ORDINANCE NO. 511

AN ORDINANCE AUTHORIZING THE EXECUTION OF A DEVELOPMENT AGREEMENT BETWEEN THE CITY AND BENCHMARK MANAGEMENT, INC. ("DEVELOPER") PROVIDING FOR CERTAIN INCENTIVES TO ENCOURAGE AND ASSIST DEVELOPER IN LOCATING, DEVELOPING AND OPERATING WITHIN THE CITY LIMITS THE CITY'S FIRST HIGH-QUALITY GROCERY STORE.

WHEREAS, the City of Basehor, Kansas (the "City"), desiring the development of a first-of-its-kind high-quality grocery store ("Grocery") within the City limits, commissioned a market feasibility study to consider whether the area could support such a store; and

WHEREAS, the study performed by Associated Wholesale Grocers and dated April 6, 2005 (the "Study"), concluded that the relevant market area will likely not fully support such a Grocery until approximately 2009; and

WHEREAS, notwithstanding the Study's conclusion, Developer has offered to make a substantial private investment to locate, develop and operate such a Grocery within the City limits, and create jobs therein, provided that the City authorizes the use of certain incentives to increase the likelihood of the project's feasibility; and

WHEREAS, the City desires to provide such incentives in pursuit of achieving the public purpose of facilitating and encouraging economic development within the City in partnership with private enterprise, specifically the establishment of a Grocery, which business will invest private capital and create new jobs in the City's economy, in exchange for the Developer's commitment to locate, develop and operate such Grocery; and

WHEREAS, pursuant to the City's home rule powers as set forth in Kansas Constitution Article 12 Section 5(b), the City has the authority in pursuit of the above-described public purpose to grant such incentives and to enter into a development agreement with the Developer detailing the same.

NOW THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF BASEHOR, KANSAS:

Section 1. That it is hereby found, determined and declared that it is necessary and in the public interest for the public purpose of facilitating and encouraging economic development within the City in partnership with private enterprise, specifically the establishment of a first-of-its-kind high-quality grocery store to serve its residents, which business will invest private capital and create new jobs in the City's economy, to enter into a development agreement with the Developer to provide the following

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incentives in exchange for the Developer's commitment to locate, develop and operate such Grocery within the City limits:

a. The City shall waive the requirement that Developer pay the City those fees otherwise required under the City Code and other applicable regulations for building permit application, review, permitting and inspection, preliminary platting, final platting and all similar fees related to the Grocery development, provided that such fees are not otherwise payable as reimbursable Transportation Development District project costs.

b. The City shall abate for ten (10) calendar years, starting in the calendar year immediately following completion of the Grocery and the full assessment thereof by the Leavenworth County Assessor, ninety-five percent (95%) of the City's real property taxes levied against the land and improvements containing the Grocery, or any real property tax rebate available under any applicable Neighborhood Revitalization Act Plan.

c. The City shall expedite the City's approval process relating to development, construction and operation of the Grocery to its full legal ability, provided, however, that the City shall not waive any notice or hearing requirements set forth in the City's zoning and planning ordinances or in the Kansas State zoning and planning statutes.

d. The City shall assist Developer in pursuing Enterprise-Zone incentives available under Kansas State law as relates to the development of the Grocery, and the creation of jobs therefore.

e. The City shall provide Developer with City staff representation relating to pursuing access rights to the Grocery from the adjacent State Highway.

f. The City shall petition other taxing districts with the power to levy real property taxes against the Grocery for real property tax abatement of the Grocery.

g. The City shall direct, through a grant program, for a limited period of time that portion of the incremental increase in City retail sales tax revenue resulting from the Grocery to the Developer in the amount necessary to ensure a reasonable rate of return based upon annual gross retail sales of $12,000,000 for the initial five (5) years of operation of the Grocery in the event the private market is unable to initially sustain the project's financial viability. In the event the Grocery exceeds $12,000,000 in annual gross sales for any two (2) consecutive years, the grant program shall terminate; except that the City will continue to be obligated to pay any and all outstanding grant payments owed to the Developer under the program.

Section 2. That the Mayor is hereby authorized and directed to execute on behalf of the City the development agreement with Developer ("Development Agreement") in substantially the form attached hereto and incorporated herein as **Exhibit A**, which provides for the incentives set forth in Section 1 of this Ordinance in exchange for the Developer's commitment to locate, develop and operate such Grocery within the City limits.

Section 3. That if any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

Section 4. All ordinances or parts of ordinances concerning the Developer and pertaining to the Grocery and any incentives associated therewith in conflict with this Ordinance are hereby superseded.

