



# EIC SPECIAL-CALLED MEETING AGENDA SEPTEMBER 03, 2020, 6:00 PM CITY HALL COUNCIL CHAMBERS 701 MAIN STREET, KERRVILLE, TEXAS



## ***EIC Meeting Procedures during the Disaster Declaration and Citizen/Public Participation Guidelines***

COVID-19 (Coronavirus) provides a unique concern in that gathering members of the public, EIC members, and City staff within a physical setting constitutes a public health risk. On March 16, 2020, the Texas Governor suspended certain requirements of the Open Meetings Act to permit open meetings to occur in a fully virtual setting (e.g., telephonic or videoconference meeting). In an effort to avoid and mitigate health risks, and limited occupancy levels in Council Chambers, EIC will convene in a virtual forum and meeting attendance will be limited to persons essential to holding the meeting. No member of the public will be admitted into Council Chambers during this time. **Despite the necessity to restrict public access to Kerrville EIC meetings in the interest of public health during the COVID-19 pandemic, citizens and visitors are welcome to participate in Kerrville EIC meetings in alternate ways as outlined below.**

### **Instructions for callers:**

Dial one of the following toll free numbers: **1-877-853-5247** or **1-888-788-0099**. If you cannot get through on one number, call the other number. Alternative telephone numbers: **1-346-248-7799** or **1-253-215-8782**. When your call is answered you will hear **"Welcome to Zoom, enter your Meeting ID followed by pound"**. Enter in the Meeting ID below followed by the pound sign (#).

The Meeting ID is **985 7313 0875#**.

If the moderator has not started the meeting, you will hear "The meeting has not started yet, please hold or call back later." Once you have called into the meeting, your microphone will be placed on mute and your call will be placed in the call queue. At this point, you will hear silence on the phone. Do not hang up. The moderator will unmute your microphone as he/she is going down the list. Once the meeting has started, you will be able to listen to proceedings even if your microphone is muted.

**The Zoom moderator will be accepting calls starting at 5:00 p.m.** Place your call before 5:45 p.m. in order to register with the Zoom moderator. Any calls made after the 5:45 p.m. deadline will not be answered, and microphones will be kept muted. You will be queued to speak. Each speaker is limited to four minutes.

**For Public Hearing Item 1A**, a caller seeking to speak on item 1A may call at any time prior to the item being introduced at the meeting. (However, all callers are encouraged to call between 5:00 p.m. and 5:45 p.m. to be registered by the moderator.) A caller must use the **"raise your hand"** feature on Zoom in order to be called upon for the Public Hearing. If a caller is using the Zoom app on a computer, tablet, or mobile phone click on **"Participants"** and click on **"Raise Hand"** button. If a caller is using a landline telephone press **\*9**.

### **Instructions for written comments:**

Written comments will be accepted for any agenda items, including Public Hearings. You are required to provide your first and last name, address, and identify the item you wish to comment on. All information must be provided in order for your comments to be read into record.

Written comments can be provided two different ways:

- **OPTION 1 by hard copy** – Comments may be dropped off at the City Hall Utility Payments Drop-Box on the north side of City Hall by 5:45 p.m. the evening of the EIC meeting.
- **OPTION 2 by email** - Comments can be emailed to [keshya.franchina@kerrvilletx.gov](mailto:keshya.franchina@kerrvilletx.gov) and [shelley.mcelhannon@kerrvilletx.gov](mailto:shelley.mcelhannon@kerrvilletx.gov) and must be received by 5:45 p.m. the evening of the EIC meeting.

Citizens may view and hear the EIC meetings on Spectrum Channel 2 or by live-streaming via the City's website ([www.kerrvilletx.gov](http://www.kerrvilletx.gov)). EIC meetings are recorded and the recordings are posted on the City's website.

Thank you for your participation!



**ECONOMIC IMPROVEMENT CORPORATION AGENDA  
SPECIAL-CALLED MEETING  
SEPTEMBER 3, 2020, 6:00 PM  
Kerrville City Hall Council Chambers  
701 Main Street, Kerrville, Texas**

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The purpose of the Economic Improvement Corporation is to improve economic prosperity in the City of Kerrville.

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**1 PUBLIC HEARING AND POSSIBLE ACTION:**

- 1.A. Killdeer Mountain Manufacturing Business Development Project, to include the following agreements:
- a.) Economic Development Grant and Real Estate Purchase Agreement.
  - b.) Economic Development Incentive Grant Agreement.
  - c.) Chapter 380 Economic Development Agreement between the City of Kerrville, Texas, and the City of Kerrville Economic Improvement Corporation.

**2 EXECUTIVE SECTION:**

*The Economic Improvement Corporation may, as permitted by law, adjourn into executive (closed) session at any time to discuss any matter listed above including if they meet the qualifications in Section 551.071 (consultation with attorney), 551.072 (deliberation regarding real property), 551.073 (deliberation regarding gifts), 551.074 (personnel matters), and 551.087 (deliberation regarding economic development negotiations) of Chapter 551 of the Texas Government Code, and the following matter(s):*

- 2.A. Killdeer Mountain Manufacturing Business Development Project (551.071, 551.072, and 551.087)

**3 POSSIBLE ACTION FOR ITEMS DISCUSSED IN EXECUTIVE SESSION:**

**ADJOURN.**

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The facility is wheelchair accessible, and accessible parking spaces are available. Requests for accommodations or interpretive services must be made 48 hours prior to this event. Please contact the City Secretary's Office at 830-257-8000 for further information.

I hereby certify that this agenda was posted as notice of the meeting on the bulletin board at the City Hall of the City of Kerrville, Texas, and on the City's website on the following date and time: August 31, 2020 at 5:30 p.m. and remained posted continuously for at least 72 hours preceding the scheduled time of the meeting.

Shelley McElhannon

Shelley McElhannon, City Secretary, City of Kerrville, Texas

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Packet posted 9/1/2020 at 4:20 p.m.  
Keshia Franchina, Deputy City Secretary

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## ECONOMIC DEVELOPMENT GRANT AND REAL ESTATE PURCHASE AGREEMENT

This **ECONOMIC DEVELOPMENT GRANT AND REAL ESTATE PURCHASE AGREEMENT** (“Agreement”) is entered into as of the Effective Date by and between **KILLDEER MOUNTAIN MANUFACTURING, INC.** (“Company”), a North Dakota corporation, acting herein by and through its duly authorized Chief Executive Officer; and the **CITY OF KERRVILLE, TEXAS, ECONOMIC IMPROVEMENT CORPORATION** (“EIC”), a Texas nonprofit corporation established pursuant to the Development Corporation Act (Chapters 501, 502, and 505 of the Texas Local Government Code and hereafter referred to as “the Act”), acting by and through its duly authorized President. Company and EIC are sometimes collectively referred to herein as “Parties” and individually as “Party”.

### WITNESSETH:

**WHEREAS**, EIC was formed to administer the special sales and use tax approved by City’s qualified voters in May 1995 and collected for the purpose of paying expenditures in relation to “projects” as defined in the Act including:

*Land, buildings, equipment, facilities, expenditures, targeted infrastructure, and improvements that are for the creation or retention of primary jobs, as that term is defined by the Act, and found by the EIC to be required or suitable for the development, retention, or expansion of manufacturing and industrial facilities as provided by Section 501.101 of the Act; and*

**WHEREAS**, pursuant to the Act, EIC is authorized to provide funding relating to the construction of projects which EIC finds to be encompassed within the definition of “Projects”, as that word is defined by Chapters 501 and 505 of the Act; and

**WHEREAS**, Company manufactures and sells various products, including circuit boards and fiber optics for use in the aerospace industry; and

**WHEREAS**, EIC has contracted to purchase the Property, as defined below; and

**WHEREAS**, Company desires to contract with EIC to purchase the Property from EIC with the intent of (i) making a Capital Investment (as hereafter defined) in the Improvements and acquiring Tangible Personal Property; and (ii) hiring a

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number of full time employment positions at the Property with the objective of increasing such employment to at least 400 employees; and

**WHEREAS**, Company has advised EIC that a contributing factor that would induce Company to make the Capital Investment, acquire the Tangible Personal Property, and begin operations would be an agreement with EIC to provide an economic development incentive grant to Company to defray the costs of acquisition of the Property; and

**WHEREAS**, EIC has determined that the Purchase Grant (as hereafter defined) complies with the Act and is in keeping with the mission of EIC and *City of Kerrville Economic Improvement Corporation 4B Sales Tax Funding Request Guidelines and Procedures* in that it will help develop and expand a manufacturing and industrial facility and a business enterprise and create and retain primary jobs, and thus constitutes a “project” as defined in the Act; and

**WHEREAS**, EIC finds that it will be in the public interest to enter into this agreement with Company for EIC to purchase the Land (as defined below) using 4B Revenues (as defined below), to convey the Land to Company for its use in its manufacturing operations, and to apply the Purchase Grant to the Purchase Price; and

**WHEREAS**, on September 3, 2020, in a meeting that was open to the public in accordance with the Texas Open Meetings Act, EIC held a public hearing pursuant to Section 505.159 of the Act related to the proposed expenditure of 4B Revenues for the purposes provided above;

**NOW THEREFORE**, for and in consideration of the recitals set forth above and the promises made herein, Company and EIC agree as follows:

## **Article I Definitions**

For purposes of this Agreement, each of the following terms has the meaning set forth herein unless the context clearly indicates otherwise:

“4B Revenues” means the \$0.005 local sales and use tax collected by EIC pursuant to the Act.

“Affiliate(s)” means, with respect to any Person, any other Person directly or indirectly Controlling, Controlled by, or under common Control with such Person.

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“Bankruptcy or Insolvency” means the dissolution or termination of a Party’s existence as a going business, insolvency, appointment of receiver for any part of such Party’s property and such appointment is not terminated within ninety (90) days after such appointment is initially made, any general assignment for the benefit of creditors, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against such Party and such proceeding is not dismissed within ninety (90) days after the filing thereof.

“Capital Investment” means (i) with respect to the Improvements, the total capitalized cost of construction of the Improvements (including design and construction of the Building and related improvements but not including costs related to purchase of the Property), and (ii) with respect to Tangible Personal Property the total capitalized cost of acquisition and installation of Tangible Personal Property to be located at the Improvements and/or the Property.

“City” means the City of Kerrville, a Texas home rule municipality located in Kerr County, Texas.

“City 380 Agreement” means that certain Economic Development Incentive Agreement between City and Company entered into pursuant to Chapter 380 of the Texas Local Government Code and providing for a grant from City to Company for the construction of certain improvements on the Property and the waiver of certain City fees in relation to construction of the Improvements.

“City Limits” means City’s incorporated boundaries as they exist on the Effective Date and changed from time to time after the Effective Date through the annexation of land into, or disannexation of land out of, City’s incorporated boundaries.

“Commencement Date” means the date Commencement of Construction occurs.

“Commencement of Construction” means that (i) the plans have been prepared and all approvals thereof required by applicable governmental authorities have been obtained for construction of the Improvements on the Property; (ii) all necessary permits for the construction of the Improvements have been issued by all applicable governmental authorities; and (iii) active construction of the Improvements has commenced.

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“Completion of Construction” means the date (i) the Improvements have been substantially completed; and, (ii) a certificate of occupancy has been issued by City for Company’s occupancy of the Property following construction of the Improvements.

“Consummated” shall have the same meaning assigned by Texas Tax Code, Section 321.203, or its successor.

“Control,” or any derivation thereof, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of securities, by contract or otherwise.

“Deed of Trust” means a Deed of Trust in the form substantially as set forth in Appendix 1, attached hereto and incorporated herein by reference, conveying a first lien on the Property to Michael C. Hayes, Trustee, for the benefit of EIC in the amount of the Purchase Grant for the purpose of securing the repayment of the Purchase Grant.

“Effective Date” means the later of (i) the date this Agreement, or identical counterparts of this Agreement, bears the signatures of the authorized representative of each Party; and (ii) the date this Agreement has been authorized by City’s City Council pursuant to Section 505.158 of the Act.

“Employment Period” means each full calendar year after Completion of Construction.

“Force Majeure” means any contingency or cause beyond the reasonable control of a Party including, without limitation, acts of God or the public enemy, war, terrorist act, or threat thereof, riot, civil commotion, insurrection, government action or inaction (unless caused by the intentionally wrongful acts or omissions of the Party), fires, earthquake, tornado, hurricane, explosions, floods, strikes, slowdowns, pandemics, or work stoppages.

“Full-Time Position” means a position eligible for employee benefits at which an individual is scheduled to work at the Property for Company as an employee (*i.e.*, not as temp-to-hire worker) for at least (i) 2080 hours for a day shift; or (ii) 1,872 hours for a second shift, both of which occur within the calendar year and who, before deducting employee contributions to employee benefits, FICA, Federal payroll tax withholding, retirement plans, and other voluntary and involuntary deductions commonly deducted from employee wages prior to payment of the wages to the person, is paid an average hourly wage of not less than \$21.00 per hour, not including the value of employee benefits paid by Company. For purposes of the definition of

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“Full-Time Position,” employer contributions to FICA, retirement plans, group health, dental, or life insurance premiums, or other employer funded benefits shall not be included in determining an employee’s hourly wage or salary. A Full-Time Position does not include seasonal positions. The average calculation aggregates Full-Time Positions, as defined below, as follows: i) hourly positions at their hourly rate; and ii) convert salaried positions to their hourly equivalent by dividing by 2080. The sum of the hourly rates and hourly equivalents will be divided by the cumulative number of Full-Time Positions for the applicable year as included in Section 4.6(a) for purposes of arriving at the average hourly rate required. For purposes of this definition, a salaried employee with a base annual salary equal to or greater than \$110,000 shall be treated as the equivalent of two Full-Time Positions.

“FTE Position” or “FTE” means one Full-Time Position filled by an individual working at the Property under contract or as an employee for Company a combined total of at least (i) 2080 hours for a day shift; or (ii) 1,872 hours for a second shift, during a calendar year.

“Grant Reimbursement Payment” means the amount of \$91,868.98, which, if the Purchase Grant were a loan, would be the amount of payment that would be made by Company to EIC based on the amount of the Purchase Grant accruing interest at an annual rate of two percent (2.0%) amortized over a period of 25 years and repaid in 25 annual installments.

“Improvements” means those alterations to, and improvements constructed on, the Property by Company at Company’s expense that are reasonable and necessary for Company to use the Property for the Required Use.

“Improvements Loan Grant Agreement” means that certain Economic Development Incentive Grant Agreement between the Parties substantially in the form attached hereto as Appendix 2 and incorporated herein by reference to be entered upon closing on the conveyance of the Property to Company.

“Land” means the real property described in **Exhibit A**, attached hereto and incorporated herein by reference.

“Local Sales and Use Tax” shall mean (a) the one percent (1%) sales and use tax imposed by the City pursuant to Chapter 321, Texas Tax Code and (b) the one-half of one percent (0.5%) sales and use tax imposed pursuant to the Development Corporation Act, Title 12, Subt. C-1, Ch. 501-505, Texas Government Code, for the benefit of EIC, on the sale of Taxable Items by Company Consummated within the City.

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“Person” means an individual, corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

“Project” means the design and construction of the Improvements, including costs related to site development with utilities, landscaping, parking, and other associated improvements, and the purchase and installation of manufacturing equipment and other personal property reasonable and necessary for the operation of Company’s manufacturing and distribution facility at the Land.

“Property” means, collectively, the Improvements and the Land.

“Purchase Agreements” means, collectively: (i) that certain *Commercial Contract – Unimproved Property* between EIC (as Buyer) and Kerrville Airport Commerce Park, Ltd. (as Seller) effective May 15, 2020, providing for the purchase by EIC of Tract 1 of the Land as described in **Exhibit A**; and (ii) that certain *Commercial Contract – Improved Property* between EIC (as Buyer) and Steven M. Chapman and Cynthia C. Chapman (as Seller) effective April 13, 2020, providing for the purchase by EIC of Tract 2 of the Land as described in **Exhibit A**.

“Purchase Grant” means an economic development incentive grant in the amount of \$1,793,600 to be applied by EIC to the Purchase Price of the Land upon the closing of said purchase by Company in accordance with this Agreement.

“Purchase Price” means the amount of \$1,793,600 to be paid by Company for the purchase of the Land and existing improvements.

“Related Agreements” means any written agreement, not including this Agreement, by and between (i) EIC and/or City and (ii) Company or any of Company’s Affiliates, including, but not limited to, (a) the City 380 Agreement and (b) the Improvements Loan Grant Agreement but not including the lease for office space.

