

ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT

THIS ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT (the "Agreement") is made and entered into this ____ day of _____, 2023, by and between the City of Montgomery, Texas (the "**City**"), and Home Depot U.S.A., Inc. ("**Home Depot**"). The City and Home Depot (hereinafter collectively referred to as the "**Parties**" and individually to as the "**Party**").

WITNESSETH:

WHEREAS, Home Depot is in the process of purchasing and developing property located at the commonly known address of 20240 Eva Street (the "**Property**"), and more particularly described in Exhibit A, to be used by Home Depot as a new retail store; and

WHEREAS, the City has requested Home Depot to fund the design, management, and construction of certain public infrastructure improvements adjacent to the Property, and, in return, Home Depot requested certain economic development incentives to defray a portion of those costs; and

WHEREAS, the City is authorized by Chapter 380 of the Texas Local Government Code to make economic development grants in recognition of the positive economic benefits to the City to promote state and local economic development and stimulate business and commercial activity in the City; and

WHEREAS, the City has concluded and hereby finds that the Agreement will clearly promote economic development in the City and, as such, meets requisites under Chapter 380 of the Texas Local Government Code, as amended, and further, is in the best interests of the City; and

WHEREAS, the City has determined that making economic development grants to Home Depot in accordance with this Agreement will further the objectives of the City and will benefit the City and the City's inhabitants, will promote local economic development, will stimulate commercial and business activity, and will generate additional sales tax and will enhance the property tax base and economic vitality of the City; and

NOW, THEREFORE, in consideration of the foregoing premises and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the City and Home Depot covenant and agree as follows:

1. Definitions. For purposes of this Agreement, each of the following terms shall have the meaning set forth below unless the context clearly indicates otherwise:

"Annual Sales Tax Grants" shall mean economic development grants, each in the amount equal to fifty percent (50%) of the Sales Tax Receipts received by the City for the applicable Sales Tax Reporting Period, to be paid annually to Home Depot as set forth herein. The amount of each Annual Sales Tax Grant shall be computed by multiplying the Sales Tax Receipts received by the City for the given Sales Tax Reporting Period

times fifty percent (50%), less the administrative fee charged to the City by the State of Texas. For purposes of clarification, and as defined in "Sales and Use Tax," below, the sales tax referenced herein subject to the aforementioned fifty percent (50%) limitation is fifty percent (50%) of the sales tax received by the City for the applicable sales tax reporting period.

"Bankruptcy or Insolvency" shall mean the dissolution or termination of a Party's existence as a business, insolvency, appointment of receiver for any part of such Party's property and such appointment is not terminated within one hundred twenty (120) days after such appointment is initially made, any general assignment for the benefit of creditors, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against such party and such proceeding is not dismissed within one hundred twenty (120) days after the filing thereof.

"Commencement Date" shall mean the date a certificate of occupancy is issued by the City to Home Depot.

"Completion of Construction" shall mean that (i) substantial completion of the Improvements has occurred; and (ii) the City has issued a certificate of occupancy for occupancy of the Improvements by Home Depot.

"Consummated" is defined in Section 321.203, Texas Tax Code, or its successor.

"Effective Date" shall mean the last date of execution hereof.

"Expiration Date" shall mean the date of payment of the Maximum Sales Tax Grant amount.

"Force Majeure" shall mean any contingency or cause beyond the reasonable control of a Party including, without limitation, acts of God or the public enemy, war, riot, civil commotion, insurrection, government or de facto governmental action or inaction (unless caused by the intentionally wrongful acts or omissions of the Party), fires, explosions or floods, strikes, slowdowns or work stoppages.

"Impositions" shall mean all taxes, assessments, use and occupancy taxes, charges, excises, license and permit fees and other charges, whether general or special, ordinary or extraordinary, foreseen or unforeseen, which are or may be assessed, charged, levied, or imposed by any public or governmental authority or the City on Home Depot, and/or a Home Depot affiliate, and applicable to the development of the Property or any property or any business owned by Home Depot.

