

NOTICE OF SPECIAL MEETING

PLEASE TAKE NOTICE THAT THE CITY COUNCIL OF THE CITY OF DARIEN HAS SCHEDULED A SPECIAL MEETING TO BE HELD ON WEDNESDAY, OCTOBER 24, 2012 AT 6:30 P.M. IN THE POLICE TRAINING ROOM AT THE POLICE DEPARTMENT, 1710 PLAINFIELD ROAD, DARIEN, ILLINOIS. AGENDA IS AS FOLLOWS:

- 1. CALL TO ORDER**
- 2. ESTABLISH A QUORUM**
- 3. APPROVAL OF A RESOLUTION AUTHORIZING A REVISED ECONOMIC DEVELOPMENT AGREEMENT BETWEEN THE CITY OF DARIEN, DUPAGE COUNTY, ILLINOIS (“CITY”) AND CHUCK’S DARIEN SOUTHERN COMFORTS CAFÉ, LLC AND CHUCK’S SOUTHERN COMFORTS CAFÉ AND BANQUETS (“DEVELOPER”)**
- 4. ADJOURNMENT**

THIS NOTICE IS GIVE PURSUANT TO CHAPTER 5, SECTION 120/2.02 OF THE ILLINOIS COMPILED STATUTES (5 ILCS 120/2.01).

**JO ANNE E. RAGONA
CITY CLERK
OCTOBER 22, 2012**

Agenda Memo
City Council
Meeting Date: October 24, 2012

ISSUE STATEMENT

Approval of a resolution authorizing the City Administrator to sign an revised economic development agreement between the City of Darien, Dupage County, Illinois (“city”) and Chuck's Darien Southern Comforts Cafe, LLC and Chuck's Southern Comforts Cafe and Banquets (“developer”).

BACKGROUND/HISTORY

On July 16, 2012, the City Council approved an economic incentive agreement with Chucks. Since that approval Chuck’s has been working to secure his business loan. The bank Chuck’s is working with contacted the city staff last week asking for several modifications to the economic incentive agreement. The bank has had a copy of the agreement for at least 2 months and this was the first time they told us, or Chucks, that they are requesting changes. The request is attached. Staff has prepared a revised agreement based on the bank’s request. The revisions are noted on the attached agreement.

The seller of the property is insisting the closing take place no later than November 12th, 2012. Since the seller is insisting on the November 12th date we are expediting approval of the revised agreement to the city council. There are 3 lenders who need to review these changes including Bancorp. Somercor and the SBA. The contact for the lender could not guarantee a review by these groups before Wednesday’s council meeting but the documents have been sent.

The resolution is written authorizing the approval of the revised agreement in substantially the form attached in [Exhibit A](#) to the resolution. We have used this language before in case there are additional changes requested by the lenders after the council’s approval. This will allow the City Attorney and staff to approve further modifications as long as those modifications meet the intent of the agreement.

STAFF/COMMITTEE RECOMMENDATION

Staff recommends approval of the agreement.

ALTERNATE CONSIDERATION

As determined by the Council

DECISION MODE

This will be on the October 24th, 2012, special City Council agenda for formal approval.

BACKGROUND INFORMATION- EMAILS

From: Kimberlee Knopf [<mailto:KKnopf@starfieldsmith.com>]
Sent: Thursday, October 18, 2012 8:04 AM
To: Kimberlee Knopf; Dan Gombac
Cc: Bryon Vana; 'John Murphey (JMurphey@rmcj.com)'; 'Butterfield, Brandon'; Cook, Debbie
Subject: RE: My email - Chucks

Thank you for your patience Dan and I apologize for the delay.

The following comments remain subject to the review and final approval of The Bancorp Bank and, as indicated previously, our firm does not represent Somercor nor the SBA so these matters also remain subject to such parties' review and approval. In addition, we reserve the right to provide further and/or additional comments as the process moves forward as further information and/or documentation is provided.

GENERAL:

Darien Documents: You indicated that Darien does not intend to record its mortgage until after our closing, however, we would like to review all additional documents to be executed and delivered by the Developer and/or principals and affiliates in connection with the Parking Lot Improvements prior to finalizing any subordination documents and, also, prior to the bank closing.

