

TEMPORARY ORDINANCE NO. 11-10

PERMANENT ORDINANCE NO. _____

AN ORDINANCE APPROVING, AND AUTHORIZING THE EXECUTION AND DELIVERY OF, AN INDEMNIFICATION AGREEMENT BY AND BETWEEN THE CITY OF LANCASTER, OHIO, AND FLAGSTAR BANK, FSB, AND DECLARING AN EMERGENCY

WHEREAS, pursuant to Ordinance No. 39-06 (the "TIF Ordinance"), passed by this Council on September 11, 2006, the City declared certain improvements to certain property (the "Property") to be a public purpose, exempting portions of the value of those improvements from real property taxes, specified that certain public infrastructure improvements, including the improvements described in Section 1 (the "Improvements"), would benefit that property, requiring the owners of the Property to make service payments in lieu of taxes (the "Service Payments"), creating the Ety Road Municipal Tax Increment Equivalent Fund (the "TIF Fund"), and authorizing a Tax Increment Financing Agreement (the "TIF Agreement") by and among the City, Island Capital Investment Group, LLC ("Island Capital"), Menard, Inc. ("Menard"), RLG Lancaster Ltd. ("RLG Lancaster"), GCG Lancaster Ltd. ("GCG Lancaster"), Anchor Lancaster, LLC ("Anchor Lancaster" and together with RLG Lancaster and GCG Lancaster, "RG/Anchor") and Wal-Mart Stores East, LP ("Wal-Mart", and together with Island Capital, Menard and RG/Anchor, the "TIF Parties"); and

WHEREAS, pursuant to Ordinance No. 18-09, passed by this Council on September 28, 2009, the City issued general obligation notes, in anticipation of the issuance of bonds, in an aggregate principal amount of \$3,475,000 bearing interest at a rate of 1.75% to pay costs of the Improvements as required by the TIF Agreement (such notes, any prior notes issued to pay costs of the Improvements, and any subsequent notes or bonds retiring such notes or bonds are collectively referred to herein as the "Debt"); and

WHEREAS, pursuant to Section 3.15 of the TIF Agreement, Island Capital provided a letter of credit from Flagstar Bank, FSB ("Flagstar") for a maximum amount of \$1,084,320 (the "Letter of Credit") to secure the payment of a portion of the Debt; and

WHEREAS, subsequent to the delivery of the Letter of Credit, the City and Island Capital agreed that the maximum amount of the Letter of Credit should be reduced by 50% to \$542,160; and

WHEREAS, Island Capital failed to provide to the City a new, revised or amended Letter of Credit reflecting the 50% reduction in the amount of the Letter of Credit; and

WHEREAS, Island Capital failed to provide a new Letter of Credit prior to the expiration of the existing Letter of Credit; and

WHEREAS, pursuant to the terms of the TIF Agreement, the City drew the entire maximum amount of the Letter of Credit (\$1,084,320); and

WHEREAS, this Council has authorized a Settlement and Escrow Agreement with Island Capital regarding the use of the proceeds of the draw on the Letter of Credit; and

WHEREAS, Flagstar sent a letter to the City asserting that (i) one-half of the draw on the Letter of Credit (\$542,160), (ii) Island Capital is in default in respect of its obligations to Flagstar Bank, (iii) any delivery by the City of a portion of the draw of the Letter of Credit to Island Capital is wrongful, and (iv) failure of the City to return one-half of the draw on the Letter of Credit to Flagstar may subject the City to immediate legal action by Flagstar; and

WHEREAS, the City and Flagstar desire to have a court determine the competing claims of Flagstar and Island Capital to one-half of the draw on the Letter of Credit;

