

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That upon receipt of sufficient legal documentation to confirm that title to the site upon which the International Hotel sits has been transferred to Hotel Don Quixote, LTD. the City Manager be authorized to sign the Tax Abatement Agreement, Chapter 380 Economic Development Program Agreement and Hotel and Convention Services Agreement by and between the City of El Paso and Hotel Don Quixote, LTD.

ADOPTED this the _____ day of June 2006.

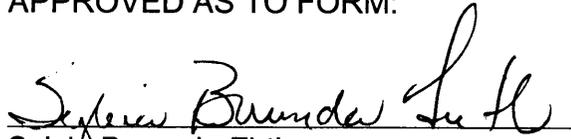
THE CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:


Sylvia Borunda Firth
Assistant City Attorney

**CITY OF EL PASO
AND
HOTEL DON QUIXOTE, LTD.**

TAX ABATEMENT AGREEMENT

This **TAX ABATEMENT AGREEMENT** is entered into by and between the **CITY OF EL PASO, TEXAS**, a home-rule municipality of El Paso County, Texas (hereinafter referred to as the "**CITY**"), and **HOTEL DON QUIXOTE, LTD.** (hereinafter referred to as the "**HOTEL DON QUIXOTE**"), a Texas limited partnership, duly acting by and through San Angel Plaza, LLC, general partner, for the purposes and considerations stated below:

WHEREAS, Section 312.002(a) of the Texas Tax Code requires the City to pass a resolution indicating the City's desire to become eligible to participate in tax abatement agreements;

WHEREAS, the City Council of the City of El Paso, Texas, has previously adopted a resolution stating that the City elected to be eligible to participate in tax abatements;

WHEREAS, on the 28th day of December, 2004, City Council of the **CITY**, adopted Tax Abatement Guidelines and Criteria, pursuant to Section 312.002 of the Texas Tax Code, which are attached hereto as **EXHIBIT A** and referred to as the **GUIDELINES AND CRITERIA**;

WHEREAS, the **GUIDELINES AND CRITERIA** attached hereto as **EXHIBIT A**, constitute appropriate guidelines and criteria governing tax abatement agreements to be entered into by the **CITY** as contemplated by the Property Redevelopment and Tax Abatement Act, Chapter 312 of the Texas Tax Code;

WHEREAS, Section 2303.051(a-2) of the Texas Government Code, as added by Texas House Bill 1659, in the 79th Legislative Session, requires the Texas Economic Development Bank of the Governor's Office to annually compile data identifying economically distressed counties within the State of Texas that automatically qualify for designation as enterprise zones under Chapter 2303 of the Texas Government Code;

WHEREAS, Section 2303.101(3) of the Texas Government Code, as added by Texas House Bill 1659, in the 79th Legislative Session, provides that an area automatically qualifies for designation as a state enterprise zone under Chapter 2303 of the Texas Government Code if the area is an area located within a distressed county;

WHEREAS, the Texas Economic Development Bank of the Governor's Office has designated El Paso County as an economically distressed county within the State of Texas, and thus areas located within El Paso County automatically qualify for designation as an enterprise zone pursuant to Chapter 2303 of the Texas Government Code;

WHEREAS, Section 312.2011 of the Texas Tax Code provides that the designation of an area as an enterprise zone under Chapter 2303 of the Texas Government Code constitutes designation of the area as a tax abatement reinvestment zone under chapter 312 of the Texas Tax Code, without further hearing or other procedural requirements other than those provided by Chapter 2303 of the Texas Government Code;

WHEREAS, Section 312.203 of the Texas Tax Code also provides that a reinvestment zone that is a state enterprise zone is designated for the same period as a state enterprise zone as provided by Chapter 2303 of the Texas Government Code;

WHEREAS, *HOTEL DON QUIXOTE* is the owner of **REAL PROPERTY** located at 600 N. El Paso Street, El Paso, Texas 79901, and further described in *EXHIBIT B* and as depicted in *EXHIBIT C* attached hereto and incorporated herein by this reference, and agrees to construct and or repair an approximately 200-room hotel located within the City of El Paso, El Paso County, Texas;

WHEREAS, this tax abatement will maintain and enhance the commercial-industrial economic and employment base of the El Paso area thereby benefiting the **CITY** in accordance with the *GUIDELINES AND CRITERIA* and the Property Redevelopment and Tax Abatement Act;

WHEREAS, the contemplated use and improvement of the **REAL PROPERTY** and the locating of the taxable situs of the **PERSONALTY**, as hereinafter defined, in the amounts and for the purposes set forth in this Agreement and the other terms hereof are consistent with encouraging development of said Enterprise Zone in accordance with the purposes for its creation and are in compliance with the *GUIDELINES AND CRITERIA* adopted by the **CITY** and all applicable law;

WHEREAS, *HOTEL DON QUIXOTE* acknowledges and agrees expend a minimum of Seventeen Million Seven Hundred Thousand Dollars (\$17,700,000.00) in total real improvements and new business personal property to restore the real property and open a hotel;

WHEREAS, *HOTEL DON QUIXOTE* acknowledges and agrees that the hotel facility shall add in the first year of operation of said hotel facility a minimum of seventy-six (76) full-time employees; and

WHEREAS, this Tax Abatement Agreement was approved by the **CITY** at a regularly scheduled meeting consistent with Section 312.207(a) of the Texas Tax Code.

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

SECTION 1. FINDINGS INCORPORATED.

All the above premises are hereby found to be true and correct and are hereby approved and incorporated into the body of this Agreement as if copied in their entirety.

SECTION 2. DEFINITIONS.

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

- (a) **Agreement.** The word "Agreement" means this Tax Abatement Agreement, together with all exhibits and schedules attached to this Agreement from time to time, if any.
- (b) **CITY.** The word "**CITY**" means the City of El Paso, Texas. For purposes of this Agreement, City's address is City of El Paso, 2 Civic Center Plaza, El Paso, Texas 79901-1196.
- (c) **Full-Time Employment.** The words "Full-Time Employment" mean a job requiring a minimum of One Thousand Nine Hundred Twenty (1,920) hours of work averaged over a twelve (12) month period, including allowance for vacation and sick leave, with full company benefits, including company paid health insurance, receiving a sustainable wage in an amount of at least \$8.50 per hour, and employed exclusively and on-site at the **REAL PROPERTY** in the City of El Paso, Texas.
- (d) **HOTEL DON QUIXOTE.** The words "**HOTEL DON QUIXOTE**" mean the Hotel Don Quixote, LTD., a Texas limited partnership. For the purposes of this Agreement, Hotel Don Quixote's address is 109 N. Oregon Street, Suite 1200, El Paso, Texas 79901.
- (e) **REAL PROPERTY.** The words "**REAL PROPERTY**" mean the hotel owned and operated by **HOTEL DON QUIXOTE**, and located at 600 El Paso Street, El Paso, Texas 79901, and as described in **EXHIBIT B**, and further depicted in **EXHIBIT C** of this Agreement.

SECTION 3. PROPERTY SUBJECT TO TAX ABATEMENT.

The real property subject of this Agreement shall be a fee simple interest in certain real property located at 600 N. El Paso Street, El Paso, Texas 79901, and further described in **EXHIBIT B** and as depicted in **EXHIBIT C** attached hereto and incorporated herein by this reference, within the city limits of El Paso, Texas. The property is hereinafter referred to as the **REAL PROPERTY** and is located within El Paso County, which is designated as a distressed county by the Governor's Texas Economic Development Bank. The **REAL PROPERTY** involves the improvement and repair of an approximately 200-room full

service hotel and parking structure located at 600 N. El Paso Street, El Paso, Texas 79901. The **REAL PROPERTY** shall be subject to a tax abatement to the extent the market value thereof, as reflected on the tax rolls of the El Paso Central Appraisal District, in each such year, exceeds the value thereof, as reflected on the tax rolls, in year immediately preceding the commencement of repairs or improvements to the **REAL PROPERTY**.

This Tax Abatement Agreement is conditioned upon **HOTEL DON QUIXOTE** making specific improvements or repairs to the **REAL PROPERTY**. As a condition for this Agreement **HOTEL DON QUIXOTE** agrees to construct a full service hotel with approximately 200 rooms and parking structure. **HOTEL DON QUIXOTE** shall commence construction of repairs or improvements to the **REAL PROPERTY** on or before the expiration of twelve (12) months from the effective date of Agreement. **HOTEL DON QUIXOTE** shall receive a certificate of occupancy and be open for business to the general public within twenty-four (24) months from the commencement of construction and/or improvements to Hotel. Further, **HOTEL DON QUIXOTE** as the owner of the **REAL PROPERTY** agrees to locate on the **REAL PROPERTY** certain business personal property referred to as **PERSONALTY**. Said **PERSONALTY** shall be new business personal property added to the **REAL PROPERTY** which is currently not on the tax rolls of the city.

HOTEL DON QUIXOTE agrees the acquisition, design, construction, restoration, operation repairs and improvements to the **REAL PROPERTY** and the **PERSONALTY** added to and located on the **REAL PROPERTY** shall exceed Seventeen Million Seven Hundred Thousand Dollars (\$17,700,000.00). The base year value of the **REAL PROPERTY**, as reflected by El Paso Central Appraisal District records on January 1, 2006 is Four Hundred and Fifty Thousand Dollars (\$450,000.00).

SECTION 4. TAX ABATEMENT.

Subject to the terms and conditions of this Agreement, and subject to the rights and holders of any outstanding bonds of the **CITY**, a portion of ad valorem real taxes from the repairs or improvements on the **REAL PROPERTY** and **PERSONALTY** added to the **REAL PROPERTY** by **HOTEL DON QUIXOTE** and otherwise owed to the **CITY** shall be abated as follows:

- (a) Term. The tax abatement period for **REAL PROPERTY** and **PERSONALTY** shall be ten (10) years, with the first year of tax abatement being the first tax year that begins after the issuance of the Certificate of Occupancy for **REAL PROPERTY** (i.e., the tax abatement period starts on January 1 of such year). Further, the term of this Agreement shall extend until eighteen (18) months after the expiration date of this Agreement.

