



# MEMORANDUM

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**To:** Finance Committee

**From:** Rich Olson, City Manager

**Date:** November 18, 2013

**Re:** Consideration – Authorization to Execute Thompson Thrift BIP Agreement

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***BACKGROUND:***

At the direction of the City Council made during the Council meeting of November 12, 2013, staff forwarded a copy of the Thompson Thrift Business Investment Program Agreement to Richard “Jep” Rose of the law firm, Poyner & Spruill in Rocky Mount. Mr. Rose has previously performed contractual work for the City on the Tanglewood and Albemarle Electric Membership Corporation Territorial Agreement. Mr. Rose has found the agreement to be legal and “basically a pretty good agreement”.

Staff was also asked to contact the Local Government Commission (LGC) about the agreement. I spoke with Jim Burke and he said that the agreement is outside the scope of the LGC. The LGC only reviews issues, which may need to go before its Board of Directors.

I had previously informed the Council that County Attorney Mike Cox consulted with Tyler Mulligan, an attorney with the School of Government, concerning several issues prior to them being incorporated into the agreement. However, Mr. Mulligan did not review the entire agreement.

***STAFF RECOMMENDATION:***

By motion, recommend that the City Council approve the Thompson Thrift Business Investment Program Agreement as presented herein and authorize execution of the document on behalf of the City by Mayor Joseph W. Peel.

RCO/vdw

## BUSINESS INVESTMENT PROGRAM GRANT AGREEMENT

**THIS AGREEMENT** (the “**Agreement**”) is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ among the **CITY OF ELIZABETH CITY** (the “**City**”), a municipal corporation of the State of North Carolina and **PASQUOTANK COUNTY** (the “**County**”), a political subdivision of the State of North Carolina (collectively the “**Grantors**”), and **THOMPSON THRIFT DEVELOPMENT, INC. (or it’s assignees)**, a corporation organized and/or operating under the laws of the State of Indiana and authorized to do business in the State of North Carolina (the “**Grantee**”).

### WITNESSETH:

**WHEREAS**, the Grantors have adopted the Elizabeth City-Pasquotank County Business Investment Program (the “**BIP**”), which provides for economic incentives to encourage the development of certain types of investments within the Elizabeth City-Pasquotank County community; and

**WHEREAS**, the Grantee, Grantee’s Tenants or Grantee’s Facility Buyers will be improving a facility (the “**Facility**”), as generally described in the Elizabeth City-Pasquotank County Business Investment Program Application Form submitted by Grantee, which is attached hereto and incorporated herein by reference as **Exhibit A** (the “**BIP Application**”); and

**WHEREAS**, the Grantee has determined that the real property located in the County more particularly described in **Exhibit B**, which is attached hereto and incorporated herein by reference (the “**Property**”), is a suitable location for the Facility; and

**WHEREAS**, based on the BIP Application, the Grantors have determined that the Property is located within an Investment Zone and is recognized Business Investment Program site (“**BIP Site**”), and that the Grantee’s project relates to and falls within one of the eligible categories of business as set out in the BIP Program; and

**WHEREAS**, in order to encourage the Grantee to develop the Facility on the Property, and to assist the Grantee in such activity, the Grantors, through actions taken by their respective governing bodies, the Elizabeth City Council and the Pasquotank County Board of Commissioners, have approved the investment grants set forth below; and

**WHEREAS**, after careful consideration and evaluation of this approval, the Grantee has substantially based its decision to construct or expand its Facility on



the BIP Site as a result of the investment grants approved by the Grantors as specified in this Agreement; and

**WHEREAS**, the Grantors acknowledge that the Grantee or its affiliates will provide additional revenue to the Grantors through the collection of sales tax; and

**WHEREAS**, the Grantors will deviate from the established BIP Program Guidelines for said reason.

**NOW, THEREFORE**, in consideration of the mutual promises set forth in this Agreement and of other consideration, the receipt and sufficiency of which are now acknowledged by the parties, the Grantors and the Grantee do hereby agree as follows:

**SECTION 1. Investment Grants.** The Grantors shall, in accordance with and as provided by this Agreement, pay the Grantee the investment grants (each as “**Investment Grant**” and, collectively, the “**Investment Grants**”) generally described in the BIP. The Grantors hereby confirm that the City Council and the Board of County Commissioners have each authorized the Investment Grants and the other terms of this Agreement. The Grantors further confirm that this Agreement constitutes the “contractual agreement” required under the BIP and that the terms of this Agreement shall govern the application of the BIP to the Facility.

