

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 GABE'S BURRITO GRILL & FRESH BLENDERS, LLC D/B/A G's TACOS, a Colorado limited liability company ("**Business**"), and TTRG COMMERCE CITY CO, LLC, an Indiana limited liability company ("**Developer**") (individually, a "**Party**" and collectively, "**Parties**"), as of the date of attestation by the City's Clerk ("**Effective Date**").

WHEREAS, Business has requested incentives from the City for the construction and establishment of a proposed new full-service restaurant including tenant improvements with a restaurant-grade kitchen, intended to be operated by Business in a leased facility that will be constructed by Developer generally at the northeast corner of E. 104th Avenue and Chambers Road in the City ("**Location**");

WHEREAS, the City deems it to be in the best interests of the residents of the City for Business to operate the full-service restaurant in the City at the proposed location and for Developer to develop a full-service restaurant space in the City to create new jobs in the City, to attract other retail opportunities in the City, and for the City to receive revenues related to construction, equipment, and other investments in connection with Business; and

WHEREAS, the City Council authorized these incentives through Resolution 2018-106;

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

I. INCENTIVES & CONDITIONS.

A. Incentives & Conditions. As an incentive for the development and continued operation of a full-service restaurant with a bar and lunch and dinner service at the Location ("**Restaurant**"), the City will provide the following incentives, subject to all conditions and limitations established in this Agreement and by applicable law, including Resolution 2018-106:

1. *Triple-Net Lease Expenses*: For a period of sixty (60) months following commencement of the obligation to pay rent for the restaurant space, the City will provide Business with incentives relative to Business' triple-net lease expenses consisting of real estate taxes, building insurance, and common area maintenance costs ("**Triple-Net Expenses**") not to exceed Eight and 50/100 Dollars (\$8.50) per square foot of floor area contained in the Restaurant, for up to 2,700 square feet of space in the Restaurant ("**Triple-Net Incentive**"). Developer or Business will provide a fully-executed copy of the lease between Business and Developer for the Restaurant ("**Lease**") establishing Business' obligation to pay the Triple-Net Expenses to Developer. City acknowledges and agrees that the Lease may be redacted as is necessary to protect the disclosure of Developer's confidential and trade secret information, provided no terms related to the Triple-Net Expenses shall be redacted. The Triple-Net Incentive will be payable by City to Business monthly after delivery of the Lease. The Triple-Net Incentive will not be subject to increase. Business will use the Triple-Net Incentive solely to pay the Triple Net Expenses for the Restaurant. Business and Developer will notify City if Business fails to pay the Triple-Net Expenses to Developer ("**Payment Failure**").

2. *Facility Construction*: The City will provide Developer, as an incentive for constructing the Restaurant, an amount not to exceed One Hundred Ninety-Five Thousand and 00/100 Dollars (\$195,000.00) to be applied to the cost to construct the Restaurant, including the design, construction, and installation of equipment for a restaurant-grade kitchen ("**Construction Incentive**"). The Construction Incentive shall be

payable upon the City's receipt of Developer's request for payment, including invoices or orders for eligible costs ("**Construction Documentation**")., provided fifty percent (50%) shall be payable only upon the earlier of the issuance of a temporary certificate of occupancy that allows Business to move in and begin operations or a permanent certificate of occupancy for the Restaurant.

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

1. Continuation of Business; Sublease. For three (3) years from and after the Restaurant's opening to the public for regular operations ("**Operating Period**"), Business will maintain the Restaurant in Continuous Operation. "**Continuous Operation**" means that the Restaurant will be opened to the general public for lunch and dinner during regular business hours as established by Business in its reasonable business judgment; provided, however, that Business may close during the Operating Period (i) for periods not to exceed sixty (60) days in any twelve (12) month period for remodeling or (ii) as a result of a Force Majeure Event as defined below (collectively, "**Permitted Closure(s)**"), and such Permitted Closures shall be deemed to be Continuous Operation for purposes of this Agreement. If Business ceases operations during the Operating Period, except for Permitted Closures or fails to pay the Triple-Net Expenses to Developer, the City may suspend or terminate the Triple-Net Incentive. If Business seeks to sublease the Restaurant before the end of the Lease term, which Lease term shall not be less than five (5) years, Business will sublease only for use as a full-service restaurant that will provide similar levels of service and be maintained in Continuous Operation in accordance with this Agreement.

2. Developer Completion & Promise to Repay. Developer shall construct and obtain a temporary certificate of occupancy that allows Business to move into the Restaurant and begin operations or a permanent certificate of occupancy for the Restaurant no later than March 31, 2020. Developer shall make such facility available for restaurant operations for no less than five (5) years after the satisfaction of such condition. If Developer fails to satisfy the conditions identified in this Section B(2), subject to extension for a Force Majeure Event, as defined below, Developer will repay the unamortized portion of the Construction Incentive (the Construction Incentive to be amortized over a five (5) year period commencing on the date the certificate of occupancy for the Building is issued) provided by the City to Developer under this Agreement within thirty (30) days of the City's demand for repayment.

3. Support for Incentives; Repayment. Business and Developer will provide data and documentation, including without limitation the redacted Lease, Construction Documentation, and notice of any Payment Failure, to the City and will cooperate with any City review to confirm any request for payment. If the City determines that the City has paid any amounts not properly payable to Business or Developer, the applicable Party will reimburse the City for any overpayment within sixty (60) days of written notice by the City.

