

AMENDMENT TO ECONOMIC INCENTIVE AGREEMENT

THIS AMENDMENT TO THE ECONOMIC INCENTIVE AGREEMENT (this "Agreement") is made and entered into this ___ day of _____, 2009 by and between the CITY OF O'FALLON, an Illinois municipal corporation located in St Clair County, Illinois (the "City") and Jack Schmitt Oldsmobile -Cadillac, Inc having a principal office at 915 West Highway 50, O' Fallon, Illinois or its assigns (the "Developer"). (All terms herein shall have the meaning ascribed to them in Paragraph I of this Agreement).

RECITALS

- A. On March 6, 1995, the City Council adopted a resolution pursuant to the Business District Development and Redevelopment Act, 65 ILCS 5/11-74.3-1 et seq., setting forth the City's intent to establish a business district.
- B. On December 18, 1995 the City Council adopted Ordinance No. 1814, designating as a Business District the area locally known as the Regency Park Business District.
- C. On December 15, 1997 the City and the Developer entered into an economic incentive agreement to provide for additions to the development project (project).
- D. The Developer proposes hereafter to make additional improvements to the property locally known as 915 W. Highway 50 (see attached Exhibit I -hereinafter referred to as the Property). Said additional improvements to the Property shall generally be as identified on the attached Exhibit 2 -hereinafter referred to as the Amended Project.
- E. The Amended Project is located in the Regency Park Business District.
- F. The City Council has found, and does hereby find, that the Amended Project (as hereinafter defined on Exhibit 2) is expected to create or retain job opportunities within the City; the Amended Project will serve to further the development of adjacent areas; without entering into this Agreement, the Amended Project would not be possible; the Developer meets high standards of credit worthiness and financial strength; the Amended Project will strengthen the commercial sector of the City; the Amended Project will enhance the tax base of the City; and this Agreement is made in the best interest of the City.
- G. The Developer has expressly conditioned the undertaking of the Development Amended Project on the City entering into this Agreement.
- H. This Agreement has been submitted to the City Council for consideration and review and the City Council has given notices and taken all actions required to be taken prior to the execution of this Agreement to make this Agreement effective.
- I. The City is authorized to enter into this Agreement pursuant to the provisions of 65 ILCS 5/8-11-20 and the powers and authority vested in the City under Illinois law to enable the development and redevelopment of property and encourage the economic growth of the City, to increase industry and commerce within the State of Illinois, and to relieve conditions of unemployment and maintain existing levels of employment.

NOW, THEREFORE, to assure opportunities for development and attract sound and stable commercial growth to promote the public interest and to enhance the tax base of the City and to induce the Developer to undertake the Project and in consideration of the Developer's agreement to undertake the Project and the City's agreement to reimburse the Developer for the costs of constructing the Improvements; and in consideration of the mutual promises, covenants, stipulations, and agreements herein contained in this Agreement, the Developer and the City hereby agree as follows;

1. **Definitions.** As used in this Agreement the following words and terms shall have the following meanings:

"Certificate of Completion": A document issued by the City in accordance with this Agreement and evidencing the Developer's satisfaction of all obligations and covenants to construct the Development Project

"City"; The City of O' Fallon, St .Clair County, Illinois, an Illinois municipal corporation.

"City Costs": Actual planning and legal costs in an amount not to exceed Fifteen Thousand Dollars (\$15,000.00) incurred by the City in preparing the Amendment to the Regency Park Business District Plan and in negotiating the terms of this Agreement with the Developer.

"City Council": The duly elected Mayor and Board of Aldermen of the City of O'Fallon, Illinois,

"Commencement Date": The first day of the month following the first month in which the City receives pursuant to applicable law Incremental Sales Tax Revenues which are attributable to the operation of the Cadillac, Suzuki and Mahindra Automobile dealerships to be established by the Developer on the Property.

"Construction Plans": Plans, drawings, specifications, and related documents, and construction schedules for the construction of the Improvements, together with all supplements, amendments or corrections, submitted by the Developer and approved by the City in accordance with this Agreement.

"Developer": Jack Schmitt Oldsmobile -Cadillac Inc. or its successors or assigns.

"Improvements": All improvements on the Property by Developer to implement the Project as more particularly described on Exhibit 2 hereof.

"Incremental Sales Tax Fund": The separate City account into which the Incremental Sales Tax Revenues are from time to time deposited pursuant to this Agreement.

