

ORDINANCE NO. 15-02

AN ORDINANCE AUTHORIZING THE EXECUTION OF A FIRST AMENDMENT TO THE BUSINESS DEVELOPMENT AGREEMENT BETWEEN THE VILLAGE OF MANTENO, BAUMGARTNER'S INC., AND CURWICK CONSTRUCTION COMPANY RELATED TO OCCUPATIONAL TAXES GENERATED FROM THE PIZZA STONE TO BE LOCATED AT 183 NORTH MAIN STREET, MANTENO, ILLINOIS

WHEREAS, on or about May 16, 2011, the Village of Manteno (the *Village*), Baumgartner's Inc. (*Baumgartner*), and Curwick Construction Company (*Curwick*) entered into a certain Business Development Agreement (the *Agreement*) related to occupational taxes generated from the operation of the operation of a restaurant called the Pizza Stone (referred to in the *Agreement* as the *Project*, herein as the *Prior Project*) at the property commonly known as 183 North Main Street, Manteno, IL 60950 (the *Subject Property*);

WHEREAS, Curwick III, L.L.C. (*Curwick III*) is the record owner and developer of the Subject Property, and a successor to Curwick under the Agreement;

WHEREAS, Baumgartner ceased operations of the Pizza Stone at the Subject Property and assigned its rights, title and interest in and to the Agreement to Curwick, which has not been fully reimbursed for the costs of the Prior Project;

WHEREAS, Durbins of Manteno, L.L.C. (*DOM*), has proposed to locate a restaurant and sports bar commonly known as *Durbins* at the Subject Property for the purposes of selling food and beverages to the public (the *Project*), which necessitates reconfiguration and redevelopment of the Subject Property;

WHEREAS, Curwick III has agreed to hire Curwick to complete the Project, and bear the costs associated therewith, in an effort to incentivize DOM to pursue the Project on the Subject Property and, in exchange, DOM has agreed to assign its rights and interest in the receipt of rebated retailers' occupation taxes (the *Sales Taxes*) generated by its operations on the Subject Property to reimburse Curwick therefor and the benefits it will inherit from the Prior Project;

WHEREAS, the Project will expand business opportunities and provide economic development in the Village that would not otherwise occur in the absence of the parties' participation;

WHEREAS, the Village is authorized under the provisions of 65 ILCS 5/8-11-20 to provide economic incentives, including sharing a portion of the sales taxes generated by the development of new businesses;

WHEREAS, the corporate authorities of the Village find that the building situated on the subject property has remained less than significantly unoccupied or underutilized for a period of at least one year;

WHEREAS, the corporate authorities of the Village find that the Project will create job opportunities in the Village both to contractors who will improve the site and to individuals who may be employed by Durbins;

WHEREAS, the corporate authorities of the Village find that the Project will serve to further the development of adjacent areas, enhance the tax base of the Village, and strengthen its commercial base, by eliminating vacancies, establishing a new business, creating a more diversified commercial base to the downtown area;

WHEREAS, the corporate authorities of the Village find that absent the accord of Curwick, Curwick III, and DOM to amend the Agreement (the *First Amendment*), they would be unwilling to undertake the Project due to financial infeasibility;

WHEREAS, the corporate authorities of the Village find that Curwick, Curwick III, and DOM meet high standards of creditworthiness and financial strength;

WHEREAS, the corporate authorities of the Village find that the First Amendment is in the best interest of the Village; and,

WHEREAS, the Village finds that this agreement will not violate the provisions of 65 ILCS 5/8-11-21.

NOW, THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Manteno, as follows:

Section 1

The recitals set forth above are incorporated herein by reference the same as if they were set forth herein verbatim and they are adopted as the findings of the corporate authorities of the Village of Manteno.

Section 2

The First Amendment to the Business Development Agreement, which shall be in substantially the form attached hereto and made a part of this ordinance by reference as Exhibit "A," is hereby approved.

Section 3

The President and Village Clerk are hereby authorized and directed to execute the First Amendment herein provided for, and to do all things necessary and essential, including the execution of any further agreements, instruments, documents and certificates incidental thereto or necessary to carry out the provisions and effectuate the purpose thereof.

Section 4

All ordinances or parts of ordinances and agreements in conflict herewith are hereby repealed.

