

RESOLUTION NO. 5528

A RESOLUTION AUTHORIZING THE CITY MANAGER TO SIGN AN AMENDMENT TO THE DEVELOPMENT AGREEMENT PREVIOUSLY EXECUTED ON OR ABOUT OCTOBER 26, 2006, BETWEEN SVC MANUFACTURING, INC., THE CITY OF ALBANY, THE COUNTY OF LINN, THE ALBANY-MILLERSBURG ECONOMIC DEVELOPMENT CORPORATION, THE OREGON DEPARTMENT OF TRANSPORTATION, AND THE STATE OF OREGON.

WHEREAS, on or about October 26, 2006, the City entered into a Development Agreement with SVC MANUFACTURING, INC., the COUNTY OF LINN, the ALBANY-MILLERSBURG ECONOMIC DEVELOPMENT CORPORATION, the OREGON DEPARTMENT OF TRANSPORTATION, and the STATE OF OREGON, concerning the terms and conditions under which, SVC MANUFACTURING, INC., a major industrial manufacturer and employer would locate and construct facilities in the City of Albany; and

WHEREAS, SVC MANUFACTURING, INC., has subsequently informed the other parties to the agreement of its desire to delay construction of the project for up to three years; and

WHEREAS, City staff, under the direction of the City Manager, have entered into negotiations with the other parties to the aforesaid agreement, concerning the terms, conditions, and circumstances, under which an amendment to the October 26, 2006, would be in the public interest; and

WHEREAS, an Amendment to the Development Agreement has been negotiated by staff and reviewed by the Albany City Council; and

WHEREAS, the Albany City Council hereby determines that it is in the public interest to execute the Amendment to the Development Agreement.

NOW, THEREFORE, BE IT RESOLVED that the City Manager of the City of Albany is authorized to execute, on behalf of the City of Albany, the Amendment to Development Agreement, which is attached hereto as Exhibit "1" and by this reference incorporated herein.

BE IT FURTHER RESOLVED that Resolution No. 5465 is hereby superseded by this resolution.

DATED AND EFFECTIVE THIS 10<sup>TH</sup> DAY OF DECEMBER 2007.

  
Council President

ATTEST:

  
City Clerk

## Amendment to Development Agreement

This Amendment to Development Agreement (this "**Amendment**") is entered into as of this \_\_\_\_ of \_\_\_\_\_, 2007 (which date shall be the date of the last Parties' signature hereto), by and between SVC MANUFACTURING, INC., a Delaware corporation ("**SVC**"), the CITY OF ALBANY, OREGON, a municipal corporation organized under the laws of the State of Oregon (the "**City**"), the COUNTY OF LINN, a political subdivision of the State of Oregon (the "**County**"), the ALBANY MILLERSBURG ECONOMIC DEVELOPMENT CORPORATION, an Oregon non-profit corporation ("**AMEDC**"), the OREGON DEPARTMENT OF TRANSPORTATION ("**ODOT**") and the STATE OF OREGON acting by and through its Economic and Community Development Department ("**OECDD**") (SVC, the City, the County, AMEDC, ODOT, and OECDD are sometimes hereinafter referred to collectively as the "**Parties**" and individually as a "**Party**").

### RECITALS

A. On or about October 26, 2006, the Parties hereto entered into a Development Agreement (hereafter, the "**Development Agreement**") setting forth the Parties' rights and responsibilities to one another concerning the location and construction of an approximately 900,000 square foot manufacturing and warehouse facility, and an anticipated "to be determined" bottle manufacturing plant.

B. Subsequent to the execution of the Development Agreement, SVC informed the other Parties of its desire to delay construction of the Project (as defined in the Development Agreement) for up to three (3) years.

C. The Parties, by this Amendment, hereby amend and modify the Development Agreement according to the terms hereof.

NOW, THEREFORE, in consideration of the mutual promises set forth herein, the Parties hereby agree as follow:

#### 1. Defined Terms

Capitalized terms used herein that are defined in the Development Agreement and not otherwise expressly defined in this Amendment shall have the meanings given to them in the Development Agreement.

#### 2. Limitation on Amendments

Except as expressly modified herein, all terms of the Development Agreement are reaffirmed by the Parties and shall remain in full force and effect and nothing contained herein shall limit or modify the remedies available to any Party in the event that the Development Agreement, as amended herein, is breached.

### **3. Extensions of Time for Performance**

A. SVC is hereby granted a one (1) year extension of all time lines and deadlines for the performance of SVC's obligations ("**Performance Time Lines**") set forth in the Development Agreement.

B. SVC may apply for, and receive, two (2) additional one (1) year extensions of its Performance Time Lines under the following terms:

#### **Second One Year Extension**

- i. In order to be eligible for a second one (1) year extension, SVC must notify the City, in writing, on or before January 31, 2009, that it seeks a second one (1) year extension and tender the one (1) year modification fee of \$710,000 referred to in Section 10 below. The remaining Parties hereby grant the City the sole authority to approve or disapprove the request for a second one (1) year extension in accordance with the terms of this Amendment.
- ii. SVC shall be entitled to a second one (1) year extension only if there have been no changes to the law (including Appellate Court decisions, but excluding changes to local law enacted or adopted by the City or the County) occurring after the date of this Amendment, (a) which materially increase the City's cost of completing the Infrastructure Projects under the terms of the Development Agreement, as modified herein, and (b) such increases cannot be financed through creation of an LID in accordance with Section 4.03 of the Development Agreement and Section 5 of this Amendment. In the event such changes have occurred, SVC shall be entitled to a second one (1) year extension only if the City and SVC are able to agree upon terms, including if necessary a subsequent amendment to the Development Agreement, reasonably necessary to fully protect the City from such increased costs.

#### **Third One Year Extension**

- i. In order to be eligible for a third one (1) year extension, SVC must notify the City in writing on or before January 31, 2010 that it seeks a third and final one (1) year extension and tender the one (1) year modification fee of \$710,000 referred to in Section 10 below. The remaining Parties hereby grant the City the sole authority to approve or disapprove the request for a third and final one (1) year extension in accordance with the terms of this Amendment.

- ii. SVC shall be entitled to a third one (1) year extension only if there have been no changes to the law (including Appellate Court decisions, but excluding changes to local law enacted or adopted by the City or the County) occurring after January 31, 2009, (a) which materially increase the City's cost of completing the Infrastructure Projects under the terms of the Development Agreement, as modified herein, and (b) such increases cannot be financed through creation of an LID in accordance with Section 4.03 of the Development Agreement and Section 5 of this Amendment. In the event such changes have occurred, SVC shall be entitled to a third one (1) year extension only if the City and SVC are able to agree upon terms, including if necessary a subsequent amendment to the Development Agreement, reasonably necessary to fully protect the City from such increased costs.

#### **4. Extension of City's Time Line for Performance**

All of the deadlines for performance of the City's obligations under Sections 4.01 and 4.05 of the Development Agreement are hereby extended by one (1) year. In the event that SVC seeks a second or third one (1) year extension of its Performance Time Lines, the City may condition the grant of such additional extensions upon a corresponding grant by SVC of an additional one-year extension to the City for any item of the City's performance under Sections 4.01 and 4.05 of the Development Agreement not yet completed.

#### **5. Financing of Infrastructure Improvements**

The City intends to continue work toward completion of all of the Infrastructure Projects under the terms of the Development Agreement. The City intends to finance some or all of its obligations in connection with the Infrastructure Projects through the creation of a LID or LIDs in accordance with Section 4.03 of the Development Agreement. In the event that SVC applies for and receives a one (1) year extension of its Performance Time Lines over and above the first one (1) year extension granted by this Amendment, SVC shall not be exempted from the obligation to pay any such LID Assessments levied against the Land during each such subsequent one (1) year extension. SVC covenants that it will pay any such LID Assessments when due, provided, however, that nothing herein shall be construed as a waiver by SVC of any right it may have to object to or remonstrate against the fairness of any LID Assessment levied against the Land.

#### **6. Sewer and Water Capacity**

In the event that the City notifies SVC, in writing, of another bona fide water and sewer user whose construction or expansion requires sewer and water capacity not then currently being used by SVC, SVC shall release the amount of sewer and water capacity required by such bona fide user, but in no event shall the water capacity reserved for SVC be less than 1,600 gallons per minute at 60 pounds per square inch with a maximum monthly average flow of 2.8 million

gallons per day; nor shall the sewer capacity reserved for SVC be less than maximum month average flow of 1 million gallons per day, average month flow of 0.7 million gallons per day, peak daily flow of 1.6 million gallons per day, maximum monthly average biochemical oxygen demand of 333 pounds per day, maximum monthly average total suspended solids of 248 pounds per day, pH range of 6.0 to 10.0.

