



MANAGER'S MEMO ITEM

ITEM: Incentive Request – Bill Kay Nissan
WORKSHOP DATE: December 6, 2004
PREPARED BY: David Van Vooren, Deputy Village Manager
BID AMOUNT: \$ _____ **ACCOUNT:** _____
BUDGET AMOUNT: \$ _____

PURPOSE: To Assist Bill Kay Nissan with the remodeling and expansion of their dealership to enhance the Village's economic retail base

BACKGROUND:

Village Staff and the EDC's attraction/retention sub-committee has been working with Lee Eisenberg and Bernie McQuillan from Bill Kay Nissan in an effort to expand the Nissan dealership in Downers Grove. This dealership currently operates on leased land and the developer/franchisee desire to purchase the site and to remodel the existing show room to meet manufacturer's requirements. This provides the Village an opportunity to work with an existing business to not only enhance the sales offices but to turn a business tenant into a business owner.

As part of this proposal, staff has requested that Bill Kay Nissan address the goals of the Ogden vision which includes opportunities to install public sidewalks and enhance the green space along the corridor. Mr. Eisenberg has agreed to provide for additional landscaping and to install the public sidewalk within the necessary sidewalk easement. Both of these goals are included in the design plan that Mr. Eisenberg has been working on with staff and his consultants and is to be an integral part of this agreement.

The EDC in the past has worked with several of the Village's car dealerships with incentive agreements that have been used to assist in the development of their properties in an effort to enhance sales within the Village and rejuvenate underperforming properties along Ogden Avenue. These agreements have been structured using sales tax in some type of shared arrangement to provide the financial assistance to the dealership. Staff with assistance from Mr. Eisenberg have determine that the financial need to complete the land purchase and the buildings improvements totals \$500,000 and the inclusion of the sidewalks and landscaping bring the assistance package to \$600,000.

In that the Nissan dealership resides within the Ogden Avenue TIF, EDC and staff are proposing to use a combination of TIF and sales tax incentives to assist this business. We are proposing to use a TIF incentive that would provide an annual payment of approximately \$22,500 for a period of ten years. The balance of the financing gap would be provided by a sales tax sharing arrangement where the Village receives the sales tax on the first \$25,000,000 of sales generated from the business and that we would share equally the sales tax from all sales above \$25,000,000 annually for a period of five years after the reopening of the dealership. The EDC retention/attraction committee did discuss in some detail if the sales tax incentive should be capped or left to open ended providing an incentive for the dealership to sell as much as possible during the agreement's term. In past agreements, the Village has not capped said incentives and also didn't guarantee that the business would receive any funds from the agreements unless they

increased sales thereby benefiting both parties. The sub-committee however felt that the Village Council may desire to re-evaluate this practice but as mentioned there are positives on both sides.

BUDGET IMPLICATIONS:

BID AMOUNT: \$ _____	ACCOUNT: _____
BUDGET AMOUNT: \$ _____	

Staff would have to include rebate dollars beginning in the fiscal year anticipated to be 2005-06 into the Village budget to meet the obligations of the agreement if adopted by the Village.

ATTACHMENTS:

Incentive agreement with Bill Kay Nissan

STAFF RECOMMENDATION:

EDC and Staff recommend that the Village Council approve the economic incentive agreement with Bill Kay Nissan.

REQUESTED COURSE OF ACTION:

Resolution approving incentive agreement for Bill Kay Nissan

RESOLUTION NO. _____

**A RESOLUTION AUTHORIZING EXECUTION OF A REDEVELOPMENT SALES TAX
REBATE AGREEMENT BETWEEN THE VILLAGE OF DOWNERS GROVE
AND J.K. PONTIAC, INC. D/B/A BILL KAY NISSAN**

BE IT RESOLVED by the Village Council of the Village of Downers Grove, DuPage County, Illinois,
as follows:

1. That the form and substance of a certain Redevelopment Sales Tax Rebate Agreement (the "Agreement"), between the Village of Downers Grove (the "Village") and J.K. Pontiac, Inc. d/b/a Bill Kay Nissan ("Bill Kay"), for the general rebate of sales tax generated from the operation of the Bill Kay Nissan auto dealership, as set forth in the form of the Agreement submitted to this meeting with the recommendation of the Village Manager, is hereby approved.

