

TEMPORARY ORDINANCE NO. 4-12

PERMANENT ORDINANCE NO. 4-12

AN ORDINANCE APPROVING AND AUTHORIZING THE EXECUTION AND DELIVERY OF A SETTLEMENT AGREEMENT AND MUTUAL RELEASE BY AND AMONG THE CITY OF LANCASTER, OHIO, FLAGSTAR BANK, FSB AND ISLAND CAPITAL INVESTMENT GROUP, LLC, AND DECLARING AN EMERGENCY

WHEREAS, in connection with the Tax Increment Financing Agreement dated as of October 3, 2006 (the "TIF Agreement") by and among the City of Lancaster, Ohio (the "City"), Island Capital Investment Group, LLC ("Island Capital"), Menard, Inc., RLG Lancaster Ltd., GCG Lancaster Ltd., Anchor Lancaster, LLC and Wal-Mart Stores East, LP, the City made a draw of \$454,100 (the "Draw") on a letter of credit (the "Letter of Credit") issued by Flagstar Bank, FSB ("Flagstar") for the benefit of Island Capital's obligations pursuant to the TIF Agreement; and

WHEREAS, a dispute has arisen among the City, Flagstar and Island Capital regarding the Draw which resulted in the filing of a lawsuit entitled *The City of Lancaster v. Flagstar Bank, FSB and Island Capital Investment Group, LLC*, Case No. 2:10-cv-1041, S.D. Ohio, Marbley, J. (the "Lawsuit"); and

WHEREAS, the City, Island Capital and Flagstar have negotiated the Settlement Agreement and Mutual Release (the "Settlement Agreement");

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Lancaster, Fairfield County, Ohio, that:

SECTION 1. It is determined that it is the best interest of the City to enter into the Settlement Agreement to resolve the Lawsuit and other disputes among the City, Island Capital and Flagstar. The Settlement Agreement now on file with the Clerk of this Council is approved, and the Mayor is authorized to execute and deliver the Settlement Agreement in substantially the form now on file with the Clerk of this Council with such changes that are not materially adverse to the interests of the City and are approved by the Mayor, all of which shall be conclusively evidenced by the Mayor's execution of the Settlement Agreement.

SECTION 2. This Council finds and determines that all formal actions of this Council concerning and relating to the passage of this ordinance, and all deliberations of this Council and of any committees that resulted in those formal actions, were taken in meetings open to the public in compliance with the law.

SECTION 3. This ordinance is declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety of the City and for the further reason that this ordinance is required to be immediately effective in order to timely resolve the Lawsuit and permit the City to use the resulting draw on the Letter of Credit and other amounts received pursuant to the Settlement Agreement, this ordinance shall be in full force and effect immediately upon its passage and approval by the Mayor.

Passed: 3/26/2012 after 1st reading. Vote: Yeas 7 Nays 0

Date Approved: 3/26/2012

Clerk: Teresa Lee Sandy

[Signature]  
President of Council  
[Signature]  
Mayor

The foregoing is a true and correct copy of Ordinance 4-12 as adopted by the Council of the City of Lancaster, Ohio at its meeting on March 26, 2012.

Offered by: [Signature]

Second by: [Signature]

Requested by Finance Committee

I, Teresa Lee Sandy, Clerk of Council do hereby certify that on \_\_\_\_\_, 2012 the Lancaster Eagle Gazette published the summary of this ordinance in accordance with Ohio Revised Code 731.24.

\_\_\_\_\_  
Clerk of Council

## SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE (the "Settlement Agreement") is made by and between The City of Lancaster ("Lancaster"), on the one hand, and Flagstar Bank, FSB ("Flagstar") and Island Capital Investment Group, LLC ("Island Capital"), on the other. Lancaster, Flagstar, and Island Capital are collectively referred to as the "Parties."

