

ORDINANCE NO. 1244

AN ORDINANCE ADOPTING THE LITTLE TOAD CREEK BREWERY AND DISTILLERY ESTABLISHING A BREWERY AND DISTILLERY AS AN ECONOMIC DEVELOPMENT PROJECT WITHIN AND FOR THE SILVER CITY ARTS AND CULTURAL DISTRICT PURSUANT TO SECTION 5-10-2 B. NMSA 1978 (LOCAL ECONOMIC DEVELOPMENT ACT) AND SECTION 16-21(a) OF THE MUNICIPAL CODE OF THE TOWN OF SILVER CITY, GRANT COUNTY, NEW MEXICO.

WHEREAS, in Section 16-21 of the Municipal Code, the Town has adopted an Economic Development Plan which provides for investment in projects which are designed to create jobs as well as to promote art and cultural projects which further creates a healthy environment for the furtherance of economic development; and

WHEREAS, the Little Toad Creek Brewery and Distillery facility is located within the Town's Arts and Culture District; and

WHEREAS, the Silver City Town Council finds that the Little Toad Creek LLC is a qualifying entity under LEDA and the Town of Silver City Economic Development Plan; and

WHEREAS, the Town Council finds that the establishment of the Little Toad Creek Brewery and Distillery facility is a worthy project in that it will contribute to the available employment and generally enhance the Town's downtown neighborhood; and

WHEREAS, the Town Council finds that the Little Toad Creek Brewery and Distillery facility Project will be beneficial to the Town as a whole by fostering economic development and revitalization of the downtown area; and

WHEREAS, it is the intent of the Town Council that the Town Manager explore all available sources of funding to complete the project, including filing applications and other requests for funding from the New Mexico Economic Development Department, and to commit the Town to agreements that include terms of use, and the securing of appropriate collateral when necessary;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE TOWN OF SILVER CITY, GRANT COUNTY, NEW MEXICO, that:

1. The Little Toad Creek LLC is a "Qualifying Entity" under State LEDA and the Town of Silver City Local Economic Development Plan; and
2. The establishment of the Little Toad Creek Brewery and Distillery facility located at 203 E. San Vicente Street, Silver City, New Mexico is formally adopted as an economic development project of the Town; and
3. The Town Manager is directed to secure funding for the project from any and all available sources, including grants from the New Mexico Economic Development Department; and

4. The Town Manager is hereby authorized to file necessary applications and to commit the Town to the terms and conditions expressed therein, including where necessary, the securing of appropriate collateral for monies loaned or granted.

PASSED, ADOPTED AND APPROVED by vote of the Council of the Town of Silver City, Grant County, New Mexico, this 8th day of December, 2015.

(Seal)

Michael S. Morones, Mayor

Attest:

Ann L. Mackie, Town Clerk

Exhibit A

PROJECT PARTICIPATION AGREEMENT

This Project Participation Agreement (this "Agreement") entered into on _____, 2015 by and between the **TOWN OF SILVER CITY**, a New Mexico Municipal Corporation (the "Town") and **LITTLE TOAD CREEK LLC** (the "Company"), agree:

1. Recitals.

A. Pursuant to the Local Economic Development Act, NMSA 1978, Sections 5-10-1 through 5-10-13 NMSA 1978 ("LEDA"), the Town adopted Ordinance No. 1050 authorizing the Town to consider applications for economic development assistance;

B. As provided in the Economic Development Plan Ordinance, the Town considered an application from the Company, which proposed that the Town serve as local government conduit for an appropriation of \$100,000 from the Legislature of the State of New Mexico (the "LEDA Funds") to go toward the Company's establishment of a brewery and distillery in Silver City (the "Project") and will create 10 new direct jobs by December 31, 2017;

C. The Town has adopted Ordinance No. _____ finding that the Company is a "qualifying entity" and the Project is an "economic development project" as those terms are defined by the Act, and approving this Project Participation Agreement (this "Agreement") as meeting the requirements of the Act.