“Required Use” means use of the Property for (i) warehousing, manufacturing, and general office purposes in association with Company’s business of manufacturing and assembling circuit card assemblies and cable and fiber harnesses for the aerospace industry, similar activities thereto, and activities necessary to support the foregoing; and, (ii) such other purposes as EIC may from time to time authorize in writing.

“Taxable Items” shall mean both “taxable items” and “taxable services” as those terms are defined by Chapter 151, Texas Tax Code, as amended.



## Article II Term

**2.1. Effective Date and Termination.** The term of this Agreement (the “Term”) commences on the Effective Date, and terminates on September 1, 2045, unless terminated by mutual agreement of the Parties or as follows:

(a) On the date EIC elects to terminate this Agreement by providing notice to Company if Commencement of Construction of the Improvements does not occur by the date set forth in Section 4.5, provided such notice is delivered before Commencement of Construction has actually occurred;

(b) On the date EIC elects to terminate this Agreement by providing notice to Company if Completion of Construction does not occur by the date set forth in Section 4.5 and, provided such notice is delivered before Completion of Construction has actually occurred;

(c) when terminated pursuant to Articles VIII or IX;

(d) at Company’s sole and absolute discretion upon Company’s repayment of the remaining balance of the Purchase Grant calculated in the same manner as set forth within Section 3.5.(b);

(e) if EIC fails to close on the purchase of the Land pursuant to the Purchase Agreements for any reason including obtaining financing relating to the purchase of Tract 2 of the Land;

(f) if Company fails to close on the purchase of the Land pursuant to the provisions set forth in **Exhibit B**, attached hereto and incorporated herein by reference; or

(g) as provided in Section 4.6(f).

**2.2 Rights upon Termination.** Upon termination of this Agreement, all rights, duties, and obligations of any kind under this Agreement will automatically expire and terminate and be of no other force and effect except to the extent such obligations expressly survive the termination of this Agreement. If termination of this Agreement occurs pursuant to Section 2.1(a), EIC shall have the option to repurchase the Land (“the Option”) for the amount of the Purchase Price, less the amount of the Purchase Grant. If EIC elects to exercise the Option, EIC must exercise the Option by presenting written notice to Company of the exercise of the

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Option not later than 5:00 PM Central Time on January 4, 2022. Not later than thirty (30) days after EIC's exercise of the Option, Company shall execute and deliver to EIC a special warranty deed substantially in the same form EIC executed to convey the Land to Company. EIC shall have the right to require specific performance by Company of reconveyance of the Land to EIC pursuant to this Section 2.2 and shall be entitled to recover costs and reasonable attorneys' fees in the event EIC is required to institute legal proceedings to enforce the provisions of this Section 2.2.

## Article III Purchase Grant

**3.1 Payment of Purchase Grant.** Subject to the obligation of Company to repay the Purchase Grant pursuant to Article IV or other provisions of this Agreement, and the continued satisfaction of all terms and conditions of this Agreement by Company, EIC agrees to provide Company with the Purchase Grant, which shall be credited against and applied to the Purchase Price of the Land upon the closing of said purchase by Company in accordance with the provisions set forth in **Exhibit B** ("the Purchase Agreement").

**3.2 Purchase Grant Limitations.** Under no circumstances shall the obligations of EIC hereunder be deemed to create any debt within the meaning of any constitutional or statutory provision. Further, EIC shall not be obligated to pay any commercial bank, lender, or similar institution for any loan or credit agreement made by Company. None of the obligations of EIC under this Agreement may be pledged or otherwise encumbered by Company in favor of any commercial lender and/or similar financial institution.

**3.3 Current Revenue.** The Purchase Grant will be paid solely from lawfully available funds that have been appropriated by EIC. EIC shall have no obligation or liability to pay any installment of the Purchase Grant except as allowed by law.

**3.4 Purchase Grant Limited to "Costs".** Payments made by EIC to or on behalf of Company from 4B Revenues will be limited to the payments of "costs" as defined by the Act and as specified above for the Project; provided, however, for purposes of this Agreement, "costs" do not include funds spent by interest or other fees paid by Company related to borrowing funds for the purpose of paying for the Project.

**3.5 Reimbursement of Purchase Grant.**

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(a) Subject to and except as provided by Article IV, Company shall reimburse to EIC the Purchase Grant in twenty-five (25) annual equal installments in the amount of the Grant Reimbursement Payment, the first such installment to be paid on the first day of the calendar month following the month in which the first (1st) anniversary of the closing occurs, with each subsequent installment being due on or before the same date of each subsequent year thereafter until the Purchase Grant and all accrued interest have been paid in full.

(b) If Company defaults in the payment of the Grant Reimbursement Payment or in the performance of any obligation in this Agreement or a Related Agreement and such default continues for a period of thirty (30) days after EIC sends Company written notice of such default, EIC may declare the unpaid balance, earned interest, and any other amounts owed on the Purchase Grant immediately due. Company waives all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

(c) Company also agrees to pay reasonable attorney's fees and court and other costs if this Agreement is placed in the hands of an attorney to collect or enforce the repayment of the Purchase Grant. Such expenses will bear interest from the date that EIC sends Company written demand to pay such expenses, at the highest rate of interest allowed by law. Company will pay EIC such expenses and interest on demand at the place set forth for providing notices in Section 10.4, below. Such expenses and interest will become part of the debt evidenced by this Agreement and will be secured by any security for payment.

**3.6 Accrual of Interest on Purchase Grant.** The unpaid balance of the Purchase Grant shall accrue interest at a rate of two percent (2.0%) per year commencing on the first day of the calendar month following the Commencement Date.

## **Article IV Conditions to the Economic Development Grant**

**4.1 Generally.** The obligation of EIC to provide the Purchase Grant to and for the benefit of Company and Company's obligation to repay, and to be excused from repayment of all or any portion of the Purchase Grant to EIC, is conditioned upon Company's compliance with the terms and conditions of this Agreement and

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specifically, each of the conditions set forth in this Article IV.

**4.2 Good Standing.** Company shall not have an incurred a breach or default of this Agreement beyond any applicable notice and cure period.

**4.3 Development Regulations.** Notwithstanding that the Land is not on the Effective Date and on the date of closing of the conveyance of the Land to Company located within City's corporate limits, Company agrees to comply with all City ordinances and regulations, including all building codes, subdivision regulations, and zoning applicable to development of the Land and construction of the Improvements if the Land were located within City's corporate limits.

**4.4 Required Use.** Commencing on the Completion of Construction and continuing thereafter until the termination of this Agreement, the Property shall be used solely for the Required Use and the operation and occupancy of the Property in conformance with the Required Use shall not cease for more than six (6) months, except in connection with and to the extent of an event of Force Majeure.

**4.5 Commencement and Completion of Construction.** Subject to delays resulting from Force Majeure events, Company shall cause Commencement of Construction of the Improvements to occur not later than January 4, 2021, and cause Completion of Construction of the Improvements not later than May 31, 2021. The foregoing deadlines for Commencement of Construction and Completion of Construction of the Improvements shall be extended one (1) business day for each business day that an event of Force Majeure results in the inability of Company to cause said Commencement of Construction and/or Completion of Construction to occur.

**4.6 Full-Time Positions.**

(a) After the Effective Date, but in no case later than the one hundred twentieth (120<sup>th</sup>) day after Completion of Construction, Company shall create and fill no fewer than fifteen (15) Full-Time Positions. Commencing with calendar year 2022 and each calendar year thereafter through the end of the Term, the number of Full-Time Positions created and filled by Company at the Property during the specified calendar year shall be as follows:

| <b>End of Calendar Year<br/>(12/31)</b> | <b>Minimum No. FTE's<br/>for Calendar Year</b> |
|-----------------------------------------|------------------------------------------------|
| 2021                                    | 15                                             |

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|           |     |
|-----------|-----|
| 2022      | 40  |
| 2023      | 60  |
| 2024      | 80  |
| 2025      | 100 |
| 2026      | 120 |
| 2027      | 140 |
| 2028      | 160 |
| 2029      | 180 |
| 2030      | 200 |
| 2031-2035 | 200 |
| 2036-2040 | 300 |
| 2041-2045 | 400 |

The minimum number of FTEs each year shall be based on a weekly average count of FTEs working at the Property for each calendar week during the calendar year. For purposes of the foregoing calculation, a person employed in a Full-Time Position who is not working at the Property because the person is on any type of excused paid leave (*e.g.*, vacation, sick leave, paid family leave, professional training, and similar purposes), or is on an unpaid leave pursuant to the Family Medical Leave Act or other federal or state law which requires Company to retain the person as an employee while absent from work, will be included in the weekly count of Full-Time Positions.

(b) Company shall use its best efforts and show a preference in its hiring process to hire 60% of FTE's who are permanent residents of Kerr County and shall encourage future employees who do not reside in Kerr County to re-locate there.

(c) Not later than February 1 following the end of each calendar year identified in Section 4.6(a), Company shall deliver to EIC a copy of employment records, Texas Workforce Commission reports, or other documentation as is reasonably required by EIC to demonstrate Company's compliance with the required number of Full-Time Positions required by Section 4.6(a) along with a sworn statement from an authorized officer of Company confirming Company's compliance with Sections 4.6(a) and 4.6(b). Company's failure to provide the information required by this Section 4.6(c) constitutes a breach of

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this Agreement and shall constitute the basis for requiring Company to make a Grant Reimbursement Payment in accordance with Section 3.5.

(d) If Company fails to establish that it has employed the minimum number of Full-Time Positions as required by Section 4.6(a) for a calendar year, not later than thirty (30) days after delivery of written demand from EIC, Company shall pay to EIC a Grant Reimbursement Payment for such calendar year in full. If, however, at least 85% of the minimum number of Full-Time Positions were employed as required by Section 4.6(a) for a calendar year, the amount of the Grant Reimbursement Payment shall be proportionate to the number of Full-Time Positions actually employed in relation to the number of Full-Time Positions that were required to be employed for said calendar year. Any Grant Reimbursement Payment not paid by Company to EIC on or before the thirtieth (30<sup>th</sup>) day after the date of delivery of the demand for such payment shall bear interest at the maximum rate allowed by law. EIC shall further be entitled to costs and reasonable attorney fees if EIC institutes any action to collect any delinquent Grant Reimbursement Payment(s).

(e) Company's payment of a Grant Reimbursement Payment when required pursuant to Section 4.6(d) shall not constitute a default of this Agreement that constitutes the basis for termination of this Agreement. Further, the requirement for Company to pay a Grant Reimbursement Payment shall apply only to the calendar years for which Company fails to employ the required minimum number of Full-Time Positions.

(f) If Company employs 400 or more Full Time Positions for five (5) consecutive calendar years during the Term of this Agreement, this Agreement shall terminate on the last day of the calendar month after EIC verifies and determines that Company employed 400 or more Full Time Positions for the fifth (5<sup>th</sup>) of said five (5) consecutive years.

**4.7 Records.** Company shall keep and maintain complete and accurate records relating to its costs of the Improvements and employment information related to Full-Time Positions, separate and identifiable from its other records, for three (3) years following the termination of this Agreement. The City Manager or designee, as representatives for EIC, shall be entitled to inspect Company's records during the term of this Agreement and for three (3) years thereafter, upon reasonable notice at Company's offices in Kerrville, Texas.

**4.8 Point of Sale.** The sale of goods manufactured or assembled on the Property shall be deemed to be consummated at the Property for the purposes of

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determining the collection of state and local sales and use taxes to the extent allowed by Texas Tax Code §321.203, as amended.

**4.9 Annexation.** Concurrent with closing on the purchase of the Land, Company agrees to petition City to annex the Land into the City Limits as soon as reasonably possible after the closing.

**4.10 Purchase of the Land.** Company agrees to purchase the Land from EIC in accordance with the provisions set forth in **Exhibit B**.

**4.11 Required Capital Investment.** Company agrees to make a Capital Investment at the Property not later than August 31, 2021.

## Article V Sale of Project, Merger or Consolidation of Company

**5.1 Sale of Company Assets.** A sale of all or any of the assets of Company shall not release Company from its duties and responsibilities to EIC under the terms of this Agreement and shall not result in the assignment of this Agreement by such acquiring entity without prior written consent from EIC, which will not be unreasonably withheld; provided, that Company's proposed successor shall have the financial condition to fully satisfy Company's duties and responsibilities hereunder and agrees to assume Company's responsibilities under this Agreement. EIC may, in its sole discretion, reasonably determine whether such proposed successor's financial condition is satisfactory.

**5.2 Merger.** In the event of any proposed merger or other consolidation of Company with any third party not affiliated with Company, not later than thirty (30) days prior to any such merger or consolidation, Company shall provide EIC with information and assurance reasonably acceptable to EIC regarding: (i) the surviving entity's assumption and satisfaction of the Company's obligations hereunder; and (ii) the financial condition of the surviving entity upon such merger or other consolidation to demonstrate that the surviving entity shall have the financial condition to fully satisfy Company's duties and responsibilities under this Agreement.

**5.3 EIC Rights.** Notwithstanding anything in this Agreement to the contrary, it is expressly understood and agreed that EIC shall have no rights to approve or disapprove any sale or merger transaction of any kind involving Company. In the event of any sale or merger involving Company or its affiliates, the surviving entity shall assume Company's obligations and rights hereunder and be entitled to any and all benefits to be received pursuant to this Agreement.

**Article VI  
Company's Representations and Warranties**

Company represents and warrants as of the date hereof:

(a) Company is a North Dakota corporation existing in good standing and authorized to do business in the State of Texas;

(b) Execution of this Agreement has been duly authorized by Company and this Agreement is not in contravention of Company's corporate charter, or any agreement or instrument to which Company is a party or by which it may be bound as of the date hereof;

(c) No litigation or governmental proceeding is pending, or, to the knowledge of Company, threatened against or affecting Company, which may result in a material adverse change in Company's business, properties, or operations sufficient to jeopardize Company's legal existence or for-profit viability; and

(d) No written application, written statement, or correspondence submitted by Company to EIC in connection with this Agreement, or in connection with any transaction contemplated hereby, to the knowledge of Company, contains any untrue statement of a material fact or fails to state any material fact necessary to keep the statements contained therein from being misleading.

(e) Except as expressly set forth in this Article VI, Company makes no other representation or warranty of any kind in connection with or related to the provisions of this Agreement.

**Article VII  
EIC'S Representations and Warranties**

EIC represents and warrants as of the date hereof:

(a) EIC, to the best of the knowledge of its Board of Directors, is legally authorized to enter into this Agreement by virtue of the statute under which it is governed and by the authorities and powers vested in it as a corporation duly and properly organized under the Act;

(b) Execution of this Agreement has been duly authorized by EIC;



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(c) No litigation or governmental proceeding is pending, or, to the knowledge of any of EIC's officers, threatened against or affecting EIC, which may result in EIC's inability to meet its obligations under this Agreement; and

(d) EIC has no reasonable basis for believing that it has or will have incurred debts beyond its ability to pay as such debts mature, including but not limited to the obligations set forth in this Agreement.

(e) Except as expressly set forth in this Article VII, EIC makes no other representation or warranty of any kind in connection with or related to the provisions of this Agreement.

## **Article VIII Conditions Under Which EIC May Suspend Performance of Its Obligations Under This Agreement**

EIC may, at its sole option and after fifteen (15) days written notice to Company, suspend EIC's performance under this Agreement until such time as Company shall have cured the condition(s) and so notified EIC, in writing, that the condition(s) have been cured:

(a) Company becomes insolvent;

(b) The appointment of a receiver of Company, or of all or any substantial part of the Property, and the failure of such receiver to be discharged within sixty (60) days thereafter;

(c) The adjudication of Company as bankrupt;

(d) The filing by Company of a petition to be adjudged as bankrupt, or a petition or answer seeking reorganization or admitting the material allegations of a petition filed against it in any bankruptcy or reorganization proceeding; or

(e) Except as allowed in Section 4.8, above, a change to a location outside the City Limits on the location where sales of Taxable Items are deemed to be Consummated such that Local Sales and Use Tax is not imposed on such sales.

Should any of the foregoing conditions not be cured by Company within ninety (90) days after the onset of the condition, Company will be considered to have breached this Agreement and EIC may, at its option, with written notice to Company, terminate this Agreement, and Company shall be obligated to pay in full to EIC the

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remaining unpaid balance of the Purchase Grant plus any accrued but unpaid interest on such unpaid balance.

