

NON-STATUTORY DEVELOPMENT AGREEMENT

Between

The City of Warrenton, Oregon,

The Port of Astoria, Oregon,

and

The Scoular Company

This Non-Statutory Development Agreement (the “Agreement”) is made and entered into this _____ day of _____, 2020 by and between the CITY OF WARRENTON, a municipal corporation of the State of Oregon (the “City”), the PORT OF ASTORIA, a port district organized under ORS Chapter 777 (the “Port”) and THE SCOULAR COMPANY, a Nebraska corporation operating in Oregon and duly registered with the Oregon Secretary of State as a foreign business corporation (the “Developer”). This Agreement is entered into by the City under the City’s home rule authority and, as between the City and Port, under authority conferred by ORS Chapter 190. This Agreement is entered into by the Port under authority conferred by ORS Chapter 777 and, as applicable, ORS Chapter 190. This Agreement does not constitute a statutory development agreement under ORS Chapter 94.504-94.528. The City, Port and Developer may be referred to jointly in this Agreement as the “Parties” and individually as a “Party.”

RECITALS

A. WHEREAS, the City, Port and Developer mutually desire to enter into the Agreement as provided herein; and

B. WHEREAS, Developer has submitted a land use application (the “Application”) proposing the development of a a 14,400 square foot fishmeal processing plant within a 1.46-acre parcel at the Port’s Airport Industrial Park (the “Facility”); and

C. WHEREAS, the City has concerns with the volume of wastewater that the proposed Facility will discharge into the City’s wastewater treatment system (the “Wastewater System”), including the City’s wastewater treatment plant (the “Treatment Plant”) as a component of the Wastewater System, given the available capacity of the Wastewater System; and

D. WHEREAS, the City’s Wastewater System receives roughly four to six million gallons of excess sewerage annually due to sewer infrastructure failures within properties held by the Port and U.S. Coast Guard (“USCG”) at the Astoria Regional Airport (“Airport”); and

E. WHEREAS, the Port has been aware of these Inflow & Infiltration (“I&I”) issues since at least 2005, as indicated by the Intergovernmental Agreement (“IGA”) entered into between the Port and the City and dated 10/17/2005; and

F. WHEREAS, the City is currently coordinating efforts with the Port to address the aforementioned I&I issues, which the parties hereby acknowledge necessarily requires addressing

before the City has adequate capacity to accommodate connection of the proposed Facility to the Wastewater System; and

G. WHEREAS, the Port tasked AM Engineering with preparing an I&I study dated September 10, 2020, which concluded that both the USCG and the Port contribute to the aforementioned I&I issues; and

H. WHEREAS, the Port has obligated itself to the City to resolve its I&I issues in a timely manner while the USCG will take three to four years to resolve its I&I issues; and

I. WHEREAS, the City cannot accommodate the proposed Facility until I&I issues are satisfactorily resolved, and Developer is dependent on both the City and the Port to effectively develop and open the proposed Facility; and

K. WHEREAS, the City, Port and Developer mutually desire to work together in good faith to accommodate the proposed Facility.

NOW, THEREFORE, the City, Port and Developer agree as follows:

AGREEMENT

In consideration of the mutual promises and performance obligations of each Party set out in this Agreement, the City, Port and Developer hereby agree to the following terms and conditions and respective obligations:

1. Developer Obligations.

A. Monthly Sewer Rate. Developer agrees to pay a monthly wastewater rate equivalent to 200 EDUs (the “Wastewater Rate”), which rate shall be charged each calendar month after the effective date of this Agreement including, without limitation months when Developer produces less than 200 EDUs of wastewater, and including months when Developer sends no wastewater to the Wastewater System. The City shall have the unilateral right to increase the Wastewater Rate when either the quantity of wastewater exceeds any of the volumetric standards provided in the following Table 1, or the quality of water falls below any of the qualitative standards provided in the following Table 1:

TABLE 1 – WASTEWATER STANDARDS

Secular Facility Discharge Standards

Parameter	Value	Units
Flow	20,000	Gpd
BOD ₅	519	mg/L
BOD ₅	87	ppd
Ammonia, NH ₃ -N*	30	mg/L
TSS*	200	mg/L

TSS*	34	ppd
FOG	0	ppd

Notes:

BOD₅ = Biological Oxygen Demand
TSS = Total Suspended Solids
FOG = Fats, Oils, and Grease
gpd = gallons per day
mg/L = milligrams per liter
ppd = pounds per day
Values denoted with an (*) are assumed maximums not provided directly by Developer.

