

CITY OF AUSTIN / THE HOME DEPOT USA, INC.,

CHAPTER 380

ECONOMIC DEVELOPMENT AGREEMENT

This Chapter 380 Economic Development Agreement ("Agreement") is made and entered into by and between THE HOME DEPOT USA, INC., a Delaware corporation licensed to do business in Texas, its successors and assigns ("Owner") and the CITY OF AUSTIN, TEXAS, a home rule city and municipal corporation ("City").

RECITALS

WHEREAS, the City has adopted Ordinance No. 040624-9, attached as Exhibit "A" ("Ordinance"), establishing and authorizing the City Manager to make economic development grants to Owner in recognition of the positive economic benefits to the City through Owner's proposed Home Depot Data Center facility to be located at 1300 Park Center Drive, Austin, Texas 78753 (the "Facility"), which project it is estimated will create at least 500 permanent jobs when the facility is fully operational (the "Project"), that will promote state and local economic development and stimulate business and commercial activity in Austin; and

WHEREAS, the proposed Facility would handle transactions and business records from throughout the country for The Home Depot USA, Inc., and

WHEREAS, the investment by Owner is estimated to be approximately \$404 million; and

WHEREAS, the City desires to offer incentives to Owner that will enable Owner to establish the Facility and provide new jobs in a manner proposed by Owner;

NOW, THEREFORE, in consideration of the mutual benefits and promises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and Owner agree as follows:

1. Authority. The City's execution of this Agreement is authorized by Chapter 380 of the Texas Local Government Code and the Ordinance and constitutes a valid and binding obligation of the City. Owner's execution and performance of this Agreement constitutes a valid and binding obligation of Owner in the event Owner proceeds with the development of the Facility.

The City acknowledges that Owner is acting in reliance upon the City's performance of its obligations under this Agreement in making its decision to commit substantial resources and money to expand the Facilities.

2. Definitions.

"Chapter 380 Payment" means the amount paid by the City to Owner under the Program (defined below).

"Effective Date" is the date this Agreement is signed by the City and Owner.

"Facility" means the proposed Home Depot Data Center to be located at 1300 Park Center Drive, Austin, Texas.

"Program" means the economic development program for this Project established by the City pursuant to Texas Local Government Code Chapter 380 and under the Ordinance to promote local economic development and stimulate business and commercial activity within the City.

3. Term. This Agreement shall become enforceable upon execution by the City and Owner and shall be effective on the Effective Date. This Agreement shall terminate twelve years from the Effective Date, unless extended by mutual agreement of the parties.

4. Owner Obligations. In consideration of the City's participation in the Program, if Owner proceeds with the Project and accepts the Chapter 380 Payment from the City pursuant to this Agreement, Owner agrees that the following performance guidelines shall be met:

a. Commencement of Facility Improvements. Owner shall issue a notice to proceed to a contractor to commence construction of improvements at the Facility no later than January 1, 2006, and shall diligently pursue such construction. In the event that Owner fails to commence the Project by January 1, 2008, Owner shall reimburse City for any Chapter 380 Payment received by Owner prior to such date, and this Agreement shall terminate and be of no further effect.

b. Employment Opportunities. By January 1, 2008, Owner shall attempt to create at least five hundred (500) permanent jobs at the Facility. After July 1, 2008, in order to receive full Chapter 380 Payments under Section 5, Owner shall maintain at least 500 permanent full-

time jobs at the Facility for the term of this Agreement. During the term of this Agreement, Owner shall make available to the City upon reasonable request records establishing the number of permanent employees employed at the Facility.

If, after July 1 2008, Owner maintains at least 400 but less than 500 jobs during any year for which Owner is entitled to Chapter 380 Payments under this Agreement, then, as a penalty, annual rebates of City taxes due to Owner as Chapter 380 Payments shall be reduced as follows:

The City shall pay a percentage of the total Ad Valorem Tax (based on the incremental real property tax, and the business personal property tax, as defined in 5.a.(1) and (2) below) calculated as follows:

The product of a fraction having a numerator being the actual number of jobs for that year and a denominator being 500, times the Ad Valorem Tax as defined in Sections 5.a.(1) and (2) below. As an example, should Owner maintain 450 jobs in any year after 2008, the amount of the Chapter 380 payment for that year would be 90% (450/500) of the Ad Valorem Tax, instead of the full 100% had 500 jobs been maintained.