"Improvements" shall mean a Home Depot retail store to be constructed on the Property, more fully described in the submittals filed by Home Depot with the City, from time to time, in order to obtain a building permit(s).

"Maximum Sales Tax Grant" shall mean the cumulative payment of Sales Tax

Grants to Home Depot which equals the total cost and/or expenses related to the Road Improvements and Signal Improvement projects, in excess of Seven Hundred and Fifty Thousand and No/100 Dollars (\$750,000.00).

"Party" shall mean any party to this Agreement.

"Payment Request" shall mean a written request from Home Depot to the City for payment of an Annual Sales Tax Grant for the applicable Sales Tax Reporting Period.

"Property" shall mean the real property described in Exhibit A.

"Road Improvements" shall mean the road improvements to North Buffalo Spring Drive from TX-105 to the northern property boundary line of the Property, as shown in Exhibit B.

"Sales and Use Tax" shall mean (i) with respect to the City, the City's **one and one half percent (1.5%)** general municipal sales and use tax imposed pursuant to Chapter 321, Texas Tax Code, on the sale of Taxable Items by Home Depot consummated on the Property.

"Sales Tax Area Reports" shall mean reports provided by the Comptroller to the City pursuant to Texas Tax Code, Section 321.3022, or other provision of the Texas Tax Code, with respect to Sales and Use Tax allocations to the City attributable to the sale of Taxable Items by Home Depot consummated on the Property or if such reports are not available from the Comptroller, such other documentation in a form reasonably acceptable to the City setting forth the collection of Sales and Use Tax by Home Depot received by the City from the Comptroller for the sale of Taxable Items by Home Depot consummated on the Property.

"Sales Tax Certificate" shall mean one or more Sales Tax Area Reports or a report provided by the Comptroller to the City in accordance with Section 321.3022, Texas Tax Code (or other applicable provision of the Texas Tax Code), which lists the amount of Sales and Use Tax collected (including any refunds, credits or adjustments) for the Sales Tax Reporting Period paid by Home Depot and received by the City from the Comptroller from the sale of Taxable Items consummated by Home Depot on the Property and, in turn, paid by the Comptroller to the City for use by the City in accordance with this Agreement; or, if such a report is not available, then a certificate or statement in a form reasonably approved by the City, setting forth the collection of Sales and Use Tax (including any refunds, credits or adjustments) by Home Depot received by the City from the Comptroller, from the sale of Taxable Items by Home Depot consummated on the Property, including supporting documentation, to be provided by Home Depot that provides the same or similar information, as such other information as the City may reasonably require from time to time.

"Sales Tax Receipts" shall mean the City's receipt of the City's Sales and Use Tax from the Comptroller from Home Depot's collection of Sales and Use Tax (it being expressly understood that the City's use of the sales and use tax receipts are being used only as a measurement for its use of general funds to make a grant for economic development purposes) as a result of the sale of Taxable Items by Home Depot for the Sales Tax Reporting Period

consummated on the Property.

"Sales Tax Reporting Period" shall mean a calendar year (with the calendar year ending December 31) except that (1) Home Depot may designate a different period coinciding with the fiscal year covered by its annual Sales and Use Tax return filed with the State of Texas and (2) the first Sales Tax Reporting Period shall begin on the Commencement Date and continue through and include the last day of the first full calendar year or fiscal year, as applicable, following the Commencement Date.

"Signal Improvement" shall mean the signal improvement located at the intersection of North Buffalo Springs Drive and TX-105, as shown in Exhibit C.

"State of Texas" shall mean the Office of the Texas Comptroller, or its successor.

"Taxable Items" shall mean both "taxable items" and "taxable services" as those terms are defined by Chapter 151, Texas Tax Code, as amended.