Subordination: When we reference subordination in our comments below it means that Darien is not to receive payment until The Bancorp Bank and Somercor/SBA are indefeasibly paid in full.

ECONOMIC DEVELOPMENT AGREEMENT:

1st paragraph The owner of the property (passive real estate investment company) will be Chuck's Darien Southern Comforts Cafe, LLC and the operating company will be Chuck's Southern Comforts Cafe and Banquets, Inc. Therefore, the "Developer" should probably be amended to be one or both of these entities.

Section 2.(c) - It is our understanding that Darien has already fully vetted the costs/proposals and, based on its extensive experience in such matters is confident that the work will not exceed \$300,000. As such, it is our position that any amounts in excess of \$300,000 should be the responsibility of Darien, and specifically stated as such in this section. It is also noted that in the event the work is less than \$300,000 then Developer's obligation to Darien should be reduced by such amount.

Section 4.(c)(d)(e)(f) - If Sales Tax paid to Darien is not \$80,000 in any year then, instead of an immediate additional payment owed for the deficiency (shortfall payment in the Agreement), such deficiency sums are to be fully subordinated to Bancorp/SBA. In addition, please clarify and confirm that any Sales Tax paid in excess of \$80,000 in any year is applied to the overall obligations at the back end to reduce the final payment(s) as opposed to a reduction the following year.

Section 5(a) - The principal amount of the obligations is \$300,000 however, the City has added a \$25,000 penalty (in addition to payment of all reasonable legal fees and costs of Darien) and an acceleration of all amounts in the event that the property or the restaurant is sold or if Developer is not diligently rehabbing the property after damage or destruction but fire, flood or other hazard. We understand there is no interest on the obligation so if such penalty can not be deleted, it is respectfully suggested this penalty should be reduced to \$18,000 which is approximately 6% and more in line with today's interest rates. In any case, any accelerated sums and penalties due as a result of these provisions should be fully subordinated to Bancorp/SBA.

Section 6(b) - As we discussed, the SBA was concerned, among other things, that Darien could shut down the business if there is a tax shortfall in any year. While it is not entirely clear that this is the intent of this provision, SBA has requested that this provision be stricken and that there be an affirmative statement that the City will not shut down the restaurant as a result of the tax shortfall while any sums are owned to SBA and The Bancorp Bank. The Bancorp Bank has an additional concern that, upon foreclosure and potential resale, this provision will have a chilling effect on any such sale as the City can refuse any further zoning, occupancy permit or business license solely based on the nonpayment of the obligations under this Agreement. It is also noted that Darien intends to file this Agreement of record against the real estate so this further supports the above referenced concerns as any potential buyer will, potentially, be bound by the obligations set forth in this Agreement.

Thank you for your consideration of all of the above issues. We look forward to working with the City of Darien in order to bring this project to fruition.

Kim

Kimberlee S. Knopf, Esquire

[email](#) | [vcard](#) | [bio](#) | [map](#) | [website](#)



1300 Virginia Drive, Suite 325

Fort Washington, PA 19034

Direct Dial: 267-470-1226

Facsimile: 215-542-0723

<mailto:kknopf@starfieldsmith.com>

<http://www.starfieldsmith.com>

Loan Documentation ♦ Closing ♦ SBA Guaranty Purchase ♦ Regulatory Compliance ♦ Franchise Consultation ♦ Business Representation ♦ Commercial Litigation ♦ Creditors' Rights

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From: Kimberlee Knopf

Sent: Wednesday, October 17, 2012 5:31 PM

To: 'Dan Gombac'
Cc: Bryon Vana; John Murphey (JMURPHEY@rmcj.com)
Subject: RE: My email - Chucks

I will. Unfortunately one of my closings turned into a fire drill so I am a bit behind.

Many thanks for following up.

From: Dan Gombac [<mailto:dgombac@darienil.gov>]
Sent: Wednesday, October 17, 2012 5:35 PM
To: Kimberlee Knopf
Cc: Bryon Vana; John Murphey (JMURPHEY@rmcj.com)
Subject: RE: My email - Chucks

Hi Kimberlee:

Did not see anything come through today regarding our conversation yesterday. Please forward as soon as possible.

Daniel Gombac
Director of Municipal Services
630-353-8106

To receive important information from the City of Darien
sign up for our electronic newsletter:

DARIEN DIRECT CONNECT

Follow the link below and subscribing is simple!