## Article IX Remedies

**9.1 Notice and Opportunity to Cure.** Except as otherwise provided in this Agreement, in the event of any default in or breach of this Agreement by any Party, or any successor to such Party, such defaulting or breaching Party (or successor) shall upon written notice from the other proceed immediately to cure or remedy such default or breach, and, in any event, within sixty (60) days after receipt of such notice. In the event that remedial action is not taken or not diligently pursued and the default or breach shall not be cured or remedied within a reasonable time (but in no event later than ninety (90) days from the date of notification of such breach), the aggrieved Party may institute such proceedings as may be necessary or desirable in its opinion to cure and remedy such default or breach, including but not limited to, seeking specific performance and/or injunctive relief, enforcement by mandamus or by the appointment of a receiver in equity with power to charge and collect rents, purchase price payments, and loan payments and to apply the revenues from the project in accordance with this Agreement, as required by the Act. This provision and specifically the notice and time to cure shall not apply to the obligation of Company found within Article IV.

**9.2 Termination.** Upon breach of this Agreement by either Party and the failure to cure as permitted by Section 9.1, the non-breaching Party shall have the sole right and discretion to either terminate this Agreement and/or pursue any and all remedies which may be provided by law and this Agreement. Each Party acknowledges and agrees that no Party hereunder shall be entitled to recover any amounts in excess of the Purchase Grant plus unpaid accrued interest contracted for under this Agreement.

**9.3 Breach of Related Agreements.** Company's breach of a Related Agreement shall constitute a default of this Agreement. Company shall timely cure any default of the provisions of a Related Agreement in accordance with the terms of the Related Agreement. In the event of termination of a Related Agreement following Company's failure to timely cure a default of said Related Agreement, EIC may, at its sole option, terminate this Agreement, in which case Company shall be required to pay any remaining balance of the Purchase Grant plus any accrued but unpaid interest as provided in this Agreement.

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**9.4 Delay Not Waiver.** Any delay by any Party in instituting or prosecuting any actions or proceedings or otherwise asserting its rights shall not, so long as the breach or default by another Party shall be continuing, operate as a waiver of such rights or to deprive it of or limit such rights in any way; nor shall any waiver in fact be made by any party with respect to any specific default by any other party except to the extent specifically waived in writing.

## Article X General Provisions

**10.1 Severability.** The provisions of this Agreement are severable, and if for any reason a provision of this Agreement is determined to be invalid by a court having competent jurisdiction over the subject matter of the invalid provision, the invalidity shall not affect other provisions that can be given effect without the invalid provision. Further, in lieu of such illegal, invalid, or unenforceable provision, there shall be added automatically as a part of this Agreement, a provision as similar in its terms to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable.

**10.2 Amendment.** This Agreement may be amended only by written amendment signed by both Parties.

**10.3 Venue.** All obligations performed under this Agreement shall be made or performed in Kerrville, Kerr County, Texas. Venue shall lie in a state court of competent jurisdiction in Kerr County, Texas; and this Agreement shall be governed by and construed in accordance with the laws of the State of Texas without respect to the conflict of laws rules thereof.

**10.4 Notices.** All notices given with respect to this Agreement shall be in writing and shall be deemed to have been properly given for all purposes (i) if sent by a nationally recognized overnight carrier for next business day delivery, on the first business day following deposit of such notice with such carrier unless such carrier confirms such notice was not delivered, then on the day such carrier actually delivers such notice, or (ii) if personally delivered, on the actual date of delivery, or (iii) if sent by certified U.S. Mail, return receipt requested postage prepaid, on the fifth business day following the date of mailing, or (iv) if sent by facsimile, then on the actual date of delivery (as evidenced by a facsimile confirmation) provided that a copy of the facsimile and confirmation is also sent by regular U.S. Mail, addressed as follows:

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For EIC

*President*

City of Kerrville, Texas, Economic Improvement Corporation  
701 Main Street  
Kerrville, Texas 78028

*With a copy to:*

*City Manager*

City of Kerrville  
701 Main Street  
Kerrville, Texas 78028

For Company

Killdeer Mountain Manufacturing, Inc.  
Attn: President/CEO  
233 Rodeo Drive  
Killdeer, North Dakota 58640

**10.5 Assignment.** This Agreement is binding upon the Parties and their successors and assigns. Except as set forth in Article V, this Agreement may not be assigned by either Party without the specific prior written consent of the other, which consent will not be unreasonably withheld. In the event that a Party consents to any valid assignment of this Agreement by the other Party, the assigning Party shall be relieved of any and all obligations and liabilities on the part of such assigning Party under this Agreement. Company may, without written consent of EIC, assign this Agreement to any entity controlled and 100% owned by Company or by the parent, subsidiary, or affiliate of Company provided the entity assumes all of Company's obligations and liabilities under this Agreement; agrees to comply with all provisions of this Agreement; has the legal, managerial, technical, and financial ability to properly perform and discharge such obligations and liabilities; and such abilities are each at least as great as those of Company and Company provides a written guarantee of such assignee's performance in a form reasonably acceptable to EIC. EIC shall be advised in writing of such assignment and of the entity's qualifications at least sixty (60) days before such assignment occurs.

**10.6 Parties in Interest.** Nothing in this Agreement shall entitle any Party other than Company or EIC to any claim, cause of action, remedy, or right of any kind except as expressly provided in Article IX.

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**10.7 Interpretation.** Each Party has had the opportunity to be represented by counsel of its choice in negotiating this Agreement. This Agreement shall therefore be deemed to have been negotiated and prepared at the joint request, direction, and construction of the Parties, at arm's length, with the advice and participation of counsel, and will be interpreted in accordance with its terms without favor to any Party.

**10.8 No Joint Venture.** Nothing contained in this Agreement is intended by the Parties to create a partnership or joint venture between the Parties.

**10.9 Survival of Terms.** All rights, duties, liabilities, and obligations accrued prior to termination shall survive termination.

**10.10 Entire Agreement.** This Agreement represents the entire agreement of the Parties with respect to the subject matter hereof.

**10.11 Recitals.** The recitals to this Agreement are incorporated herein.

**10.12 Counterparts.** This Agreement may be executed in counterparts. Each of the counterparts shall be deemed an original instrument, but all of the counterparts shall constitute one and the same instrument.

**10.13 Employment of Undocumented Workers.** During the term of this Agreement, Company agrees not to knowingly employ any undocumented workers, and if convicted of a violation under 8 U.S.C. Section 1324a (f), Company shall repay the Purchase Grant herein and any other funds received by Company from EIC as of the date of such violation within 120 days after the date Company is notified by EIC of such violation, plus interest at the rate of 6% compounded annually from the date of violation until paid. Company is not liable for a violation of this Section by a subsidiary, Affiliate, or franchisees of Company or by a person with whom Company contracts, or any other Person other than Company.

**10.14 Non-Business Day.** If the final date of any period provided herein for the performance of an obligation or for the taking of any action falls on a Saturday, Sunday, or a City recognized holiday, then the end of such period shall be extended to the next business day.

**10.15 Headings.** Section headings are for convenience of reference only and do not modify or restrict any provisions hereof and shall not be used to construe any provisions.

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**10.16 Prohibition of Boycott of Israel.** Company verifies that (i) it does not Boycott Israel; and (ii) will not Boycott Israel during the term of the Agreement. This section does not apply if Company is a sole proprietor, a non-profit entity or a governmental entity; and only applies if: (i) the Company has ten (10) or more fulltime employees and (ii) this Agreement has a value of \$100,000.00 or more to be paid under the terms of this Agreement.

**10.17 EIC Inspection Rights.** Authorized representatives of EIC shall have the right to enter the Property during the term of this Agreement for purposes of making such inspections as reasonable and necessary to ensure Company's compliance with this Agreement. Such inspections shall be during Company's regular business hours and conducted no earlier than 24 hours after EIC provides written notice to Company of EIC's intent to conduct such inspection.

*(Signature Page to Follow)*

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**SIGNED AND AGREED** on this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

**CITY OF KERRVILLE, TEXAS ECONOMIC  
IMPROVEMENT CORPORATION**

\_\_\_\_\_  
Greg Richards, President

**Attest:**

\_\_\_\_\_  
Keesha Franchina, Recording Secretary

**Approved as to Form:**

\_\_\_\_\_  
Michael C. Hayes, Attorney for EIC

**SIGNED AND AGREED** on this \_\_\_\_\_ day of \_\_\_\_\_,  
2020.

**KILLDEER MOUNTAIN MANUFACTURING, INC.**

\_\_\_\_\_  
Donald Hedger, President/CEO

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## EXHIBIT A DESCRIPTION OF THE LAND

### Tract 1:

Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, according to the map or plat thereof recorded in Volume 7, Page 220, Plat Records of Kerr County, Texas.

**Tract 2:** Being a 5.00 acre tract of land located in the O. V. Robinson Survey No. 44, Abstract No. 282, Kerr County, Texas, and being a portion of that certain called 10.00 acre tract, recorded in volume 1186, page 80, Official Public Records of Kerr County, Texas, said 5.00 acre tract being more particularly described by metes and bounds as follows:

Note: all bearings based on the Texas State Plane Coordinate System, South Central Zone (North American Datum of 1983, 2011 Adjustment);

BEGINNING at a ½” rebar with “Voelkel” cap found in the southwest right-of-way line of State Highway No. 27, (100’ right-of-way) at the northwest corner of the herein described tract, the northeast corner of the remaining portion of a called 141.38 acre tract, recorded in Volume 882, Page 638, Real Property Records of Kerr County, Texas;

THENCE S 52° 12’ 48” E, along the southwest right-of-way line of State Highway No. 27, a distance of 449.84’ (S 52° 14’ E) to a ½” rebar found for northeast corner at the northwest corner of Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, recorded in Volume 7, Page 220, Plat Records of Kerr County, Texas;

THENCE S 00° 55’ 28” E, with the west boundary line of Lot 1, Block 1, a distance of 479.85’ (S 00° 57’ E) to a ½” rebar with “Voelkel” cap found for southeast corner at the southwest corner of Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, an angle point in the north boundary line of Lot 2R, Block 1, Kerrville Airport Commerce Park, Phase 1 Replat, recorded in Volume 7, Page 383, Plat Records of Kerr County, Texas;

THENCE S 89° 07’ 25” W, with the north boundary line of Lot 2R, Block 1, a distance of 351.13’ (S 89° 03’ 06” W, 351.18’) to a ½” rebar with “Voelkel” cap found for southwest corner in the east boundary line of the remaining portion of the called 141.38 acre tract;

THENCE N 00° 54’ 57” W, with the east boundary line of the remaining portion of



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the called 141.38 acre tract, a distance of 760.89' (N 00° 57' W, 2029.5') to the POINT OF BEGINNING, CONTAINING 5.00 acres of land, more or less.

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## EXHIBIT B TERMS AND CONDITIONS OF SALE OF LAND TO COMPANY

As a condition of this Agreement, EIC agrees to sell to Company, and Company agrees to purchase from EIC, the Land, pursuant to the following terms and conditions:

1. **Title and Survey.**

(a) Not later than (10) days after the Effective Date, EIC will, at EIC's expense, cause the Title Company to issue, with respect to the Land, the following:

(i) a current commitment for an Owner's Policy of Title Insurance for the Land from the Title Company, setting forth the state of title to the Land together with any easements or restrictions (existing or created pursuant hereto) benefiting or burdening the Land, together with all exceptions or conditions to such title;

(ii) best available copies of all documents referenced in the Title Commitment;

(iii) tax certificate(s) regarding the payment of ad valorem taxes for current and prior years;

(iv) copies of any surveys of the Land in EIC's possession; and

(v) copies of any environmental studies of the Land in EIC's possession.

(b) EIC has previously acquired a survey of the Property which is believed by EIC to acceptable to the Title Company and has provided of copy of such survey to Company. EIC agrees to provide to Company and Title Company a Form T-47 affidavit with respect to said survey. However, not later than fifteen (15) calendar days after the Effective Date, Company may, at Company's expense and option, obtain an updated survey (the "Update Survey") of the Land prepared by a duly licensed Texas Registered Public Land Surveyor. The Updated Survey shall be staked on the ground, and the plat shall show the location of all improvements, highways, streets, roads, railroads, rivers, creeks, or other water courses, fences, easements, and rights-of-way on or adjacent to the Land, if any, and shall contain the surveyor's certification that there are no encroachments on the Land other than what

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are listed on the Title Commitment and shall set forth a metes and bounds description of the Land. If different than the platted description of the Land because of save and except portions of the platted lot, then, the legal description contained in said Updated Survey shall be used by the Parties as the legal description contained in the Special Warranty Deed. Otherwise, if there are no save and exception portions of the platted lot, then the platted lot legal description will be used in the Special Warranty Deed.

(c) Company shall, not later than five (5) days after Company's receipt of the last of the Updated Survey (or after the expiration of the period for obtaining the Updated Survey, whether or not an Updated Survey is obtained, whichever is earlier), and the Title Commitment notify EIC and Title Company in writing of any objections to the Updated Survey or Title Commitment related to the Land. If there are any timely written objections made by Company in accordance with this Section 1(c), EIC may, but shall be under no obligation to, attempt to satisfy same prior to Closing. EIC shall not be required to incur any cost to cure any of Company's objections. If EIC delivers written notice to Company not later than the fifth (5<sup>th</sup>) business day after EIC's receipt of Company's objections that EIC is unwilling or unable to satisfy such objections, Company may, as its sole and exclusive remedy, either (i) waive such objections and accept such title as EIC is able to convey prior to the expiration of the Inspection Period, or (ii) terminate this Agreement by written notice to EIC and the Title Company prior to the expiration of the Inspection Period, whereupon neither Party shall have any further rights or obligations hereunder except as to those rights or obligations which are stated to expressly survive the termination of this Agreement. Any exceptions to title to which Company does not timely object in accordance with this Section 1(c) or to which Company objects but are subsequently waived by Company shall be deemed to be Permitted Exceptions.

(d) The transaction described in this Agreement and the transactions described in the Purchase Contracts shall be treated by the Title Company as a pass-through transaction such that Title Company shall issue only one owner's title policy to Company as the ultimate purchaser and owner of the Land pursuant to the Purchase Contracts.

## 2. Inspection Period.

(a) During the twenty (20) day period after the Effective Date (the "Inspection Period"), Company and its agents, contractors, representatives, consultants or employees shall have the right to enter upon the Land during regular business hours to conduct such non-invasive inspections, tests and studies as they

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may deem necessary; provided, however, that the costs, risks and expenses of Company's investigation shall be borne solely by Company and Company shall use its best efforts to avoid damage to the Land. If for any reason Company determines not to purchase the Land, Company may, as its sole and exclusive remedy under this Section 2(a), terminate this Agreement by notifying EIC and Title Company in writing prior to the end of the Inspection Period, in which event, neither Party shall have any further claim against the other under this Agreement, except as otherwise provided herein.

(b) Company may enter the Land to conduct its inspection but shall be solely responsible for any damages caused thereby. **To the extent allowed by law, Company hereby indemnifies, protects and holds EIC, the Sellers of the Land in the Purchase Agreements, and their respective, officers, employees, agents, beneficiaries, heirs, successors, and assigns (collectively, "the Indemnitees") harmless from any and all liens, claims, causes of action, damages, liabilities and expenses (including reasonable attorneys' fees) and including, without limitation, physical damage or injury, directly or indirectly caused or resulting from Company's review and inspections of the Land, except to the extent proximately caused by the negligent act(s) or omission(s) or willful misconduct of one or more of the Indemnitees. Nothing stated herein shall be construed as a waiver of the protections afforded EIC pursuant to the Act or other law, including, but not limited to, any immunity to liability or immunity from suit afforded EIC under the Texas Tort Claims Act (Chapter 101, Tex. Civ. Prac. & Rem Code, as amended). Notwithstanding anything to the contrary in this Agreement, Company's indemnification obligations set forth in this Section 2(b) will survive termination and closing of this Agreement.**

(c) The provisions of this Section 2 shall expressly survive any termination of this Agreement or the Closing.

3. **Closing.** The closing of the sale of the Land in accordance with the terms of this Agreement (the "Closing") shall occur on the closing dates in the Purchase Agreements ("Closing Date") at the Title Company or by mail or overnight delivery service, or at such other time as may be agreeable to the parties.

