



## MEMORANDUM

Date: June 17, 2014

To: The Redevelopment Authority of the City of Menasha (RDA)  
From: Pamela A. Captain, City Attorney

RE: <sup>PAC</sup> Mark Winter Homes Subordination Request

Mark Winter Homes informs the RDA that with respect to the Land Purchase and Development Agreement the RDA needs to be in a second mortgage position behind Mark Winter Homes' lender. The reason cited was that its lender "would have a bigger financial interest."

It is my opinion that the RDA should require a first mortgage position and not agree to the subordination. Having the RDA first is the least risky and more fair. If there is a default and the RDA needs to recover the RDA will only take the value of the land with the remaining value available to the bank. Additionally, with the way that the transaction is structured, it is likely that the amount owed to the RDA will decrease from \$35,000 possibly down to \$2,900. This will not be the case with the bank.

With the bank in first position if there is a default and the bank seeks recovery it will take the value of the building and the land, especially after adding costs of collection, penalties, additional interest and including attorney fees. It is unlikely that the RDA will recover anything in that case. With the bank in first position, the bank will have the total value of the land available to it in the event of default.

If the RDA does consider subordinating, I am advising that the Land Purchase and Development Agreement be limited to one lot at a time. In other words, I am recommending that the option to purchase up to five lots be eliminated. This will reduce the risk to the RDA. If Mark Winter Homes is successful with the first lot, then another such contract can be entered into for an additional lot and so on and so forth.

If taking on the additional risk, the RDA should also consider reducing the length of time before payment is due from three years to one year after final construction.

Land Purchase and Development Agreement  
By and Between  
The Redevelopment Authority of the City of Menasha  
and  
Mark Winter Homes, Inc.  
Dated as of \_\_\_\_\_, \_\_, 2014

This Land Purchase and Development Agreement (hereinafter AGREEMENT) is made and entered into as of the \_\_\_ day of \_\_\_\_\_ 2014, by and between the Redevelopment Authority of the City of Menasha, Wisconsin, a Wisconsin municipal corporation with its principal offices located at 140 Main St., Menasha, Wisconsin 54952 (hereinafter "RDA"), and Mark Winter Homes, Inc., a Wisconsin corporation with its principal offices located at 2025 N. Casaloma Dr., Appleton, WI 54913 (hereinafter "DEVELOPER").

**RECITALS**

Whereas: Mark Winter Homes, Inc. (DEVELOPER) has requested certain incentives from the Redevelopment Authority of the City of Menasha (RDA) to facilitate the purchase of lots, development of model homes and to market the developed properties within Lake Park Villas Phase II Homeowners Association (LPVHOA); and

Whereas: The RDA has obligations under its development agreement with the City of Menasha to promote the development of the LPVHOA and to market and sell properties contributed from the city to the RDA; and

Whereas: The RDA has determined that the provision of incentives to DEVELOPER is necessary to stimulate the sale of lots and construction of homes in LPVHOA.

**ARTICLE I**

SECTION 1.01      PURPOSE OF AGREEMENT. The purpose of this AGREEMENT is to facilitate the sale, development and marketing of certain properties within The Lake Park Villas Phase II Homeowners Association (hereafter LPVHOA) owned by the Redevelopment Authority of the City of Menasha (hereafter RDA) by Mark Winter Homes, Inc. (hereafter DEVELOPER).

**ARTICLE II**

**DEVELOPER OBLIGATIONS**

SECTION 2.01 DEVELOPER agrees to purchase up to five lots of its choosing within the LPVHOA from the RDA:

SECTION 2.01.1 Purchase Price of each lot shall be \$35,000.00.

SECTION 2.01.2 Purchase of the first lot shall occur on or before [REDACTED] 1, 2014.

SECTION 2.01.3 Purchase of the last lot shall occur on or before [REDACTED] 1, 2019.

SECTION 2.02 DEVELOPER shall execute a Promissory Note in favor of the RDA in the amount of the Purchase Price. The terms of the Promissory Note shall be 0% interest per annum until paid in full, except that interest shall accrue starting on [insert date 3 years from date of purchase] on the unpaid principal balance at a rate of 3% per annum and in the event of default, interest shall accrue on the unpaid balance at a rate of 18% per annum From date of purchase until the default is cured. DEVELOPER shall be required to pay the outstanding balance of each Promissory Note in full for each lot sold or transferred, prior to or at the time of each closing using first proceeds for said payment or 3 years from the date of execution of Promissory Note, whichever comes first. As security for said Promissory Note(s), DEVELOPER shall give RDA a second mortgage position.

SECTION 2.03 DEVELOPER agrees to construct a model home on each lot purchased within the LPVHOA from the RDA:

SECTION 2.03.1 Construction of the first model home shall commence no later than [REDACTED] 15, 2014 and shall be completed, demonstrated by receipt of a certificate of occupancy, no later than [REDACTED] 15, 2014.

SECTION 2.03.2 Construction of homes on lots subsequently purchased shall commence within 60 days of the date of purchase and shall be completed, demonstrated by receipt of a certificate of occupancy, no later than 120 days from the date of purchase.