2. Sales Tax Grants.

(a) Annual Sales Tax Grants. Subject to the continued satisfaction of all the terms and conditions of this Agreement by Home Depot, the City (the "Grantor") agrees to provide Home Depot with Annual Sales Tax Grants. The Annual Sales Tax Grants paid by the City to Home Depot shall occur annually until the cumulative payments of sales tax grants to Home Depot equal the Maximum Sales Tax Grant. The Annual Sales Tax Grants shall be paid within ninety (90) days after receipt of a Payment Request. Each Payment Request shall be submitted to the City not later than April 1 of the calendar year immediately following the end of the applicable Sales Tax Reporting Period (or 90 days immediately following the end of the applicable Sales Tax Reporting Period if such period is not on a calendar year basis), beginning with the first Sales Tax Reporting Period. Failure to timely submit a Payment Request for a given Sales Tax Grant Reporting Period shall require the City to notify Home Depot of such failure to submit and give Home Depot thirty (30) days to cure after its receipt of such notice. Fifty percent (50%) of each Annual Sales Tax Grant shall be paid by the City directly to Home Depot at the address of Home Depot specified on the related Payment Request.

(b) Adjustment Notification. Home Depot shall promptly notify the City in writing of any adjustments found, determined or made by Home Depot, the State of Texas, or by an audit which results, or will result, in either a refund or reallocation of Sales Tax Receipts or the payment of Sales and Use Tax or involving amounts reported by Home Depot as subject to this Agreement. Such notification shall also include the amount of any such adjustment in Sales and Use Tax or Sales Tax Receipts. Home Depot shall notify the City in writing within ninety (90) days after receipt of notice of the intent of the State of Texas to audit Home Depot. Such notification shall also include the period of such audit or investigation.

(c) Adjustments. In the event Home Depot files an amended Sales and Use Tax return, or report with the State of Texas, or if additional Sales and Use Tax is due and

owing by Home Depot to the State of Texas, as determined, or approved by the State of Texas affecting Sales Tax Receipts for a previous Sales Tax Reporting Period, then the Annual Sales Tax Grant payment for the Sales Tax Reporting Period immediately following such State of Texas approved amendment shall be adjusted accordingly (*i.e.*, up or down, depending on the facts), provided the City has received Sales Tax Receipts attributed to such adjustment. As a condition precedent to payment of such adjustment, Home Depot shall provide the City with a copy of any such amended sales and use tax report or return, and the approval thereof by the State of Texas. Copies of any amended Sales and Use Tax return or report or notification from the State of Texas that additional Sales and Use Tax is due and owing by Home Depot to the State of Texas, as determined by the State of Texas, affecting Sales Tax Receipts for a previous Sales Tax Reporting Period shall be provided to the City with the Payment Request for the next Sales Tax Reporting Period.

(d) Refunds and Underpayments of Annual Sales Tax Grants. In the event the State of Texas issues a final determination that the City erroneously received (or failed to receive), for the benefit of the City, Sales Tax Receipts, or that the amount of Sales and Use Tax paid by Home Depot exceeds (or is less than) the correct amount of Sales and Use Tax for a previous Sales Tax Reporting Period, for which Home Depot and Developer have received an Annual Sales Tax Grant, Home Depot shall, within sixty (60) days after receipt of notification thereof from the City specifying the amounts by which such Annual Sales Tax Grant exceeded (or was less than) the amount to which Home Depot and Developer were entitled pursuant to such State of Texas determination, adjust (up or down, depending on the facts) the amount claimed due for the Annual Sales Tax Grant payment for the Sales Tax Reporting Period immediately following such State of Texas determination. If Home Depot does not adjust the amount claimed due for the Annual Sales Tax Grant payment for the Sales Tax Reporting Period immediately following such State of Texas determination the City may, at its option, adjust the Annual Sales Tax Grant payment for the Sales Tax Reporting Period immediately following such State of Texas determination. If the adjustment results in funds to be paid back to the City for the benefit of the City, Home Depot shall repay their respective amounts to the City within ninety (90) days after receipt of such State of Texas determination. As a condition precedent to payment of such refund, the City shall provide Home Depot with a copy of such determination issued by the State of Texas. If the adjustment results in additional funds to be paid to Home Depot, the City shall pay such amount to Home Depot as part of the next Annual Sales Tax Grant payment. The provisions of this Section shall survive termination of this Agreement.