2. That the Mayor and Village Clerk are hereby respectively authorized and directed for and on behalf of the Village to execute, attest, seal and deliver the Agreement, substantially in the form approved in the foregoing paragraph of this Resolution, together with such changes as the Manager shall deem necessary.

3. That the proper officials, agents and employees of the Village are hereby authorized and directed to take such further action as they may deem necessary or appropriate to perform all obligations and commitments of the Village in accordance with the provisions of the Agreement.

4. That all resolutions or parts of resolutions in conflict with the provisions of this Resolution are hereby repealed.

5. That this Resolution shall be in full force and effect from and after its passage as provided by law.

Mayor

Passed:

Attest: _____

Village Clerk

**REDEVELOPMENT/SALES TAX REBATE AGREEMENT BETWEEN
THE VILLAGE OF DOWNERS GROVE AND
J.K. PONTIAC D/B/A BILL KAY NISSAN**

This Agreement made and entered into this ____ day of _____, 200__, by and between the Village of Downers, Illinois, an Illinois Municipal Corporation situated in the County of DuPage, Illinois (the "Village") and J.K. Pontiac, an Illinois Corporation, d/b/a Bill Kay Nissan, ("Bill Kay");

WITNESSETH:

WHEREAS, the Village is an Illinois municipal corporation possessing home rule powers under Section 6 of Article VII of the Illinois Constitution, and;

WHEREAS, the Village has the authority to prevent the spread of blight and to encourage private development to enhance the local tax base and to enter into contractual agreements for the purpose of achieving these purposes; and

WHEREAS, the Village has developed a tax increment financing district under the provisions of the Tax Increment Allocation Redevelopment Act, 65 ILCS 5/11-74.4-1, as amended (the "Act"), to finance redevelopment in accordance with the conditions and requirements set forth in the act, and specifically in accordance with Section 11-74.4-7; and

WHEREAS, Bill Kay currently operates an automobile dealership on leased land within the Village of Downers Grove located at 1601 Ogden Avenue, Downers Grove, Illinois, and legally described as follows (the "Property"):

INSERT LEGAL

(Commonly known as 1601 Ogden Avenue, Downers Grove, IL PIN: _____)

WHEREAS, Bill Kay is endeavoring to purchase the Property, remodel the showroom and make other on-site improvements such as landscaping and sidewalks as indicated on the Design Plan attached hereto and herein incorporated as Exhibit A (the "Redevelopment Project"); and,

WHEREAS, the Village, recognizing the economic and other benefits derived therefrom by the Village and its residents, seeks to assist Bill Kay in its endeavors to own and redevelop the Property; and

WHEREAS, the Village desires to assist in the Redevelopment Project in order to serve the needs of the Village, to produce increased tax revenues and to stimulate employment and development within the TIF and therefore the Village has agreed to assist in financing the Redevelopment Project through incremental property tax revenues in accordance with the terms and provisions of the Act and this agreement; and

WHEREAS, the Village and Bill Kay agree to permit Bill Kay to purchase the Property and to construct the Redevelopment Project, that it is necessary that the Village also provide an incentive in the form of certain sales tax rebate assistance in accordance with law and the terms of this Agreement; and

NOW, THEREFORE, for and in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby covenant and agree as follows:

1. **Incorporation of Recitals:** The foregoing recitals are hereby incorporated and adopted as set forth herein.
- 2 **General Terms:**
 - a) Bill Kay, after receipt of the promises and inducements contained herein, agrees to purchase the Property and redevelop its existing automobile sales dealership in substantial accordance

with the Design Plan (Exhibit A). It is understood and agreed that there will be a specific site plan to be submitted to and approved by the Village in relation to the Dealership and the Property as required by the Village Zoning Code at some time in the future. In addition, the architecture, building, zoning, sign requirements and landscape plans for the Property must be submitted to and approved by the Village. The redevelopment of the Property shall be constructed substantially in accordance with the plans and specifications approved by the Village.

b) The parties hereto acknowledge, and Bill Kay represents and warrants, that it requires economic assistance from the Village in order to commence and complete the Redevelopment Project, and that, but for said economic assistance, the Redevelopment Project as contemplated would not be economically viable, nor would the funds necessary for its commencement and completion be available.

c) For purposes of this Agreement, the use of the terms "sales tax" and "sales tax revenue" shall be construed to refer to that net portion of taxes imposed by the State of Illinois for distribution to the Village pursuant to the Retailers' Occupation Tax Act and the Service Occupation Tax Act (as said Acts may be amended from time to time) and which are collected by the State and distributed to the Village, and all revenue derived from such taxes. It is expressly understood that if a governmental or legislative body enacts any law or statute which results or which may result in any material changes or amendments to the foregoing sales tax provisions, which changes or amendments prohibit the Village from complying with this Agreement or which adversely affect the Village's ability to comply herewith, then the Village, at its sole discretion, may reevaluate and/or discontinue the incentive to be provided herein. The use of the terms "sales tax" and "sales tax revenue" shall not be construed to mean any additional taxes imposed by the Village as a home rule municipality

d) For purposes of this Agreement, the incentives and inducements set forth herein shall apply only to Bill Kay and the Redevelopment Project. It is expressly understood that this Agreement shall not apply to any automobile sales that may occur on the Property prior to the construction and operation of the improvements as specified in Exhibit A.

e) Bill Kay agrees that in the event there is a change in the ownership (legal or beneficial) of the Dealership or Property, or any portion thereof, the Village shall no longer be required to pay all or any portion of the incentive payments or property acquisition reimbursement payments provided for in this Agreement, except as provided for in Section 11.

f) Bill Kay agrees that it shall purchase the Property prior to, or within a reasonable time following, the execution of this Agreement. In the event that Bill Kay fails to purchase, obtain and/or otherwise acquire an ownership interest of the Dealership Property within ninety (90) days following the execution of this Agreement, this Agreement, and any and all obligations imposed thereunder, shall become null, void and of no legal effect.

3. TIF Reimbursement of Property Acquisition Costs and Sales Tax Incentive:

The Village agrees to finance the purchase of the Property in an amount equal to the actual cost of acquisition or \$225,000.00 (TWO HUNDRED TWENTY-FIVE THOUSAND DOLLARS), whichever is less. Bill Kay, upon acquiring title to the Property shall provide proof of ownership to the Village in the form of a deed. The Village shall reimburse Bill Kay over a ten (10) year period in equal payments ("TIF Reimbursement Payments") for the cost of acquisition or \$225,000.00, whichever is less. The first payment shall be due and payable July 1st of the year following the Village's receipt of proof of ownership.

Following payments shall be due and payable July 1st of each subsequent year for nine (9)

years following the initial TIF Reimbursement Payment.

In the event that all terms and conditions set forth in this Agreement are satisfactorily met by Bill Kay, including the construction, development and operation of the Dealership on the Dealership property, the Village hereby agrees to pay Bill Kay by quarterly installments over a maximum period of five (5) years (the "Incentive Period") as follows, subject however to the following conditions and restrictions:

- a. It is understood that each amount will be due and payable solely from the proceeds of sales tax revenue received by the Village from the Dealership Property.
 - b. It is acknowledged and understood by and between the parties hereto that the Village receives sales tax revenue monthly, and that the taxes generated by sales in any one month are distributed to the Village approximately three months later (e.g. taxes generated by sales in July are generally not received by the Village until October).
 - c. The initial payment year (hereinafter referred to as the "Initial Payment Year") shall be that twelve (12) month period commencing on the first day of the full month that follows the month in which the Dealership is operating and opened to the public for business (each subsequent twelve month period is hereinafter referred to as "Subsequent Incentive Year").
 - d. The incentive base for the Incentive Period shall be **TWENTY FIVE MILLION DOLLARS (\$25,000,000.00)** (hereinafter referred to as the "Incentive Base"). For the Incentive Period, the Village shall be entitled to all the sales tax revenue received from the Dealership Property up to the Incentive Base. For the Incentive Period, respectively, Bill Kay shall thereafter be entitled to fifty percent (50%) of the sales tax revenue, if any, received from the Dealership Property that exceeds the Incentive Base.
 - e. The Incentive Payments shall be computed at the close of each calendar quarter (March 31, June 30, September 30, December 31) by the Village as provided herein. The Village will make payments to Bill Kay within thirty (30) days after it receives notification from the State of the sales tax revenue generated by the Dealership Property.
4. **Disclosure:** Bill Kay shall execute and provide the Village with a power of attorney

letter (or other necessary document), in form and content reasonably acceptable to the Village, which

letter shall be addressed to the Illinois Department of Revenue and shall authorize the Illinois Department of Revenue to release any and all gross revenue and sales tax information on a monthly basis with respect to the operation of the Dealership on the Property to the Village during the Incentive Period. In addition to said letter, Bill Kay shall prepare and submit such other or additional forms as may be required from time to time by the Illinois Department of Revenue in order to release such information to the Village. Finally, in the event that the sales tax revenue information is not released by the State due to the failure of Bill Kay to execute the necessary authorization and/or release, the Village shall not be required to make any of the incentive payments provided for in this Agreement.

5. Construction of Dealership: Bill Kay shall commence construction of the Redevelopment Project on or before _____, and shall not cause or permit the existence of any violation of Village ordinances, including but not limited to the Village's building code, zoning ordinances, fire code and any and all rules and regulations thereunder. Bill Kay shall have completed construction of the Redevelopment Project and shall have begun operations and sales from the Dealership on or before _____. As part of the Redevelopment Project, Bill Kay agrees that it, pursuant to the Economic Development Commission's Ogden Avenue Commercial Corridor Plan adopted by the Downers Grove Village Council in March of 1999, will install the public sidewalk within the sidewalk easement and will landscape the Property. If the conditions of this Section are not met, this Agreement shall be declared null, void and of no legal effect.

6. Commitment to Continue Dealership: The parties agree that all Incentive Payments and TIF Reimbursement Payments are based in part upon: 1) a commitment by Bill Kay to purchase the property and to continue operation of the Dealership, or an equivalent dealership, on the Property for a period of not less than twelve (12) years from the effective date of this Agreement, and; 2) a

scheduled reimbursement of such incentive payments, if the terms of this commitment are not fulfilled. To that end, Bill Kay agrees to continue the operation of a new car Dealership(s) on the Property and shall continue to offer automotive sales with the point of sale being in Downers Grove for twelve (12) years from the effective date of this Agreement. If, at any time during this time period, the Dealership, or a successor, fails to offer automotive sales of new automobiles as proposed by the Dealership, then the Village shall be released and discharged from any further obligation to make payments under this Agreement, and Bill Kay or its successors shall reimburse the Village in accordance with Section 7 of this Agreement. The failure to meet this commitment is not a breach, but rather a foreseeable event for which the offsetting terms have been agreed to in Section 7 of this Agreement.

7. **Reimbursement:** In the event Bill Kay, or any approved successor, fails to continue the Dealership on the Property as provided in Section 6 of this Agreement, Bill Kay, or such approved successor, shall reimburse to the Village within sixty (60) days of receipt of a written demand from the Village specifying the amount of the reimbursement all or a portion of the Incentive Payments and TIF Reimbursement Payments paid hereunder according to the following schedule:

If said event occurs during:

- * *Year one through three - One hundred percent (100%) of the Incentive Payment and TIF Reimbursement Payment received*
- * *Year four through year five - seventy-five percent (75%) of the Incentive Payment and TIF Reimbursement Payment received*
- * *Year five through year ten - fifty percent (50%) of the Incentive Payment and TIF Reimbursement Payment received*

After the expiration of a 60 day written demand by the Village to Bill Kay or its successors, specifying the amount due, the Village may, in its sole discretion, pursue any and all available legal remedies to recover said monies, including, without limitation:

- * Drawing upon the Letter of Credit provided for below; and/or
- * Proceed with an action in law or in equity to recover the amounts owed.

8. Letter of Credit: In consideration of the Incentive Payments and TIF Reimbursement Payment received by Bill Kay, on or before March 31st of each year of this Agreement beginning in year 2005, and prior to the payment of any Incentive Payments for any quarter for that year or TIF Reimbursement Payments, Bill Kay, or the principals of any successors shall provide the Village with an irrevocable letter of credit in an amount equal to 100% of the amount of the Incentive Payments and TIF Reimbursement Payments paid to date multiplied by the refund percentage due to the Village for that specific year in accordance with Section 7 of this Agreement. The principals of any successors of Bill Kay shall provide the above described letter of credit within thirty (30) days from when the succession occurs. The Letters of Credit shall be in a form acceptable to the Village Attorney and, at a minimum, shall (1) provide that it shall not be canceled without the prior written consent of the Village; and (2) not require the consent of Bill Kay or its successors prior to the collection by the Village of any amounts covered by said letter of credit or other instrument. Bill Kay or its successors shall be solely responsible for any costs associated with obtaining the letter of credit. The letter of credit shall serve as security for the benefit of the Village in the event that any of the Incentive Payments or TIF Reimbursement Payments must be refunded by Bill Kay or its successors to the Village, as hereafter provided.

9. Indemnification: In the event that any third party or parties institutes any legal proceedings against the Village and/or Bill Kay, which relate to the terms of this Agreement, then, in that event, Bill Kay shall indemnify and hold harmless the Village from any and all such proceedings. Further, Bill Kay, upon receiving notice from the Village of such legal proceedings, shall assume, fully

and vigorously, the entire defense of such lawsuit or proceedings and any and all costs and expenses of whatever nature relating thereto; provided, however, that Bill Kay may not at any time settle or compromise such proceedings without the Village's consent and even then only so long as such settlement or compromise does not involve an admission of wrongdoing on the part of the Village, nor any liability on the part of the Village, monetary or otherwise.

If the Village, in its sole discretion, determines that there is, or may probably be, a conflict of interest between the Village and Bill Kay on an issue of material importance to the Village, or which may reasonably have a potentially substantial adverse effect on the Village, then the Village shall have the option of being represented by its own legal counsel. In the event that the Village exercises such option, then Bill Kay shall reimburse the Village from time to time on written demand from the Village and notice of the amount due for any and all reasonable out-of-pocket costs and expenses, including but not limited to court costs, reasonable attorney's fees, witnesses' fees and/or other litigation expenses incurred by the Village in connection therewith.

In the event that the Village institutes legal proceedings against Bill Kay for a breach of this Agreement, or any term or condition hereof, and secures a judgment in its favor, the court having jurisdiction thereof shall determine and include in any judgment against Bill Kay all costs and expenses of such legal proceedings incurred by the Village, including but not limited to court costs, reasonable attorney's fees and witnesses' fees, incurred in connection therewith. Either party may, in its sole discretion, appeal any judgment rendered in relation thereto.

10. Limitation of Actions: No recourse under or upon any obligation, covenant or agreement of this Agreement or for any claim based thereon or otherwise in respect thereof shall be had against the Village, its officers, agents and employees, in any amount or in excess of any specific sum

agreed by the Village to be paid to Bill Kay hereunder, subject to the terms and conditions herein, and no liability, right or claim at law or in equity shall attach to, or shall be incurred by the Village, its officers, agents and employees in excess of such amounts, and all and any such rights or claims of Bill Kay against the Village, its officers, directors, agents and employees are hereby expressly waived and released as a condition of and as consideration for the execution of this Agreement by the Village.

11. Assignments: Bill Kay shall not assign this Agreement to any person or entity without the prior written consent of the Village, said consent not to be unreasonably withheld. No such assignment shall be effective, even if consented to by the Village, unless and until the Assignee acknowledges in writing to the Village that the obligations of the Village to Bill Kay or any Assignee hereunder are contingent upon certain obligations on the part of Bill Kay which such Assignee is willing to assume, including the issuance of a letter of credit in accordance with Section 8. Notwithstanding any such assignments and/or assumption of responsibility, Bill Kay shall remain liable for all of its agreements, covenants and obligations and the performance thereof pursuant to this Agreement.

12. Breach: In the event of breach of any of the terms and conditions of the Agreement, the non-breaching party shall have the right to terminate this Agreement, which will not relieve the breaching party from performance. In addition, the non-breaching party shall have the right, by any action or proceeding at law or in equity, to secure the specific performance of the covenants and agreements herein contained, and may be awarded damages or failure of performance, or both, except that the exclusive remedy for the failure to meet the Section 6 commitment is the payment of the scheduled reimbursements as set forth in Section 7. The foregoing rights and remedies shall be cumulative and exclusive. Nothing herein shall modify, limit or abrogate any right of the Village to a refund as provided under Section 7 of this Agreement.

13. Amendments: This Agreement sets forth all the promises, inducements, agreements, conditions and understandings by and between the parties relative to the subject matter hereof, and there are no promises, agreements, conditions or understandings, either oral or written, express or implied, between them, other than those expressly set forth herein. No subsequent alteration, amendment, change or addition to this Agreement shall be binding upon the parties hereto unless authorized in accordance with the law and reduced in writing and signed by them.

14. Time: Time is of the essence under this Agreement and all time limits set forth herein are mandatory and cannot be waived except by a lawfully authorized and executed written waiver by the party excusing such timely performance.

15. Notices: Any notices required in this Agreement shall be effective when in writing and upon mailing by certified mail return receipt requested, or by delivering the same in person or to an officer of such party or by prepaid telegram or private overnight courier, when appropriate, addressed to the party to be notified.

All notices to Downers Grove shall be sent to:

Village Manager
Village of Downers Grove
801 Burlington Avenue
Downers Grove, Illinois 60515

All notices to Bill Kay shall be sent to:

J.K. Pontiac, Inc. d/b/a Bill Kay Nissan
Attn: _____
1601 Ogden Avenue
Downers Grove, IL 60515

16. Exhibits: Exhibits attached herein are hereby incorporated in and made a part of this Agreement.

17. Jurisdiction: This Agreement shall be governed by the laws of the State of Illinois, and the sole and exclusive venue for any disputes arising out of this Agreement shall be the appropriate state or

federal court located within the State of Illinois.

18. Waiver: A waiver of any part of this Agreement shall be limited to that specific event and shall not be a waiver of the entire Agreement.

19. Authorization to Execute: The officers of Bill Kay who have executed this Agreement hereby warrant that he/she has been lawfully authorized by Bill Kay to execute this Agreement on behalf of Bill Kay.

WITNESS their hands and seals the day and year first above written.

THE VILLAGE OF DOWNERS GROVE,
ILLINOIS, an Illinois Municipal Corporation

J.K. PONTIAC D/B/A BILL KAY
NISSAN

By _____
Mayor

By _____

Attest _____
Village Clerk

Attest _____
Secretary

Date _____

Date _____

I:\wp8\agr.04\BillKay-TaxrRebate

EXHIBIT A
Design Plan