Section 5

This ordinance shall be immediately in full force and effect after its passage and approval as provided by law.

PASSED by the President and Board of Trustees of the Village of Manteno, Illinois and deposited in the office of the Village Clerk this 18th day of May, 2015.

DEPOSITED with the Village Clerk
this 18th day of May, 2015.



ALISA BLANCHETTE, Village Clerk

APPROVED by me this 18th
day of May, 2015.



TIMOTHY O. NUGENT, Village President

**FIRST AMENDMENT TO BUSINESS DEVELOPMENT AGREEMENT
BETWEEN THE VILLAGE OF MANTENO, BAUMGARTNER'S INC.,
AND CURWICK CONSTRUCTION COMPANY RELATED TO
OCCUPATIONAL TAXES GENERATED FROM THE PIZZA STONE TO
BE LOCATED AT 183 NORTH MAIN STREET, MANTENO, ILLINOIS**

This First Amendment to Business Development Agreement (the *First Amendment*) is made and entered into this 18th day of May, 2015, by and between the VILLAGE OF MANTENO (the *Village*), Kankakee County, Illinois, an Illinois municipal corporation, CURWICK CONSTRUCTION COMPANY (*Curwick*), an Illinois corporation, CURWICK III, LLC (*Curwick III*), an Illinois limited liability company, and DURBINS OF MANTENO, INC. (*DOM*), an Illinois corporation as follows:

PREAMBLE

WHEREAS, on or about May 16, 2011, the Village, Baumgartner's Inc. (*Baumgartner*), and Curwick entered into a certain Business Development Agreement (the *Agreement*) related to occupational taxes generated from the operation of the operation of a restaurant called the Pizza Stone at the property commonly known as 183 North Main Street, Manteno, IL 60950 (the *Subject Property*);

WHEREAS, Baumgartner located a restaurant called the Pizza Stone at the subject property for the purposes of selling food and beverages to the public (referred to in the Agreement as the *Project*, and for purposes of this First Amendment, the *Prior Project*);

WHEREAS, Curwick III is the record owner and developer of the Subject Property, and a successor to Curwick under the Agreement;

WHEREAS, Baumgartner ceased operation of the Pizza Stone at the Subject Property and assigned its rights, title and interest in and to the Agreement to Curwick, which has not been fully reimbursed for the costs of the Prior Project;

WHEREAS, DOM has proposed to locate a restaurant and sports bar called "Durbins" at the subject property for the purposes of selling food and beverages to the public (hereinafter, the *Project*), which necessitates reconfiguration and redevelopment of the Subject Property to suit the Project;

WHEREAS, Curwick III has agreed to hire Curwick to complete the Project, and bear the costs associated therewith, in an effort to incentivize DOM to pursue the Project on the Subject Property and, in exchange, DOM has agreed to assign its rights and interest in the receipt of rebated retailers' occupation taxes ("sales taxes") generated by DOM's operations on the subject property to reimburse Curwick therefor;

WHEREAS, the Project will expand business opportunities and provide economic development in the Village that would not otherwise occur in the absence of the parties' participation;

WHEREAS, the Village is authorized under the provisions of 65 ILCS 5/8-11-20 to provide economic incentives, including sharing a portion of the sales taxes generated by the development of new businesses;

WHEREAS, the Village President and Board of Trustees have determined that it is essential to the economic and social welfare of the Village that economic vitality be promoted by assuring opportunities for development and sound and stable commercial growth within the Village;

WHEREAS, the Village President and Board of Trustees has determined that the subject property has remained significantly underutilized for at least one year prior to the date of this Agreement, that the Project is expected to create or retain job opportunities within the Village, that the Project will serve to further the development of adjacent areas, that the Project would not be possible without this Agreement, DOM, Curwick and Curwick III meet high standards of creditworthiness and financial strength, that the Project will strengthen the commercial sector of the Village, that the Project will enhance the tax base of the Village, and that this First Amendment is in the best interest of the Village;

WHEREAS, the Village finds that this agreement will not violate the provisions of 65 ILCS 5/8-11-21;

WHEREAS, the Village finds the powers exercised hereunder to be in furtherance of a public use and essential to the public interest; and

WHEREAS, in order to make it economically feasible for DOM and Curwick to undertake the Project, the Village has agreed to reimburse them for a portion of the development costs relative to the Project through the use of a rebate of a portion of the Sales Tax generated by the Project.

