

RESOLUTION NO. 2021-03-27

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS, RATIFYING THE TERMS AND CONDITIONS OF AN ECONOMIC DEVELOPMENT GRANT AGREEMENT BY AND BETWEEN THE LANCASTER ECONOMIC DEVELOPMENT CORPORATION OF LANCASTER TEXAS, (LEDC) AND DW DISTRIBUTION, INC. (DWD) AND AUTHORIZING THE LEDC TO ENTER INTO A FORMAL AGREEMENT; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, DW Distribution, Inc. seeks to lease and move its manufacturing operations to a recently completed building located at 2001 Daniieldale Road; a location within the City of Lancaster, Texas; and

WHEREAS, pursuant to Lancaster Economic Development Corporation (hereinafter "LEDC") Resolution 2021-01-03, which was passed and approved on the 3rd of March, 2021 by the Board of Directors of the LEDC, providing an incentive grant to DW Distribution, Inc.; and

WHEREAS, the City of Lancaster and LEDC recognize the importance of their continued role in economic development in the community of Lancaster; and

WHEREAS, the City of Lancaster and LEDC are authorized by state law to issue grants in order to promote local economic development by stimulating the local economy; and

WHEREAS, an Economic Development Grant Agreement containing the terms of the grant of incentives from the LEDC is appropriate.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS:

SECTION 1. . The City Council of the City of Lancaster, Texas ratifies the March 3, 2021 actions of the Board of Directors of the LEDC approving a Grant Agreement by and between DW Distribution, Inc. and the Lancaster Economic Development Corporation, as set forth in and incorporated by reference as Exhibit A.

SECTION 2. The City Council authorizes the LEDC to enter into the Grant Agreement with DW Distribution, Inc.

SECTION 3. That this resolution shall take effect immediately from and after its passage and it is so duly resolved.

DULY PASSED and approved by the City Council of the City of Lancaster, Texas, on this the 8th day of March, 2021.

ATTEST:



Sorangel O. Arenas, City Secretary

APPROVED:



Clyde C. Hairston, Mayor

APPROVED AS TO FORM:



David T. Ritter, City Attorney

EXHIBIT A
PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** by and between *DW DISTRIBUTION, INC.*, a Texas corporation, (hereinafter referred to as "Developer"), and the *LANCASTER ECONOMIC DEVELOPMENT CORPORATION*, a Texas non-profit corporation (hereinafter referred to as the "LEDC"), is made and executed on the following recitals, terms and conditions.

WHEREAS, LEDC is a Type A economic development corporation operating pursuant to Chapter 504 of the Texas Local Government Code, as amended (also referred to as the "Act"), and the Texas Non-Profit Corporation Act, as codified in the Texas Business Organizations Code, as amended; and

WHEREAS, Section 501.101 of the Texas Local Government Code, in pertinent part, defines the term "project" to mean "land, buildings, equipment, facilities, expenditures, targeted infrastructure, and improvements that are: (1) for the creation or retention of primary jobs; and (2) found by the board of directors to be required or suitable for the development, retention, or expansion of: (A) manufacturing and industrial facilities; (B) research and development facilities; (C) military facilities, including closed or realigned military bases; . . . (F) recycling facilities; . . . (I) distribution centers; (J) small warehouse facilities capable of serving as decentralized storage and distribution centers; (K) primary job training facilities for use by institutions of higher education; or (L) regional or national corporate headquarters facilities"; and

WHEREAS, Section 501.103 of the Texas Local Government Code, in pertinent part, defines the term "project" to mean "expenditures that are found by the board of directors to be required or suitable for infrastructure necessary to promote or develop new or expanded business enterprises, limited to: (1) streets and roads, rail spurs, water and sewer utilities, electric utilities, or gas utilities, drainage, site improvements, and related improvements; (2) telecommunications and Internet improvements . . ."; and