4. **Closing Deliverables.**

(a) At the Closing, EIC shall deliver to the Title Company:

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(i) a special warranty deed, (the “Deed”) in form and substance reasonably acceptable to Company, conveying good and indefeasible title to the Land to Company, free and clear of any and all encumbrances except the Permitted Exceptions (as defined in Section 7 hereof);

(ii) such other documents as may be reasonably required by Title Company in order to cause Title Company to issue a Texas owner’s policy of title insurance (or equivalent) in the amount of the Purchase Price, insuring such title to the Company;

(iii) possession of the Land, free of parties in possession except as set out in Schedule B of the Title Commitment, as depicted in the Survey, and as provided by law in the lien in favor of taxing authorities for real property taxes not yet due and payable;

(iv) the Finish-Out Grant Agreement, signed by EIC.

(b) At the Closing, Company shall deliver to EIC through the Title Company:

(i) the Purchase Price, less a credit in the amount of the Purchase Grant;

(ii) the Deed of Trust, signed by Company in recordable form;

(iii) the Finish-Out Grant Agreement sign by Company; and

(iv) such other documents as may be reasonably required by the Title Company.

## 5. **Taxes.**

(a) EIC shall pay at or before Closing all ad valorem taxes, plus any penalties, interest, court costs, and attorneys’ fees, if any, due on delinquent amounts not paid, for tax years prior to the year in which Closing occurs, which amounts may be paid out of the Purchase Price notwithstanding anything in this Agreement to the contrary. Ad valorem taxes due but not yet payable for the current year on the Land shall be pro-rated as of the date of Closing between Company and EIC, and Company shall be responsible for payment of the current year taxes when due. If the Land has been the subject of special valuation and reduced tax assessments pursuant to the

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provisions of Chapter 23, Subchapter D, of the Texas Tax Code or under any other provision of law with respect to any period before the Closing, and if additional taxes, penalties, or interest are assessed pursuant to Texas Tax Code §23.55 or under the other provision of law, Company will be responsible for the payment of these additional taxes.

## 6. Closing Costs.

(a) EIC agrees to pay and be responsible for the following closing costs:

(i) All costs related to obtaining any release of mortgage and liens on the Land, including the costs or preparation and recording of any related releases of liens;

(ii) All fees and premiums for the Basic Owners Title Policy and, if requested by Company, fees for issuance of the survey exception endorsement;

(iii) The Title Company's escrow fees;

(iv) Costs for any tax certificates issued;

(v) EIC's attorneys' fees, if any;

(vi) Recording fees for the Special Warranty Deed and Deed of Trust;  
and

(vii) Such other incidental costs and fees customarily paid by EIC of property in Kerr County, Texas, for transactions of a similar nature to the transaction contemplated herein.

(b) Company hereby agrees to pay and be responsible for the following closing costs:

(i) All fees and/or premiums for any amendments to and endorsements to the Basic Owner's Title Policy which Company requests other than the survey exception endorsement;

(ii) All fees and/or premiums for any Mortgagee Title Policy requested by Company;

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- (iii) All costs and fees for the Survey, if obtained;
- (iv) Company's attorneys' fees; and
- (vi) Such other incidental costs and fees customarily paid by sellers of property in Kerr County, Texas, for transactions of a similar nature to the transaction contemplated herein.

7. **Permitted Exceptions.** The (i) lien for current taxes not yet due and payable, (ii) any matters shown on the Title Commitment which are promulgated by law to appear in any title insurance commitment or policy, (iii) any exceptions to title to which Company does not timely object in accordance with Section 1(c) above or to which Company objects but are subsequently waived by Company, (iv) zoning ordinances, (v) existing oil and gas leases and reservations of the mineral estate, (vi) items shown on the Survey and (vii) any deed of trust lien or other lien against the Land created at Closing, shall not be valid objections to title and shall be deemed to be "Permitted Exceptions". Subject to the foregoing, as a condition of Closing, EIC must resolve, at EIC's sole cost, the items that are listed on Schedule C of the Title Commitment which are by their nature EIC's responsibility, remove all liquidated liens, remove all exceptions that arise by, through, or under EIC after the Effective Date of this Agreement, and use due diligence to cure the title and survey objections that EIC has agreed in writing to cure pursuant to Section 1(c) above, if any.

8. **Representations and Covenants.** (a) EIC represents and covenants that: (i) to EIC's actual knowledge, without duty of inquiry, no other person has any interests in or claims against the Land (other than as reflected by the Title Commitment or the Survey); (ii) except as may be set forth in the documents delivered by EIC to Company pursuant to Section 1(a), EIC has no actual knowledge, without duty of inquiry, of any uncured violation of applicable laws, rules, regulations, codes or ordinances with respect to the Land, nor of any existence, release or disposal of any toxic or hazardous substance or waste upon or affecting the Land, nor of any pending or threatened litigation affecting the Land; and (iii) it will not hereafter encumber the Land.

(b) Company represents that it has authority to enter into this Agreement and that this Agreement represents the legal, valid and binding obligation of Company, enforceable against Company in accordance with its terms.

(c) The representations set forth in this Section 8 shall survive Closing.

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## 9. Land Sold As Is.

(a) Company hereby acknowledges and agrees that the sale of the Land hereunder is and will be made on an “as is, where is and with all faults” basis. The occurrence of Closing shall constitute an acknowledgment by Company that the Land was accepted without representation or warranty, express or implied (except as otherwise specifically set forth herein and except for the special warranties of title set forth in the special warranty deed).

(b) Except as otherwise specifically set forth in this Agreement and except for the special warranties of title set forth in the Deed, EIC hereby specifically negates and disclaims any representations, warranties or guaranties of any kind or character, whether express or implied, oral or written, past, present, future or otherwise, of, as to, concerning or with respect to the Land, including without limitation (i) the nature and condition of the Land and the suitability thereof for any and all activities and uses which Company may elect to conduct thereon, (ii) the nature and extent of any right-of-way, lease, possession, lien, encumbrance, license, reservation, condition or any other matter relating in any way to the Land, (iii) the compliance of the Land or its operation with any laws, ordinances or regulations of any government or other authority or body, (iv) the existence of any toxic or hazardous substance or waste in, on, under the surface of or about the Land, (v) geological conditions, including, without limitation, subsidence, subsurface conditions, water table, underground water reservoirs, limitations regarding the withdrawal of water and faulting, (vi) whether or not and to the extent to which the Land or any portion thereof is affected by any stream (surface or underground), body of water, flood prone area, floodplain, floodway or special flood hazard, (vii) drainage, (viii) zoning or land use restrictions rules and regulations to which the Property or any portion thereof may be subject, (ix) the availability of any utilities to the Land or any portion thereof including, without limitation, water, sewage, gas and electric and including the utility availability capacities allocated to the Land by the relevant governmental or regulatory authority, (x) usages of adjoining property, (xi) access to the Land or any portion thereof, (xii) the value, compliance with the plans and specifications, size, location, age, use, design, quality, description, durability, structural integrity, operation, leasing, title to, or physical or financial condition of the Land or any portion thereof, or any income, expenses, charges, liens, encumbrances, rights or claims on or affecting or pertaining to the Land or any part thereof, (xiii) the potential for further development of the Land, or (xiv) the merchantability of the Land or fitness of the Land for any particular purpose (Company affirming that Company has not relied on EIC’s skill or judgment to select or furnish the Land for any particular purpose, and that EIC makes no warranty that



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the Land is fit for any particular purpose).

(c) Land agrees that prior to the expiration of the Inspection Period it will have the opportunity to examine and investigate the Land and that, in purchasing the Land, Company will rely solely upon its independent examination, study, inspection and knowledge of the Land, and Company is relying solely upon its own examination, study, inspection, and, except for representations and warranties specifically set forth herein and, except for the special warranties of title set forth in the special warranty deed, knowledge of the Land and Company's determination of the value of the Land and uses to which the Land may be put, and not on any information provided or to be provided by EIC.

(d) The provisions of this Section 9 shall survive the termination of this Agreement and the Closing.

10. **Reservation of Minerals.** Company agrees that EIC, for itself and its successors and assigns, as their interests may appear, reserves unto EIC all oil, gas and other minerals owned by EIC located in and under and that may be produced from the Land to the extent not reserved by prior grantors; provided, however, EIC, for itself and its successors and assigns hereby waives all surface rights and other rights of ingress and egress in and to the Land, and agrees that in conducting operations with respect to the exploration for and production, processing, transporting and marketing of oil, gas and other minerals from the Land, that no portion of the surface of the Land will be used, occupied or damaged and that fixtures, equipment, buildings or structures used in connection with the exploitation of the reserved mineral, oil and gas rights, shall not be placed on the surface of the Land. Nothing herein, however, restricts or prohibits the pooling or unitization of the portion of the mineral estate owned by EIC with land other than the Land; or the exploration or production of the oil, gas, and other minerals by means of wells that are drilled or mines that open on land other than the Land but enter or bottom under the Land, provided that these operations in no manner interfere with the surface or subsurface support of any improvements constructed or to be constructed on the Land. The foregoing reservation of minerals and EIC's waiver of surface rights set forth above shall be included in the Deed.

11. **Condition of Closing.** The Closing on the purchase of the Property by Company shall be subject to and conditioned upon:

- (a) The Parties negotiating and executing the Finish-Out Grant Agreement (as defined below);

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- (b) Company executing in recordable form the Deed of Trust;
- (c) Company and City executing the City Incentive Agreement (as defined below); and
- (d) EIC closing on the purchase of the Land pursuant to the Purchase Agreements.

12 **Brokers.** The Parties represent and warrant they have worked with no broker relative to this transaction and that no brokerage commission is due and payable upon the Closing. To the extent allowed by law, each Party agrees to indemnify, defend, and hold the other Party harmless from and against any costs, expenses or liability for any compensation, commission, fee, or charges that may be claimed by any agent, finder or other similar party by reason of any dealings or acts of the indemnifying Party.

13 **Section References.** Unless stated otherwise, the references to Sections within this **Exhibit B** refer to the various sections in this **Exhibit B** and not the main body of this Agreement.

14. **Definitions.** The defined terms in this **Exhibit B** shall have the same meaning as set forth in Article I of this Agreement. In addition, the following words and phrases as used in this **Exhibit B** shall have the following meanings:

*City Incentive Agreement* means an economic development incentive agreement entered pursuant to the authority of Chapter 380 of the Texas Local Government Code between Company and City wherein City agrees to extend certain water and sanitary sewer service lines to the Land at City's cost and Company agrees to annex the Land into the City Limits.

*Deed of Trust* means that certain first lien deed of trust securing the repayment of the Purchase Grant, the form of which shall be substantially as set forth in **Appendix 1**, attached to this **Exhibit B**.

*Finish-Out Grant Agreement* means the Economic Development Incentive Agreement between Company and EIC substantially in the form attached as **Appendix 2** to this **Exhibit B** providing a grant in the amount of up to \$250,000 to be applied to costs for construction of the Improvements.

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*Inspection Period* means the period ending September 9, 2020.

*Purchase Price* means the amount of \$1,793,600 to be paid by Company for the purchase of the Land.

*Title Company* means Kerr County Abstract & Title Co., Ltd., 712 Earl Garrett Street, Kerrville, Texas 78028, Phone (830) 257-5151, Fax: (830) 792-4330.

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## Appendix 1 Form of Deed of Trust

### FORM OF DEED OF TRUST

**NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER**

STATE OF TEXAS                    §  
                                                  §  
COUNTY OF KERR               §

#### Deed of Trust

#### Terms

**Date:** \_\_\_\_\_, 2020

**Grantor:** Killdeer Mountain Manufacturing, Inc., a North Dakota corporation

**Grantor's Mailing Address:** Attn: President/CEO, 233 Rodeo Drive, Killdeer, North Dakota 58640

**Trustees:** Michael C. Hayes

**Trustee's Mailing Address:** 701 Main Street, Kerrville, Kerr County, Texas 78028

**Lender:** City of Kerrville, Texas, Economic Improvement Corporation, a Texas non-profit corporation

**Lender's Mailing Address:** 701 Main Street, Kerrville, Kerr County, Texas 78028

#### Obligation

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**Loan:**

**Date:** \_\_\_\_\_, 2020

**Original principal amount:** \$1,793,600.00

**Borrower:** Killdeer Mountain Manufacturing, Inc.

**Lender:** City of Kerrville, Texas, Economic Improvement Corporation

**Maturity date:** As set forth in the Economic Development Grant and Real Estate Purchase Agreement dated \_\_\_\_\_, 2020, between Lender and Borrower (the “Loan Grant Agreement”).

**Other Debt:** None

**Property (including any improvements):**The real property located in Kerr County, Texas, particularly described in **Exhibit A**, attached hereto and incorporated herein by reference.

**Prior Lien:** None

**Other Exceptions to Conveyance and Warranty:** (i) Any and all matters affecting the state of title to the Property recorded in the appropriate public records of Kerr County, Texas, or visible or apparent from an inspection of the Property, and (ii) all zoning, building and other laws, regulations and ordinances of any and all municipal, governmental and quasi-governmental bodies and agencies having jurisdiction over the Property or any part thereof.

For value received and to secure payment of the Obligation, Grantor conveys the Property to Trustee in trust. Grantor warrants and agrees to defend the title to the Property, subject to the Prior Lien and Other Exceptions to Conveyance and Warranty. On payment of the Obligation and all other amounts secured by this deed of trust, this deed of trust will have no further effect, and Lender will release it at Grantor’s expense.

## Clauses and Covenants

### A. Grantor’s Obligations

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Grantor agrees to—

1. keep the Property in good repair and condition;
2. pay all taxes and assessments on the Property before delinquency;
3. defend title to the Property subject to the Other Exceptions to Conveyance and Warranty and preserve the lien's priority as it is established in this deed of trust;
4. obey all laws, ordinances, and restrictive covenants applicable to the Property; and
5. if the lien of this deed of trust is not a first lien, pay or cause to be paid all prior lien notes and abide by or cause to be abided by all prior lien instruments.

## **B. Lender's Rights**

1. Lender may appoint in writing a substitute trustee, succeeding to all rights and responsibilities of Trustee.
2. If the proceeds of the Obligation are used to pay any debt secured by prior liens, Lender is subrogated to all the rights and liens of the holders of any debt so paid.
3. Notwithstanding the terms of the Loan Grant Agreement to the contrary, and unless applicable law prohibits, all payments received by Lender from Grantor with respect to the Obligation or this deed of trust may, at Lender's discretion, be applied first to amounts payable under this deed of trust and then to amounts due and payable to Lender with respect to the Obligation, to be applied to late charges, principal, or interest in the order Lender in its discretion determines.
4. If Grantor fails to perform any of Grantor's obligations, Lender may perform those obligations and be reimbursed by Grantor on demand for any amounts so paid, including attorney's fees, plus interest on those amounts from the dates of payment at the rate stated in the Loan Grant Agreement for matured, unpaid amounts. The amount to be reimbursed will be secured by this deed of trust.
5. If there is a default on the Obligation or if Grantor fails to perform any of Grantor's obligations, and the default continues for a period of 30 days after Lender

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sends Grantor written notice of such default, Lender may—

- a. declare the unpaid principal balance and earned interest on the Obligation immediately due;
  - b. direct Trustee to foreclose this lien, in which case Lender or Lender's agent will cause notice of the foreclosure sale to be given as provided by the Texas Property Code as then in effect; and
  - c. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited on the Obligation.
6. Lender may remedy any default without waiving it and may waive any default without waiving any prior or subsequent default.

## C. Trustee's Rights and Duties

If directed by Lender to foreclose this lien, Trustee will—

1. either personally or by agent give notice of the foreclosure sale as required by the Texas Property Code as then in effect;
2. sell and convey all or part of the Property "AS IS" to the highest bidder for cash with a general warranty binding Grantor, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty and without representation or warranty, express or implied, by Trustee;
3. from the proceeds of the sale, pay, in this order—
  - a. expenses of foreclosure, including a reasonable commission to Trustee;
  - b. to Lender, the full amount of principal, interest, attorney's fees, and other charges due and unpaid;
  - c. any amounts required by law to be paid before payment to Grantor; and
  - d. to Grantor, any balance; and

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4. be indemnified, held harmless, and defended by Lender against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this deed of trust, which includes all court and other costs, including attorney's fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.

## D. General Provisions

1. If any of the Property is sold under this deed of trust, Grantor must immediately surrender possession to the purchaser. If Grantor fails to do so, Grantor will become a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

2. Recitals in any trustee's deed conveying the Property will be presumed to be true.

3. Proceeding under this deed of trust, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

4. This lien will remain superior to liens later created even if the time of payment of all or part of the Obligation is extended or part of the Property is released.

