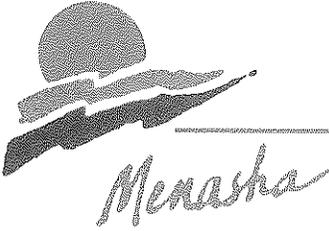


It is expected that a Quorum of the Personnel Committee, Board of Public Works, and Administration Committee will be attending this meeting: (although it is not expected that any official action of any of those bodies will be taken)

**CITY OF MENASHA  
Special Common Council  
Third Floor Council Chambers  
140 Main Street, Menasha  
March 24, 2011  
5:00 PM  
AGENDA**

- A. CALL TO ORDER
- B. PLEDGE OF ALLEGIANCE
- C. ROLL CALL/EXCUSED ABSENCES
- D. PUBLIC COMMENTS ON ANY MATTER LISTED ON THE AGENDA  
(five (5) minutes time limit for each person)
- E. ACTION ITEMS
  1. [Financial Advisory Agreement with Wisconsin Public Finance Professionals, LLC.](#)
  2. [R-11-11 Resolution Amending Resolutions No. R-20-06, R-8-07 and R-9-09 to Remove Pledge of Electric Utility Revenues from Safe Drinking Water Loan Bonds.](#)
  3. [R-12-11 Resolution Authorizing the Transfer of Funds, the establishment of an Escrow Account with Respect to and the Defeasance of the Combined Utility Revenue Refunding Bonds, Series 2005, Dated December 28, 2005.](#)
  4. [R-13-11 Resolution Approving Application to Board of Commissioners of Public Lands to Borrow \\$3,500,000 from the State Trust Funds, Authorizing the Borrowing and the Issuance of Certificates of Indebtedness and Levying a Tax in Connection Therewith.](#)
  5. Motion to Adjourn into Closed Session pursuant to sec. 19.85(1)(e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session (Development Agreement with The Ponds of Menasha LLC and Cypress Homes and Realty, Inc.)
  6. Motion to go back into Open Session immediately following the Closed Session to take action on matters discussed in Closed Session.
  7. [Motion to Remove from the Table the Development Agreement between City of Menasha and The Ponds of Menasha LLC](#)
  8. [Motion to Remove from the Table the Development Agreement between City of Menasha and Cypress Homes and Realty, Inc.](#)
- F. ADJOURNMENT

"Menasha is committed to its diverse population. Our Non-English speaking population and those with disabilities are invited to contact the Menasha City Clerk at 967-3603 24-hours in advance of the meeting for the City to arrange special accommodations."



MEMORANDUM

TO: Mayor Merkes, Council President Hendricks and the members of the City of Menasha Common Council

FROM: City Comptroller/Treasurer Stoffel *Ts*

DATE: 03/23/2011

SUBJECT: Financial Advisory Agreement

Enclosed in your packet is an agreement from Wisconsin Public Finance Professionals, LLC, Carol Wirth, President, for services to be performed by the company to effectuate the activities needed to obtain a loan from the Wisconsin Board of Commissioners of Public Lands and to complete the defeasance of the Electric and Water Utility Revenue bonds. This agreement needs Council approval so Wisconsin Public Finance Professionals, LLC has standing as a representative of the City in the proceedings which will be taking place. Cost of these services is \$16,500. There will be additional charges from other participants:

Escrow Agent Administration Fee	\$3,200
Auditor Verification Fee	4,000
Bond Counsel for the City	35,000

These charges are necessary to complete the defeasance and provide security that the City's actions are correct and legal. I would recommend that the Common Council approve the agreement.



WISCONSIN PUBLIC FINANCE PROFESSIONALS, LLC  
1020 NORTH BROADWAY, SUITE G-9  
MILWAUKEE, WI 53202  
414-434-9644  
FAX: 414-226-2014

## **Financial Advisory Agreement**

**City of Menasha  
Calumet and Winnebago Counties, Wisconsin  
Dated: March 22, 2011**

### **2005 Combined Utility Revenue Bonds Defeasance State Trust Fund Loan Application - 2011**

Wisconsin Public Finance Professionals, LLC ("WFPF") will perform financial advisory services for the City of Menasha, Wisconsin, ("City"), whereby the City will deposit moneys in an escrow, from the State Trust Fund Loan ("Loan"), to purchase State and Local Government Services to defease the City's 2005 Combined Utility Revenue Bonds (the "defeasance"). In connection with such defeasance, and Loan application, and the performance of the financial advisory services listed below, the City hereby retains WFPF as its Financial Advisor in accordance with the terms of this Financial Advisory Agreement.

1. Review bonding documents to verify purposes, arbitrage yields, bond structuring (water vs electric), interest rates and redemption provisions.
2. Perform escrow account computations to determine amount of U.S. Treasury State and Local Government Series to be purchased for deposit in an irrevocable escrow account for the defeasance.
3. Coordinate the reservation of the State and Local Government Series with the Escrow Agent.
4. Coordinate information and documentation between transaction team members, City and Utility, to accomplish defeasance including Quarles & Brady, Bond Counsel, Associated Trust Co., Escrow Agent, and Barthe-Wahrman, auditor for independent verification, all of whom will be retained by the City.
5. Review legal documents required to accomplish defeasance including final resolution, escrow agreement and verification report.
6. Conference calls and email communications with Board of Commissioners of Public Lands, City, Utility, and Bond Counsel regarding applying for State Trust Fund Loan for advance refunding; assist City with application and authorization process.
7. Coordinate closing with City, Utility and transaction team members.
8. Participate in conference calls, email communications and meetings as requested by City, Utility and transaction team members.

The City acknowledges that advice and recommendations involve professional judgment on WFPF's part and that the results cannot be, and are not, guaranteed.

The City agrees to provide WFPF with information relating to the City, the Combined Utility, the 2005 Combined Utility Revenue Bonds and other matters considered appropriate to perform our duties under this Agreement. The City acknowledges that we are entitled to rely on the accuracy and completeness of all information provided by the City on your behalf.

The City agrees to pay WFPF's fee for services performed under this Financial Advisory Agreement in the amount of \$16,500 which includes all necessary in-state travel expenses, and general out-of-pocket expenses i.e. supplies and copying. WFPF's fee is due and payable upon the closing of the defeasance. The City shall be responsible for the fees and expenses of the City's Bond Counsel, Escrow Agent, and Independent Auditor for verification.

This Agreement is subject to the condition that Carol Ann Wirth is the responsible party for WFPF in its relationship with the City.

This Agreement may be terminated by either party upon 30-day's written notice. This Agreement may be amended or modified only by a writing signed by both parties. This Agreement is solely for the benefit of the City and WFPF and no other person. WFPF may not assign this Agreement without the City's prior written consent. The laws of the State of Wisconsin shall apply to this Agreement.

WISCONSIN PUBLIC FINANCE  
PROFESSIONALS, LLC

CITY OF MENASHA, CALUMET AND  
WINNEBAGO COUNTIES, WISCONSIN

By: Carol Wirth  
Carol Ann Wirth, President

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

RESOLUTION NO. R-11-11

RESOLUTION AMENDING RESOLUTIONS NO. R-20-06, R-8-07 AND R-9-09  
TO REMOVE PLEDGE OF ELECTRIC UTILITY REVENUES  
FROM SAFE DRINKING WATER LOAN BONDS

Introduced by Mayor Merkes:

WHEREAS, the City of Menasha, Calumet and Winnebago Counties, Wisconsin (the "Municipality") currently owns and operates a combined electric and water utility (the "Combined System") which is operated for a public purpose as a public utility by the Municipality; and

WHEREAS, pursuant to Resolution No. R-48-05 adopted on December 19, 2005, the Municipality heretofore issued its Combined Utility Revenue Refunding Bonds, Series 2005, dated December 28, 2005 (the "2005 Bonds"), which 2005 Bonds are payable from the income and revenues of the Combined System; and

WHEREAS, pursuant to Resolution No. R-20-06 adopted on April 18, 2006 (the "2006 Resolution"), the Municipality has heretofore issued its Combined Utility Revenue Bonds, Series 2006, dated April 26, 2006 (the "2006 Bonds"), which 2006 Bonds are payable from the income and revenues of the Combined System; and

WHEREAS, pursuant to Resolution No. R-8-07 adopted on April 2, 2007 (the "2007 Resolution"), the Municipality has heretofore issued its Combined Utility Revenue Bonds, Series 2007, dated April 11, 2007 (the "2007 Bonds"), which 2007 Bonds are payable from the income and revenues of the Combined System; and

WHEREAS, pursuant to Resolution No. R-9-09 adopted on April 6, 2009 (the "2009 Resolution"), the Municipality has heretofore issued its Combined Utility Revenue Bonds, Series 2009, dated April 22, 2009 (the "2009 Bonds"), which 2009 Bonds are payable from the income and revenues of the Combined System; and

WHEREAS, the Common Council of the Municipality has now determined, by separate resolution, that it is necessary and desirable to sell the electric utility assets to WPPI Energy (said transaction referred to herein as the "Sale Transaction"); and

WHEREAS, the Common Council of the Municipality has also, by separate resolution, determined that it is necessary and desirable to defease and discharge the 2005 Bonds simultaneously with the closing of the Sale Transaction; and

WHEREAS, Common Council of the Municipality has determined that it is necessary and desirable to amend the 2006 Resolution, 2007 Resolution and 2009 Resolution (collectively, the "SDW Resolutions") so that the SDW Resolutions, simultaneously with the closing of the Sale Transaction, no longer pledge any revenues of the electric utility to the 2006 Bonds, 2007

Bonds and 2009 Bonds (collectively, the "SDW Bonds"), and that the SDW Bonds be payable from and secured by the income and revenues of only the water utility; and

WHEREAS, the Municipality represents that the income and revenues of the water utility alone will be sufficient to pay the principal of and interest on the SDW Bonds when due; and

WHEREAS, the SDW Resolutions may be amended, in this respect, with the written consent of the owners of all of the respective SDW Bonds outstanding; and

WHEREAS, the State of Wisconsin Safe Drinking Water Loan Program, as owner of all of the outstanding SDW Bonds, has provided such consent, which is attached hereto.

NOW, THEREFORE, be it resolved by the Governing Body of the Municipality that:

Section 1. Amendment to the SDW Resolutions. Each SDW Resolution is hereby amended to remove the pledge of electric utility revenues so that the SDW Bonds authorized thereby are payable from and secured by the income and revenues of solely the Municipality's water utility. All references to the electric utility are hereby stricken from each SDW Resolution. In particular:

(a) Section 1(j) of each SDW Resolution is stricken in its entirety and is hereby amended to read as follows:

(j) "Gross Earnings" means the gross earnings of the System, including all revenues, income and earnings of the System derived from water charges imposed by the Municipality, all payments to the Municipality under any agreements between the Municipality and any contract users of the System, and any other monies received from any source including all rentals and fees and any special assessments levied and collected in connection with the Project;

(b) Section 1(q) of each SDW Resolution is stricken in its entirety and is hereby amended to read as follows:

(q) "System" means the water utility of the Municipality specifically including that portion of the Project owned by the Municipality and including all property of every nature now or hereafter owned by the Municipality for the collection, treatment, storage and distribution of water, including all improvements and extensions thereto made by the Municipality while any of the Bonds and Parity Bonds remain outstanding, including all real and personal property of every nature comprising part of or used or useful in connection with such water utility and including all appurtenances, contracts, leases, franchises, and other intangibles;

(c) Each reference in each SDW Resolution to "Combined Utility Revenue Fund", "Combined Utility Operation and Maintenance Fund", "Combined Utility Special Redemption Fund", "Combined Utility Depreciation Fund" and "Combined Utility Surplus Fund" is stricken and hereby amended to read "Water Utility Revenue Fund", "Water Utility Operation and Maintenance Fund", "Water Utility Special Redemption Fund", "Water Utility Depreciation Fund" and "Water Utility Surplus Fund", respectively.

(d) The first sentence of Section 9 of each SDW Resolution is hereby stricken in its entirety and amended to read as follows:

"The reasonable cost and value of services rendered to the Municipality by the System by furnishing water services for public purposes shall be charged against the Municipality and shall be paid in quarterly installments as the service accrues, out of the current revenues of the Municipality collected or in the process of collection, exclusive of the revenues derived from the System; that is to say, out of the tax levy of the Municipality made by it to raise money to meet its necessary current expenses."

Except as expressly amended by this Resolution, the SDW Resolutions shall remain in full force and effect.

Section 2. Conflicting Resolutions. All ordinances, resolutions, or orders, or parts thereof heretofore enacted, adopted or entered, in conflict with the provisions of this Resolution, are hereby repealed.

Section 3. Effective Date. This Resolution shall take effect upon the occurrence of all of the following: (1) closing of the transfer of ownership of the electric utility assets to WPPI Energy pursuant to the Sale Transaction and (2) the defeasance and discharge of the 2005 Bonds.