- (b) Abatement Amount. The tax abatement rate for each such year during the tax abatement period shall be the following percentage of the portion of the value of **REAL PROPERTY** including **PERSONALTY** added to and located on the **REAL PROPERTY** that is subject to abatement, as set forth in Section 3 and such qualifications as noted elsewhere in this Agreement:

| Year of Tax Abatement Period | Abatement Percentage |
|-------------------------------------|-----------------------------|
| One | 100% |
| Two | 100% |
| Three | 100% |
| Four | 100% |
| Five | 100% |
| Six | 100% |
| Seven | 100% |
| Eight | 100% |
| Nine | 100% |
| Ten | 100% |

Said abatement of the taxes assessed on the **REAL PROPERTY** including **PERSONALTY** added to and located on the **REAL PROPERTY** shall be based upon the increased value of the **REAL PROPERTY** over the value in the year in which this Agreement is executed and in accordance with the terms of this Agreement and all applicable federal, state, and local laws and regulations.

SECTION 5. USE OF PROPERTY.

As consideration for the agreement of **CITY** contained herein, **HOTEL DON QUIXOTE** agrees that it will diligently and faithfully in a good and workmanlike manner pursue the commencement and completion of repairs or improvements on the **REAL PROPERTY** consistent with the requirements set forth herein. **HOTEL DON QUIXOTE** agrees that construction, repairs or improvements to the **REAL PROPERTY** will be in accordance with all applicable federal, state, and local laws and regulations. The **REAL PROPERTY** shall be limited in its use to uses consistent with the development and operation of a hotel consistent with the **CITY'S** development goals which is the encouraging of development or redevelopment of the zone.

SECTION 6. DEFAULT AND RECAPTURE PROVISION.

- (a) Event of Default.

In the event that (A) **HOTEL DON QUIXOTE** fails to: (1) complete construction of the repairs or improvements to **REAL PROPERTY**; (2) create, staff, and maintain

Full-Time Employment positions for the **REAL PROPERTY**; in accordance with this Agreement; or (B) **HOTEL DON QUIXOTE** breaches any of the terms or conditions of this Agreement, then this Agreement shall be in default. In the event that **HOTEL DON QUIXOTE** defaults in its performance of (A) or (B) above, then the **CITY** shall give **HOTEL DON QUIXOTE** written notice of such default and if **HOTEL DON QUIXOTE** has not cured any default within sixty (60) days or if such failure cannot be cured within such sixty (60) day period in the exercise of all due diligence, then if **HOTEL DON QUIXOTE** fails to commence such cure with such sixty (60) day period or fails to continuously thereafter diligently prosecute the cure of such failure of said written notice this Agreement may be terminated by the **CITY**, and the taxes abated by virtue of this Agreement shall be recaptured and paid within sixty (60) days from the date of termination.

(b) Recapture Provisions.

(1) Property Value:

The parties to this Agreement agree that the taxable value of the **REAL PROPERTY and PERSONALTY** after completion of the construction and improvements have a base value of Five Million Dollars (\$5,000,000.00). **HOTEL DON QUIXOTE** covenants and agrees that during the term of this Agreement it shall not challenge or permit anyone else to take actions on its behalf to challenge any assessments by the Central Appraisal District at \$5,000,000.00 or lower. It is the intent of the parties that the assessed value of the **REAL PROPERTY and PERSONALTY** on the tax rolls be a base value of \$5,000,000.00 during the term of this agreement and any affirmative act by **HOTEL DON QUIXOTE** to reduce the assessed value to amount lower than \$5,000,000.00 will be an event of default that will result in termination of this agreement and recapture of taxes that were abated prior to the default.

(2) Jobs Created:

(A) **HOTEL DON QUIXOTE** agrees that it shall create, staff, and maintain seventy-six (76) Full-Time Employment positions for the **REAL PROPERTY**, within thirty-six (36) months from the effective date of this Agreement, and shall maintain seventy-six (76) Full-Time Employment positions for its Hotel through the full term of this Agreement. **HOTEL DON QUIXOTE** shall report to the **CITY**, on a quarterly basis, its employment level, distributed by wage brackets, and any other pertinent information that would affect the ability of the operation of the **REAL PROPERTY**. Such reports shall be prepared on a quarterly basis, and shall be submitted to the **CITY'S** Economic Development Department, no later than thirty (30) days following the end of each calendar quarter.

- (B) In the event that the **REAL PROPERTY** is not completed and does not begin operation with the minimum number of Full-Time Employment positions by January 1st following the completion of construction, no abatement shall be given for that tax year, and the full amount of taxes assessed against the **REAL PROPERTY** shall be due and payable for that tax year. In the event **HOTEL DON QUIXOTE** fails to begin operation with seventy-six (76) Full-Time Employment positions for the **REAL PROPERTY** by the next January 1st, then this Agreement terminates automatically, and all abated taxes during the period of construction shall be recaptured and paid within sixty (60) days from the date of termination.
- (C) In the event repairs and improvement to the **REAL PROPERTY** are completed and **HOTEL DON QUIXOTE** begins operation with the required seventy-six (76) Full-Time Employment positions for the **REAL PROPERTY**, within 36 months from the effective date of this Agreement, but **HOTEL DON QUIXOTE** subsequently discontinues operations and the minimum number of Full-Time Employment positions is not maintained on any January 1st during the term of the Agreement after the completion of construction, repairs, and improvements to the **REAL PROPERTY**, for any reason except on a temporary basis due to fire, explosion, or other casualty or accident or natural disaster, this Agreement may be terminated by the **CITY** and all taxes previously abated pursuant to this Agreement shall be recaptured and paid within sixty (60) days from the date of termination.

- c. Ownership Interest. James F. Scherr agrees that during the term of this Agreement, he or a trust for the benefit of his family created by Mr. Scherr shall continuously maintain majority ownership in the **REAL PROPERTY**. Majority interest shall be defined as at least 51% percent ownership of the entity that holds fee title to the **REAL PROPERTY**. Adequate documentation to verify the majority ownership interest shall be provided to the City as part of the annual certification required pursuant to paragraph 8 of this Agreement. Failure of James F. Scherr or a trust for the benefit of his family created by Mr. Scherr to maintain an majority ownership interest shall constitute an event of default that may, at the option of the City, result in termination of this Agreement without notice of any kind to **HOTEL DON QUIXOTE** or to James F. Scherr and the taxes abated by virtue of this Agreement shall be recaptured and paid within sixty days (60) days from the date of termination. Provided however, the parties agree that the death of Mr. Scherr during the term of the Agreement and the transfer of his ownership interest to his heirs shall not be an event of default.

The signature of James F. Scherr, in his individual capacity, affixed to this Agreement is for the limited purpose of evidencing his knowledge and agreement with this paragraph 6 (c) of this Agreement.

- d) Delinquent Taxes. Should **HOTEL DON QUIXOTE** allow its real or personal property taxes owed the **CITY** to become delinquent and fails to timely and properly follow the legal procedures for protest and/or contest of any such taxes, this Agreement shall terminate and so shall the abatement of the taxes for the tax year of the delinquency. Further, the total taxes assessed without abatement for that tax year shall be paid within sixty (60) days from the date of the termination.
- (e) Notice, Effect of Default. Notice shall be in writing and shall be delivered by personal delivery or certified mail, return receipt requested, or overnight delivery to the addresses below.

Notice to HOTEL DON QUIXOTE:

Ms. Elma Carreto
Hotel Don Quixote, Ltd.
109 N. Oregon Street, Suite 1300
El Paso, Texas 79901

Telephone: (915) 545-2797
Fax: (915) 532-1759

With copy to:

Mr. William Ehrlich
Scherr, Legate & Ehlich, P.L.L.C.
109 N. Oregon, Suite 1200
El Paso, Texas 79901

Notice to CITY:

Ms. Joyce A. Wilson
City Manager
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

SECTION 7. RIGHT OF ACCESS FOR INSPECTION.

HOTEL DON QUIXOTE further agrees that the **CITY**, their agents and employees, shall have reasonable right to access the **REAL PROPERTY** to inspect the repairs or improvements and other items subject to this Agreement in order to ensure that the

construction of the repairs or improvements are in accordance with this Agreement and all applicable federal, state, and local laws and regulations. After completion of the repairs or improvements, the **CITY** shall have the continuing right of inspection to ensure that such are thereafter maintained and operated in accordance with this Agreement. All inspections will be made only after giving at least twenty-four (24) hours prior notice and will only be conducted in such manner as to not unreasonably interfere with the construction and or operation of the **REAL PROPERTY**. All inspections will be made with one (1) or more representatives of **HOTEL DON QUIXOTE**, and in accordance with its safety standards, if any.

SECTION 8. ANNUAL CERTIFICATION.

On or before March 31 of each year, **HOTEL DON QUIXOTE** shall provide to **CITY'S** Economic Development Department written certification that **HOTEL DON QUIXOTE** is in compliance with each applicable term of this Agreement. Such certification shall be in a form reasonably satisfactory to the **CITY**, and shall include, at a minimum, information supporting **HOTEL DON QUIXOTE** conclusions that it met (or expects to meet) each condition and requirement to abatement set forth in this Agreement. Any failure of the **CITY** to request or demand such certification shall not constitute a waiver of such certification or any future certification. Further, it will be the responsibility of **HOTEL DON QUIXOTE** to provide the reports as requested. The **CITY** is not obligated to request the annual certifications, and will not certify **HOTEL DON QUIXOTE** eligibility to receive any tax abatement without the reports. Failure to provide these required reports in a timely manner shall constitute grounds for termination of this Agreement.

SECTION 9. CANCELLATION OR MODIFICATION OF AGREEMENT.

The **CITY** and **HOTEL DON QUIXOTE** agree that the **CITY** may cancel or modify this Agreement if **HOTEL DON QUIXOTE** fails to comply with this Agreement.

SECTION 10. AUTHORIZATION TO SIGN THIS AGREEMENT.

This Agreement was authorized by Resolution of the City Council at a regular scheduled City Council meeting authorizing the City Manager to execute the Agreement on behalf of the **CITY**.

SECTION 11. LIMITED RETURN ON INVESTMENT (ROI).