WHEREAS, Section 501.158 of the Texas Local Government Code prohibits the provision of a direct incentive unless LEDC enters into an Agreement with Developer providing at a minimum a schedule of additional payroll or jobs to be created or retained by LEDC's investment; a schedule of capital investments to be made as consideration for any direct incentives provided by LEDC to Developer; and a provision specifying the terms and conditions upon which repayment must be made should Developer fail to meet the agreed to performance requirements specified in this Agreement; and

WHEREAS, Developer has applied to LEDC for financial assistance necessary occupy and commence operations at its spec building to be constructed within the city limits of the City of Lancaster, Texas; ("the Facility") on real property owned by the Developer ("the Property") and

WHEREAS, the LEDC's Board of Directors have determined the financial assistance provided to Developer for Facility operations located on the Property is consistent with and meets the definition of "project" as that term is defined in Sections 501.101 and 501.103 of the Texas Local Government Code; and the definition of "cost" as that term is defined by Section 501.152

of the Texas Local Government Code; and

WHEREAS, Developer agrees and understands that Section 501.073(a) of the Texas Local Government Code requires the City Council of the City of Lancaster, Texas, to approve all programs and expenditures of LEDC, and accordingly this Agreement is not effective until City Council has approved this Agreement at a City Council meeting called and held for that purpose.

NOW, THEREFORE, for and in consideration of the agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, LEDC and Developer agree as follows:

SECTION 1. FINDINGS INCORPORATED.

The foregoing recitals are hereby incorporated into the body of this Agreement and shall be considered part of the mutual covenants, consideration and promises that bind the parties.

SECTION 2. TERM.

This Agreement shall be effective as of the Effective Date, as defined herein, and shall continue thereafter until **February 19, 2023**, unless terminated sooner under the provisions hereof.

SECTION 3. DEFINITIONS.

The following words shall have the following meanings when used in this Agreement.

- (a) **Act.** The word “Act” means Chapters 501 to 505 of the Texas Local Government Code, as amended.
- (b) **Agreement.** The word “Agreement” means this Performance Agreement, together with all exhibits and schedules attached to this Performance Agreement from time to time, if any.
- (c) **Certificate of Occupancy.** The words “Certificate of Occupancy” mean a certificate of occupancy (or its local equivalent) for the Facility.
- (d) **City.** The word “City” means the City of Lancaster, Texas, a Texas home-rule municipality, whose address for the purposes of this Agreement is 211 N. Henry Street, Lancaster, Texas 75146.
- (e) **Developer.** The word “Developer” means **DW DISTRIBUTION, INC.** a Texas corporation, its successors and assigns, whose address for the purposes of this Agreement is 1200 E. Centre Park Blvd., DeSoto, TX 75115.

- (f) **Effective Date.** The words “Effective Date” mean the date of the latter to execute this Agreement by and between the Developer and LEDC, following approval by their respective Council and Board.
- (g) **Event of Default.** The words “Event of Default” mean and include any of the Events of Default set forth below in the section entitled “Events of Default.”
- (h) **Facility.** The word “Facility” means Developer’s warehousing/office facilities constructed on the Property. In order to qualify as the “Facility” under this Agreement, the facility must meet all of the following criteria: (1) be located within the City; (2) contain at least 185,900 square feet, (3) maintain a taxable value for business personal property of at least \$2,000,000; and (4) improvements to the Facility must be completed and a Certificate of Occupancy obtained within twelve (12) months from the Effective Date of the Agreement and maintained throughout the Term of this Agreement.
- (i) **Full-Time Equivalent Employment Positions.** The words “Full-Time Equivalent Employment Position(s)” mean a job: (i) with an average annual wage of at least \$45,000; and (ii) requiring a minimum of one thousand nine hundred and twenty (1,920) hours of work averaged over a twelve-month period with such hours also to include any vacation and sick leave.
- (j) **LEDC.** The word “LEDC” means the Lancaster Economic Development Corporation, a Texas non-profit corporation, its successors and assigns, whose corporate address for the purposes of this Agreement is P.O. Box 940, Lancaster, Texas 75146.
- (k) **Program Payment.** The words “Program Payment” mean the economic development funds provided by the LEDC to Developer in accordance with the Agreement.
- (l) **Property.** The word “Property” means Developer’s ±14.75-acre tract or tracts of land located at 2001 Danieldale Road in Nathan P. Pierce Survey, Abstract No. 1132, City of Lancaster, Dallas County, Texas, as generally described and/or depicted in *Exhibit A* of this Agreement, which is attached hereto and incorporated herein for all purposes, together with any other adjacent land owned or hereafter acquired by Developer.
- (m) **Term.** The word “Term” means the term of this Agreement as specified in Section 2 of this Agreement.

