

STATE OF TEXAS

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COUNTY OF HARRIS

**CHAPTER 380 AGREEMENT FOR WAIVER OF PAYMENT FOR CLOSURE OF STREET
RIGHT-OF-WAY, BETWEEN YBARRA RESTAURANTS, INC., A TEXAS CORPORATION
AND THE CITY OF LA PORTE, TEXAS**

This AGREEMENT is entered into by and between the City of La Porte, Texas, a Texas municipal corporation of Harris County, Texas (“CITY”), and Ybarra Restaurants, Inc., a Texas Corporation (hereinafter called “DEVELOPER”). DEVELOPER and CITY may be referred to jointly herein as the “Parties” and individually as a “Party.”

WITNESSETH:

WHEREAS, Article III, Section 52-a of the Texas Constitution and Chapter 380 of the Texas Local Government Code provides statutory authority for a local government to establish and provide for the administration of one or more programs, for making loans and grants and providing personnel and services of the municipality, to promote state or local economic development and to stimulate business and commercial activity in the municipality;

WHEREAS, CITY has found that providing a program consisting of a grant of funds to DEVELOPER in exchange for DEVELOPER’S completion of the Project proposed by DEVELOPER will promote local economic development and stimulate business and commercial activity and create jobs within the CITY (hereafter referred to as “PROGRAM”); and

WHEREAS, the Project proposed by DEVELOPER will additionally benefit CITY by generating revenue from the assessment of ad valorem tax on personal property, inventory and real property; and

WHEREAS, CITY has determined that the PROGRAM will directly establish a public purpose and that all transactions involving the use of public funds and resources in the establishment and administration of the PROGRAM contain controls likely to ensure that the public purpose is accomplished; and

NOW THEREFORE, for the reasons stated in these Recitals, which are incorporated into and made part of this Agreement, and in consideration of the mutual covenants and obligations herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

Section 1. The Project.

1.1 DEVELOPER is planning to construct a restaurant with a minimum capital investment of at least *Five Million* (\$5 Million), more fully described in Exhibit “A” (the “Project” herein), to be located on a tract of land generally situated at the northeast corner of Sens Road and West Main Street, as more particularly described in Exhibit “B” (the “Property”).

1.2 As a precondition to implementation of the Project, DEVELOPER has determined that it would be necessary to petition CITY to close, vacate and abandon that portion of the 25th Street right-of-way situated between West Main Street and West Polk Street (the “Right-of Way” herein), which currently separates DEVELOPER’S tracts, in order to consolidate said tracts and thereafter construct the proposed restaurant and associated facilities.

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1.3 DEVELOPER has filed an application with CITY to close, vacate and abandon the Right of Way.

1.4 Under Chapter 62, Article II of CITY's Code of Ordinances, a landowner is required to pay to CITY the fair market value of the right-of-way petitioned to be closed, in exchange for conveyance of the right-of-way to the landowner after closure. Section 62-35(b) of said Code defines "fair market value" as 75% of the appraised value of the right-of-way. An independent appraisal of the Right-of-Way determined the fair market value to be \$154,800.00, 75% of which is \$116,100.00.

1.5 In accordance with Texas Local Government Code Chapter 272 and Chapter 62 of CITY's Code of Ordinances, on Oct. 10, 2016 CITY considered DEVELOPER's application for closure of the Right-of-Way, and upon a finding of no public necessity to maintain the Right-of-Way and proper receipt of notices of Non-Objection from utilities maintaining facilities in the Right-of-Way, did on such date vote to adopt Ordinance 2016-3656, to effect the closure of Right-of-Way and convey title to same to DEVELOPER. Said Ordinance 2016-3656 and accompanying Deed Without Warranty are attached to this Agreement as Exhibit "C" and is incorporated by reference for all purposes.

1.6 In exchange for development of the Project, and attainment of certain performance standards upon completion of the Project, as more fully described herein, DEVELOPER seeks CITY's agreement to waive and credit to DEVELOPER, payment of fair market value as required under Chapter 62 of CITY'S Code of Ordinances, for closure of the Right-of-Way.