SECTION 2.03.3 Each home shall be at least 1,700 square feet exclusive of garage and basement floor space.

SECTION 2.03.4 Each home shall be constructed in accordance with the LPVHOA Home Construction Standards.

SECTION 2.04 Taxes. It is understood that the land and improvements resulting from the acquisition and subsequent construction of homes on the lots shall be subject to property taxes. DEVELOPER shall pay when due all federal, state and local taxes in connection with the lots and homes thereon constructed.

SECTION 2.05 Condition Precedent to Closing. DEVELOPER shall have provided to the Administrative Services Director for review, audited financial statements (if available, and if audited financial statements are not available, financial statements in a form reasonably acceptable to the Administrative Services Director) for the two most recent fiscal years prior, plus two years complete tax returns, including all schedules for DEVELOPER and any successors or assigns or transferees of DEVELOPER and each of the members of any of the foregoing and each member of the Board of Directors (or equivalent) of any of the foregoing, unless otherwise acceptable to the Administrative Service Director in her sole discretion. The financial statements must show a financial condition acceptable to the RDA, in the judgment of the Administrative Services Director.

### ARTICLE III

#### RDA OBLIGATIONS

SECTION 3.01 RDA agrees to sell up to five lots to DEVELOPER within the LPVHOA for the purchase price of \$35,000 for each lot.

SECTION 3.02 The lots shall be conveyed "as is." The RDA is not responsible for any subsequent remediation, demolition, underground debris, or other clean up costs after conveyance.

SECTION 3.03 At the closing on each lot to be sold to DEVELOPER, RDA agrees to accept a Promissory Note from DEVELOPER in favor of the RDA in the amount of the Purchase Price. The terms of the Promissory Note shall be 0% interest per annum until paid in full, except that interest shall accrue starting on [insert date 3 years from date of purchase] on the unpaid principal balance at a rate of 3% per annum and in the event of default, interest shall accrue on the unpaid balance at a rate of 18% per annum from date of purchase until the default is cured. DEVELOPER shall be required to pay the outstanding balance of each Promissory Note in full for each lot sold or transferred, prior to or at the time of each closing using first proceeds for said payment or 3 years from the date of execution of Promissory Note, whichever comes first. As security for said Promissory Note(s), DEVELOPER shall give RDA a second mortgage position.

SECTION 3.04 Conditions to Credit. The following provisions apply at the time DEVELOPER is required to pay the RDA under the terms of each Promissory Note, as long as DEVELOPER is not in default of its obligations under this agreement or any terms of the Promissory Note or Loan Agreement:

- SECTION 3.04.1 RDA agrees to credit DEVELOPER an amount equal to the amount of taxes paid and the pro-rata share of taxes owed for the tax year in which the lot is sold on land and improvements, based on the most recent available tax rate, on lots sold to DEVELOPER for a period of up to three years, commencing on the date of purchase. The total amount of such credit shall not exceed \$11,000.
- SECTION 3.04.2 RDA agrees to credit DEVELOPER an amount equal to the amount of interest paid on construction loans on lots sold to DEVELOPER for a period of up to three years, commencing from the date of purchase. Interest shall be calculated from the date of sale and transfer from RDA to DEVELOPER until the sale and transfer of the lot to a third party. The total amount of such credit shall not exceed \$19,000.
- SECTION 3.04.3 RDA agrees to credit DEVELOPER an amount equal to the amount of property insurance paid on lots sold to DEVELOPER for a period of up to three years, commencing from the date of purchase. Insurance shall be calculated from the date of sale and transfer from RDA to DEVELOPER until the sale and transfer of the lot to a third party. The total amount of such credit shall not exceed \$2,100.
- SECTION 3.04.4 Reconciliation of Credit on Promissory Note. DEVELOPER shall provide RDA documentation of costs it incurred or is expected to incur for taxes, interest and insurance from the date of sale and transfer of a lot from the RDA to DEVELOPER to the date of purchase and transfer of the lot from DEVELOPER to a third party.
- SECTION 3.04.5 No Cash Value. There is no cash value on the credit available under this section, it is only available to DEVELOPER and it is only available as a credit against the amount due on the Promissory Note(s).
- SECTION 3.04.6 Expiration of Credit. The credit available to DEVELOPER under this section shall terminate upon the sale and transfer of the fifth lot from DEVELOPER to a third party or on            1, 2019, whichever occurs first.