These parties agree that the initial Investment Grant to the Grantee (the “**BIP Term**”) shall begin on January 1 of the calendar year which begins after the calendar year that each of the BIP Requirements has first been satisfied and shall end on December 31 of the 15<sup>th</sup> calendar year thereafter. Further, any subsequent qualifying expansion of the Facility by the Grantee after the election by the Grantee of the initial BIP Term shall (provided the BIP is still in effect) be eligible for consideration as a separate investment grant under the BIP, each for a separate BIP Term.

**SECTION 2. Program Requirements.** With respect to the Grantee’s operations on the BIP Site, the Grantee shall meet the BIP Requirements detailed below:

**2.1 BIP Investment.** The Grantee, Grantee’s Tenants or Grantee’s Facility Buyers agrees to invest a minimum of \$20 million in acquisition costs, improvements to land, construction of or improvements to buildings, soft costs (to include but not be limited to due diligence, leasing commissions, lease fees, development fees, design costs, legal costs, carrying costs, interest expense) and the purchase or lease of equipment or new buildings constructed at the request of the Grantee (including the value of any leasehold interest in qualifying real or personal property) which will result in all such

property being added to the local ad valorem tax base (the “**BIP Investment**”) as represented in the Grantee’s BIP Application. This required investment must substantially remain in place at the BIP Site during the 15 year BIP Term subject, however, to condemnation, casualty, normal and customary replacements to and depreciation of the qualifying improvements and equipment. The qualifying investment in the BIP Investment shall include, without duplication, the value of such investment by the Grantee and by any tenant of the Grantee or Buyer of a portion of the Facility made at the request of the Grantee. Upon completion of the BIP Investment, the Grantee shall send to the Grantors a schedule showing all investments made by the Grantee, Grantee’s Tenants and Grantee’s Facility Buyers which the Grantee believes qualified as BIP Investment, which shall include all hard and soft costs associated with the Facility. After verification by the Grantors of such investment, the Grantors shall submit to the Grantee a copy of such schedule certified by Grantee as being accurate, and approved by the Grantors. Once approved by the City and County Managers or their designees, such schedule shall be attached to this Agreement as **Exhibit C**. The total amount of such BIP Investment shown on such Exhibit C shall be used as the BIP Investment for the Investment Grants and the amount used to calculate the Investment Grants as specified in Section 4 hereof, provided, however, the BIP Investment must be at least the minimum amount stated above.

**2.2 Additional Requirements.** The Grantee (or affiliates) must meet each of the following additional BIP Requirements in order to remain eligible for the Investment Grants:

- a. Take material steps (e.g., acquisition of the property on which the Facility will be located, commencement of construction, execution of purchase orders, etc.) toward completion of the BIP Investment within 12 months of the approval of the BIP Application; and
- b. Prior to receipt of any Investment Grant and for each year during the BIP Term, ensure payment in full of all taxes and other charges due and payable to the City and the County with respect to the BIP Site and all improvements located thereon and all other taxes owed by the Grantee to the City and the County. Notwithstanding the foregoing, should Grantee sell a portion of the Facility (purchaser of an outlot for example) and such new owner does not pay all or a portion of the taxes and other charges due and payable to the City and the County with respect to the BIP Site, Grantee shall continue to be eligible for the Investment Grant applicable to the portion of the Facility



that is current on any taxes and other charges due and payable to the City and the County.

**SECTION 3. Monitoring.** Compliance with the BIP Requirements set forth in Section 2.2 shall be determined by the Grantors, whose determinations shall be conclusive absent manifest error. The Grantee shall accommodate the Grantors in its monitoring duties by providing to the Grantors all information requested and necessary to enable the Grantors to reach a determination as to the Grantee's compliance with the BIP Requirements.

