

**INDUSTRIAL DEVELOPMENT BOARD**  
**Thursday, March 22, 2012**  
**Administrative Conference Room – 5:30 p.m.**  
**Department of Economic and Community Development**  
**1920 S. Germantown Road**

The Germantown Industrial Development Board met on Thursday, March 22, 2012, in the Administrative Conference Room. Chairman Henry Evans called the meeting to order at 5:30 p.m. A quorum was established with the following members present.

**PRESENT:** Chairman Henry Evans, Vice-Chairman Mike Harless, Dick Vosburg, David Klevan, Julie Klein and Dr. Frank Markus

**ABSENT:** Keith Saunders, Charlie McCraw

**STAFF** Economic and Development Services Director Andrew Pouncey, Marie Burgess, Planner and Josh Lawhead, PILOT Attorney, Burch Porter & Johnson PLLC

**MINUTES**

A motion was made by Mike Harless, seconded by Frank Markus, to approve the December 8, 2011 minutes. Motion passed.

**THYSSENKRUPP**

Henry Evans stated the IDB drafted a resolution to accept a Bill of Sale from ThyssenKrupp Elevator Manufacturing, Inc. (“TKE”) proposing to convey 2011 personal property additions, and to approve the proposed amendment to the Personal Property PILOT lease effective December 31, 2011, which includes such additions. Charles Pierce was present to represent ThyssenKrupp. Andy Pouncey reminded Charles Pierce that compliance reports are due around this time of the year. Josh Lawhead stated ThyssenKrupp has presented a Bill of Sale by which the personal property of ThyssenKrupp has been added to this property. The IDB will accept the Bill of Sale and the second amendment to the personal property lease, (which will be entered into) whereby this additional personal property 2011 would be added. Mr. Lawhead noted the resolution to accept the Bill of Sale and to authorize execution of the second amendment of the personal property lease by the Chairman of the IDB.

Mike Harless identified that the TKE Resolution calls for the Chairman and Secretary/Treasurer to sign the Resolution. Mr. Harless asked if Secretary/Treasurer should be changed to Vice Chairman in future resolutions.

Josh Lawhead answered yes.

Mike Harless recused himself from this item with ThyssenKrupp.

A motion was made by Frank Markus, seconded by Dick Vosburg, to approve the resolution to accept the Bill of Sale from ThyssenKrupp Elevator Manufacturing, Inc. (“TKE”) proposing to convey 2011 personal property additions, and to approve the proposed amendment to the Personal Property PILOT lease effective December 31, 2011, which includes such additions. (Please see attached resolution). The motion passed.

**RESOLUTION OF THE INDUSTRIAL DEVELOPMENT BOARD  
OF THE CITY OF GERMANTOWN, TENNESSEE**

Resolution No. 2012-1

IN RE: ThyssenKrupp Elevator Manufacturing, Inc., Applicant

**WHEREAS**, The IDB and the Applicant entered into that certain Personal Property Lease Agreement dated December 31, 2006 (the "Original Personal Property Lease");

**WHEREAS**, IDB and Applicant amended the Original Personal Property Lease pursuant to that certain Amendment to Personal Property Lease Agreement dated December 8, 2011 (the "Amendment to Personal Property Lease" and, together with the Original Personal Property Lease, collectively the "Personal Property Lease");

**WHEREAS**, Applicant has delivered to IDB that certain Bill of Sale dated as of December 31, 2011 and attached hereto as Exhibit "A" (the "Bill of Sale"), whereby Applicant desires to convey to IDB certain personal property more particularly described therein (the "2011 Personal Property");

**WHEREAS**, IDB desires to accept the 2011 Bill of Sale as of December 31, 2011;

**WHEREAS**, IDB and Applicant desire to amend the Personal Property Lease by adding thereto the 2011 Personal Property, with such amendment being effective as of December 31, 2011, and with the PILOT benefit as to the 2011 Personal Property expiring December 31, 2016, pursuant to that certain Second Amendment to Personal Property Lease attached hereto as Exhibit "B" (the "Second Amendment to Personal Property Lease").

