

REQUEST FOR BOARD ACTION

HENDERSON COUNTY

BOARD OF COMMISSIONERS

MEETING DATE: 6 February 2012

SUBJECT: Sierra Nevada Brewing Co. incentives agreement

PRESENTER: Charles Russell Burrell

ATTACHMENT(S): Agreement approved by the Company

SUMMARY OF REQUEST:

At the conclusion of the Board's public hearing on this matter (then referred to as "Project 300"), the Board voted to offer a grant of economic incentives in this matter "in a maximum amount of **\$3,750,000.00**", directed staff to negotiate a proposed agreement, and to bring the proposed agreement back before the Board.

Attached you will find a proposed agreement, already executed by Sierra Nevada Brewing Co., and also by its local affiliate, Wild River Corp. In it:

1) The County agrees to pay incentives to Wild River Corp. in the total amount of **\$2,713,362.00**, over a fixed schedule (set out in the agreement) through December, 2017.

2) Wild River Corp. will purchase certain land upon which it holds an option, located in Henderson County.

3) Sierra Nevada Brewing Co. will construct and equip a new plant (and also a transshipment site) on the property acquired by Wild River Corp., with total investment (not including cost of land) of \$30,000,000.00 in buildings and other real estate improvements, and \$77,500,000.00 in equipment and other personal property improvements, and will create not fewer than ninety-three (93) new jobs.

County staff will be present and prepared if requested to give further information on this matter.

BOARD ACTION REQUESTED:

Approval of the proposed agreement.

If the Board is so inclined, the following motion is suggested:

I move that the Board adopt the proposed agreement attached to this agenda item.

STATE OF NORTH CAROLINA

COUNTY OF HENDERSON

AGREEMENT

This Agreement is made and entered into this the 6th day of February, 2012, by and between Henderson County, a body politic and corporate, hereinafter "County", Sierra Nevada Brewing Co., hereinafter "Company", and Wild River Corp., hereinafter "Landowner".

WITNESSETH:

Whereas, the County is a body politic and corporate having the capacity to contract under N.C.G.S. § 153A-11; and

Whereas, the Company is a California corporation authorized to do business in North Carolina; and

Whereas the Landowner is a North Carolina corporation affiliated with the Company;

Whereas, the Company has been considering commencing operations in Henderson County, which if it occurs is estimated by the Company to result in a capital investment of at least One Hundred Seven Million Five Hundred Thousand Dollars (\$107,500,000.00), of which not less than Thirty Million Dollars (\$30,000,000.00) is in real property improvements, and not fewer than ninety-three (93) new jobs, paying an average wage in excess of Forty-One Thousand Five Hundred Seventy-Nine Dollars (\$41,579) per year (plus other benefits); and

Whereas, the Company has stated that Henderson County is competing with one or more other sites for the location of the capital investment.

Whereas, the Landowner holds the option to purchase certain real estate located in Henderson County upon which the Company will, if it chooses to locate its new business in Henderson County, build the facility in which the capital investment referred to above will occur; and

Whereas, the Company requested assistance from the County in the form of Economic Incentives to offset thereal estate acquisition cost; and

Whereas, in reliance upon the Company's representations to the County concerning the net capital investment to be made, the County set a public hearing for December 12, 2011, and in further reliance upon the Company's representations to the County, duly advertised in the Hendersonville Tribune, a newspaper having daily general circulation in Henderson County, on December 1, 2011, their intent to consider granting Economic Incentives to the Company and/or Landowner consisting of assistance with the acquisition of real estate, a total amount not to exceed a total of Three Million Seven Hundred Fifty Thousand Dollars (\$3,750,000.00) Dollars to be reimbursed to the Landowner over a period of years as stated herein; and

Whereas, the County has the authority under N.C. Gen. Stat. § 158-7.1(a) to assist industries in the expenses associated with the start-up of expanded operations where the

assistance will stimulate the local economy, will promote business, and benefit the public by generating additional tax revenue for the County; and