2. The LEDA Funds.

The State has appropriated \$100,000 in LEDA Funds for use in the Project. The Company may request the disbursement of up to \$100,000 during the period beginning January 1, 2016 and ending December 31, 2016 (the "Disbursement Period"). The Town will direct the LEDA Funds to the Company for use in the Project in the following manner:

a. From time to time, but no more frequently than monthly, the Company may submit to the Town a request for disbursement of a portion of the LEDA Funds to reimburse the Company for expenses in connection with the Project, with documentation substantiating such expenses (collectively, a "Disbursement Request"). The Company will not submit a Disbursement Request for less than \$20,000, but may submit a Disbursement Request for up to the full amount of the LEDA Funds available to the Company.

b. The Town may, in good faith, object to or request additional information regarding a Disbursement Request by delivering written notice

("Notice of Objection") to Company no later than 15 days after the date the Town receives the Disbursement Request. If the Town fails to deliver a timely Notice of Objection, the Disbursement Request will be deemed approved. If the Town delivers a timely Notice of Objection, the Town and the Company will work in good faith to resolve the issues raised in the Notice of Objection. If the Town and the Company have not resolved such issues 15 days after the delivery of the Notice of Objection, either party may submit the objection to mediation as described in Section 10 of this Agreement.

c. Except as set forth in Section 3(D) below, if the Town does not deliver a timely Notice of Objection, the Town will disburse to Company the full amount requested in the Disbursement Request no later than 30 days after the Company's delivery of the Disbursement Request. If the Town delivers a timely Notice of Objection, the Town will disburse the amount ultimately agreed or decided to be released to the Company no later than 30 days after the resolution of the issues raised in such Notice of Objection.

d. The Town will coordinate with the New Mexico Economic Development Department ("NMEDD") to cause the State to deliver the LEDA Funds to the Town in a timely manner and to ensure that the LEDA Funds are available for the Project. LEDA funds will be expended for reimbursement of project expenses only and cannot be advanced to the Town or to the Qualified Entity. The Town will have no obligation to expend any Town funds to make disbursements to the Company pursuant to this Agreement, and the Town will only be required to disburse funds to the Company to the extent that the Town receives the LEDA Funds from the State. If the Company submits a Disbursement Request before the Town receives the LEDA Funds from the State, the Town will notify the Company, and the 30-day period to deliver the LEDA Funds set forth in Section 3(C) will be tolled until the Town notifies the Company that it has received the LEDA Funds from the State.

e. During the Disbursement Period, the Company may continue to deliver Disbursement Requests in accordance with this Section 3 until the earlier of (i) the date on which all LEDA Funds available have been delivered to the Company and (ii) the expiration date of the Disbursement Period.

f. The Town may not offset any internal costs or overhead charges for review or processing of the Disbursement Requests against the Disbursement Request or the LEDA Funds.

3. Substantive Contribution from Little Toad Creek Brewery and Distillery.

The Company will make the following substantive contributions:

a. Project Contribution. The Company anticipates making capital investments in the Project and costs associated therewith (including, for the acquisition of equipment, tangible personal property and services associated with

the acquisition, construction and equipping of the Project) in the amount of approximately \$550,000 by December 31, 2017 (the "Project Contribution"). The parties acknowledge and agree that the intent of this Agreement is to complete the Project, and that the construction of any plant in the Town that enables the Company to engage in its manufacturing operations will satisfy this Project Contribution. Although the Company intends to have a long-term presence in the Town, for purpose of the contractual obligations of this Agreement, the Company covenants to continue to operate the Project until December 31, 2018.

b. Job Commitment. It is the Company's current intention to retain current employment and create 10 new direct jobs at the facility by December 31, 2017 (the "Job Target"). "Job" means a permanent, full-time employment position offering the employee the full range of benefits offered to other Company full-time employees.