(e) Grant Payment Termination: Suspension. The payment of the Annual Sales Tax Grants shall terminate on the effective date of determination by the State of Texas or other appropriate agency or court of competent jurisdiction that Home Depot is not a place of business resulting in Sales and Use Taxes being due the City from the sale of Taxable Items by Home Depot on the Property. In the event the State of Texas seeks to invalidate Home Depot as a place of business where Sales and Use Tax was properly remitted to the State of Texas (the "Comptroller Challenge") the payment of Annual Sales Tax Grants by the City hereunder shall be suspended until such Comptroller Challenge is resolved in whole favorably to the City. In such event, Home Depot shall not be required to return or refund Annual Sales Tax Grants previously received from the City provided Home Depot is actively defending against and/or contesting the Comptroller Challenge and Home Depot promptly

informs the City in writing of such Home Depot actions and with copies of all documents and information related thereto. In the event the Comptroller Challenge is resolved favorably to the City, the City shall remit to Home Depot all unpaid Annual Sales Tax Grants that they would have otherwise been entitled to during the suspension due to the Comptroller Challenge. In the event the Comptroller Challenge is not resolved favorably to the City and/or in the event the State of Texas determines that Home Depot does not have a place of business on the Property or that Home Depot is not a place of business where the Sales and Use Tax was properly remitted to the State of Texas, and Sales and Use Tax Receipts previously paid or remitted to the City relating to the Improvements are reversed and required to be repaid to the State of Texas, then the obligation to pay the Annual Sales Tax Grants shall terminate and Home Depot shall refund all respective amounts of Annual Sales Tax Grants received by Home Depot from the City that relate to the Comptroller Challenge, which refund shall be paid to the City within ninety 90 days after the date that the Comptroller Challenge required the City to repay Sales and Use Tax Receipts.

(f) **Sales Tax Reports.** The City and Home Depot designate this Agreement as a "revenue sharing agreement," thereby entitling the City to request annual sales and use tax information from the Comptroller, pursuant to Section 321.3022 of the Texas Tax Code, as amended. The City shall request in writing that the Comptroller issue sales tax reports pursuant to Section 321.3022 for total sales of Taxable Items consummated on the Property by Home Depot and the payment of Sales and Use Tax (the "Sales Tax Reports") for each calendar year during the term hereof. To the extent that the release of any such reports or information regarding the Sales and Use Tax collected by Home Depot for the sale of Taxable items consummated on the Property by Home Depot shall require the consent of Home Depot, Home Depot shall provide such consent to the City. Home Depot shall provide the sales tax identification numbers for Home Depot so that payments can be verified by the City.

(g) **Confidentiality.** Unless otherwise determined by the Texas Attorney General in writing, the sales and use tax documentation referenced in this Agreement shall be considered confidential financial information contained in a public document (or other reproduction media) not subject to release to the public. The City shall seek a written opinion from the Texas Attorney General raising any applicable exception to release, prior to any release to a third-party under the Texas Public Information Act. The Parties agree, however, that this Agreement shall not be considered confidential.

3. Administration. The City, by and through its City Administrator, or designee, shall have the authority to administer this Agreement, including the receipt of Payment Requests and the payment of Annual Sales Tax Grants.