4. Debts to City. The City will not be obligated to provide any incentive payments to a Party at any time that Party 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 Triple-Net Expenses or construction of the Restaurant, and will make the incentive payment(s) to the recipient when the recipient's obligations and debts are satisfied, subject to any applicable condition.

5. Deficiency Reporting. Business and Developer must report any claimed deficiencies or errors in any incentive payments made by the City pursuant to this Agreement within thirty (30) days of payment. Such Party's failure to report any such deficiencies or errors will relieve the City of any obligation to pay incentives to such Party related to such claimed deficiencies or errors.

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

7. Sales and Use Tax Restriction. No portion of the 1.0% sales and use tax approved by voters on November 5, 2013, and no future increase will be used to provide any incentive payments pursuant to this Agreement. The City's obligation to pay the incentives set forth herein is subject to all commitments to pay any City bonds and any restrictions in such bonds.

8. 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 the need for City-wide voter approval, the City's obligations to provide incentives, or any portion thereof, shall be on a fiscal year basis and are subject to annual appropriations that are a legislative decision of the City Council for the City. Accordingly, the Parties agree that the City's obligation to make any payments under this Agreement are expressly contingent upon appropriation of funds for such purposes.

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

II. NOTICES.

Except for routine communications, notices required under this Agreement and all other correspondence between the Parties regarding this Agreement 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:

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

To Business:

Gabriel Wheeler
Gabe's Burrito Grill & Fresh Blenders, LLC
13149 W. 88th Avenue
Arvada, CO 80005

Copy to:

City Attorney
City of Commerce City
7887 E. 60th Avenue
Commerce City, Colorado 80022

To Developer:

General Counsel
TTRG Commerce City CO, LLC
111 Monument Circle, Suite 1600
Indianapolis, Indiana 46204

III. GENERAL PROVISIONS.

A. Remedy for Erroneous Payment. Business and Developer will promptly refund any incentive payment(s) which are known by the receiving Party to have been provided based on erroneous information or clerical errors. If the receiving Party does not return or refund the payment(s) that are known by such Party to be erroneous, the City may offset any such erroneous payment(s) from any other incentive

payments which are due to be paid to the applicable Party. This remedy is in addition to any remedies available at law or in equity.

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

C. Force Majeure Events. For purposes of this Agreement, the term “**Force Majeure Event**” shall mean the inability to perform and any delay in performance resulting from moratoriums, strike, lockout or labor dispute, lack or failure of customary sources of supply of fuel, labor and materials, or due to any other cause beyond the reasonable control of the applicable Party, including, without limitation, national emergency, any law or governmental rule, order or regulation, war, civil commotion, riot, interference by civil or military authorities, condemnation, fire or other casualty or act of God. In the event of the occurrence of a Force Majeure Event, deadlines established in this Agreement shall be extended until a reasonable time after the cessation of the Force Majeure Event. Notwithstanding the foregoing, without limitation, Force Majeure Events shall not include governmental actions, laws, rules, orders, or regulations relating to land use approvals, the use or occupancy of buildings, building or construction permits, certificates of occupancy, inspections, land sales, or liquor licenses.

D. 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 or party other than the City, Business, and Developer 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.

E. 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 and Developer consent to the exclusive jurisdiction of and venue in the state courts in the County of Adams, State of Colorado. Business and Developer waive 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.

F. Acknowledgement of Open Records Act. Business and Developer 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.

G. 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.

H. No Partnership or Agency. Notwithstanding any language in this Agreement or any representation or warranty to the contrary, neither the City nor Business nor Developer shall be deemed or constituted a partner or joint venturer of the other Parties. None 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.

I. Rules of Construction. No 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. No term of this Agreement will be construed or resolved in favor of or against the City, Business, or Developer 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.

J. 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.

K. 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.

L. 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 such Party and to bind such Party to the terms of this Agreement.

M. 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.

N. No Assignment. Neither this Agreement nor any rights to receive payment under this Agreement shall be assigned by Business or Developer without the City's consent, provided Developer may assign this Agreement to an affiliated entity with notice to the City. Any attempted assignment in violation of this provision will be void, will not obligate the City to provide any incentive payments to any other person or entity, and will relieve the City of any obligation to provide any incentive payments to the assigning Party.

O. 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. Except as expressly provided in this Agreement, this Agreement shall not be modified or amended except by a written agreement validly executed by all Parties. Except for the Lease, 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. The Lease is not incorporated into this Agreement and nothing in this Agreement shall be construed to modify the Lease in any way.

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

IN WITNESS WHEREOF, the City, Business, and Developer have caused this Incentive 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, City Attorney

Date: _____, 2019

Recommended for approval:

Michelle Claymore, Economic Development Director

GABE'S BURRITO GRILL & FRESH
BLENDERS, LLC

Signature

GABRIEL R. WHEELER, PRESIDENT / OWNER
Printed Name & Title

TTRG COMMERCE CITY CO, LLC

Signature

Printed Name

Title

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CITY OF COMMERCE CITY

Brian McBroom
Brian McBroom, City Manager

ATTEST:

Laura J. Bauer
Laura J. Bauer, CMC, City Clerk

Date: June 19, 2019



APPROVED AS TO FORM:

Robert Sheesley
Robert Sheesley, City Attorney

Recommended for approval:

Michelle Claymore
Michelle Claymore, Economic Development Director

**GABE'S BURRITO GRILL & FRESH
BLENTERS, LLC**

Signature

Printed Name & Title

TTRG COMMERCE CITY CO, LLC

Paul M. Thrift
Signature

PAUL M. THRIFT
Printed Name

MANAGER
Title