Section 5. This Ordinance shall be in full force and effective from and after its passage, and publication in the official city newspaper.

Approved by the City Council this 22 day of February, 2007.

Approved by the Mayor this 22 day of February, 2007.

Mayor Chris Garcia

Approved For Content:

John F. Thompson, City Attorney

Attest:

Mary A. Mogle, CMC City Clerk

Exhibit A to Ordinance No. 511

Development Agreement

REGARDING CERTAIN INCENTIVES FOR ECONOMIC DEVELOPMENT PROJECT

By and Between

THE CITY OF BASEHOR, KANSAS

and

BENCHMARK MANAGEMENT, INC.

Dated February 22, 2007

This Agreement ("Agreement") is entered into by and between the CITY OF BASEHOR, KANSAS, a municipal corporation (the "City") and BENCHMARK MANAGEMENT, INC., a Kansas corporation (the "Developer") (collectively referred to as the "Parties") and is dated and effective as of the date executed by both parties. In consideration of the mutual covenants and agreements contained herein, the Parties agree as follows:

Section 1. Purpose.

The City of Basehor, Kansas desiring the development of a first-of-its-kind high-quality grocery store ("Grocery") within the City limits, commissioned a market feasibility study to consider whether the area could support such a store, and the study concluded that the relevant market area will likely not fully support such a Grocery until approximately 2009. Notwithstanding the study's conclusion, Developer has offered to make a substantial private investment to locate, develop and cause to operate such a Grocery within the City limits, and create jobs therein, earlier than 2009, provided that the City authorizes the use of certain incentives to increase the likelihood of the project's feasibility.

The City desires to provide such incentives in pursuit of achieving the public purpose of facilitating and encouraging economic development within the City in partnership with private enterprise, specifically the establishment of a Grocery, which will invest private capital and create new jobs in the City's economy, in exchange for the Developer's commitment to locate, develop and cause to operate such Grocery as described herein.

Section 2. Authority.

Pursuant to the City's home rule powers as set forth in Kansas Constitution Article 12 Section 5(b), cities are empowered to determine their local affairs and government, except when such power is limited or prohibited by enactment of the legislature applicable uniformly to all cities. The home rule power and authority granted cities shall be liberally construed for the purpose of giving the cities the largest measure of self-government. One aspect of self-governance is the City's authority to promote its economic growth. The facilitation of economic

development in partnership with private enterprise has been recognized as a legitimate public purpose for the expenditure of public money.

On the 22nd day of February, 2007, the City Council passed Ordinance No. 511, an executed copy of which is attached hereto as Exhibit A, in which the City Council of Basehor ("City Council") found, determined and declared that it is necessary and in the public interest for the public purpose of facilitating and encouraging economic development within the City in partnership with a private enterprise, specifically for the establishment of a first-of-its-kind high-quality grocery store to serve its residents, to provide certain incentives to the Developer as set forth in this Agreement.

Section 3. The Parties.

(a) The City is a municipal corporation and a city of the third class under the laws of the state of Kansas (the "State"), exercising governmental powers and organized and existing pursuant to K.S.A. 15-101 et seq., and is acting herein according to the authority granted by Article 12, §5 of the Constitution of the State (the "Act") and local implementing legislation. The principal office of the City is: 2620 North 155th Street, Basehor, Kansas 66007, Attention: Carl Slaugh, City Administrator.

(b) The Developer is a corporation duly organized and existing under the laws of the state of Kansas. Throughout the **term** of this Agreement, Developer agrees to maintain its status as a domestic corporation, in good standing and authorized to do business in the State. The principal office and mailing office of the Developer is: Benchmark Management, Inc., P.O. Box 516, Basehor, Kansas 66007, Attention: Ed McIntosh, President.

Section 4. Restrictions on Transfer and Assignment.

The Parties acknowledge that the qualifications and identity of the Developer are critical to the City's authority and ability to enter into this Agreement. Accordingly, except as otherwise specifically provided herein, Developer agrees that it will not assign or transfer all or any of its rights and duties under this Agreement without the prior written consent of the City.

Section 5. Administrative Incentives.

(a) Development Fees. Notwithstanding Section 13 of the Development Agreement between the Parties dated June 5, 2006, related to the Wolf Creek Transportation Development District, the City agrees to waive the requirement that Developer pay to the City those fees otherwise required under the Basehor Code of Ordinances and other applicable regulations for the building permit application, review, permitting and inspection, preliminary platting, final platting and all other similar fees relating to the Grocery development, which will be located on a portion of the real property generally described on Exhibit B, attached hereto and incorporated herein. Provided, that such fees are not otherwise subject to reimbursement by the Wolf Creek Junction Transportation Development District.