B. SDCs. Developer agrees to pay a Water and Sewer System Development Charge (“SDC”) equivalent to 200 EDU’s. The SDC fee will be increased in the event that either the quantity of wastewater exceeds any of the volumetric standards provided in Table 1, above, or the quality of water raises above any of the qualitative standards provided in Table 1. The fee increase will be based on the equivalent EDU associated with the increased quantity or quality.

C. Wastewater Discharge Limits. Developer agrees to the following wastewater discharge limits provided in Table 2, below:

TABLE 2 – DISCHARGE LIMITS

Scouler Facility Discharge Standards

Parameter	Value	Units
Flow ^(a)	20,000	gpd
BOD ₅ ^(b)	519	mg/L
Ammonia, NH ₃ -N ^(b)	30	mg/L
TSS ^(b)	250	mg/L
FOG ^(b)	100	mg/L
pH ^(a)	6-9	--

Notes

- (a) Limits are daily maximums. pH must be greater than 6 and less than 9.
- (b) Limits are based on the maximum composite sample. Samples would be collected twice monthly.

BOD = Biological Oxygen Demand
TSS = Total Suspended Solids
FOG = Fats, Oils, and Grease
gpd = gallons per day
mg/L = milligrams per liter
ppd = pounds per day

In the event that any of the wastewater discharge limits in Table 2 are exceeded, Developer agrees to pay Extra-Strength Charges as provided in Section 1.J, below.

D. Flow Meter/Totalizer. Developer shall install a flowmeter (magnetic flow meter) (the “Flowmeter”) on the discharge side of the onsite private wastewater pump station installed at Developer’s sole cost and expense. The Flowmeter shall be connected to a Mission-managed¹ SCADA system that is connected to the City’s Mission system, so as to provide the City real-time access to wastewater flows entering the Wastewater System from the Facility. The Flowmeter shall be calibrated annually by the Developer and a calibration certificate from a duly licensed calibration specialist shall be provide to the City.

E. Sampling. Developer shall provide a sample port on the discharge side of the equalization tank described in Section 1.G, below. Developer shall obtain grab samples twice per month for analysis. pH testing will be completed by Developer on a daily basis. Developer shall provide a Sigma or Hach brand refrigerated composite sampler to the equalization tank for sample collection. The City will be provided access for confirmation sampling, at the discretion of the City Engineer, at a time of the City’s choice with no less than 1-hour notice to Developer. Confirmation samples acquired by the City are required in the event that any exceedance is reported and will be charged to Developer at a rate of \$350 per sample.

F. Analysis and Reporting. Developer shall provide grab samples no less than twice per calendar month for analytical testing at an accredited facility, approved by the City in its sole discretion, for the parameters listed in Table 2. Developer shall submit an analytical report and flow records to the City electronically on a monthly basis in Microsoft Excel format. Analytical reports shall be submitted in PDF format. Collection of data shall be required only when the Facility is in operation. Developer shall provide at least 24-hour notice in accordance with Section 7.A before operations at the proposed Facility are started or halted.

G. Equalization. Developer shall provide a minimum of 10,000-gallon equalization with mixing (above-ground tank or as part of the onsite private wastewater pump station) so that flow can be metered at a constant rate and peak flows from the facility can be discharged during off-peak hours according to the Treatment Plant’s diurnal flow curve.

H. Screening. Developer shall provide screening as proposed in Exhibit 1 with a Hycor wedge wire screen to recycle solids to the process. Developer shall screen ahead of the equalization tank to minimize tank flushing events. The Developer shall provide additional screening under either of the following conditions: a) tote washing is implemented or b) the TSS limit in Table 2, above, is exceeded for the average of the prior calendar month’s sample results.

I. Sumps. Sumps within the facility connected directly to the onsite equalization tank or pump station shall be equipped by Developer with basket strainers sized with maximum 0.25-inch diameter perforations. The strainers shall be manually cleaned after washdown events.

¹ <https://www.123mc.com/en/homepage/>

J. Extra-Strength Charges. Extra-strength charges will be imposed for exceeding limitations based on the equations below. These equations are based on concentration limits defined in Table 2, above, and volume of flows between samples taken. Extra strength charges will be assessed monthly with standard billing to the facility for water consumption. Rates in the following equations will escalate at 2% annually or at the annual rate of inflation expressed as a percentage tied to the U.S. Bureau of Labor Statistics (Seattle Region) Consumer Price Index (CPI) whichever is greater.

$$\text{Flow Charge (\$)} = (\text{Daily Flow in gallons} - 20,000 \text{ gpd}) \times (0.50 \text{ \$/gallon})$$

$$\text{BOD Charge (\$)} = (\text{Avg. BOD in mg/L} - 519 \text{ mg/L}) \times (10 \text{ \$/lb}) \times (\text{Total Volume since last sample in gallons}) \times (3.785 \text{ liter/gallon}) \times (1/453,592 \text{ lb/mg})$$

$$\text{Ammonia Charge (\$)} = (\text{Avg. Ammonia in mg/L} - 30 \text{ mg/L}) \times (10 \text{ \$/lb}) \times (\text{Total Volume since last sample in gallons}) \times (3.785 \text{ liter/gallon}) \times (1/453,592 \text{ lb/mg})$$

$$\text{TSS Charge (\$)} = (\text{Avg. TSS in mg/L} - 250 \text{ mg/L}) \times (10 \text{ \$/lb}) \times (\text{Total Volume since last sample in gallons}) \times (3.785 \text{ liter/gallon}) \times (1/453,592 \text{ lb/mg})$$

$$\text{FOG Charge (\$)} = (\text{Avg. FOG in mg/L} - 100 \text{ mg/L}) \times (10 \text{ \$/lb}) \times (\text{Total Volume since last sample in gallons}) \times (3.785 \text{ liter/gallon}) \times (1/453,592 \text{ lb/mg})$$

$$\text{pH Charge (\$)} = \$500 \text{ for each day of exceedance}$$

K. Maximum Discharge Limits. City has the right to halt discharges from the Facility and immediately revoke permission to discharge to the public sewer system for the following reasons:

- i. Effluent discharged from the facility exceeds 1.25 times the value in Table 2 for any single parameter;
- ii. Effluent discharged from the facility exceeds the value in Table 2 for any single parameter twice in any 3 month period.
- iii. Heavy rainfall events that cause surcharging of the City's Wastewater System downstream of the Development;
- iv. Forecasted rainfall events that exceed 2.7" in 24-hours.; or
- iv. Forecasted rainfall events that exceed 3.8" in 48-hours

L. Industrial Pretreatment Program. The City may be required to have an industrial pretreatment program in place at some point in the future. Developer hereby agrees to be part of such program and pay Developer's equitable fees, as determined by the City, necessary to develop and operate such program. The requirement of an industrial pretreatment program will necessitate amending this Agreement, and accordingly Developer agrees to negotiate any such amendment in good faith with the

City and the Port, and acknowledges that any such requirement will most likely require substantial changes to this Agreement.

2. Port Obligations.

A. Pressure System. The Port shall undertake to install a combined pressure sanitary system (“Pressure System”) in accordance with the timelines provided in Section 2.C below and subject to approval by the City, for existing Port tenants and all future tenants on Airport property.

B. Pressure System Project Manager. The Port has hired AM Engineering (“Project Manager”) to design, bid, and oversee the construction of the system. The Port shall consult with the City before replacing its Project Manager.

C. Timelines. The Port hereby obligates itself to solicit bids for the Pressure System project construction work, receive bids by no later than January 15, 2021, and award the contract no later than February 1, 2021. The Project Engineer’s estimate of the time required for completion of the Pressure System project is 45 days and includes the following tentative timeline:

Tentative Schedule:

October 6	Port Commission approves Agreement
October 7	Warrenton Commission approves Agreement
October 8	Port executes contract with AM Engineering
November 6	Pressure System design is complete and ready for review
December 15	Out to bid
January 15	Port Receives bids
February 1	Port awards Pressure System contract
March 1	Construction commences on Pressure System
April 15	Complete construction of Pressure System
May 14	Pressure System Contract closeout

Work shall commence on the Pressure System no later than March 1, 2021 and is estimated to complete by April 15, 2021.

3. City Obligations.

A. Non-Statutory Agreement. The City hereby confirms that it can approve and execute this Agreement pursuant to its home rule charter and not pursuant to ORS 94.504-94.528, and does further confirm that this Agreement does not constitute or concern the adoption, amendment, or application of the Statewide Planning Goals, the City comprehensive plan, or a City land use regulation.

B. Authority. The Parties agree that each Party has the authority to adopt this Agreement outside of ORS Chapter 94 and the adoption of this Agreement is not, nor does it establish, a Local Improvement District.

C. Authorizations. In consideration of the Port's performance under the terms of this Agreement, and in consideration of Developer's performance under the terms of this Agreement, if all other aspects of Developer's plans and Application satisfy City building and land use requirements, and all other applicable requirements, and all other necessary authorizations and permits are secured by Developer, the City will issue Developer a conditional building permit entitling Developer to construct the Facility in accordance with the approved plans and any terms and conditions imposed as part of the authorizations and permits issued to Developer. If the Facility construction passes all inspections, the Port's Pressure System is constructed consistent with the terms of this Agreement, and the Developer is in compliance with all applicable terms of this Agreement, the City will authorize Developer to occupy and use the premises consistent with the authorizations and permits secured by Developer.

4. Compliance with all Local and State Laws.

In carrying out this Agreement, the Developer shall follow and comply with all applicable local and state laws, including any requirement that state law may place on the Developer to pay prevailing wages for construction of the improvements required by this Agreement, if applicable.

5. Assignability of Agreement.

This Agreement shall not be assigned by the Developer, in whole or in part, absent the written approval of the City in its sole and absolute discretion. The terms and conditions contained in this Agreement shall, subject to the provisions of this section, apply to and bind the heirs, successors, personal representatives, and assigns of the Parties hereto.

6. Remedies.

A. Each Party shall have all available remedies at law or in equity to recover damages and compel the performance of the other Party pursuant to this Agreement. The rights and remedies afforded under this Agreement are not exclusive and shall be in addition to and cumulative with any and all rights otherwise available at law or in equity. The exercise by either Party of any one or more of such remedies shall not preclude the exercise by it, at the same or different time, of any other such remedy for the same default or breach or of any of its remedies for any other default or breach by the other Party, including, without limitation, the right to compel specific performance.

B. Developer hereby releases the City, its officers, employees, agents and contractors from any and all liability for the extent of public improvements required under the terms of this Agreement.

7. Miscellaneous Provisions.

A. Notice. Any notice or communication required to be delivered to one Party under this Agreement by the other Party shall be in writing and shall be dispatched by registered or certified mail, postage prepaid, return receipt requested, or delivered by either personal delivery or nationally-recognized overnight courier (such as UPS or FedEx) or by facsimile transmission, and:

- a. In the case of a notice or communication to the Developer, addressed as follows:

[INSERT ADDRESS]

With copies to: [INSERT ADDRESS]

- b. In the case of a notice or communication to City, addressed as follows:

Collin Stelzig, Public Works Director
City of Warrenton
P.O. Box 250
Warrenton, OR 97146

With a copy to: Linda Engbretson, City Manager
City of Warrenton
P.O. Box 250
Warrenton, OR 97146

And a copy to: Spencer Parsons, City Attorney
Beery, Elsner & Hammond, LLP
1750 S. Harbor Way, Suite 380
Portland, Oregon 97201

- c. In the case of a notice or communication to the Port, addressed as follows:

[INSERT ADDRESS]

With copies to: [INSERT ADDRESS]

or addressed in such other way in respect to a Party as that Party may, from time to time designate in writing dispatched as provided in this section. Otherwise, this Agreement permits the Parties to deliver informal or “day-to-day” communications via all normal and customary means, including electronic and telephonic communications.

B. Headings. Any titles of the sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

C. Counterparts. In the event this Agreement is executed in two (2) or more counterparts, each counterpart shall be deemed to be an original, and such counterparts shall constitute one and the same instrument.

D. Waivers. No waiver made by either Party with respect to the performance, or manner or time thereof, of any obligation of the other Party or any condition inuring to its benefit under this Agreement shall be considered a waiver of any other rights of the Party making the waiver. No waiver by the City or Developers of any provision of this Agreement or any breach thereof shall be of any force or effect unless in writing; and no such waiver shall be construed to be a continuing waiver.

E. Time of the Essence. Time is of the essence under this Agreement.

F. Choice of Law. This Agreement shall be interpreted under the laws of the State of Oregon.

G. Calculation of Time. All periods of time referred to herein shall include Saturdays, Sundays, and legal holidays in the State of Oregon, except that if the last day of any period falls on any Saturday, Sunday, or legal holiday in the State of Oregon, the period shall be extended to include the next day which is not a Saturday, Sunday, or such a holiday.

H. Construction. In construing this Agreement, singular pronouns shall be taken to mean and include the plural.

I. Severability. If any clause, sentence or any other portion of the terms and conditions of this Agreement becomes illegal, null or void for any reason, the remaining portions will remain in full force and effect to the fullest extent permitted by law.

J. Place of Enforcement. Any action or suit to enforce or construe any provision of this Agreement by any Party shall be brought in the Circuit Court of the State of Oregon for Clatsop County, or the United States District Court for the District of Oregon.

K. Good Faith and Reasonableness. The Parties intend that the obligations of good faith and fair dealing apply to this Agreement generally and that no negative inferences be drawn by the absence of an explicit obligation to be reasonable in any portion of this Agreement. The obligation to be reasonable shall only be negated if arbitrariness is clearly and explicitly permitted as to the specific item in question, such as in the case of a Party being given "sole discretion" or being allowed to make a decision in its "sole judgment."

L. Condition of City Obligations. Any City obligations pursuant to this Agreement which require the expenditure of funds are contingent upon future appropriations by the City as part of the local budget process. Nothing in this Agreement implies an obligation on the City to appropriate any such monies.

M. Cooperation in the Event of Legal Challenge. In the event of any legal action instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement, the Parties agree to cooperate in defending such action.

N. Enforced Delay, Extension of Times of Performance. In addition to the specific provisions of this Agreement, performance by any Party shall not be in default where delay or default is due to war; insurrection, strikes, riots, floods, drought, earthquakes, fires, casualties, acts of God, governmental restrictions imposed or mandated by governmental entities other than the City, enactment of conflicting state or federal laws or regulations, new or supplementary environmental regulation, litigation or similar bases for excused performance which is not within reasonable control of the Party to be excused.

O. Other Necessary Acts. Each Party shall execute and deliver to the other all such further instruments and documents and take such additional acts (which, in the case of the City, shall require adopting necessary ordinances and resolutions) as may be reasonably necessary to carry out this Agreement in order to provide and secure to the other Parties the full and complete enjoyment of rights and privileges hereunder.

P. Entire Agreement. This Agreement constitutes the entire agreement between the Parties as to the subject matter covered by this Agreement.

Q. Interpretation of Agreement. This Agreement is the result of arm's length negotiations between the Parties and shall not be construed against any Party by reason of its preparation of this Agreement.

R. Capacity to Execute; Mutual Representations. The Parties each warrant and represent to the other that this Agreement constitutes a legal, valid, and binding obligation of that Party. Without limiting the generality of the foregoing, each Party represents that its governing authority has authorized the execution, delivery, and performance of this Agreement by it. The individuals executing this Agreement warrant that they have full authority to execute this Agreement on behalf of the entity for whom they purport to be acting. Each Party represents to the other that neither the execution and delivery of this Agreement, nor performance of the obligations under this Agreement will conflict with, result in a breach of, or constitute a default under, any other agreement to which it is a party or by which it is bound.

S. Amendment or Modification. No amendment, change, or modification of this Agreement shall be valid unless in writing and signed by all Parties.

T. Relationship. Nothing herein shall be construed to create an agency relationship or a partnership or joint venture between the Parties.

U. Effective Date. This Agreement shall take effect upon execution and approval by all Parties.

V. Term of Agreement. This Agreement shall be effective until it is fully implemented. This term shall be tolled in the event of an appeal of any land use decision or Limited Land Use decision for the Facility until a final appellate judgment is entered.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the day and year first above written.

THE SCOULAR COMPANY,
a Nebraska corporation

By: _____

Printed Name: _____

Title: _____

CITY OF WARRENTON, OREGON

By: _____

Printed Name: _____

Title: _____

PORT OF ASTORIA, OREGON

By: _____

Printed Name: _____

Title: _____

**DEVELOPMENT AGREEMENT
EXHIBITS**

- Exhibit 1** Response from Scoular to a June 12, 2020 Request for Information
- Exhibit 2** Scoular Environmental Survey
- Exhibit 3** Process Flow Diagram