During the term of this Agreement if **HOTEL DON QUIXOTE** realizes an ROI in excess of 15% per annum, the total package of incentives arising from this Agreement, the Tax Abatement Agreement and the Chapter 380 Economic Development Program Agreement shall be reduced by an amount to result in a yield of only 15% per annum.

SECTION 12. MISCELLANEOUS PROVISIONS.

- (a) 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. It is the intention and agreement of the parties to this Agreement that each such illegal, invalid or unenforceable provision shall be amended by the parties hereto to the extent necessary to make it legal, valid and enforceable while achieving the same objective of such provision, or, if that is not possible, by substituting therefor another provision that is legal, valid and enforceable and achieves the same objectives (or, if such provision cannot be amended or a provision substituted therefore in a manner that is legal, valid and enforceable and achieves the same objectives, then such provision shall be amended or a new provision substituted therefore that achieves as closely as possible the same objectives or economic position as the illegal, invalid or unenforceable provision, irrespective of whether such amendment or substituted provision is materially different than the illegal, invalid or unenforceable provision).
- (b) Notwithstanding any provision in this Agreement to the contrary **HOTEL DON QUIXOTE'S** and **CITY'S** only liability for breaching any provision of this Agreement shall be the remedies expressly set forth in this Agreement.
- (c) The terms and conditions of this Agreement are binding upon the successors and assigns of all parties hereto. Furthermore, this Agreement cannot be assigned by **HOTEL DON QUIXOTE** unless written permission is first granted by the **CITY**. Any attempt to transfer without the prior written consent of the City shall be void and shall constitute an event of default that will result in the termination of this Agreement and recapture of the taxes abated prior to the attempted transfer.
- (d) It is understood and agreed between the parties that the **HOTEL DON QUIXOTE**, in performing its obligations hereunder, is acting independently, and the **CITY** assumes no responsibility or liability in connection therewith to third parties and **HOTEL DON QUIXOTE** agrees to indemnify and hold harmless **CITY** from any and all claims, suits, and causes of actions, including attorneys' fees, of any nature whatsoever arising out of **HOTEL DON QUIXOTE'S** obligations hereunder.
- (e) This Agreement shall be construed under the laws of the State of Texas. Venue for any action arising under state law under this Agreement shall be the State District Court of El Paso County, Texas.
- (f) A certified copy of this Agreement in recordable form shall be recorded in the Deed Records of El Paso County.
- (g) The **CITY** designates this Agreement as a revenue sharing agreement, thereby entitling the **CITY** to request Sales and Use Tax information from the State

Comptroller, pursuant to Section 321.3022 of the Texas Tax Code, as amended.

- (h) No party hereto waives any statutory or common law right to sovereign immunity by virtue of its execution hereof.
- (i) 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.

The Agreement is performable in El Paso County, Texas, to be effective as of the _____ of _____, 2006 (the "EFFECTIVE DATE").

CITY:

CITY OF EL PASO, TEXAS

By: _____

Joyce A. Wilson
City Manager

APPROVED AS TO FORM:

Sylvia Borunda Firth
Assistant City Attorney

STATE OF TEXAS §

§

COUNTY OF EL PASO §

This instrument was acknowledged before me on the ____ day of _____, 2006, by Joyce A. Wilson, City Manager of the City of El Paso, Texas, on behalf of the City of El Paso, Texas.

Notary Public, State of Texas

(SIGNATURES CONTINUE ON FOLLOWING PAGE)

HOTEL DON QUIXOTE:

HOTEL DON QUIXOTE, LTD.,
a Texas limited partnership
San Angel Plaza, LLC, general partner

By: _____
Name: _____
Title: General Partner
Date: _____

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This instrument was acknowledged before me on the ____ day of _____, 2006, by _____, general partner on behalf of ***HOTEL DON QUIXOTE, LTD.***, a limited partnership, organized and existing under the laws of the State of Texas.

Notary Public, State of Texas

James F. Scherr

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This instrument was acknowledged before me on the ____ day of _____, 2006, by James F. Scherr

Notary Public, State of Texas

Exhibit A

[Tax Abatement Guidelines and Criteria]

Exhibit B

[Legal Description]

Exhibit C

[Legal Depiction]

**CITY OF EL PASO
AND
HOTEL DON QUIXOTE, LTD.**

**CHAPTER 380 ECONOMIC DEVELOPMENT
PROGRAM AGREEMENT**

This **CHAPTER 380 ECONOMIC DEVELOPMENT PROGRAM AND AGREEMENT** (this "Agreement") is made and entered into by and between the **CITY OF EL PASO, TEXAS** ("hereinafter referred to as "**CITY**"), a Texas home rule municipal corporation, and **HOTEL DON QUIXOTE, LTD.** (hereinafter "**HOTEL DON QUIXOTE**"), a Texas limited partnership, for the purposes and considerations stated below:

WHEREAS, the **HOTEL DON QUIXOTE** desires to enter into this Agreement pursuant to Chapter 380 of the Texas Local Government Code (hereinafter referred to as "Chapter 380"); and

WHEREAS, the **CITY** desires to provide, pursuant to Chapter 380, an incentive to **HOTEL DON QUIXOTE** to develop the Hotel as defined below; and

WHEREAS, the **CITY** has the authority under Chapter 380 to make loans or grants of public funds for the purposes of promoting local economic development and stimulating business and commercial activity within the City of El Paso; and

WHEREAS, the **CITY** determines that a grant of funds to **HOTEL DON QUIXOTE** will serve the public purpose of promoting local economic development and enhancing business and commercial activity within the **CITY**; and

WHEREAS, the **CITY** and **HOTEL DON QUIXOTE** desire that development of the Hotel, includes construction and/or installation of certain infrastructure improvements, as set forth in this Agreement, and the creation of seventy-six (76) Full-Time Employment positions at the Hotel; and

WHEREAS, the creation of seventy-six (76) Full-Time Employment positions will encourage increased economic development in the **CITY**, provide significant increases in the **CITY'S** sales tax revenues, and improve the **CITY'S** ability to provide for the health, safety and welfare of the citizens of El Paso; and

WHEREAS, the **CITY** has concluded and hereby finds that this Agreement clearly promotes economic development in the City of El Paso and, as such, meets the requisites under Chapter 380 of the Texas Local Government Code and further, is in the best interests of the **CITY** and **HOTEL DON QUIXOTE**.

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

SECTION 1. TERM.

This Agreement shall be effective for ten (10) years from the Effective Date of this Agreement.

SECTION 2. DEFINITIONS.

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

- (a) **Agreement.** The word "Agreement" means this Chapter 380 Economic Development Program and Agreement, together with all exhibits and schedules attached to this Agreement from time to time, if any.
- (b) **CITY.** The word "**CITY**" means the City of El Paso, Texas. For purposes of this Agreement, City's address is City of El Paso, 2 Civic Center Plaza, El Paso, Texas 79901-1196.
- (c) **Development.** The word "Development" means the planned Hotel (also known as Hotel Don Quixote) as described by **Exhibit A** attached to this Agreement.
- (d) **Full-Time Employment.** The words "Full-Time Employment" mean a job requiring a minimum of One Thousand Nine Hundred Twenty (1,920) hours of work averaged over a twelve (12) month period, including allowance for vacation and sick leave, with full company benefits, including company paid health insurance, receiving a sustainable wage in an amount of at least \$8.50 per hour, and employed at the Hotel in the City of El Paso, Texas.
- (e) **Grant.** The word "Grant" means a payment to **HOTEL DON QUIXOTE** under the terms of this Agreement computed with reference to Sales and Use Taxes, and Mixed Beverage Taxes generated by Hotel, and payable from the **CITY'S** general revenue fund.
- (f) **Grant Submittal Package.** The words "Grant Submittal Package" mean the documentation required to be supplied to **CITY** on a quarterly basis as a condition of receipt of any Grant.
- (g) **Hotel.** The word "Hotel" means the hotel, as described by **Exhibit A** owned and operated by **HOTEL DON QUIXOTE**, and generally located at 600 El Paso Street, El Paso, Texas 79901.
- (h) **HOTEL DON QUIXOTE.** The words "**HOTEL DON QUIXOTE**" mean the Hotel Don Quixote, LTD., a Texas limited partnership. For the purposes of this

Agreement, Hotel Don Quixote's address is 109 N. Oregon Street, Suite 1300, El Paso, Texas 79901.

- (i) **Mixed Beverage Tax.** The words "Mixed Beverage Tax" or "Mixed Beverage Taxes" have the same meaning as defined by Section 183.021 of the Texas Tax Code, as amended.
- (j) **Qualified Expenditures.** The words "Qualified Expenditures" means those costs incurred by **HOTEL DON QUIXOTE** in the acquisition, construction, development, furnishing, operation, and or repair of Hotel.
- (k) **Sales and Use Tax.** The words "Sales and Use Tax" or "Sales and Use Taxes" mean the **CITY'S** municipal sales and use tax, at the rate of one percent (1.0%), pursuant to Section 321.103(a) of the Texas Tax Code, as amended.
- (l) **State Comptroller.** The words "State Comptroller" means the Office of the Texas Comptroller of Public Accounts, or any successor agency.

SECTION 3. OBLIGATIONS OF HOTEL DON QUIXOTE.