5. If any portion of the Obligation cannot be lawfully secured by this deed of trust, payments will be applied first to discharge that portion.

6. Grantor assigns to Lender all amounts payable to or received by Grantor from condemnation of all or part of the Property, from private sale in lieu of condemnation, and from damages caused by public works or construction on or near the Property. After deducting any expenses incurred, including attorney's fees and court and other costs, Lender will either release any remaining amounts to Grantor or apply such amounts to reduce the Obligation. Lender will not be liable for failure to collect or to exercise diligence in collecting any such amounts. Grantor will immediately give Lender notice of any actual or threatened proceedings for condemnation of all or part of the Property.

7. Grantor assigns to Lender absolutely, not only as collateral, all present and future rent and other income and receipts from the Property. Grantor warrants the validity and enforceability of the assignment. Grantor may as Lender's licensee collect rent and other income and receipts as long as Grantor is not in default with respect to the Obligation or this deed of trust. Grantor will apply all rent and other



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income and receipts to payment of the Obligation and performance of this deed of trust, but if the rent and other income and receipts exceed the amount due with respect to the Obligation and the deed of trust, Grantor may retain the excess. If Grantor defaults in payment of the Obligation or performance of this deed of trust, Lender may terminate Grantor's license to collect rent and other income and then as Grantor's agent may rent the Property and collect all rent and other income and receipts. Lender neither has nor assumes any obligations as lessor or landlord with respect to any occupant of the Property. Lender may exercise Lender's rights and remedies under this paragraph without taking possession of the Property. Lender will apply all rent and other income and receipts collected under this paragraph first to expenses incurred in exercising Lender's rights and remedies and then to Grantor's obligations with respect to the Obligation and this deed of trust in the order determined by Lender. Lender is not required to act under this paragraph and acting under this paragraph does not waive any of Lender's other rights or remedies.

8. Interest on the debt secured by this deed of trust will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

9. In no event may this deed of trust secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

10. When the context requires, singular nouns and pronouns include the plural.

11. The term *Loan Grant Agreement* includes all extensions, modifications, and renewals of the *Loan Grant Agreement* and all amounts secured by this deed of trust.

12. This deed of trust binds, benefits, and may be enforced by the successors in interest of all parties.

13. If Grantor and Borrower are not the same person, the term *Grantor* includes Borrower.

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14. Grantor and each surety, endorser, and guarantor of the Obligation waive all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

15. Grantor agrees to pay reasonable attorney's fees, trustee's fees, and court and other costs of enforcing Lender's rights under this deed of trust if this deed of trust is placed in the hands of an attorney for enforcement.

16. If any provision of this deed of trust is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

17. Grantor acknowledges that this deed of trust is made pursuant to and subject to the Loan Grant Agreement, between Grantor and Lender ("the Economic Development Incentive Agreement"), the terms of which, to the extent that they affect and govern the payment of the Principal Amount and interest in the Loan Grant Agreement or the terms of this deed of trust, are incorporated herein by reference. Grantor further acknowledges that the Loan Grant Agreement is entered pursuant to the Development Corporation Act, Chapters 501-505, Texas Local Government Code (the "Act"). Grantor understands, acknowledges, and agrees that the proceeds advanced by Lender will be used to pay costs for the construction of the Improvements (as defined in the Loan Grant Agreement) and constitutes a Project under the Act. Lender understands and agrees that the Principal Amount of the Loan Grant Agreement shall be reduced and forgiven in accordance with Section 4.6 of the Loan Grant Agreement, which provision is incorporated herein by reference. Grantor further understands and agrees that Grantor's uncured default of the Loan Grant Agreement constitutes a default of this Deed of Trust entitled Lender to exercise the rights granted to Lender and Trustee herein relating to non-judicial foreclosure.



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## EXHIBIT A TO DEED OF TRUST PROPERTY DESCRIPTION

**Tract 1:** Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, according to the map or plat thereof recorded in Volume 7, Page 220, Plat Records of Kerr County, Texas.

**Tract 2:** Being a 5.00 acre tract of land located in the O. V. Robinson Survey No. 44, Abstract No. 282, Kerr County, Texas, and being a portion of that certain called 10.00 acre tract, recorded in Volume 1186, Page 80, Official Public Records of Kerr County, Texas, said 5.00 acre tract being more particularly described by metes and bounds as follows:

*Note: all bearings based on the Texas State Plane Coordinate System, South Central Zone (North American Datum of 1983, 2011 Adjustment);*

BEGINNING at a ½” rebar with “Voelkel” cap found in the southwest right-of-way line of State Highway No. 27, (100’ right-of-way) at the northwest corner of the herein described tract, the northeast corner of the remaining portion of a called 141.38 acre tract, recorded in Volume 882, Page 638, Real Property Records of Kerr County, Texas;

THENCE S 52° 12’ 48” E, along the southwest right-of-way line of State Highway No. 27, a distance of 449.84’ (S 52° 14’ E) to a ½” rebar found for northeast corner at the northwest corner of Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, recorded in Volume 7, Page 220, Plat Records of Kerr County, Texas;

THENCE S 00° 55’ 28” E, with the west boundary line of Lot 1, Block 1, a distance of 479.85’ (S 00° 57’ E) to a ½” rebar with “Voelkel” cap found for southeast corner at the southwest corner of Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, an angle point in the north boundary line of Lot 2R, Block 1, Kerrville Airport Commerce Park, Phase 1 Replat, recorded in Volume 7, Page 383, Plat Records of Kerr County, Texas;

THENCE S 89° 07’ 25” W, with the north boundary line of Lot 2R, Block 1, a distance of 351.13’ (S 89° 03’ 06” W, 351.18’) to a ½” rebar with “Voelkel” cap found for southwest corner in the east boundary line of the remaining portion of the called 141.38 acre tract;

THENCE N 00° 54’ 57” W, with the east boundary line of the remaining portion of

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the called 141.38 acre tract, a distance of 760.89' (N 00° 57' W, 2029.5') to the POINT OF BEGINNING, CONTAINING 5.00 acres of land, more or less.

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**Appendix 2  
Form of Finish-Out Grant Agreement**

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## ECONOMIC DEVELOPMENT INCENTIVE GRANT AGREEMENT

This **ECONOMIC DEVELOPMENT INCENTIVE GRANT AGREEMENT** (“Agreement”) is entered into as of the Effective Date by and between **KILLDEER MOUNTAIN MANUFACTURING, INC.** (“Company”), a North Dakota corporation, acting herein by and through its duly authorized Chief Executive Officer; and the **CITY OF KERRVILLE, TEXAS, ECONOMIC IMPROVEMENT CORPORATION** (“EIC”), a Texas nonprofit corporation established pursuant to the Development Corporation Act (Chapters 501, 502, and 505 of the Texas Local Government Code and hereafter referred to as “the Act”), acting by and through its duly authorized President. Company and EIC are sometimes collectively referred to herein as “Parties” and individually as “Party”.

### WITNESSETH:

**WHEREAS**, EIC was formed to administer the special sales and use tax approved by City’s qualified voters in May 1995 and collected for the purpose of paying expenditures in relation to “projects” as defined in the Act including:

*Land, buildings, equipment, facilities, expenditures, targeted infrastructure, and improvements that are for the creation or retention of primary jobs, as that term is defined by the Act, and found by the EIC to be required or suitable for the development, retention, or expansion of manufacturing and industrial facilities as provided by Section 501.101 of the Act; and*

**WHEREAS**, pursuant to the Act, EIC is authorized to provide funding relating to the construction of projects which EIC finds to be encompassed within the definition of “Projects”, as that word is defined by Chapters 501 and 505 of the Act; and

**WHEREAS**, Company manufactures and sells various products, including, but not limited to, circuit boards and fiber optics for use in the aerospace industry; and

**WHEREAS**, pursuant to that certain *Economic Development Grant and Real Estate Purchase Agreement* between the Parties effective September 3, 2020, (the “Purchase Grant Agreement”), Company purchased the Property (defined below) from EIC with the intent of (i) making a Capital Investment (as hereafter defined) in the Improvements and acquiring Tangible Personal Property; and (ii) and hiring a number of full time employment positions at the Property with the objective of

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increasing the number of full time employment positions to at least 400 employees; and

**WHEREAS**, Company has advised EIC that a contributing factor that would induce Company to make the Capital Investment, acquire the Tangible Personal Property, and begin operations would be an agreement by EIC to provide an economic development incentive grant to Company in the form of a forgivable loan to defray the costs of constructing the Improvements; and

**WHEREAS**, EIC has determined that the Loan Grant (as hereafter defined) complies with the Act and is in keeping with the mission of EIC and *City of Kerrville Economic Improvement Corporation 4B Sales Tax Funding Request Guidelines and Procedures* in that it will help develop and expand a manufacturing and industrial facility and a business enterprise and create and retain primary jobs and constitutes a “project” as defined in the Act; and

**WHEREAS**, EIC finds that it will be in the public interest to enter into this agreement with Company to provide the Loan Grant using 4B Revenues (as defined below), to provide funds for construction of the Improvements; and

**WHEREAS**, on September 3, 2020, in a meeting that was open to the public in accordance with the Texas Open Meetings Act, EIC held a public hearing pursuant to Section 505.159 of the Act related to the proposed expenditure of 4B Revenues for the purposes provided above;

**NOW THEREFORE**, for and in consideration of the recitals set forth above and the promises made herein, Company and EIC agree as follows:

## **Article I Definitions**

For purposes of this Agreement, each of the following terms has the meaning set forth herein unless the context clearly indicates otherwise:

“4B Revenues” means the \$0.005 local sales and use tax collected by EIC pursuant to the Act.

“Affiliate” means, with respect to any Person, any other Person directly or indirectly Controlling, Controlled by, or under common Control with such Person.

“Annual Loan Grant Payment” means the amount of \$27,831.63 based on the amount of the Loan Grant accruing interest at an annual rate of two percent (2.0%)



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amortized over a period of ten (10) years and repaid in ten (10) equal annual installments.

“Bankruptcy or Insolvency” means the dissolution or termination of a Party’s existence as a going business, insolvency, appointment of receiver for any part of such Party’s property and such appointment is not terminated within ninety (90) days after such appointment is initially made, any general assignment for the benefit of creditors, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against such Party and such proceeding is not dismissed within ninety (90) days after the filing thereof.

“Capital Investment” means (i) with respect to the Improvements, the total capitalized cost of construction of the Improvements, including design and construction of the Building and related improvements but not including costs related to purchase of the Property; and (ii) with respect to Tangible Personal Property, the total capitalized cost of acquisition and installation of Tangible Personal Property to be located at the Improvements and/or the Property.

“City” means the City of Kerrville, a Texas home rule municipality located in Kerr County, Texas.

“City 380 Agreement” means that certain Economic Development Incentive Agreement between City and Company entered into pursuant to Chapter 380 of the Texas Local Government Code and providing for a grant from City to Company for the construction of Improvements on the Property

“Commencement Date” means the date Completion of Construction occurs.

“Commencement of Construction” means that (i) the plans have been prepared and all approvals thereof required by applicable governmental authorities have been obtained for construction of the Improvements on the Property; (ii) all necessary permits for the construction of the Improvements have been issued by all applicable governmental authorities; and (iii) active construction of the Improvements has commenced.

“Completion of Construction” means the date (i) the Improvements have been substantially completed; and, (ii) a certificate of occupancy has been issued by City for Company’s occupancy of the Property following construction of the Improvements.

“Control,” or any derivation thereof, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of securities, by contract or otherwise.

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“Deed of Trust” means a Deed of Trust in the form substantially as set forth in **Exhibit B**, attached hereto and incorporated herein by reference, conveying a first lien on the Property to Michael C. Hayes, Trustee, for the benefit of EIC in the amount of the Loan Grant for the purpose of securing the repayment of the Loan Grant.

“Effective Date” means the later of (i) the date this Agreement, or identical counterparts of this Agreement, bears the signatures of the authorized representatives of each Party and (ii) the date this Agreement has been authorized by City’s City Council pursuant to Section 505.158 of the Act.

“Employment Period” shall have the same meaning as in the Purchase Grant Agreement.

“Eligible Costs” means the “hard” costs incurred and paid by Company for the construction of the Improvements, which shall not include costs for legal fees, permit fees, insurance, interest, finance, the cost of financing, management fees or other soft costs related to the design, construction, and/or financing of the Improvements.

“Expiration Date” means the tenth (10th) anniversary of the Commencement Date.

“Force Majeure” means any contingency or cause beyond the reasonable control of a Party including, without limitation, acts of God or the public enemy, war, terrorist act, or threat thereof, riot, civil commotion, insurrection, government action or inaction (unless caused by the intentionally wrongful acts or omissions of the Party), fires, earthquake, tornado, hurricane, explosions, floods, strikes, slowdowns, pandemics, or work stoppages.

“Full-Time Position” means a position eligible for employee benefits at which an individual is scheduled to work at the Property for Company as an employee (*i.e.*, not as temp-to-hire worker) for at least (i) 2080 hours for a day shift; or (ii) 1,872 hours for a second shift, both of which occur within the calendar year and who, before deducting employee contributions to employee benefits, FICA, Federal payroll tax withholding, retirement plans, and other voluntary and involuntary deductions commonly deducted from employee wages prior to payment of the wages to the person, is paid an average hourly wage of not less than \$21.00 per hour, not including the value of employee benefits paid by Company. For purposes of the definition of “Full-Time Position,” employer contributions to FICA, retirement plans, group health, dental, or life insurance premiums, or other employer funded benefits shall not be included in determining an employee’s hourly wage or salary. A Full-Time Position does not include seasonal positions. The average calculation aggregates Full-Time Positions, as defined below, as follows: i) hourly positions at their hourly rate;

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and ii) convert salaried positions to their hourly equivalent by dividing by 2080. The sum of the hourly rates and hourly equivalents will be divided by the cumulative number of Full-Time Positions for the applicable year as included in Section 4.6(a) for purposes of arriving at the average hourly rate required. For purposes of this definition, a salaried employee with a base annual salary equal to or greater than \$110,000 shall be treated as the equivalent of two Full-Time Positions.

“FTE Position” or “FTE” means one Full-Time Position filled by an individual working at the Property under contract or as an employee for Company a combined total of at least (i) 2080 hours for a day shift; or (ii) 1,872 hours for a second shift, during a calendar year.

“Improvements” means those alterations to, and improvements constructed on, the Property by Company at Company’s expense that are reasonable and necessary for Company to use the Property for the Required Use.

“Land” means the real property described in **Exhibit A**, attached hereto and incorporated herein by reference.

“Loan Grant” means a loan in the amount of \$250,000.00 to be paid by EIC to Company in accordance with this Agreement.

“Person” means an individual, corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

“Project” means the design and construction of the Improvements, including costs related to site development with utilities, landscaping, parking, and other associated improvements, and the purchase and installation of manufacturing equipment and other personal property reasonable and necessary for the operation of Company’s manufacturing and distribution facility at the Land.

“Property” means, collectively, the Improvements and the Land.

“Purchase Grant Agreement” shall have the meaning set forth in the Recitals.

“Related Agreements” means any written agreement (not including this Agreement) by and between (i) EIC and/or City and (ii) Company or any of Company’s Affiliated entities including, but not limited to (a) the Purchase Grant Agreement and (b) the City 380 Agreement.

“Required Use” means use of the Property for (i) warehousing, manufacturing, and general office purposes in association with Company’s business of manufacturing

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and assembling circuit card assemblies and cable and fiber harnesses for the aerospace industry, similar activities thereto, and activities necessary to support the foregoing; and (ii) such other purposes as EIC may from time to time authorize in writing.

“Taxable Items” shall mean both “taxable items” and “taxable services” as those terms are defined by Chapter 151, Texas Tax Code, as amended.

## Article II Term

**2.1. Effective Date and Termination.** The term of this Agreement (the “Term”) commences on the Effective Date, and terminates on the Expiration Date unless terminated earlier by mutual agreement of the Parties or as follows;

(a) On the date EIC elects to terminate this Agreement by providing notice to Company if Commencement of Construction of the Improvements does not occur by the date set forth in Section 4.5, provided such notice is delivered before Commencement of Construction has actually occurred;

(b) On the date EIC elects to terminate this Agreement by providing notice to Company if Completion of Construction does not occur by the date set forth in Section 4.5 and, provided such notice is delivered before Completion of Construction has actually occurred;

(c) when terminated pursuant to Articles VIII or IX; or

(d) at Company’s sole and absolute discretion, upon Company’s repayment of the remaining balance of the Loan Grant calculated in the same manner as set forth within Section 3.2(b).