Whereas, the County has determined after a duly advertised public hearing held on December 12, 2011, that the investment and new employment as stated above by the Company would benefit the public in Henderson County; and

Whereas, the County has determined that a capital investment of One Hundred Seven Million Five Hundred Thousand Dollars (\$107,500,000.00) will benefit the county by generating an additional One Hundred Seven Million Five Hundred Thousand Dollars (\$107,500,000.00) in taxable capital property, real or personal; and

NOW, THEREFORE, in consideration of the mutual covenants and promises and obligations contained herein below, the parties agree as follows:

1. The Landowner will execute its option to purchase the real property located in Henderson County upon which the Company will construct a new plant and other sites for operations in Henderson County (together, "the Facility"), and will acquire the requisite equipment for the same.
2. The Company will construct the Facility, and will acquire the requisite equipment for the same. The construction and equipping shall result in a capital investment by the Company in the real property acquired by the Landowner (not including the land purchase price) in the amount of Thirty Million Dollars (\$30,000,000.00), and in personal property in an amount of not less than Seventy-Seven Million Five Hundred Thousand Dollars (\$77,500,000.00). The capital investment shall be of the type and occur (in amounts and time) by not later than the schedule shown in Appendix A. The capital investment will be taxable by the County pursuant to N.C. Gen. Stat. §105-274. (The construction and equipping of the new operation and requisite taxable investment are hereinafter referred to as the "Capital Investment Requirement.") It is understood and agreed by both parties to this Agreement that the Henderson County Assessor will make an independent valuation of all such property constituting the Capital Investment Requirement for *ad valorem* tax purposes at its true value in money (defined as fair market value in N.C. Gen. Stat. §105-382) as required by N.C. Gen. Stat. §105-382. In the event the Company disagrees with the independent valuation placed upon such real and personal property by the Henderson County Assessor, the Company shall have the right to appeal such valuation to the Henderson County Board of Equalization and Review and further to the North Carolina Property Tax Commission in accordance with the North Carolina General Statutes.
3. The Company shall complete the Capital Investment Requirement in a timely manner and with due diligence, but in any event in the amounts and at not later than the dates set out in Appendix A. The respective amounts and dates collectively are the "Capital Investment Term." In the event the Company fails to complete the Capital Investment Requirement as required by the Capital Investment Term, the Landowner shall reimburse any and all Economic Incentives (as hereinafter defined) which have been paid to the County promptly and without delay.

4. During the Term hereof, the Company shall list the Capital Investment each year as required by the Henderson County Assessor's Office, and the Capital Investment shall be depreciated pursuant to the Henderson County Assessor's Office guidelines in existence at the time of listing. Company shall pay to the County directly (or possibly indirectly under certain lease terms if the Capital Investment constitutes leased property) the *ad valorem* property tax on the applicable portion of the Capital Investment by January of the year after it is listed, as set forth in the County's annual personal property tax bill. The amount of *ad valorem* personal property taxes paid to the County for a particular *ad valorem* property tax year related to items comprising the Capital Investment shall constitute "Capital Investment Taxes". Upon payment of Capital Investment Taxes, Company shall be eligible for the Economic Incentives as set forth in Paragraph 5 below.

5. The Landowner shall be entirely responsible for acquiring and paying all expenses for all real property needed for the Company's sites, and the Company shall be entirely responsible for completing the real and personal property improvements and for paying all expenses associated with the Capital Investment Requirement. However, so long as the Landowner has acquired the real estate needed by the Company and the Company has complied with all other requirements imposed upon it stated herein, the County shall reimburse the Landowner for a portion of the actual real estate acquisition costs by paying the landowner as follows:

- a. On or before 31 December 2012, the sum of One Million Three Hundred Seventy-Five Thousand Dollars (\$1,375,000.00).
- b. On or before 31 December 2013, the sum of Two Hundred Sixty-Seven Thousand Six Hundred Seventy-Two Dollars and Forty Cents (\$267,672.40).
- c. On or before 31 December, 2014, the sum of Two Hundred Sixty-Seven Thousand Six Hundred Seventy-Two Dollars and Forty Cents (\$267,672.40).
- d. On or before 31 December, 2015, the sum of Two Hundred Sixty-Seven Thousand Six Hundred Seventy-Two Dollars and Forty Cents (\$267,672.40).
- e. On or before 31 December 2016, the sum of Two Hundred Sixty-Seven Thousand Six Hundred Seventy-Two Dollars and Forty Cents (\$267,672.40).
- f. On or before 31 December, 2017, the sum of Two Hundred Sixty-Seven Thousand Six Hundred Seventy-Two Dollars and Forty Cents (\$267,672.40).

The County shall not pay any interest to the Landowner on any portion of the Economic Incentives paid to the Landowner by the County pursuant to the terms of this Agreement.

6. The Company and Landowner shall indemnify and hold harmless Henderson County for any and all occurrences associated with the Expansion. The terms of this paragraph shall survive any termination of this Agreement, or any determination or event rendering this Agreement null and void.

7. The Term of this Agreement shall run from the Effective Date through midnight, December 31, 2020.

8. If the Company shall make a determination to cease operation of the Facility prior to the end of the Term, this Agreement shall be deemed terminated, and Henderson

County shall have no further obligations hereunder, including but not limited to the obligation to pay any further installments on the Economic Incentives after the date of such cessation of operation.

9. Not later than thirty (30) days after the completion of the Capital Investment Requirement, the Company shall certify in writing by one authorized to execute contracts on behalf of Company to the County that the Capital Investment has been completed, hereinafter "Capital Investment Certification". The Company shall include with such Capital Investment Certification evidence that the total Capital Investment required by the terms of this Agreement has been completed and paid for by the Company. Such evidence shall consist of invoices, purchase orders, canceled checks, and other documents which will reasonably prove to the satisfaction of the County that the obligation for an One Hundred Seven Million Five Hundred Thousand Dollars (\$107,500,000.00) taxable capital investment has been met by the Company on the schedule required by Appendix A. In the event the Company fails to provide the Capital Investment Certification and evidence required by the terms of this Paragraph to the County within the time frame specified above, this Agreement shall be deemed terminated, and the County shall have no further obligation hereunder.

10. The Company shall certify to the County in writing by one authorized to execute contracts on behalf of the Company the Start-up Costs associated with the Expansion, the certification being referred to as "Certification of Start-Up Costs". The Company shall include with the Certification of Start-Up Costs adequate documentation that the Expansion has been completed and paid for and adequate documentation as to the amount spent for Start-up Costs. Such adequate documentation may consist of invoices, purchase orders, canceled checks, and other documents which will reasonably prove to the satisfaction of the County the Start-up Costs paid for by the Company. As provided above, the County's obligation to begin reimbursement for Start-Up Costs shall not be triggered until such Certification of Start-Up Costs and supporting documentation has been received by the County.

11. The Company agrees that any duly authorized representative of the County shall have access to and the right to reasonably inspect, copy, audit, and examine all of the books, records, and other documents relating to the fulfillment of this Agreement during the Term.

12. The Landowner may, at any time during the Term, refund the Economic Incentives, or portion thereof, paid to the Landowner by the County pursuant to the terms of this Agreement. Such refund shall end all obligations of the Company all obligations to complete the Capital Investment imposed by the terms of this Agreement.

13. Not later than 90 days after the Company provides to the County the Capital Investment Certification and the Certification of Costs, and annually thereafter for the term of this agreement, the Company shall provide to the County in writing, executed by one authorized to execute contracts on behalf of the Company, accurate certification (collectively, "Employment Certification") that the Company employs at least ninety-three (93) jobs paying an average wage of Forty-One Thousand Five Hundred Seventy-Nine Dollars (\$41,579.00), plus benefits, which would not exist in the absence of the Company's expenditure of the Capital Investment. As a part of the Employment Certification, the Company shall provide the County with a list of the positions created as a result of this Agreement, the average wage rate for such

positions, and a summary of the other employment benefits received by the persons in those positions. Should the Company fail to make any Employment Certification, the Landowner shall immediately repay to the County the remaining principal amount secured by the Deed of Trust pursuant to paragraph 14, below, or the total amount of incentives payments received by it from the County, whichever is lesser.