(b) Expedited Approval Process. The City agrees to expedite the City's approval process relating to development and construction processes to its full legal ability, provided, however that the City shall not waive any notice or hearing requirements set forth in the City's zoning and planning ordinances or in the Kansas State zoning and planning statutes.

Section 6. Assistance with other Incentive Programs and Jurisdictions.

(a) **State Highway Access Rights.** The City agrees to, at its sole cost and expense, provide Developer with City staff assistance and representation in discussions with the Kansas Department of Transportation regarding access rights from the adjacent Kansas State Highway 24 to the Grocery real property.

(b) **Enterprise-Zone**. The City agrees to, at its sole cost and expense, assist the Developer in obtaining Enterprise-Zone sales tax exemption under Kansas State Law for retail businesses which create at least two net new jobs and are located in a city of less than 2,500 population. The sales tax exemption shall apply to all sales of tangible personal property or services purchased for the purpose of and in conjunction with construction of a retail business and the sale and installation of machinery and equipment purchased for installation at any such retail business.

(c) **Other Taxing Districts**. The City agrees to, at its sole cost and expense, petition other taxing districts with the power to levy real property taxes upon the real property of the Grocery for real property tax abatement of such taxes, including participation in any applicable Neighborhood Revitalization Act Plan real property tax rebate.

(d) **Limitation on Assistance and Representation**. In no event shall any assistance or representation to be provided by the City pursuant to this Section 6 require the City to incur or pay any legal fees.

Section 7. City Real Property Tax Rebate or Abatement.

(a) **Tax Rebate.** Notwithstanding Section 13 of the Development Agreement between the Parties dated June 5, 2006, related to the Wolf Creek Transportation Development District, the City shall, pursuant to its authority under K.S.A. 12-17,114 et seq. (the "Neighborhood Revitalization Act") and any applicable Neighborhood Revitalization Act Plan, and upon application by Developer, and for a period of ten (10) calendar years, provide a rebate equal to ninety-five percent (95%) of the City's real property taxes levied against the land and improvements containing the Grocery, starting in the calendar year immediately following completion of the construction of the Grocery and the full assessment of the land and improvements thereof by the Leavenworth County Assessor.

(b) **Tax Abatement**. In the event that the Developer does not qualify or receive said rebate pursuant to the Neighborhood Revitalization Act at any time during the ten (10) year period, the City agrees to abate such property taxes for the remainder of the ten (10) year period at ninety-five percent (95%) of the City's real property taxes levied against the land and improvements containing the Grocery.

(c) **Notification of Assessment.** The Developer shall notify the City when the construction of the Grocery is complete and the full assessment of the land and improvements thereof by the Leavenworth County Assessor is complete. The City shall then notify in writing the Leavenworth County Assessor's Office of the City's real property tax exemption to be applied to the Grocery property.

Section 8. Performance Based Start Up Incentive.

(a) Commitment of Grant Funds. The City agrees to award a cash grant to the Developer in the event the Grocery, during its first five (5) years of operation, fails to generate annually Gross Retail Sales (as defined below) in the amount of Twelve Million Dollars ($12,000,000.00) (the "Base Amount"). The Base Amount may be adjusted by the mutual written agreement of the parties prior to the Commencement Date (as defined below). Said cash grant shall be in the amount of Developer's net loss (the "Net Loss") during the respective year based on the formula of Gross Retail Sales less Retail Expenses.

Gross Retail Sales shall mean those retail sales of general grocery store related items, excluding, if any, catering, pharmacy, and flower shop retail sales.

Retail Expenses shall mean those costs and expenses incurred based on reasonable and customary practices for a grocery operation in the Leavenworth County, Kansas area and shall not include any indirect general administrative expenses or charge backs unrelated to the Grocery's operation.

(b) Source of Grant Funds. Any necessary grant shall be funded only from the incremental increase in the City's retail sales tax revenue generated by the Grocery ("Grant Funds"). The City agrees to identify and collect the incremental increase in the City's retail sales tax revenue generated by the Grocery and deposit it into a segregated account to be used to fund the cash grant provided for under this Section of this Agreement.

(c) Grant Program Period. The five (5) year period for this grant program shall commence on the date of the first day of retail sales at the Grocery ("Commencement Date"). Notwithstanding, in the event the Grocery's Gross Retail Sales exceed the Base Amount for any two (2) consecutive calendar years, the Grant Program shall terminate; provided, however, in such event, the City's obligation to pay any and all outstanding grant payments shall continue until all grant payments are paid in full.