"Incremental Sales Tax Revenues": All Municipal Retailers' Occupation Tax (MROT) revenues which the City is entitled to receive during the period of this Agreement which are the result of 1% of retail sales and service operation of the Developer (or of its parent, subsidiary or other affiliated entity) at the Property, pursuant to 20 ILCS 5/1 et seq. and such

other authority as shall be applicable or any successor statute. Said amount of assistance to the Developer by the City shall be based upon one-half of the 1% MROT sales tax generated by automotive sales and servicing at the Property for the Cadillac Dealership the amount of assistance to the Developer by the City shall be based upon the one-half of the 1% of the MROT sales tax generated by automotive sales and servicing at the property which exceeds \$6,600 in any month of operation. For the Suzuki and Mahindra dealerships, the amount of assistance to the Developer by the City shall be based upon one-half of 1% of MROT sales tax generated by automotive sales and servicing at the property in any month of operation. The amount of total assistance to the Developer for the Cadillac dealership shall remain as originally agreed in the amount of \$300,000 with the assistance to be based on sales for a period ending September 30, 2011. For the Suzuki and Mahindra dealerships, the amount of assistance shall be a total of \$350,000 for each dealership, with the assistance to be based on sales for a period of ten years from the commencement date.

"Initial Construction": The commencement of site construction of the Improvements in connection with the Development Project.

"Project Site" or "Property": Is defined in paragraph D of the Recitals and Exhibit 1 to this Agreement.

2. Developer's Performance of the Work.: The Developer, subject to paragraph eight of this Agreement, shall commence Initial Construction, of the Amended Project, on or before January 1, 2010 and complete expansion of the Cadillac dealership and the construction of the Suzuki and Mahindra dealerships by December 31, 2011; provided that the time for completion shall be extended for delays beyond the control of the Developer, including but not limited to, acts of God, inclement weather, strikes, inability to procure or a general shortage of labor, equipment, facilities, materials, or supplies, lockouts, acts of labor unions, condemnation, court orders, laws, or order of governmental or military authorities, or delays by the City in approving the Construction Plans for the Improvements.

Developer agrees to construct, or cause to be constructed, all Improvements in accordance with zoning; subdivision and other development codes including plans and specifications as approved by the City Engineer, City of O'Fallon.

- 2.1 Construction Plans: The Developer shall submit for City approval Construction Plans in sufficient completeness and detail to show that construction of the Improvements will be in accordance with the provisions of this Agreement and that the Project will conform to applicable City codes. The Construction Plans shall be prepared by a professional architect or engineer licensed to practice in the State of Illinois. Construction Plans and all construction practices and procedures with respect to the Improvements shall be in conformity with all applicable state and local laws ordinances and regulations.

The City shall approve or reject in writing the Construction Plans within thirty (30) days after submittal by the Developer to the City, otherwise, the Construction Plans shall be deemed approved. Immediately upon approval of the Construction Plans, the City shall issue a building permit for the Project. If the City rejects the Construction Plans, said rejection shall specify any and all deficiencies in the Construction Plans based on applicable City codes and ordinances.

Following receipt of the rejection the Developer shall submit new or corrected Construction Plans within thirty (30) days after the date the Developer receives written notice of the City's rejection of the Construction Plans referred to in the latest such notice. The provisions of this subparagraph relating to such approval, rejection and re-submittal of the Construction Plans shall continue to apply to re-submittal of corrected Construction Plans until the Construction Plans have been approved by the City and a building permit for the Project issued. Said approval shall not be unreasonably withheld or delayed by the City. The Developer agrees that all construction work by the Developer or its agents or independent contractors shall be in substantial conformity with the Construction Plans as finally approved by the City.