4. Road Improvements and Signal Improvements. Home Depot agrees to fund all costs and/or expenses associated with the Road Improvements to North Buffalo Spring Drive from TX-105 to the northern property boundary line of the Property as shown in Exhibit B and the Signal Improvement located at the intersection of North Buffalo Springs Drive and TX-105 as shown on Exhibit C. Upon execution of this Agreement, Home Depot agrees to deposit an amount sufficient to cover all costs and/or expenses related to the design, survey, geo technical analysis, and competitive bidding with the City for the Road Improvements and Signal

Improvement projects. The Road Improvements and Signal Improvement projects will be bid as separate projects. Prior to the City entering into the construction contracts for the Road Improvements and Signal Improvement projects (i.e., after City awards the construction contract but before the actual construction contract is fully executed), Home Depot agrees to deposit with the City the amount of the bid plus fifteen percent (15%) contingencies plus the amount for construction administration, inspection, and materials testing with the City, or \$137,500.00. Within sixty (60) days after the acceptance by the City of the Road Improvements and Signal Improvement projects, a final accounting of each of the project cost(s) will be conducted by the City and Home Depot will either be required to deposit additional funds or receive a reimbursement from the City. In the event the construction cost of the Road Improvement projects exceeds the projected cost of \$1,669,800.00, the City unilaterally reserves the right to reduce the scope of the Road Improvement project from the northern property boundary line of the Property to the access road entrance of the Improvements. See Exhibit D.

5. Obligations. The obligation of the City to provide the Annual Sales Tax Grants hereunder shall be conditioned upon the compliance and satisfaction of each of the terms and conditions of this Agreement by Home Depot and each of the terms and conditions set forth below:

(a) Payment Request. Home Depot shall provide the City with the applicable Payment Request.

(b) Good Standing. So long as Home Depot is in compliance with this Agreement, the City's obligation to provide Home Depot with its Annual Sales Tax Grant when due and payable shall remain in effect.

(c) Completion of Construction of the Improvements. Home Depot shall, subject to events of Force Majeure, cause Completion of Construction to occur on or before **December 1, 2024**.

(d) Required Use. During the term of this Agreement following the Commencement Date and continuing thereafter until the Expiration Date, the Improvements shall not be used for any purpose other than as a Home Depot retail store, and the operation and occupancy of the Improvements in conformance with such use shall not cease for more than thirty (30) consecutive days except in connection with and to the extent of an event of Force Majeure.

(e) Continuous Ownership. During the term of this Agreement following the Commencement Date and continuing thereafter until the Expiration Date, Home Depot or an affiliate of Home Depot shall continuously own the Property.

(f) Sales Tax Certificate. As a condition to the payment of each Annual Sales Tax Grant hereunder, the City shall have received a Sales Tax Certificate for the applicable Sales Tax Reporting Period for which payment of an Annual Sales Tax Grant is requested. The City shall use its best efforts to obtain such Sales Tax Certificate from the Comptroller and shall provide a copy of each such Sales Tax Certificate to Home Depot upon its request. The City shall have no duty to calculate the Sales Tax Receipts or determine the entitlement of

Home Depot to any Annual Sales Tax Grant, or pay any Annual Sales Tax Grant during the term of this Agreement until such time as Home Depot has provided items (1) through (4) set forth below and a Payment Request for the applicable Sales Tax Reporting Period. The City may, but is not required to, provide Home Depot with forms for items (1) through (4) set forth below and required herein. At the request of the City, Home Depot shall provide such additional documentation as may be reasonably requested by the City to evidence, support and establish the Sales Tax Receipts (including Sales and Use Tax paid directly to the State of Texas pursuant to a direct payment permit) received by City from the State of Texas. Each Payment Request shall at a minimum be accompanied by the following:

(1) Schedules, which show the amount of total sale of Taxable Items by Home Depot consummated on the Property for the applicable Sales Tax Reporting Period, and the amount of Sales and Use Tax collected and paid to the State of Texas as a result of the sale of Taxable Items by Home Depot consummated at the Improvements for the applicable Sales Tax Period;