#### ARTICLE IV

#### REPRESENTATIONS, WARRANTIES AND COVENANTS

DEVELOPER represents and warrants to and covenants with the RDA and the RDA represents and warrants to and covenants with DEVELOPER as respectively follows:

- SECTION 4.01 Each of the parties will use its best efforts to take all action and to do all things necessary, proper, or advisable in order to consummate and make effective the transactions contemplated by this AGREEMENT.
- SECTION 4.02 Each party shall give any notices to, make any filings with, and use its best efforts to obtain any authorizations, consents, and approvals of governments and governmental agencies in connection with the matters referred to in this AGREEMENT.
- SECTION 4.03 DEVELOPER shall not engage in any practice, take any action, or enter into any transaction outside the Ordinary Course of Business and shall at its own cost and expense, maintain and preserve its business in accordance with prudent business practices.
- SECTION 4.05 RDA represents and warrants it is a municipality entity, duly organized and validly existing under the laws of the State of Wisconsin.
- SECTION 4.06 DEVELOPER represents and warrants it is a corporation, duly organized and validly existing under the laws of the state of Wisconsin.
- SECTION 4.07 RDA and DEVELOPER have full power and authority to execute and deliver this AGREEMENT and to perform their obligations hereunder.
- SECTION 4.08 The execution and delivery of this AGREEMENT, the consummation of the transactions contemplated in this AGREEMENT, and the execution and delivery of the documents required to be executed, delivered or acknowledged by DEVELOPER at the closing will not violate any provision of DEVELOPER's articles or bylaws or any applicable statute, rule, regulation, judgment, order or decree of the state of Wisconsin or a court having jurisdiction over DEVELOPER or its properties.
- SECTION 4.09 DEVELOPER represents and warrants it has timely filed all tax returns required by law, all tax returns of DEVELOPER are true and correct in all material respects, DEVELOPER has paid all taxes due, except those, if any, currently being contested by it in good faith.
- SECTION 4.10 DEVELOPER represents and warrants there is no action, suit, proceeding, claim, arbitration against DEVELOPER, its activities or assets before any court or governmental agency except as disclosed in writing to RDA.
- SECTION 4.11 DEVELOPER represents and warrants its balance sheets and statements of income provided for review hereunder are true, correct and complete, and fairly represent the financial condition of DEVELOPER at the date or dates therein indicated and the results of operations for the period or periods therein specified and that there has not been any Material Adverse Change since the Balance Sheet Date.

SECTION 4.12 The Representations and Warranties set forth herein shall be true and correct in all material respects at and as of each Closing Date.

SECTION 4.13 DEVELOPER shall have a continuing obligation to immediately report any material adverse changes in its financial condition to the RDA from the Date of Closing through completion of construction.

## ARTICLE V

### MISCELLANEOUS PROVISIONS

SECTION 5.01 Assignment. The rights, duties and obligations of the any of the parties hereunder may not be assigned without the written consent of both parties to the assignment.

SECTION 5.02 Survival of AGREEMENT. The terms of this AGREEMENT shall survive closing on the lots. Any provision of this AGREEMENT which has not been fully performed prior to transfer of possession shall not be deemed to have been terminate, but shall survive unless expressly waived in writing, and shall be in full force and effect until performed.

SECTION 5.03 No Subordination. The RDA shall not subordinate any interest it has in this AGREEMENT for any reasons, unless it is determined to be in the best interests of the RDA.

SECTION 5.04 Severability. If any provisions of this AGREEMENT shall be held or deemed to be or shall, in fact, be inoperative or unenforceable as applied in any particular case in any jurisdiction or jurisdictions or in all jurisdictions, or in all cases because it conflicts with any other provision or provisions hereof or any constitution or statute or rule of public policy, or for any other reason, such circumstances shall not have the effect of rendering the provision in question inoperative or unenforceable in any other case or circumstance, or of rendering any other provision or provisions herein contained invalid, inoperative or unenforceable to any extent whatever.

SECTION 5.05 RECORDING OF AGREEMENT. The parties hereto agree that the RDA may record this AGREEMENT or a memorandum of this AGREEMENT on the record title to the Real Estate. The DEVELOPER shall upon request of the RDA execute and deliver any such memorandum or other document in connection with such recording.

SECTION 5.06 NO PARTNERSHIP. This AGREEMENT specifically does not create any partnership or joint venture between the parties, or render any party liable for any debts or obligations of the other party.

SECTION 5.07 CONSTRUCTION. The parties have participated jointly in the negotiation and drafting of this AGREEMENT. In the event an ambiguity or question of intent or interpretation arises, this AGREEMENT shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this AGREEMENT.

SECTION 5.08 SURVIVAL OF WARRANTIES, REPRESENTATIONS AND AGREEMENTS. Any warranty, representation or AGREEMENT herein contained shall survive the Closing. Any provision of this AGREEMENT which has not been fully performed prior to transfer of possession shall not be deemed to have been terminate, but shall survive unless expressly waived in writing, and shall be in full force and effect until performed.

## ARTICLE VI

### CERTIFICATE OF COMPLETION

Upon completion of the improvements by DEVELOPER and review of the improvements by RDA, the RDA will provide DEVELOPER with an appropriate instrument certifying that the improvements have been made in accordance with this AGREEMENT.

Termination. This agreement shall terminate upon the sale and transfer of fifth lot from DEVELOPER to a third party or on        1, 2019, whichever comes first.

IN WITNESS WHEREOF, the parties have duly executed this AGREEMENT, or caused it to be duly executed, as of the \_\_ day of \_\_, 2014.

THE REDEVELOPMENT AUTHORITY OF THE  
CITY OF MENASHA

By:

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Phillip K. Vanderhyden  
Chairman

MARK WINTER HOMES, INC.

By:

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Mark J. Winter, Owner