Section 2. CITY Obligations.

CITY agrees to waive DEVELOPER'S obligation to make payment of fair market value for closure of Right-of-Way, and credit such fee to DEVELOPER as a grant in accordance with this Agreement and as allowed by Texas Local Government Code Chapter 380, as an inducement to DEVELOPER to complete the Project. However, as provided in Section 3 of this Agreement, CITY'S agreement to waive payment of fair market value is conditioned on DEVELOPER's obligation to attain certain specified performance benchmarks in connection with the Project. The failure of DEVELOPER to satisfy the specified performance benchmarks shall provide CITY the right to forfeit such grant and reclaim from DEVELOPER, the fair market value of the Right-of-Way, as the term "fair market value" is defined in Section 1.4 above.

Section 3. DEVELOPER Obligations.

3.1 As a condition for CITY's waiver of DEVELOPER'S obligation to make payment of fair market value in connection with CITY's closure of the Right-of-Way on Oct. 10, 2016, and CITY'S promise to permanently forbear collection of such payment and credit same to DEVELOPER as a grant to induce completion of the Project, DEVELOPER promises to submit to CITY, and shall submit to CITY the following items, by the deadlines indicated:

- a) Proof of Certificate of Occupancy issued by CITY for restaurant building to be situated on the Property, with the restaurant building having a minimum of 7500 square feet of floor space, no later than three (3) years after the effective date of this Agreement
- b) Documentation substantiating minimum capital investment by DEVELOPER of *Five Million* (\$5 Million), for infrastructure, site improvements, construction, and other related improvements which are necessary to develop the proposed restaurant no later than three (3) years after the effective date of this Agreement.

3.2 DEVELOPER agrees that CITY will have the right to review the business records of DEVELOPER that relate to the Project and this Agreement in order to determine DEVELOPER'S

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compliance with the terms of this AGREEMENT. Such review shall occur at any reasonable time and upon thirty (30) days' prior notice to DEVELOPER. To the extent reasonably possible, DEVELOPER shall make all such records available in electronic form.

3.3 Upon execution of this Agreement DEVELOPER agrees to simultaneously execute a promissory note in the amount of \$116,100.00 and a second lien position Deed of Trust in favor of CITY, with said Deed of Trust imposing a lien on and against the Property, (secondary and subordinate to lenders' liens for acquisition of the property and subsequent to the Project's construction costs funded by the first lien lenders), to secure DEVELOPER'S obligation to remit to CITY the fair market value of the Right-of-Way in the event of DEVELOPER'S breach of this Agreement. The promissory note reference in paragraph 3.3 above shall become due and payable in full three (3) years after the effective date of the note and this Agreement, but shall be forgiven and deemed discharged if DEVELOPER sooner satisfies its obligations under this Agreement.

3.5 Mr. Roland Ybarra, President of DEVELOPER, agrees that he will, as a condition of City's entering into this Agreement, execute in favor of CITY a personal guarantee in his individual capacity, in the amount of \$116,100.00.

3.6 Said guaranty, promissory note, and deed of trust are collectively attached to this Agreement as Exhibit "D" and is incorporated by reference for all purposes.

3.7 DEVELOPER shall not allow any portion of ad valorem taxes owed to CITY on the Property, or any other property owned by DEVELOPER and located within the City of La Porte, Texas to become delinquent beyond the date when due, as such date may be extended to permit protest of valuation or any appeal; nor shall DEVELOPER fail to render for taxation any personal property, including inventory and equipment, owned by DEVELOPER and located within the City of La Porte, Texas.