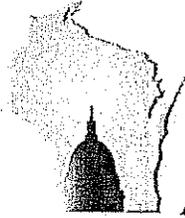
Passed: March 24, 2011

Approved: March 24, 2011

\_\_\_\_\_  
Donald Merkes  
Mayor

Attest:

\_\_\_\_\_  
Deborah A. Galeazzi  
City Clerk



WISCONSIN DEPARTMENT OF  
ADMINISTRATION

SCOTT WALKER  
GOVERNOR

MIKE HUEBSCH  
SECRETARY

DOA – Capital Finance Office, 10<sup>th</sup> flr  
Environmental Improvement Fund  
P. O. Box 7864  
Madison, WI 53707-7864  
Fax 608.266.7645 TTY 608.267.9629  
[www.doa.state.wi.us/debf/scf.htm](http://www.doa.state.wi.us/debf/scf.htm)

**City of Menasha Combined Utility Revenue Bonds, Series 2006, 2007 and 2009**  
**Consent to Remove Pledge of Electric Utility Revenues**

WHEREAS, pursuant to Resolution No. R-20-06 adopted on April 18, 2006 (the "2006 Resolution"), the City of Menasha, Wisconsin (the "Municipality") has heretofore issued its Combined Utility Revenue Bonds, Series 2006, dated April 26, 2006 (the "2006 Bonds") to the State of Wisconsin Safe Drinking Water Loan Program (the "State"); and

WHEREAS, pursuant to Resolution No. R-8-07 adopted on April 2, 2007 (the "2007 Resolution"), the Municipality has heretofore issued its Combined Utility Revenue Bonds, Series 2007, dated April 11, 2007 (the "2007 Bonds") to the State; and

WHEREAS, pursuant to Resolution No. R-9-09 adopted on April 6, 2009 (the "2009 Resolution"), the Municipality has heretofore issued its Combined Utility Revenue Bonds, Series 2009, dated April 22, 2009 (the "2009 Bonds") to the State; and

WHEREAS, the Common Council of the Municipality has determined that it is necessary and desirable to sell the Municipality's electric utility assets to WPPI Energy (said transaction referred to herein as the "Sale Transaction") and to defease and discharge its Combined Utility Revenue Bonds, Series 2005, dated December 28, 2005 in connection therewith; and

WHEREAS, the Common Council of the Municipality has asked the State's consent to amend the 2006 Resolution, 2007 Resolution and 2009 Resolution (collectively, the "SDW Resolutions") so that the SDW Resolutions, which currently pledge revenues of the electric utility and water utility to the 2006 Bonds, 2007 Bonds and 2009 Bonds, would no longer pledge any revenues of the electric utility to the 2006 Bonds, 2007 Bonds and 2009 Bonds (collectively, the "SDW Bonds"), and so that the SDW Bonds would be payable from and secured by the income and revenues of only the water utility; and

WHEREAS, the Municipality represents to the State that the projected income and revenues of the water utility alone will be sufficient to pay the principal of and interest on the SDW Bonds when due.

NOW, THEREFORE, the State, as sole registered owner of all of the SDW Bonds, consents to the amendment of each SDW Resolution as set forth in the attached amending Resolution to provide that electric utility income and revenues will no longer be pledged to or secure the SDW Bonds, and consents to the adoption of the attached amending Resolution by the Common Council of the Municipality. This consent shall apply only in connection with the SDW Bonds and shall be effective only upon the occurrence of the events described in the amending Resolution, and shall not extend to any other bonds or prejudice any rights or remedies whatever that the State may have with respect to any other bonds.

Dated as of March 22, 2011

State of Wisconsin Safe Drinking Water  
Loan Program

By:   
Michael D. Wolff  
Finance Programs Administrator

ACCEPTED by:  
City of Menasha, Wisconsin

By: \_\_\_\_\_  
Donald Merkes  
Mayor

Attest: \_\_\_\_\_  
Deborah A. Galeazzi  
City Clerk

Resolution No. R-12-11

RESOLUTION AUTHORIZING THE TRANSFER OF FUNDS,  
THE ESTABLISHMENT OF AN ESCROW ACCOUNT WITH RESPECT  
TO AND THE DEFEASANCE OF  
THE COMBINED UTILITY REVENUE REFUNDING BONDS, SERIES 2005,  
DATED DECEMBER 28, 2005

Introduced by Mayor Merkes:

WHEREAS, the City of Menasha, Calumet and Winnebago Counties, Wisconsin (the "City") has outstanding its Combined Utility Revenue Refunding Bonds, Series 2005, dated December 28, 2005 (the "2005 Bonds") which are payable from the income and revenues of the City's combined water and electric utility;

WHEREAS, the Common Council of the City has now determined, by separate resolution, that it is necessary and desirable to sell the electric utility assets to WPPI Energy (said transaction referred to herein as the "Sale Transaction"); and

WHEREAS, the Common Council of the City has also, by separate resolution, determined that it is necessary and desirable to defease and discharge the 2005 Bonds simultaneously with the closing of the Sale Transaction; and

WHEREAS, the Common Council of the City deems it desirable and in the best interest of the City to transfer and apply certain debt service funds and reserve funds for the 2005 Bonds and other funds available to it for this purpose (collectively, the "Funds") to the defeasance and early redemption of the outstanding 2005 Bonds; and

WHEREAS, since the 2005 Bonds are not currently callable, it is necessary for the Funds to be irrevocably deposited into an escrow account, invested in direct obligations of the United States of America, treated as a portion of the special redemption fund for the 2005 Bonds and applied to pay the principal of and interest on the 2005 Bonds on their respective maturity or redemption dates.

NOW, THEREFORE, BE IT RESOLVED by the Common Council of the City of Menasha, Wisconsin, that:

1. Establishment of Escrow Account. Subject to and simultaneously with the closing of the Sale Transaction, the Common Council hereby authorizes and directs the officers of the City to enter into an Escrow Agreement in substantially the form attached hereto as Exhibit A with Associated Trust Company, National Association, Green Bay, Wisconsin, as Escrow Agent (the "Escrow Agent") (such form may be modified by said officers prior to its execution, the execution of such Agreement to constitute full approval of the City of any such modifications).

2. Transfer and Deposit to Escrow Account. Subject to and simultaneously with the closing of the Sale Transaction, the Common Council hereby authorizes and approves the transfer and deposit of the Funds into the Escrow Account to be established with the Escrow Agent in an amount sufficient, together with earnings thereon, to provide for the payment of the 2005 Bonds concurrently with the execution of the Escrow Agreement, and the subsequent use, investment and disbursement thereof by the Escrow Agent in the manner provided by the Escrow Agreement.

3. Professional Services. The Common Council hereby ratifies and approves the retention of Wisconsin Public Finance Professionals, LLC ("WPFP") to provide financial advisory services in connection with this transaction; Quarles & Brady LLP ("Bond Counsel") to provide bond counsel services in connection with this transaction; and Barthe & Wahrman PA to provide mathematical verification and related services in connection with this transaction.

4. Redemption of the 2005 Bonds, Notice of Defeasance and Redemption. Subject to the closing of the Sale Transaction and the establishment of the Escrow Account, the 2005 Bonds maturing on May 1, 2018 and thereafter are hereby called for redemption on May 1, 2017. The Common Council hereby directs the Escrow Agent pursuant to the Escrow Agreement to provide a notice of the defeasance of the 2005 Bonds and a notice with respect to the redemption of the callable portion of the 2005 Bonds at the times and in the manner set forth in the final Escrow Agreement.

5. Authorization of Officers and Agents. The Common Council hereby authorizes the appropriate officers and agents of the City to work with WPFP and Bond Counsel to review and approve the finalized Escrow Agreement including the escrow deposit and other details, to provide the notices of defeasance and redemption and any other required notices and to execute and deliver all documents required by Bond Counsel with respect to this transaction.

Passed: March 24, 2011

Approved: March 24, 2011

---

Donald Merkes  
Mayor

ATTEST:

---

Deborah A. Galeazzi  
City Clerk

(SEAL)

EXHIBIT A

CITY OF MENASHA, WISCONSIN

TO

ASSOCIATED TRUST COMPANY, NATIONAL ASSOCIATION  
GREEN BAY, WISCONSIN

AS ESCROW AGENT

---

ESCROW AGREEMENT

DATED AS OF APRIL 6, 2011

COPY

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SECURING THE  
COMBINED UTILITY REVENUE REFUNDING BONDS, SERIES 2005,  
DATED DECEMBER 28, 2005  
OF THE CITY OF MENASHA,  
CALUMET AND WINNEBAGO COUNTIES, WISCONSIN

THIS ESCROW AGREEMENT is made and entered into April 6, 2011 by and between the City of Menasha, Wisconsin (the "City") and Associated Trust Company, National Association, Green Bay, Wisconsin, a national banking association with trust powers (the "Escrow Agent").

### RECITALS

The City has outstanding its Combined Utility Revenue Refunding Bonds, Series 2005, dated December 28, 2005 (the "2005 Bonds" or the "Prior Issue").

There are presently available certain debt service and reserve funds and other funds available to the City (the "Funds") in an amount that is equal to the amount which, when invested as provided herein, will be required to pay the principal of and interest on the 2005 Bonds.

It has been determined by the City that it is necessary, desirable and in the best interest of the City to deposit said Funds in an escrow account to pay the principal of and related interest on the outstanding 2005 Bonds (the "Defeased Obligations"), on their respective maturity or redemption dates (the totality of said transaction is referred to herein as the "Defeasance"). The Defeased Obligations are more fully described on Exhibit A-1 hereto.

To accomplish the Defeasance, the Escrow Agent has been appointed custodian of the City's Funds for the Defeased Obligations until the Defeased Obligations are paid in full.

The execution of this Agreement has been duly authorized by a resolution of the Common Council entitled: "Resolution Authorizing the Transfer of Funds, the Establishment of an Escrow Account With Respect to and the Defeasance of the Combined Utility Revenue Refunding Bonds, Series 2005, Dated December 28, 2005" (the "Resolution") adopted by the Common Council of the City on March 24, 2011.

In consideration of the mutual covenants contained herein, the parties hereto covenant and agree as follows for the equal and proportionate benefit and security of the holders of the Defeased Obligations:

1. Escrow Deposit. Concurrently with the execution of this Agreement, the City has irrevocably deposited with the Escrow Agent, receipt of which is hereby acknowledged by the Escrow Agent, \$ \_\_\_\_\_ from the Funds.

The foregoing, along with earnings and interest thereon, shall be held and disposed of by the Escrow Agent only in accordance with this Agreement. The City represents and warrants that the foregoing, if held, invested and disposed of by the Escrow Agent in accordance with this Agreement, will be sufficient, without the need for any further investment or reinvestment, to make all payments required under this Agreement. The Escrow Agent has not determined and is under no obligation to determine whether the amounts deposited hereunder are or will be sufficient to make all of the payments directed to be made hereunder.

2. Acceptance of Escrow. The Escrow Agent acknowledges receipt of the escrow deposit hereunder and accepts the responsibilities imposed on it by this Agreement.

3. Application of Escrow Deposit. There is hereby created by the City and ordered established with the Escrow Agent an account hereby designated, "City of Menasha Escrow Account" (the "Escrow Account").

The Escrow Agent shall deposit the amount described above in the Escrow Account to be used as follows:

a) \$ \_\_\_\_\_ to be used to purchase the \$ \_\_\_\_\_ principal amount of United States Treasury Certificates of Indebtedness, Notes and/or Bonds - State and Local Government Series ("SLGs"), described on the attached Exhibit B-1, pay for the SLGs from monies in the Escrow Account and hold the SLGs in the Escrow Account;

b) \$ \_\_\_\_\_ to be used to establish a beginning cash balance in the Escrow Account; and

c) \$ \_\_\_\_\_ to be used to pay the Defeasance Expenses set forth on the attached Exhibit C-1, which the Escrow Agent is hereby authorized to pay.

Except as set forth in Section 8 hereof, the Escrow Account (other than the cash held pursuant to subsection (b) above) shall remain invested in the SLGs, and the Escrow Agent shall not sell or otherwise dispose of the SLGs.

The Escrow Agent is hereby directed to pay the Defeasance Expenses set forth on the attached Exhibit C-1 upon receipt of invoices for the authorized amounts listed on Exhibit C-1.

Except as set forth in Section 8 hereof, no reinvestment of amounts on deposit in the Escrow Account shall be permitted.

The Escrow Agent shall apply the monies in the Escrow Account to the payment of the Defeased Obligations in the amounts set forth on the attached Exhibit A-1.

Barthe & Wahrman PA, Bloomington, Minnesota, a firm of independent accountants (the "Accountant"), has delivered to the City, the Escrow Agent, Wisconsin Public Finance Professionals, LLC, the bond insurer for the Prior Issue, if any, and Quarles & Brady LLP, for their purposes, a report stating that the firm has reviewed the arithmetical accuracy of certain computations based on assumptions relating to the sufficiency of forecasted net cash flow from the United States government securities (paragraph (a) above) and any initial cash deposit (paragraph (b) above) to pay the principal of and interest (if any) on the Defeased Obligations when due as described on Exhibit A-1. Based upon the summarized data presented in its report and the assumption that the principal and interest payments on the United States government securities are deposited in the Escrow Account when due, in its opinion, the proceeds from the United States government securities, plus any initial cash deposit will be sufficient for the timely payment of principal and interest, when due, on the Defeased Obligations.

The Escrow Account cash flow prepared by the Accountant defined below is set forth on Exhibit D-1.

If at any time it shall appear to the Escrow Agent that the money in the Escrow Account will not be sufficient to make any required payments due to the holders of the Defeased Obligations, the Escrow Agent shall immediately notify the City. Upon receipt of such notice, the City shall forthwith transmit to the Escrow Agent for deposit in the Escrow Account from legally available funds such additional monies as may be required to make any such payment.

4. Redemption of the Defeased Obligations. Pursuant to the Resolution, the City has heretofore called the Defeased Obligations for redemption and authorized and directed the Escrow Agent to give notice of said intended redemption of the Defeased Obligations by providing appropriate notice (in substantially the form attached hereto as Exhibit E-1) in the manner and at the times set forth on Exhibit E-1, and the Escrow Agent hereby agrees to give such notice.

5. Notice of Defeasance of the Defeased Obligations. The Escrow Agent is hereby directed and agrees to provide to the owners of the Defeased Obligations a Notice of Defeasance, in substantially the form attached hereto as Exhibit F-1, as soon as practicable after the date of this Agreement. The Notice of Defeasance shall also be provided to any fiscal agent for the Defeased Obligations and to the MSRB through the Electronic Municipal Market Access (EMMA) System and to DTC and any other depositories as described in Exhibit F-1.