**WHEREAS**, Lancaster, Island Capital, Menard, Inc., RLG Lancaster Ltd., GCG Lancaster, Ltd., Anchor Lancaster, LLC and Wal-Mart Stores East, LP entered into a certain Tax Increment Financing Agreement dated as of October 3, 2006 (the "TIF Agreement");

**WHEREAS**, Pursuant to the TIF Agreement, Island Capital provided to Lancaster an irrevocable standby letter of credit ("LOC") issued by Flagstar in the amount of \$1,084,320.00;

**WHEREAS**, On or about October 1, 2009, Island Capital failed to provide a replacement LOC as required under the TIF Agreement;

**WHEREAS**, On or about October 6, 2009, Lancaster drew the entire amount of the LOC (\$1,084,320.00) from Flagstar in pursuant to the TIF Agreement due to Island Capital's failure to provide a replacement letter of credit (the "Initial LOC Draw");

**WHEREAS**, Subsequent to the Initial LOC Draw, Lancaster and Flagstar agreed (i) to reduce the amount of City's draw on the LOC to \$542,160.00, (ii) that Lancaster would return \$542,160.00 of the initial draw on the LOC to Flagstar minus \$18,000.00 for certain legal expense and minus \$70,000.00 to be placed in a separate escrow account (the "Escrow Fund") for application if Island Capital failed to pay property taxes or service payments due under the TIF Agreement (the "Island Capital Defaults") and (iii) the remaining \$542,000 of the Initial LOC Draw (the "Remainder LOC Draw") would be subject to the TIF Agreement;

**WHEREAS**, On September 6, 2009, Lancaster issued and delivered its \$542,160.00 Island Capital TIF Note, Series 2009 bearing interest from the date of the draw on the Island Capital LOC and maturing on December 31, 2010 (the "2009 TIF Note") in exchange for the Remainder LOC Draw;

**WHEREAS**, On December 31, 2010, Lancaster issued and delivered its \$553,861.62 Island Capital TIF Note, Series 2010 maturing on December 31, 2011 (the "2010 TIF Note") to Island Capital in exchange for Island Capital's delivery of the 2009 TIF Note to Lancaster;

**WHEREAS**, On December 31, 2011, Lancaster issued and delivered its \$563,554.20 Island Capital TIF Note, Series 2011 maturing on December 31, 2012 (the

“2011 TIF Note”) to Island Capital in exchange for Island Capital's delivery of the Series 2010 TIF Note to Lancaster;

**WHEREAS**, A dispute has arisen between the Parties as to the application of the proceeds of the Remainder LOC Draw which resulted in the filing of a lawsuit entitled *The City of Lancaster v. Flagstar Bank, FSB and Island Capital Investment Group, LLC*, Case No. 2:10-cv-1041, S.D. Ohio, Marbley, J. (the “Lawsuit”); and

**WHEREAS**, by this Settlement Agreement and with no admission of liability, each of the Parties, subject to the terms and conditions set forth herein, hereby settle and compromise the Lawsuit.

**NOW, THEREFORE**, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **Consideration.**

(a) **Payment.** Within ten (10) business days following the effective date of authorizing legislation promulgated by Lancaster, (the “Payment Date”), Lancaster shall pay to Flagstar the sum of Two Hundred and Twenty Five Thousand Dollars (\$225,000.00), as follows:

(i) One Hundred Thousand Dollars (\$100,000.00) shall be transferred to Flagstar pursuant to the wire instructions provided herein; and

(ii) One Hundred and Twenty Five Thousand (\$125,000.00) shall be retained by Lancaster for full and final payment of all attorneys fees it has incurred in connection with the Lawsuit.

(b) **LOC Note Reduction.** On the Payment Date, Lancaster shall issue and deliver to Island Capital a replacement 2011 TIF Note bearing interest from December 31, 2011 and maturing on December 31, 2012 in the principal amount of \$338,554.20 in exchange for Island Capital's delivery of the 2011 TIF Note. The replacement 2011 TIF Note reflects a reduction in the current principal amount of the 2011 TIF Note of \$225,000.00. Island Capital agrees that such replacement 2011 TIF Note is acceptable and waives any claim or counterclaim regarding the amount of the replacement 2011 TIF Note.

(c) **Escrow Account.** On the Payment Date, Lancaster shall, first, pay from the Escrow Fund any amount due because of Island Capital Defaults under the TIF Agreement, and, second, pay any remaining amount in the Escrow to Flagstar. Any amount to be paid to Flagstar shall be paid by wire transfer pursuant to the wire instructions provided herein.

(d) **Wire Instructions.** All payments made to Flagstar shall be transferred according to these instructions:

Bank:  
Bank Location:  
ABA/ Routing No.:  
Account Name:  
Account No.:  
Attn:

2. **Dismissal With Prejudice.** The Parties agree that the Lawsuit, including all claims, counterclaims, and affirmative defenses shall be dismissed with prejudice, with each Party to bear its own attorney fees and costs, except as set forth in paragraph 1(a)(ii), above. Lancaster shall file a Notice of Dismissal With Prejudice, in the form attached in Exhibit A, on behalf of all of the parties, by the Payment Date.