- 2.2 Changes: During the progress of the Improvements the Developer may make such reasonable changes, including, without limitation, modification of the construction schedule, including dates of commencement and completion, modification of the areas in which the Improvements are to be performed, expansion or deletion of items, and any and all such other changes as site conditions or orderly development may dictate and as may be in furtherance of the general objectives of the Project, but the construction shall be subject to approval by the City.
- 2.3 Certificate of Completion: Promptly after completion of the Improvements in accordance with the provisions of this Agreement, the City will furnish to the Developer a Certificate of Completion so certifying. Certification by the City shall be conclusive determination of the satisfaction of the Developer's agreements and covenants to complete the Improvements. The Certificate of Completion provided for by this subparagraph shall be in a form which will enable recordation in the office of the St Clair County Recorder. If the City shall refuse or fail to provide such certification, the City shall, within ten (10) days after written request by the Developer provide to the Developer a written statement stating in adequate detail in what respects the Developer has failed to complete the Improvements in reasonable accordance with the provisions of this Agreement or is otherwise in default and what reasonable measures or acts the Developer must take or perform, in the opinion of the City to obtain such certification.
3. Pledge of Incremental Sales Tax Revenues. The City hereby pledges and agrees to apply the Incremental Sales Tax Revenues to the reimbursement of Development Costs incurred by the Developer in accordance with this Agreement. Said reimbursement shall not exceed \$300,000 (including distributions made to date pursuant to the party's original Agreement) for the Cadillac dealership and \$350,000 each for the Suzuki and Mahindra dealerships. The City agrees that during the term of this Agreement, the City shall not further encumber or pledge any portion of Incremental Sales Tax Revenues or take any action inconsistent with the terms and intent of this Agreement; the City hereby indemnifies and agrees to hold Developer harmless from and against any breach or violation of the foregoing.
- 3.1 Establishment of and Deposits into Incremental Sales Tax Fund: The City hereby agrees to cause its treasurer to create a separate fund account to be known as the Incremental Sales Tax Fund for the Jack Schmitt Oldsmobile -Cadillac, Suzuki, and Mahindra dealerships. Beginning on the Commencement Date and for the term of this Agreement, the City shall deposit into the Incremental Sales Tax Fund for the Jack Schmitt Inc. Project all Incremental Sales Tax Revenues within ten (10) business days after receipt thereof. Prior to the end of each calendar month during the term of this Agreement, the City shall prepare and deliver to the Developer a written report of the amount of Incremental Sales Tax Revenue deposited in to the Incremental Sales Tax fund for Jack Schmitt Cadillac Inc. Project for the calendar month immediately preceding. Payments will be quarterly based information received from the Illinois Department of Revenue.

3.2 Sales Tax Reporting: Within twenty (20) days after the end of the calendar month, which includes the Commencement Date and within twenty (20) days after the end of each calendar month thereafter until all amounts due to Developer hereunder have been paid in full, Developer shall provide to the Treasurer of the City or to such other official as shall be designated by the City ("City Official"), a written summary of the Incremental Sales Tax Revenues to which the City is entitled by reason of sales made in such month by Developer. Such Summary shall be in form and substance and shall be accompanied by copies of the ST-I Form that is required by the State of Illinois Department of Revenue for each retail business operating at the Property each month. Within five (5) days of the City Official's receipt of such summary and back-up documentation, the City Official shall calculate and certify to the City the amount of Incremental Sales Tax Revenues due to the Developer in accordance with this Agreement. The City Official shall otherwise keep confidential all information contained in any such summary and back-up documentation submitted pursuant to this Agreement and shall use such information only for the purposes of this Agreement.

The Developer and the City agree to cooperate and to take all additional reasonable actions necessary to ensure accurate calculation and deposits of the Incremental Sales Tax Revenues. The City shall arrange with the Illinois Department of Revenue for the systematic receipt of sales tax information for sales made by the Developer from the Project Site. To assist the City, the Developer shall supply or cause to be supplied to the City appropriate authorizations of the Illinois Department of Revenue to provide such information.

3.3 Monthly Accounting and Adjustment: As soon as possible after the end of each quarter following the Commencement Date, the City shall cause its City Official to provide to the Developer an accounting of the receipts and expenditures from the Incremental Sales Tax Fund for each of the dealerships and within ten(10) days after the end of each calendar quarter, the City shall pay to the Developer all Incremental Sales Tax Revenues due the Developer that have been deposited in the Incremental Sales Tax Fund for the dealerships during such quarter.

3.4 Operating Commitment: Developer agrees that it will operate the Cadillac, Suzuki and Mahindra dealerships at the Project Site as identified, herein, and conduct said businesses in good faith for a period of not less than 15 years from the date of this Agreement. Failure to do so shall, notwithstanding the provisions of Section 6, hereof, or any other provisions pertaining to Assignment of this Agreement, result in Developer repaying to the City the amount of Incremental Sales Tax Revenues paid by the City to Developer. Said amount shall not exceed \$300,000 for the Cadillac dealership and shall not exceed \$350,000 each for the Suzuki and Mahindra dealerships. In each case the repayment shall be within 10 days of termination of the respective dealership operations at the Project Site.