6. The Escrow Agent.

a) Annual Report. The Escrow Agent shall, in the month of February of each year while this Agreement is in effect, and as soon as practicable after termination of this Agreement, forward by first class mail to the City a report of the receipts, income, investments, reinvestments, redemptions and payments of and from the Escrow Account during the preceding calendar year, including in such report a statement, as of the end of the preceding calendar year, regarding the manner in which it has carried out the requirements of this Agreement. The City shall have the right, at any time during business hours, to examine all of the Escrow Agent's records regarding the status and details of the Escrow Account.

b) Separate Funds; Accountability. Except as otherwise permitted under Section 3 hereof, the Escrow Agent shall keep all monies, securities and other properties deposited hereunder, all investments and all interest thereon and profits therefrom, at all times in a special fund and separate trust account, wholly segregated from all other funds and securities on deposit with it; shall never commingle such deposits, investments and proceeds with other funds or securities of the Escrow Agent; and shall never at any time use, pledge, loan or borrow the same in any way. The funds established hereunder shall be held separately and distinctly and not commingled with any other such funds. Nothing herein contained shall be construed as requiring the Escrow Agent to keep the identical monies, or any part thereof, received from or for the Escrow Account, on hand, but monies of an equal amount shall always be maintained on hand as funds held by the Escrow Agent, belonging to the City, and a special account thereof, evidencing such fact, shall at all times be maintained on the books of the Escrow Agent. All uninvested money held at any time in the Escrow Account shall be continuously secured by the deposit in a Federal Reserve Bank or direct obligations of the United States of America in a principal amount always not less than the total amount of uninvested money in the Escrow Account. It is understood and agreed that the responsibility of the Escrow Agent under this Agreement is limited to the safekeeping and segregation of the monies and securities deposited with it for the Escrow Account, and the collection of and accounting for the principal and interest payable with respect thereto, and the application of such monies in the Escrow Account to the payment of the Defeased Obligations as provided herein.

In the event the Escrow Agent due to any action or inaction required hereunder is unable or fails to account for any property held hereunder, such property shall be and remain the property of the City, and if, for any reason such property cannot be identified, all other assets of the Escrow Agent shall be impressed with a trust for the amount thereof and the City shall be

entitled to the preferred claim upon such assets enjoyed by any trust beneficiary. Property held by the Escrow Agent hereunder shall not be deemed to be a banking deposit of the City to the extent that the Escrow Agent shall have no right or title with respect thereto (including any right of set-off) and the City shall have no right of withdrawal thereof.

c) Liability. The Escrow Agent shall be under no obligation to inquire into or be in any way responsible for the performance or nonperformance by the City or any paying agent of any of its obligations, or to protect any of the City's rights under any bond proceeding or any of the City's other contracts with or franchises or privileges from any state, county, municipality or other governmental agency or with any person. The Escrow Agent shall not be liable for any act done or step taken or omitted by it, as Escrow Agent, or for any mistake of fact or law, or for anything which it may do or refrain from doing in good faith and in the exercise of reasonable care and believed by it to be within the discretion or power conferred upon it by this Agreement, except for its negligence or its default in the performance of any obligation imposed upon it hereunder. The Escrow Agent shall not be responsible in any manner whatsoever for the recitals or statements contained herein, including without limitation those as to the sufficiency of the trust deposit to accomplish the purposes hereof or in the Prior Issue or in any proceedings taken in connection therewith, but they are made solely by the City on the basis of representations made to it by consultants retained by the City, including the Accountant.

d) Resignations; Successor Escrow Agent. The Escrow Agent may at any time resign by giving not less than 60 days written notice to the City. Upon giving such notice of resignation, the resigning Escrow Agent may petition any court of competent jurisdiction for the appointment of a successor escrow agent. Such court may thereupon, after such notice, appoint a successor escrow agent of comparable qualifications to those of the resigning Escrow Agent. The resignation of the Escrow Agent shall take effect only upon the appointment of a successor escrow agent and such successor escrow agent's acceptance of such appointment.

Any successor escrow agent shall be a state or national bank, have full banking and trust powers, and have a combined capital and surplus of at least \$5,000,000.

Any successor escrow agent shall execute, acknowledge and deliver to the City and to its predecessor escrow agent an instrument accepting such appointment hereunder, and thereupon the resignation of the predecessor escrow agent shall become effective and such successor escrow agent, without any further act, deed or conveyance, shall become vested with all the rights, powers, duties and obligations of its predecessor hereunder, with like effect as if originally named as escrow agent herein; but nevertheless, the escrow agent ceasing to act shall execute and deliver an instrument transferring to such successor escrow agent, upon the terms herein expressed, all the rights, power, and duties of the escrow agent so ceasing to act, with a copy to the City. Upon the request of any such successor escrow agent, the City shall execute any and all instruments in writing for more fully and certainly vesting in and confirming to such successor escrow agent all such rights, powers and duties. Any predecessor escrow agent shall pay over to its successor escrow agent a proportional part of the Escrow Agent's fee hereunder and provide an accounting for the cash and securities held in the Escrow Account.

e) Fees. The Escrow Agent acknowledges receipt from the City the sum of \_\_\_\_\_ DOLLARS (\$ \_\_\_\_\_) as and for full compensation for all services to be performed by it as the Escrow Agent under this Agreement. Any out-of-pocket expenses including legal fees and publication costs will be paid by the City as incurred. The Escrow Agent expressly waives any lien upon or claim against the monies and investments in the Escrow Account.

7. Arbitrage. The City has covenanted and agreed and the Escrow Agent hereby covenants and agrees, to the extent any action is within its control and to its knowledge, to and for the benefit of the holders of the Prior Issue, that no investment of the monies on deposit in the Escrow Account will be made in a manner that would cause the Prior Issue to be "arbitrage bonds" within the meaning of Section 148 of the Code or any Regulations promulgated or proposed thereunder.

In order to ensure continuing compliance with Section 148 of the Code and the Regulations, the Escrow Agent agrees that it will not invest the cash balance nor reinvest any cash received in payment of the principal of and interest on the federal securities held in the Escrow Account nor redeem such federal securities except as specifically provided in Section 1 hereof. Said prohibition on reinvestment shall continue unless and until the City requests that such reinvestment be made and shall be restricted to noncallable direct obligations of the United States Treasury. Prior to any such request for reinvestment of the proceeds from the federal securities held in the Escrow Account, the City shall provide to the Escrow Agent: (i) an opinion by an independent public accountant that after such reinvestment the principal amount of the substituted securities, together with the earnings thereon and other available monies, will be sufficient to pay, as the same become due, all principal of, redemption premium where required, and interest on the Defeased Obligations which have not then previously been paid, and (ii) an unqualified opinion of nationally recognized bond counsel to the effect that (a) such reinvestment will not cause any bonds of the Prior Issue to be "arbitrage bonds" within the meaning of Section 148 of the Code and the Regulations in effect thereunder on the date of such reinvestment, and (b) such reinvestment complies with the Constitution and laws of the State of Wisconsin and the provisions of all relevant documents relating to the issuance of the Prior Issue.

8. Substitute Investments. At the written request of the City and upon compliance with the conditions hereinafter stated, the Escrow Agent shall have the power to request the redemption of the SLGs and to substitute direct obligations of, or obligations which are unconditionally guaranteed by, the United States of America, which are not subject to redemption prior to maturity and which are available for purchase with the proceeds derived from the disposition of the SLGs on the date of such transaction. The Escrow Agent shall purchase such substitute obligations with the proceeds derived from the sale, transfer, disposition or redemption of the SLGs. The transactions may be effected only by simultaneous sale and purchase transactions, and only if (i) the amounts and dates on which the anticipated transfers from the Escrow Account to the fiscal agent or depository for the payment of the principal of and interest on the Defeased Obligations will not be diminished or postponed thereby, (ii) the Escrow Agent shall receive, at the expense of the City, an opinion of a nationally recognized firm of attorneys experienced in the area of municipal finance to the effect that such disposition and substitution would not cause any bonds of the Prior Issue to be "arbitrage bonds" within the meaning of Section 148 of the Code and the Regulations thereunder; and (iii) the Escrow Agent shall receive, at the expense of the City, a certification from an independent certified public

accountant that, after such transaction, the principal of and interest on the U.S. government obligations in the Escrow Account will, together with other monies in the Escrow Account available for such purpose, be sufficient at all times to pay, when due, the principal of, redemption premium, where required, and interest on the Defeased Obligations.

The City hereby covenants that no part of the monies or funds at any time in the Escrow Account shall be used directly or indirectly to acquire any securities or obligations, the acquisition of which would cause any bonds of the Prior Issue to be "arbitrage bonds" within the meaning of Section 148 of the Code and the Regulations thereunder.

9. Miscellaneous.

a) Third Party Beneficiaries. This Agreement has been entered into by the City and the Escrow Agent for the benefit of the holders of the Defeased Obligations, and is not revocable by the City or the Escrow Agent, and the investments and other funds deposited in the Escrow Account and all income therefrom have been irrevocably appropriated for the payment of interest on the Defeased Obligations when due and the payment and any redemption of the Defeased Obligations and interest thereon when due, in accordance with this Agreement. This Agreement shall be binding upon and shall inure to the benefit of the City and the Escrow Agent and their respective successors and assigns. In addition, this Agreement shall constitute a third party beneficiary contract for the benefit of the owners of the Defeased Obligations. Said third party beneficiaries shall be entitled to enforce performance and observance by the City and the Escrow Agent of the respective agreements and covenants herein contained as fully and completely as if said third party beneficiaries were parties hereto.

b) Severability. If any section, paragraph, clause or provision of this Agreement shall be invalid or ineffective for any reason, the remainder of this Agreement shall remain in full force and effect, it being expressly hereby agreed that the remainder of this Agreement would have been entered into by the parties hereto notwithstanding any such invalidity.

c) Termination. This Agreement shall terminate upon the payment of all of the principal of and interest on the Defeased Obligations. The parties realize that some of the amounts hereunder may remain upon termination. Any amounts remaining upon termination shall be returned to the City. Termination of this Agreement shall not, of itself, have any effect on the City's obligation to pay the Defeased Obligations.

d) Indemnification. To the extent permitted by law, the City agrees to hold the Escrow Agent harmless and, to indemnify the Escrow Agent against any loss, liability, expenses (including attorney's fees and expenses), claims, or demand arising out of or in connection with the performance of its obligations in accordance with the provisions of this Agreement, except for negligence, willful misconduct or failure to act of the Escrow Agent. The foregoing indemnities in this paragraph shall survive the resignation or removal of the Escrow Agent or the termination of the Agreement.

e) Execution in Counterparts. This Agreement may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their duly authorized officers on the date first above written.

CITY OF MENASHA,  
CALUMET AND WINNEBAGO COUNTIES,  
WISCONSIN

(SEAL)

By: \_\_\_\_\_  
Mayor

By: \_\_\_\_\_  
City Clerk

ASSOCIATED TRUST COMPANY,  
NATIONAL ASSOCIATION,  
GREEN BAY, WISCONSIN,  
AS AGENT

(SEAL)

By: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

And: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Defeased Obligations)

EXHIBIT A-1

\$7,015,000  
City of Menasha, Wisconsin  
Combined Utility Revenue Refunding Bonds, Series 2005  
Dated December 28, 2005

[to be inserted from final verification report]

COPY

Depository:

The Depository Trust Company  
New York, New York

EXHIBIT B-1

U.S. TREASURY SECURITIES

(State and Local Government Series)

For Delivery April 6, 2011

CONFIDENTIAL

(See Attached Subscription Forms)

EXHIBIT C-1

AUTHORIZED DEFEASANCE EXPENSES

Financial Advisory Services, Wisconsin Public Finance Professionals, LLC	\$ _____
Escrow Agent, Associated Trust Company, National Association	_____
Escrow Verification, Barthe & Wahrman PA	_____
Bond Counsel Services, Quarles & Brady LLP	_____
Total:	\$ _____

COPY

EXHIBIT D-1

ESCROW ACCOUNT CASH FLOW

(SEE ATTACHED)

COPY

EXHIBIT E-1

NOTICE OF CALL\*

Regarding

CITY OF MENASHA  
CALUMET AND WINNEBAGO COUNTIES, WISCONSIN  
COMBINED UTILITY REVENUE REFUNDING BONDS, SERIES 2005  
DATED DECEMBER 28, 2005

NOTICE IS HEREBY GIVEN that the Bonds of the above-referenced issue which mature on the dates and in the amounts; bear interest at the rates; and have CUSIP Nos. as set forth below have been called by the City for prior payment on May 1, 2017 at the principal amount thereof plus accrued interest to the date of prepayment:

<u>Maturity Date</u>	<u>Principal Amount</u>	<u>Interest Rate</u>	<u>CUSIP No.</u>
May 1, 2018	\$200,000	4.00 %	586501CC0
May 1, 2019	200,000	4.00	586501CD8
May 1, 2020	210,000	4.00	586501CE6
May 1, 2021	220,000	4.00	586501CF3
May 1, 2022	225,000	4.10	586501CG1
May 1, 2023	240,000	4.125	586501CH9
May 1, 2024	250,000	4.125	586501CJ5
May 1, 2025	260,000	4.20	586501CK2

The City's Escrow Agent shall deposit federal or other immediately available funds sufficient for such redemption at the office of The Depository Trust Company on or before May 1, 2017.

Said Bonds will cease to bear interest on May 1, 2017.

By Order of the  
Common Council  
City of Menasha  
City Clerk

Dated \_\_\_\_\_

\* To be provided by registered or certified mail, overnight express delivery, or facsimile transmission to The Depository Trust Company, Attn: Supervisor, Call Notification Department, 55 Water Street, 50<sup>th</sup> Floor, New York, NY 10041-0099, not less than thirty (30) days nor more than sixty (60) days prior to May 1, 2017 and to the MSRB. Notice shall also be provided to XL Capital Assurance Inc., or its successor, the bond insurer of the Bonds.

\*\* If the Bonds are subject to the continuing disclosure requirements of SEC Rule 15c2-12 effective July 3, 1995, this Notice should be filed electronically with the MSRB through the Electronic Municipal Market Access (EMMA) System website at [www.emma.msrb.org](http://www.emma.msrb.org).

EXHIBIT F-1\*

NOTICE OF DEFEASANCE AND REDEMPTION  
OF THE COMBINED UTILITY REVENUE REFUNDING BONDS, SERIES 2005, DATED  
DECEMBER 28, 2005  
OF THE CITY OF MENASHA, WISCONSIN (THE "2005 BONDS")

Notice is given that the 2005 Bonds described below (the "Defeased Obligations")\*\*, of the City of Menasha, Wisconsin (the "City") have been defeased by the City pursuant to an Escrow Agreement dated April 6, 2011 between the City and Associated Trust Company, National Association, Green Bay, Wisconsin (the "Escrow Agent").