During the term of this Agreement, **HOTEL DON QUIXOTE** shall comply with the following terms and conditions:

- (a) **HOTEL DON QUIXOTE** agrees to develop, construct, at its sole cost, an approximately 200 room full-service Doubletree Hotel (or hotel brand of equal or higher quality) and a parking structure. A full service hotel means a hotel with an on site restaurant and bar, room service, swimming pool, concierge, banquet/meeting rooms and other amenities common in a convention hotel. **HOTEL DON QUIXOTE** shall commence construction and or repairs to Hotel within twelve (12) months of the effective date of this Agreement. **HOTEL DON QUIXOTE** shall receive a certificate of occupancy, and be open for business to the general public within twenty four (24) months from the commencement of construction and/or improvements to Hotel. The Hotel shall be an approximately two hundred (200) room Hotel. **HOTEL DON QUIXOTE** agrees that it shall make Qualified Expenditures of not less than Seventeen Million Seven Hundred Dollars (\$17,700,000.00) in the Hotel and/or equipment installed in the Hotel. **HOTEL DON QUIXOTE** shall submit receipts to the **CITY** for Qualified Expenditures towards the purchase, operations, construction, design and/or improvement of Hotel, in a minimum amount of Seventeen Million Seven Hundred Dollars (\$17,700,000.00) within thirty-six (36) months of the effective date of this Agreement.
- (b) **HOTEL DON QUIXOTE** agrees that it shall create, staff, and maintain seventy-six (76) Full-Time Employment positions for its Hotel within thirty-six (36) months from the effective date of this Agreement, and shall maintain seventy-six (76) Full-

Time Employment positions for its Hotel through the full term of this Agreement. **HOTEL DON QUIXOTE** shall maintain the full-time jobs for each quarter of each fiscal year with the total per day hours worked averaged over each fiscal quarter.

HOTEL DON QUIXOTE shall provide an annual report by April 30th certifying the status of compliance through the life of the Agreement of new jobs created, new investments and any other relevant information. Documentation for jobs may be in the form of quarterly IRS 941 returns, Texas Workforce Commission Employer Quarterly Reports, or employee rosters that show the hours worked and the positions filled, and such other reports as may reasonably be required.

HOTEL DON QUIXOTE, during normal business hours, at its principal place of business, shall allow **CITY** reasonable access to its employment records and books, and other books and records that are related to the other described economic development consideration and incentives, to verify employment records and any other records related to other economic development consideration and incentives, but the confidentiality of such records will be maintained.

- (c) On or before the 28th day of the first calendar month after the month in which **HOTEL DON QUIXOTE** makes its final payment of Sales and Use Tax and Mixed Beverage Tax to State Comptroller for its first full or partial calendar quarter of sales at the Hotel and continuing on or before the 28th day of the second calendar month after each successive calendar quarter thereafter, **HOTEL DON QUIXOTE** agrees to submit to the **CITY** a Grant Submittal Package containing the following:
- (1) **HOTEL DON QUIXOTE** grant request letter (or fax) stating the gross amount of the **CITY'S** one percent (1%) Sales and Use Tax paid by **HOTEL DON QUIXOTE** for the Hotel for the applicable quarter, and the amount due **HOTEL DON QUIXOTE** by the **CITY** for such quarter;
 - (2) **HOTEL DON QUIXOTE** grant request letter (or fax) stating the gross amount of the Mixed Beverage Taxes paid by **HOTEL DON QUIXOTE** (equals fourteen percent (14.0%) of the mixed beverage receipts) for the Hotel for the applicable quarter, and the amount due **HOTEL DON QUIXOTE** (presently equals 10.7143 percent of the mixed beverage receipts) by the **CITY** for such quarter;
 - (3) **HOTEL DON QUIXOTE'S** certification of the documentation required by Section 3(c)(4) of this Agreement, evidencing the amount of Sales and Use Taxes and Mixed Beverage Taxes paid by Hotel to the State Comptroller for the applicable quarter; and

- (4) **HOTEL DON QUIXOTE'S** documentation identifying the taxable "sales and use tax-eligible" sales and Mixed Beverage Taxes from the Hotel for the preceding quarter.

Unless otherwise agreed by the **CITY** and **HOTEL DON QUIXOTE**, each Grant Submittal Package shall be in the form attached hereto as **Exhibit B**. If **HOTEL DON QUIXOTE** shall fail to timely submit a Grant Submittal Package for a particular quarter, then the **CITY** may give **HOTEL DON QUIXOTE** written notice of **HOTEL DON QUIXOTE'S** failure to timely submit such Grant Submittal Package, and **HOTEL DON QUIXOTE** shall have thirty (30) calendar days calculated from the date on which such written notice is given in which to submit such Grant Submittal Package. The **CITY'S** determination of the amount of the Grant payment due to **HOTEL DON QUIXOTE** is final; provided, however **HOTEL DON QUIXOTE** may appeal to the City Council within thirty (30) days of payment, the City Council shall hear the appeal within thirty (30) days and the City Council's determination of the amount of the Grant payment shall be final; provided, however, nothing herein shall limit (or be construed to limit) **HOTEL DON QUIXOTE'S** rights and remedies as described in Section 5 of this Agreement.

- (d) **HOTEL DON QUIXOTE** shall pay by January 31 of each year all of the real and business personal ad valorem taxes due for the previous tax year on the Hotel referenced in **Exhibit A**. **HOTEL DON QUIXOTE** shall have the right to contest the appraised value of the Hotel as provided by law, but in no event shall **HOTEL DON QUIXOTE** contest the value of the Hotel on the tax rolls of the El Paso Central Appraisal District during the term of this Agreement at an amount of Five Million Dollars (\$5,000,000.00) or less.

- (e) Property Value:

The parties to this Agreement agree that the taxable value of the **REAL PROPERTY AND PERSONALTY** after completion of the construction and improvements will have a base value of Five Million Dollars (\$5,000,000.00). **HOTEL DON QUIXOTE** covenants and agrees that during the term of this Agreement it shall not challenge or permit anyone else to take actions on its behalf to challenge any assessments by the Central Appraisal District at \$5,000,000.00 or lower. It is the intent of the parties that the assessed value of the **REAL PROPERTY AND PERSONALTY** on the tax rolls have a base value of \$5,000,000.00 during the term of this agreement and any affirmative act by **HOTEL DON QUIXOTE** to reduce the assessed value to amount lower than \$5,000,000.00 will be an event of default that will result in termination of this agreement.

SECTION 4. OBLIGATIONS OF CITY.

During the term of this Agreement and so long as an event of default has not occurred and is continuing as set forth in Section 6 of this Agreement (provided, however, an event of default hereunder shall not be deemed to have occurred until after the expiration of the applicable notice and cure period), **CITY** shall comply with the following terms and conditions:

- (a) For each calendar quarter during the term of this Agreement and beginning in the second full or partial calendar quarter after the date **HOTEL DON QUIXOTE** first opens to business to the general public at the Hotel, an amount equaled to the **CITY'S** one percent (1%) Sales and Use Tax revenue, and Mixed Beverage Taxes, generated by and attributed solely to Hotel's sales in the immediately prior calendar quarter and remitted from the State Comptroller to **CITY**, shall be tendered from the **CITY'S** general fund as a Grant by the **CITY** to **HOTEL DON QUIXOTE** on a quarterly basis upon **HOTEL DON QUIXOTE'S** satisfaction of the requirements of Section 3(c) of this Agreement.
- (b) The **CITY** agrees to process any Grant payments to **HOTEL DON QUIXOTE** within thirty (30) days after receipt of the later of:
 - (1) Sales and Use Tax funds from the State Comptroller's office;
 - (2) Mixed Beverage Tax funds from the State Comptroller's office; and
 - (3) **HOTEL DON QUIXOTE'S** Grant Submittal Package.

SECTION 5. EVENTS OF DEFAULT.

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

- (a) **Failure to Maintain Development.** Failure to operate a Hotel on the Property for the term of this Agreement, and **HOTEL DON QUIXOTE** fails to cure such failure within sixty (60) days after written notice from the **CITY** describing such failure, or if such failure cannot be cured within such sixty (60) day period in the exercise of all due diligence, then if **HOTEL DON QUIXOTE** fails to commence such cure within such sixty (60) day period or fails to continuously thereafter diligently prosecute the cure of such failure.
- (b) **False Statements.** Any written warranty, representation or statement made or furnished to the **CITY** by **HOTEL DON QUIXOTE** under this Agreement or any document(s) related hereto furnished to the **CITY** by **HOTEL DON QUIXOTE** is/are false or misleading in any material respect, either now or at the time made or furnished, and **HOTEL DON QUIXOTE** fails to cure same within sixty (60) days after written notice from the **CITY** describing the violation, or if such violation cannot

be cured within such sixty (60) day period in the exercise of all due diligence, then if **HOTEL DON QUIXOTE** fails to commence such cure within such sixty (60)day period or fails to continuously thereafter diligently prosecute the cure of such violation, or if **HOTEL DON QUIXOTE** obtains actual knowledge that any such warranty, representation or statement has become false or misleading after the time that it was made, and **HOTEL DON QUIXOTE** fails to provide written notice to the **CITY** of the false or misleading nature of such warranty, representation or statement within ten (10) days after **HOTEL DON QUIXOTE** learns of its false or misleading nature.

- (c) **Insolvency.** The dissolution or termination of **HOTEL DON QUIXOTE'S** existence as a going business or concern, **HOTEL DON QUIXOTE'S** insolvency, appointment of receiver for any part of **HOTEL DON QUIXOTE'S** portion of the Property, any assignment of all or substantially all of the assets of **HOTEL DON QUIXOTE** for the benefit of creditors of **HOTEL DON QUIXOTE**, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against **HOTEL DON QUIXOTE** unless, in the case of involuntary proceedings, such proceedings are discharged within sixty (60) days after filing.
- (d) **Construction of Hotel.** **HOTEL DON QUIXOTE'S** failure to comply with its construction obligations set forth in this Agreement and **HOTEL DON QUIXOTE** fails to cure same within sixty (60) days after written notice from the **CITY** unless such failure cannot be cured within such sixty (60)day period in the exercise of all due diligence, then if **HOTEL DON QUIXOTE** fails to commence such cure within such sixty (60) day period or fails to continuously thereafter diligently prosecute the cure of such failure, except to the extent such failure is caused by any act or failure to act on the part of the **CITY**.
- (e) **Property Taxes.** **HOTEL DON QUIXOTE** allows its property 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 or post a satisfactory bond within thirty (30) days after written notice thereof from the **CITY** and/or El Paso Central Appraisal District. **HOTEL DON QUIXOTE** shall have the right to contest the appraised value of the Hotel, but in no event shall **HOTEL DON QUIXOTE** contest the value of the Hotel on the tax rolls of the El Paso Central Appraisal District during the term of this Agreement at an amount \$5,000,000.00 or less.
- (f) **Other Defaults.** Failure of **HOTEL DON QUIXOTE** or **CITY** to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any related documents, or failure of **HOTEL DON QUIXOTE** or **CITY** to comply with or to perform any other term, obligation, covenant or condition contained in any other agreement between the **CITY** and **HOTEL DON QUIXOTE**, and **HOTEL DON QUIXOTE** or **CITY** fails to cure such failure within sixty (60) days after written notice from the **CITY** or **HOTEL DON QUIXOTE**, as the case may be, describing such failure, or if such failure cannot be cured within such 30-day period

in the exercise of all due diligence, then if **HOTEL DON QUIXOTE** or **CITY** fails to commence such cure within such sixty (60) day period or fails to continuously thereafter diligently prosecute the cure of such failure.