SECTION 4. AFFIRMATIVE COVENANTS OF DEVELOPER.

Developer covenants and agrees with LEDC that, while this Agreement is in effect, it shall comply with the following terms and conditions:

- (a) **Occupation of Facility.** Developer covenants and agrees to occupy the Facility within twelve (12) months of the Effective Date of this Agreement.

- (b) **Certificate of Occupancy.** Developer covenants and agrees to obtain or cause to be obtained a Certificate of Occupancy from the City for the Facility located on the Property within twelve (12) months of the Effective Date of this Agreement.
- (c) **Operation of Facility.** Developer covenants and agrees to maintain and actively Operate the Facility located on the Property beginning within twelve (12) months of the Effective Date of this Agreement and during the remainder of the Term of this Agreement.
- (d) **Payment of City Fees.** Developer covenants and agrees to pay to the City all City-related development fees for the development of the Property, construction of the Facility and for Facility Operations. Those fees include (but may not be limited to) the following: special use permit fees, building permit fees, sign permit fees, plan review fees, plumbing, heating and electrical permit fees, grading permit fees, architectural review fees, variance application fee, and zoning change fee. Further, Developer covenants and agrees to submit to the LEDC invoices, receipts, or other documentation indicating the amount of City-related development fees paid for the development of the Property in a reimbursable amount (as defined below in Section 5(a)).
- (e) **Definition of and Documentation of Machinery/Infrastructure Costs.** Developer covenants and agrees to obtain accurate invoices, receipts, and other written documentation regarding the amount of machinery and infrastructure costs actually incurred and paid for the development of the Property and construction of the Facility. Those costs include the following machinery costs: costs of sound-abatement equipment for the facility including dust collector silencer/muffler, acoustic treatment, and acoustic engineering/design costs, and infrastructure costs for street, sewer and water improvements to the Property in support of the Facility. All costs for which reimbursement is sought must be actual paid and incurred costs. Further Developer covenants and agrees to submit to the LEDC invoices, receipts, or other documentation indicating the amount of City-related development fees paid for the development of the Property in a reimbursable amount (as defined below in Section 5(b)).
- (f) **Full-Time Equivalent Employment Positions.** Developer covenants and agrees to establish not fewer than sixty (60) new Full-Time Equivalent Employment positions within twelve (12) months of the Effective Date of this Agreement as documented by payroll rolls submitted annually on the anniversary of the day of the Effective Date of this Agreement, such positions to be maintained throughout the Term of this Agreement and to provide complete reports to the LEDC on an annual basis verifying the employment for each preceding calendar year by January 30th of each year after receiving a Certificate of Occupancy for the Facility. Developer covenants and agrees to make best efforts to hire Lancaster residents within the term of the agreement.
- (g) **Performance.** Developer agrees to perform and comply with all terms, conditions, and provisions set forth in this Agreement and in all other instruments and agreements by and

between Developer and LEDC.

- (h) **Business Personal Property Valuation.** Developer covenants and agrees that the value of Business Personal Property at the Facility will meet Dallas Central Appraisal District values of at least two million dollars (\$2,000,000) for each valuation year beginning the with first full tax-year after obtaining a Certificate of Occupancy for the Facility. Developer will also provide BPP reports to LEDC on an annual basis for each preceding calendar year by January 30th of the following year after obtaining a Certificate of Occupancy from the City.
- (i) **Annual Reports.** Developer will provide City with an Annual Report within thirty (30) days of the first seven (7) years of the anniversary of the Effective Date of this Agreement, containing the following information: (1) evidence of payment of property taxes for Business Personal Property for Facility for proceeding year; (2) evidence of payment of all City fees associated with finish-out of building (first report only); (3) documentation of machinery costs including invoices and evidence of payment (first report only); and (4) employment roll including identification number, city of residence and annual salary for preceding year.