<u>Maturity Date</u>	<u>Principal Amount</u>	<u>Interest Rate</u>	<u>CUSIP No.</u>
May 1, 2011	\$790,000	4.00%	586501BV9***
May 1, 2012	820,000	4.00	586501BW7***
May 1, 2013	160,000	4.00	586501BX5***
May 1, 2014	165,000	4.00	586501BY3***
May 1, 2015	175,000	4.00	586501BZ0***
May 1, 2016	180,000	4.00	586501CA4***
May 1, 2017	185,000	4.00	586501CB2***
May 1, 2018	200,000	4.00	586501CC0***
May 1, 2019	200,000	4.00	586501CD8***
May 1, 2020	210,000	4.00	586501CE6***
May 1, 2021	220,000	4.00	586501CF3***
May 1, 2022	225,000	4.10	586501CG1***
May 1, 2023	240,000	4.125	586501CH9***
May 1, 2024	250,000	4.125	586501CJ5***
May 1, 2025	260,000	4.20	586501CK2***

The City has instructed the Escrow Agent to call the Defeased Obligations maturing on May 1, 2018 and thereafter for redemption on May 1, 2017. The City has irrevocably deposited United States government securities and cash in escrow with the Escrow Agent in an amount which, together with investment income on it, is sufficient to pay the principal and interest on the Defeased Obligations beginning with the May 1, 2011 principal and interest payment up to and including May 1, 2017 and to redeem the remaining Defeased Obligations on May 1, 2017 at a price of par plus accrued interest to May 1, 2017. Interest on the Defeased Obligations will cease to accrue on May 1, 2017.

Dated: April 6, 2011.

Associated Trust Company, National Association  
as Escrow Agent

\* As soon as practicable after the closing for the Defeased Obligations, notice shall be provided to the registered owners of the Defeased Obligations, to any fiscal agent for the Defeased Obligations and to the MSRB. Notice shall also be provided to XL Capital Assurance Inc., or its successor, the bond insurer of the 2005 Bonds.

\*\* If the Defeased Obligations are subject to the continuing disclosure requirements of SEC Rule 15c2-12 effective July 3, 1995, this Notice should be filed electronically with the MSRB through the Electronic Municipal Market Access (EMMA) System website at [www.emma.msrb.org](http://www.emma.msrb.org).

\*\*\* Indicates refunding of full CUSIP.

Resolution Approving Application to Board of Commissioners of Public Lands to Borrow \$3,500,000 from the State Trust Funds, Authorizing the Borrowing and the Issuance of Certificates of Indebtedness and Levying a Tax in Connection Therewith.

The following preamble and resolutions were presented by ~~Alderman~~ Mayor Merkes and were read to the meeting.

By the provisions of Sec. 24.66 of the Wisconsin Statutes, all municipalities may borrow money for such purposes in the manner prescribed, and,

By the provisions of Chapter 24 of the Wisconsin Statutes, the Board of Commissioners of Public Lands of Wisconsin is authorized to make loans from the State Trust Funds to municipalities for such purposes. (Municipality as defined by Sec. 24.60(2) of the Wisconsin Statutes means a town, village, city, county, public inland lake protection and rehabilitation district, town sanitary district created under Sec. 60.71 or 60.72, metropolitan sewerage district created under Sec. 200.05 or 200.23, joint sewerage system created under Sec. 281.43(4), school district or technical college district.)

THEREFORE, BE IT RESOLVED, that the City of **Menasha**, in the County(ies) of **Calumet And Winnebago**, Wisconsin, borrow from the Trust Funds of the State of Wisconsin the sum of **Three Million Five Hundred Thousand And 00/100 Dollars (\$3,500,000.00)** for the purpose of **financing advance refunding of utility revenue bond** and for no other purpose.

The loan is to be payable within **20** years from the 15th day of March preceding the date the loan is made. The loan will be repaid in annual installments with interest at the rate of **5.00** percent per annum from the date of making the loan to the 15th day of March next and thereafter annually as provided by law.

RESOLVED FURTHER, that there shall be raised and there is levied upon all taxable property, within the City of **Menasha**, in the County(ies) of **Calumet And Winnebago**, Wisconsin, a direct annual tax for the purpose of paying interest and principal on the loan as they become due.

RESOLVED FURTHER, that no money obtained by the City of **Menasha** by such loan from the state be applied or paid out for any purpose except **financing advance refunding of utility revenue bond** without the consent of the Board of Commissioners of Public Lands.

RESOLVED FURTHER, that in case the Board of Commissioners of Public Lands of Wisconsin agrees to make the loan, that the mayor and clerk of the City of **Menasha**, in the County(ies) of **Calumet And Winnebago**, Wisconsin, are authorized and empowered, in the name of the city to execute and deliver to the Commission, certificates of indebtedness, in such form as required by the Commission, for any sum of money that may be loaned to the city pursuant to this resolution. The mayor and clerk of the city will perform all necessary actions to fully carry out the provisions of Chapter 24, Wisconsin Statutes, and these resolutions.

RESOLVED FURTHER, that this preamble and these resolutions and the aye and no vote by which they were adopted, be recorded, and that the clerk of this city forward this certified record, along with the application for the loan, to the Board of Commissioners of Public Lands of Wisconsin.

Passed and approved this                      day of March, 2011

\_\_\_\_\_  
Donald Merkes, Mayor

ATTEST:

\_\_\_\_\_  
Deborah A. Galeazzi, City Clerk

**DEVELOPMENT AGREEMENT**

**BY AND BETWEEN**

**THE CITY OF MENASHA, WISCONSIN,**

**AND**

**THE PONDS OF MENASHA, LLC**

**DATED AS OF JANUARY \_\_\_\_, 2011**

## DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT is made and entered into as of the \_\_\_ day of January 2011, by and between the CITY OF MENASHA, Wisconsin, a Wisconsin municipal corporation with its principal offices located at 140 Main St., Menasha, Wisconsin 54952 (hereinafter "CITY"), and The Ponds of Menasha, LLC, a Wisconsin limited liability company with its principal offices located at 1300 N. Kimps Ct., Green Bay, Wisconsin 54313 (hereinafter "DEVELOPER").

### RECITALS

The Project to be undertaken by the DEVELOPER, as described herein, is of particular importance to the CITY and provides special benefits to the CITY because it promotes the physical and economic development of the CITY, increases the range of choice in the CITY's housing stock, accelerates sales of CITY-owned property, provides a means of paying the CITY's debt associated with land acquisition and improvements of the CITY-owned development known as Lake Park Villas.

### ARTICLE I

SECTION 1.01 PURPOSE OF AGREEMENT. The parties hereto are entering into this Development AGREEMENT for the preparation and construction of a residential development within Lake Park Villas Project Area and proposed City of Menasha Tax Incremental District Number 12 (TID #12). The parties have worked cooperatively regarding initial planning, financing and feasibility of such a development. Further, the parties have reached an understanding regarding participation in the future development and intend to enter into this Development AGREEMENT to record the understandings and undertakings of the parties and to provide a framework within which the development may proceed.

SECTION 1.02 CERTAIN DEFINITIONS. As used in this AGREEMENT, the following terms shall have the meanings indicated:

"AVAILABLE TAX INCREMENT" – The amount of tax increment (as defined in Sec. 66.1105, Wis. Stats.) generated solely by the Development Property and Development Improvements as of January 1 of each calendar year.

"CONCEPT PLAN" – The conceptual plan, estimated schedule and value estimates for the contemplated development of the Development Property. It is attached as **EXHIBIT** [insert].

"DEVELOPMENT" – The Development Improvements and Infrastructure that constitute the planned development project that is the subject of this AGREEMENT.

"DEVELOPMENT IMPROVEMENTS" - Means structures, buildings and accoutrements

constructed by DEVELOPER in compliance with Implementation Plans comprised of the following:

- PHASE I – A single family residential development within Development Area “A” comprised of not less than 70 units at a density not less than three units per acre with an estimated improved value of \$11,900,000.
- PHASE II – A single family residential development within Development Area “B” comprised of not less than 50 units at a density not less than three units per acre with an estimated improved value of \$8.5 million.
- PHASE III– A multi-family residential development within Development Area “C” comprised of not less than 54 units with an estimated improved value of \$2.7million (54 units @ \$54,000 estimate = \$2.7 million).

“DEVELOPMENT AREA A” – An area consisting of approximately 20 acres located in the NW ¼ of the NE ¼ of Section 17, T20N, R17E and proposed CITY of Menasha Tax Incremental Financing District # 12 attached as **EXHIBIT A**, the actual area of which is to be determined via a Certified Survey Map pursuant to Section 3.02.1

“DEVELOPMENT AREA B” - An area consisting of approximately 20 acres, excluding the area designated as a regional storm water pond, located in the NW ¼ of the NE ¼ of Section 17 T20N R17E and proposed CITY of Menasha Tax Incremental Financing District # 12 attached as **EXHIBIT B**, the actual area of which is to be determined via a Certified Survey Map pursuant to Section 3.02.1

“DEVELOPMENT AREA C” - An area consisting of approximately 3 acres, described as Lot 16 Lake Park Villas Plat and located in the proposed City of Menasha Tax Incremental Financing District # 12 attached as **EXHIBIT C**.

“DEVELOPMENT PROPERTY” - consists of Development Areas “A,” “B,” and “C.”

“DEVELOPMENT COSTS” — The hard and soft costs enumerated in the development budget set forth in **EXHIBIT D**.

“EQUALIZED ASSESSED VALUE” – The value also known as “EAV” is defined as the estimated fair market value of land and buildings on the real estate tax bill for a particular parcel.

“INFRASTRUCTURE” – Public and Private Infrastructure.

“IMPLEMENTATION PLAN” – Detailed plans, drawings, specifications and other information as required for the site plan review under CITY Ordinances regarding the construction of Private Infrastructure, Infrastructure and Development Improvements. A specific Implementation Plan must be submitted to and approved by the CITY prior to construction as provided by CITY Ordinance. Each specific Implementation Plan shall be attached to this AGREEMENT as an exhibit upon approval by the CITY.

“PERFORMANCE INCENTIVE” – Annual payments of the Available Tax Increment, commencing in 2013 through 2031 to the DEVELOPER. Performance Incentive shall be payable to DEVELOPER as provided in this AGREEMENT.

“PUBLIC IMPROVEMENTS” – The road improvements including final roadway street base course and three inch blacktopping, curb and gutter, sidewalks as well as sanitary sewer, water mains, storm water drainage, drainage ponds, and other public facilities normally provided by or required by local governments fronting the Development Property whether in place or to be constructed or upgraded in conjunction with the development contemplated in the Concept Plan, including storm water management ponds, but specifically excluding Infrastructure.

“PUBLIC INFRASTRUCTURE”– Consists of those Public Improvements that will be the responsibility of the DEVELOPER as more particularly described in Exhibit \_\_\_\_ (attached) and shall include sanitary sewer service, storm sewer, water mains, and two (2) inch binder temporary asphalt paving, street lighting, that have been constructed by DEVELOPER and dedicated to the CITY under this AGREEMENT.

“PRIVATE INFRASTRUCTURE” – Site grading, balancing for storm sewer water, management facility, pipes, sanitary sewer laterals, potable water laterals, private roads and other facilities owned, constructed and maintained by DEVELOPER to service the Development Improvements from the Public Improvements or Private Infrastructure described more particularly in **EXHIBIT** [insert].

“TID # 12” means CITY of Menasha Tax Incremental District Number 12 and project plan created by CITY.

## ARTICLE II

### OVERVIEW OF THE PROJECT

SECTION 2.01 The Project consists of residential development to take place in three phases resulting in the creation of not less than 120 single family residential units and 54 multi-family units. The construction of at least ten (10) homes within Phase I is to begin by September 1, 2011 with an expected completion date of May 1, 2012. Projected completion dates are January 1, 2016 for Phase I, January 1, 2020 for Phase II. For Phase III, the projected completion date shall be thirty-six (36) months after the DEVELOPER acquires the Property. Upon completion, the entire project is expected to have a value of \$23 million.

## ARTICLE III

### DEVELOPER OBLIGATIONS

SECTION 3.01 Acquisitions of Development Areas. Upon completion of the pre-closing conditions but in no case later than June 1, 2011, DEVELOPER shall acquire fee simple title to Development Areas “A” and “B.” Upon the City securing the purchase of Development Area “C” in accordance with Section 5.02.2 and before December 31, 2011, DEVELOPER shall acquire fee simple title to Development Area “C.”

SECTION 3.01.1 CITY shall transfer the Real Estate for Phase I and Phase II to

DEVELOPER by warranty deed for \$17,000 per acre subject to the terms and conditions of this AGREEMENT and a separate Real Estate Purchase AGREEMENT to be executed by the parties. The Real Estate Purchase AGREEMENT shall provide that DEVELOPER shall pay \$27,200 down at date of closing and shall execute a Promissory Note in favor of CITY in the amount of the balance of the Purchase Price. The terms of the Note shall be zero percent (0%) interest until paid in full, except that in the event DEVELOPER fails to pay in full before January 1, 2020, then interest shall be paid at five percent (5%) of the remaining balance assessed from the date of closing. DEVELOPER shall be required to make a payment of \$5,700 to CITY toward the outstanding balance of the Promissory Note for each Lot sold or transferred by DEVELOPER. As security for said Promissory Note, the DEVELOPER shall give CITY a first mortgage position on the Real Estate Development Area "B" which CITY shall subordinate upon Phase I Development Improvements being completed and a second mortgage position on the Real Estate Development Area "A", second to the first mortgage position of the commercial lending institution approved by DEVELOPER in the approximate amount of \$2,000,000 representing monies necessary for DEVELOPER's Public and Private Infrastructure obligations herein for Phase I and Phase II. Closing shall take place on or before June 30, 2011. Real estate shall be defined as the Development Area A and the Development Area B estimated to be approximately forty (40) acres of land (Purchase Price estimated to be \$680,000 (\$17,000 x 40)). CITY shall be responsible for any and all transfer taxes as well as preparation of any and all Certified Survey Maps. CITY shall further be responsible for obtaining the two separate legal descriptions, one description for each Development Area. Certified Survey Map and legal description shall be provided to DEVELOPER by CITY, at CITY's sole expense, at least thirty (30) days prior to closing. The AGREEMENT of sale shall also provide that the CITY shall update all wetland studies for the Real Estate and provide a copy of said wetland studies to DEVELOPER at least fifteen (15) days prior to closing. The AGREEMENT shall further provide that the AGREEMENT is contingent upon the CSM mappings allowing for the development of one hundred twenty (120) or more residential real estate lots, as approved by DEVELOPER, within the real estate areas known as Development Area A and Development Area B.