(2) A copy of all Sales and Use Tax returns and reports, Sales and Use Tax prepayment returns, direct payment permits and reports, including amended sales and use tax returns or reports, filed by Home Depot for the applicable Sales Tax Reporting Period showing the Sales and Use Tax collected (including Sales and Use Tax paid directly to the State of Texas pursuant to a direct payment certificate) by Home Depot for the sale of Taxable Items consummated at the Improvements;

(3) A copy of all direct payment and self-assessment returns, if any, including amended returns, filed by Home Depot for the applicable Sales Tax Reporting Period showing the Sales and Use Tax paid for the sale of Taxable Items consummated at the Improvements; and

(4) Information concerning any refund or credit received by Home Depot during the applicable Sales Tax Reporting Period of the Sales and Use Taxes paid or collected by Home Depot which has previously been reported by Home Depot as Sales and Use Tax paid or collected.

Within thirty (30) business days after a request by the City, Home Depot shall provide a release or releases to the City as necessary to allow the State of Texas to disclose the Sales and Use Tax information pertaining to the sale of Taxable Items by Home Depot on the Property during the term of this Agreement in a form as may be required by the State of Texas.

6. Termination Provisions.

(a) Termination. This Agreement terminates on the Expiration Date, and may, prior to the Expiration Date, be terminated upon any one or more of the following:

(1) by mutual written agreement of the Parties;

(2) by a Party, if another Party defaults or breaches any of the terms or

conditions of this Agreement, and such default or breach is not cured within ninety (90) days after written notice thereof;

(3) by the City, if any Impositions owed to the City or the State of Texas by Home Depot with respect to the Property shall have become delinquent (provided, however, Home Depot retains the right to timely and properly protest and contest any such taxes or Impositions);

(4) by the City, if Home Depot suffers an Event of Bankruptcy or Insolvency; or

(5) by any Party if any subsequent federal or state legislation or any final and non-appealable decision of a court of competent jurisdiction declares or renders this Agreement invalid, illegal or unenforceable.

(b) **Offsets.** The City may at its option, offset any amounts due and payable under this Agreement against any debt (including taxes) lawfully due to the City from Home Depot, 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 the City has been reduced to judgment by a court.

7. Binding Agreement. The terms and conditions of this Agreement are binding upon the successors and permitted assigns of the Parties.

8. Limitation on Liability. It is understood and agreed between the Parties that the City assumes no responsibilities or liabilities to third parties in connection with Home Depot actions. Further, Home Depot agrees to indemnify and hold harmless the City from all claims, suits, demands, and causes of actions by a third party arising from actions and performance under this Agreement, as hereinafter referenced.

9. No Joint Venture. It is acknowledged and agreed by the Parties that the terms hereof are not intended to and shall not be deemed to create a partnership or joint venture among the Parties.

10. Authorization. Each Party represents that it has full capacity and authority to grant all rights and assume all obligations that are granted and assumed under this Agreement.

11. Right of Access. Home Depot further agrees that, upon twenty-four (24) hours' written notice, the City, its agents and employees, shall have a reasonable right to access the Property during the store's normal operating hours and any improvements thereon to inspect same in order to ensure that the construction of the improvements is in accordance with this Agreement and/or all applicable federal, state and local laws, ordinances and regulations. After completion of the improvements, upon twenty-four (24) hours' written notice, the City and its agents and employees shall have the continuing right of inspection during the store's normal operating hours to ensure that such are thereafter maintained and operated in accordance with this Agreement and/or all applicable federal, state and local laws.

12. Construction of Agreement; Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Montgomery County, Texas. Venue for any action arising under this Agreement shall lie in Montgomery County, Texas.