**NOW, THEREFORE, BE IT RESOLVED BY THE IDB THAT,**

1. The IDB hereby approves and accepts the 2011 Bill of Sale as of December 31, 2011.
2. The IDB hereby approves the execution and delivery by the IDB of the Second Amendment to Personal Property Lease, effective as of December 31, 2011, pursuant to which the PILOT benefit as to the 2011 Personal Property will expire December 31, 2016, and all such other matters, documents, and transactions as may be necessary to effectuate the desires of the IDB as set forth above, all pursuant to such terms and conditions as may be negotiated by and among the Board's Chairman or Secretary/Treasurer in consultation with the Board Counsel, and all upon such terms and conditions as the Chairman and Secretary/Treasurer shall deem appropriate in their sole and absolute discretion.
3. Each of the Chairman and the Secretary/Treasurer, are each hereby authorized and directed, in consultation with the Board Counsel, to negotiate, execute and deliver on behalf of the IDB such documents or instruments as may be necessary to accomplish the transactions contemplated by this Resolution including, without limitation, the Second Amendment to Personal Property Lease.

**APPROVED AND ADOPTED** by the IDB in public session this the 22nd day of March, 2012.

THE INDUSTRIAL DEVELOPMENT BOARD OF  
THE CITY OF GERMANTOWN, TENNESSEE

By: \_\_\_\_\_  
Henry R. Evans, Chairman

EXHIBIT "A" to RESOLUTION NO. 2012-1

**BILL OF SALE**

FOR AND IN CONSIDERATION of the sum of Ten Dollars (\$10.00) cash in hand paid, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, **THYSSENKRUPP ELEVATOR MANUFACTURING, INC.**, a Delaware corporation ("Seller"), does by these presents bargain, sell, convey, transfer, assign, set over and deliver unto **THE INDUSTRIAL DEVELOPMENT BOARD OF THE CITY OF GERMANTOWN, TENNESSEE**, a public not-for-profit corporation of the State of Tennessee (the "Board"), its successors and assigns, all of its right, title and interest in and to the personal property (the "Personal Property") described in Exhibit "A" attached hereto and incorporated herein by reference. Seller binds itself and its successors and assigns to WARRANT AND FOREVER DEFEND the title to the Personal Property against the lawful claims of all persons.

This conveyance is subject to Seller's option to purchase the Personal Property set forth in Section 11.01 of the Personal Property Lease Agreement dated as of December 31, 2006 between Seller, as lessee, and the Board, as lessor, whereby the Board has leased the Personal Property to Seller.

Executed as of the 31<sup>st</sup> day of December, 2011

**THYSSENKRUPP ELEVATOR  
MANUFACTURING, INC.,**  
a Delaware corporation

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

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

Title: \_\_\_\_\_

EXHIBIT "B" to RESOLUTION NO. 2012-1

**SECOND AMENDMENT TO PERSONAL PROPERTY LEASE AGREEMENT**

THIS AMENDMENT TO PERSONAL PROPERTY LEASE AGREEMENT ("Second Amendment") is made and entered into effective as of the 31st day of December, 2011, by and between **THE INDUSTRIAL DEVELOPMENT BOARD OF THE CITY OF GERMANTOWN, TENNESSEE**, a public not-for-profit corporation organized and existing under the laws of the State of Tennessee, with its office at 1930 Germantown Road South, Germantown, Tennessee ("Board" or "Lessor"), and **THYSSENKRUPP ELEVATOR MANUFACTURING, INC.**, a Delaware corporation ("Lessee").

**Recitals of Fact**

WHEREAS, Lessor and Lessee entered into that certain Personal Property Lease Agreement (the "Original Lease") dated as of December 31, 2006, pursuant to which Lessor leased to Lessee certain personal property, as more particularly described in the 2006 Lease;

WHEREAS, Lessor and Lessee amended the Original Lease pursuant to that certain Amendment to Personal Property Lease Agreement (the "First Amendment" and, together with the Original Lease, collectively the "Lease") dated December 8, 2011;

WHEREAS, Lessor and Lessee desire to amend the Lease as of December 31, 2011 in order to include certain additional personal property acquired or installed in 2011 and identified on Exhibit "A" hereto (the "2011 Property"); and

NOW, THEREFORE, in consideration of the premises as set forth in the Recitals of Fact, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Lessor and Lessee covenant and agree as follows:

**Agreements**

1. **Personal Property.** The Lease is hereby amended by adding to Exhibit "A" thereto the personal property described in Exhibit "A," attached hereto and incorporated herein by reference.