[http://www.darien.il.us/Departments/Administratio
n/CityNews.html](http://www.darien.il.us/Departments/Administratio
n/CityNews.html)

From: Dan Gombac
Sent: Tuesday, October 16, 2012 11:37 AM
To: 'Kimberlee Knopf'
Cc: Bryon Vana
Subject: RE: My email - Chucks

Ok

Daniel Gombac
Director of Municipal Services
630-353-8106

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sign up for our electronic newsletter:

DARIEN DIRECT CONNECT

Follow the link below and subscribing is simple!

[http://www.darien.il.us/Departments/Administratio
n/CityNews.html](http://www.darien.il.us/Departments/Administratio
n/CityNews.html)

From: Kimberlee Knopf [<mailto:KKnopf@starfieldsmith.com>]

Sent: Tuesday, October 16, 2012 11:22 AM

To: Dan Gombac

Subject: My email - Chucks

Hi Dan. Thank you for taking the time to speak with me this morning.

My follow up email probably won't come until tomorrow due to another matter that needed attention.

I apologize for the delay..

Kimberlee S. Knopf, Esquire

[email](#) | [vcard](#) | [bio](#) | [map](#) | [website](#)



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***Loan Documentation ♦ Closing ♦ SBA Guaranty Purchase ♦ Regulatory Compliance ♦
Franchise Consultation ♦ Business Representation ♦ Commercial Litigation ♦ Creditors'
Rights***

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ECONOMIC DEVELOPMENT AGREEMENT

This Economic Development Agreement (“Agreement”) is dated this ___ day of _____, 2012, ~~among~~ the City of Darien, DuPage County, Illinois (“City”) and ~~(i) Chuck’s Darien Southern Comforts Café LLC (the “LLC”) and (ii) Chucks Southern Comforts Café and Banquets, Inc., an Illinois corporation (the “Corporation”)~~ (the LLC and Corporation are collectively referred to unless otherwise indicated by context as “Developer”).

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Deleted: (“Developer”).

REASONS FOR ENTERING INTO THIS AGREEMENT

A. Developer is an experienced restaurant operator seeking to develop a full-service family restaurant in the City.

B. To that end, ~~the LLC~~ is the Contract Purchaser of a parcel of property in the City with a common address of 8025 South Cass Avenue (the “Subject Property”), Pin Nos. **09-34-102-009 and 09-34-102-010**, ~~and the Corporation will be the operating entity of the restaurant to be developed on the Subject Property as described more fully as set forth hereinbelow.~~

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Deleted: Developer

C. The Subject Property is vacant and is the site of several former restaurants. The Subject Property also has a parking area.

D. Over the past several years, the Subject Property, and particularly, the parking area, ~~has~~ fallen into disrepair.

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E. In order to redevelop the Subject Property for a restaurant, it will be necessary to resurface the parking lot, restripe it, and improve its drainage and lighting (the “Parking Lot Improvements”). The parties estimate that the Parking Lot Improvements will cost approximately THREE HUNDRED THOUSAND & 00/100 (\$300,000.00) DOLLARS.

F. Developer has requested that the City provide economic support for the development by directly paying the costs of the Parking Lot Improvements.

G. The City has reviewed this proposal and has concluded that but for this economic assistance as requested by the Developer, the Subject Property is not reasonably expected to redevelop as a restaurant in the foreseeable future.

H. In addition, the City has concluded that a successful restaurant operation at the Subject Property will increase the City's sales and property tax revenues, thereby providing a revenue source to repay the City over time for the monies paid by the City to complete the Parking Lot Improvements.

I. Accordingly, it is the purpose of this Agreement to set forth the framework pursuant to which the City will provide economic assistance to the Developer's project.

IT IS HEREBY AGREED by and between the City and Developer as follows:

Section 1. Developer Commitments and Agreements. Developer hereby agrees as follows:

(a) Promptly upon the execution of this Agreement, Developer will proceed to close on the acquisition of the Subject Property. Developer will advise the City as to the closing date.

(b) Developer shall provide the City with evidence (which may be in the form of a letter from a bank or other lender) that Developer has obtained sufficient funding to redevelop the Subject Property for a full-service family restaurant.