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

SECTION 1. It is in the best interests of the City to file an interpleader complaint pursuant to Ohio Civil Rule 22 in the Fairfield County Court of Common Pleas naming Flagstar and Island Capital as defendants to resolve their competing claims to portions of the draw on the Letter of Credit. Since Flagstar desires to indemnify the City for certain amounts the City desires to withhold from one-half of the draw of the Letter of Credit should Island Capital prevail in the dispute regarding the draw on the Letter of Credit, it is also in the best interest of the City to enter into an Indemnification Agreement with Flagstar. Thus, the Indemnification Agreement in the form now on file with this Council is approved, and the Mayor is authorized to execute and deliver on behalf of the City the Indemnification Agreement in substantially the form now on file with this Council with such changes that are not materially adverse to the interests of the City and are approved by the Mayor. The Mayor's execution and delivery of the Indemnification Agreement shall be conclusive evidence of his approval of any changes to that agreement. Upon the execution and delivery of the Indemnification Agreement, the Director of Law is authorized to file an interpleader complaint substantially in the form attached to the Indemnification Agreement and the Treasurer is authorized to deposit the Funds (as defined in the Indemnification Agreement) with the Fairfield County Court of Common Pleas.

SECTION 3. This Council finds and determines that all formal actions of this Council concerning and relating to the passage of this Ordinance were taken in an open meeting of this Council and that all deliberations of this Council and of any of its committees that resulted in those formal actions were in meetings open to the public, all in compliance with the law.

SECTION 4. 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 avoid possible legal action against the City by Flagstar and/or Island Capital; wherefore, this Ordinance shall be in full force and effect immediately upon its passage and approval by the Mayor.

Passed: _____ after _____ reading. Vote: Yeas _____ Nays _____

Date Approved: _____

Clerk: _____

President of Council

Mayor

The foregoing is a true and correct copy of Ordinance ____-10 as adopted by the Council of the City of Lancaster, Ohio at its meeting on _____, 2010.

Offered by: _____

Second by: _____

Requested by Finance Committee

I, Teresa Lee Sandy, Clerk of Council do hereby certify that on _____, 2010 the Lancaster Eagle Gazette published the summary of this ordinance in accordance with Ohio Revised Code 731.24.

Clerk of Council

INDEMNIFICATION AGREEMENT

This Indemnification Agreement (“Agreement”) is made and entered into by and between City of Lancaster (“City”) and Flagstar Bank, FSB (“Flagstar Bank”).

RECITALS

WHEREAS, in 2006, the City entered into a Tax Increment Financing Agreement (“TIF Agreement”) with Island Capital Investment Group, LLC (“Island Capital”), in connection with the development of certain property located in Fairfield County, Ohio; and

WHEREAS, the TIF Agreement required, inter alia, that Island Capital provide a letter of credit to secure certain payments to the City; and

WHEREAS, Island Capital obtained a Irrevocable Standby Letter of Credit (“Letter of Credit”) from Flagstar Bank and in favor of the City in the amount of \$1,084,320.00 and, pursuant to the terms of the TIF Agreement, provided that Letter of Credit to the City; and

WHEREAS, on November 20, 2007, the City entered into a letter agreement (“Letter Agreement”) with Island Capital to reduce the required Letter of Credit amount by 50% upon certain conditions; and

WHEREAS, Island Capital did not, however, provide the City with a replacement Letter of Credit reflecting the newly agreed upon amount; and

WHEREAS, the TIF Agreement provided that “[t]he City shall draw on a Letter of Credit in the entire amount of that Letter of Credit if the provider of that Letter of Credit has not provided a new Letter of Credit ... at least 15 days prior to the expiration of the then current Letter of Credit;” and

WHEREAS, because Island Capital did not provide a new letter of credit at least 15 days prior to the expiration of the then current Letter of Credit on January 3, 2010, the City drew the entire amount of \$1,084,000.00; and

WHEREAS, Island Capital demanded a return of 50% of that draw, i.e., \$542,160.00, pursuant to the terms of the prior Letter Agreement; and

WHEREAS, on July 19, 2010, the City authorized a settlement agreement ("Settlement Agreement") with Island Capital which provided that the City would retain 50% of the draw, i.e., \$542,160.00, plus \$18,000.00 for the City's legal expenses, plus \$70,000.00 to be held in an Escrow Fund. Pursuant to the Settlement Agreement, the remaining balance, \$454,160.00, would be paid to Island Capital and its attorneys ("Funds"); and

WHEREAS, On July 16, 2010, the City received a letter from Flagstar Bank asserting that:

- a. the funds in question do not, and never did, belong to Island Capital but instead belong to Flagstar Bank;
- b. Island Capital is in default in respect of its obligations to Flagstar Bank;
- c. Flagstar Bank will consider the delivery of any such funds to or for the benefit of Island Capital as wrongful; and
- d. the failure of the City to return such funds directly to Flagstar Bank may subject the City to immediate legal action on behalf of Flagstar Bank; and

WHEREAS, the City and Flagstar Bank desire to have a court determine the competing claims to the Funds asserted by Flagstar Bank and Island Capital.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing and the obligations, covenants, and representations set forth in this Agreement, the City and Flagstar Bank agree as follows:

1. Interpleader. The City shall file an Interpleader Complaint, pursuant to Ohio Civil Rule 22, in the Fairfield County Court of Common Pleas, naming as defendants Flagstar Bank and Island Capital, in the form attached hereto as Exhibit A. Contemporaneously therewith, the City shall also deposit the Funds with the Fairfield County Court of Common Pleas.
2. Escrow Funds. The City shall establish a separate fund in the custody of the City entitled the "Capital Island/ Flagstar Escrow Fund." From the City's draw on the Letter of Credit, \$70,000.00 shall be deposited into the Escrow Fund. The amount on deposit in the Escrow Fund may be used to pay Taxes or Service Payments of Island Capital (as more fully defined in the TIF Agreement) to the extent those remain unpaid for 90 days past their respective due-date. Upon the earlier of: (i) timely payment of all Taxes and Service Payments for three consecutive calendar years after execution of this Agreement, or (ii) Island Capital's bona fide sale or transfer of all of the Island Capital Property (as defined in the TIF Agreement) to unrelated persons or entities and all Taxes and Service Payments have been paid, the City shall pay the amount then on deposit in the Escrow Fund to Flagstar Bank or Island Capital, or their respective designees, consistent with the outcome of the Interpleader action referenced in paragraph 1.
3. Indemnification. In consideration of the foregoing, Flagstar Bank hereby agrees to indemnify and hold the City and its officials and employees harmless from liability upon any and all claims, demands, and causes of action of any kind whatsoever that will or may be

asserted by Island Capital with respect to amounts withheld by the City above and beyond 50% of the \$1,084,000.00 draw the City made on the Letter of Credit, i.e., the \$18,000.00 withheld to pay the City's legal expenses, and the \$70,000.00 withheld in the Escrow Fund. Flagstar Bank and the City further agree, however, that the total obligation of Flagstar Bank to indemnify and hold harmless under this Section shall in no event exceed \$88,000.00.

4. No Admission. Neither the execution nor performance of any terms of this Agreement constitutes or may be construed as an admission of liability or wrongdoing whatsoever by the City or Flagstar Bank.

5. Interpretation. The City and Flagstar Bank have each had an opportunity for their legal counsel to review this Agreement, and this Agreement may not be interpreted against any party because that party's counsel drafted this Agreement in whole or in part.

6. Entire Agreement. Each of the parties to this Agreement acknowledges that the party is entering into this Agreement in good faith and of the party's own free will and that no other party or agent or attorney of any other party has made any promises or representations, express or implied, written or oral, not contained herein to induce any other party to execute this instrument or any other document referred to herein, and that this Agreement constitutes the entire agreement and understanding between them. No waiver, modification, or termination of the terms hereof will be valid unless in writing signed by the party to be charged. The parties further acknowledge that they understand the terms of this Agreement and acknowledge that they were adequately represented and advised by their independent, competent counsel.

7. Governing Law. This Agreement will be governed by and construed in accordance with the substantive law of the State of Ohio and, if breached, is enforceable by an action in the courts of that state.

8. Counterparts. This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which together will constitute one in the same instrument. A facsimile transmitted signature will be considered valid and binding upon the parties as if an original.

IN WITNESS WHEREOF, this Agreement was executed by the authorized representative of each of the parties.

The City of Lancaster

By: _____

Its: _____

Sworn to and subscribed in my presence this _____ day of _____, 2010.

NOTARY PUBLIC

Flagstar Bank, FSB

By: _____

Its: _____

Sworn to and subscribed in my presence this _____ day of _____, 2010.

NOTARY PUBLIC