WITNESSETH

NOW, THEREFORE, in consideration of the foregoing and the covenants hereinafter set forth, it is mutually agreed as follows:

1. Recitals: That the recitals set forth in the Preamble are incorporated herein by reference, as if fully set forth.

2. Legislative Authority: The Village represents that the approval and execution of this First Amendment is within its scope of authority under the provisions of 65 ILCS 5/8-11-20 and that it is duly authorized and empowered to enter into and carry out the terms of this Agreement.

3. In General: The Village agrees to rebate to Curwick a part of the sales tax revenue generated by the Project in consideration for making such improvements to the subject property and providing financial accommodations to incentivize DOM to locate "Durbins" at the Subject Property and within its corporate limits. Curwick agrees to assign to Curwick III any

and all sales tax revenue rebated to it by the Village under this agreement in consideration for Curwick III's development of the subject property in a manner that will allow the Project to proceed.

4. Commencement of Business: Curwick and Curwick III agree to promptly commence the development of the subject property and undertake the Project so that it will be substantially completed by mid-June of 2015.

5. Assignment: DOM assigns and transfers to Curwick any portion of the sales tax generated by the Project which is subject to rebate under this First Amendment. Curwick assigns and transfers to Curwick III any portion of the sales tax generated by the Project which is subject to rebate under this First Amendment. The Village is authorized and directed to pay, on behalf of DOM and Curwick, to Curwick III in accordance with this agreement, without further notice or approval by DOM or Curwick, that portion of the sales tax generated by the Project which is subject to rebate under this agreement.

6. Sales Tax Rebate Provision: In consideration of DOM, Curwick and Curwick III's decision to undertake the Project in the Village, the Village agrees to annually rebate to Curwick III, as a second-tier assignee, in accordance with paragraph 5, certain monies as follows:

A. *Annual Periods:* Commencing July 1, 2015 and thereafter ending June 30, 2025, the Village shall rebate to Curwick III 50% of all Sales Tax generated by DOM on the Subject Property. "Sales Tax" means the Village's portion of the Retailer's Occupation Tax and the Retailer's Service Occupation Tax that is collected by DOM as a result of business transactions occurring at the subject property and which is received by the Village through the Illinois Department of Revenue.

If the Village no longer receives Sales Tax from DOM due to a law change by the State of Illinois, then the Village shall make payments to Curwick III from any alternate sources of revenue provided to the Village by the State of Illinois specifically as a replacement or substitute for Sales Tax presently received by the Village (the "Alternate Source Revenue") and, in that event, the payment to Curwick III shall be calculated as if the Village were continuing to receive the Sales Tax at a rate equal to the sales tax rate applicable to the Village's share of the State of Illinois sales tax immediately prior to the elimination of DOM's gross sales that would have been subject to State of Illinois Sales Tax. The Alternate Source Revenues shall be subject to a proportionate reduction in the event that the Alternate Source Revenues do not constitute, or are not intended to constitute, a 100%, dollar for dollar, replacement of the Sales Tax previously received by the Village. Notwithstanding the foregoing, the payment to Curwick III from Alternate Source Revenues is contingent upon the ability of the Village to obtain, and confirm as accurate, gross sales by DOM that would have been subject to State of Illinois Sales Tax in the same form that such information would have been furnished to the Illinois Department of Revenue. In the event that said gross sales

figures cannot be obtained or confirmed as accurate by the Village, the Village shall have no obligation to tender any payments hereunder to Curwick III.