- (g) **Failure to Cure.** If any Event of Default by **HOTEL DON QUIXOTE** shall occur, and after **HOTEL DON QUIXOTE** fails to cure same in accordance herewith, then this Agreement is terminated and the **CITY'S** obligations end at that time. If a default has not been cured within the time frame stated herein, the non-defaulting party shall have all rights and remedies under the law or in equity.

SECTION 6. TERMINATION OF AGREEMENT BY CITY WITHOUT DEFAULT.

CITY may terminate this Agreement without an event of default by **HOTEL DON QUIXOTE** and effective immediately if (i) any state or federal statute, regulation, case law, or other law renders this Agreement ineffectual, impractical or illegal, including case law holding that a Chapter 380 Economic Development Agreement rebating Sales and Use Taxes such as this Agreement is an unconstitutional debt; or (ii) the federal government implements the Streamlined Sales and Use Tax or similar legislation in such a manner as to change the consummation of a sales and use tax event to a tax situs outside of the **CITY** thereby eliminating the **CITY'S** rights in the sales tax proceeds paid by **HOTEL DON QUIXOTE** for the Hotel.

SECTION 7. LIMITED RETURN ON INVESTMENT (ROI).

During the term of this Agreement if **HOTEL DON QUIXOTE** realizes an ROI in excess of 15% per annum, the total package of incentives arising from this Agreement, the Tax Abatement Agreement and the Chapter 380 Economic Development Program Agreement shall be reduced by an amount to result in a yield of only 15% per annum.

SECTION 8. 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 El Paso County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of El Paso County, Texas.

- (c) **Assignment.** *HOTEL DON QUIXOTE* understands and agrees that the *CITY* expressly prohibits *HOTEL DON QUIXOTE* from selling, transferring, assigning or conveying in any way any rights to receive the Grant proceeds without the *CITY'S* *prior written* consent. James F. Scherr agrees that during the term of this Agreement, he or a trust created by James F. Scherr for the benefit of his family shall continuously maintain majority ownership in the Hotel. Majority interest shall be defined as at least 51% percent ownership of the entity that holds fee title to the Hotel. Adequate documentation to verify the majority ownership interest shall be provided to the City as part of the annual certification required pursuant to paragraph 8 of the Tax Abatement Agreement signed between the parties on the same date as this Agreement. Failure of James F. Scherr or a trust created by Jim Scherr for the benefit of his family to maintain an majority ownership interest shall constitute an event of default that may, at the option of the City, result in immediate termination of this Agreement without notice of any kind to *HOTEL DON QUIXOTE* or to James F. Scherr. Provided however, the parties agree that the death of Mr. James F. Scherr during the term of the Agreement and the transfer of his ownership interest to his heirs shall not be an event of default.

The signature of James F. Scherr, in his individual capacity, affixed to this Agreement is for the limited purpose of evidencing his knowledge and agreement with this paragraph 6 c of this Agreement.

- (d) **Binding Obligation.** This Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. *CITY* warrants and represents that the individual executing this Agreement on behalf of *CITY* has full authority to execute this Agreement and bind *CITY* to the same. *HOTEL DON QUIXOTE* 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) **Completion of Hotel.** As consideration for the agreements of the *CITY* as contained herein, *HOTEL DON QUIXOTE* agrees that it will diligently and faithfully in a good and workmanlike manner pursue the completion of the Hotel and that the construction of same will be in accordance with all applicable federal, state and local laws and regulations.
- (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) **Effective Date.** The effective date (the "Effective Date") of this Agreement shall be the date of the later to execute this Agreement by *HOTEL DON QUIXOTE* and *CITY*.
- (h) **Execution of Agreement.** City Council shall authorize the Mayor to execute this Agreement on behalf of *CITY*.

- (i) **Filing.** This Agreement shall be filed in the deed records of El Paso County, Texas. The provisions of this Agreement shall be deemed to run with the land and shall be binding on heirs, successors and assigns of **HOTEL DON QUIXOTE**. Upon any sale or other transfer of ownership rights in the Property, **HOTEL DON QUIXOTE** shall notify the **CITY** in writing of such sale or transfer within thirty (30) business days of such sale or transfer. Such provision is a material term of this Agreement and the failure to notify the **CITY** of such sale or transfer within the applicable period shall constitute a default.
- (j) **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.
- (k) **Notices.** All notices required to be given under this Agreement shall be given in writing and shall be effective when actually delivered or when deposited in the United States mail, first class, postage prepaid, addressed to the party to whom the notice is to be given at the addresses shown above. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, each party agrees to keep the other informed at all times of its current address.
- (l) **Ordinance Applicability.** The signatories hereto shall be subject to all ordinances of the **CITY**, whether now existing or in the future arising; provided however no ordinance shall reduce or diminish the contractual obligations contained herein. This Agreement shall confer no vested rights on the Hotel unless specifically enumerated herein.
- (m) **Revenue Sharing Agreement.** The **CITY** designates this Agreement as a revenue sharing agreement, thereby entitling the **CITY** to request Sales and Use Tax information from the State Comptroller, pursuant to section 321.3022 of the Texas Tax Code, as amended.
- (n) **Severability.** In the event any provision of this Agreement shall be determined by any court of competent jurisdiction to be invalid or unenforceable, the Agreement shall, to the extent reasonably possible, remain in force as to the balance of its provisions as if such invalid provision were not a part hereof.
- (o) **Sovereign Immunity.** No party hereto waives any statutory or common law right to sovereign immunity by virtue of its execution hereof.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year first above written.

HOTEL DON QUIXOTE:

HOTEL DON QUIXOTE, LTD.,
a Texas limited partnership
San Angel Plaza, LLC, general partner

By: _____
Name: _____
Title: General Partner
Date: _____

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This instrument was acknowledged before me on the ____ day of _____, 2006, by _____, general partner on behalf of ***HOTEL DON QUIXOTE, LTD.***, a limited partnership, organized and existing under the laws of the State of Texas.

Notary Public, State of Texas

James F. Scherr
Date: _____

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This instrument was acknowledged before me on the ____ day of _____, 2006, by James F. Scherr. _____

Notary Public, State of Texas

(SIGNATURES CONTINUE ON FOLLOWING PAGE)

CITY:

CITY OF EL PASO, TEXAS

By: _____

Joyce A. Wilson
City Manager

APPROVED AS TO FORM:

Sylvia Borunda Firth
Assistant City Attorney

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This instrument was acknowledged before me on the ____ day of _____, 2006, by Joyce A. Wilson, City Manager of the City of El Paso, Texas, on behalf of the City of El Paso, Texas.

Notary Public, State of Texas

EXHIBIT A
[Legal Description]

EXHIBIT B
[Legal Depiction]

EXHIBIT C

[Grant Submittal Package Form]

**CITY OF EL PASO
AND
HOTEL DON QUIXOTE, LTD.**

**HOTEL AND CONVENTION SERVICES
AGREEMENT**

This **HOTEL AND CONVENTION SERVICES AGREEMENT** (this "Agreement") is made and entered into by and between the **CITY OF EL PASO, TEXAS** ("hereinafter referred to as "**CITY**"), a Texas home rule municipal corporation, **HOTEL DON QUIXOTE, LTD.** (hereinafter "**HOTEL DON QUIXOTE**"), a Texas limited partnership, for the purposes and considerations stated below:

WHEREAS, Chapter 351 of the Texas Tax Code addresses expenditures of the municipal hotel occupancy tax revenue; and

WHEREAS, Section 351.101(a) of the Texas Tax Code provides in pertinent part that revenue from "the municipal hotel occupancy tax may be used only to promote tourism and the convention and hotel industry, and that use is limited to the following: (1) the acquisition of sites for and the construction, improvement, enlarging, equipping, repairing, operation, and maintenance of convention center facilities or visitor information centers, or both; (2) the furnishing of facilities, personnel, and materials for the registration of convention delegates or registrants; [and] (3) advertising and conducting solicitations and promotional programs to attract tourists and convention delegates or registrants to the municipality or its vicinity"; and

WHEREAS, **HOTEL DON QUIXOTE** agrees to provide the use of Hotel facilities, personnel, and materials; further **HOTEL DON QUIXOTE** will conduct advertising and conducting solicitations and other promotional programs in an effort to attract tourists and convention delegates or registrants to the City of El Paso; and

WHEREAS, **HOTEL DON QUIXOTE** agrees to provide for **CITY'S** use during the day, and allow visitors of the **CITY'S** Library, Convention Center, Art Museum, History Museum, Plaza Theatre, and Insights Museum the use of parking facilities in the **HOTEL DON QUIXOTE'S** parking lot; and

WHEREAS, the **CITY** has concluded and hereby finds that this Agreement clearly promotes tourism and the convention and hotel industry within the City of El Paso and, further meets the requirements contained in Chapter 351 of the Texas Tax Code, as amended.

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

SECTION 1. TERM.

This Agreement shall be effective for ten (10) years from the Effective Date (as such term is defined in Section 6(f) of this Agreement).

SECTION 2. DEFINITIONS.