13. Notices. Any notices required or permitted to be given hereunder shall be given by certified or registered mail, return receipt requested, to the addresses set forth below or to such other single address as either party hereto shall notify the other:

If to the City: City of Montgomery, Texas
101 Old Plantersville Road
Montgomery, Texas 77316
Attn: Gary Palmer, City Administrator

With a copy to: Johnson Petrov LLP
2929 Allen Parkway, Suite 3150
Houston, Texas 77019
Attn: Alan Petrov, City Attorney

If to Home Depot: Home Depot U.S.A., Inc.
2455 Paces Ferry Rd.
Attn: Wakesha Edwards
Atlanta, GA 30339-4024

14. Attorney's Fees to Prevailing Party. In the event any Party initiates or defends any legal action or proceeding against another Party to enforce or interpret any of the terms of this Agreement, the prevailing Party in any such action or proceeding shall be entitled to recover its reasonable costs and attorney's fees (including its reasonable costs and attorney's fees on any appeal).

15. Entire Agreement; Binding Effect of Agreement. This Agreement contains the entire agreement between the parties hereto and supersedes all prior agreements, oral or written, with respect to the subject matter hereof.

16. Indemnification.

(a) HOME AGREES TO DEFEND, INDEMNIFY AND HOLD THE CITY AND ITS RESPECTIVE OFFICERS, AGENTS AND EMPLOYEES (COLLECTIVELY FOR THE PURPOSE OF THIS SECTION, THE "CITY") HARMLESS FROM AND AGAINST ANY AND ALL REASONABLE LIABILITIES, DAMAGES, CLAIMS, LAWSUITS, JUDGMENTS, ATTORNEY FEES, COSTS, EXPENSES, AND DEMANDS BY THE STATE OF TEXAS INsofar AS SUCH LIABILITIES, DAMAGES, CLAIMS, LAWSUITS, JUDGMENTS, ATTORNEY FEES, COSTS, EXPENSES, AND DEMANDS ARISE OUT OF A CLAIM BY THE STATE OF TEXAS THAT THE CITY HAS BEEN PAID ERRONEOUSLY, HAS BEEN OVER-PAID OR HAS BEEN INCORRECTLY ALLOCATED SALES AND USE TAX ATTRIBUTED SOLELY

TO THE SALE OF TAXABLE ITEMS BY HOME DEPOT AND/OR HOME DEPOT AFFILIATES CONSUMMATED ON THE PROPERTY DURING THE TERM OF THIS AGREEMENT, IT BEING THE INTENTION OF THE PARTIES THAT HOME DEPOT SHALL BE RESPONSIBLE FOR THE REPAYMENT OF ANY ANNUAL SALES TAX GRANTS PAID TO HOME DEPOT HEREIN BY THE CITY THAT RELATE TO SALES AND USE TAX RECEIPTS THAT THE STATE OF TEXAS HAS DETERMINED WERE ERRONEOUSLY PAID, DISTRIBUTED, OR ALLOCATED TO OR COLLECTED BY THE CITY. THE INDEMNIFICATION SHALL NOT APPLY TO ANY LIABILITY RESULTING SOLELY FROM ERRORS OR OMISSIONS OF THE CITY. THE PROVISIONS OF THIS SECTION SHALL SURVIVE TERMINATION OF THIS AGREEMENT. THE PROVISIONS OF THIS SECTION ARE SOLELY FOR THE BENEFIT OF THE PARTIES HERETO AND DO NOT CREATE ANY OBLIGATIONS FROM OR GRANT ANY CONTRACTUAL OR OTHER RIGHTS TO ANY OTHER PERSON OR ENTITY, OTHER THAN OBLIGATIONS, IF ANY, THAT ARISE FROM HOME DEPOT TO THE CITY TO PERFORM OBLIGATIONS CREATED BY THIS SECTION.

