

Staff Summary Report



Council Meeting Date: August 14, 2008

Agenda Item Number: 77

SUBJECT: Request approval of a resolution authorizing the execution of a Development Agreement with Kalil Bottling Co., an Arizona Corporation.

DOCUMENT NAME: 20080814cdcm03 **COMMUNITY DEVELOPMENT/REDEVELOPMENT ADMIN (0403-01) RESOLUTION NO. 2008.79**

SUPPORTING DOCS: Yes

COMMENTS: Request approval of Resolution 2008.79 authorizing the Mayor to execute a Development Agreement with Kalil Bottling Co., an Arizona Corporation.

PREPARED BY: Chris Messer, Principal Planner 480-350-8562

REVIEWED BY: Chris Salomone, Community Development Manager 480-350-8294

LEGAL REVIEW BY: Cynthia McCoy, Assistant City Attorney 480-350-2187

FISCAL NOTE: The agreement contains a rebate of construction sales taxes to be paid in connection with the construction of additional parking facilities required to accommodate additional employees. This incentive is needed to overcome the extraordinary costs associated with the doubling of Kalil's employees working at this new location.

RECOMMENDATION: Approval of Resolution No 2008.79 as presented

ADDITIONAL INFO: Kalil Bottling Company proposes to relocate its Central Arizona Regional Headquarters and Distribution Center to the old Hensley Distributing site at 2735 South Hardy Drive. Kalil will increase tax revenues and increase opportunities for jobs at the facility. To provide for the additional employees, Kalil would need to construct a parking structure at the site. Kalil plans to invest roughly \$4,000,000.00 of capital constructing the parking structure and other improvements to the site and provide 175 to 225 new jobs at the facility.

RESOLUTION NO. 2008.79

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE MAYOR TO EXECUTE A DEVELOPMENT AGREEMENT BETWEEN THE CITY OF TEMPE AND KALIL BOTTLING CO.

WHEREAS, Kalil Bottling Co. ("Kalil") desires to relocate its operations to a location with an enterprise zone within the City of Tempe (the "Project"); and

WHEREAS, the Project will require the construction of additional parking facilities to house additional employees; and

WHEREAS, the City and Kalil hereby acknowledge and agree that significant benefits will accrue to the City from the Project; and

WHEREAS, City and Kalil desire to enter a Development Agreement to set forth their agreements regarding the Project, and such other related matters as they deem appropriate.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, as follows:

Section 1: That the Mayor is authorized to execute a Development Agreement (No. C08-_____), in substantially the form on file with the City Clerk's office and to take such further actions as are necessary to implement its terms.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, this _____ day of August, 2008.

Hugh L. Hallman, Mayor

ATTEST:

CITY CLERK

APPROVED AS TO FORM:

CITY ATTORNEY

WHEN RECORDED, RETURN TO:

City of Tempe Basket

Development Agreement

City Contract Number c2008- _____

THIS DEVELOPMENT AGREEMENT ("Agreement") is made as of the _____ day of August, 2008, between the **CITY OF TEMPE**, an Arizona municipal corporation (the "City"), and Kalil Bottling Co., an Arizona corporation ("Developer").

RECITALS

A. Developer intends to relocate its Central Arizona Regional Headquarters and Distribution Center (the "Project") to a building located on the real property more particularly described on Exhibit A hereto (the "Property") in Tempe, Arizona (the "Building"); and

B. City and Developer hereby acknowledge and agree that significant benefits will accrue to the City from the development of the Project by Developer, including, without limitation, a capital investment of at least \$4,000,000.00, the addition of 175 to 225 new jobs within the City, increased tax revenues, increased opportunities for employment within the City, expansion and improvement of facilities within the City in general and the Enterprise Zone in particular, and will otherwise improve or enhance the economic welfare of the inhabitants of the City and;

C. This Agreement is a development agreement within the meaning of A.R.S. §9-500.05 and shall be construed as such.

AGREEMENT

NOW THEREFORE, in consideration of the above premises, the promises contained in this Agreement and for good and valuable consideration, the receipt and sufficiency of which the parties acknowledge, the parties hereto agree as follows:

ARTICLE I DEFINITIONS

The following terms shall have the meanings set forth below whenever used in this Agreement, except where the context clearly indicates otherwise:

1.1 “**Developer**” means Kalil Bottling Co., an Arizona corporation, and its permitted successors and assigns.