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

- (a) **Agreement.** The word “Agreement” means this Hotel and Convention Services Agreement, together with all exhibits and schedules attached to this Agreement from time to time, if any.
- (b) **CITY.** The word “**CITY**” means the City of El Paso, Texas. For purposes of this Agreement, City’s address is City of El Paso, 2 Civic Center Plaza, El Paso, Texas 79901-1196.
- (c) **Convention and Tourist Facilities.** The words “Convention and Tourist Facilities” mean and include the following: El Paso Convention Center, located at 1 Civic Center Plaza, El Paso, Texas, 79901; El Paso Museum of Art, located at 1 Arts Festival Plaza, El Paso, Texas, 79901; El Paso Museum of History, located at 12901 Gateway West, El Paso, Texas, 79928; Plaza Theatre Performing Arts Center, located at 125 Pioneer Plaza, El Paso, Texas 79901; and Insights El Paso Science Museum, located at 505 N Santa Fe Street, El Paso, Texas, 79901.
- (d) **Event Room Block.** The words “Event Room Block” mean ninety-six (96) Hotel guest rooms reserved and made available, at the Event Block Rate, for tourists and guests attending said event.
- (e) **Event Block Rate.** The words “Event Block Rate” mean the lowest rate the **CITY** may require **HOTEL DON QUIXOTE** to quote or charge visitors of Convention and Tourist Facilities for a guest room at Hotel during said event. The Event Block Rate shall be the charge assessed by **HOTEL DON QUIXOTE** for guest rooms at the regular standard room rate less ten percent (10%).
- (f) **Hotel.** The word “Hotel” means the hotel, as described by **Exhibit A** and as depicted in **Exhibit B**, owned and operated by **HOTEL DON QUIXOTE**, and generally located at 600 El Paso Street, El Paso, Texas 79901.
- (g) **HOTEL DON QUIXOTE.** The words “**HOTEL DON QUIXOTE**” mean the Hotel Don Quixote, LTD., a Texas limited partnership. For the purposes of this Agreement, Hotel Don Quixote’s address is 109 N. Oregon Street, Suite 1300, El Paso, Texas 79901.

- (h) **Hotel Parking Lot Facilities.** The words “Hotel Parking Lot Facilities” mean Hotel parking spaces reserved and dedicated for use by **CITY** or visitor and guests of Convention and Tourist Facilities, as depicted in **Exhibit C** of this Agreement.
- (i) **Local Hotel Occupancy Tax Revenue.** The words “Local Hotel Occupancy Tax Revenue” mean the municipal hotel occupancy tax levied by the **CITY** pursuant to chapter 351 of the Texas Tax Code, as amended, at the rate of seven percent (7%), as of the effective date of this Agreement, which is attributable to guest staying at the Hotel, and is remitted by **HOTEL DON QUIXOTE** to **CITY**.
- (j) **Operator and Hotel Franchise.** The words “Operator and Hotel Franchise” mean an experienced hotel operator and a franchise for a Doubletree or other hotel of equivalent or better quality.
- (k) **Qualified Expenditures.** The words “Qualified Expenditures” means those costs incurred by **HOTEL DON QUIXOTE** in the acquisition, construction, development, furnishing, operation, and or repair of Hotel.

SECTION 3. OBLIGATIONS OF HOTEL DON QUIXOTE.

During the term of this Agreement, **HOTEL DON QUIXOTE** shall comply with the following terms and conditions:

(a) **Construction of Hotel.**

- (1) **HOTEL DON QUIXOTE** agrees to develop, construct, at its sole cost, a full-service Doubletree Hotel (or hotel brand of higher quality, if approved by **CITY**) and a parking structure. **HOTEL DON QUIXOTE** shall commence construction and or improvement to Hotel within twelve (12) months of the effective date of this Agreement. **HOTEL DON QUIXOTE** shall receive a certificate of occupancy, and be open for business to the general public within twenty-four (24) months from the commencement of construction and/or improvements to Hotel. The Hotel shall be at a minimum an approximately two hundred (200) room full service Doubletree (or equivalent quality) hotel. **HOTEL DON QUIXOTE** agrees that it shall make Qualified Expenditures of not less than Seventeen Million Seven Hundred Dollars (\$17,700,000.00) in the Hotel and/or equipment installed in the Hotel, which investment shall be made and the equipment installed no later than thirty-six (36) months following the effective date of this Agreement. **HOTEL DON QUIXOTE** shall submit receipts to the **CITY** for Qualified Expenditures towards the construction and/or improvement of Hotel, in a minimum amount of Seventeen Million Seven Hundred Dollars (\$17,700,000.00) within twenty-four (24) months of the effective date of this Agreement. At a minimum, the Hotel shall contain the following features:

- (A) approximately two hundred (200) guestrooms furnished and maintained to the standard of a Doubletree hotel or its equivalent;
 - (B) at least seventeen (10) stories of guestrooms;
 - (C) full service restaurant and bar;
 - (D) standard room service;
 - (E) concierge services;
 - (F) banquet/meeting rooms
 - (G) swimming pool;
 - (H) in room internet access; and
 - (I) amenities common in a full service convention hotel.
- (2) **HOTEL DON QUIXOTE** agrees that it shall create, staff, and maintain seventy-six (76) Full-Time Employment positions for its Hotel within thirty-six (36) months from the effective date of this Agreement, and shall maintain seventy-six (76) Full-Time Employment positions for its Hotel through the full term of this Agreement. **HOTEL DON QUIXOTE** shall maintain the full-time jobs for each quarter of each fiscal year with the total per day hours worked averaged over each fiscal quarter.
- (3) **HOTEL DON QUIXOTE** shall provide an annual report by April 30th certifying the status of compliance through the life of the Agreement of new jobs created, new investments and any other relevant information. Documentation for jobs may be in the form of quarterly IRS 941 returns, Texas Workforce Commission Employer Quarterly Reports, or employee rosters that show the hours worked and the positions filled, and such other reports as may reasonably be required.
- (4) **HOTEL DON QUIXOTE**, during normal business hours, at its principal place of business, shall allow **CITY** reasonable access to its employment records and books, and other books and records that are related to the other described economic development consideration and incentives, to verify employment records and any other records related to other economic development consideration and incentives, but the confidentiality of such records will be maintained.
- (5) **HOTEL DON QUIXOTE** agrees to provide **CITY** a copy of the following:

- (A) Closing Statement and any debt instruments for the purchase of the land and improvements thereon.
- (B) Copy of a development budget providing complete picture of construction expenditures, soft costs and all other typical development costs, including contingencies.
- (C) Copy of financial pro-forma to include a detailed revenue and expense statement, including reserves for replacement, from pre-opening to stabilization.
- (D) Proof of equity of \$3,400,000 (including approved credits) with at least \$2,000,000.00 cash to be held in escrow in a local financial institution.
- (E) Copy of the construction bid and copy of the final construction contract with terms and conditions in accordance with the approved budget. Any construction costs over and above the approved budget shall be the sole responsibility of **HOTEL DON QUIXOTE**.
- (F) Signed copies the proposed hotel operator/management and franchise agreements with a Doubletree hotel or equivalent containing all the terms and conditions regarding their operation of the hotel including all fees, required annual capital expenditure requirements, etc.
- (G) Copy of the interim construction loan commitment along with all terms and conditions including the reserve requirements.
- (H) Copy of the proposed permanent loan commitment along with all terms and conditions including reserve requirements.
- (I) Copy of the Phase I and Phase II environmental study issued to **HOTEL DON QUIXOTE** and the City of El Paso (and banking institutions as required). All remediation costs will be the full responsibility of HDQ and any costs above the approved budget will be the full responsibility of HDQ

(b) **Tourist Facilities Services and Promotional Programs.**

- (1) **HOTEL DON QUIXOTE** hereby agrees to conduct the following activities which promotes tourism, and the convention and hotel industry, and is consistent with the Chapter 351 of the Texas Tax Code, as amended: to provide Hotel facilities, personnel, and materials for the registration of convention delegates or registrants; to conduct advertising, solicitations

and promotional programs to attract tourists and convention delegates or registrants to the City of El Paso or its vicinity; and to conduct solicitations and promotional programs to encourage tourists and convention delegates to visit historic sites and museums located within the City of El Paso, including Convention and Tourist Facilities, which are in the immediate vicinity of the El Paso Convention Center, and are frequented by tourists and convention delegates. **HOTEL DON QUIXOTE** agrees to the following:

- (A) **HOTEL DON QUIXOTE**, through its Operator and Hotel Franchise, hereby agrees to make Hotel staff available periodically to assist El Paso Convention and Visitors Bureau staff with voluntary convention registration processes and activities.
 - (B) **HOTEL DON QUIXOTE** through its Operator and Hotel Franchise, hereby agrees to periodically assist the **CITY** and El Paso Convention and Visitors Bureau with its convention marketing efforts by providing mutually acceptable facilities for event planner site visits and familiarization trips.
 - (C) **HOTEL DON QUIXOTE** through its Operator and Hotel Franchise, hereby agrees to cooperate with the **CITY** and or El Paso Convention and Visitors Bureau by placing approved logos and slogans on Hotel advertising material targeting the meetings and tourism markets as directed by the **CITY** and or El Paso Convention and Visitors Bureau.
- (2) **HOTEL DON QUIXOTE** shall be entitled to reimbursement for activities and programs conducted pursuant to this Section of the Agreement, and chapter 351 of the Texas Tax Code, as amended. To obtain reimbursement, **HOTEL DON QUIXOTE** shall submit to **CITY**, not more frequently than quarterly, a written draw request submitted by **HOTEL DON QUIXOTE** accompanied by an activity report, schedule of work, activities, and programs performed. **CITY** shall fund the requested amount of each reimbursement request within thirty (30) days after its receipt of the specified submittals with respect thereto. **CITY** shall not be obligated to fund any reimbursement which is not submitted in accordance with this section. **CITY'S** reimbursements under this Agreement shall equal but not exceed fifty percent (50%) of the Local Hotel Occupancy Tax Revenue collected by **HOTEL DON QUIXOTE** and remitted to **CITY** during the term of this Agreement.