(c) Developer will proceed with due diligence to submit building plans for the development of such restaurant, the format of which will be generally similar to Developer's restaurant located in Burbank, Illinois.

Section 2. City Commitment. At such time as Developer has satisfied his commitments as set forth hereinabove and has obtained a building permit from the City, the City will proceed to complete the Parking Lot Improvements:

(a) Developer hereby authorizes the City and its contractors to enter upon the Subject Property for purposes of completing the Parking Lot Improvements.

(b) The City shall be solely responsible for the costs associated with the Parking Lot Improvements.

(c) ~~The City makes no warranty as to the Parking Lot Improvements.~~ The warranty provided on the ~~Parking Lot Improvements~~ is limited to the warranty provided by the contractors.

(d) The City will provide that the contractor performing the Parking Lot Improvements will have no lien rights against the Subject Property. ~~The City will assign contractor warranties for the Parking Lot Improvements to Developer.~~

(e) Once the Parking Lot Improvements are completed, Developer shall be responsible for parking lot maintenance and upkeep.

~~Upon completion of the Parking Lot Improvements, Developer shall be responsible to repay the City for the cost of said improvements in the manner provided for hereinbelow. In the event the total cost of the Parking Lot Improvements are less than \$300,000.00, then Developer's repayment obligation, established at \$300,000.00 for purposes of this Agreement, shall be reduced to an amount equal to the actual cost of the Parking Lot Improvements. For clarity purposes, the repayment obligation of \$300,000.00 will be used throughout the body of this Agreement.~~

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Section 3. "Sales Tax" Defined; Verification.

(a) For purposes of this Agreement, the term “Sales Tax” shall mean all sales tax received by the City generated from sales at the Subject Property.

(b) In order to provide for the administration of this Agreement, Developer agrees to execute such forms as may be required by the Illinois Department of Revenue to authorize the release of reporting information necessary to allow the parties to determine the Sales Tax during the term of this Agreement.

Section 4. Reimbursement of City for Parking Lot Improvements from Sales Tax; Calculations; Shortfalls.

(a) The parties agree to a methodology whereby the City will be reimbursed for its Parking Lot Improvement investment by way of the Sales Tax. Developer reasonably projects that restaurant sales in Year 1 will generate at least EIGHTY THOUSAND & 00/100 (\$80,000.00) DOLLARS in Sales Tax. Based on its experience with its other restaurant, Developer further anticipates that for later years, Sales Tax will be greater than \$80,000.00 per year based on increased sales.

(b) As soon as the City receives the information from the Illinois Department of Revenue necessary to determine Sales Tax during the restaurant’s first twelve (12) full months of operation (“First Year’s Sales Tax”), the First Year’s Sales Tax shall be credited against Developer’s reimbursement obligation.

(c) If the First Year’s Sales Tax meets or exceeds \$80,000.00, then Developer shall have no further annual obligation to the City with respect to such Sales Tax. On the other hand, if the First Year’s Sales Tax is less than \$80,000.00, Developer shall reimburse the City for that shortfall within thirty (30) days after the City provides Developer with a written recapitulation.

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The City's entitlement to such shortfall payments are subordinated to the rights of Developer's lender.

(d) By way of example, assume the First Year's Sales Taxes are \$100,000.00. Because the actual sales tax receipts exceed \$80,000.00 by \$20,000.00, the full \$100,000.00 will be credited towards Developer's reimbursement obligation (reducing that obligation from \$300,000.00 to \$200,000.00) and Developer shall have no supplemental reimbursement obligation to the City. In the alternative, assume that the First Year's Sales Tax is \$75,000.00. In that event, Developer shall reimburse the City \$5,000.00.

(e) This methodology will be followed annually until such time as Sales Tax plus any shortfall payments made by Developer equals THREE HUNDRED THOUSAND & 00/100 (\$300,000.00) DOLLARS.

(f) Each year's receipts will be evaluated and reconciled separately. In the event the First Year's Sales Taxes are \$100,000, but the Second Year's Sales Taxes are \$75,000.00, then Developer shall reimburse the City \$5,000.00 for the Second year.

(g) There is no interest on this obligation.

(h) Developer may prepay this obligation at any time.