**SECTION 4. Payment of Investment Grants.** Upon initial certification by the Grantors that the Grantee (or affiliate) was in compliance with the BIP Requirements and receipt of property tax payments from the Grantee, Grantee's Tenants and/or Buyers of a portion of the Facility, the Grantors shall pay to the Grantee the year one Investment Grant. The Grantors shall determine compliance within sixty (60) days after the end of each calendar year of the BIP Term. During the remaining years of the BIP Term, Investment Grants will be paid within sixty (60) days after the Grantors determine that the Grantee is in continuing compliance with the BIP Requirements. The total grant payments for the term of this agreement will not exceed \$2.2 Million Dollars

Investment Grant amounts will be determined in accordance with the following:

- 4.1 **Year One.** For year one of the BIP Term, the Grantors shall collectively pay to the Grantee an Investment Grant equal to one hundred percent ( 100%) of the new property taxes paid by the Grantee Grantee's Tenants or Buyers of a portion of the Facility.
- 4.2 **Subsequent Years.** In each of the following fourteen (14) years of the BIP Term, the percentage of the Investment Grants shall be one hundred percent (100%) of the new property taxes until such time as the Grantor shall pay the Grantee \$2.2 Million Dollars.
- 4.3 **Termination of Payments.** After payment of the Investment Grant has reached \$2.2 Million, no additional Investment Grants shall be made with respect to the BIP Investment covered by this Agreement.
- 4.4 **Share of Payments by Grantors.** The share of the payments from the Grantors shall be based on the proportional City/County tax rates for the applicable property, for the current fiscal year in which each grant payment is made.
- 4.5 **New Property Taxes.** The New Property Taxes are the incremental business and real property taxes paid by the Grantee, Grantee's Tenants or Buyers of a portion of the Facility above and beyond those

business and real property taxes paid by the Grantee to the Grantors prior to the investment (current taxes are \$562.50 per acre annually); and/or the business and real property taxes generated from the property prior to the investment. Said prior property tax will be determined to be the amount of property included in Phase I multiplied by \$562.50 per acre.

**SECTION 5. Loss of Investment Grants.** If the Grantors determine that the Grantee has NOT met each BIP Requirement, then Investment Grants for the year(s) of non-compliance will NOT be made. The Grantee may seek reinstatement for BIP Investment Grant eligibility for subsequent years by submitting satisfactory evidence of compliance with each BIP Requirement to the Grantors. Notwithstanding the foregoing, should Grantee sell a portion of the Facility and such new owner does not pay a portion of the taxes and other charges due and payable to the City and the County with respect to the BIP Site, Grantee shall continue to be eligible for continued payment of the Investment Grant applicable to the portion of the Facility that is current on any taxes and other charges due and payable to the City and the County.

**SECTION 6. Refund of Investment Grants.** If Grantee removes a "Substantial Portion" (a substantial portion shall be defined as twenty-five (25%) of the total investment into the facility) of the investment from Elizabeth City-Pasquotank County during the fifteen (15) year term of the Grant Agreement, the Grantee shall pay to the Grantors the entire amount of the Grant payments made to date.

If the Grantee removes twenty-five percent (25%) or more of the investment from Elizabeth City/Pasquotank County within four (4) years of the end of the Grant Term the Grantee shall pay the Grantors according to the following schedule:

- Within one year of Grant Term 40% of Grant Payments
- Within two years of Grant Term 30% of Grant Payments
- Within three years of Grant Term 20% of Grant Payments
- Within four years of Grant Term 10% of Grant Payments

**SECTION 7. MEDIATION.** If a dispute arises between the Grantors and the Grantee, either party involved in the dispute may refer the dispute to mediation by a request made in writing upon the other. Such mediation shall be held in Pasquotank County, North Carolina. Within thirty (30) days of the receipt of such a request, the parties shall select a single mediator to hear the matter. If the parties are unable to agree on the selection of a single mediator, then each party shall name one mediator, and the two mediators thus selected shall select a third mediator. Provided, however, if either party fails to select a mediator, or if the two mediators selected by the parties fail to select the third mediator within thirty (30)



days after the appointment of the second mediator, then in each such instance a proper court, on petition of a party, shall appoint the second or third mediator or both, as the case may be, in accordance with North Carolina law. If the matter is unable to be settled by the mediator either party may elect to pursue the matter by filing action with the Pasquotank County, North Carolina Court. .