(c) **Hotel Parking Lot Facilities.**

HOTEL DON QUIXOTE hereby agrees to keep the parking facility open to the public and provide parking at the Hotel for **CITY** and Convention and Tourist Facilities' use during the day, from 8:00 a.m. to 5:00 p.m. The parking will be provided free of charge to patrons that provide a validated ticket issued by one of the Convention and Tourist Facilities. However, notwithstanding anything herein the contrary, parking for the Hotel and its operation shall have priority. Other than the recorded easement agreement that was in place when **HOTEL DON QUIXOTE** acquired title to the property, **HOTEL DON QUIXOTE** agrees that the Hotel shall be prohibited from any other parking contracts unless the agreement is approved by the City in writing. The Hotel Parking Lot Facilities to be made available for use under the terms of this Agreement is those Hotel parking spaces as specified in **Exhibit C** of this Agreement.

(d) **Group Sales.**

HOTEL DON QUIXOTE hereby agrees to provide Event Room Block at the Event Block Rate for visitors of Convention and Tourist Facilities during the term of this Agreement. **HOTEL DON QUIXOTE** hereby agrees to provide the Event Block Rate to the **CITY** at a minimum fourteen (14) days per month for the term of this Agreement. **HOTEL DON QUIXOTE** will provide an Event Room Block to visitors of Convention and Tourist Facilities with six (6) months advance notice of the event or convention and receipt of negotiated deposit and room rental contract.

(e) **Records.**

HOTEL DON QUIXOTE hereby agrees to provide and maintain a records acceptable to the **CITY** specifying each scheduled activity, program, or event that: (i) is directly funded or reimbursed by the Local Hotel Occupancy Tax Revenue; and (ii) is directly enhancing and promoting tourism and the convention and hotel industry.

(f) **Reports to the CITY and State Comptroller's Office.**

Pursuant to Chapter 156 of the Texas Tax Code, **HOTEL DON QUIXOTE** hereby agrees to timely remit to the State Comptroller, the state hotel occupancy tax collected, at the state rate of six percent (6%) for each reporting period. Further, **HOTEL DON QUIXOTE** hereby agrees to provide the **CITY** a copy of the report filed with the State Comptroller's office. A copy of the report shall be provided to the **CITY** within thirty (30) days of reporting to the State Comptroller's office. The report shall include the following:

- (1) the total amount of the payments made for rooms at the Hotel during the preceding reporting period;

- (2) the amount of the state hotel occupancy tax collected by **HOTEL DON QUIXOTE** during the preceding reporting period;
- (3) the amount of Local Hotel Occupancy Tax Revenue collected by **HOTEL DON QUIXOTE** during the preceding reporting period; and
- (4) other information that the State Comptroller requires to be in the report.

(g) **Environmental Studies.**

HOTEL DON QUIXOTE shall perform and provide the **CITY** with a copy of a Phase I and Phase II environmental study issued to **HOTEL DON QUIXOTE** and the **CITY** (and banking institutions, as required). An environmental indemnity from **HOTEL DON QUIXOTE** to the **CITY** will be required. All remediation costs will be the full responsibility of **HOTEL DON QUIXOTE** and any costs for remediation not included in the approved budget will be the full responsibility of **HOTEL DON QUIXOTE**.

CITY has determined that the hotel project to be undertaken by **HOTEL DON QUIXOTE** pursuant to this agreement is eligible for funding from the account balance in the TIF No. 1 account and has agreed to reimburse **HOTEL DON QUIXOTE** up to the amount of \$900,000.00 for the costs incurred by **HOTEL DON QUIXOTE** to conduct asbestos abatement and environmental cleanup at the site. **HOTEL DON QUIXOTE** shall be eligible to receive reimbursement upon presentation of:

- (1) Signed documentation from the project architect to evidence the fact the construction of the hotel and parking garage is at least 80% complete;
- (2) Certification that the asbestos has been abated or contained and properly disposed of and that other environmental cleanup has taken place;
- (3) Receipts to show the amounts expended by **HOTEL DON QUIXOTE** to abate the asbestos and perform related work to dispose of same and perform other environmental clean-up. Only fully documented expenditures will be reimbursed; and
- (4) Signed environmental indemnification in favor of the **CITY** in the form and substance approved by the City Attorney.

(h) **Ad Valorem Taxes.**

HOTEL DON QUIXOTE shall pay by January 31 of each year all of the real and business personal ad valorem taxes due for the previous tax year on the Hotel,

as described by **Exhibit A** and as depicted in **Exhibit B** of this Agreement. **HOTEL DON QUIXOTE** shall have the right to contest the appraised value of the Hotel as provided by law, but in no event shall **HOTEL DON QUIXOTE** contest a valuation of Five Million Dollars (\$5,000,000.00) or lower. The parties to this Agreement agree that the taxable value of the hotel and garage after completion of the construction and improvements will have a base value of Five Million Dollars (\$5,000,000.00). **HOTEL DON QUIXOTE** covenants and agrees that during the term of this Agreement it shall not challenge or permit anyone else to take actions on its behalf to challenge any assessments by the Central Appraisal District at \$5,000,000.00 or lower. It is the intent of the parties that the assessed value of the **REAL PROPERTY and PERSONALTY** on the tax rolls be a base value of \$5,000,000.00 during the term of this agreement and any affirmative act by **HOTEL DON QUIXOTE** to reduce the assessed value to amount lower than \$5,000,000.00 will be an event of default that will result in termination of this agreement.

(i) **Profit Sharing.**

As additional consideration for the incentive package, **HOTEL DON QUIXOTE** has agreed that if the Hotel is sold to a third party during the term of this Agreement, and **HOTEL DON QUIXOTE** realizes a profit from the sale of the Hotel, the **CITY** shall be entitled to share in the Net Profit. The Net Profit shall be the amount remaining after deducting customary seller's closing costs such as inspection, survey, title insurance, and commission and legal fees (as verified by a Seller's Closing Statement) and the amount necessary to pay all indebtedness secured by the Hotel and the total amount of equity contributed by **HOTEL DON QUIXOTE**. Within six (6) months after the completion of construction and the commencement of operations of the hotel, **HOTEL DON QUIXOTE** shall submit a written document detailing the equity investment by **HOTEL DON QUIXOTE** including the acquisition costs, design and construction expenses, franchise fees, etc. The City Manager shall review and approve the expenses and the **HOTEL DON QUIXOTE's** equity will be agreed to by the parties, for purposes of this section of the Agreement only. In the event **HOTEL DON QUIXOTE** fails to submit a proposed equity figure within the time period specified herein, **HOTEL DON QUIXOTE's** equity shall be deemed to be \$4,000,000.00 for purposes of this section in the event a third party offer to buy the hotel is received during the term of this Agreement.

The **CITY'S** share of the profits shall be 22.5% of the Net Profit if there is no adjustment to the actual equity contributed by **HOTEL DON QUIXOTE** as specified above. This is a negotiated figure calculated using a ratio of the proposed \$900,000.00 case reimbursement paid by the **CITY** for asbestos abatement and the \$4,000,000.00 equity contributed by **HOTEL DON QUIXOTE** at the inception of the project. This number may be adjusted based upon the actual equity contributed by **HOTEL DON QUIXOTE** and documented within the time period specified above. The parties have agreed that the 15% cap on the **HOTEL DON QUIXOTE'S** return on investment will not apply to in the event of a sale to a third party.

Once the sale is consummated and the division of profits has been made, both parties are released from any and all obligations arising from this Agreement, the Tax Abatement Agreement and the 380 Economic Development Agreement. Provided, however, the City at its sole and absolute discretion may agree to approve an assignment of the remaining term of the agreements.

SECTION 4. OBLIGATIONS OF CITY.

During the term of this Agreement and so long as an event of default has not occurred and is continuing as set forth in Section 5 of this Agreement (provided, however, an event of default hereunder shall not be deemed to have occurred until after the expiration of the applicable notice and cure period), **CITY** shall comply with the following terms and conditions:

- (a) **CITY** shall reimburse **HOTEL DON QUIXOTE** on a dollar-to-dollar basis, an amount equal to fifty percent (50%) of the Local Hotel Occupancy Tax Revenue collected by the Hotel, and remitted to the **CITY**. The **CITY** shall reimburse **HOTEL DON QUIXOTE** for qualified activities and programs conducted by **HOTEL DON QUIXOTE** on an annual basis pursuant to Section 3(b) of this Agreement. Provided however, the amount reimbursed to **HOTEL DON QUIXOTE** shall never exceed 50% of the amount actually remitted to **CITY** in the previous year. The **CITY** shall fund the requested amount of each reimbursement request within thirty (30) days after its receipt. **CITY** is obligated to make the payments under this section from the Local Hotel Tax Revenue. The **CITY** is not and shall not be obligated to make such payments from any other funds or revenues of the **CITY**.
- (b) **CITY** shall pay to **HOTEL DON QUIXOTE** on an annual basis One Hundred Thousand Dollars (\$100,000.00) a year for the term of this Agreement for the use of Hotel Parking Lot Facilities as prescribed in Section 3(c) of this Agreement. Payment shall be made in equal monthly installments of \$8,333.00 each commencing the first day of the calendar month following the date upon which the Hotel opens for business and continuing regularly on the first day of each succeeding month until 120 monthly payments of \$8,333.00 have been made. In no event shall the City pay more than \$100,000.00 a year for ten (10) years.
- (c) **CITY** shall pay to **HOTEL DON QUIXOTE** on an annual basis Eighty-Four Thousand Dollars (\$84,000.00) a year for the term of this Agreement for Event Room Blocks, and for the provision of Event Block Rates for attendees at Convention and Tourist Facilities, as prescribed in Section 3(d) of this Agreement. **CITY** hereby agrees to provide **HOTEL DON QUIXOTE** six (6) months advance notice requiring **HOTEL DON QUIXOTE** to provide the Hotel Event Room Block at the Event Block Rate for visitors of Convention and Tourist Facilities upon receipt of negotiated deposit and room rental contract during the term of this Agreement. Further, the **CITY** hereby agrees to provide **HOTEL**

DON QUIXOTE with “move in” and “move out” dates for the Convention and Tourist Facilities event. Payment shall be made in equal monthly installments of \$7,000.00 each. The first such payment shall be made the first day of the calendar month following the opening of the Hotel and shall continue regularly and monthly on the first day of each succeeding monthly until 120 monthly payments of \$7,000.00 each have been made. In no event shall the City pay more than \$84,000.00 a year for ten (10) years.