(d) Payment Obligation.

(i) On an annual basis from the Commencement Date, the Developer shall determine the Gross Retail Sales from the Grocery's operation and notify the City of such amount in writing.

(ii) If the Gross Retail Sales do meet the Base Amount, Developer shall determine its Net Loss and notify the City of such Net Loss in writing.

(iii) Within sixty (60) days of receipt of Developer's notice of Net Loss, the City shall begin making monthly grant payments to the Developer, to the full extent as Grant Funds are available.

(iv) Any Grant Funds owed to the Developer pursuant to this Section of this Agreement shall be payable until the accrued grant obligation is paid in full.

(e) Financial Report. Developer shall, upon written request from the City, submit a complete written financial statement to City in a format reasonably acceptable to City showing in reasonable detail the calculation of Net Loss from the Grocery's operation.

Section 9. Developer Obligations.

(a) Developer commits to build the Grocery as soon as commercially reasonable with an estimated opening date of September 30, 2007.

(b) Developer Obligations herein are expressly conditional upon the occurrence of each of the following events:

(i) Acquisition by Developer of all the property necessary for development of the Grocery.

(ii) City approval of all zoning, subdivision and permit applications required for development of the Grocery.

(iii) Developer obtaining the financing necessary for development of the Grocery.

Section 10. Default and Remedies.

(a) The failure or delay by either of the Parties to this Agreement to perform any material term or provision of this Agreement required of such party, shall be a default under this Agreement, subject to rights of cure and Permitted Delays, as specified below.

(b) Any party to this Agreement claiming a default (the "Claimant") shall give written notice of such claimed default to the other party, describing such default. Such notices shall be given at the addresses of the Parties stated in Section 3 of this Agreement.

(c) A Claimant shall not institute legal proceedings against the other party nor be entitled to damages if, within 14 days from the receipt of a notice of claimed default, the other party undertakes acts to cure, correct or remedy such claimed default, proceeds with due diligence to complete such cure, correction or remedy and such cure correction or remedy is completed within thirty days of the date such party received a notice of default, provided, however, if such default requires more than 30 days to correct, the nonperforming party shall not be deemed in default hereunder if such party commences curing the default within 14 days after receipt of written notice thereof and diligently prosecutes the cure to completion.

(d) Parties shall not be deemed in default of this Agreement because of delays caused by reason of acts of God, war, civil commotion, riots, strikes, picketing or other labor disputes, preemptive governmental regulation, unavailability of labor or materials or damage to work in progress by reason of fire or other casualty, the default of the City, or other causes beyond the reasonable control of Developer (collectively "Permitted Delays").

Section 11. Governing Law, Jurisdiction.

(a) This Agreement shall be governed by, interpreted and enforced pursuant to the laws of the state of Kansas.

(b) The Parties agree that any legal actions arising out of this Agreement will be instituted in the District Court of Leavenworth County, Kansas or, in the case of federal jurisdiction, in the Federal District Court of the District of Kansas.

Section 12. Rights and Remedies Cumulative, Waivers.

Except as otherwise expressly provided in this Agreement, the rights and remedies of the Parties shall be cumulative, and the exercise by one party of one or more such rights shall not preclude the exercise by it, at the same or different times, of any other rights or remedies specified herein. Any failure or delay by either party in asserting any of its rights and remedies as to any default hereunder shall not operate as a waiver of such default or of any rights or remedies specified hereunder, or deprive either party of its right to assert and enforce any such right or remedy.

Section 13. Amendments.

The Developer and the City agree to cooperate and consider reasonable requests for amendments to this Agreement, provided that, any such amendments must be approved by the City Council and the Developer, and shall be in writing.

Section 14. Term.

This Agreement shall commence on the effective date hereof and shall terminate following the final year of tax abatement pursuant to Section 7 of this Agreement or when all grant payments are paid in full, whichever is later.

Section 15. Notices, Demands, Communications Among Parties.

Written notices, demands and other communications between the City and Developer shall be deemed delivered under this Agreement if given by personal service, registered or certified mail, postage prepaid and return receipt requested, or by overnight courier, to the principal offices of the City and the Developer set forth in Section 3 of this Agreement.

Section 16. Entire Agreement.

This Agreement is executed in duplicate originals, each of which shall be considered an original. This Agreement includes pages 1 through 7, and Exhibits A and B which constitutes the entire agreement and understanding of the Parties.

This Agreement supersedes all negotiations or previous agreements between the parties or their predecessors in interest with respect to all of any part of the subject matter of this Agreement.