Section 5. Sale of Restaurant or Subject Property Prior to Satisfaction of Repayment Obligation.

(a) Developer acknowledges that the City is entering into this Agreement in part based on the demonstrated quality of Developer's Burbank restaurant, its acceptance in the marketplace, and the reputation of Developer's principal. Accordingly, in the event Developer sells either the restaurant or the Subject Property within 5 years from date of opening, then upon the closing of the sale of either the restaurant or the Subject Property, Developer will pay the

City from closing proceeds a sum equal to THREE HUNDRED EIGHTEEN THOUSAND & 00/100 (\$318,000.00) DOLLARS.

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(b) Because sales tax reporting is generally three-four (3-4) months in arrears, the parties shall utilize the actual sales tax figures reported by Developer to the Illinois Department of Revenue for purposes of crediting Developer for Sales Tax as of the date of closing.

(c) In the event Developer closes the restaurant, then all sums due as described hereinabove shall be payable within thirty (30) days after the date of the closing.

(d) In the event the restaurant is damaged or destroyed by fire, flood or other hazard and the restaurant remains closed for a period of more than three (3) months, then the entire remaining repayment obligation shall be immediately due. Notwithstanding the above, if Developer is proceeding with due diligence to rehabilitate or rebuild the restaurant (as evidenced by submittal of revised building plans), then during such period of due diligence, the repayment obligation shall not accelerate.

Section 6. Security.

(a) The repayment obligation set forth herein shall operate as a lien against the Subject Property. The City will not close the restaurant or suspend any of Developer's's operating licenses or permits as a means of collecting any part of Developer's repayment obligation.

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(b) The City shall be under no obligation to issue any zoning permit, occupancy permit or business license for any successor business on the Subject Property until such time as the City has been fully reimbursed for the Developer's reimbursement obligation.

(c) Developer shall memorialize this obligation in any purchase and sales contract for either the restaurant or the Subject Property.

Section 7. Successors in Assigns. This Agreement is binding on Developer, its successors and assigns.

Section 8. Personal Guarantee; Additional Security James Pine whose address is 8720 South 55th Avenue, Oak Lawn, Illinois 60456 (“Guarantor”) hereby personally guarantees all of the rights and obligations set forth in this Agreement. At the request of the City, Pine will grant the City a mortgage on real property owned by Pine to further secure the obligation of this Agreement.

Section 9. Litigation; Attorney’s Fees. In the event the City files suit to collect sums due pursuant to this Agreement, Developer and Guarantor consent to venue in the Eighteenth Judicial Circuit, DuPage County, Illinois. In the event the City prevails, Developer and Guarantor shall pay the City its reasonable attorney’s fees in addition to such principal sum as may be awarded by the Court.

Section 10. Default; Acceleration. In the event Developer defaults in any of its obligations provided for herein and such default is not cured within thirty (30) days after notice of default, then the entire remaining repayment obligation shall accelerate and become due.

Section 11. Notices. All notices required or contemplated by this Agreement shall be in writing and shall be delivered either in hand, certified mail, or via commercial express mail such as Federal Express or UPS to the following addresses:

Developer:

Guarantor:

With Copy To:

City:

City of Darien
1702 Plainfield Road
Darien, Illinois 60561
Attention: Bryon Vana, City Administrator

With Copy To:

John B. Murphey
Rosenthal, Murphey, Coblenz & Donahue
30 North LaSalle Street, Suite 1624
Chicago, Illinois 60602

Section 12. Non-Assignment. Developer may not assign this Agreement without the prior written consent of the City.

Section 13. Recordation. The parties shall cause this Agreement along with the City's authorizing Ordinance to be recorded in the office of the DuPage County Recorder of Deeds against the Subject Property. The Subject Property is legally described on **Exhibit 1** attached hereto and made a part hereof.

DATED this ____ day of _____, 2012.