- (d) **Limited Return on Investment (ROI).** During the term of this Agreement if **HOTEL DON QUIXOTE** realizes an ROI in excess of 15% per annum the total package of incentives arising from this Agreement, the Tax Abatement Agreement and the Chapter 380 Economic Development Program Agreement shall be reduced by an amount to result in a yield of only 15% per annum.

SECTION 5. EVENTS OF DEFAULT.

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

- (a) **Construction of Hotel.** HOTEL DON QUIXOTE’S failure to comply with its construction obligations set forth in this Agreement and **HOTEL DON QUIXOTE** fails to cure same within sixty (60) days after written notice from the **CITY** unless such failure cannot be cured within such sixty (60) day period in the exercise of all due diligence, then if **HOTEL DON QUIXOTE** fails to commence such cure within such sixty (60) day period or fails to continuously thereafter diligently prosecute the cure of such failure, except to the extent such failure is caused by any act or failure to act on the part of the **CITY**.
- (b) **Quality of Hotel.** **HOTEL DON QUIXOTE’S** failure to operate the hotel as a full service convention services hotel as specified in paragraph 3(a) (Double Tree or equivalent quality hotel). Change of franchise without the prior written consent of **CITY** shall be an event of default.
- (c) **Management of Hotel.** **HOTEL DON QUIXOTE’S** failure to manage the hotel with a first quality professional hotel management company. Change of Management Company without the prior written consent of **CITY** shall be an event of default.
- (d) **Majority Ownership.** James F. Scherr agrees that during the term of this Agreement, he or a trust created by James F. Scherr for the benefit of his family shall continuously maintain majority ownership in the hotel. Majority interest shall be defined as at least 51% percent ownership of the entity that holds fee title to the hotel and parking structure. Adequate documentation to verify the majority ownership interest shall be provided to the City as part of the annual certification required pursuant to paragraph 8 of the Tax Abatement signed by the parties on the same date as this Agreement. Failure of James F. Scherr or a trust created by

James F. Scherr for the benefit of his family to maintain an majority ownership interest shall constitute an event of default that may, at the option of the City, result in immediate termination of this Agreement without notice of any kind to **HOTEL DON QUIXOTE** or to James F. Scherr. Provided however, the parties agree that the death of Mr. Scherr during the term of the Agreement and the transfer of his ownership interest to his heirs shall not be an event of default.

The signature of James F. Scherr, in his individual capacity, affixed to this Agreement is for the limited purpose of evidencing his knowledge and agreement this paragraph.

- (e) **False Statements.** Any written warranty, representation or statement made or furnished to the **CITY** by **HOTEL DON QUIXOTE** under this Agreement or any document(s) related hereto furnished to the **CITY** by **HOTEL DON QUIXOTE** is/are false or misleading in any material respect, either now or at the time made or furnished, and **HOTEL DON QUIXOTE** fails to cure same within sixty (60) days after written notice from the **CITY** describing the violation, or if such violation cannot be cured within such sixty (60) day period in the exercise of all due diligence, then if **HOTEL DON QUIXOTE** fails to commence such cure within such sixty (60) day period or fails to continuously thereafter diligently prosecute the cure of such violation, or if **HOTEL DON QUIXOTE** obtains actual knowledge that any such warranty, representation or statement has become false or misleading after the time that it was made, and **HOTEL DON QUIXOTE** fails to provide written notice to the **CITY** of the false or misleading nature of such warranty, representation or statement within ten (10) days after **HOTEL DON QUIXOTE** learns of its false or misleading nature.

- (f) **Insolvency.** The dissolution or termination of **HOTEL DON QUIXOTE'S** existence as a going business or concern, **HOTEL DON QUIXOTE'S** insolvency, appointment of receiver for any part of **HOTEL DON QUIXOTE'S** portion of the Property, any assignment of all or substantially all of the assets of **HOTEL DON QUIXOTE** for the benefit of creditors of **HOTEL DON QUIXOTE**, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against **HOTEL DON QUIXOTE** unless, in the case of involuntary proceedings, such proceedings are discharged within sixty (60) days after filing.

- (g) **Local Hotel Occupancy Tax Revenue.** **HOTEL DON QUIXOTE** shall file a hotel occupancy tax return with the **CITY** (in a form prescribed by **CITY** from time to time) and include a copy of the Hotel's tax report submitted to the State Comptroller's office for Local Hotel Occupancy Tax Revenue. **HOTEL DON QUIXOTE** shall keep and maintain accurate records of the consideration and local hotel occupancy tax paid by the occupant of each sleeping room in the Hotel. **CITY** shall not be required to pay any monies for any period or portion thereof during the term of this Agreement for which the **CITY** has not received Local Hotel Occupancy Tax Revenue, or if **HOTEL DON QUIXOTE** is in default of this Agreement.

- (h) **Property Taxes.** *HOTEL DON QUIXOTE* allows its property 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 or post a satisfactory bond within thirty (30) days after written notice thereof from the **CITY** and/or El Paso Central Appraisal District.
- (i) **Other Defaults.** Failure of *HOTEL DON QUIXOTE* or **CITY** to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any related documents, or failure of *HOTEL DON QUIXOTE* or **CITY** to comply with or to perform any other term, obligation, covenant or condition contained in any other agreement between the **CITY** and *HOTEL DON QUIXOTE*, and *HOTEL DON QUIXOTE* or **CITY** fails to cure such failure within sixty (60) days after written notice from the **CITY** or *HOTEL DON QUIXOTE*, as the case may be, describing such failure, or if such failure cannot be cured within such 60-day period in the exercise of all due diligence, then if *HOTEL DON QUIXOTE* or **CITY** fails to commence such cure within such 60-day period or fails to continuously thereafter diligently prosecute the cure of such failure.
- (j) **Failure to Cure.** If any Event of Default by *HOTEL DON QUIXOTE* shall occur, and after *HOTEL DON QUIXOTE* fails to cure same in accordance herewith, then this Agreement may be terminated and the **CITY'S** obligations end at that time. If a default has not been cured within the time frame stated herein, the non-defaulting party shall have all rights and remedies under the law or in equity.

SECTION 6. 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 El Paso County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of El Paso County, Texas.
- (c) **Assignment.** *HOTEL DON QUIXOTE* understands and agrees that the **CITY** expressly prohibits *HOTEL DON QUIXOTE* from selling, transferring, assigning or conveying in any way any rights to receive the proceeds under this Agreement without the **CITY'S** prior written consent.

- (d) **Binding Obligation.** This Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. **CITY** warrants and represents that the individual executing this Agreement on behalf of **CITY** has full authority to execute this Agreement and bind **CITY** to the same. **HOTEL DON QUIXOTE** 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) **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.
- (f) **Effective Date.** The effective date (the "Effective Date") of this Agreement shall be the date of the later to execute this Agreement by **HOTEL DON QUIXOTE** and **CITY**.
- (g) **Enforcement.** The City Attorney or his or her designee may enforce all legal rights and obligations under this Agreement without further authorization. **HOTEL DON QUIXOTE** shall provide to the City Attorney all documents and records that the City Attorney requests to assist in determining **HOTEL DON QUIXOTE'S** compliance with this Agreement.
- (h) **Execution of Agreement.** City Council shall authorize the Mayor to execute this Agreement on behalf of **CITY**.
- (i) **Filing.** This Agreement shall be filed in the deed records of El Paso County, Texas. The provisions of this Agreement shall be deemed to run with the land and shall be binding on heirs, successors and assigns of **HOTEL DON QUIXOTE**. Upon any sale or other transfer of ownership rights in the Property, **HOTEL DON QUIXOTE** shall notify the **CITY** in writing of such sale or transfer within thirty (30) business days of such sale or transfer. Such provision is a material term of this Agreement and the failure to notify the **CITY** of such sale or transfer within the applicable period shall constitute a default.
- (j) **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.
- (k) **Notices.** All notices required to be given under this Agreement shall be given in writing and shall be effective when actually delivered or when deposited in the United States mail, first class, postage prepaid, addressed to the party to whom the notice is to be given at the addresses shown above. Any party may change its address for notices under this Agreement by giving formal written notice to the

other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, each party agrees to keep the other informed at all times of its current address.

- (l) **Ordinance Applicability.** The signatories hereto shall be subject to all ordinances of the **CITY**, whether now existing or in the future arising provided however no ordinance shall reduce or diminish the contractual obligations contained herein. This Agreement shall confer no vested rights on the Hotel unless specifically enumerated herein.
- (m) **Severability.** In the event any provision of this Agreement shall be determined by any court of competent jurisdiction to be invalid or unenforceable, the Agreement shall, to the extent reasonably possible, remain in force as to the balance of its provisions as if such invalid provision were not a part hereof.
- (n) **Sovereign Immunity.** No party hereto waives any statutory or common law right to sovereign immunity by virtue of its execution hereof.

(SIGNATURES BEGIN ON FOLLOWING PAGE)

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year first above written.

HOTEL DON QUIXOTE:

HOTEL DON QUIXOTE, LTD.,
a Texas limited partnership
San Angel Plaza, LLC, General Partner

By: _____
Name: _____
Title: _____
Date: _____

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This instrument was acknowledged before me on the ____ day of _____, 2006, by _____, general partner on behalf of ***HOTEL DON QUIXOTE, LTD.***, a limited partnership, organized and existing under the laws of the State of Texas.

Notary Public, State of Texas

James F. Scherr

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This instrument was acknowledged before me on the ____ day of _____, 2006, by James F. Scherr

Notary Public, State of Texas

(SIGNATURES CONTINUE ON FOLLOWING PAGE)

CITY:

CITY OF EL PASO, TEXAS

By: _____

Joyce A. Wilson,
City Manager

Date: _____

APPROVED AS TO FORM:

Sylvia Borunda Firth
Assistant City Attorney

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This instrument was acknowledged before me on the ____ day of _____, 2006, by Joyce A. Wilson, City Manager of the City of El Paso, Texas, on behalf of the City of El Paso, Texas.

Notary Public, State of Texas

Exhibit A
[Legal Description]

Exhibit B
[Legal Depiction]

Exhibit C
[Hotel Parking Lot Facilities]