SECTION 3.01.2 Title Insurance. The CITY shall obtain and pay for a title insurance commitment in the amount of the purchase price. A commitment by the title company agreeing to issue a title policy upon the recording of proper documents as agreed herein shall be deemed sufficient performance. DEVELOPER may obtain additional title insurance at its cost. The CITY shall provide to DEVELOPER a preliminary commitment for title insurance not less than fifteen (15) days prior to the closing.

SECTION 3.01.3 Title. The CITY shall cooperate with DEVELOPER to clear up any defect in title that may be pertaining to the property; provided, however, the Real Estate shall be conveyed subject to (1) reasonable and customary easements and restrictions of record; (2) a reversion of title in accordance with this AGREEMENT; (3) requisite public and private utility easements; (4) CITY covenants which are attached hereto and fully incorporated herein, none of which may be removed or modified without CITY's approval (ATTACH COVENANTS AS EXHIBIT \_\_\_\_); and (5) all other terms and conditions of this AGREEMENT.

SECTION 3.01.4 Closing Date. The closing date for the transfer of the Real Estate

shall be on or before June 1, 2011 for Development Areas "A" and "B" and shall be held at the office of the City Attorney, City Hall, 140 Main Street, Menasha, Wisconsin or where the parties may otherwise agree. The closing date for Development Area "C" shall be on or before December 31, 2011.

SECTION 3.01.5 The Real Estate shall be conveyed "as is." The CITY is not responsible for any subsequent remediation, demolition, underground debris, or other clean up costs after conveyance.

SECTION 3.01.6 Listing Contract. CITY had previously engaged a broker for listing Development Areas A and B and the CITY may owe a brokerage fee to said listing broker as a result of the sale of real estate contemplated herein. Said CITY shall be responsible for the payment of any brokerage fees associated with the sale of the real estate.

SECTION 3.02 DEVELOPER's Covenant to Develop. DEVELOPER agrees and covenants to use its best efforts to proceed with due diligence to complete the Development substantially in accordance with the Concept Plan and Implementation Plans which plans and specifications shall be subject to such reasonable review and approval by the CITY as may be normal, customary or required in order to proceed with the Development in accordance with all applicable rules, codes, regulations, ordinances and laws. The DEVELOPER shall cause IMPROVEMENTS to the DEVELOPMENT AREAS to create a value of not less than \$23 million including Phase III / Development Area C. The cost for such improvements shall include Development hard and soft costs, site clearance and preparation and costs associated with the construction of single family and multi-family housing units. DEVELOPER shall be required to complete construction Phase I of the Development by January 1, 2016, Phase II by January 1, 2020 and Phase III within thirty-six (36) months after acquisition of Development Area C by DEVELOPER .

SECTION 3.03 Compliance with Codes, Plans and Specifications. DEVELOPER, at its own expense, shall obtain all approvals, permits and licenses as may be required by any governmental or non-governmental entity in connection with the Development. The building and other improvements to be constructed upon the Property, the construction thereof, and their uses shall be in compliance with all applicable codes and ordinances of the CITY, and with all pertinent provisions of this AGREEMENT, the Project Plan and the Plans and Specifications.

SECTION 3.04 Taxes. It is understood that the land, improvements and personal property resulting from the Development shall be subject to property taxes. DEVELOPER shall pay when due all federal, state and local taxes in connection with the Project and all operating expenses in connection with the Real Estate and Development.

SECTION 3.05 Reversion of Undeveloped Portion of Development Property. Notwithstanding the foregoing, in the event that the DEVELOPER does not construct Phase 1 on or before [insert date] or the Aggregate Increment does not reach [insert amount] by [insert date] the CITY may, at its discretion demand the reversion of any property in the Development Areas that have not been improved by Development Improvements contemplated by the Concept Plan. Upon receipt of such demand, the DEVELOPER shall deliver by warranty deed the property identified by the CITY free and clear of any encumbrances within 60 days of the demand. The purchase price of the property so conveyed shall be \$17,000 per acre. In the event that the DEVELOPER fails to timely deliver the property, the CITY may commence an action to enforce this provision without further cure.

SECTION 3.06 Public Infrastructure. DEVELOPER shall in connection with and during the construction of the Development undertake at its expense, design and construction of Public Infrastructure in accordance with City of Menasha specifications as furnished to the DEVELOPER by the Menasha Department of Public Works. The Public Infrastructure shall be undertaken consistent with the overall schedule of construction for the Development and shall be completed upon substantial completion of the Development. The Public Infrastructure shall be funded solely by the DEVELOPER. Improvements designed and constructed by the CITY such as sidewalks, curb and gutter and final street paving will be specially assessed or otherwise charged against the benefitting properties within the Development, including lots owned by the DEVELOPER, but not until at least eighty percent (80%) of the Development Improvements within Development Areas A and B have been constructed or January 1, 2017, whichever occur first.

SECTION 3.07 Private Infrastructure. DEVELOPER shall in connection with and during the construction of the Development undertake at its expense, design and construction of Private Infrastructure in accordance with approved IMPLEMENTATION PLAN.

SECTION 3.08 Easements. DEVELOPER shall grant the CITY or any public utility such easements as reasonably necessary for public improvements, infrastructure, ingress or egress, utilities, lighting or landscaping or any other need necessary to effectuate the Development in accordance with approved plans at no cost to the CITY.

SECTION 3.09 Record Retention. DEVELOPER understands and acknowledges that the CITY is subject to Public Records Law of the State of Wisconsin. As such, DEVELOPER agrees to retain all records as defined by Wisconsin Statute §19.35(2) applicable to this AGREEMENT for a period of not less than seven (7) years. DEVELOPER agrees to assist the CITY in complying with any public records request that they receive pertaining to this AGREEMENT. DEVELOPER agrees to indemnify and hold the CITY, their officers, employees and authorized representatives harmless for any liability, including without limitation, reasonable attorney fees relating to or in any way arising from DEVELOPER's actions or omissions which contribute to the Indemnified Party's inability to comply with the Public Records Law. In the event DEVELOPER decides not to retain its records for a period of seven (7) years, then it shall provide written notice to the CITY whereupon the CITY shall take custody of said records assuming such records are not already maintained by the CITY. This provision shall survive termination of this AGREEMENT.

SECTION 3.10 Prevailing Wages. DEVELOPER shall pay all applicable prevailing wages as required by Wisconsin law.

#### ARTICLE IV

#### CITY OBLIGATIONS

SECTION 4.01 The CITY shall be responsible for the installation of sidewalk, curb and gutter and final street paving, which will not be constructed earlier than one (1) winter season following completion of the development project. The CITY will assess each property/lot owner the cost and expenses associated with these public improvements in accordance with CITY ordinances and state statutes, but not until at least eighty percent (80%) of the Development Improvements within Development Areas A and B have been constructed or January 1, 2017, whichever occur first.

SECTION 4.02 Provision of Tax Increment Financial Incentive. In order to induce

DEVELOPER to undertake the DEVELOPMENT within proposed TID #12, the DEVELOPER has requested and the CITY may be required to make available financial incentive to the DEVELOPER in a total amount not to exceed \$4 million, for the purpose of implementing the proposed TID #12 Project Plan and this AGREEMENT (the "CITY Contribution"). The CITY Contribution is made pursuant to Sections 66.1105(2)(f)1 of the Wisconsin Statutes, and shall be made available in the amount as follows:

SECTION 4.02.1 DEVELOPER agrees to advance funds for project costs, which the CITY shall reimburse through financial incentive under the terms of this AGREEMENT, with funds to be made available upon verification of the Tax Increment increase as defined herein.

#### SECTION 4.02.2

- PHASE I

- 16% of the Equalized Assessed Value (EAV) will be paid to the DEVELOPER for properties valued at \$170,000 or less.
- 18% of the Equalized Assessed Value (EAV) will be paid to the DEVELOPER for properties valued between \$170,000 and \$180,000.
- 19% of the Equalized Assessed Value (EAV) will be paid to the DEVELOPER for properties valued greater than \$180,000.

#### SECTION 4.02.3

- PHASE II

- 17% of the Equalized Assessed Value (EAV) will be paid to the DEVELOPER for properties valued at \$160,000 or less.
- 18% of the Equalized Assessed Value (EAV) will be paid to the DEVELOPER for properties valued between \$160,000 and \$170,000.
- 19% of the Equalized Assessed Value (EAV) will be paid to the DEVELOPER for properties valued greater than 170,000.

#### SECTION 4.02.4

- PHASE III

- 12.5% of the EAV

SECTION 4.02.5 A total amount not to exceed \$4 million of ACCUMULATED TAX INCREMENT may be distributed to the DEVELOPER according to the schedule set forth herein when and only when the threshold value of the Development Improvements reaches \$2.5 million. The threshold value will be the equalized assessed value of the project on January 1, 2012.

- For four years beginning in 2013, 25% of the Available Tax Increment

attributable to the Development Improvements will be distributed to the DEVELOPER payable on or before September 1 of each of the four years.

- Beginning in 2017 until termination of the City contribution, 80% of the Available Tax Increment attributable to the Development Improvements will be distributed to the DEVELOPER payable on or before September 1 of each year.

SECTION 4.02.6 CONDITIONS TO PAYMENT OF CITY CONTRIBUTION/SHORTFALL PROTECTION. If DEVELOPER has not constructed Development Improvement of a threshold EAV value of \$2.5 million or more before December 31, 2011, the CITY may delay the commencement of payment of the Performance Incentive until the year following the attainment of a threshold EAV of \$2.5 million, said EAV being measured as of January 1 of any particular year.

SECTION 4.02.7 If on or before January 1, 2016, the DEVELOPER has not completed Phase I, the DEVELOPER shall be required to pay in full, monies owed to the CITY for the purchase of Development Area "B."

SECTION 4.02.8 No City contribution to DEVELOPER provided for in this AGREEMENT shall be paid or deemed due and owing to DEVELOPER for any year in which any property tax pertaining to any portion of the Development Property which is under the ownership of the DEVELOPER, is not timely paid. In the event of any delinquency the CITY may give the DEVELOPER 30 days to cure. If the DEVELOPER fails to cure, the City contribution shall be withheld in that year. Nothing in this AGREEMENT shall in any way affect the City's right to enforce collection of property taxes in the manner provided by law.

SECTION 4.03 CERTIFICATION OF COMPLETION. Upon completion and review of the improvements of each phase by the CITY, the CITY shall provide the DEVELOPER with an appropriate recordable instrument certifying that the improvements have been made in accordance with this AGREEMENT and the project plans for each said phase and any amendment or modifications thereto.

SECTION 4.04 CITY PERFORMANCE SUBJECT TO REQUIRED GOVERNMENT APPROVALS. The DEVELOPER acknowledges that various of the specific undertakings of the CITY described in this AGREEMENT require approvals from the City's Common Council and/or Planning Commission as well as from governmental bodies external to the CITY, some of which approvals may require public hearings and other legal proceedings as conditions precedent thereto. The City's obligations are conditioned upon the obtaining of all such approvals in the manner required by law. The CITY cannot assure that all such approvals will be obtained; however, it agrees to use good faith efforts to obtain such approvals on a timely basis. DEVELOPER shall receive a reasonable extension on all time requirement deadlines set forth within this AGREEMENT due to approval delays by CITY.

SECTION 4.05 CITY REMOVAL OF SILOS. As and for additional consideration to DEVELOPER with respect to this AGREEMENT, CITY agrees that within one (1) year from the date of signing this AGREEMENT, CITY shall arrange for the removal of the two (2) silos within parcel Outlot 6 which lies adjacent to Development Area B ("Silo Parcel").

## ARTICLE V

## CONDITIONS PRECEDENT TO CLOSING

SECTION 5.01 Purpose. The parties acknowledge that the Development will require substantial financial resources. While each party is willing and prepared to perform its obligations hereunder, the parties recognize that each must begin its performance under this AGREEMENT and continue it up to the point of Closing without absolute assurance that the other will be able to raise and commit all the funds necessary for Closing.

SECTION 5.02 Conditions to DEVELOPER's Obligation to Close. DEVELOPER's obligation to consummate the transactions to be performed by it in connection with the Closing is subject to satisfaction of the following conditions:

SECTION 5.02.1 The CITY, at its expense, causing Development Areas "A" and "B" to be split from Lot 2 of the Lake Park Villas subdivision and that part, if any, of Parcel #7-01722-00 comprising the Development Area via Certified Survey Map.

SECTION 5.02.2 As it relates to Development Area "C," DEVELOPER is not required to DEVELOP Development Area "C" unless and until CITY arranges for DEVELOPER to acquire Development Area "C" for not more than \$165,000.

SECTION 5.02.3 Creation of a Mixed Use Tax Incremental Financing District – Proposed TID#12 for twenty (20) years in duration.

SECTION 5.03 Pre-Closing Undertakings of the DEVELOPER. Prior to Closing, the DEVELOPER agrees that it shall:

SECTION 5.03.1 Financing Commitment. DEVELOPER shall obtain and provide to the CITY: (1) a written financial commitment from a conventional lender for Public and Private Infrastructure of Phase I / Development Area A of not less than \$\_\_\_\_\_, (2) written construction contract to construct and finance the Development, (3) other written proof of financial resources to construct the Development, or (4) any combination thereof. Said documents shall be acceptable in all respects to the CITY, in the sole and absolute discretion of the CITY Comptroller or other agent for the CITY. DEVELOPER shall have closed the loan, which is the subject of the financing commitment and in connection therewith, DEVELOPER shall have provided copies of the documents to be executed in connection with the construction loan to the CITY Comptroller. DEVELOPER shall provide to the CITY copies of all appraisals and market studies prepared in connection with the financial commitment.

SECTION 5.03.2 Prepare conceptual lot layouts and restrictive covenants for the Development which are acceptable to the CITY and DEVELOPER.

SECTION 5.03.3 Financial Statements. Within five (5) business days of the execution of this Agreement, DEVELOPER, Lexington Homes and Jeffrey Marlow shall have provided to the City Comptroller, audited financial statements (if available, and if audited financial statements are not available, financial statements in a form reasonably acceptable to the City Comptroller) for fiscal years 2009 and 2010 plus three years complete tax returns, including all schedules. The financial statements must show a financial condition acceptable to

the CITY, in the judgment of the CITY Comptroller.