SECTION 5. AFFIRMATIVE COVENANTS OF LEDC.

LEDC covenants and agrees with the Developer that, while this Agreement is in effect, it shall comply with the following terms and conditions:

- (a) **Reimbursement for Payment of City Fees.** LEDC covenants and agrees within thirty (30) days of receipt and acceptance of Developer's invoices, receipts, and other documentation indicating the amount of City fees paid in accordance with Section 4(d) of this Agreement and submitted no later than June 1, 2022, that LEDC will reimburse Developer for one hundred percent (100%) of cost of City fees actually incurred and paid, up to a maximum amount (together with Section 5(b) incentives) of **One Hundred Eighty Thousand and no/100 dollars (\$180,000.00)**.
- (b) **Reimbursement for Machinery/Infrastructure Costs.** LEDC covenants and agrees within thirty (30) days of receipt of Developer's invoices, receipts, and other documentation indicating the amount of infrastructure costs paid in accordance with Section 4(e) of this Agreement and submitted no later than February 28, 2021, that LEDC will reimburse Developer for one hundred percent (100%) of all qualifying machinery/ infrastructure costs for the Property and/or Facility actually incurred and paid, up to a maximum amount (together with Section 5(a) incentives) of **One Hundred Eighty Thousand and no/100 dollars (\$180,000.00)**.
- (c) **Timing of Payment.** An initial Program Payment of up to a maximum of one hundred and fifty thousand and no/100 dollars (\$150,000.00) shall be payable within sixty (60) days of receipt and acceptance of Developer's invoices, receipts and other documentation

indicating the amount of City fees paid in accordance with Section 4(d) of the Agreement, and qualifying machinery/infrastructure costs paid in accordance with Section 4(e) of the Agreement, and submitted within sixty (60) days of obtaining a Certificate of Occupancy and no later than June 1, 2022. A second Program Payment of up to a maximum of thirty thousand and no/100 dollars (\$30,000.00) shall be payable upon the first anniversary of receipt of the Certificate of Occupancy for the Facility.

- (d) **Maximum LEDC Payment under this Agreement.** The Parties agree that, notwithstanding anything to the contrary in this Agreement or any other Agreement involving the Facility and/or Property, LEDC's maximum payment to Developer (provided all conditions precedent to payment set forth herein are met) shall be **One Hundred Eighty Thousand and no/100 Dollars (\$180,000.00)**. **The Parties expressly agree that the total maximum possible Program Payment under Sections 5(a) and 5(b) is a total of \$180,000.00, and not two separate \$180,000.00 Program Payments.**

SECTION 6. CESSATION OF ADVANCES

If LEDC has made any commitment to make any advance of financial assistance to Developer, whether under this Agreement or under any other agreement, LEDC shall have no obligation to advance or disburse any financial assistance if: (i) Developer becomes insolvent, files a petition in bankruptcy or similar proceedings, or is adjudged bankrupt; or (ii) an Event of Default occurs and is not cured within the time period provided in Section 8.

SECTION 7. EVENTS OF DEFAULT.

Each of the following shall constitute an Event of Default under this Agreement:

- (a) **General Event of Default.** Failure of Developer or LEDC to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement, or failure of Developer or LEDC to comply with or to perform any other term, obligation, covenant or condition contained in any other agreement by and between Developer and LEDC is an Event of Default.
- (b) **False Statements.** Any warranty, representation, or statement made or furnished to the LEDC by or on behalf of Developer under this Agreement that is false or misleading in any material respect, either now or at the time made or furnished is an Event of Default.
- (c) **Insolvency.** Developer's insolvency, appointment of receiver for any part of Developer's property, any assignment for the benefit of creditors of Developer, any type of creditor workout for Developer, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Developer is an Event of Default.
- (e) **Ad Valorem Taxes.** Developer allows its ad valorem taxes owed to the City to become delinquent and fails to timely and properly follow the legal procedures for protest and/or

contest of such taxes and to cure such failure within thirty (30) days after written notice thereof from LEDC and/or Dallas County Central Appraisal District is an Event of Default.