1.2 “**Certificate of Occupancy**” means a certificate of occupancy for the Improvements issued by the City Development Services Department.

1.3 “**City**” means the City of Tempe, an Arizona municipal corporation, and any successor public body or entity.

1.4 “**Conceptual Site Plan**” shall mean the Plan illustrated in Exhibit “B” attached hereto and incorporated herein by this reference.

1.5 “**Improvements**” shall mean all the improvements which may be constructed from time to time on the Property for the Project as defined in this Agreement, including, without limitation, all parking structures, infrastructure, utilities, buildings, driveways, parking areas, walls, landscaping and other improvements of any type or kind, or any other alteration of the natural terrain to be built by the Developer.

1.6 “**PAD**” shall mean that Planned Area Development which is approved by the City with respect to the Property and which sets forth general uses, densities, features and other development matters with respect to the Property.

1.7 “**Project**” shall mean the project planned by the Developer on and within the Property in general conformance with the Conceptual Site Plan and the PAD.

1.8 “**Property**” shall mean that real property depicted in Exhibit “A” attached hereto and incorporated herein by this reference.

1.9 “**Schedule of Performance**” shall mean that schedule of performance agreed to by the City and the Developer as set forth in Exhibit “C” attached hereto and incorporated herein by this reference.

ARTICLE II DURATION; DEVELOPMENT PLAN; PROJECT COMPLETION

2.1 **Duration of Development Agreement.** The term of this Agreement shall commence on the effective date of this Agreement and continue until a Certificate of

Completion for the Project is issued by the City pursuant to the Developer Schedule of Performance, unless sooner terminated as provided in Article V of this Agreement.

2.2 Conceptual Site Plan. The Conceptual Site Plan sets forth the scope of development for the Property depicting the types of basic land uses, permissible range of the intensity and density of such uses, and a permissible range in the relative height, bulk and size of buildings and structures on the Property. The intensity and density of the land uses within the Project as described in the Conceptual Site Plan may be flexible, but are subject to becoming refined and final through the approval of a PAD or Development Plan. The Property shall be developed in substantial conformance with the approved plans.

ARTICLE III DEVELOPMENT SCHEDULE, PROCESS AND COMPLETION

3.1 Schedule of Performance. The City and Developer intend that the development of the Project shall be achieved pursuant to, and in accordance with the milestones set forth on, the Schedule of Performance. The Developer shall use commercially reasonable efforts to ensure that the development of the Project occurs in accordance with the Schedule of Performance.

3.2 Approvals. The City hereby agrees that, in connection with all requests for approval relating to the development within the Property and the construction of any Improvements that no extraordinary plan or review requirements will be imposed on the Developer.

3.3 Completion of Project. Developer shall complete the relocation of its headquarters within six (6) months after the date this Agreement is executed. Developer shall submit to City within three years of the date of execution of this Agreement, a compliance certificate executed by its Chief Financial Officer attesting to completion of the Project, confirming the number of persons then employed at the Project.

3.4 Enterprise Zone Cooperation. City will work with Developer to ensure that all benefits available to Developer under the Arizona Enterprise Zone and Job Training Programs are maximized in accordance with program guidelines.

ARTICLE IV SALES TAX REBATE

4.1 Sales Tax Rebate for Construction Activities. Developer has represented that completion of the Project is economically feasible only by the commitment of the City to provide Developer with the benefit of a sales tax rebate of the City's share of construction sales taxes ("Construction Sales Tax") generated by construction of the Improvements. Therefore, City hereby grants Developer a Construction Sales Tax rebate in the amount of 100% of Construction Sales Taxes (currently 1.2%, exclusive of the .5% for

Transportation and .1% for the Arts) generated and paid by Developer, and/or any contractor engaged by Developer, and received by the City in relation to the construction of the Improvements, including building construction and site work, constructed in accordance with this Agreement. The Improvements are estimated to cost \$4,000,000.00 ("Estimated Improvement Costs"). The City is not required to remit Construction Sales Taxes levied against costs in an amount in excess of ten percent (10%) of the Estimated Improvement Costs. The Construction Sales Taxes rebate shall be remitted to Developer within six (6) months after the issuance of a certificate of occupancy for the Improvements. The Construction Sales Taxes rebate is based upon the demonstrated need identified by the Developer and agreed to by the City.