DEVELOPER:

CITY:

City of Darien

By: _____

By: _____
Bryon Vana, City Administrator

GUARANTOR:

EXHIBIT 1

Legal Description and PIN of Subject Property

G:\rncj\ DAR\ Chuck's Restaurant\ Economic Incentive Agt #6 marked.doc

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Rosenthal, Murphey, Coblenz & Donahue

30 North LaSalle St. Suite 1624 ~Chicago, Illinois 60602
Phone (312) 541-1070 ~ Fax (312) 541-9191
JBM Direct Dial (312) 541-1072
JBM e-mail: jmurphey@rmcj.com

Confidential Memorandum

To: Kimberlee Knopf

Fr: John Murphey

Date: 10-21-12

Re: Darien, Illinois/Chuck's Economic Incentive Agreement

Please review the attached. I have modified the agreement to address the issues you raised – with one exception, which is Section 6(b). Please let me give you the City's thinking on this issue.

We agree that we should not use permitting, licensing, or other regulatory authority of the City as a means of "self-help" to collect the debt. Our view is that would be at odds with the City's goal to do what we can to make the restaurant a success.

To address your client's concern on this point, I have modified Section 6(a) to provide a guarantee against utilizing self-help as a means of collecting the debt from your borrower.

But we need to keep 6(b) in the agreement. It is the only vehicle we have to secure repayment of our loan in the event of Developer's failure. Under this agreement, the City is adding \$300,000.00 of value to the bank's collateral – the real estate. Let's assume this developer fails with \$50,000.00 still owing. It may take years for the bank to complete the foreclosure and get a new buyer for the property, which will be improved with not only a new parking lot, but also with a relatively new, fully-equipped restaurant.

The City is willing to wait for all of this to sort itself out. But the taxpayers are entitled to be repaid at such time as the property is conveyed and a new

restaurant is ready to open. The only realistic way the City has to secure this obligation is with the power of the permit. It is irrelevant who actually repays us as between the successor developer and the lender, but we need to be repaid at the re-sale juncture.

I would envision this to work by way of closing disbursements – the City would deposit all required licenses and operating certificates into the escrow, along with a sworn statement of the amount due pursuant to the Agreement – the regulatory equivalent of a payoff letter. The escrow would be instructed to release the permits to the buyer and disburse to the City.

Please review this with your client and SBA. I hope all the other changes are self-explanatory and acceptable. Please feel free to comment and suggest changes.

We have a logistical issue which we hope you can help us accommodate. The borrower indicates the bank is looking to close in early November. We need to take the revised agreement back to our Council. We are tentatively scheduling a special meeting for this Wednesday, October 24.

If possible, we would like to hear from you in the next day or two if these changes are acceptable. If so, we will adopt the revised agreement in “substantially the form presented,” to allow for document finalization.

Thank you for your cooperation.

cc: Bryon Vana & Dan Gombac, City of Darien

RESOLUTION NO. _____

A RESOLUTION AUTHORIZING THE CITY ADMINISTRATOR TO SIGN A REVISED ECONOMIC DEVELOPMENT AGREEMENT BETWEEN THE CITY OF DARIEN, DUPAGE COUNTY, ILLINOIS (“CITY”) AND CHUCK’S DARIEN SOUTHERN COMFORTS CAFÉ, LLC AND CHUCK’S SOUHTERN COMFORTSCAFE AND BANQUETS (“DEVELOPER”).

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DARIEN, DU PAGE COUNTY, ILLINOIS, as follows:

SECTION 1: The City Council of the City of Darien hereby authorizes the City Administrator to sign a revised agreement between the City of Darien, DuPage County, Illinois (“City”) and Chuck's Darien Southern Comforts Cafe, LLC and Chuck's Southern Comforts Cafe and Banquets (“Developer”) in substantially the form attached in [Exhibit A](#) to this resolution.

SECTION 2: The City has concluded that but for approval of this economic development agreement as requested by the Developer, the Subject Property is not reasonably expected to redevelop as a restaurant in the foreseeable future.

SECTION 3: This Resolution shall be in full force and effect from and after its passage and approval as provided by law.

PASSED BY THE CITY COUNCIL OF THE CITY OF DARIEN, DU PAGE COUNTY, ILLINOIS, this 24th day of October, 2012.

AYES: _____

NAYS: _____

ABSENT: _____

**APPROVED BY THE MAYOR OF THE CITY OF DARIEN, DU PAGE COUNTY,
ILLINOIS, this 24th day of October, 2012.**

KATHLEEN MOESLE WEAVER, MAYOR

ATTEST:

JOANNE E. RAGONA, CITY CLERK

APPROVED AS TO FORM:

CITY ATTORNEY