Section 17. Severability.

The invalidity or inability to enforce any one or more phrases, sentences, clauses or sections of this Agreement shall not affect the validity or enforceability of the remaining portions of this Agreement.

In addition, in the event it is determined that the City lacks authority to implement any incentive described in this Agreement, the City shall be relieved of its obligation to perform said incentive.

Section 18. No Liability of City Officials or Employees.

All liabilities under this Agreement on the part of the City are solely corporate liabilities of the City, and, no officer, employee, or agent of the City shall have any personal or individual liability under this Agreement for anything done or omitted to be done by the City hereunder.

Section 19. Sale or Disposition of Grocery.

The Parties agree that the Developer may sell the Grocery, subject to City approval, and the tax abatement provided for in Section 7 of this Agreement will pass on to the purchaser and continue; provided the Grocery continues to operate.

[Remainder of page intentionally left blank. Signature page follows.]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed on 22nd day of February, 2007 and represent that the individuals executing this Agreement on behalf of the Parties have the express authority to do so.

CITY OF BASEHOR, KANSAS

Chris Garcia, Mayor

03/01/07
Date

SEAL OF THE CITY OF BASEHOR, KANSAS
CORPORATE
SEAL

Attest:

Mary A. Mogle, CMC, City Clerk

BENCHMARK MANAGEMENT, INC.

By: Ed McIntosh
Title: Vice President

3/5/07
Date

Attest:

By:
Title: City Clerk/Notary

Exhibit B

SITE

A tract of land in the South half of Section 2, Township 11 South, Range 22 East of the 6th Principal Meridian, in the City of Basehor, Leavenworth County, Kansas, described as follows:

Commencing at the Southwest corner of the Southeast Quarter of said section; thence along the West line of said Southeast Quarter N2°04'41"W a distance of 127.22' to a point on the North right of way of US Hwy 24-40 as now established, said point being on the South line of "Wolf Creek Junction" a subdivision of record in Leavenworth County, KS and Point of Beginning; thence along said right of way and plat line the following courses: S 88°31'29"W a distance of 121.05'; S88°30'35"W a distance of 381.37'; N34°02'04"W a distance of 153.55' to a point on the East right of way of 155th Street, as now established; thence along said right of way and plat line N1°51'07"W a distance of 69.03'; thence departing said right of way and along the South line of Lot 1, Block 2 in said subdivision N88°08'53"E a distance of 257.00'; thence along the East side of said Lot N1°51'07"W a distance of 87.10'; thence along a tangent curve to the right along said East line having a radius of 100.00' and a central angle of 20°16'44" an arc length of 35.39'; thence continuing along said line N18°25'37"E a distance of 72.40' to the Northeast corner of said lot; thence along the North line of said Lot on a non tangent curve to the left having a radius of 470.00', a central angle of 12°02'07" and a chord bearing of N85°50'03"W, an arc length of 98.73'; thence S88°08'53"W a distance of 190.29' to a point on the East right of way of said 155th St.; thence along said line N1°51'07"W a distance of 316.43' to the Northwest corner of said plat; thence along the North line thereof N88°31'33"E a distance of 430.00' to the Northeast corner of said plat: thence departing said plat line continuing N88°31'33"E a distance of 1475.30' to a point on the West line of "Prairie Lakes Estates Phase 3" a subdivision of record in Leavenworth County, KS; thence along the West line of said plat S1°41'36"E a distance of 29.25' to the Southwest corner of said plat; thence along the South line of said plat N88°11'09"E a distance of 448.74'; thence continuing along said south plat line S74°50'40"E a distance of 122.29'; thence continuing along said line S60°32'39"E a distance of 297.28'; thence N88°11'09"E a distance of 403.69' to a point on the West right of way of 150th Street, as now established; thence along said West right of way S23°05'35"W a distance of 33.96' to a point on the North right of way line of US Hwy 24-40; thence along said North right of way the following courses: Along a non tangent curve to the right having a radius of 395.00', a central angle of 38°01'34" and a chord bearing of S40°37'07"W, an arc length of 262.15'; S59°37'06"W a distance of 204.55'; along a tangent curve to the left having a radius of 280.00' and a central angle of 46°31'15", an arc length of 227.34'; thence S86°07'21"W a distance of 404.07'; N82°53'33"W a distance of 202.24'; S82°38'16"W a distance of 117.62'; S82°43'15"W a distance of 83.96'; S88°31'29"W a distance of 1235.54' to the Point of Beginning, containing 45.06 acres, more or less