SECTION 5.03.4 DEVELOPER shall at its expense have obtained all necessary approvals and permits necessary to undertake the Development, including but not limited to, site plan review, zoning approvals, and any other local, state or federal approvals or permits.

SECTION 5.03.5 Within 120 days of the execution of this AGREEMENT, DEVELOPER will, at its own cost and expense, prepare and file with the appropriate City offices, a Preliminary Plat pursuant to Sec. 14-1-4 of the City of Menasha Code of Ordinances. The Development Plan must allow for bike and pedestrian access to existing CITY bike / trail systems per map at Exhibit \_\_\_\_\_.

## ARTICLE VI

### REPRESENTATIONS, WARRANTIES AND COVENANTS

SECTION 6.01 DEVELOPER represents and warrants to and covenants with the CITY and the CITY represents and warrants to and covenants with DEVELOPER as respectively follows:

SECTION 6.02.1 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 6.01.2 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 6.01.3 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 6.01.4 DEVELOPER will permit representatives of CITY (including legal counsel, accountants, inspectors and consultants) to have full access at all reasonable times, and in a manner so as not to interfere with the normal business operations of DEVELOPER, to all premises, properties, personnel, books, records (including tax records), contracts, and documents of or pertaining to DEVELOPER's business.

SECTION 6.01.5 CITY represents and warrants it is a municipality, duly organized and validly existing under the laws of the state of Wisconsin.

SECTION 6.01.6 DEVELOPER represents and warrants it is a corporation, duly organized and validly existing under the laws of the state of Wisconsin.

SECTION 6.01.7 CITY and DEVELOPER have full power and authority to execute and deliver this AGREEMENT and to perform their obligations hereunder.

SECTION 6.01.8 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 6.01.9 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 6.01.10 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 CITY.

SECTION 6.01.11 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 6.01.12 The Representations and Warranties set forth herein shall be true and correct in all material respects at and as of the Closing Date.

SECTION 6.01.13 DEVELOPER shall have a continuing obligation to immediately report to the CITY Comptroller any material adverse changes in its financial condition to the CITY from the Date of Closing through completion of construction.

## ARTICLE VII

### POST-CLOSING OBLIGATIONS OF DEVELOPER

SECTION 7.01 DEVELOPER will, at its expense, cause the Development Area to be platted.

SECTION 7.02 Public Infrastructure. DEVELOPER shall in connection with and during the construction of the Development Area undertake at its expense, design and construction of Public Infrastructure in accordance with City of Menasha specifications as furnished to the DEVELOPER by the Menasha Department of Public Works. The Public Infrastructure shall be undertaken consistent with the overall schedule of construction for the Development Area and shall be completed upon substantial completion of the Development Area. The Public Infrastructure shall be funded solely by the DEVELOPER. DEVELOPER shall be responsible to ensure that Contractors installing such infrastructure comply with and pay prevailing wage rates as set forth by the Wisconsin Department of Workforce Development.

SECTION 7.03 DEVELOPER pledges that it shall complete the construction of the Public Infrastructure shown on [insert plan name] on or before December 31, 2017. In the event the public infrastructure has not been completed by that date, the parties may either agree to an extension, or the CITY may complete the public infrastructure and assess the costs of the public infrastructure against those portions of the Development Area that are benefitted.

SECTION 7.04 Dedication of Public Infrastructure. The DEVELOPER shall dedicate the Public Infrastructure to the CITY without cost to the CITY under the following terms. The CITY shall accept dedication of Public Infrastructure upon (a) receipt of As-Built Drawings, and (b) inspection and satisfaction of CITY staff that the Public Infrastructure was constructed in accordance with the as-built drawings; and (c) DEVELOPER's contractors execute a guarantee, in the form normally required by the CITY for similar work, guaranteeing the workmanship, adequacy and fitness for purpose of the Public Infrastructure for at least one (1) year after conveyance to the CITY.

SECTION 7.05 Maintenance of Private Infrastructure. The DEVELOPER shall be responsible for the cost of maintenance of the Private Infrastructure and Development Improvements.

SECTION 7.06 Failure to Dedicate Public Infrastructure. If the DEVELOPER does not timely dedicate the Public Infrastructure or the Public Infrastructure is not accepted by the CITY, the CITY shall give the DEVELOPER 30 days written notice to cure. Upon failure to cure the CITY may enter the Development Property and repair or reconstruct the Public Infrastructure to the CITY's satisfaction and assess the cost of the repair or reconstruction against benefitted properties or bring an action for specific performance or to otherwise compel compliance with this AGREEMENT.

SECTION 7.07 Except as may be mutually agreed by the CITY and DEVELOPER, the DEVELOPER will participate in FVHB Parade of Home events.

SECTION 7.08 DEVELOPER will initiate construction of at least ten (10) homes no later than September 1, 2011 in Development Area "A." with an expected completion date of May 1, 2012. Projected completion dates are estimated to be January 1, 2016 for Phase I, January 1 and 2020 for Phase II.

SECTION 7.09 Standards of Construction. DEVELOPER shall see to it that all infrastructure and improvements are constructed in a good and workmanlike manner and consistent with prevailing industry standards for high quality construction in the area of the CITY. DEVELOPER shall perform all work in compliance with applicable laws, regulations, ordinances and permits and DEVELOPER shall at its own cost and expense obtain all necessary permits and licenses for such development.

SECTION 7.10 If the DEVELOPER has not completed improvements on at least 75 % of the lots in Phase I by January 1, 2016, the CITY shall have the option to repurchase Development Area "B" (Phase II) for an amount of \$17,000 per acre.

## ARTICLE VIII

### BUDGET AND BUDGET RECONCILIATION; FINANCIAL REPORTS

SECTION 8.01 Attached hereto as **EXHIBIT** [insert] is the DEVELOPER's budget for the Development. The DEVELOPER agrees to maintain records such that its actual expenditures for the Development may be ascertained and reconciled against such budget. From time to time upon reasonable notice from the CITY, authorized representatives of the CITY, including the CITY Comptroller, shall be entitled to examine such records at the DEVELOPER's offices to verify construction costs during and after construction.

ARTICLE IX  
ASSIGNMENT

SECTION 9.01 The rights, duties and obligations of the DEVELOPER hereunder may not be assigned by DEVELOPER without the written consent of the CITY to the assignment, which consent shall not be unreasonably withheld. Any assignee or purchaser or transferee of any portion of the Real Estate shall be bound by the terms and conditions of this AGREEMENT, which shall run with the land and be binding upon all such assignees, purchasers and transferees. Written evidence satisfactory to the CITY that such assignee or entity has agreed in writing to be bound by the terms of this AGREEMENT must be provided to the CITY. Any such sale, transfer or conveyance of any portions of the Real Estate shall not relieve the DEVELOPER of its obligations hereunder.

ARTICLE X  
INDEMNITY

SECTION 10.01 DEVELOPER shall indemnify and hold harmless the CITY, its officers, employees and authorized representatives (Indemnified Party) from and against any and all liabilities, including, without limitation, remediation required by any federal or state agency having jurisdiction, losses, damages, costs and expenses, including reasonable attorney fees and costs, arising out of any third-party claims, causes of action, or demands made against or suffered by the Indemnified Party on account of this AGREEMENT, unless such claims, causes of action, or demands: (a) relate to the Indemnified Party failing to perform its obligations to DEVELOPER; or (b) arise out of any willful misconduct of the Indemnified Party. At the Indemnified Party's request, DEVELOPER shall appear for and defend the Indemnified Party, at DEVELOPER's expense, in any action or proceeding to which the Indemnified Party may be made a party by reason of any of the foregoing.

ARTICLE XI  
NOTICES

SECTION 11.01 All notices, demands, certificates or other communications under this AGREEMENT shall be sufficiently given and shall be deemed given when hand delivered or when mailed by first class mail, postage prepaid, property addressed as indicated below:

To the DEVELOPER:                   The Ponds of Menasha, LLC  
1300 N. Kimps Court  
Green Bay, WI 54313

With a copy to:

To the CITY:                        City of Menasha, Wisconsin  
City Hall  
140 Main Street  
Menasha, WI 54952  
Attn: CITY Clerk

With a copy to:

Greg Keil, Community Development Director  
City Hall  
140 Main Street  
Menasha, WI 54952

SECTION 11.02 Any party may, by written notice to the party (ies), designate a change of address for the purposes aforesaid.

## ARTICLE XII

### NONDISCRIMINATION

SECTION 12.01 In the performance of work under this AGREEMENT, the DEVELOPER agrees not to discriminate against any employee or applicant for employment nor shall the development or any portion thereof be sold to, leased or used by any party in any manner to permit discrimination or restriction on the basis of race, religion, marital status, age, color, sex, sexual orientation, physical condition, disability, national origin or ancestry and that the construction and operation of the Development shall be in compliance with all effective laws, ordinances and regulations relating to discrimination on any of the foregoing grounds.

## ARTICLE XIII

### MISCELLANEOUS PROVISIONS

SECTION 13.01 ENTIRE AGREEMENT. This document contains the entire AGREEMENT between DEVELOPER and the CITY and it shall inure to the benefit of and shall be binding upon the parties hereto and the respective heirs, executives, successors and assigns. This AGREEMENT may be modified only by a written Amendment signed by the parties, which Amendment shall become effective upon the recording in the Office of Register of Deeds for the County.

SECTION 13.02 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.

SECTION 13.03 DEFAULT. In addition to any remedies set forth within this AGREEMENT, the Parties shall have all rights and remedies available under law or equity with respect to said default. All remedies shall be cumulative and the exercise of one remedy shall not preclude the use of any other or all of said remedies.

SECTION 13.04 FAILURE TO ENFORCE NOT A WAIVER. Failure of the CITY to enforce any provision contained herein shall not be deemed a waiver of the City's right to enforce such provision or any other provision in the event of a subsequent default.

SECTION 13.05 NO SUBORDINATION. The CITY shall not subordinate any interest it has in this AGREEMENT for any reason, unless it is determined to be in the best interests of the CITY.

SECTION 13.06 MEDIATION OF DISPUTES REQUIRED. Except as expressly provided herein, prior to litigation and as a condition precedent to bringing litigation, any party

deeming itself aggrieved under this AGREEMENT shall be obligated to request nonbinding mediation of this dispute. Mediation shall proceed before a single mediator. In the event the parties cannot agree, the aggrieved party may then commence an action. However, the parties will be bound to agree to alternative dispute resolution as ordered by the Court.

SECTION 13.07 GOVERNING LAW. This AGREEMENT shall be governed by, enforced and construed in accordance with the domestic laws of the State of Wisconsin.

SECTION 13.08 COUNTERPARTS. This AGREEMENT may be signed in any number of counterparts with the same effect as if the signatures thereto and hereto were upon the same instrument.

SECTION 13.09 AMENDMENTS AND WAIVERS. No amendment of any provision of this AGREEMENT shall be valid unless the same shall be in writing and signed by CITY and DEVELOPER. No waiver by any party of any provision of this AGREEMENT or any default, misrepresentation, or breach of warranty shall be valid unless the same shall be in writing and signed by the parties making such a waiver, nor shall such waiver be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

SECTION 13.10 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 13.11 RECORDING OF AGREEMENT. The parties hereto agree that the CITY 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 CITY execute and deliver any such memorandum or other document in connection with such recording.

SECTION 13.12 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 13.13 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 13.14 INCORPORATION OF EXHIBITS. The **EXHIBITS** identified in this AGREEMENT are incorporated herein by reference and made a part hereof.

IN WITNESS WHEREOF, the parties have duly executed this AGREEMENT, or caused it to be duly executed, as of the \_\_\_\_\_ day of \_\_\_\_\_, 2011

THE PONDS OF MENASHA, LLC

By: \_\_\_\_\_

By: \_\_\_\_\_

CITY OF MENASHA

By: \_\_\_\_\_  
Donald Merkes, Mayor

Attest: \_\_\_\_\_  
Deborah A. Galeazzi, City Clerk

STATE OF WISCONSIN     )  
  ) ss.  
COUNTY OF WINNEBAGO )

Personally came before me this \_\_\_\_\_ day of January 2011, the above named \_\_\_\_\_, to me known to be the person who executed the foregoing instrument and acknowledged the same in the capacity and the purposes therein intended.

\_\_\_\_\_  
Notary Public, State of Wisconsin  
My Commission: \_\_\_\_\_

STATE OF WISCONSIN     )  
  ) ss.  
COUNTY OF WINNEBAGO )

Personally came before me this \_\_\_\_\_ day of, the above named Donald Merkes, Mayor, and Deborah A. Galeazzi, City Clerk, of the City of Menasha, to me known to be the person who executed the foregoing instrument and acknowledged the same in the capacity and the purposes therein intended.

\_\_\_\_\_  
Notary Public, State of Wisconsin  
My Commission: \_\_\_\_\_

Countersigned pursuant to §62.09(10) Wis. Stats.

APPROVED AS TO FORM:

\_\_\_\_\_  
City Comptroller

\_\_\_\_\_  
Pamela A. Captain, City Attorney

EXHIBITS A, B & C



Consider 16 Dated  
 Overlap of  
 1/20/11  
 for Development  
 for Development  
 for Development

Phase I (Development Area A)  
 Phase II (Development Area B)  
 Phase III (Development Area C)

Phase III (Development Area C)

120 / 143

120  
 143  
 120  
 143

LAKE PARK VILLAS

126 LOTS

Mentenson & Eisele, Inc.  
 217 Main Street  
 Mendota, WI 53120  
 www.mentenson-eisele.com  
 608.833.1111

**DEVELOPMENT AGREEMENT**

**BY AND BETWEEN**

**THE CITY OF MENASHA, WISCONSIN,**

**AND**

**CYPRESS HOMES AND REALTY, INC.**

**DATED AS OF MARCH \_\_\_\_, 2011**

## DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT is made and entered into as of the \_\_\_ day of March 2011, by and between the CITY OF MENASHA, Wisconsin, a Wisconsin municipal corporation with its principal offices located at 140 Main St., Menasha, Wisconsin 54952 (hereinafter "CITY"), and CYPRESS HOMES AND REALTY, INC., a Wisconsin corporation with its principal offices located at 1500 W. College Avenue, Ste A, Appleton, WI 54914 (hereinafter "DEVELOPER").