14. The Landowner shall pledge a valid first lien on all real estate acquired by it in Henderson County pursuant to this Agreement (by means of a first Deed of Trust in favor of Charles Russell Burrell, Trustee for the County), as collateral to secure the performance by the Company of all its obligations hereunder. The original principal amount of such Deed of Trust shall be Two Million Seven Hundred Thousand Thirteen Thousand Three Hundred Sixty-Two Dollars (\$2,713,362.00). The principal amount secured by such Deed of Trust shall decrease by one-eighth (1/8) of the original principal value for each year no breach occurs through the end of the Term of this Agreement. It is specifically agreed that the Company's obligations hereunder include, but are not limited to, the timely completion of the Capital Investment Certification or each required Employment Certification.

15. No provision of this Agreement shall be construed or interpreted as creating a pledge of the faith and credit of the County within the meaning of any constitutional debt limitation. No provision of this Agreement shall be construed or interpreted as delegating governmental powers nor as a donation or a lending of the credit of the County within the meaning of the State Constitution. This Agreement shall not directly or indirectly or contingently obligate the County to make any payments beyond those appropriated in the County's sole discretion for any fiscal year in which this Agreement shall be in effect. No provision of this Agreement shall be construed to pledge or to create a lien on any class or source of the County's moneys, nor properties, nor shall any provision of the Agreement restrict to any extent prohibited by law, any action or right of action on the part of any future County governing body. To the extent of any conflict between this Paragraph and any other paragraph of this Agreement, this Paragraph shall take priority.

16. The Company shall be entirely responsible for, and shall bear all risk of loss associated with the Expansion and with the creation of new employment. Further, in the event that the assistance provided by the County hereunder, or any party thereof, is deemed by a court of competent jurisdiction to be *ultra vires* or not authorized by the laws or constitution of the State of North Carolina, the Company shall promptly refund all amounts paid hereunder by the County to the County. This Paragraph shall survive the expiration or termination of this Agreement.

17. This Agreement shall bind all successors and assigns of the Company; however, neither this Agreement, nor the right to payment under the terms of this Agreement, may be assigned by the Company, or otherwise used as collateral for any obligations of the Company, financial or otherwise without the expressed written consent of the Henderson County Board of Commissioners.

18. This Agreement shall be governed by the laws of the State of North Carolina.

19. The Company represents and warrants to the County that the Company and Landowner will comply with all applicable local, State, and Federal laws in carrying out the obligations incurred by the Company under the terms of this Agreement.

20. Any written notice or written certification or payment required by the terms of this Agreement shall be deemed given if delivered in person, or mailed certified mail, return receipt requested to the persons named below:

To the County: Charles Russell Burrell, County Attorney
Office of the County Attorney
1 Historic Courthouse Square, Suite 5
Hendersonville, NC 28792

To the Company: _____
SIERRA NEVADA BREWING CO.
1075 East 20th Street
Chico, CA 95928

For the Landowner: Wild River Corp.
c/o Sierra Nevada Brewing Co.
1075 East 20th Street
Chico, CA 95928

20. In the event any term, covenant or condition of this Agreement is deemed invalid or unenforceable, the remainder of this Agreement, of the application of such term, covenant or condition to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected and each term, covenant or condition of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

21. The provisions hereof shall inure to the benefit of and bind the parties hereto and their respective heirs, successor and assigns. This document shall be considered to have been prepared equally by the parties hereto and shall not be construed more strictly against either of them. The provision hereof shall be liberally construed to give effect to their apparent intent.