**2.2 Rights upon Termination.** Upon termination of this Agreement, all rights, duties, and obligations of any kind under this Agreement will automatically expire and terminate and be of no other force and effect except to the extent such obligations expressly survive the termination of this Agreement.

## Article III Loan Grant

**3.1 Payment of Loan Grant.** Subject to the obligation of Company to repay the Loan Grant pursuant to Sections 3.2, below, or other provisions of this Agreement, and the continued satisfaction of all terms and conditions of this

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Agreement and Related Agreements by Company, EIC agrees to provide Company with the Loan Grant following Company's entering into a contract for the construction of the Improvements as verified and approved by EIC through examination of supporting document provided by Company.

**3.2 Repayment of Loan Grant.** Company agrees to repay the Loan Grant subject to the following:

(a) Subject to Section 4.6(d), below, Company shall repay to EIC the Loan Grant in ten (10) annual equal installments in the amount of the Annual Loan Grant Payment, the first such installment to be paid on first day of the calendar month following the month in which the first (1<sup>st</sup>) anniversary the Commencement Date occurs, with each remaining installment being due on or before the same date of each subsequent year thereafter until the Loan Grant and all accrued interest have been paid in full.

(b) If Company defaults in the payment of the Annual Loan Grant Payment or in the performance of any obligation in this Agreement or a Related Agreement and such default continues for a period of thirty (30) days after EIC sends Company written notice of such default, EIC may declare the unpaid principal balance, earned interest, and any other amounts owed on the Loan Grant immediately due. Company waives all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

(c) Company also agrees to pay reasonable attorney's fees and court and other costs if Agreement is placed in the hands of an attorney to collect or enforce the repayment of the Loan Grant. Such expenses will bear interest from the date that EIC sends Company written demand to pay such expenses, at the highest rate of interest allowed by law. Company will pay EIC such expenses and interest on demand at the place set forth for providing notices in Section 10.4, below. Such expenses and interest will become part of the debt evidenced by this Agreement and will be secured by any security for payment.

**3.3 Accrual of Interest on Loan Grant.** The unpaid balance of the Loan Grant shall accrue interest at a rate of two percent (2.0%) per year commencing on the first day of the calendar month following the Commencement Date.

**3.4 Loan Grant Limitations.** Under no circumstances shall the obligations of EIC hereunder be deemed to create any debt within the meaning of any constitutional or statutory provision. Further, EIC shall not be obligated to pay any

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commercial bank, lender, or similar institution for any loan or credit agreement made by Company. None of the obligations of EIC under this Agreement may be pledged or otherwise encumbered by Company in favor of any commercial lender and/or similar financial institution.

**3.5 Current Revenue.** The Loan Grant will be paid solely from lawfully available funds that have been appropriated by EIC.

**3.6 Loan Grant Limited to “Costs”.** In addition to being limited to the payment of Eligible Costs, payments made by EIC to Company from 4B Revenues will be limited to the payments of “costs” as defined by the Act and as specified above for the Project; provided, however, for purposes of this Agreement, “costs” do not include funds spent on interest or other fees paid by Company related to borrowing funds for the purpose of paying for the Project.

**3.7 Prepayment.** Company may terminate this Agreement at any time by paying to EIC the remaining unpaid balance of the Loan Grant and any accrued but unpaid interest. If Company elects to terminate this Agreement by repayment of the Loan Grant, EIC shall have no obligation to reimburse Company for any Annual Loan Grant Payments that would have been due in subsequent years for which Company would have been excused from paying pursuant to Section 4.6(d), below.

**3.8 Security for Repayment of the Loan Grant.** Notwithstanding Section 3.1 to the contrary, EIC shall not be obligated to pay any portion of the Loan Grant to Company unless and until Company has signed in recordable form and delivered to EIC the Deed of Trust.

## **Article IV Conditions to the Economic Development Grant**

**4.1 Generally.** The obligation of EIC to provide the Loan Grant to Company and Company’s obligation to repay, and to be excused from repayment of all or any portion of the Loan Grant to EIC, is conditioned upon Company’s compliance with the terms and conditions of this Agreement and specifically, each of the conditions set forth in this Article IV.

**4.2 Good Standing.** Company shall not have an incurred a breach or default of this Agreement or any Related Agreement beyond any applicable notice and cure period.

**4.3 Development Regulations.** Notwithstanding that the Land is not on the Effective Date and on the date of closing of the conveyance of the Land to

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Company located within City's corporate limits, Company agrees to comply with all City ordinances and regulations, including all building codes, subdivision regulations, and zoning applicable to development of the Land and construction of the Improvements if the Land were located within City's corporate limits at the time of construction of the Improvements.

**4.4 Required Use.** Commencing on the Commencement Date and continuing thereafter until the termination of this Agreement, the Property shall be used solely for the Required Use, and the operation and occupancy of the Property in conformance with the Required Use shall not cease for more than six (6) months, except in connection with and to the extent of an event of Force Majeure.

**4.5 Commencement and Completion of Construction.** Subject to delays resulting from Force Majeure events, Company shall cause Commencement of Construction of the Improvements to occur not later than January 4, 2021, and cause Completion of Construction of the Improvements not later than May 31, 2021. The foregoing deadlines for Commencement of Construction and Completion of Construction of the Improvements shall be extended one (1) business day for each business day that an event of Force Majeure results in the inability of Company to cause said Commencement of Construction and/or Completion of Construction to occur.

**4.6 Full-Time Positions.**

(a) After the Effective Date, but in no case later than the one hundred twentieth (120<sup>th</sup>) day after Completion of Construction, Company shall create and fill no fewer than fifteen (15) Full-Time Positions. Commencing with calendar year 2022 and each calendar year thereafter through the end of the Term, the number of Full-Time Positions created and filled by Company at the Property during the specified calendar year shall be as follows:

| <b>End of Calendar Year<br/>(12/31)</b> | <b>Minimum No. FTE's<br/>for Calendar Year</b> |
|-----------------------------------------|------------------------------------------------|
| 2021                                    | 15                                             |
| 2022                                    | 40                                             |
| 2023                                    | 60                                             |
| 2024                                    | 80                                             |
| 2025                                    | 100                                            |
| 2026                                    | 120                                            |
| 2027                                    | 140                                            |

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|      |     |
|------|-----|
| 2028 | 160 |
| 2029 | 180 |
| 2030 | 200 |

The minimum number of FTEs each year shall be based on a weekly average count of FTEs working at the Property for each calendar week during the calendar year. For purposes of the foregoing calculation, a person employed in a Full-Time Position who is not working at the Property because the person is on any type of excused paid leave (e.g., vacation, sick leave, paid family leave, professional training, and similar purposes), or is on an unpaid leave pursuant to the Family Medical Leave Act or other federal or state law which requires Company to retain the person as an employee while absent from work, will be included in the weekly count of Full-Time Positions.

(b) Company shall use its best efforts and show a preference in its hiring process to hire 60% of FTE's who are permanent residents of Kerr County and shall encourage future employees who do not reside in Kerr County to re-locate there.

(c) Not later than February 1 following the end of each calendar year identified in Section 4.6(a), Company shall deliver to EIC a copy of employment records, Texas Workforce Commission reports, or other documentation as is reasonably required by EIC to demonstrate Company's compliance with the required number of Full-Time Positions required by Section 4.6(a) along with a sworn statement from an authorized officer of Company confirming Company's compliance with Sections 4.6(a) and 4.6(b). Company's failure to provide the information required by this Section 4.6(c) constitutes a breach of this Agreement and shall constitute the basis for requiring Company to make a Grant Reimbursement Payment in accordance with Section 3.2.

(d) If Company fails to establish that it has employed the minimum number of Full-Time Positions as required by Section 4.6(a) for a calendar year, not later than thirty (30) days after delivery of written demand from EIC, Company shall pay EIC the Annual Loan Grant Payment for such calendar year in full. If, however, at least 85% of the minimum number of Full-Time Positions were employed as required by Section 4.6(a) for a calendar year, the Grant Reimbursement Payment shall be proportionate to the number of Full-Time Positions actually employed in relation to the number of Full-Time Positions that were required to be employed for said calendar year. Any Annual Loan Grant Payment not paid by Company to EIC on or before the



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thirtieth (30<sup>th</sup>) day after the date of delivery of the demand for such payment shall bear interest at the maximum rate allowed by law. EIC shall further be entitled to costs and reasonable attorney fees if EIC institutes any action to collect any delinquent Annual Loan Grant Payment(s).

**4.7 Records.** Company shall keep and maintain complete and accurate records relating to its costs of the Improvements and employment information related to Full-Time Positions, separate and identifiable from its other records, for three (3) years following the termination of this Agreement. The City Manager or designee, as representatives for EIC, shall be entitled to inspect Company's records during the term of this Agreement and for three (3) years thereafter, upon reasonable notice at Company's offices in Kerrville, Texas.

**4.8 Point of Sale.** The sale of goods manufactured or assembled on the Property shall be deemed to be consummated at the Property for the purposes of determining the collection of state and local sales and use taxes to the extent allowed by Texas Tax Code §321.203, as amended.

**4.9 Required Capital Investment.** Company agrees to make a Capital Investment at the Property not later than August 31, 2021.

## Article V

### Sale of Project, Merger or Consolidation of Company

**5.1 Sale of Company Assets.** A sale of all or any of the assets of Company shall not release Company from its duties and responsibilities to EIC under the terms of this Agreement and shall not result in the assignment of this Agreement by such acquiring entity without prior written consent from EIC, which will not be unreasonably withheld; provided, that Company's proposed successor shall have the financial condition to fully satisfy Company's duties and responsibilities hereunder and agrees to assume Company's responsibilities under this Agreement. EIC may, in its sole discretion, reasonably determine whether such proposed successor's financial condition is satisfactory.

**5.2 Merger.** In the event of any proposed merger or other consolidation of Company with any third party not affiliated with Company, not later than thirty (30) days prior to any such merger or consolidation, Company shall provide EIC with information and assurance reasonably acceptable to EIC regarding: (i) the surviving entity's assumption and satisfaction of the Company's obligations hereunder; and (ii) the financial condition of the surviving entity upon such merger or other consolidation to demonstrate that the surviving entity shall have the financial condition to fully satisfy Company's duties and responsibilities under this Agreement.

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**5.3 EIC Rights.** Notwithstanding anything in this Agreement to the contrary, it is expressly understood and agreed that EIC shall have no rights to approve or disapprove any sale or merger transaction of any kind involving Company. In the event of any sale or merger involving Company or its affiliates, the surviving entity shall assume Company's obligations and rights hereunder and be entitled to any and all benefits to be received pursuant to this Agreement.

## **Article VI Company's Representations and Warranties**

Company represents and warrants as of the date hereof:

(a) Company is a North Dakota corporation existing in good standing and authorized to do business in the State of Texas;

(b) Execution of this Agreement has been duly authorized by Company and this Agreement is not in contravention of Company's corporate charter, or any agreement or instrument to which Company is a party or by which it may be bound as of the date hereof;

(c) No litigation or governmental proceeding is pending, or, to the knowledge of Company, threatened against or affecting Company, which may result in a material adverse change in Company's business, properties, or operations sufficient to jeopardize Company's legal existence or for-profit viability; and

(d) No written application, written statement, or correspondence submitted by Company to EIC in connection with this Agreement, or in connection with any transaction contemplated hereby, to the knowledge of Company, contains any untrue statement of a material fact or fails to state any material fact necessary to keep the statements contained therein from being misleading.

(e) Except as expressly set forth in this Article VI, Company makes no other representation or warranty of any kind in connection with or related to the provisions of this Agreement.

## **Article VII EIC'S Representations and Warranties**

EIC represents and warrants as of the date hereof:

# **DRAFT 9/1/20**

(a) EIC, to the best of the knowledge of its Board of Directors, is legally authorized to enter into this Agreement by virtue of the statute under which it is governed and by the authorities and powers vested in it as a corporation duly and properly organized under the Act;

(b) Execution of this Agreement has been duly authorized by EIC;

(c) No litigation or governmental proceeding is pending, or, to the knowledge of any of EIC's officers, threatened against or affecting EIC, which may result in EIC's inability to meet its obligations under this Agreement;

(d) EIC has no reasonable basis for believing that it has or will have incurred debts beyond its ability to pay as such debts mature, including but not limited to the obligations set forth in this Agreement; and

(e) Except as expressly set forth in this Article VII, EIC makes no other representation or warranty of any kind in connection with or related to the provisions of this Agreement.

## **Article VIII Conditions under which EIC May Suspend Performance of its Obligations under this Agreement**

EIC may, at its sole option and after fifteen (15) days written notice to Company, suspend EIC's performance under this Agreement until such time as Company shall have cured the condition(s) and so notified EIC, in writing, that the condition(s) have been cured:

(a) Company becomes insolvent;

(b) The appointment of a receiver of Company, or of all or any substantial part of the Property, and the failure of such receiver to be discharged within sixty (60) days thereafter;

(c) The adjudication of Company as bankrupt;

(d) The filing by Company of a petition to be adjudged as bankrupt, or a petition or answer seeking reorganization or admitting the material allegations of a petition filed against it in any bankruptcy or reorganization proceeding; or

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(e) Except as allowed in Section 4.8, above, a change to a location outside the City Limits on the location where sales of Taxable Items are deemed to be Consummated such that Local Sales and Use Tax is not imposed on such sales.

Should any of the foregoing conditions not be cured by Company within ninety (90) days after the onset of the condition, Company will be considered to have breached this Agreement and EIC may, at its option, with written notice to Company, terminate this Agreement and Company shall be obligated to pay in full the amount of the Loan Grant to EIC.

## Article IX Remedies

**9.1 Notice and Opportunity to Cure.** Except as otherwise provided in this Agreement, in the event of any default in or breach of this Agreement by any Party, or any successor to such Party, such defaulting or breaching Party (or successor) shall upon written notice from the other proceed immediately to cure or remedy such default or breach, and, in any event, within thirty (30) days after receipt of such notice. In the event that remedial action is not taken or not diligently pursued and the default or breach shall not be cured or remedied within a reasonable time (but in no event later than ninety (90) days from the date of notification of such breach), the aggrieved Party may institute such proceedings as may be necessary or desirable in its opinion to cure and remedy such default or breach, including but not limited to, seeking specific performance and/or injunctive relief, enforcement by mandamus or by the appointment of a receiver in equity with power to charge and collect rents, purchase price payments, and loan payments and to apply the revenues from the project in accordance with this Agreement, as required by the Act. This provision and specifically the notice and time to cure shall not apply to the obligation of Company found within Article IV.

**9.2 Termination.** Upon breach of this Agreement by either Party and the failure to cure as permitted by Section 9.1, the non-breaching Party shall have the sole right and discretion to either terminate this Agreement and/or pursue any and all remedies which may be provided by law and this Agreement.

**9.3 Breach of Related Agreements.** Company's breach of a Related Agreement shall constitute a default of this Agreement. Company shall timely cure any default of the provisions of a Related Agreement in accordance with the terms of the Related Agreement. In the event of termination of a Related Agreement following Company's failure to timely cure a default of said Related Agreement, EIC may, at its sole option, terminate this Agreement, in which case Company shall be required

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to pay any remaining balance of the Loan Grant plus accrued interest as provided in the this Agreement.

**9.4 Delay Not Waiver.** Any delay by any Party in instituting or prosecuting any actions or proceedings or otherwise asserting its rights shall not, so long as the breach or default by another Party shall be continuing, operate as a waiver of such rights or to deprive it of or limit such rights in any way; nor shall any waiver in fact be made by any party with respect to any specific default by any other party except to the extent specifically waived in writing.

## Article X General Provisions

**10.1 Severability.** The provisions of this Agreement are severable, and if for any reason a provision of this Agreement is determined to be invalid by a court having competent jurisdiction over the subject matter of the invalid provision, the invalidity shall not affect other provisions that can be given effect without the invalid provision. Further, in lieu of such illegal, invalid, or unenforceable provision, there shall be added automatically as a part of this Agreement, a provision as similar in its terms to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable.