SECTION 8. EFFECT OF AN EVENT OF DEFAULT.

In the event of default under Section 7 of this Agreement, the non-defaulting party shall give written notice to the other party of any default, and the defaulting party shall have ninety (90) days to cure a default. Should said default remain uncured as of the last day of the applicable cure period, and the non-defaulting party is not otherwise in default, the non-defaulting party shall have the right to immediately terminate this Agreement, enforce specific performance as appropriate, institute cessation of Program Payments or claw back provisions as set forth herein, or maintain a cause of action for damages caused by the event(s) of default. In the event, Developer defaults and is unable or unwilling to cure said default within the prescribed time period, the amounts provided by LEDC to Developer pursuant to Section 5 of this Agreement shall become immediately due and payable by Developer to the LEDC.

SECTION 9. INDEMNIFICATION.

TO THE EXTENT ALLOWED BY LAW, EACH PARTY AGREES TO RELEASE, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE OTHER (AND ITS OFFICERS, AGENTS, AND EMPLOYEES) FROM AND AGAINST ALL CLAIMS OR CAUSES OF ACTION FOR INJURIES (INCLUDING DEATH), PROPERTY DAMAGES (INCLUDING LOSS OF USE), AND ANY OTHER LOSSES, DEMAND, SUITS, JUDGMENTS AND COSTS, INCLUDING REASONABLE ATTORNEYS' FEES AND EXPENSES, IN ANY WAY ARISING OUT OF, RELATED TO OR RESULTING FROM ITS PERFORMANCE UNDER THIS AGREEMENT, OR CAUSED BY ITS NEGLIGENT ACTS OR OMISSIONS (OR THOSE OF ITS RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, OR ANY OTHER THIRD PARTIES FOR WHOM IT IS LEGALLY RESPONSIBLE) IN CONNECTION WITH PERFORMING THIS AGREEMENT.

SECTION 10. MISCELLANEOUS PROVISIONS.

The following miscellaneous provisions are a part of this Agreement:

- (a) **Amendments.** This Agreement constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.
- (b) **Applicable Law and 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 Dallas County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts or federal courts for Dallas County,

Texas.

- (c) **Assignment.** This Agreement may not be assigned without the express written consent of the other party, with the exceptions of an assignment from Developer to a Lender for initial project funding and an assignment to an Approved Assignee. A copy of any such assignment shall be provided to LEDC within thirty (30) days of execution. Should consent be withheld by the LEDC, Developer may terminate this Agreement upon written notice to the LEDC. Notwithstanding anything herein to the contrary, upon such Notice from Developer, such termination shall not be deemed a Default under this Agreement.
- (d) **Binding Obligation.** This Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. Developer warrants and represents that the individual or individuals executing this Agreement on behalf of Developer has full authority to execute this Agreement and bind Developer to the same. LEDC warrants and represents that the individual executing this Agreement on its behalf has full authority to execute this Agreement and bind it to the same.
- (e) **Caption Headings.** Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of the Agreement.
- (f) **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same document.
- (g) **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, fire or other casualty, or court injunction, 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 obligation or requirement shall be extended for a period of time equal to the period such party was delayed.
- (h) **Notices.** Any notice or other communication required or permitted by this Agreement (hereinafter referred to as the "Notice") is effective when in writing and (i) personally delivered either by facsimile (with electronic information and a mailed copy to follow) or by hand or (ii) three (3) days after notice is deposited with the U.S. Postal Service, postage prepaid, certified with return receipt requested. The parties agree to keep the other party or parties informed of their address at all times during the Term of this Agreement. The Notices shall be addressed as follows:

if to Developer:

DW Distribution, Inc.
1200 E. Centre Park Blvd.
DeSoto, TX 75115

if to LEDC:

Lancaster Economic Development Corporation
P.O. Box 940
Lancaster, Texas 75146
Attn: Shane Shephard