### RECITALS

The Project to be undertaken by the DEVELOPER, as described herein, is of particular importance to the CITY and provides special benefits to the CITY because it promotes the physical and economic development of the CITY, increases the range of choice in the CITY's housing stock, accelerates sales of CITY-owned property and provides a means of paying the CITY's debt associated with land acquisition and improvements of the CITY-owned development known as Lake Park Villas.

### ARTICLE I

SECTION 1.01 PURPOSE OF AGREEMENT. The parties hereto are entering into this Development AGREEMENT for the preparation and construction of a residential development within Lake Park Villas Project Area and proposed City of Menasha Tax Incremental District Number 12 (TID #12). The parties have worked cooperatively regarding initial planning, financing and feasibility of such a development. Further, the parties have reached an understanding regarding participation in the future development and intend to enter into this Development AGREEMENT to record the understandings and undertakings of the parties and to provide a framework within which the development may proceed.

SECTION 1.02 CERTAIN DEFINITIONS. As used in this AGREEMENT, the following terms shall have the meanings indicated:

"AVAILABLE TAX INCREMENT" – The amount of tax increment (as defined in Sec. 66.1105, Wis. Stats.) generated solely by the Development Property and Development Improvements as of January 1 of each calendar year.

"CONCEPT PLAN" – The conceptual plan, estimated schedule and value estimates for the contemplated development of the Development Property. It is attached as **EXHIBIT** [insert].

"DEVELOPMENT" – The Development Improvements and Infrastructure that constitute the planned development project that is the subject of this AGREEMENT.

"DEVELOPMENT AREA 'D'" – An area consisting of approximately 5 acres located in the NW ¼ of the NE ¼ of Section 17, T20N, R17E and proposed CITY of Menasha Tax Incremental Financing District # 12 attached as **EXHIBIT A**, the actual area of which is to be determined via a Certified Survey Map pursuant to Section 3.02.1

“DEVELOPMENT IMPROVEMENTS” - Means structures, buildings and accoutrements constructed by DEVELOPER in compliance with Implementation Plans comprised of the following:

- Residential condominium development within Development Area “D” comprised of not less than 16 single family residential units with an estimated improved value of \$2.8 million.

“DEVELOPMENT PROPERTY” - means Development Area “D.”

“DEVELOPMENT COSTS” — The hard and soft costs enumerated in the development budget set forth in **EXHIBIT** [insert].

“INFRASTRUCTURE” – Public and Private Infrastructure.

“IMPLEMENTATION PLAN” – Detailed plans, drawings, specifications and other information as required for the site plan review under CITY Ordinances regarding the construction of Private Infrastructure, Infrastructure and Development Improvements. A specific Implementation Plan must be submitted to and approved by the CITY prior to construction as provided by CITY Ordinance. Each specific Implementation Plan shall be attached to this AGREEMENT as an exhibit upon approval by the CITY.

“PERFORMANCE INCENTIVE” – Payment of Available Tax Increment to the DEVELOPER as provided in this AGREEMENT.

“PUBLIC IMPROVEMENTS” – The road improvements, curb and gutter, storm water drainage ponds and other public facilities normally provided by or required by local governments fronting the Development Property whether in place or to be constructed or upgraded in conjunction with the development contemplated in the Concept Plan, including storm water management ponds, but specifically excluding Infrastructure.

“PUBLIC INFRASTRUCTURE”– Those Public Improvements that will be the responsibility of the DEVELOPER as more particularly described in **EXHIBIT** [insert] (attached) and shall include, without limitation, improvements necessary to provide adequate access, sanitary sewer service, storm sewer, water mains and any appurtenances associated with these facilities, storm water drainage, street base course, temporary asphalt paving consisting of at least a two inch binder course, street lighting, pedestrian facilities, trails, sidewalks or other public utility improvements to the Development Property that have been constructed by DEVELOPER and dedicated to the CITY under this AGREEMENT.

“PRIVATE INFRASTRUCTURE” – Site grading in accordance with an approved grading and drainage plan, sanitary sewer laterals, potable water laterals and other facilities owned, constructed and maintained by DEVELOPER to service the Development Improvements from the Public Improvements or Private Infrastructure described more particularly in **EXHIBIT** [insert].

“TID # 12” means CITY of Menasha Tax Incremental District Number 12 and project

plan created by CITY in accordance with Section 5.02.3 hereinafter.

## ARTICLE II

### OVERVIEW OF THE PROJECT

SECTION 2.01 The Project consists of residential condominium development resulting in the creation of not less than 16 single family residential units. Construction is to begin by June 1, 2011 with an expected completion date of December 31, 2017. Upon completion, the Development Improvements will have a value of at least \$2.8 million.

## ARTICLE III

### DEVELOPER OBLIGATIONS

SECTION 3.01 Acquisition of Development Areas. Upon completion of the pre-closing conditions but in no case later than June 1, 2011, DEVELOPER shall acquire fee simple title to Development Area "D."

SECTION 3.01.1 CITY shall transfer the Real Estate to DEVELOPER by warranty deed for \$17,000 per acre subject to the terms and conditions of this AGREEMENT and a separate Real Estate Purchase Agreement to be executed by the parties [insert condition/date]. The Real Estate Purchase Agreement shall provide that DEVELOPER shall pay 8% of the purchase price at closing and DEVELOPER shall execute a Promissory Note in favor of CITY in the amount of the purchase price less the 8% paid at closing with interest at 3.25%. Equal installment payments on the Promissory Note shall be due 12/31/2011, 12/31/2012, 12/31/2013 and 12/31/2014.

SECTION 3.01.2 Title Insurance. The CITY shall obtain and pay for a title insurance commitment in the amount of the purchase price. A commitment by the title company agreeing to issue a title policy upon the recording of proper documents as agreed herein shall be deemed sufficient performance. DEVELOPER may obtain additional title insurance at its cost. The CITY shall provide to DEVELOPER a preliminary commitment for title insurance not less than fifteen (15) days prior to the closing.

SECTION 3.01.3 Title. The CITY shall cooperate with DEVELOPER to clear up any defect in title that may be pertaining to the property; provided, however, the Real Estate shall be conveyed subject to (1) reasonable and customary easements and restrictions of record; (2) a reversion of title in accordance with this AGREEMENT; (3) requisite public and private utility easements; (4) CITY covenants, none of which may be removed or modified without City's approval; and (5) all other terms and conditions of this AGREEMENT.

SECTION 3.01.3 Closing Date. The closing date for the transfer of the Real Estate shall be on or before June 1, 2011 for Development Area "D" and shall be held at the office of the City Attorney, City Hall, 140 Main Street, Menasha, Wisconsin

or where the parties may otherwise agree.

SECTION 3.01.4 The Real Estate shall be conveyed “as is.” The CITY is not responsible for any subsequent remediation, demolition, underground debris, or other clean up costs after conveyance.

SECTION 3.02 DEVELOPER’s Covenant to Develop. DEVELOPER agrees and covenants to use its best efforts to proceed with due diligence to complete the Development substantially in accordance with the Concept Plan and Implementation Plans which plans and specifications shall be subject to such review and approval by the CITY as may be normal, customary or required in order to proceed with the Development in accordance with all applicable rules, codes, regulations, ordinances and laws. The DEVELOPER shall cause IMPROVEMENTS to the DEVELOPMENT AREAS to create a value of not less than \$2.8 million. The cost for such improvements shall include Development hard and soft costs, site clearance and preparation and costs associated with the construction of single family condominium housing units. DEVELOPER shall be required to complete construction of the Development by December 31, 2017.

SECTION 3.03 Compliance with Codes, Plans and Specifications. DEVELOPER, at its own expense, shall obtain all approvals, permits and licenses as may be required by any governmental or non-governmental entity in connection with the Development. The building and other improvements to be constructed upon the Property, the construction thereof, and their uses shall be in compliance with all applicable codes and ordinances of the CITY, and with all pertinent provisions of this AGREEMENT, the Project Plan and the Plans and Specifications.

SECTION 3.04 Taxes. It is understood that the land, improvements and personal property resulting from the Development shall be subject to property taxes. DEVELOPER shall pay when due all federal, state and local taxes in connection with the Project and all operating expenses in connection with the Real Estate and Development.

SECTION 3.05 Public Infrastructure. DEVELOPER shall in connection with and during the construction of the Development undertake at its expense, design and construction of Public Infrastructure in accordance with City of Menasha specifications as furnished to the DEVELOPER by the Menasha Department of Public Works. The Public Infrastructure shall be undertaken consistent with the overall schedule of construction for the Development and shall be completed upon substantial completion of the Development. The Public Infrastructure shall be funded solely by the DEVELOPER. Improvements designed and constructed by the CITY such as curb and gutter and final paving may be specially assessed or otherwise charged against the benefitting properties within the Development, including lots owned by the DEVELOPER at the sole discretion of the CITY.

SECTION 3.06 Private Infrastructure. DEVELOPER shall in connection with and during the construction of the Development undertake at its expense, design and construction of Private Infrastructure in accordance with the approved IMPLEMENTATION PLAN.

SECTION 3.07 Easements. DEVELOPER shall grant the CITY or any public utility such easements as reasonably necessary for public improvements, infrastructure, ingress or egress, utilities, lighting or landscaping or any other need necessary to effectuate the

Development in accordance with approved plans at no cost to the CITY.

SECTION 3.08 Record Retention. DEVELOPER understands and acknowledges that the CITY is subject to Public Records Law of the State of Wisconsin. As such, DEVELOPER agrees to retain all records as defined by Wisconsin Statute §19.35(2) applicable to this AGREEMENT for a period of not less than seven (7) years. DEVELOPER agrees to assist the CITY in complying with any public records request that they receive pertaining to this AGREEMENT. DEVELOPER agrees to indemnify and hold the CITY, their officers, employees and authorized representatives harmless for any liability, including without limitation, reasonable attorney fees relating to or in any way arising from DEVELOPER's actions or omissions which contribute to the Indemnified Party's inability to comply with the Public Records Law. In the event DEVELOPER decides not to retain its records for a period of seven (7) years, then it shall provide written notice to the CITY whereupon the CITY shall take custody of said records assuming such records are not already maintained by the CITY. This provision shall survive termination of this AGREEMENT.

SECTION 3.09 Repair and/or Replacement of Infrastructure. DEVELOPER shall repair and/or replace any damaged CITY infrastructure or other CITY property that may occur as a result of the Development.

SECTION 3.10 Prevailing Wages. DEVELOPER shall pay all applicable prevailing wages as required by Wisconsin law.

#### ARTICLE IV

#### CITY OBLIGATIONS

SECTION 4.01 The CITY shall be responsible for the installation of curb and gutter and final paving, which will not be constructed earlier than one (1) winter season following completion of the development project. The CITY, in its sole discretion, may assess each property/lot owner the cost and expenses associated with these public improvements in accordance with CITY ordinances and state statutes.

SECTION 4.02 Provision of Tax Increment Financial Incentive. In order to induce DEVELOPER to undertake the DEVELOPMENT within proposed TID #12, the DEVELOPER has requested and the CITY may be required to make available financial incentive to the DEVELOPER in a total amount not to exceed \$175,000, for the purpose of implementing the proposed TID #12 Project Plan and this AGREEMENT (the "CITY Contribution"). The CITY Contribution is made pursuant to Sections 66.1105(2)(f)1 of the Wisconsin Statutes, and shall be made available in the amount as follows:

SECTION 4.02.1 DEVELOPER agrees to advance funds for project costs, including costs associated with the installation of the Public Infrastructure. The CITY shall pay the DEVELOPER financial incentive under the terms of this AGREEMENT with funds to be made available upon verification of the Tax Increment increase as defined below.

SECTION 4.02.5 Earned financial incentive based on AVAILABLE TAX INCREMENT may be distributed to the DEVELOPER according to the schedule set forth herein when and only when the 10<sup>th</sup> residential unit in Development Area "D" is completed and certificate of occupancy have been issued: DEVELOPER to be paid an annual payment made on or before September 1, commencing in

2013, equal to 75% of AVAILABLE TAX INCREMENT received by CITY until \$175,000 is paid out or until 2018, whichever occurs first.

**SECTION 4.02.6 CONDITIONS TO PAYMENT OF CITY CONTRIBUTION**

If on or before December 31, 2017, the DEVELOPER has not met the Minimum Development or threshold value of \$2.8 million, the CITY shall not be required to continue to pay DEVELOPER the City contribution.

**SECTION 4.02.7** No City contribution to DEVELOPER provided for in this AGREEMENT shall be paid or deemed due and owing to DEVELOPER for any year in which any property tax pertaining to the Development Property or any portion thereof which is under the ownership and control of the DEVELOPER, is not timely paid. In the event of any delinquency the CITY may give the DEVELOPER 30 days to cure. If the DEVELOPER fails to cure, the City contribution shall be withheld in that year. Nothing in this AGREEMENT shall in any way affect the City's right to enforce collection of property taxes in the manner provided by law.

**SECTION 4.03 CERTIFICATION OF COMPLETION.** Upon completion and review of the Development Improvements by the CITY, the CITY shall provide the DEVELOPER with an appropriate recordable instrument certifying that the improvements have been made in accordance with this AGREEMENT and the project plans and any amendment or modifications thereto.

**SECTION 4.04 CITY PERFORMANCE SUBJECT TO REQUIRED GOVERNMENT APPROVALS.** The DEVELOPER acknowledges that various of the specific undertakings of the CITY described in this AGREEMENT require approvals from the City's Common Council and/or Planning Commission as well as from governmental bodies external to the CITY, some of which approvals may require public hearings and other legal proceedings as conditions precedent thereto. The City's obligations are conditioned upon the obtaining of all such approvals in the manner required by law. The CITY cannot assure that all such approvals will be obtained; however, it agrees to use good faith efforts to obtain such approvals on a timely basis.

**ARTICLE V**

**CONDITIONS PRECEDENT TO CLOSING**

**SECTION 5.01 Purpose.** The parties acknowledge that the Development will require substantial financial resources. While each party is willing and prepared to perform its obligations hereunder, the parties recognize that each must begin its performance under this AGREEMENT and continue it up to the point of Closing without absolute assurance that the other will be able to raise and commit all the funds necessary for Closing.