ARTICLE V DEFAULT; REMEDIES; TERMINATION

5.1 Default. It shall be a default hereunder if either party fails to perform any of its obligations hereunder and such failure continues for a period of thirty (30) days after written notice from the non-defaulting party specifying in reasonable detail the nature of the failure; provided that if the nature of the default is such that it cannot reasonably be cured within the thirty-day period, no default shall be deemed to exist if the defaulting party commences a cure within that thirty-day period and diligently and expeditiously pursues such cure to completion.

5.1.1 Additional Defaults. In addition to the foregoing, it shall be a default hereunder if: (a) Developer ceases to operate the Project within the parameters established in this Agreement; (b) any petition or application for a custodian, as defined by Title 11, United States Code, as amended from time to time (the "Bankruptcy Code") or for any form of relief under any provision of the Bankruptcy Code or any other law pertaining to reorganization, insolvency or readjustment of debts is filed by or against Developer or any partnership of which it is a partner, their respective assets or affairs, and such petition or application is not dismissed within ninety (90) days of such filing; (c) Developer makes an assignment for the benefit of creditors, is not paying material debts as they become due, or is granted an order for relief under any chapter of the Bankruptcy Code; (d) a custodian, as defined by the Bankruptcy Code, takes charge of any property of Developer or any property of any partnership of which it is a partner; (e) garnishment, attachment, levy or execution in an amount in excess of an amount equal to ten percent (10%) of its net worth is issued against any of the property or effects of Developer, or any partnership of which it is a partner, and such issuance is not bonded against within ninety (90) days; (f) the dissolution or termination of existence of Developer or the sale of all or substantially all of the assets or stock of Developer, unless its obligations hereunder have been assumed by an entity whose financial capacity has been approved in advance by City (such approval not to be unreasonably withheld or delayed); or (g) there is a material default or material breach of any representation, warranty or covenant, or there is a material false statement or material omission, by Developer under any other document forming part of the transaction in respect of which this Agreement is made.

5.2 City's Remedies; Right to Terminate Agreement. If, after the passage of any applicable cure period, Developer remains in default under this Agreement, then the City shall have the right and option, without obligation, to (a) terminate this Agreement immediately upon written notice to the Developer, and (b) exercise such other remedies as are available at law or in equity for breach of contract. On any such termination, this Agreement shall be of no further force or effect other than the indemnification provisions which shall survive the expiration or termination of this Agreement.

5.3 Development Rights in the Event of Termination. Upon the termination of this Agreement as provided herein, Developer shall have all customary rights to develop the Property. However, future uses and development occurring on the Property shall be subject to all of the City's applicable development standards and review processes, and termination shall constitute the immediate revocation of the privileges and rights granted under Articles 2 and 3 hereof.

5.4 Developer's Remedies. If the City is in default under this Agreement and the parties do not resolve the City's default pursuant to the nonbinding mediation described in this Agreement, Developer shall have the right to terminate this Agreement upon written notice to the City.

5.5 Dispute Resolution. In the event that there is a dispute hereunder which the parties cannot resolve between themselves, the parties agree that there shall be a forty-five (45) day moratorium on litigation during which time the parties agree to attempt to settle the dispute by nonbinding mediation before commencement of litigation. The mediation shall be held under the commercial mediation rules of the American Arbitration Association. The mediator selected shall have at least five (5) years of experience in mediating or arbitrating disputes relating to commercial property development. The cost of any such mediation shall be divided equally between the City and the Developer or in such other fashion as the mediator may order. The results of the mediation shall be nonbinding on the parties, and any party shall be free to initiate litigation upon the conclusion of mediation.

5.6 No Personal Liability. No member, official or employee of the City shall be personally liable to the Developer, or any successor or assignee (a) in the event of any default or breach by the City, (b) for any amount which may become due to the Developer or its successor or assign, or (c) pursuant to any obligation of the City under the terms of this Agreement.

5.7 Effect of Event of Termination. Upon the termination of this Agreement as the result of the default or breach of the Developer, the Developer shall have no further rights pursuant to the terms of this Agreement or have any further rights to City-provided development incentives pursuant to this Agreement.