- (i) **Severability.** If a court of competent jurisdiction finds any provision of this Agreement to be invalid or unenforceable as to any person or circumstance, such finding shall not render that provision invalid or unenforceable as to any other persons or circumstances. If feasible, any such offending provision shall be deemed to be modified to be within the limits of enforceability or validity; however, if the offending provision cannot be so modified, it shall be stricken and all other provisions of this Agreement in all other respects shall remain valid and enforceable.
- (j) **Time is of the Essence.** Time is of the essence in the performance of this Agreement.
- (k) **Undocumented Workers.** Developer certifies that the Developer 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, Developer is convicted of a violation under 8 U.S.C. § 1324a(f), Developer shall repay the amount of the public subsidy provided under this Agreement plus interest, at the rate of six percent (6%), not later than the 120th day after the date LEDC notifies Developer of the violation.
- (l) In accordance with Section 2270.002 of the Texas Government Code (as added by Tex. H.B. 89, 85th Leg., R.S. (2017)), the Developer verifies that it does not boycott Israel and will not boycott Israel during the Term of this Agreement.
- (m) In accordance with Section 2252.152 of the Texas Government Code (as added by Tex. S.B. 252, 85th Leg., R.S. (2017)), the Parties covenant and agree that Developer is not on a list maintained by the State Comptroller's office prepared and maintained pursuant to Section 806.051, 807.051, or 2252.153 of the Texas Government Code.
- (n) **Estoppel Certificate.** Upon written request by Developer to LEDC, LEDC will provide Developer with a certificate stating, as of the date of the certificate, (i) whether this Agreement is in full force and effect and, if Developer is in breach of this Agreement, the nature of the breach, and (ii) a statement as to whether this Agreement has been amended and, if so, the identity and substance of each amendment.

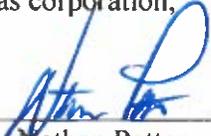
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DEVELOPER ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS PERFORMANCE AGREEMENT, AND DEVELOPER AGREES TO ITS TERMS. THIS PERFORMANCE AGREEMENT IS EFFECTIVE AS OF THE EFFECTIVE DATE AS DEFINED HEREIN.

DEVELOPER:

DW DISTRIBUTION, INC.

a Texas corporation,

By: 
Nathan Potter

CEO

Date Signed: 5/25/2021

STATE OF TEXAS

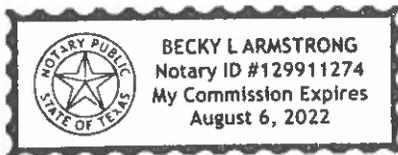
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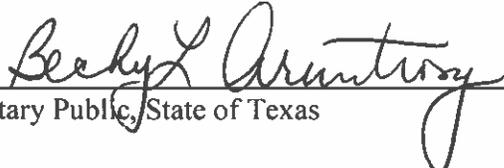
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COUNTY OF DALLAS

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This instrument was acknowledged before me on the 25th day of May, 2021, by Nathan Potter of DW Distribution, Inc., a Texas corporation, on behalf of said Texas corporation.




Notary Public, State of Texas

LEDC:

**LANCASTER ECONOMIC
DEVELOPMENT CORPORATION,**
a Texas non-profit corporation

By: Ted Burk
Ted Burk
President
Date Signed: 5-27-2021

ATTEST:

Cynthia Suk
Secretary

STATE OF TEXAS

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COUNTY OF DALLAS

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This instrument was acknowledged before me on the 27 day of MAY 2021, by Ted Burk, President of the Lancaster Economic Development Corporation, a Texas non-profit corporation, on behalf of said Texas corporation.

Deborah Shelby Buntton
Notary Public, State of Texas

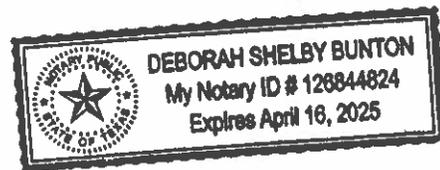


Exhibit A

[Legal Description and/or Depiction of Property]