4. Clawbacks. The clawback provisions of this Section ("Clawbacks") are intended to be the exclusive remedies with respect to any breach of this Agreement caused by the occurrence of any of the events described in this Section.

a. Facility Closure Clawback. If the Company ceases operations in the Town on or before December 31, 2018, the Company will repay to the Town all LEDA Funds that the Company actually received from the Town as of that date (the "Facility Closure Clawback.")

b. Performance Clawback. If the Company does not achieve the Job Target set forth in Section 3(b) of this Agreement by December 31, 2017 (the "Job Target Date"), the Company shall make a penalty payment to the Town (the "Performance Clawback") which will be calculated in the manner specified in the table below:

Portion of Job Target achieved as of December 31, 2017	Performance Clawback Amount
8-10 jobs	No Performance Clawback required
6-7 jobs	10% percent of all LEDA Funds actually received
4-5 jobs	20% percent of all LEDA Funds actually received
0-3 jobs	30% percent of all LEDA Funds actually received

If the Company has been required to pay the Facility Closure Clawback, the Company will not be required to pay any Performance Clawback that may come due after the date of such payment.

C. Job Target Date Reporting Requirement. For the purposes of determining compliance with Section 5.8 above, the Company will provide to the Town a copy of Company's Form ES-903, filed with the New Mexico Department of Workforce Solutions and such other data and information on its workforce that is reasonably necessary for the Town or its independent contractor to determine whether the Company has met its Job Target obligations under this Agreement. Such report will be due no later than 30 days after December 31, 2017. In addition, the Company will provide the Town with semi-annual copies of certain of Company's Form ES-903 reports no later than May 1 and November 1 of each year commencing on May 1, 2016 and ending on November 1, 2018.

D. Maximum Clawback. In no event will the Company be required to pay more than the total amount of all LEDA Funds that Company actually receives, for all Clawbacks in the aggregate.

5. Security. No later than the day prior to the date on which the Company receives its first disbursement of LEDA Funds, the Company will provide the Town with a guarantee in a form mutually acceptable to the parties (the "Guarantee"). The maximum obligation secured by the Guarantee (the "Maximum Obligation") will be \$100,000 as of the date the Guarantee is granted. Provided that the Company has not been required to pay any Clawback, the Guarantee will terminate on January 1, 2019. If the Company does not draw the entire amount of the LEDA Funds available upon the expiration of the Distribution Period, the Maximum Obligation will be reduced proportionately to reflect the actual amount of LEDA Funds actually received.

6. Force Majeure. Neither party shall be liable to the other party for any failure to perform any provisions or obligations of this Agreement if such failure is caused by or results directly or indirectly from Force Majeure. If a Force Majeure occurs, the Town and Company will work in good faith to determine how to address the impact of the Force Majeure on each party's obligations under this Agreement.

7. Dispute Resolution. The parties will work in good faith to resolve any disputes that arise prior to filing any litigation in relation to this Agreement.

8. Notice. All notices or other written communications, including requests for disbursement, that are required or permitted to be given pursuant to this Agreement must be in writing and delivered personally, by a recognized courier service, by a recognized overnight delivery service, by fax, by electronic mail,

or by registered or certified mail, postage prepaid, to the parties at the addresses shown below. If notice is mailed, it will be deemed received on the earlier of actual receipt or on the third business day following the date of mailing. If a notice is hand-delivered or sent by overnight delivery service, it will be deemed received upon actual delivery. If any written notice is sent by facsimile or electronic mail, it will be deemed received upon printed or written confirmation of the transmission. A party may change its notice address by written notice to the other party to this Agreement.

The initial notice addresses for the parties are as follows:

If to the Town:

Town of Silver City
Attention: Town Manager
PO Box 1188 Silver City NM 88062-1188
101 W Broadway St Silver City NM 88061-5323
(575)538-3731

If to the Company:

Little Toad Creek LLC
Attention: Teresa Dahl-Bredine and David Crosley
HC 68 Box 134, Silver City, NM 88061
575-536-9649

9. Ratification. The Town and the Company hereby ratify all actions consistent with this Agreement that the own and the Company or their respective agents may have taken in furtherance of the Project.