**10.2 Amendment.** This Agreement may be amended only by written amendment signed by both Parties.

**10.3 Venue.** All obligations performed under this Agreement shall be made or performed in Kerrville, Kerr County, Texas. Venue shall lie in a state court of competent jurisdiction in Kerr County, Texas; and this Agreement shall be governed by and construed in accordance with the laws of the State of Texas without respect to the conflict of laws rules thereof.

**10.4 Notices.** All notices given with respect to this Agreement shall be in writing and shall be deemed to have been properly given for all purposes (i) if sent by a nationally recognized overnight carrier for next business day delivery, on the first business day following deposit of such notice with such carrier unless such carrier confirms such notice was not delivered, then on the day such carrier actually delivers such notice, or (ii) if personally delivered, on the actual date of delivery, or (iii) if sent by certified U.S. Mail, return receipt requested postage prepaid, on the fifth business day following the date of mailing, or (iv) if sent by facsimile, then on the actual date of delivery (as evidenced by a facsimile confirmation) provided that a copy of the facsimile and confirmation is also sent by regular U.S. Mail, addressed as follows:

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For EIC

*President*

City of Kerrville, Texas, Economic Improvement Corporation  
701 Main Street  
Kerrville, Texas 78028

*With a copy to:*

*City Manager*

City of Kerrville  
701 Main Street  
Kerrville, Texas 78028

For Company

Killdeer Mountain Manufacturing, Inc.  
Attn: President/CEO  
233 Rodeo Drive  
Killdeer, North Dakota 58640

**10.5 Assignment.** This Agreement is binding upon the Parties and their successors and assigns. Except as set forth in Article V, this Agreement may not be assigned by either Party without the specific prior written consent of the other, which consent will not be unreasonably withheld. In the event that a Party consents to any valid assignment of this Agreement by the other Party, the assigning Party shall be relieved of any and all obligations and liabilities on the part of such assigning Party under this Agreement. Company may, without written consent of EIC, assign this Agreement to any entity controlled and 100% owned by Company or by the parent, subsidiary, or affiliate of Company provided the entity assumes all of Company's obligations and liabilities under this Agreement; agrees to comply with all provisions of this Agreement; has the legal, managerial, technical, and financial ability to properly perform and discharge such obligations and liabilities; and such abilities are each at least as great as those of Company and Company provides a written guarantee of such assignee's performance in a form reasonably acceptable to EIC. EIC shall be advised in writing of such assignment and of the entity's qualifications at least sixty (60) days before such assignment occurs.

**10.6 Parties in Interest.** Nothing in this Agreement shall entitle any Party other than Company or EIC to any claim, cause of action, remedy, or right of any kind except as expressly provided in Article IX.

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**10.7 Interpretation.** Each Party has had the opportunity to be represented by counsel of its choice in negotiating this Agreement. This Agreement shall therefore be deemed to have been negotiated and prepared at the joint request, direction, and construction of the Parties, at arm's length, with the advice and participation of counsel, and will be interpreted in accordance with its terms without favor to any Party.

**10.8 No Joint Venture.** Nothing contained in this Agreement is intended by the Parties to create a partnership or joint venture between the Parties.

**10.9 Survival of Terms.** All rights, duties, liabilities, and obligations accrued prior to termination shall survive termination.

**10.10 Entire Agreement.** This Agreement represents the entire agreement of the Parties with respect to the subject matter hereof.

**10.11 Recitals.** The recitals to this Agreement are incorporated herein.

**10.12 Counterparts.** This Agreement may be executed in counterparts. Each of the counterparts shall be deemed an original instrument, but all of the counterparts shall constitute one and the same instrument.

**10.13 Employment of Undocumented Workers.** During the term of this Agreement, Company agrees not to knowingly employ any undocumented workers, and if convicted of a violation under 8 U.S.C. Section 1324a (f), Company shall repay the Loan Grant herein and any other funds received by Company from EIC as of the date of such violation within 120 days after the date Company is notified by EIC of such violation, plus interest at the rate of 6% compounded annually from the date of violation until paid. Company is not liable for a violation of this Section by a subsidiary, Affiliate, or franchisees of Company or by a person with whom Company contracts, or any other Person other than Company.

**10.14 Non-Business Day.** If the final date of any period provided herein for the performance of an obligation or for the taking of any action falls on a Saturday, Sunday, or holiday, then the end of such period shall be extended to the next business day.

**10.15 Headings.** Section headings are for convenience of reference only and do not modify or restrict any provisions hereof and shall not be used to construe any provisions.

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**10.16 Prohibition of Boycott of Israel.** Company verifies that (i) it does not Boycott Israel; and (ii) will not Boycott Israel during the term of the Agreement. This section does not apply if Company is a sole proprietor, a non-profit entity or a governmental entity; and only applies if: (i) the Company has ten (10) or more fulltime employees and (ii) this Agreement has a value of \$100,000.00 or more to be paid under the terms of this Agreement.

**10.17 EIC Inspection Rights.** Authorized representatives of EIC (including officers and employees of with EIC or City) shall have the right to enter the Property during the term of this Agreement for purposes of making such inspections as reasonable and necessary to ensure Company's compliance with this Agreement. Such inspections shall be during Company's regular business hours and conducted no earlier than 24 hours after EIC provides written notice to Company of EIC's intent to conduct such inspection.

*(Signature Page to Follow)*



# DRAFT 9/1/20

SIGNED AND AGREED on this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

**CITY OF KERRVILLE, TEXAS ECONOMIC  
IMPROVEMENT CORPORATION**

\_\_\_\_\_  
Greg Richards, President

**Attest:**

\_\_\_\_\_  
Keesha Franchina, Recording Secretary

**Approved as to Form:**

\_\_\_\_\_  
Michael C. Hayes, Attorney for EIC

SIGNED AND AGREED on this \_\_\_\_\_ day of \_\_\_\_\_,  
2020.

**KILLDEER MOUNTAIN MANUFACTURING, INC.**

\_\_\_\_\_  
Donald Hedger, President/CEO

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## EXHIBIT A DESCRIPTION OF THE LAND

**Tract 1:** Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, according to the map or plat thereof recorded in Volume 7, Page 220, Plat Records of Kerr County, Texas.

**Tract 2:** Being a 5.00 acre tract of land located in the O. V. Robinson Survey No. 44, Abstract No. 282, Kerr County, Texas, and being a portion of that certain called 10.00 acre tract, recorded in Volume 1186, Page 80, Official Public Records of Kerr County, Texas, said 5.00 acre tract being more particularly described by metes and bounds as follows:

*Note: all bearings based on the Texas State Plane Coordinate System, South Central Zone (North American Datum of 1983, 2011 Adjustment);*

BEGINNING at a ½” rebar with “Voelkel” cap found in the southwest right-of-way line of State Highway No. 27, (100’ right-of-way) at the northwest corner of the herein described tract, the northeast corner of the remaining portion of a called 141.38 acre tract, recorded in Volume 882, Page 638, Real Property Records of Kerr County, Texas;

THENCE S 52° 12’ 48” E, along the southwest right-of-way line of State Highway No. 27, a distance of 449.84’ (S 52° 14’ E) to a ½” rebar found for northeast corner at the northwest corner of Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, recorded in Volume 7, Page 220, Plat Records of Kerr County, Texas;

THENCE S 00° 55’ 28” E, with the west boundary line of Lot 1, Block 1, a distance of 479.85’ (S 00° 57’ E) to a ½” rebar with “Voelkel” cap found for southeast corner at the southwest corner of Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, an angle point in the north boundary line of Lot 2R, Block 1, Kerrville Airport Commerce Park, Phase 1 Replat, recorded in Volume 7, Page 383, Plat Records of Kerr County, Texas;

THENCE S 89° 07’ 25” W, with the north boundary line of Lot 2R, Block 1, a distance of 351.13’ (S 89° 03’ 06” W, 351.18’) to a ½” rebar with “Voelkel” cap found for southwest corner in the east boundary line of the remaining portion of the called 141.38 acre tract;

THENCE N 00° 54’ 57” W, with the east boundary line of the remaining portion of the called 141.38 acre tract, a distance of 760.89’ (N 00° 57’ W, 2029.5’) to the POINT OF BEGINNING, CONTAINING 5.00 acres of land, more or less.

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## EXHIBIT B FORM OF DEED OF TRUST

**NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER**

STATE OF TEXAS           §  
                                          §  
COUNTY OF KERR       §

### Deed of Trust

#### Terms

**Date:** \_\_\_\_\_, 2020

**Grantor:** Killdeer Mountain Manufacturing, Inc., a North Dakota corporation

**Grantor's Mailing Address:** Attn: President/CEO, 233 Rodeo Drive, Killdeer, North Dakota 58640

**Trustees:** Michael C. Hayes

**Trustee's Mailing Address:** 701 Main Street, Kerrville, Kerr County, Texas 78028

**Lender:** City of Kerrville, Texas, Economic Improvement Corporation, a Texas non-profit corporation

**Lender's Mailing Address:** 701 Main Street, Kerrville, Kerr County, Texas 78028

#### Obligation

##### Loan:

**Date:** \_\_\_\_\_, 2020

**Original principal amount:** \$250,000.00

**Borrower:** Killdeer Mountain Manufacturing, Inc.

**Lender:** City of Kerrville, Texas, Economic Improvement Corporation

**Maturity date:** As set forth in the Economic Development Incentive Agreement dated

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\_\_\_\_\_, 2020, between Lender and Borrower (the “Loan Grant Agreement”).

**Other Debt:** None

**Property (including any improvements):** The real property located in Kerr County, Texas, particularly described in **Exhibit A**, attached hereto and incorporated herein by reference.

**Prior Lien:** None

**Other Exceptions to Conveyance and Warranty:** (i) Any and all matters affecting the state of title to the Property recorded in the appropriate public records of Kerr County, Texas, or visible or apparent from an inspection of the Property, and (ii) all zoning, building and other laws, regulations and ordinances of any and all municipal, governmental and quasi-governmental bodies and agencies having jurisdiction over the Property or any part thereof.

For value received and to secure payment of the Obligation, Grantor conveys the Property to Trustee in trust. Grantor warrants and agrees to defend the title to the Property, subject to the Prior Lien and Other Exceptions to Conveyance and Warranty. On payment of the Obligation and all other amounts secured by this deed of trust, this deed of trust will have no further effect, and Lender will release it at Grantor’s expense.

## Clauses and Covenants

### A. Grantor’s Obligations

Grantor agrees to—

1. keep the Property in good repair and condition;
2. pay all taxes and assessments on the Property before delinquency;
3. defend title to the Property subject to the Other Exceptions to Conveyance and Warranty and preserve the lien’s priority as it is established in this deed of trust;
4. obey all laws, ordinances, and restrictive covenants applicable to the Property; and
5. if the lien of this deed of trust is not a first lien, pay or cause to be paid all prior lien notes and abide by or cause to be abided by all prior lien instruments.

### B. Lender’s Rights

1. Lender may appoint in writing a substitute trustee, succeeding to all rights and responsibilities of Trustee.
2. If the proceeds of the Obligation are used to pay any debt secured by prior liens, Lender is subrogated to all the rights and liens of the holders of any debt so paid.

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3. Notwithstanding the terms of the Loan Grant Agreement to the contrary, and unless applicable law prohibits, all payments received by Lender from Grantor with respect to the Obligation or this deed of trust may, at Lender's discretion, be applied first to amounts payable under this deed of trust and then to amounts due and payable to Lender with respect to the Obligation, to be applied to late charges, principal, or interest in the order Lender in its discretion determines.

4. If Grantor fails to perform any of Grantor's obligations, Lender may perform those obligations and be reimbursed by Grantor on demand for any amounts so paid, including attorney's fees, plus interest on those amounts from the dates of payment at the rate stated in the Loan Grant Agreement for matured, unpaid amounts. The amount to be reimbursed will be secured by this deed of trust.

5. If there is a default on the Obligation or if Grantor fails to perform any of Grantor's obligations, and the default continues for a period of 30 days after Lender sends Grantor written notice of such default, Lender may—

a. declare the unpaid principal balance and earned interest on the Obligation immediately due;

b. direct Trustee to foreclose this lien, in which case Lender or Lender's agent will cause notice of the foreclosure sale to be given as provided by the Texas Property Code as then in effect; and

c. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited on the Obligation.

6. Lender may remedy any default without waiving it and may waive any default without waiving any prior or subsequent default.

## C. Trustee's Rights and Duties

If directed by Lender to foreclose this lien, Trustee will—

1. either personally or by agent give notice of the foreclosure sale as required by the Texas Property Code as then in effect;

2. sell and convey all or part of the Property "AS IS" to the highest bidder for cash with a general warranty binding Grantor, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty and without representation or warranty, express or implied, by Trustee;

3. from the proceeds of the sale, pay, in this order—

a. expenses of foreclosure, including a reasonable commission to Trustee;

b. to Lender, the full amount of principal, interest, attorney's fees, and other

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charges due and unpaid;

- c. any amounts required by law to be paid before payment to Grantor; and
- d. to Grantor, any balance; and

4. be indemnified, held harmless, and defended by Lender against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this deed of trust, which includes all court and other costs, including attorney's fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.

## D. General Provisions

1. If any of the Property is sold under this deed of trust, Grantor must immediately surrender possession to the purchaser. If Grantor fails to do so, Grantor will become a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

2. Recitals in any trustee's deed conveying the Property will be presumed to be true.

3. Proceeding under this deed of trust, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

4. This lien will remain superior to liens later created even if the time of payment of all or part of the Obligation is extended or part of the Property is released.

5. If any portion of the Obligation cannot be lawfully secured by this deed of trust, payments will be applied first to discharge that portion.

6. Grantor assigns to Lender all amounts payable to or received by Grantor from condemnation of all or part of the Property, from private sale in lieu of condemnation, and from damages caused by public works or construction on or near the Property. After deducting any expenses incurred, including attorney's fees and court and other costs, Lender will either release any remaining amounts to Grantor or apply such amounts to reduce the Obligation. Lender will not be liable for failure to collect or to exercise diligence in collecting any such amounts. Grantor will immediately give Lender notice of any actual or threatened proceedings for condemnation of all or part of the Property.

7. Grantor assigns to Lender absolutely, not only as collateral, all present and future rent and other income and receipts from the Property. Grantor warrants the validity and enforceability of the assignment. Grantor may as Lender's licensee collect rent and other income and receipts as long as Grantor is not in default with respect to the Obligation or this deed of trust. Grantor will apply all rent and other income and receipts to payment of the Obligation and performance of this deed of trust, but if the rent and other income and receipts exceed the amount due with respect to the Obligation and the deed of trust, Grantor may retain the excess. If Grantor defaults in payment of the Obligation or performance of this deed of trust, Lender may terminate Grantor's license to collect rent and other income and then as Grantor's agent may rent the Property

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and collect all rent and other income and receipts. Lender neither has nor assumes any obligations as lessor or landlord with respect to any occupant of the Property. Lender may exercise Lender's rights and remedies under this paragraph without taking possession of the Property. Lender will apply all rent and other income and receipts collected under this paragraph first to expenses incurred in exercising Lender's rights and remedies and then to Grantor's obligations with respect to the Obligation and this deed of trust in the order determined by Lender. Lender is not required to act under this paragraph and acting under this paragraph does not waive any of Lender's other rights or remedies.

8. Interest on the debt secured by this deed of trust will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

9. In no event may this deed of trust secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

10. When the context requires, singular nouns and pronouns include the plural.

11. The term *Loan Grant Agreement* includes all extensions, modifications, and renewals of the *Loan Grant Agreement* and all amounts secured by this deed of trust.

12. This deed of trust binds, benefits, and may be enforced by the successors in interest of all parties.

13. If Grantor and Borrower are not the same person, the term *Grantor* includes Borrower.

14. Grantor and each surety, endorser, and guarantor of the Obligation waive all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

15. Grantor agrees to pay reasonable attorney's fees, trustee's fees, and court and other costs of enforcing Lender's rights under this deed of trust if this deed of trust is placed in the hands of an attorney for enforcement.

16. If any provision of this deed of trust is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

17. Grantor acknowledges that this deed of trust is made pursuant to and subject to the Loan Grant Agreement, between Grantor and Lender ("the Economic Development Incentive Agreement"), the terms of which, to the extent that they affect and govern the payment of the





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## EXHIBIT A TO DEED OF TRUST PROPERTY DESCRIPTION

**Tract 1:** Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, according to the map or plat thereof recorded in Volume 7, Page 220, Plat Records of Kerr County, Texas.