2. **Ratification; Miscellaneous.** Lessor and Lessee agree that, as modified by this Second Amendment, the Lease is ratified and confirmed in all respects and shall remain in full force and effect. This Second Amendment shall be governed by and construed in accordance with the laws of the State of Tennessee. This Second Amendment may be executed in one or more counterparts, which when taken together shall constitute but one and the same agreement.

IN WITNESS WHEREOF, Lessor and Lessee have executed this Second Amendment To Personal Property Lease Agreement effective as of the day and year first above written.

**THE INDUSTRIAL DEVELOPMENT BOARD  
OF THE CITY OF MEMPHIS AND COUNTY  
OF SHELBY, TENNESSEE**

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

**THYSSENKRUPP ELEVATOR  
MANUFACTURING, INC.,  
a Delaware corporation**

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

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Industrial Development Board

March 22, 2012

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**WEST FRASER**

Henry Evans discussed the opinion letter from Shelby County concerning Germantown's reduction of West Fraser's PILOT benefit.



# Shelby County Government

MARK H. LUTTRELL, JR.  
MAYOR

February 14, 2012

KELLY RAYNE  
COUNTY ATTORNEY

The Honorable Mike Ritz  
Shelby County Commissioner  
160 N. Main Street Suite 450  
Memphis, TN 38103

Henry Evans, Chairman  
Germantown Industrial Development Board  
c/o Joshua B. Lawhead  
Burch, Porter & Johnson, PLLC  
130 North Court Avenue  
Memphis, TN 38103

**Re: Reduction in Benefit Term for Germantown Industrial Development Board  
("GIDB") Lease**

Dear Commissioner Ritz and Mr. Evans:

You both asked for a legal opinion which addresses whether the GIDB is required to reduce the benefit for a PILOT lease that was entered into in 2007 so that the benefit terms for the Germantown benefit and Shelby County benefit are equal.

## Short Answer

Pursuant to the 2002 MOU, as defined in the Facts section below, the GIDB entered into real and personal property leases, as defined in the Facts section below ("Leases"), with West Fraser, Inc. ("Applicant") that bound Shelby County to the granted benefit. The Leases have provisions that address default requirements. The Lease provisions contemplate the use of the policies in place at the time the benefits were granted, and do not provide for either the GIDB or Shelby County to unilaterally update policies and impose the new requirements on the applicant. Shelby County does not have the capacity to interfere with the GIDB as long as it is administering the contract with West Fraser, Inc. pursuant to the Leases. Therefore, because the company has defaulted in meeting certain commitments to create jobs as required by the Leases, the GIDB is required to adjust the West Fraser PILOT benefit to comply with the 2002 Interlocal Agreement, as set forth in greater detail below.

## Facts

On November 9, 2002, a Memorandum of Understanding By and Among Shelby County, Tennessee ("Shelby County") and The Industrial Development Board of the City of Germantown, Tennessee ("2002 MOU") was entered into, and the provisions thereof served as the written agreement and understanding between Shelby County, Tennessee and the Germantown IDB with respect to any contemplated Payment-in-Lieu-of-Tax ("PILOT") agreement entered into by and between the Germantown IDB and an applicant thereto pursuant to which PILOT benefits would be awarded to Shelby County ad valorem property taxes.

VASCO A. SMITH, JR. ADMINISTRATION BUILDING  
160 North Main Street, Suite 660 • Memphis, TN 38103 • 901-545-4230 • Fax 901-545-4687  
[www.shelbycountyttn.gov](http://www.shelbycountyttn.gov)

On December 31, 2007, the Germantown IDB, as Lessor, and its Lessee, Nineteen Hundred Exeter Road, LLC (“Lessee”), entered into a Real Property Lease Agreement whereby a PILOT benefit was awarded to City of Germantown taxes for a period of 8 years, and as to Shelby County taxes for a period of 9 years pursuant to an application submitted by the Applicant (the “Real Property Lease”). On December 31, 2007, the Germantown IDB, as Lessor, and Applicant, as lessee, entered into a Personal Property Lease Agreement whereby a PILOT benefit was awarded as to City of Germantown taxes for a period of 8 years, and as to Shelby County taxes for a period of 9 years (the “Personal Property Lease”).