(b) NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS SECTION 15, IT IS UNDERSTOOD AND AGREED THAT IN THE EVENT AND TO THE EXTENT THAT ANY INDEMNIFIED PARTY IS ENTITLED TO INDEMNIFICATION FROM HOME DEPOT UNDER THE TERMS OF PARAGRAPH (A) ABOVE IN RESPECT OF ANY OF THE LIABILITIES, DAMAGES, CLAIMS, LAWSUITS, JUDGMENTS, ATTORNEY FEES, COSTS, EXPENSES, AND DEMANDS REFERRED TO THEREIN, HOME DEPOT SHALL BE LIABLE FOR SUCH AMOUNT, TO THE CITY, AND SUCH AMOUNT PAYABLE BY HOME DEPOT SHALL LIMITED TO AND SHALL NOT EXCEED THE TOTAL AMOUNT OF ANNUAL SALES TAX GRANTS PREVIOUSLY RECEIVED BY EACH OF THEM PURSUANT TO THIS AGREEMENT.

17. **Invalidation.** Invalidation of any one of the provisions of this Agreement by judgment or court order shall in no way affect any of the other provisions, which shall remain in full force and effect.

18. **Facsimile.** A telecopied or electronic facsimile of a duly executed counterpart of this Agreement shall be sufficient to evidence the binding agreement of each party to the terms herein.

19. **Severability.** In the event any provision of this Agreement shall be determined by any court of competent jurisdiction to be invalid or unenforceable, this Agreement shall, to the extent reasonably possible, remain in force as to the balance of its provisions as if such invalid provision were not a part hereof.

20. **Authority to Execute Agreement.** This Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. The City warrants and

represents that (1) it has all requisite power and authority under the Constitution and laws of the State of Texas to enter into and perform its obligations under this Agreement, and (2) the individual executing this Agreement on behalf of the City has full authority to execute this Agreement and bind the City to the same.

Home Depot warrants and represents that the individual executing this Agreement on its behalf has full authority to execute this Agreement and bind Home Depot to same.

21. Non-Binding Mediation. In the event of any disagreement or conflict concerning the interpretation of this Agreement, and such disagreement cannot be resolved by the signatories hereto, the signatories agree to submit such disagreement to non-binding mediation.

22. Compliance with Chapter 2264, Texas Government Code. Home Depot certifies that it does not and will not knowingly employ an undocumented worker in accordance with Chapter 2264 of the Texas Government Code, as amended. If during the term of this Agreement, Home Depot, or its successors, heirs, assigns, grantees, trustees, representatives, and all others holding any interest in the Property now or in the future, is convicted of a violation under 8 U.S.C. § 1324a(f), Home Depot shall repay the amount of the public subsidy provided under this Agreement plus interest, at the rate of eight percent (8%), not later than the 120th day after the date the City notifies Home Depot of the violation.

23. Amendment. This Agreement may only be amended by a written agreement executed by the Parties.

24. Recitals. The recitals in this Agreement are true and correct, represent representations and warranties of the Parties, and are incorporated as part of this Agreement for all purposes.

25. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original instrument, but all of the counterparts shall constitute one and the same instrument.

26. Exhibits. All exhibits to this Agreement are incorporated herein by reference for all purposes wherever reference is made to the same.

27. Survival of Covenants. Any covenants of the Parties that are to be performed after termination of this Agreement shall survive termination of this Agreement.

28. Assignment. This Agreement may not be assigned by Home Depot, in whole or in part, without the prior written consent of the City. Any attempted assignment by Home Depot in violation of the terms and provisions of this section shall be void.

29. No Covenant to Build or Operate. Notwithstanding any other provision of this Agreement, the City acknowledges that Home Depot has not yet purchased the Property, and that nothing contained within this Agreement, either express or implied, shall be

deemed as a covenant on the part of Home Depot to build or operate a Home Depot store on the Property. The City further acknowledges that their sole remedy for Home Depot's failure to build or operate a Home Depot store on the Property shall be to terminate this Agreement as permitted by Section 5.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first above written.

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THE CITY OF MONTGOMERY

By: _____
Byron Sanford, Mayor

HOME DEPOT U.S.A., INC., a Delaware corporation

By: _____

Name: _____

Title: _____

EXHIBIT(S)