22. This Agreement constitutes the entire agreement of the parties hereto and may not be modified or canceled except pursuant to the terms hereof or an instrument in writing signed by the parties hereto.

23. This Agreement may be executed in one or more counterparts and shall become effective when one or more counterparts have been signed by all of the parties; each counterpart shall be deemed an original but all counterparts shall constitute a single instrument.

24. Any provision herein contained which by its nature and effect is required to be observed, kept, or performed after the execution of this Agreement shall survive said execution and remain binding upon and for the benefit of the parties until fully observed, kept, or performed. Provided however, that all provisions of this Agreement which by their terms survive any termination of this Agreement shall survive indefinitely.

25. This Agreement is intended to benefit the parties hereto only, and therefore no third party shall have any rights under this Agreement, or be deemed a third party beneficiary.

26. This Agreement shall be effective after it has been duly executed by the parties, the effective date being the date above first written.

(The remainder of this page was left blank intentionally.)

Now, therefore, the parties have caused this Agreement to be duly approved and duly executed in quadruplicate, each to have the force and effect of an original as of the date and year above first written.

HENDERSON COUNTY

BY: _____ (Seal)
THOMAS H. THOMPSON, Chairman
Henderson County Board of Commissioners

Attest: (County Seal)

Clerk to the Board


SIERRA NEVADA BREWING CO.

BY: 
KEN GROSSMAN President

Attest:

Secretary

WILD RIVER CORP.

BY:  KEN GROSSMAN, President

Attest:

Secretary

STATE OF CALIFORNIA
COUNTY OF BUTTE

I, _____, Notary Public for said County and State, certify that Bill Bales, personally came before me this day and acknowledged that he is Secretary to SIERRA NEVADA BREWING CO., a California corporation authorized to do business in North Carolina, that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its President, , and attested by himself as its Secretary.

I certify under Penalty of Perjury under the laws of the State of California that the foregoing paragraph is true and correct.

Witness my hand and official seal, this the ____ day of _____, 20__.

(Official Seal)

Notary Public

My Commission expires _____, 20__.

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STATE OF CALIFORNIA
COUNTY OF BUTTE

I, _____, Notary Public for said County and State, certify that Bill Bales, personally came before me this day and acknowledged that he is Secretary to WILD RIVER CORP. a North Carolina corporation, that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its President, and attested by himself as its Secretary.

I certify under Penalty of Perjury under the laws of the State of California that the foregoing paragraph is true and correct.

Witness my hand and official seal, this the ____ day of _____, 20__.

(Official Seal)

Notary Public

My Commission expires _____, 20__.

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

I, _____, Notary Public for said County and State, certify that Teresa Wilson personally came before me this day and acknowledged that she is Clerk to the Board of Commissioners of Henderson County, a body politic and corporate and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its Chairman of the Board of Commissioner, sealed with its corporate seal, and attested by herself as its Clerk.

Witness my hand and official seal, this the ____ day of _____, 20__.

(Official Seal)

Notary Public

My commission expires _____, 20__.

APPENDIX A

Time Schedule and Amount of Various Investments

During the period prior to 1 January 2014, the Company will complete the investment of the following amounts:

Real property improvements	\$25,000,000.00
New personal property and equipment	\$55,000,000.00

During or before the period from 1 January 2014 through 31 December 2014, the Company will complete the investment of the following amounts:

Real property improvements	\$0.00
New personal property and equipment	\$7,500,000.00

During or before the period from 1 January 2015 through 31 December 2015, the Company will complete the investment of the following amounts:

Real property improvements	\$5,000,000.00
New personal property and equipment	\$7,500,000.00

During or before the period from 1 January 2016 through 31 December 2016, the Company will complete the investment of the following amounts:

Real property improvements	\$0.00
New personal property and equipment	\$7,500,000.00

The total of all investment will be as follows:

Real property improvements	\$30,000,000.00
New personal property and equipment	\$77,500,000.00