

PROJECT FLAG DEVELOPMENT AGREEMENT

EFFECTIVE DATE: _____, 2023

BETWEEN: CITY OF TUCSON, a municipal corporation (the “City”), and American Battery Factory, Inc, a Utah Corporation, (the “Company”). City and Company are sometimes hereafter collectively referred to as the “Parties” and individually as a “Party.”

RECITALS

The Parties agree that the following recitals are true and constitute a material part of this Agreement.

A. Company will spend an estimated \$1.17 billion to construct and equip its facilities (the “Project”) located near the intersection of S. Nogales Highway and E. Old Vail Road (Parcel Nos. 140-51-001A, -0020, -003A, -004A, - 026A, -0270;140-52-001N, -001U, -001W) (the “Property”). The Property is located within the corporate limits of City.

B. Company has submitted an Application for Primary Jobs Incentive (the “Application”) to City pursuant to City’s Primary Jobs Incentive Programs established pursuant to Resolution No. 21764 adopted by the City on or about August 9, 2011 (the “Program”).

C. Pursuant to A.R.S. § 9-500.11, an independent economic analysis concluded that the proposed tax incentive is anticipated to raise more revenue than the amount of the incentive within the duration of the agreement and that in the absence of a tax incentive Company would not locate in the City in the same time, place or manner.

D. Mayor and Council directed staff to proceed with the negotiation of this Development Agreement (this “Agreement”) on December 6, 2022.

E. This Agreement is intended to set forth certain obligations of the Parties with respect to the contemplated development of the Property with the Project, as permitted by Arizona law. The Parties intend for this Agreement to be a “Development Agreement” within the meaning of A.R.S. § 9-500.05.

AGREEMENTS

NOW AND THEREFORE, based upon the foregoing recitals and in consideration of the mutual covenants contained herein and other good and valuable consideration the Parties agree as follows:

1. Construction Sales Taxes and Reimbursement. For the purposes of this Agreement, the term “Construction Sales Taxes” means the two percent (2%) transaction privilege tax on construction contracting activities imposed under the Tax Code of the City of Tucson.

City shall reimburse and pay to Company an amount equivalent to 100% of the Construction Sales Taxes imposed and actually received by the City for construction contracting activities related to the Project (the “Construction Sales Tax Reimbursement”). The reimbursement represents the economic benefit received by the City due to the creation of one thousand (1,000) total jobs with fifty (50) jobs paying at least \$54,932 and an estimated \$1.17 billion dollar capital investment. The economic benefits of this Project were verified by an independent economic analysis performed by Sun Corridor Inc., attached hereto as Exhibit A. In no event shall the total Construction Sales Tax Reimbursement received by Company exceed \$3,965,574. Company shall provide proof to the City of payment of such Construction Sales Taxes, in a form which is reasonably acceptable to the City.

1.1 Payment of Reimbursement. The City shall pay the Construction Sales Tax Reimbursement to Company after the Construction Sales Taxes have been paid to the City. City will reimburse Company annually based on the percentage of total jobs created that year to the total minimum jobs required under this Agreement (50 jobs). All jobs must be created within five (5) years of the issuance date of the permanent Certificate of Occupancy and retained for five (5) years from the date the job was created.

2. Intentionally omitted.

3. Mutual Benefits and Consideration. The Parties expressly agree, find and determine that the terms of this Agreement are justified based on the consideration provided by Company in developing the Project and meeting the Incentive Conditions.

4. Clawback. In the event the Program funds are distributed in whole or part, but all of the Incentive Conditions are not met, Company shall be required to pay back the portion of the funds that have been distributed, plus interest at the rate of three percent (3.0%) per annum. No fund distribution will be made until the distribution is fully collateralized in a form proposed by the Company.

4.1 "Incentive Conditions" shall mean all of the following:

(a) Company created within and retained for a period of five (5) years ("Retention Period"), fifty (50) new primary, non-retail jobs that pay a wage of at least \$54,932.

(b) Company paid 75% of each employee's healthcare premiums during the Retention Period.

(c) Company invests at least \$1.17 billion into the Project.

4.2. Verification of Compliance with Incentive Conditions. Company shall provide documentation upon request to verify that Company has complied with Incentive Conditions.

5. Use of Primary Jobs Incentive Proceeds. Company shall use incentive proceeds for public infrastructure and/or to offset impact fees. Company shall provide documentation to City stipulating the use of incentive proceeds.

6. General Terms and Conditions.

6.1 All of the provisions of this Agreement shall inure to the benefit of and be binding upon the Parties and their successors and assigns.

6.2 This constitutes the final integrated agreement of the Parties and supersedes all prior and contemporaneous offers, negotiations and other agreements all of which are merged into this Agreement.

6.3 This Agreement shall be construed according to Arizona law.

6.4 No moratorium, as that term is defined in A.R.S. § 9-463.06, shall be imposed on the Project unless it is imposed pursuant to an ordinance that complies with A.R.S. § 9-463.06, as amended.

6.5 All Parties shall promptly and expeditiously execute and deliver all such documents and perform all acts as reasonably necessary, from time to time, to carry out the matters contemplated by this Agreement.

6.6 This Agreement shall be recorded in its entirety in the official records of Pima County, Arizona, not later than ten (10) days after this Agreement is executed by all Parties and an ordinance is enacted by the Mayor and Council authorizing this Agreement.

6.7 No change or addition is to be made to this Agreement except by a written amendment executed by all Parties and recorded in Pima County, Arizona.

6.8 The individuals executing this Agreement represent that they have full right, power and authority to execute this Agreement on behalf of their respective Parties. City may delegate the authority to manage this Agreement to the City Manager or the Manager's delegate.

6.9 Company agrees to indemnify, defend, and hold harmless the City of Tucson, its employees, officers, agents, and contractors from any legal challenge to this Agreement claiming it violates Article 9, §7 of the Arizona Constitution, commonly known as the Gift Clause.

6.10 In the event of litigation to enforce or interpret this Agreement, the substantially prevailing Party shall be entitled to recover its reasonable attorney's fees and court costs from the substantially non-prevailing Party.

6.11 This Agreement may be executed in counterparts, all of which together shall constitute one and the same Agreement.

6.12 Notice is hereby given of the applicability of A.R.S. § 38-511.

6.13 This Agreement shall be effective on date of execution and shall have a term of ten (10) years.

[Signatures on following page.]

This Development Agreement is entered effective as of _____, 2023.

CITY OF TUCSON
A municipal corporation

By _____
Regina Romero, Mayor

Attest:

Suzanne Mesich, City Clerk

APPROVED AS TO FORM:

By _____
City Attorney

COMPANY:

By  _____

Its: COO and General Counsel