**ARTICLE VI
GENERAL PROVISIONS**

6.1 Liability and Indemnification. The Developer unconditionally agrees to indemnify, protect, defend and hold harmless the City, its Council members, officers, employees, and agents from any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and cleanup actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorneys' fees and costs of defense arising, directly or indirectly, in whole or in part, out of the performance of this Agreement by the Developer.

6.2 Conflict of Interest. Pursuant to Arizona law, rules and regulations, no member, official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interest or the interest of any corporation, partnership or association in which he or she is, directly or indirectly, interested. This Agreement is subject to A.R.S. § 38-511.

6.3 Assignment. Developer shall have the right to assign all or part of its right, title and interest in, to and under this Agreement; provided, however, that any assignment pursuant to this Section 6.3 shall be conditioned upon the delivery to the City of written notice of such assignment, together with an executed copy of the documents pursuant to which assignee assumes all of Developer's obligations under this Agreement.

6.4 Notice. All notices which shall or may be given pursuant to this Agreement shall be in writing and transmitted by registered or certified mail, return receipt requested, addressed as follows:

To Developer:

George Kalil
4045 S. 38th Street
Phoenix, Arizona, 85040

With a copy to:

Charles Huellmantel
Huellmantel and Affiliates
PO Box 1833
Tempe, Arizona 85282

To the City:

City Manager
City of Tempe
PO Box 5002
Tempe, Arizona 85280

With a copy to:

City Attorney
City of Tempe
21 East Sixth Street, Suite 201
Tempe, Arizona 85281

Either party may designate any other address for this purpose by written notice to the other party in the manner described herein.

6.5 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona. This Agreement has been made and entered into in Maricopa County, Arizona. In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law.

6.6 Successors and Assigns. This Agreement shall run with the land and all of the covenants and conditions set forth herein shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto; provided that Developer shall not have the right to assign, transfer, hypothecate or otherwise alienate all or any portion of its interest in and rights under this Agreement.

6.7 Waiver. No waiver by either party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

6.8 Attorneys' Fees. In the event of any actual litigation between the parties in connection with this Agreement, the party prevailing in such action shall be entitled to recover from the other party all of its costs and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury.

6.9 Miscellaneous. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument. All schedules and exhibits attached hereto are incorporated herein by this reference as though fully set forth herein. Each of the parties hereto represents and warrants to the other that the individual executing this Agreement on behalf of the respective parties are authorized and empowered to bind the party on whose behalf such individual is signing and that this Agreement shall be binding upon such parties.

This Agreement may only be amended by an instrument in writing executed by both parties. It is not intended by this Agreement to, and nothing contained in this Agreement shall, create any partnership, joint venture or other arrangement between Developer and the City. No term or provision of this Agreement is intended to, or shall, be for the benefit of any person, firm, organization or corporation not a party hereto, and no such other person, firm, organization or corporation shall have any right or cause of action hereunder.

6.10 Recordation of Agreement. This Agreement shall be recorded in the Official Records of Maricopa County, Arizona, within ten (10) days after the approval and execution of this Agreement by the City and Developer.

6.11 City Manager's Power to Consent. The City authorizes and empowers the City Manager to consent to any and all requests of the Developer requiring the consent of the City hereunder without further action of the City Council, except for any actions requiring City Council approval as a matter of law, such as, without limitation, any material amendment or modification of this Agreement.

{Signature pares follow}

IN WITNESS WHEREOF, the City has caused this Agreement to be duly executed in its name and behalf by its Mayor and its seal to be hereunto duly affixed and attested to by the City Clerk, and the Developer has executed and sealed the same on or as of the day and year first above written.

ATTEST:

"CITY"

THE CITY OF TEMPE, an Arizona municipal corporation

City Clerk

APPROVED AS TO FORM:

By _____
Hugh Hallman, Mayor

City Attorney

STATE OF ARIZONA)
)ss
COUNTY OF MARICOPA)

The foregoing instrument was acknowledged before me this ____ day of _____, 2008.

Notary Public

My Commission Expires:

“DEVELOPER”

KALIL BOTTLING CO.

By: _____

Name: _____

Title: _____

STATE OF ARIZONA)
)ss
COUNTY OF MARICOPA)

The foregoing instrument was acknowledged before me this ____ day of _____, 2008.