3.8 DEVELOPER covenants and certifies that DEVELOPER does not and will not knowingly employ an undocumented worker as that term is defined by section 2264.01(4) of the Texas Government Code. In accordance with Section 2265.052 of the Texas Government Code, if DEVELOPER is convicted of a violation under 8 U.S.C. Section 1324a(f), DEVELOPER shall repay to the CITY the full amount of the payment waived under this Agreement, plus 10% per annum from the date the waiver was made. Repayment shall be paid within 120 days after the date DEVELOPER receives notice of violation from the CITY.

Section 4. Force Majeure.

It is expressly understood and agreed by the parties to this Agreement that if the performance of any obligations hereunder is delayed by reason of war, civil commotion, acts of God, inclement weather, governmental restrictions, regulations, or interferences, delays caused by the franchise utilities, fire or other casualty, court injunction, necessary condemnation proceedings, acts of the other party, its affiliates/related entities and/or their contractors, or any actions or inactions of third parties or other circumstances which are reasonably beyond the control of the party obligated or permitted under the terms of this Agreement to do or perform the same, regardless of whether any such circumstance is similar to any of those enumerated or not ("**Force Majeure**"), the party so obligated or permitted shall be excused from doing or performing the same during such period of delay, so that the time period applicable to such design or construction requirement shall be extended for a period of time equal to the period such party was delayed.

Section 5. Term. The term of this Agreement shall begin upon the execution hereof by both Parties (the Effective Date) and end either upon the complete performance of all obligations and conditions imposed upon DEVELOPER under this Agreement (unless sooner terminated in writing in

January 1, 2020 TOZ

accordance with this Agreement), or on that date which is four (4) years after the Effective Date ~~January 1, 2019~~, whichever date occurs first.

Section 6. Indemnity.

DEVELOPER AGREES TO DEFEND, INDEMNIFY AND HOLD HARMLESS THE CITY AND ITS OFFICERS, AGENTS AND EMPLOYEES, AGAINST ANY AND ALL CLAIMS, LAWSUITS, JUDGMENTS, COSTS AND EXPENSES FOR PERSONAL INJURY (INCLUDING DEATH), PROPERTY DAMAGE OR OTHER HARM FOR WHICH RECOVERY OF DAMAGES IS SOUGHT THAT ARISE OUT OF OR ARE OCCASIONED BY DEVELOPER'S BREACH OF ANY OF THE TERMS OR PROVISIONS OF THIS AGREEMENT, OR BY ANY NEGLIGENT ACT OR OMISSION OF DEVELOPER, ITS OFFICERS, AGENTS, ASSOCIATES, OR EMPLOYEES, IN THE PERFORMANCE OF THIS AGREEMENT; EXCEPT THAT THE INDEMNITY PROVIDED FOR IN THIS PARAGRAPH SHALL NOT APPLY TO ANY LIABILITY RESULTING FROM THE SOLE NEGLIGENCE OF CITY OR ITS OFFICERS, AGENTS, EMPLOYEES OR SEPARATE CONTRACTORS, AND IN THE EVENT OF JOINT AND CONCURRENT NEGLIGENCE OF BOTH DEVELOPER AND CITY, RESPONSIBILITY, IF ANY, SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS OR FEDERAL LAW. THE PROVISIONS OF THIS PARAGRAPH ARE SOLELY FOR THE BENEFIT OF THE PARTIES HERETO AND NOT INTENDED TO CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, TO ANY OTHER PERSON OR ENTITY.

Section 7. Breach and Recapture.

7.1 Breach - A breach of this Agreement shall result upon DEVELOPER'S 1) failure to satisfy any one or more of the performance benchmarks, including the failure to do so by the deadlines applicable thereto, outlined in Section 3.1 of this Agreement; 2) failure to comply with any other term or condition of this Agreement; or 3) sale of the Property to a third party without the express, written consent of CITY, during the term of this Agreement.

7.2. Notice of Breach - In the event that CITY makes a reasonable determination that DEVELOPER has breached this Agreement, then CITY shall give DEVELOPER written notice of such. DEVELOPER has thirty (30) days following receipt of said written notice to cure such breach, after which time this Agreement may be terminated by CITY, and the right of CITY to reclaim and recapture any and all funds granted to DEVELOPER under this Agreement shall then immediately accrue. Notice of breach shall be in writing and shall be delivered by personal delivery or certified mail to DEVELOPER at its address provided in Section 10 of this Agreement.