On December 19, 2008, the Germantown IDB, and the Applicant entered into a First Amendment to Personal Property Lease Agreement whereby the PILOT benefit as to City of Germantown taxes was increased by 1 year, to a total of 9 years. The term of the Shelby County benefit was not amended and remained at a total of 9 years.

On January 22, 2009, the Germantown IDB, the Real Property Lessee, and the Applicant entered into a First Amendment to the Real Property Lease Agreement whereby the PILOT benefit as to City of Germantown taxes was increased by 1 year, to a total of 9 years. The term of the Shelby County benefit was not amended and remained at a total of 9 years.

On December 21, 2010, Shelby County and the Germantown IDB entered into an Interlocal Agreement (the “2010 Interlocal Agreement”) which provides, that “. . . neither the term nor the percentage of the county taxes reduced for the PILOT shall be greater (i.e. more favorable to the PILOT recipient) than the [Germantown] IDB PILOT.”

Pursuant to the most recent Compliance Certificate delivered by Applicant to the Germantown IDB, the Applicant is in default of the Real Property Lease and the Personal Property Lease for failure to reach the number of jobs created as set forth in Applicant’s application and, pursuant to application of the applicable matrices to the actual number of jobs, average wages, amount of capital investment, and other applicable criteria, the Project is entitled to 8 years of total benefit as to Germantown taxes and 9 years of total benefit as to Shelby County taxes.

### **Discussion**

The GIDB entered into the Leases and granted the Shelby County tax benefits pursuant to the 2002 MOU. The Leases complied with the requirements of the 2002 MOU. The 2002 MOU contained a section regarding the guaranty of benefits and a section regarding the enforcement upon default. Section 9.04(d) of each of the Leases provides that:

. . . Any such Pilot Adjustment shall be made so as to produce and reflect from and after the effective date of the Event of Default (which includes any period allowed hereunder for the curing of any such default) the maximum Pilot Incentive (the “Adjusted Pilot Incentive”) for which the Project would have been qualified or entitled under Lessor’s policies, procedures and criteria applicable to the Project at

the date the Application was originally approved by Lessor. . . .

The 2002 MOU does not contain any provision requiring the GIDB benefit term to be the same as the Shelby County benefit term. The 2010 Interlocal Agreement was amended and updated to change the section controlling the benefits to require that the GIDB and Shelby County benefit terms be identical. However, no change was made to the enforcement section language in the 2010 Interlocal Agreement. A review of the County Commission's minutes and transcripts indicates that the discussion was focused on the granting of benefits, and not on the retroactive application of terms in enforcement situations.

Even if the County Commission imposed a retroactive adjustment in enforcement situations, any interference by Shelby County in the administration of a valid contract by requiring additional modification and/or reduction in term pursuant to terms not used when the Leases were entered into would subject Shelby County to liability. The Leases clearly establish that they will be administered with policies and procedures in place when the benefit was granted. The 2010 Interlocal Agreement may only be utilized for benefits granted after the date of the 2010 Interlocal Agreement. The GIDB has the administrative power vested by the interlocal agreements to reduce the term of the PILOT in regard to the Shelby County taxes so long as it complies with the policies and procedures in place at the time the benefit is granted and the Leases are entered.

#### **Conclusion**

The GIDB utilized the 2002 MOU to enter into the Leases with West Fraser. The 2002 MOU does not require that the term of the PILOT in relation to taxes abated for the county be equal to the term of abatement for the municipality's taxes. Accordingly, the GIDB should reduce the PILOT benefit in relation to county taxes consistent with the terms of the 2002 MOU for the West Fraser matter. Please note that this opinion is very fact specific and may not apply to the circumstances with significantly different facts.

Hopefully, this letter answers your questions. If you have any other issues, please do not hesitate to contact us.