10. Miscellaneous. This Agreement binds and inures to the benefit of the own and the Company and their respective successors and permitted assigns. This Agreement may not be assigned without the written consent of the non-assigning party and the New Mexico Economic Development Department; provided, however, that with notice to the County and the New Mexico Economic Development Department, the Company may assign this Agreement to any affiliate or purchaser of substantially all of Company's assets or stock that agrees in writing to assume and perform all of Company's obligations under this Agreement. This Agreement may be amended or modified, and the performance by any party of its obligations under this Agreement may be waived, only in a written instrument duly executed by both parties. This Agreement may be executed in any number of counterparts, each of which is an original and all of which taken together constitute one instrument. This Agreement is governed by and is to be construed in accordance with the laws of New Mexico applicable to agreements made and to be performed in New Mexico.

Effective Date: _____

SIGNATURE PAGE TO PROJECT PARTICIPATION AGREEMENT

TOWN OF SILVER CITY
a governmental entity organized and
existing under the laws of the
State of New Mexico by its
TOWN COUCNIL

LITTLE TOAD CREEK LLC
Managing Member(s)

By _____

By _____

Name _____

Name _____

Title _____

Title _____

**INTERGOVERNMENTAL AGREEMENT BETWEEN
THE NEW MEXICO ECONOMIC DEVELOPMENT
DEPARTMENT AND TOWN OF SILVER CITY**

This Intergovernmental Agreement ("Agreement") is entered into as of the date of the last signature affixed below by and between the New Mexico Economic Development Department ("EDD") and the Town of Silver City ("Town"), a political subdivision of the State of New Mexico, and collectively referred to as "the Parties" with reference to the following facts.

SECTION 1. RECITALS:

WHEREAS, the New Mexico State Legislature has appropriated fifty million dollars (\$50,000,000) to EDD "for economic development projects pursuant to the Local Economic Development Act" (the "Appropriation"); and

WHEREAS, the purpose of the Local Economic Development Act, NMSA 1978 §5-10- 1 through §5-10-13 (2007) ("LEDA"), is to provide "public support for economic development to foster, promote and enhance local economic development efforts...;" and

WHEREAS, the Town has adopted LEDA by Ordinance No. 1050, which established the Town of Silver City Economic Development Plan that promotes economic development within the Town; and

WHEREAS, Little Toad Creek Brewery and Distillery ("hereinafter Qualifying Entity") has entered into a Local Economic Development Project Participation Agreement (hereinafter "PPA") with the Town and, pursuant to the terms of that PPA, the Qualifying Entity will materially participate by providing the following services to the Project:

The Qualifying Entity will establish a brewery and distillery on land in the Town that will manufacture their products (the "Project") and will create 10 new full-time positions by December 31, 2017. A copy of the PPA is attached hereto as Exhibit A; and

WHEREAS, EDD and the Town desire to enter into this Agreement as necessary to facilitate disbursement of funds for the Project.

NOW THEREFORE, the Parties do hereby agree to the following terms and conditions to accomplish the Project.

SECTION 2. PURPOSE OF AGREEMENT:

The purpose of this Agreement is to place the primary responsibility on the Town for overseeing and administering EDD's use of \$100,000 of the Appropriations for the Project. It is the intent of the parties that the Town will receive an amount not to exceed one hundred thousand dollars (\$100,000) to implement the Project. The Parties agree that any and all State funds received will be accounted for by Town as the fiscal agent for EDD in accordance with the procedures the Town will use to account for its own funds and property used to implement the project, or any properties acquired or developed by the Town as a result of implementation of the Project will be used by the Town for economic development purposes only.

SECTION 3. SCOPE OF WORK:

The Town will act as fiscal agent for \$100,000 of the Appropriations for the Project. Pursuant to Section 5-10-3(D) of LEDA, EDD will transfer \$100,000 to the Town for costs and expenses associated with the Project. In exchange for the contribution, the Qualifying Entity certifies it will create 10 full-time new full-time jobs by December 31, 2017.

All the terms, conditions, and requirements set forth under the PPA are incorporated into this Agreement by reference. EDD and the Town agree that failure of the Qualifying Entity to create the number of new full-time jobs described in Section 5(B) of the PPA or otherwise meet its obligations set forth under the PPA will result in a violation of the terms and conditions of this Agreement. Such violation will require that the Town foreclose on the security interest after any cure period granted to the Qualifying Entity. Any monies recovered by the Town as a result of the sale or foreclosure of the security interest shall be returned to EDD. The Qualifying Entity will deliver to the Town contemporaneously with the execution of the PPA a Corporate Guaranty, which will be incorporated into this Agreement as Exhibit B.

SECTION 4. TOWN OF SILVER CITY RESPONSIBILITIES:

The Town shall:

1. Pay the costs and expenses incurred for the Project from the LEDA Appropriations;

2. Provide to EDD supporting documentation in a format acceptable to EDD for activities associated with the Project. Any funds recaptured by the Town as the result of enforcing the provisions of the PPA shall be returned to EDD;
3. The Town shall notify EDD in writing of any default by the Qualified Entity within 10 days of the event of default;
4. Serve as Fiscal Agent for the funds transferred to it under this Agreement;
5. Complete all of the following goals identified in this Agreement within the time limits agreed upon by the Parties;
 - distribute the funds transferred to the Town by EDD to the Project;
 - account for receipts and disbursements of said monies;
 - provide EDD with the required financial documentation pertaining to this disbursement; and
 - submit all required and reasonably requested documentation to EDD including the endorsed LEDA Ordinance approved by the Town Council accepting the Project as a qualifying entity for LEDA, with the accompanying endorsed Project Application and PPA entered into by the Town and the Qualifying Entity, a fully executed copy of the security interest, and copies of invoices and other documentation as required by EDD within the time required;
6. Not impose any obligations on EDD with respect to the administration of this Project, other than the reimbursement of funds described in this agreement; and
7. Initiate and prosecute litigation to enforce the terms of the PPA, at EDD's cost, if necessary; and
8. Monitor job creation by the Qualified Entity and report the number of jobs created twice yearly to EDD for a period of three years following completion of the Project. Job reports shall include a copy of FORM-903 provided by the Qualified Entity to the Town, on file with the New Mexico Department of Workforce Solutions.

SECTION 5. TOWN CERTIFICATIONS:

As Fiscal Agent, the Town hereby assures and certifies that:

- A. It will comply with all applicable State laws, regulations, policies, guidelines and requirements with respect to the acceptance and use of State funds;

- B. It has the legal authority to receive and expend the funds;
- C. It will enforce the provisions of Ordinance No. _____ approving the Project and the Town's Economic Development Plan;
- D. It has exercised due diligence in certifying that the Project is a viable economic development initiative with potential long term economic development benefits;
- E. It will provide to EDD upon request all documentation and references to expertise it has relied upon in approving this Project upon receipt thereof or reliance thereupon and also with copies of all reports and documentation Town receives from the Qualifying Entity;
- F. It has entered into a PPA with the Qualifying Entity and has obtained all financial documentation necessary to protect the Town's and State's investments in the Project;
- G. It shall not at any time during the life of this Agreement convert any property acquired or developed pursuant to this Agreement to uses other than those within the Project description as defined herein;
- H. It will notify EDD of any default on the part of the Qualifying Entity within 10 days of the event of default and shall provide the Qualifying Entity an opportunity to cure any default by in accordance with the PPA prior to termination thereof;
- I. It will comply with the State Procurement Code and local procurement codes and will keep files of all related procurement documents, including but not limited to requests for professional services, advertisements, minutes of pertinent meetings, selection and award criteria, contacts, subcontracts and agreements;
- J. No member, officer or employee of the Town or its designees or agents, no member of the governing body of the locality of which the program is situated, and no other public official that exercises any functions or responsibilities with respect to the Project during his/her tenure, or for one (1) year thereafter, shall have any interests, direct or indirect, in any contract or subcontract, or the process thereof, for work to be performed in connection with the Project that is the subject of this Agreement. The Town shall incorporate in all contracts or subcontracts a provision prohibiting such interest pursuant to this certification; and
- K. It has complied with Article IX, Section 14, of the New Mexico Constitution known as the "anti-donation clause".

SECTION 6. EDD RESPONSIBILITIES:

EDD shall:

- A. Transfer to the Town for costs and expenses incurred for the Project an amount not to exceed one hundred thousand dollars (\$100,000). The funds shall be used only for the purpose stated in this Agreement;
- B. At its discretion, review and audit the Project if it is deemed to be necessary or desirable; and
- C. Reimburse the Town for any costs associated with litigation to enforce the terms of the Guaranty, if necessary.

SECTION 7. TERM OF AGREEMENT:

This Agreement shall become effective on the date it is fully executed and shall terminate December 31, 2018 pursuant to this agreement.

SECTION 8. LIABILITY:

No party shall be responsible for liability incurred as a result of the other party's acts or omissions. Any liability incurred in connection with this Agreement is subject to the New Mexico Tort Claims Act. The Town and EDD may agree to reimburse one another under these liability provisions, subject to sufficient appropriation by the New Mexico Legislature or sufficient funds being available to the party, as determined by the party responsible for payment.

SECTION 9. DISPOSITION OF PROPERTY; RECORDS; RETURN OF SURPLUS FUNDS

- A. Property purchased under this Agreement for the Project shall remain with the purchasing party unless otherwise agreed upon.
- B. The Town shall keep such records as will fully disclose the amount and disposition of the total funds from all sources budgeted for the Project, the purposes for which such funds were used and such other records as EDD may require.
- C. If, upon the expiration of the Project or the termination date of this Agreement, any

surplus funds are possessed by Town, Town shall return said funds to EDD for disposition in accordance with law.

SECTION 10. STRICT ACCOUNTABILITY:

The Town shall be strictly accountable for receipts and disbursements relating hereto and shall make all relevant financial records available to EDD and the New Mexico State Auditor quarterly or upon request, and shall maintain all such records for a period of six (6) years following completion of all the records and any audits

SECTION 11. REPORTS:

The Town shall submit bi-annual reports in May and November of each year during the life of this Agreement to EDD respecting job retention and creation attributable to the State appropriation and a Final Report EDD either on or before the termination of this Agreement or upon final reimbursement to the Town of an amount equal to all the Public Contributions, whichever occurs first. The Final Report shall contain a description of work accomplished, the methods and procedures used, a detailed budget breakdown of expenditures, a description of any problems or delays encountered and the reasons therefore, and such other information as may be requested by EDD.

SECTION 12. NOTICES; REPRESENTATIVES OF THE PARTIES:

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. Mail, either first class or certified, return receipt requested, postage prepaid, as follows. The parties hereby designate the individuals named below as their representative responsible for overall administration of this Agreement.

To EDD:

Juan Torrez
Finance Development Team Leader
Joseph Montoya Building
1100 St. Francis Drive
Santa Fe, New Mexico 87505

To the Town:

Alex C. Brown
Town Manager
Town of Silver City
PO Box 1188
Silver City, New Mexico 88062-1188

SECTION 13. AMENDMENTS:

This Agreement shall not be altered, changed or amended, except by instrument in writing executed by all of the Parties hereto.

SECTION 14. GOVERNING LAW:

This Agreement shall be governed by the laws of the State of New Mexico.

[THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the last date of signature below,

TOWN OF SILVER CITY, NEW MEXICO

By: _____

Name: _____

Title: _____

Date: _____

APPROVED AS TO FORM

By: _____

Town of Silver City Attorney

NEW MEXICO ECONOMIC DEVELOPMENT DEPARTMENT

By: _____

Jon Barela

Cabinet Secretary

Date: _____

APPROVED AS TO FORM

By: _____

Wade Jackson

General Counsel