7.3. Recapture - Should DEVELOPER commit a breach of this Agreement as established in Section 7, CITY may enforce its right to reclaim and recapture the fair market value of the Right-of-Way, as conditionally granted to DEVELOPER under the terms of this Agreement, by any means lawfully available to CITY, including but not limited to foreclosure of the aforementioned Deed of Trust lien on the Property.

7.4 Termination for Misrepresentation. Notwithstanding any provision for notice of default and any opportunity to cure provided for in this Agreement, CITY may terminate this Agreement immediately by providing written notice to DEVELOPER, if DEVELOPER, its officers or signatories to this Agreement misrepresented or misrepresents any material fact or information: 1) upon which CITY relied in entering into this Agreement; 2) upon which CITY relied in making grant to DEVELOPER; or 3) which served as an inducement for CITY to make a grant to DEVELOPER.

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Section 8. Personal Liability of Public Officials.

No employee or elected official of CITY shall be personally responsible for any liability arising under or related to this Agreement. Under no circumstances shall City's actions or obligations hereunder be deemed to create any debt within the meaning of any constitutional or statutory provision.

Section 9. Venue and Governing Law.

This Agreement is performable in Harris County, Texas and venue of any action arising out of this Agreement shall be exclusively in Harris County. This Agreement shall be governed and construed in accordance with the laws of the State of Texas.

Section 10. Notices.

Any notice required by this Agreement shall be deemed to be properly served if deposited in the U.S. mail by certified letter, return receipt requested, addressed to the recipient at the recipient's address shown below, subject to the right of either party to designate a different address by notice given in the manner just described.

If intended for CITY, to:

City of La Porte, Texas
604 W. Fairmont Pkwy.
La Porte, Texas 77571
ATTN: City Manager

If intended for DEVELOPER, to:

Ybarra Restaurants, Inc.
by: Roland D. Ybarra, President & Director
7529 Bayway Drive, Baytown, Tx., 77520

Section 11 Applicable Laws.

This Agreement is made subject to the provisions of the Charter and ordinances of CITY, as amended, and all applicable state and federal laws (collectively, the "Applicable Laws"), and violation of same shall constitute a default under this Agreement.

Section 12. Legal Construction.

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

Section 13. Counterparts.

This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and constitute one and the same instrument.

Section 14. Captions.

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The captions to the various clauses of this Agreement are for informational purposes only and shall not alter the substance of the terms and conditions of this Agreement.

Section 15. Successors and Assigns.

The terms and conditions of this Agreement are binding upon the successors and assigns of all parties hereto. This Agreement **SHALL NOT** be assigned by DEVELOPER to any other person or entity, without prior, written CITY approval. Written approval of the CITY shall be required for an assignment to an Affiliate of DEVELOPER, but in such case approval shall not be unreasonably withheld. "Affiliate of DEVELOPER," as used herein, is defined as a parent, sister, partner, joint venture, or subsidiary entity of DEVELOPER; any entity in which DEVELOPER is a major shareholder, owns an equity interest, or is a joint venture or partner (whether general or limited).

Section 16. Entire Agreement.

This Agreement embodies the complete agreement of the parties hereto regarding waiver of payment of the fair market value to close the Right-of-Way in connection with the Project, superseding all oral or written previous and contemporary agreements between the parties, and except as otherwise provided herein cannot be modified without written agreement of the parties to be attached to and made a part of this Agreement.

Effective this the _____ day of _____, 2016.

CITY OF LA PORTE, TEXAS

EXECUTED THIS 10 day of
October, 2016, by CITY, signing
by and through its City Manager.



YBARRA RESTAURANTS, INC.

EXECUTED THIS _____ day of
_____, 2016, by Roland Ybarra,
President