**Tract 2:** Being a 5.00 acre tract of land located in the O. V. Robinson Survey No. 44, Abstract No. 282, Kerr County, Texas, and being a portion of that certain called 10.00 acre tract, recorded in Volume 1186, Page 80, Official Public Records of Kerr County, Texas, said 5.00 acre tract being more particularly described by metes and bounds as follows:

*Note: all bearings based on the Texas State Plane Coordinate System, South Central Zone (North American Datum of 1983, 2011 Adjustment);*

BEGINNING at a ½” rebar with “Voelkel” cap found in the southwest right-of-way line of State Highway No. 27, (100’ right-of-way) at the northwest corner of the herein described tract, the northeast corner of the remaining portion of a called 141.38 acre tract, recorded in Volume 882, Page 638, Real Property Records of Kerr County, Texas;

THENCE S 52° 12’ 48” E, along the southwest right-of-way line of State Highway No. 27, a distance of 449.84’ (S 52° 14’ E) to a ½” rebar found for northeast corner at the northwest corner of Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, recorded in Volume 7, Page 220, Plat Records of Kerr County, Texas;

THENCE S 00° 55’ 28” E, with the west boundary line of Lot 1, Block 1, a distance of 479.85’ (S 00° 57’ E) to a ½” rebar with “Voelkel” cap found for southeast corner at the southwest corner of Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, an angle point in the north boundary line of Lot 2R, Block 1, Kerrville Airport Commerce Park, Phase 1 Replat, recorded in Volume 7, Page 383, Plat Records of Kerr County, Texas;

THENCE S 89° 07’ 25” W, with the north boundary line of Lot 2R, Block 1, a distance of 351.13’ (S 89° 03’ 06” W, 351.18’) to a ½” rebar with “Voelkel” cap found for southwest corner in the east boundary line of the remaining portion of the called 141.38 acre tract;

THENCE N 00° 54’ 57” W, with the east boundary line of the remaining portion of the called 141.38 acre tract, a distance of 760.89’ (N 00° 57’ W, 2029.5’) to the POINT OF BEGINNING, CONTAINING 5.00 acres of land, more or less.

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## CHAPTER 380 ECONOMIC DEVELOPMENT AGREEMENT BETWEEN THE CITY OF KERRVILLE, TEXAS, AND THE CITY OF KERRVILLE ECONOMIC IMPROVEMENT CORPORATION

This Chapter 380 Economic Development Agreement (“Agreement”) is made and entered into as of the Effective Date, by and between the **City of Kerrville**, a Texas home-rule municipality (“City”), and the **City of Kerrville Economic Improvement Corporation**, a Texas nonprofit corporation established pursuant to the Development Corporation Act (Chapters 501, 502, and 505 of the Texas Local Government Code and hereafter referred to as “the Act”) (“EIC”); City and EIC each being a “Party,” and collectively “the Parties”; for the purposes and considerations stated below.

### WITNESSETH:

**WHEREAS**, Chapter 380 of the Texas Local Government Code permits a city to make loans or grants of public funds for the purpose of promoting economic development and stimulating business and commercial activity within a city; and

**WHEREAS**, City and the EIC seek to encourage Kildeer Mountain Manufacturing, Inc., a North Dakota corporation (“KKM”), to acquire, develop, and improve two properties, all of which will be annexed into City’s corporate limits, in a manner for KKM to open a manufacturing facility which will eventually employ several hundred people; and

**WHEREAS**, KKM manufactures and sells various products including circuit boards and fiber optics for use in the aerospace industry and plans to expand its operations into Kerrville; and

**WHEREAS**, pursuant to the KKM Agreement (defined below), EIC has agreed to purchase the Property (as defined in the KKM Agreement and in **Exhibit A** attached hereto) pursuant to the Purchase Agreements and convey the Property to KKM; and

**WHEREAS**, EIC intends to use EIC’s revenues to pay the closings costs, a portion of the purchase price, and other costs of acquisition of the Property; and

**WHEREAS**, City desires to loan funds to EIC to be used to pay the remaining balance of the purchase price for the Property; and

**WHEREAS**, pursuant to Section 501.008 of the Act, EIC is limited in incurring financial obligations except where such obligations are paid from specified

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sources, one of which is money granted under a contract with a city under Section 380.002 of the Texas Local Government Code; and

**WHEREAS**, Section 380.002 of the Texas Local Government Code specifically provides that City, as a home-rule municipality, may, under a contract with EIC, grant or loan public money to EIC and that EIC must then use such proceeds for the development and diversification of the state's economy, elimination of unemployment or underemployment in the state, and development and expansion of commerce in the state; and

**WHEREAS**, both City and EIC find that the funds that City will grant EIC pursuant to this Agreement, will in every respect help develop and diversify the state's economy, eliminate unemployment or underemployment, and develop and expand state commerce; and

**WHEREAS**, pursuant to Resolution No. 18-2014, City has previously established a Chapter 380 economic development program (the "Program") to encourage economic development within City's corporate limits; and

**WHEREAS**, City's City Council finds and determines that this Agreement will effectuate the purposes of the Program and that City's grant of funds to EIC will provide local economic development and stimulate business and commercial activity within City's corporate limits and is consistent with the General Statement of Purpose and Policy as stated within the Program; and

**WHEREAS**, City is authorized by the provisions of Article III, Section 52-a of the Texas Constitution and Section 380.001 of the Texas Local Government Code to provide grants of public money to promote local economic development and to stimulate business and commercial activity within City's corporate limits.

**NOW THEREFORE**, in consideration of the foregoing and the mutual agreements, covenants, and payments herein and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

## **ARTICLE 1** **Recitals/Definitions**

**1.01 Recitals.** The recitals to this Agreement are incorporated herein for all purposes.

**1.02 Definitions.** As used in this Agreement, the following words and phrases shall have the meanings indicated:

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“City Loan” means a loan of funds in the amount of \$1,000,000 by City to EIC and to be repaid by EIC pursuant to this Agreement, the unpaid balance of which shall bear interest at the rate of two percent (2.0%) per year until repaid in full.

“City Loan Funds” means the funds to be paid by City to EIC pursuant to the City Loan.

“Force Majeure” means any contingency or cause beyond the reasonable control of a Party including, without limitation, acts of God or the public enemy, war, riot, civil commotion, insurrection, government or de facto governmental action (unless caused by the intentionally wrongful acts or omissions of the Party), fires, earthquake, tornado, explosions, floods, strikes, slowdowns, pandemics, or work stoppages.

“KKM Agreement” means that certain Economic Development Grant and Real Estate Purchase Agreement effective \_\_\_\_\_ between EIC and KMM.

“Project” means the design, plans, construction, renovation, and installation of the Improvements at the Property in accordance with the KKM Agreement.

“Purchase Agreements” means, collectively: (i) that certain Commercial Contract – Unimproved Property between EIC (as Buyer) and Kerrville Airport Commerce Park, Ltd. (as Seller) effective May 15, 2020, providing for the purchase by EIC of Tract 1 of the Property; and (ii) that certain Commercial Contract – Improved Property between EIC (as Buyer) and Steven M. Chapman and Cynthia C. Chapman (as Seller) effective April 13, 2020, providing for the purchase by EIC of Tract 2 of the Property.

“Purchase Grant” shall have the meaning set forth in the KKM Agreement.

**ARTICLE 2  
Term**

The term of this Agreement (“Term”) will commence on the Effective Date and terminate on September 15, 2024, unless sooner terminated as provided herein.

**ARTICLE 3  
EIC Obligations**

**3.01 Payment of City Loan Funds.** Upon notice from EIC to City that EIC is prepared to close on the purchase of the Property pursuant to the Purchase Agreements, City agrees to deliver the City Loan Funds to EIC or, if requested by EIC, directly to the title company identified in the Purchase Agreements.

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**3.02 Repayment of City Loan.** EIC agrees to repay the City Loan to City as follows:

- A. Seven (7) semi-annual interest-only payments of TEN THOUSAND AND NO/100 DOLLARS (\$10,000.00) each due on March 15, 2021, September 15, 2021, March 15, 2022, September 15, 2022, March 15, 2023, September 15, 2023, and March 15, 2024; and
- B. One (1) final payment of principal and accrued interest in the amount of \$1,010,000.00 due on September 15, 2024.

EIC shall cause its annual budgets during the term of this Agreement to provide for repayment of the City Loan, to include principal and interest pursuant to this Section 3.02, to the extent that the EIC is obligated to make repayment during any fiscal year and shall cause any required disclosures to reflect the obligations of the EIC for repayment of the City Loan. EIC has the right to prepay the City Loan, in whole or in part, at any time and from time to time, without premium or penalty. The obligation of EIC to repay the City Loan Funds and any accrued interest thereon shall survive the termination of this Agreement.

**3.03 City Loan Limitations.** Under no circumstances shall the obligations of City hereunder be deemed to create any debt within the meaning of any constitutional or statutory provision.

**3.04 Current Revenue.** The City Loan Funds will be paid solely from lawfully available funds that have been appropriated by City.

**3.05 Conditions of the City Loan.** The obligation of City to provide the City Loan is conditioned upon:

- A. EIC's continued compliance with, and satisfaction of, each of the terms and conditions of this Agreement and specifically, that EIC shall not have an incurred a breach or default of this Agreement;
- B. EIC's purchase of the Property pursuant to the Purchase Agreements;
- C. EIC entering into and performing its obligations pursuant to the KMM Agreement; and
- D. Using the City Loan Funds solely to apply to the costs for purchase of the Property.

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**3.06 Late Payments.** If EIC fails to make a payment to City on or before the fifth (5<sup>th</sup>) business day after the date required by Section 3.02, EIC shall pay late payment fee in the amount of 5% of the delinquent payment, which late fee shall be paid concurrently with the payment then due.

## ARTICLE 5 Termination

This Agreement may be terminated upon any one or more of the following:

- A. Upon written notice by any Party, if the other Party defaults or breaches any of the terms or conditions of this Agreement other than Section 3.01 and such default or breach is not cured within thirty (30) days after written notice thereof; and
- B. If EIC fails to make any payment within the time required by Section 3.02 and, if such payment remains unpaid on or after the fifth (5) day after City makes a written demand for such past due payment.

Upon termination of this Agreement by City pursuant to this Article V, EIC shall be required to immediately pay to City the remaining unpaid balance of the City Loan Funds and all unpaid accrued interest thereon.

## ARTICLE 6 Miscellaneous

**6.01 Severability.** The provisions of this Agreement are severable, and if for any reason a provision of this Agreement is determined to be invalid by a court having competent jurisdiction over the subject matter of the invalid provision, the invalidity shall not affect other provisions that can be given effect without the invalid provision. Further, in lieu of such illegal, invalid, or unenforceable provision, there shall be added automatically as a part of this Agreement, a provision as similar in its terms to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable.

**6.02 Amendment.** This Agreement may be amended only by written amendment signed by both Parties.

**6.03 Venue.** All payments made pursuant to this Agreement and other obligations performed under this Agreement shall be made or performed in Kerrville, Kerr County, Texas. Venue shall lie in a state court of competent jurisdiction in Kerr County, Texas; and this Agreement shall be governed by and construed in accordance with the laws of the State of Texas without respect to the conflict of laws rules thereof.

# DRAFT 9/1/20

**6.04 Notices.** All notices given with respect to this Agreement shall be in writing and shall be deemed to have been properly given for all purposes (i) if sent by a nationally recognized overnight carrier for next business day delivery, on the first business day following deposit of such notice with such carrier unless such carrier confirms such notice was not delivered, then on the day such carrier actually delivers such notice, or (ii) if personally delivered, on the actual date of delivery, or (iii) if sent by certified U.S. Mail, return receipt requested postage prepaid, on the fifth business day following the date of mailing, or (iv) if sent by facsimile, then on the actual date of delivery (as evidenced by a facsimile confirmation) provided that a copy of the facsimile and confirmation is also sent by regular U.S. Mail, addressed as follows:

For City:

City Manager  
City of Kerrville  
701 Main Street  
Kerrville, Texas 78028  
Facsimile: (830) 792-3850

For EIC:

President  
City of Kerrville, Texas, Economic Improvement Corporation  
701 Main Street  
Kerrville, Texas 78028

**6.05 Assignment.** This Agreement is binding upon the Parties and their successors and assigns. This Agreement may not be assigned by either Party without the specific prior written consent of the other Party, which consent may be withheld at the sole discretion of the non-assigning Party.

**6.06 Parties in Interest.** Nothing in this Agreement shall entitle any party other than City or EIC to any claim, cause of action, remedy, or right of any kind.

**6.07 Interpretation.** Each Party has had the opportunity to be represented by counsel of its choice in negotiating this Agreement. This Agreement shall therefore be deemed to have been negotiated and prepared at the joint request, direction, and construction of the Parties, at arm's length, and will be interpreted in accordance with its terms without favor to any Party.

**6.08 No Joint Venture.** Nothing contained in this Agreement is intended by the Parties to create a partnership or joint venture between the Parties.

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**6.09 Survival of Terms.** All rights, duties, liabilities, and obligations accrued prior to termination shall survive termination.

**6.10 Entire Agreement.** This Agreement represents the entire agreement of the Parties with respect to the subject matter hereof.

**6.11 Recitals.** The recitals to this Agreement are incorporated herein.

**6.12 Counterparts.** This Agreement may be executed in counterparts. Each of the counterparts shall be deemed an original instrument, but all of the counterparts shall constitute one and the same instrument.

**6.13 Exhibits.** All exhibits to this Agreement are incorporated herein by reference for all purposes wherever reference is made to the same.

**6.14 Employment of Undocumented Workers.** During the term of this Agreement, City and EIC agree not to knowingly employ any undocumented workers, and if convicted of a violation under 8 U.S.C. Section 1324a (f), EIC shall immediately repay the City Loan Funds and any other funds received by EIC from City pursuant to this Agreement as of the date of such violation within 120 days after the date EIC is notified by City of such violation, plus interest at the rate of 2% compounded annually from the date of violation until paid. EIC is not liable for a violation of this Section by a subsidiary, Affiliate, or franchisees of EIC or by a person with whom EIC contracts, or any other person other than EIC.

**CITY OF KERRVILLE, TEXAS**

**CITY OF KERRVILLE, TEXAS ECONOMIC  
IMPROVEMENT CORPORATION**

\_\_\_\_\_  
Mark L. McDaniel, City Manager

\_\_\_\_\_  
Greg Richards, President

ATTEST:

ATTEST:

\_\_\_\_\_  
Shelley McElhannon, City Secretary

\_\_\_\_\_  
Keesha Franchina, Recording Secretary



# DRAFT 9/1/20

## EXHIBIT A Description of the Property

**Tract 1:** Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, according to the map or plat thereof recorded in Volume 7, Page 220, Plat Records of Kerr County, Texas.

**Tract 2:** Being a 5.00 acre tract of land located in the O. V. Robinson Survey No. 44, Abstract No. 282, Kerr County, Texas, and being a portion of that certain called 10.00 acre tract, recorded in Volume 1186, Page 80, Official Public Records of Kerr County, Texas, said 5.00 acre tract being more particularly described by metes and bounds as follows:

*Note: all bearings based on the Texas State Plane Coordinate System, South Central Zone (North American Datum of 1983, 2011 Adjustment);*

BEGINNING at a ½” rebar with “Voelkel” cap found in the southwest right-of-way line of State Highway No. 27, (100’ right-of-way) at the northwest corner of the herein described tract, the northeast corner of the remaining portion of a called 141.38 acre tract, recorded in Volume 882, Page 638, Real Property Records of Kerr County, Texas;

THENCE S 52° 12’ 48” E, along the southwest right-of-way line of State Highway No. 27, a distance of 449.84’ (S 52° 14’ E) to a ½” rebar found for northeast corner at the northwest corner of Lot 1, Block 1, Kerrville Airport Commerce Park, Phase 1, recorded in Volume 7, Page 220, Plat Records of Kerr County, Texas;

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THENCE S 89° 07’ 25” W, with the north boundary line of Lot 2R, Block 1, a distance of 351.13’ (S 89° 03’ 06” W, 351.18’) to a ½” rebar with “Voelkel” cap found for southwest corner in the east boundary line of the remaining portion of the called 141.38 acre tract;

THENCE N 00° 54’ 57” W, with the east boundary line of the remaining portion of the called 141.38 acre tract, a distance of 760.89’ (N 00° 57’ W, 2029.5’) to the POINT OF BEGINNING, CONTAINING 5.00 acres of land, more or less.