3. **Mutual and Full Release.** Lancaster, , on behalf of itself and its respective agents, servants, employees, officers, directors, attorneys, predecessors, successors, assigns, and other related persons or entities shall, by their execution of this Agreement, be deemed to have RELEASED and FOREVER DISCHARGED Flagstar and Island Capital, and each of their respective agents, servants, employees, officers, directors, attorneys, predecessors, successors, assigns, members, partners, limited partners, general partners, parent corporations, affiliates, subsidiaries, executors, administrators, heirs and other related persons or entities, whether or not named herein, from any and all claims, actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, liabilities, liens, judgments, executions, claims and demands whatsoever, in law or equity, which Lancaster ever had, now has, or hereafter may have, from the beginning of the world to the date of this Settlement Agreement, that arise from, relate to, are based upon, or associated with, directly or indirectly, the Lawsuit and the conduct giving rise thereto, whether now or hereafter existing, whether known or unknown, asserted or unasserted, equitable or legal, arising under or pursuant to common law or statutory law, rules, or regulations including, but not limited to, state and/or federal law.

Likewise, Flagstar and Island Capital, on behalf of themselves and their respective agents, servants, employees, officers, directors, attorneys, predecessors, successors, assigns, members, partners, limited partners, general partners, parent corporations, affiliates, subsidiaries, and other related persons or entities shall, by their execution of this Agreement, be deemed to have RELEASED and FOREVER DISCHARGED Lancaster, and each of its respective agents, servants, employees, officers, directors, attorneys, predecessors, successors, assigns, members, partners, limited partners, general partners, parent corporations, affiliates, subsidiaries, executors, administrators, heirs and other related persons or entities, whether or not named

herein, from any and all claims, actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, liabilities, liens, judgments, executions, claims and demands whatsoever, in law or equity, which Flagstar and Island Capital, separately or collectively, ever had, now have, or hereafter may have, from the beginning of the world to the date of this Settlement Agreement, that arise from, relate to, are based upon, or associated with, directly or indirectly, the Lawsuit and the conduct giving rise thereto, whether now or hereafter existing, whether known or unknown, asserted or unasserted, equitable or legal, arising under or pursuant to common law or statutory law, rules, or regulations including, but not limited to, state and/or federal law.

Notwithstanding the foregoing Releases, going forward, the Parties are not otherwise released from their contractual obligations, if any, set forth in the TIF Agreement.

4. **No Admission.** This Settlement Agreement constitutes a settlement only and may not be used for any purpose not expressly provided for herein. Neither the making of this Settlement Agreement nor any of the provisions herein shall constitute or be considered an admission of wrongdoing by any of the Parties.

5. **Voluntary Agreement/Assistance of Counsel.** Each of the Parties represents that it has been represented and advised in connection with the negotiation of this document by counsel of its choice. No Party is relying on the legal advice of any other Party hereto.

6. **Notice.** All notices to be provided under this Agreement may be provided by facsimile transmission, United States mail, or overnight delivery service such as Federal Express. Notices and payments made under this Agreement shall be directed to:

The City of Lancaster:  
Drew H. Campbell, Esq.  
Bricker & Eckler, LLC  
100 South Third Street  
Columbus, OH 43215  
Telephone: (614) 227-2319  
Facsimile: (614) 227-2390

Notices to Flagstar Bank, FSB shall be directed to:

Notices sent to Island Capital Investment Group, LLC, shall be sent to:  
Richard Wolney  
5728 Eaglesham Drive

Westerville, Ohio 43081

All such notices shall be conclusively deemed to have been received, in the case of facsimile delivery, upon transmission, in the case of United States mail, on the third day following mailing or, in the case of overnight delivery, the day guaranteed by the carrier, absent information to the contrary provided by the carrier.

7. **Entire Agreement.** This Settlement Agreement comprises the entire and final agreement between the Parties hereto concerning the subject matter set forth herein, and supersedes all prior and/or contemporaneous oral or written agreements, representations, or understandings of any nature, including, without limitation, drafts or other writings or proposed settlement agreements. It is further understood and agreed that this Settlement Agreement, including this paragraph, shall not be varied, modified, or contradicted by evidence of prior, contemporaneous, or subsequent agreements or conduct of any nature, absent an express writing, signed by the Parties. There are no unwritten agreements or understandings between the Parties related to the subject matter of this Settlement Agreement, as set forth herein.