Notary Public

My Commission Expires:

Exhibit "A"
PROPERTY

Located at
2735 South Hardy Drive
Tempe, Arizona

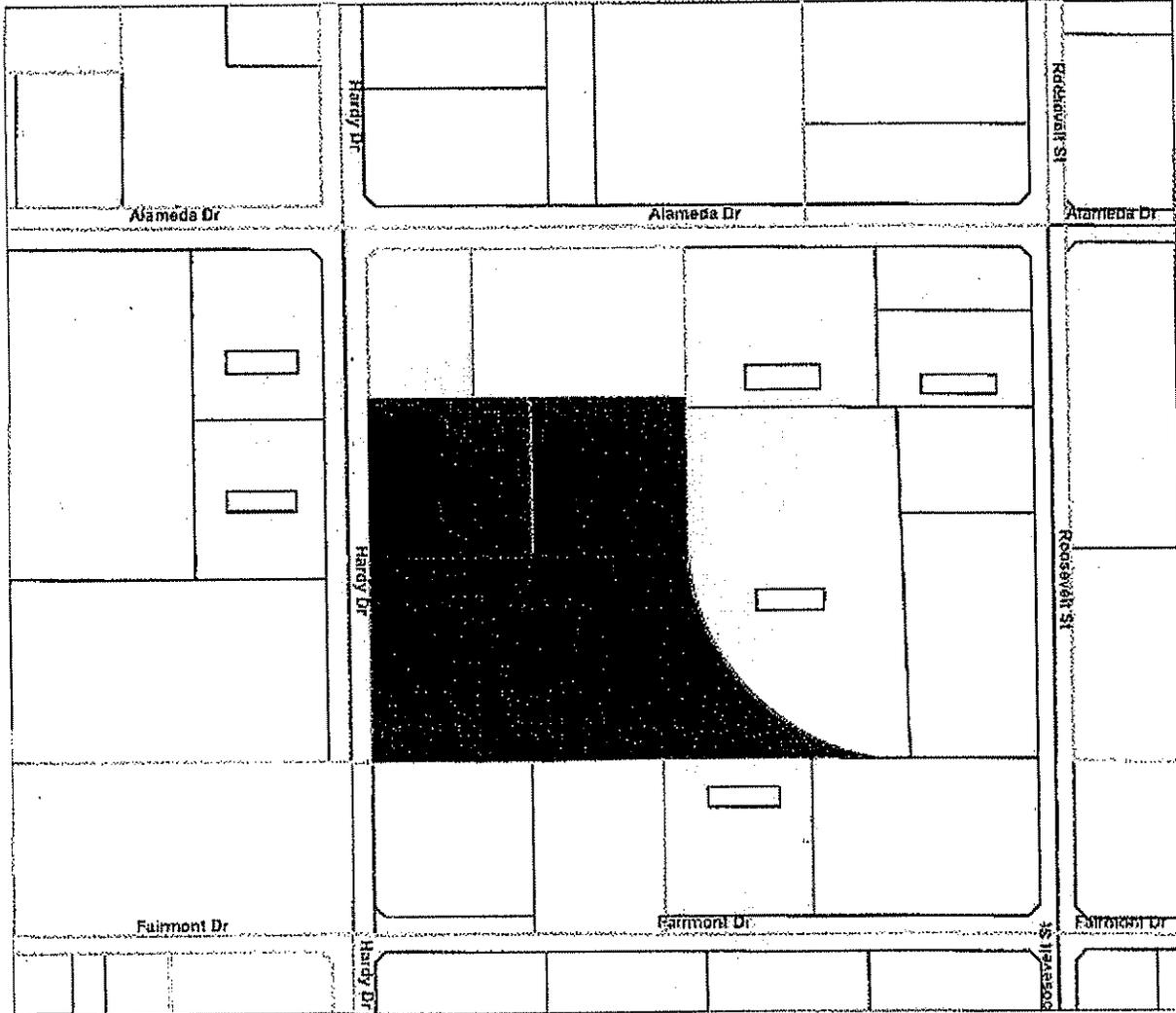


Exhibit "C"
SCHEDULE OF PERFORMANCE

- Relocate headquarters within six months following execution of Development Agreement
- Complete Project within thirty-six months following execution of Development Agreement