Sincerely,



Kelly Rayne  
Shelby County Attorney



Mark E. Beutelsehies  
Assistant Shelby County Attorney



City of Germantown Industrial Development Board  
Retention PILOT Guidelines  
(Adopted \_\_-\_\_, 2012)

RETENTION PILOTS AND THE GUIDELINES THEREFORE ARE SUBJECT AT ALL TIMES TO CHANGE IN THE DISCRETION OF THE BMA OF THE CITY OF GERMANTOWN (“CITY”) OR THE GERMANTOWN INDUSTRIAL DEVELOPMENT BOARD (“GIDB”). ALL POTENTIAL APPLICANTS MUST CHECK WITH GIDB STAFF TO VERIFY CURRENT RETENTION GUIDELINES THEN IN EFFECT.

To qualify for a payment-in-lieu-of-tax (PILOT) retention incentive from the GIDB as to City **property** taxes:

1. Company must have been operating and directly employing workers in the City for at least 10 years prior to submitting an application for this retention assistance.
2. Company must be financially sound.
3. Company history and performance regarding any past PILOT agreements will be reviewed by the Board.
4. The Board places a higher value on those projects, which expand operations and/or upgrade technology or processes to better position the company for longevity.
5. Company must demonstrate a long-term commitment to the City by buying or building a facility to house its operations, expanding an existing facility, or by signing or extending a lease for at least as long as the term of the incentive.
6. Company must invest a minimum of (\_\_\_\_) in real and/or personal property for this project in the City. **2.5 to 3 million?**
7. Company must retain a minimum of \_\_\_\_ **jobs** in the City with an average annual pay of at least the most recently published per capita income for residents of the City. **50 jobs?**
8. Financial benefit within Shelby County from the jobs retained must exceed the opportunity cost of the tax incentive by a ratio of at least \_\_\_\_ to 1 over the term of the incentive agreement. **2 to 1?**
9. Company must comply with all application, fee and compliance requirements in the Board’s Policy Statement.
10. The GIDB PILOT matrix shall be applied to the projected jobs retained and capital investment to establish a benchmark for compliance.
11. If the Company does not comply with the number of jobs to be retained or the amount of capital investment for the project, the GIDB PILOT Evaluation Matrix will be applied to the actual jobs retained and capital investment made to determine the appropriate reduction or termination of incentive benefits. **Create a Retention PILOT Matrix**
12. A relevant ramp-up period will be established for retention projects, to the extent applicable.
13. As with all PILOTs granted by the GIDB, the term of any retention PILOT shall not exceed 10 years.

Mike Harless asked if the county approved a regular 7 year PILOT, could we decide to give 8 years instead?

Henry Evans noted there does not have to be a county PILOT. The county does not care if we are giving a city PILOT with no Shelby county benefits. They are still paying the Shelby County tax bill.

Dick Vosburg questioned whether the process for title holding and conveyance with IDBs might be changed per the state.

Josh Lawhead said it has not happened yet.

Henry Evans discussed a “clawback” provision for inclusion in future PILOT lease agreements. This was forced on ThyssenKrupp by the county. Mr. Evans stated he thinks it is important that the IDB consider the clawback language.

### **ORGILL**

Orgill continues to grow annually in revenue and U.S. customer base; and the Company is currently discussing its existing lease with the property owner, which expires during December 2017. Orgill needs to make a decision now on whether or not to open the existing lease to negotiate a new 15 to 20 year lease with the current property owner; and such a decision will be based, in part, on whether or not the City of Germantown, and its IDB, would agree to a PILOT extension for a new period to cover the term of the new lease.

Orgill is requesting an extension of its existing PILOT (a retention PILOT) for another ten (10) years so that it can be better positioned to open and negotiate its existing lease for another ten (10) years, which would result in a commitment by Orgill to keep its Corporate Headquarters in the City of Germantown, Shelby County, for at least another fifteen (15) years. The requested retention PILOT would need to be approved by the City of Germantown and Shelby County.

Orgill needs to provide a termination request for the personal property lease.

### **ADJOURNMENT**

There being no further business to come before the board, the meeting was adjourned.