4. Method of Reimbursement: The City agrees to reimburse the Developer for Development Costs incurred by the Developer up to \$300,000 for the Cadillac dealership and \$350,000 each for the Suzuki and Mahindra dealerships in accordance with the provisions contained herein and further described below:

A. Beginning on the Commencement Date and until September, 2011 for the Cadillac dealership and for a maximum of (10) years from Commencement date for the Suzuki and Mahindra dealerships the City will pay to the Developer the Incremental Sales Tax Revenues received by the City during such period.

B. Incremental Sales Tax Revenues required to be paid to the Developer shall be payable on a quarterly basis after the City's receipt thereof from the Illinois Department of Revenue or other agency that may remit such revenues to the City, provided that nothing in this Agreement shall require the City to pay any amount in excess of the Incremental Sales Tax Revenues actually received by the City during the period that this Agreement is in effect.

C. If during the period that this Agreement is in full force and effect except for causes or conditions provided for in paragraph 8 of this Agreement, Developer or its parent, subsidiary or affiliated entity ceases to operate from the Project Site a Jack Schmitt Oldsmobile -Cadillac Inc for a period exceeding ninety (90) consecutive days then the City shall have no further obligation to make payments of Incremental Sales Tax Revenues to Developer as provided for in this Agreement, nor shall such payment be due to any successor developer or tenant.

5. Termination: The Developer and the City shall have the right of termination as follows:

5.1 Developer's Right of Termination: At any time prior to the Developer's initiation of construction of the Development Project in accordance with paragraph 2 of this Agreement, the Developer may, by giving written notice to the City, terminate this Agreement and Developer's obligations hereunder, if the Developer, in the Developer's sole discretion, determines that the Development Project is no longer economically feasible. Upon such termination, the Developer shall reimburse the City in the amount of the City Costs and the City shall have no further obligation to reimburse the Developer for any amounts to be advanced under this Agreement.

5.2.1 City's Right of Termination: Except in the event of causes or conditions as provided for in paragraph 8 of this Agreement, the City may, by giving written notice to the Developer, terminate this Agreement and City's obligations hereunder for each respective dealerships, if the Developer has not started expansion of the Cadillac dealership or construction of the facilities for the Suzuki and Mahindra dealerships by January 1, 2010 and completed construction of same by December 31, 2011. Upon such termination, the City shall have no further obligation to reimburse the Developer for any amounts to be advanced under this Agreement.

6. Assignment. Prior to the completion of the Development Project, the Developer's rights, duties and obligations under this Agreement shall be assignable only with the consent of the City, which consent shall not be unreasonably withheld. Once the Development Project has been completed the Developer's rights, duties and obligations under this agreement shall be assignable without the consent of the City.

However, any such assignment which results in the operation of any retail business other than the Cadillac, Suzuki and Mahindra dealerships which occupies all of the space originally constructed for such dealership as part of the Development Project shall relieve the City from any further obligations to reimburse the Developer for any amounts to be advanced under this Agreement.

7. Remedies: Except as otherwise provided in this Agreement in the event of any default in or breach of any term or provision, the defaulting or breaching party (or successor or assign) shall, upon written notice from the other party, proceed promptly to cure or remedy such default or breach, and shall, in any event, within thirty (30) days after receipt of notice, commence to cure or remedy such default or breach. In case such cure or remedy is not commenced within said thirty (30) days or not diligently pursued, or the default or breach shall not be cured or remedied within a reasonable time, 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, proceedings to compel specific performance by the defaulting or breaching party. Costs of said action, including reasonable attorney's fees, shall be borne by the defaulting or breaching party.

8. Force Majeure: Neither the City nor the Developer nor any successor in interest or assignee shall be considered in breach or default of their respective obligations under this Agreement, and time for performance of obligations hereunder shall be extended, in the event of any delay caused by force majeure, including, without limitation, damage or destruction by fire or other casualty; condemnation; strike; lockout; civil disorder; war; restrictive government regulations; delay in the issuance of any permits and/or legal authorization (including engineering approvals) by any governmental entity necessary for the Developer to proceed with construction; inability to procure or a general shortage or labor, equipment, facilities, materials or supplies; acts of God; unusually adverse weather or wet soil conditions; or other causes beyond the parties reasonable control, included but not limited to, any court order or judgment resulting from any litigation affecting the validity of the Development Project or this Agreement.