**SECTION 5.02 Conditions to DEVELOPER's Obligation to Close.** DEVELOPER's obligation to consummate the transactions to be performed by it in connection with the Closing is subject to satisfaction of the following conditions:

**SECTION 5.02.1** The CITY, at its expense, causing Development Areas "D" to be

split from Lot 2 of the Lake Park Villas subdivision and that part, if any, of Parcel #7-01722-00 comprising the Development Area via Certified Survey Map.

SECTION 5.02.2 Creation of a Mixed Use Tax Incremental Financing District – Proposed TID#12 sufficient to meet obligations under this Agreement.

SECTION 5.03 Pre-Closing Undertakings of the DEVELOPER. Prior to Closing, the DEVELOPER agrees that it shall:

SECTION 5.03.1 Financing Commitment. DEVELOPER shall obtain and provide to the CITY: (1) a written financial commitment from a conventional lender, (2) written construction contract to construct and finance the Development, (3) other written proof of financial resources to construct the Development, or (4) any combination thereof. Said documents shall be acceptable in all respects to the CITY, in the sole and absolute discretion of the CITY Comptroller or other agent for the CITY. DEVELOPER shall have closed the loan, which is the subject of the financing commitment and in connection therewith, DEVELOPER shall have provided copies of the documents to be executed in connection with the construction loan to the CITY Comptroller. DEVELOPER shall provide to the CITY copies of all appraisals and market studies prepared in connection with the financial commitment.

SECTION 5.03.2 Prepare conceptual lot layouts and restrictive covenants for the Development which are acceptable to the CITY.

SECTION 5.03.3 Financial Statements. DEVELOPER shall have provided to the City Comptroller, audited financial statements (if available, and if audited financial statements are not available, financial statements in a form reasonably acceptable to the City Comptroller) for fiscal years 2009 and 2010 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. The financial statements must show a financial condition acceptable to the CITY, in the judgment of the CITY Comptroller.

SECTION 5.03.4 DEVELOPER shall at its expense have obtained all necessary approvals and permits necessary to undertake the Development, including but not limited to, site plan review, zoning approvals, and any other local, state or federal approvals or permits.

SECTION 5.03.5 Within [insert number] days of the execution of this AGREEMENT, DEVELOPER will, at its own cost and expense, prepare and file with the appropriate City offices, a Preliminary Plat pursuant to Sec. 14-1-4 of the City of Menasha Code of Ordinances. DEVELOPER will prepare restrictive covenants regarding home and development standards for the Development Area subject to design and permitting requirements of the CITY.

## ARTICLE VI

## REPRESENTATIONS, WARRANTIES AND COVENANTS

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

SECTION 6.01 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 6.02 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 6.03 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 6.04 DEVELOPER will permit representatives of CITY (including legal counsel, accountants, inspectors and consultants) to have full access at all reasonable times, and in a manner so as not to interfere with the normal business operations of DEVELOPER, to all premises, properties, personnel, books, records (including tax records), contracts, and documents of or pertaining to DEVELOPER's business.

SECTION 6.05 CITY represents and warrants it is a municipality, duly organized and validly existing under the laws of the state of Wisconsin.

SECTION 6.06 DEVELOPER represents and warrants it is a corporation, duly organized and validly existing under the laws of the state of Wisconsin.

SECTION 6.07 CITY and DEVELOPER have full power and authority to execute and deliver this AGREEMENT and to perform their obligations hereunder.

SECTION 6.08 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 6.09 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 6.10 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 CITY.

SECTION 6.11 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 6.12 The Representations and Warranties set forth herein shall be true and correct in all material respects at and as of the Closing Date.

SECTION 6.13 DEVELOPER shall have a continuing obligation to immediately report any material adverse changes in its financial condition to the CITY from the Date of Closing through completion of construction.

## ARTICLE VII

### POST-CLOSING OBLIGATIONS OF DEVELOPER

SECTION 7.01 DEVELOPER will, at its expense, cause the Development Area to be platted.

SECTION 7.02 Public Infrastructure. DEVELOPER shall in connection with and during the construction of the Development Area undertake at its expense, design and construction of Public Infrastructure in accordance with City of Menasha specifications as furnished to the DEVELOPER by the Menasha Department of Public Works. The Public Infrastructure shall be undertaken consistent with the overall schedule of construction for the Development Area and shall be completed upon substantial completion of the Development Improvements. The Public Infrastructure shall be funded solely by the DEVELOPER. DEVELOPER shall be responsible to ensure that Contractors installing such infrastructure comply with and pay prevailing wage rates as set forth by the Wisconsin Department of Workforce Development. Other improvements constructed by the City, including sidewalks, curb and gutter and final paving may be specially assessed or otherwise charged against the benefitting properties within the Development, including lots owned by the DEVELOPER.

SECTION 7.03 DEVELOPER acknowledges that the costs of the public infrastructure contemplated by this AGREEMENT is approximately \$150,000. DEVELOPER pledges that it shall complete the construction of the infrastructure shown on [insert plan name] on or before September 1, 2011. In the event the public infrastructure has not been completed by that date, the parties may either agree to an extension, or the CITY may complete the public infrastructure and assess the costs of the public infrastructure against those portions of the Development Area that are benefitted.

SECTION 7.04 Dedication of Public Infrastructure. The DEVELOPER shall dedicate the Public Infrastructure to the CITY without cost to the CITY under the following terms. The CITY shall accept dedication of Public Infrastructure upon (a) receipt of As-Built Drawings, and (b) inspection and satisfaction of CITY staff that the Public Infrastructure was constructed in accordance with the as-built drawings; and (c) DEVELOPER's contractors execute a guarantee, in the form normally required by the CITY for similar work, guaranteeing the workmanship, adequacy and fitness for purpose of the Public Infrastructure for at least 1 year(s) after conveyance to the CITY.

SECTION 7.05 Maintenance of Private Infrastructure. The DEVELOPER shall be responsible for the cost of maintenance of the Private Infrastructure and Development

Improvements.

SECTION 7.06 Failure to Dedicate Public Infrastructure. If the DEVELOPER does not timely dedicate the Public Infrastructure or the Public Infrastructure is not accepted by the CITY, the CITY shall give the DEVELOPER 30 days written notice to cure. Upon failure to cure the CITY may enter the Development Property and repair or reconstruct the Public Infrastructure to the CITY's satisfaction and assess the cost of the repair or reconstruction against benefitted properties or bring an action for specific performance or to otherwise compel compliance with this AGREEMENT.

SECTION 7.07 Except as may be mutually agreed by the CITY and DEVELOPER, the DEVELOPER will participate in FVHB Parade of Home events. [Need specificity here.]

SECTION 7.08 DEVELOPER will initiate construction of at least one (1) home no later than June 1, 2011 in Development Area "D" with an expected completion date of November 1, 2011. All Development Improvements must be completed by December 31, 2017.

SECTION 7.09 Standards of Construction. DEVELOPER shall see to it that all infrastructure and improvements are constructed in a good and workmanlike manner and consistent with prevailing industry standards for high quality construction in the area of the CITY. DEVELOPER shall perform all work in compliance with applicable laws, regulations, ordinances and permits and DEVELOPER shall at its own cost and expense obtain all necessary permits and licenses for such development.

## ARTICLE VIII

### BUDGET AND BUDGET RECONCILITATION; FINANCIAL REPORTS

SECTION 8.01 Attached hereto as **EXHIBIT** [insert] is the DEVELOPER's budget for the Development. The DEVELOPER agrees to maintain records such that its actual expenditures for the Development may be ascertained and reconciled against such budget. From time to time upon reasonable notice from the CITY, authorized representatives of the CITY, including the CITY Comptroller, shall be entitled to examine such records at the DEVELOPER's offices to verify construction costs during and after construction.

## ARTICLE IX

### ASSIGNMENT

SECTION 9.01 The rights, duties and obligations of the DEVELOPER hereunder may not be assigned by DEVELOPER without the written consent of the CITY to the assignment, which consent shall not be unreasonably withheld. Any assignee or purchaser or transferee of any portion of the Real Estate shall be bound by the terms and conditions of this AGREEMENT, which shall run with the land and be binding upon all such assignees, purchasers and transferees. Written evidence satisfactory to the CITY that such assignee or entity has agreed in writing to be bound by the terms of this AGREEMENT must be provided to the CITY. Any such sale, transfer or conveyance of any portions of the Real Estate shall not relieve the DEVELOPER of its obligations hereunder.

## ARTICLE X

### INDEMNITY

SECTION 10.01 DEVELOPER shall indemnify and hold harmless the CITY, its officers,

employees and authorized representatives (Indemnified Party) from and against any and all liabilities, including, without limitation, remediation required by any federal or state agency having jurisdiction, losses, damages, costs and expenses, including reasonable attorney fees and costs, arising out of any third-party claims, causes of action, or demands made against or suffered by the Indemnified Party on account of this AGREEMENT, unless such claims, causes of action, or demands: (a) relate to the Indemnified Party failing to perform its obligations to DEVELOPER; or (b) arise out of any willful misconduct of the Indemnified Party. At the Indemnified Party's request, DEVELOPER shall appear for and defend the Indemnified Party, at DEVELOPER's expense, in any action or proceeding to which the Indemnified Party may be made a party by reason of any of the foregoing.

## ARTICLE XI

### NOTICES

SECTION 11.01 All notices, demands, certificates or other communications under this AGREEMENT shall be sufficiently given and shall be deemed given when hand delivered or when mailed by first class mail, postage prepaid, property addressed as indicated below:

To the DEVELOPER: Cypress Homes and Realty, Inc.  
1500 W. College Ave., Ste A  
Appleton, WI 54914

With a copy to:

To the CITY: City of Menasha, Wisconsin  
City Hall  
140 Main Street  
Menasha, WI 54952  
Attn: CITY Clerk

With a copy to: Greg Keil, Community Development Director  
City Hall  
140 Main Street  
Menasha, WI 54952

Any party may, by written notice to the party (ies), designate a change of address for the purposes aforesaid.

## ARTICLE XII

### NONDISCRIMINATION

SECTION 12.01 In the performance of work under this AGREEMENT, the DEVELOPER agrees not to discriminate against any employee or applicant for employment nor

shall the development or any portion thereof be sold to, leased or used by any party in any manner to permit discrimination or restriction on the basis of race, religion, marital status, age, color, sex, sexual orientation, physical condition, disability, national origin or ancestry and that the construction and operation of the Development shall be in compliance with all effective laws, ordinances and regulations relating to discrimination on any of the foregoing grounds.

## ARTICLE XIII

### MISCELLANEOUS PROVISIONS

SECTION 13.01 ENTIRE AGREEMENT. This document contains the entire AGREEMENT between DEVELOPER and the CITY and it shall inure to the benefit of and shall be binding upon the parties hereto and the respective heirs, executives, successors and assigns. This AGREEMENT may be modified only by a written Amendment signed by the parties, which Amendment shall become effective upon the recording in the Office of Register of Deeds for the County.

SECTION 13.02 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.

SECTION 13.03 DEFAULT. In addition to any remedies set forth within this AGREEMENT, the Parties shall have all rights and remedies available under law or equity with respect to said default. All remedies shall be cumulative and the exercise of one remedy shall not preclude the use of any other or all of said remedies.

SECTION 13.04 FAILURE TO ENFORCE NOT A WAIVER. Failure of the CITY to enforce any provision contained herein shall not be deemed a waiver of the City's right to enforce such provision or any other provision in the event of a subsequent default.

SECTION 13.05 NO SUBORDINATION. The CITY shall not subordinate any interest it has in this AGREEMENT for any reason, unless it is determined to be in the best interests of the CITY.

SECTION 13.06 GOVERNING LAW. This AGREEMENT shall be governed by, enforced and construed in accordance with the domestic laws of the State of Wisconsin.

SECTION 13.07 COUNTERPARTS. This AGREEMENT may be signed in any number of counterparts with the same effect as if the signatures thereto and hereto were upon the same

instrument.

SECTION 13.08 AMENDMENTS AND WAIVERS. No amendment of any provision of this AGREEMENT shall be valid unless the same shall be in writing and signed by CITY and DEVELOPER. No waiver by any party of any provision of this AGREEMENT or any default, misrepresentation, or breach of warranty shall be valid unless the same shall be in writing and signed by the parties making such a waiver, nor shall such waiver be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

SECTION 13.09 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 13.10 RECORDING OF AGREEMENT. The parties hereto agree that the CITY 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 CITY execute and deliver any such memorandum or other document in connection with such recording.

SECTION 13.11 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 13.12 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 13.13 INCORPORATION OF EXHIBITS. The **EXHIBITS** identified in this AGREEMENT are incorporated herein by reference and made a part hereof.

IN WITNESS WHEREOF, the parties have duly executed this AGREEMENT, or caused it to be duly executed, as of the \_\_\_\_\_ day of \_\_\_\_\_, 2011

CYPRESS HOMES AND REALTY, INC.

By: \_\_\_\_\_

By: \_\_\_\_\_

CITY OF MENASHA

By: \_\_\_\_\_

Donald Merkes, Mayor

Attest: \_\_\_\_\_

Deborah Galeazzi, City Clerk

STATE OF WISCONSIN )  
 ) ss.  
COUNTY OF WINNEBAGO )

Personally came before me this \_\_\_\_ day of March 2011, the above named \_\_\_\_\_,  
to me known to be the person who executed the foregoing instrument and acknowledged the same in the capacity and the purposes therein intended.

\_\_\_\_\_  
Notary Public, State of Wisconsin  
My Commission: \_\_\_\_\_

STATE OF WISCONSIN )  
 ) ss.  
COUNTY OF WINNEBAGO )

Personally came before me this \_\_\_\_ day of March 2011, the above named Donald Merkes, Mayor, and Deborah Galeazzi, City Clerk, of the City of Menasha, to me known to be the person who executed the foregoing instrument and acknowledged the same in the capacity and the purposes therein intended.

\_\_\_\_\_  
Notary Public, State of Wisconsin  
My Commission: \_\_\_\_\_

Countersigned pursuant to §62.09(10) Wis. Stats.

\_\_\_\_\_  
City Comptroller

APPROVED AS TO FORM:

