manager

ATTEST:

APPROVED AS TO FORM:

Laura J. Bauer, CMC, City Clerk

Robert Sheesley, Senior Assistant City Attorney

Date: _____, 2015

Recommended for approval:

Michelle Claymore, Economic Development Director

PETER DEFRIES CORPORATION

Signature

Doug Morse, Director of Real Estate