**7. SVC to Accept Risks of Delay**

SVC acknowledges that delay carries with it additional risks of land use challenges, permit difficulties, changes in the law, or unforeseen litigation. SVC agrees that it remains solely responsible for securing all required land use approvals, and regulatory permits. If changes to the law (including Appellate Court decisions, but excluding changes to local law enacted or adopted by the City or the County) that occur after the date of this Amendment, or, after January 31, 2009 if SVC has exercised its second extension, or after January 31, 2010 if SVC has exercised its third extension, materially increase the City's costs of completing the Infrastructure Projects under the terms of the Development Agreement, as modified herein, and such increases cannot be financed through creation of an LID in accordance with Section 4.03 of the Development Agreement and Section 5 of this Amendment, SVC shall reimburse City for such additional costs. Provided, however, that any such cost increases must be documented with reasonable particularity and must be directly caused by changes to the law as described in this Section 7.

**8. Continuing Cooperation**

SVC and City agree to communicate through meetings or telephone conversations not less than monthly (unless waived by both parties) concerning the progress of the Project and to work cooperatively to secure the purposes of the Development Agreement as modified by this Amendment.

**9. Modification Fees**

Contemporaneously with the execution of this Amendment, SVC will pay the City \$200,000 as a one time modification fee. In addition to this one time fee, SVC agrees to pay an additional modification fee of \$710,000 for each one (1) year extension that it is granted pursuant to the terms of this Amendment. The first \$710,000 payment shall be due January 31, 2008 to pay for the one (1) year extension granted by this Amendment, and a like payment shall be due on January 31 of each succeeding year wherein SVC requests an additional one (1) year extension.

**10. Entire Agreement; Continuing Cooperation**

This Amendment together with the Development Agreement, as modified herein, sets forth the entire agreement and understanding among the Parties with respect to the subject matter referenced herein and in the Development Agreement. The Parties agree to cooperate with one

another to secure the purposes and effectuate the terms of this Amendment and the Development Agreement.

**11. Not a Statutory Development Agreement or Land Use Decision**

For avoidance of doubt, the City and the County each do hereby confirm that each has approved and executed this Amendment, as well as the Development Agreement, pursuant to their respective governing charters, and not pursuant to Oregon Revised Statutes 94.504, *et seq.*, and do further confirm that neither this Amendment, nor the Development Agreement, constitutes or concerns a final decision or determination that concerns the adoption, amendment, or application of the goals, a comprehensive plan provision or a land use regulation, the City and the County and the other Parties hereto acknowledging and agreeing that any and all land use approvals required for the Project are to be obtained in due course at a later date in accordance with all applicable laws and regulations.

**12. Clarification of Section 2.03**

The Parties agree that the last sentence of Section 2.03 of the Development Agreement inadvertently misstated the formula for determining the pro rata portion of the Project Fee intended to be expressed in such sentence. The last sentence of Section 2.03 of the Development Agreement is therefore hereby amended to read as originally intended, to-wit:

"Otherwise, the pro rata portion of the Project Fee will be \$630,000 minus the amount which is the product of multiplying the actual Bottle Manufacturing Plant investment by a fraction, the numerator of which is \$630,000, and the denominator of which is \$85,000,000."

*[Nothing further – signatures begin on the following page]*

THIS AMENDMENT is executed by SVC, the City, AMEDC, the County, ODOT, and OECDD as of the date first hereinabove written.

**SVC MANUFACTURING, INC.**, a Delaware corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

**CITY OF ALBANY, OREGON**, a municipal corporation organized under the laws of the State of Oregon

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

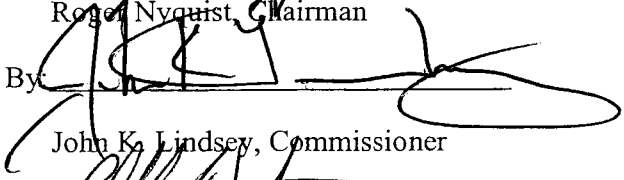
**COUNTY OF LINN, OREGON**, a political subdivision of the State of Oregon

By: **LINN COUNTY BOARD OF**

**COUNTY COMMISSIONERS**

By:  \_\_\_\_\_

Roger Nyquist, Chairman

By:  \_\_\_\_\_

John K. Lindsey, Commissioner

By:  \_\_\_\_\_

Cliff Wooten, Commissioner

Date: 11/28/07

**ALBANY MILLERSBURG ECONOMIC  
DEVELOPMENT CORPORATION, an Oregon  
non-profit corporation**

By: [Signature]  
Name: John Pasum  
Its: President  
Date: 11/21/07

**STATE OF OREGON acting by and through its  
Economic and Community Development  
Department**

By: [Signature]  
Name: BOB REPINE  
Its: DIRECTOR  
Date: 11/6/07

**OREGON DEPARTMENT OF  
TRANSPORTATION**

By: [Signature]  
Name: Jeff Schaeck  
Its: Region Manager  
Date: 11/15/07