B. *Duration:* The obligation of the Village to rebate a portion of the Sales Tax to Curwick III generated by DOM in the operation of Durbins shall continue for the following consecutive Annual Periods:

July 1, 2015 –December 31, 2015
January 1, 2016 – December 31, 2016
January 1, 2017 – December 31, 2017
January 1, 2018 – December 31, 2018
January 1, 2019 – December 31, 2019
January 1, 2020 – December 31, 2020
January 1, 2021 – December 31, 2021
January 1, 2022 – December 31, 2022
January 1, 2023 – December 31, 2023
January 1, 2024 – December 31, 2024
January 1, 2025– June 30, 2025

7. **Sale Tax Reports:** Within 45 days after each Annual Period, Curwick III shall cause DOM to provide the Village with a statement from the Illinois Department of Revenue as to the dollar amount of Sales Tax paid to the State of Illinois for the benefit of the Village during the prior Annual Period. Additionally, Curwick III shall cause DOM to maintain and have available for inspection by the Village copies of any and all sales tax returns, sales tax reports, amendments, proof of payment or any other Sales Tax information filed with the State of Illinois or other appropriate governmental entity, which documents are being held available for the Village for purposes of identifying Sales Tax collected pursuant to this Agreement. To the extent permitted by law, the Village shall endeavor to maintain the confidentiality of the information contained in such reports, but shall be permitted to disclose such information and documents to employees and consultants as the Village, in its sole discretion, deems appropriate in order to monitor compliance and audit this Agreement. DOM, Curwick and Curwick III understand and agree that the provisions of this First Amendment and any all payments made pursuant to this First Amendment shall be a matter of public record. Curwick III shall cause DOM to agree to furnish such consents or waivers as may be required by the Illinois Department of Revenue to allow the Village to obtain sales tax information directly from the Illinois Department of Revenue.

8. **Reimbursement Mechanism:** Not later than 30 days after the receipt of the signed statement from DOM for the applicable Annual Period has been verified by information supplied by the Illinois Department of Revenue, the Village shall remit in full to Curwick III, the applicable share of the Sales Tax for that particular Annual Period. The Village shall be under no obligation to remit any monies whatsoever until all Sales Tax are received from the Illinois Department of Revenue for the applicable Annual Period, but the Village reserves the right to make such earlier and additional payments in such amounts and at such times as the Village, in its sole discretion, deems appropriate. Any payments determined to be due to Curwick III from the Village based upon DOM's statement or its sales tax returns shall be reduced by the amount

of any and all collection fees imposed upon the Village by the State of Illinois or the Illinois Department of Revenue for collection of the Sales Tax, if any.

9. Limitations of Liability: No recourse under or upon any obligation, covenant or agreement of this First Amendment or for any claim based thereon or otherwise in respect thereof shall be had against the Village, its officers, agents and employees, in excess of any specific sum agreed by the Village to be paid to DOM (and Curwick and Curwick III through assignment) 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 DOM, Curwick and Curwick III against the Village, its officers, agents and employees are hereby expressly waived and released as a condition of and as consideration for the execution of this First Amendment by the Village. No recourse under or upon any obligation, covenant or agreement of this First Amendment or for any claim based thereon or otherwise in respect thereof shall be had against DOM, Curwick or Curwick III, their respective directors, officers, members, managers, agents and employees, in excess of their obligations to the Village hereunder, subject to the terms and conditions herein, and no liability or claim at law or in equity shall attach to or shall be incurred by DOM, Curwick or Curwick III, their respective directors, officers, members, managers agents and employees, in excess of their obligations hereunder.

10. Disputes: Curwick and Curwick III acknowledge that in the event DOM ceases operations at the subject property, or in the event the Village is unable to secure DOM's portion of the sales tax revenue or any accurate accounting of such revenue, any obligation of the Village to DOM, Curwick or Curwick III shall cease without recourse to the Village. The Village shall not be obligated to file suit to enforce the provisions of this First Amendment or seek to compel the production of records even if such failure results in Curwick or Curwick III's non-receipt of DOM's share of tax monies as contemplated by this Agreement.

11. Mutual Assistance: DOM, Curwick and Curwick III agree to do all things necessary or appropriate to carry out the terms and provisions of this First Amendment and to aid and assist each other in carrying out the terms hereof.

12. Provisions Concerning Limitation on Debt: The receipt of Sales Tax as provided earlier in this First Amendment shall be a condition precedent to any obligation of the Village to pay monies to Curwick III, as second tier assignee, and as such, no debt from the Village to Curwick III shall exist unless the Village has first received, during any Annual Period, Sales Tax for that Annual Period.