**SECTION 8. Miscellaneous.**

**8.1 Notices.** All notices, certificates or other communications required by or made pursuant to this Agreement shall be sufficiently given and shall be deemed given when delivered or mailed by registered or certified mail, postage prepaid or sent by fax as follows:

The County: Pasquotank County  
Attn: County Manager  
206 E. Main Street  
P.O. Box 39  
Elizabeth City, NC 27907-0039  
Fax: 252-335-0866

Copy to: County Attorney  
P. O. Box 39  
Elizabeth City, North Carolina 27907-0039  
Fax: 252-337-6610

The City: City of Elizabeth City  
Attn: City Manager  
P. O. Box 347  
Elizabeth City, North Carolina 27907-0347  
Fax: 252-335-2503

Copy to: City Attorney  
410 E. Main Street  
Elizabeth City, North Carolina 27909  
Fax: 252-331-2962

Grantee: Tim Fears  
Legal/Development Operations  
Thompson Thrift Development Inc.  
901 Wabash Avenue, Suite 300  
Terre Haute, IN 47807  
Fax: 812-242-1194

The Grantors and the Grantee may, by notice given to the other, designate any further or different addresses to which notices, certificates, requests or other communications shall be sent.

- 8.2 **Binding Effect.** This Agreement shall inure to the benefit of and is binding upon the Grantors and the Grantee and their respective successors and assigns,
- 8.3 **Amendments, Changes, and Modifications.** Except as otherwise provided in this Agreement, this Agreement may not be amended, changed, modified or altered except by written agreement of the parties.
- 8.4 **Severability.** If any provision of this Agreement is held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision of this Agreement.
- 8.5 **Counterparts.** This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed an original, and it shall not be necessary in making proof of this Agreement to produce or account for more than one such fully executed counterpart.
- 8.6 **Governing Law.** This Agreement is governed by and shall be construed in accordance with the laws of the State of North Carolina.
- 8.7 **Captions.** The Captions or headings used throughout this Agreement are for convenience only and in no way define, limit, or describe the scope or intent of any provision of this Agreement.
- 8.8 **Confidentiality.** The Grantee and the Grantors acknowledge that certain Exhibits to this Agreement, and/or other information provided by the Grantee pursuant to this Agreement, may contain the Grantee's trade secrets and confidential information. Accordingly, the Grantors will maintain information marked as "Trade Secrets" in confidence, unless its release is consented to in writing by the Grantee, or the Grantors are ordered by a court of competent jurisdiction to release such information. In the event of any such lawsuit, Grantors agree to give the Grantee notice of such legal action and to allow the Grantee to participate in its defense.
- 8.9 **Construction.** The parties acknowledge and stipulate that this Agreement is the product of mutual negotiation and bargaining and that it has been drafted by counsel for the parties. As such, the



doctrine of construction against the drafter shall have no application to this Agreement.

**8.10 Assignment.** Grantee may, with Grantor's consent (which consent shall not be unreasonably withheld, conditioned or delayed) assign this Agreement to an assignee who shall take title to the Property and upon such assignment Grantee shall be released from any further liability to Grantor.

**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement under seal as of the day and year first written.

**Thompson Thrift Development Inc.**

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

ATTEST:

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

(CORPORATE SEAL)

**PASQUOTANK COUNTY**

By: \_\_\_\_\_  
Chairman, Board of County Commissioners

ATTEST:

By: \_\_\_\_\_  
Clerk to the Board

(COUNTY SEAL)

This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.

By: \_\_\_\_\_  
Finance Director, Pasquotank County

Approved as to Form:

\_\_\_\_\_  
County Attorney

**CITY OF ELIZABETH CITY**

By: \_\_\_\_\_  
Mayor, City of Elizabeth City

ATTEST:

By: \_\_\_\_\_  
City Clerk

[CITY SEAL]

This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.

By: \_\_\_\_\_  
Finance Director, City of Elizabeth City

Approved as to Form:

\_\_\_\_\_  
City Attorney



**EXHIBIT A**  
**BIP APPLICATION**

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**EXHIBIT B**  
**THE PROPERTY**

Street Address:

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Tax Parcel #(s):

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**EXHIBIT C**

As required by Section 2.1 of the Agreement, the City of Elizabeth City and Pasquotank County have verified that the investment shown on the attached schedule was made by the Grantee, and qualifies as Grant Investment under the Agreement.

Approved as Exhibit C to Agreement:

\_\_\_\_\_  
City Manager (or designee)

\_\_\_\_\_  
(date)

\_\_\_\_\_  
County Manager (or designee)

\_\_\_\_\_  
(date)