9. Notices: Any notice demand or other communication required by this Agreement to be given by either party hereto to the other shall be in writing and shall be sufficiently given or delivered if dispatched by certified United States First Class Mail, postage prepaid or delivered personally.

In the case of the City, to:
c/o City Clerk
255 South Lincoln Avenue
O'Fallon, Illinois 62269

In the case of the Developer, to:
Jack Schmitt Oldsmobile -Cadillac, Inc.
915 West Hwy 50
O'Fallon, IL. 62269

Or to such other address with respect to either party as that party may, from time to time, designate in writing and forward to the other as provided in this paragraph.

10. Term: As to the Cadillac Dealership this Agreement shall remain in full force and effect until September, 2011 or until the amount of \$300,000 is rebated to the Developer whichever occurs first. For the Suzuki and Mahindra dealerships this Agreement shall remain in full force and effect for ten (10) years from the Commencement Date or until \$350,000 is rebated to each respective Dealership, whichever comes first.

11. Mutual Assistance: The parties agree to take such actions including the execution and delivery of such documents, instruments, petitions and certifications supplement hereto (including appropriate amendments to the Regency Park Business District Park), and the obtaining of grants of access to and easements over public property as may be necessary or appropriate to carry out the terms, provisions and intent of this Agreement and which do not impair the rights of the signing party as they exist under this Agreement, and to aid and assist each other in carrying out said terms, provisions, and intent provided that nothing herein shall be construed to obligate the City, acting as a party hereto, to grant municipal permits or other approvals it would not be obligated to grant, acting as a political subdivision, absent this Agreement.

12. Miscellaneous Provisions.
 - 12.1 Inspection: The Developer shall allow authorized representatives of the City access to the Development Project Site from time to time upon reasonable advance notice prior to the completion of the Improvements for reasonable inspection thereof
 - 12.2 Choice of Law: This Agreement shall be taken and deemed to have been fully executed, made by the parties in, and governed by the laws of the State of Illinois for all purposes and intents.
 - 12.3 Entire Agreement: Amendment. The parties agree that this Agreement constitutes the entire agreement between the parties and that no other agreements or representations other than those contained in this Agreement have been made by the parties. This Agreement shall be amended only in writing and effective when signed by the authorized agents of the parties.
 - 12.4 Severability: In the event any term or provision of this Agreement is held to be unenforceable by the court of competent jurisdiction, the remainder shall continue in **full** force and effect to the extent the remainder can be given effect without the invalid provision.

13. Representative Not Personally Liable: No official agent, employee, or representative of the City shall be personally liable to the Developer in the event of any default or breach by any party under this Agreement, or for any amount which may become due to any party or on any of the Obligations under the terms of this Agreement.

14. Representation of the Parties.
 - 14.1 Representations of the City: City hereby represents and warrants that the City has full constitutional and lawful right, power and authority, under current applicable law, to execute and deliver and perform the duties and obligations of this Agreement, and all of the foregoing have been or will be duly and validly authorized and approved by all necessary City proceedings, findings and actions. Accordingly, this Agreement constitutes the legal, valid and binding obligation of the City, enforceable in accordance with its terms,

- 14.2 Representations of the Developer: The Developer hereby represents and warrants that the Developer has full corporate power to execute and deliver and perform the terms, duties, and obligations of this Agreement and all of the foregoing has been duly and validly authorized by all necessary corporate proceedings. This Agreement constitutes the legal valid and binding obligations of the Developer enforceable in accordance with its terms,
15. Payment of Claims: The City will pay and discharge from sources other than the Incremental Sales Tax Fund for the Developer's Cadillac, Suzuki and Mahindra dealerships any lawful claims which if unpaid, might become a lien or charge upon the Incremental Sales Tax Revenues or the moneys in the Incremental Sales Tax Fund for the Developer's Cadillac, Suzuki and Mahindra dealerships. Nothing herein contained shall require the City to make such payments so long as the City in good faith shall contest the validity of such claims.

IN WITNESS WHEREOF the City and the Developer have caused this Agreement to be executed in their respective names and caused their respective seals to be affixed thereto, and attested as to the date first above written.

ATTEST

THE CITY OF O'FALLON, ILLINOIS

Philip A. Goodwin, City Clerk

Gary L. Graham, Mayor

ATTEST:

DEVELOPER

By:

Jack Schmitt, President