13. Governing Law, Waiver and Notices: This First Amendment shall be governed by the laws of the State of Illinois, and the sole and exclusive venue for any disputes arising out of this First Amendment shall be the Circuit Court of Kankakee County, Illinois. A waiver of any part of this First Amendment shall be in writing and shall be limited to that specific event and shall not be a waiver of the entire First Amendment. Any notices required in regard to this First Amendment shall be in writing and sent by certified mail, return receipt requested, by courier, or by delivering the same in person or to an officer of such party.

Notice to the Village shall be sent to:
Village of Manteno
Attn: Timothy O. Nugent, Village President
98 East Third Street
Manteno, IL 60950

Notice to DOM shall be sent to:
Durbins of Manteno, Inc.

Notice to Curwick shall be sent to:
Curwick Construction Company
Attn: Jerry Curwick, Jr., President
600 North Main Street
Manteno, IL 60950

Notice to Curwick III shall be sent to:

Curwick III, LLC
Attn: Jerry Curwick, Jr., Manager
600 North Main Street
Manteno, Illinois 60950

or to such other address as a party may designate for itself by notice given from time to time to the other parties in the manner provided herein.

14. Time is of the Essence: Time is of the essence of this First Amendment. The parties shall make every reasonable effort to expedite the subject matters hereof, and they hereby acknowledge that the successful performance of this First Amendment requires their continued cooperation.

15. Breach: Upon a breach of this First Amendment, either of the parties, by any action or proceeding in equity, may secure the specific performance of the covenants and agreements herein contained. Under no condition shall the Village be liable for any damages, fees, or other expenses of DOM, Curwick or Curwick III, even if the Village shall be in default under this First Amendment. The sole and exclusive remedy for violation of this First Amendment shall be specific performance.

16. Other Mutual Covenants: The parties agree to the following other mutual covenants:

A. *Entire Agreement*: This instrument contains the entire agreement between the parties with respect to the transaction contemplated in this First Amendment.

B. *Severability:* If any provision of this First Amendment is held invalid by a court of competent jurisdiction, after exhaustion of all appeals or periods for such or in the event such a court shall determine that the Village does not have the power to perform any such provision, after exhaustion of all appeals or periods for such, such provision shall be deemed to be excised here from, and the invalidity thereof shall not affect any of the other provisions contained herein, and such judgment or decree shall relieve the Village from performance under such invalid provision of this Agreement; provided, however, if the judgment or decree relieves the Village of any of its monetary obligations, then this First Amendment shall terminate.

C. *Amendment:* This First Amendment may be amended, altered or revoked at any time, in whole or in part, by filing with this First Amendment a written instrument setting forth such changes signed by all of the parties to this Agreement.

D. *Binding:* This First Amendment shall be binding on the parties, and their respective successors, assigns, heirs and legal representatives.

E. *Section and Other Headings:* Section or other headings contained in this First Amendment are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

F. *Assignment:* Neither DOM, Curwick nor Curwick III shall assign this Agreement, or any of the proceeds contemplated hereunder, to any person or entity without the prior written consent of the Village. No such assignment shall be effective, even if consented to by the Village, unless and until the Assignee assumes in writing the obligations of its assignor hereunder.

G. *Permits and Approvals:* DOM, Curwick and Curwick III recognize and agree that the Village has sole discretion with regard to all approvals and permits including, but not limited to, approval of the final development plan, demolition and excavation permits, grading permits, building permits and occupancy permits, and failure on the part of the Village to grant any required approval or issue any required permit shall not be deemed as the cause of default under this First Amendment, or give rise to any claim against or liability to the Village pursuant to this First Amendment.

H. *Authorization to Execute:* _____, the president of DOM warrants that he has legal authorization to execute this Agreement. Jerry Curwick, the president of Curwick Construction Company and the manager of Curwick III, LLC, warrants that he has legal authorization to execute this Agreement. The Village President and Village Clerk of the Village hereby warrant that they have been lawfully authorized to execute this Agreement. Curwick, Curwick III and the Village shall deliver, upon request, to each other at the respective time such entities cause their authorized agents to affix their

signatures hereto, copies of all articles of organization, operating agreement, by-laws, resolutions, ordinances or other documents required to legally evidence the authority to so execute this First Amendment on behalf of the respective parties.