8. **Severability.** If any provision of this Settlement Agreement or application thereof to any person or entity is held invalid, such invalidity shall not affect other provisions or applications of this Settlement Agreement, and to this end the provisions of this Settlement Agreement are severable.

9. **Contract Matters.** It is hereby expressly understood and agreed that the terms hereof are contractual and not merely recitals.

10. **Waiver.** Any waiver by any Party of any breach or violation of any term or condition of this Settlement Agreement shall not operate as a waiver of any other breach of such term and condition or any other term or condition nor shall any failure to enforce any provision hereof operate as a waiver of such provision or of any other provision hereof or constitute or be deemed a waiver or release of any rights, either at law or in equity.

11. **Authority.** Each of the Parties hereto acknowledges and represents that it has the full power, authority, and capacity to enter into this Settlement Agreement, and that the person/people signing this Settlement Agreement on its behalf has the full power, capacity, and authority to do so.

12. **Successors and Assigns.** This Agreement shall be binding upon, and shall inure to the benefit of, the successors, assigns, executors, and other legal representatives of the Parties hereto.

13. **Choice of Law.** This Agreement shall be governed by the laws of the State of Ohio, notwithstanding its conflict of laws provisions.

14. **Preparation of Settlement Agreement.** The Parties hereto acknowledge that this Settlement Agreement was the result of negotiation and discussion among the Parties. The Parties further acknowledge that this Settlement Agreement shall be deemed to have been jointly prepared and that no particular Party is to be deemed the drafter or preparer of this Settlement Agreement. Accordingly, to the extent there should later prove to be ambiguities in the Settlement Agreement, the Parties agree that such ambiguity shall not be construed in favor of or against a particular Party to this Settlement Agreement.

15. **Counterparts.** It is understood and agreed that this Settlement Agreement may be executed in any number of counterparts, each of which is deemed to be an original, all of which when taken together shall constitute but one agreement.

16. **Effective Date.** This Settlement Agreement shall be deemed to become effective upon the latest date of execution by the Parties hereto, following appropriate authorizing legislation promulgated by Lancaster.

**IN WITNESS WHEREOF**, intending to be legally bound hereby, and to legally bind their successors and assigns, each of the Parties has hereunto set their respective hand or have caused it to be executed by their duly authorized representative.

THE CITY OF LANCASTER

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

Its: \_\_\_\_\_

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

FLAGSTAR BANK, FSB

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

Its: \_\_\_\_\_

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

ISLAND CAPITAL INVESTMENT GROUP,  
LLC

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

Its: \_\_\_\_\_

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

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

CITY OF LANCASTER,	:	
	:	
Plaintiff-Counterclaim	:	
Defendant,	:	Case No. 2:10 CV 1041
	:	
v.	:	Judge Marbley
	:	Magistrate Judge Deavers
FLAGSTAR BANK, FSB, et al.,	:	
	:	
Defendants-Counterclaim	:	
Plaintiffs.	:	

**NOTICE OF DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a) and the terms of the Settlement Agreement by and between them, each of the parties hereto dismisses, with prejudice, each claim, counterclaim, and affirmative defense each has raised in this action. The parties' shall assume costs and fees as set forth in their settlement agreement.

Respectfully submitted,

/s/ Drew H. Campbell  
Drew Campbell (0047197)  
Bridget Purdue Riddell (0082502)  
BRICKER & ECKLER, LLP  
100 South Third Street  
Columbus, Ohio 43215  
Telephone: (614) 227-2310  
Fax: (614) 227-2390  
Email: [dcampbell@bricker.com](mailto:dcampbell@bricker.com)  
*Attorneys for the City of Lancaster*

/s/ Joseph R. Miller  
Joseph R. Miller (0068463)  
Jonathan P. Corwin (0075056)  
VORYS, SATER, SEYMOUR & PEASE,  
52 East Gay Street  
Columbus, Ohio 43215  
Telephone: (614) 464-6233  
Fax: (614) 719-4630  
Email: [jrmiller@vorys.com](mailto:jrmiller@vorys.com)  
*Attorneys for Flagstar Bank, FSB*

/s/ Joseph F. Murray

Joseph F. Murray (0063373)

MURRAY MURPHY MOUL + BASIL

1533 Lake Shore Drive

Columbus, Ohio 43204

Telephone: (614) 488-0400

Fax: (614) 488-0401

Email: murray@mmmb.com

*Counsel for Island Capital Investment Group, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on \_\_, \_\_, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Drew H. Campbell