After the year 2008, the number of jobs must be maintained by Owner for the entire calendar year to qualify for Chapter 380 Payments. If, after July 1, 2008, the number of jobs maintained by Owner falls below 400 jobs, then such event shall be cause for automatic termination of this Agreement under Section 4.f below.

- c. Investment. Owner will invest at least \$404,000,000 in real property, improvements, business personal property and non-capital expenditures at the Facility over the term of this Agreement.
- d. Purchase Within the City. Owner shall use its best efforts to purchase computers and computer equipment related to the Facility and its operation within the City of Austin's full purpose city limits, in order for the City to receive sales tax revenue from such purchases. During the term of this Agreement, Owner shall make available to the City upon request records verifying computer equipment purchases.

- e. Certificate of Compliance. At the time that Owner delivers to City the annual Ad Valorem Revenue Notice required under Section 5 below, Owner shall also deliver to City a Certificate of Compliance, under which Owner warrants to the City that it is in full compliance with each of its obligations under this Agreement, including the number of jobs maintained by Owner for the preceding year. City has the right to inspect the Facility and pertinent records of Owner to verify compliance. Inspections shall be preceded by at least seventy-two hours notice by telephone to the head of the Facility.
- f. Failure to Meet Obligations. In the event that Owner fails to fulfill any of its obligations under the performance guidelines in paragraphs 4.a. through e. above, and, City has made demand on Owner to fulfill those specific obligations, but more than 60 days has elapsed since such demand and Owner has still failed to materially fulfill the specific obligations that were the subject of the City's demand, then the Agreement is terminated, in which case the provisions of Section 8 do not apply. In the event of such termination, Owner shall not be entitled to further Chapter 380 Payments, and Owner shall not be required to reimburse City for prior Chapter 380 Payments.
- g. Compliance with City Regulations. Owner will be ineligible for incentives if it is not complying with City of Austin current water quality regulations at the Facility unless the applicant has negotiated or negotiates an agreement with the City in which it complies with current impervious cover limits overall and agrees to build with current water quality controls and waive any claim to grandfathering to prior water quality regulations.

In the event that Owner fails to fulfill its obligations under this paragraph 4.g, City may terminate this Agreement and no further City payment shall be required under this Agreement; provided however, that Owner shall not be required to reimburse the City for payments made under this Agreement by City for any year during which Owner was in compliance with this paragraph 4.g.

5. City Obligations.

a. City Chapter 380 Payments to Owner. The City will pay Owner as follows:

- (1) For a period of ten (10) years beginning on January 1, 2006, the City shall pay the Owner a Chapter 380 Payment equal to the Incremental Ad Valorem Tax on the real property, and improvements at the Facility, except as such Payment may be reduced in accordance with Section 4.b. above. "Incremental Ad Valorem Tax" means any increase in the City Ad Valorem Tax over the City ad valorem tax that would be due on the value of the Facility, including all real property and improvements, as it existed on May 1, 2004. For purposes of this Agreement, the value of the Facility as it existed on May 1, 2004 is deemed to be \$12,000,000.00.
- (2) For a period of ten (10) years beginning on January 1, 2006, the City shall pay to the Owner a Chapter 380 Payment equal to one hundred percent (100%) of the Ad Valorem Tax paid on eligible business personal property located at the Facility for each tax year, except as such Payment may be reduced in accordance with Section 4.b. above. Eligible business personal property is listed on Exhibit "B" to this Agreement.

With respect to each type of Chapter 380 Payment described in subsections 5.a.(1) and (2) above, Owner shall notify the City in writing of any sums paid by Owner to the County tax collector in the form of city ad valorem taxes on the real and personal property eligible for Chapter 380 incentives during the term of this Agreement [the "Ad Valorem Revenue Notice"]. The Chapter 380 Payments with respect to the Incremental Ad Valorem Revenues shall be based on the amount stated in the Ad Valorem Revenue Notice, which shall be verified by the City. Both real property and personal property Chapter 380 Payments shall be paid to Owner by the City on an annual basis for the preceding year, on or before October 30th following the tax year for which they were paid. For example, the first Chapter 380 Payments shall be based on taxes paid for the year 2005, and shall be paid on or before October 30, 2006, and the last Chapter 380 Payments shall be based on taxes paid for the year 2014, and shall be paid on or before October 30, 2015.

- b. Payment Amount. The total direct Chapter 380 Payments under this Agreement to be paid to Owner is estimated at \$6,742,535, to be paid out of City funds as set out herein.
 - c. Austin Energy Equipment and Services. Austin Energy, the City of Austin Electric Utility, will provide up to \$445,000 in equipment and services to enhance power quality and reliability at the Facility.
 - d. Payments Subject to Future Appropriation. This Agreement shall not be construed as a commitment, issue or obligation of any specific taxes or tax revenues for payment to Owner. All payments made by the City under this Agreement are subject to the City's appropriation of funds for such payments to be paid in the budget year for which they are made. The payments to be made to Owner, if paid, shall be made solely from annual appropriations from the general funds of the City or from such other funds of the City as may be legally set aside for the implementation of Article III, Section 52a of the Texas Constitution or Chapter 380 of the Local Government Code or any other economic development or financing program authorized by statute or home rule powers of the City under applicable Texas law, subject to any applicable limitations or procedural requirements. In the event the City does not appropriate funds in any fiscal year for payments due under this Agreement, the City shall not be liable to Owner for such payments, and the Owner shall have the right but not the obligation to rescind this Agreement. To the extent there is a conflict between this paragraph 5.d and any other language or covenant in this Agreement, this paragraph 5.d shall control.
6. Mutual Assistance. City and Owner will do all things reasonably necessary or appropriate to carry out the terms and provisions of this Agreement, and to aid and assist each other in carrying out such terms and provisions in order to put each other in the same economic condition contemplated by this Agreement regardless of any changes in public policy, the law or taxes or assessments attributable to the Facility.
 7. Representations and Warranties. The City represents and warrants to Owner that the Program and this Agreement are within its authority, and that it is duly authorized and empowered to establish the Program and enter into this Agreement, unless otherwise ordered by a court of competent jurisdiction. Owner represents and warrants to City that it has the requisite authority to enter into this Agreement.

8. Default. If either the City or Owner should default in the performance of any obligations of this Agreement, the other party shall provide such defaulting party written notice of the default, and a minimum period of thirty (30) days to cure such default, prior to instituting an action for breach or pursuing any other remedy for default.
9. Attorney's Fees. In the event any legal action or proceeding is commenced between the City and Owner to enforce provisions of this Agreement and recover damages for breach, the prevailing party in such legal action shall be entitled to recover its reasonable attorney's fees and expenses incurred by reason of such action, to the extent allowed by law.
10. Entire Agreement. This Agreement contains the entire agreement between the parties. All prior negotiations, discussions, correspondence, and preliminary understandings between the Parties and others relating hereto are superseded by this Agreement. This Agreement may only be amended, altered or revoked by written instrument signed by the City and Owner.
11. Binding Effect. This Agreement shall be binding on and inure to the benefit of the parties, their respective successors and assigns.
12. Assignment. Except as provided, Owner may not assign all or part of its rights and obligations to a third party without prior written approval of the City, which approval shall not be unreasonably withheld or delayed. Notwithstanding anything to the contrary, Owner may assign all or part of its rights and obligations without the prior consent of the City to any party affiliated with Owner by reason of controlling, being controlled by, or being under common control, with Owner, or to a third party lender advancing funds for the acquisition, construction or operation of the Facility.
13. Termination. In the event Owner elects not to proceed with the Project as contemplated by this Agreement, Owner shall notify the City in writing, and this Agreement and the obligations on the part of both parties shall be deemed terminated and of no further force or effect, with the exception of reimbursements, if any, that may be due to the City under paragraph 4.a above.
14. Notice. Any notice and or statement required and permitted to be delivered shall be deemed delivered by actual delivery, facsimile with receipt of confirmation, or by depositing the same in the United States mail, certified

with return receipt requested, postage prepaid, addressed to the appropriate party at the following addresses:

Owner: Jim Fisher 770-384-4144
Vice President
Systems, Engineering and Field Operations
The Home Depot U.S.A., Inc.
2245 Paces Ferry Road, NW
Atlanta, GA 30339-4024
Re: Economic Development Agreement

with copies to: John S. Torigian
Krell & Torigian
1600 Smith Street
Suite 3885
Houston, Texas 77002
Ph: (713) 951-7603
Fax: (713) 951-7611

AND,

General Counsel
Building C22
The Home Depot USA, Inc.
2245 Paces Ferry Road, NW
Atlanta, GA 30339-4024

AND,

Managing Director
Home Depot Data Center
1300 Park Center Drive
Austin, Texas 78753

mike kincaid
512-977-2030

Elizabeth Gloria
elizabeth_k_gloria@home depot.com

City:

City Manager
301 West 2nd Street
Austin, Texas 78701
(P.O. Box 1088, Austin, Texas 78767)
Ph: (512) 974-2200

with copies to:

Director, Economic Growth and
Redevelopment Services
301 West 2nd Street Austin, Texas 78701
Ph: (512) 974-7820

AND,

City Attorney
301 West 2nd Street
Austin, Texas 78701
(P.O. Box 1546, Austin, Texas 78767)
Ph: (512) 974-2268
Fx: (512) 974-2912

Either party may designate a different address at any time upon written notice to the other party.

15. Interpretation. Each of the parties has been represented by counsel of their choosing in the negotiation and preparation of this Agreement. Regardless of which party prepared the initial draft of this Agreement, this Agreement shall, in the event of any dispute, however its meaning or application, be interpreted fairly and reasonably and neither more strongly for or against any party.
16. Applicable Law. This Agreement is made, and shall be construed and interpreted, under the laws of the State of Texas and venue shall lie in the State courts of Travis County, Texas.
17. Severability. In the event any provisions of this Agreement are illegal, invalid or unenforceable under present or future laws, and in that event, it is the intention of the parties that the remainder of this Agreement shall not be affected. It is also the intention of the parties of this Agreement that in lieu of each clause and provision that is found to be illegal, invalid or unenforceable, a provision be added to this Agreement which is legal, valid or enforceable and is as similar in terms as possible to the provision found to be illegal, invalid or unenforceable.

18. Paragraph Headings. The paragraph headings contained in this Agreement are for convenience only and will in no way enlarge or limit the scope or meaning of the various and several paragraphs.
19. No Third Party Beneficiaries. This Agreement is not intended to confer any rights, privileges or causes of action upon any third party.
20. No Joint Venture. It is acknowledged and agreed by the parties that the terms of this Agreement are not intended to and shall not be deemed to create any partnership or joint venture among the parties. The City, its past and future officers, elected officials, employees and agents do not assume any responsibilities or liabilities to any third party in connection with the Facility or the design, construction or operation of any portion of the Facility.
21. Exhibits. The following Exhibits "A" and "B" are attached and incorporated by reference for all purposes:

Exhibit "A": Ordinance No. 040624-9
Exhibit "B": Eligible Business Personal Property

This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which, taken together, shall constitute but one and the same instrument, which may be sufficiently evidenced by one counterpart.

EXECUTED to be effective as of the 7th day of Feb, 2005.

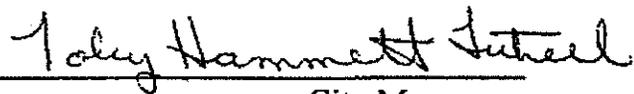
THE HOME DEPOT USA, INC.
a Delaware corporation

By: 
Printed Name: Jim Fisher

Title: Vice President, Systems,
Engineering and Field Operations

Date: 2-7-05

CITY OF AUSTIN, TEXAS,
a home-rule city and municipal
corporation

By: 
_____, City Manager,

APPROVED as to form:

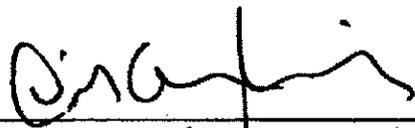

DAVID ALLAN GILLET, City Attorney



Exhibit "A"

ORDINANCE NO. 040624-9

ORDINANCE NO. 040624-9

AN ORDINANCE CREATING AN ECONOMIC DEVELOPMENT PROGRAM AND AUTHORIZING AN ECONOMIC DEVELOPMENT AGREEMENT WITH THE HOME DEPOT, INC.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. Findings. The city council finds that:

- (A) The Home Depot, Inc. (Home Depot) is proposing to locate a Home Depot Data Center in a facility located at 1300 Park Center Drive, Austin, Texas.
- (B) The Home Depot Data Center will create at least 500 permanent jobs in Austin when the facility is fully operational.
- (C) The investment by Home Depot is estimated to be \$404 million over a ten year period, with a total annual economic impact to the Austin area estimated to be between \$100 and \$125 million.
- (D) The impact of the Home Depot Data Center will provide economic benefits to the City, be a catalyst for economic development benefiting the entire community, promote local economic development, and stimulate business and commercial activity in the City.
- (E) Chapter 380 of the Texas Local Government Code (*Miscellaneous Provisions Relating to Municipal Planning and Development*) authorizes the City to establish local economic development programs.

PART 2. An economic development program for Home Depot Data Center is created under Chapter 380 (*Miscellaneous Provisions Relating to Municipal Planning and Development*) of the Texas Local Government Code.

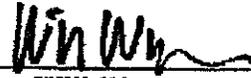
PART 3. As part of the City's economic development program, the city manager is directed and authorized to negotiate and execute a performance based economic development agreement with Home Depot that includes the terms and conditions attached as Exhibit A, and incorporated as part of this ordinance.

PART 4. This ordinance takes effect on July 5, 2004.

PASSED AND APPROVED

____ June 24 _____, 2004

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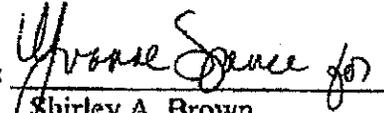
Will Wynn
Mayor

APPROVED:



David Allan Smith
City Attorney

ATTEST:



Shirley A. Brown
City Clerk

Exhibit A

**TERMS FOR ECONOMIC DEVELOPMENT AGREEMENT FOR HOME
DEPOT DATA CENTER**

1. For a period of ten years, commencing on January 1, 2006:
 - a. City will rebate 100% of city tax on eligible business personal property. Eligible business personal property means computers and computer equipment, servers and related equipment, telephones and related equipment.
 - b. City will rebate 100% of city tax on incremental increase in TCAD appraised value above 2003 TCAD appraised value, after purchase and renovation of real property at 1300 Park Center Drive, Austin, Texas.

The estimated amount of city tax to be rebated is \$6,742,535.

2. Austin Energy will provide up to \$445,000 in equipment and services to enhance power quality and reliability.
3. The Home Depot, Inc., will employ and maintain at least 500 new employees at the site by January 1, 2008.
4. The Home Depot, Inc., will invest at least \$404 million over a ten year period in real property improvements and business personal property at the site.
5. Other terms and conditions deemed necessary, advisable or required by the City Attorney.

Exhibit "B"

ELIGIBLE BUSINESS PERSONAL PROPERTY consists of:

Computers and computer equipment

Servers and related equipment

Telephones and related telephone equipment