I. *Defaults:* Failure on the part of DOM, Curwick, Curwick III or the Village to comply with any term, representation, warranty, provision or condition of this First Amendment after written notice thereof from the other party and failure to cure within 15 business days thereafter shall constitute an event of default. Upon an occurrence of an event of default by DOM, Curwick, Curwick III or the Village, the non-defaulting party shall be relieved of any and all of its obligations arising pursuant to this First Amendment, and such obligations shall be immediately canceled and without any force or effect, and the non-defaulting party may take whatever action in equity to enforce the performance and observance of any obligation, understanding, covenant or agreement as aforesaid.

J. *Extension:* For good cause shown and upon agreement of the Village President and Board of Trustees, this First Amendment may be extended for an additional period of time as determined by the Village President and Board of Trustees.

K. *Existing Retail Locations:* DOM acknowledges and discloses that other affiliates currently operate similar business establishments in the State of Illinois. DOM promises, covenants and warrants that none of the sales tax revenue that is proposed to be generated from the Subject Property would have been paid to any other municipality in the absence of this First Amendment. DOM expressly promises, covenants and warrants that the sales to occur on the Subject Property, and within the Village of Manteno, shall be new and additional sales, and the consequence of an expanded business enterprise, which its other locations are unrelated or will not support.

L. *Duty to Defend, Indemnify and Hold Harmless:* DOM, Curwick and Curwick III shall be obligated to defend, indemnify and hold harmless the Village, its officers and employees, for any cause of action arising from a violation of 65 ILCS 5/8-11-21. The Village may, but shall not be obligated to, defend any court action that may be brought attacking the Village's power or authority to enter into this First Amendment or perform any of its provisions, including any appeals reasonably required. In the event the Village elects not to defend such actions, DOM, Curwick and Curwick III shall defend, indemnify and hold harmless the Village from any and all claims and damages claimed thereby. In the event the First Amendment or any material provision contained therein is deemed by a court to be illegal or in violation of the laws of the State of Illinois, such decision/judgment shall relieve the Village from past/future performance and the First Amendment shall terminate without recourse from the Village to DOM, Curwick or Curwick III.

M. *Competing Sales Tax Sharing Agreements:* DOM, its officers, or its now existing or hereinafter created parent, subsidiary, or affiliate entity(ies)

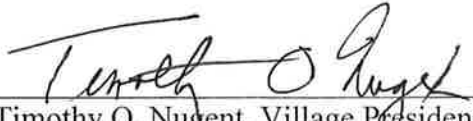
(collectively "DOM Entities"), promise, covenant, warrant they shall not, and they shall otherwise be prohibited to, source any of its Illinois sales to a situs in another unit of local government other than the Village that would otherwise be properly sourced to the Village. DOM Entities promise, covenant, warrant that they shall not, and they shall otherwise be prohibited to, enter into or executing any agreements, or extensions or amendments to existing agreements, which call for, discuss, contemplate, or may result in the sourcing of Illinois sales to any place other than the Village, or which call for, discuss, contemplate a disbursement of or a rebate to it of any portion of sales tax revenue, or measured thereby, distributable to a unit of local government other than the Village, as a result of sales sourced thereto, either directly with a unit of local government or indirectly with or through a broker or other third-party, during the term of this First Amendment. Notwithstanding the above, nothing herein shall preclude DOM Entities from entering into or extending agreements of a similar nature provided no sales that would be sourced to the Village are diverted to the other unit of local government under such agreements or extensions.

N. *Reporting:* DOM shall, no later than ten (10) days after the Village's execution of this Agreement, provide to the Village such information sufficient to permit it to file its report to the Illinois Department of Revenue pursuant 65 ILCS 5/8-11-21 including, but not limited to, whether or not DOM maintains additional places of business in the State of Illinois other than the subject property and the common address of such locations, and the name of any business who is not a party to this First Amendment but who directly or indirectly receives a share, refund, or rebate of the Sales Taxes.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS THEREOF, the parties hereto have executed this First Amendment on this 18th day of May, 2015.

VILLAGE OF MANTENO



Timothy O. Nugent, Village President



Alisa Blanchette, Village Clerk

DURBINS OF MANTENO, INC.

By: 
_____, President

CURWICK CONSTRUCTION CORPORATION

By: 

Jerry Curwick, Jr., President

CURWICK III, LLC

By: 

Jerry Curwick, Jr., Manager