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LEGAL SERVICES DEPARTMENT


Office of the City Attorney

100 North Appleton Street

Appleton, WI 54911

Phone: 920/832-6423

Fax: 920/832-5962

TO: Members of the Common Council
FROM: James P. Walsh, City Attorney 
DATE: August 1, 2013
RE: RiverHeath Assignment and Subordination

On the Agenda for the Council's approval this evening is the signing of a Collateral Assignment and Subordination Agreement from the City of Appleton to National Exchange Bank & Trust. The Developers for the RiverHeath project have been in negotiation with National Exchange Bank & Trust for a loan to continue progress on the RiverHeath development site. Pursuant to the terms of the City's Development Agreement with RiverHeath, the City has agreed to subordinate its interest to any loans made to the Developer. The Agreement indicates that the subordination provision is self-operative.

Attached you will find a communication from the bank's counsel requesting the City Council approve the Subordination Agreement. That agreement is attached for your information. If you have any questions in this regard, please feel free to contact Mayor Hanna, Director Harkness or myself.

Attachment

JPW:jls



Whyte Hirschboeck Dudek S.C.

Thomas E. Klancnik
Direct Dial: 608-258-7121
tklancnik@whdlaw.com

July 29, 2013

Mr. David R. Moody
Senior Vice President
National Exchange Bank & Trust
130 South Main Street
P.O. Box 988
Fond du Lac, WI 54936-0988

Re: Riverheath, LLC Loans

Dear Mr. Moody:

The only major open item with respect to loans to Riverheath, LLC, RH C1, LLC and RH Ventures, Inc. is the approval by the City Council of the City of Appleton of the Consent of City, Subordination and Agreement to Make Payments to Lender (the "Consent"). As we have discussed, the ambiguities in the Development Agreement, as amended, between the City of Appleton and Riverheath, LLC have led us to recommend that National Exchange Bank & Trust cannot rely on tax increment finance payments from the City for the duration of the loan. However, if the City Council were to approve the execution of the Consent by the Mayor, we would then recommend that the last open item to closing the loan would have been completed.

Of course, there are other conditions precedent to closing the loans, many relating to the real estate and the guarantees. However, we consider those to be normal deliveries for any loan closing and should not represent an impediment to closing the loan, once the City Council approval has been obtained.

If you have any questions, please call.

Very truly yours,

Thomas E. Klancnik

TEK/jah

WHD/9672775.1

COLLATERAL ASSIGNMENT
OF TAX INCREMENT DISTRICT NO. 8
DEVELOPMENT AGREEMENT

THIS COLLATERAL ASSIGNMENT OF DEVELOPMENT AGREEMENT (this "Assignment") is made and entered into as of July __, 2013 by RiverHeath, LLC, a Wisconsin limited liability company ("Borrower") in favor of National Exchange Bank and Trust ("Lender").

RECITALS

A. Borrower has requested that Lender make a loan to Borrower, RH Ventures, Inc. and RH C1 LLC in the aggregate, maximum principal amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000) (the "TIF Loan") pursuant to a Construction Loan Agreement dated the date hereof. The Loan will be evidenced by a promissory note in the maximum principal amount of the Loan and will be secured by one or more Mortgages (the "Mortgages"). Proceeds of the Loan will be used for the construction upon certain lands more particularly described in Exhibit A to the Mortgages (the "Project").

B. Borrower and the City of Appleton, a Wisconsin municipal corporation (the "City"), have entered into that certain Tax Increment District No. 8 Development Agreement dated July 15, 2009, as amended (as amended, the "Development Agreement") under which the City shall pay to Borrower a principal amount up to \$9,750,000, plus interest as provided in the Agreement. A true, correct and complete copy of the Development Agreement is attached hereto and made a part hereof as Exhibit B.

C. Lender will not make the Loan unless this Assignment is executed.

D. Borrower desires to execute this Assignment, in accordance with the terms and provisions hereof, in order to induce Lender to make the Loan.

NOW, THEREFORE, in consideration of the foregoing and of the mutual promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Borrower and the City, the parties hereto hereby agree as follows:

1. Assignment of Rights to Receive Payments under Development Agreement. Borrower hereby collaterally assigns and transfers to Lender all of its rights and interests the obligations of the City to make the payments required in Sections 4.4, 4.5 and 4.6 of the Development Agreement, including without limitation the obligations of the City to make the City's Contributions to the Borrower or RH

Ventures, Inc. plus interest thereon, to secure the payment and performance by Borrower of its Obligations under the Note. The Borrower shall direct the City to make such payments directly to the Lender without any further action on the part of the Borrower.

2. Assignment of Development Agreement. Borrower hereby collaterally assigns and transfers to Lender all of its other rights and interests in the Development Agreement to secure the payment and performance by Borrower of its Obligations under the Note, it being understood and agreed that Lender shall not exercise its rights under this Assignment to such other rights and interests of the Borrower unless and until an event of default occurs under the Construction Loan Agreement, the Note or any Mortgage and continues beyond any applicable cure period (an "Event of Default"). The events of default in the Construction Loan Agreement are attached hereto as Exhibit C. Notwithstanding the foregoing, the Borrower shall direct the City to make the payments required under Sections 4.4, 4.5 and 4.6 of the Development Agreement directly to the Lender for the account of the Borrower.

3. Lender's Rights Upon Default. Upon the occurrence of an Event of Default, then Lender may, at its option, but without any obligation to do so in its sole discretion, take over and assume Borrower's rights and obligations under the Development Agreement. In such event, Lender shall have all of the rights and obligations of Borrower under the Development Agreement, and Lender and the City shall continue to perform under the terms of the Development Agreement in the manner specified in the Development Agreement, as if Lender were originally a party thereto. Borrower hereby irrevocably appoints Lender its true and lawful attorney-in-fact, empowered to act in Borrower's name or in Lender's name, or otherwise to enforce all rights of Borrower under the Development Agreement so long as an Event of Default then exists. Prior to the occurrence of an Event of Default and the election by Lender to assume Borrower's rights and obligations under the Development Agreement, nothing in this Assignment shall be construed as an assumption by Lender of any liability or obligation of Borrower under the Development Agreement.

4. No Modification or Amendment. Neither Borrower nor the City shall cause the Development Agreement to be modified or amended, and Borrower shall not waive any of its rights under the Development Agreement, without the Lender's prior written consent. The City shall not exercise any remedies, including, without limitation, termination of the Development Agreement, without giving at least thirty (30) days' prior written notice to Lender; provided however that the City shall not terminate its obligations to make the payments under Sections 4.4, 4.5 and 4.6 of the Development Agreement for improvements made by the Borrower prior to such termination. Lender, upon receipt of such notice, shall have the right, but not the obligation, in its sole discretion, to assume Borrower's rights and obligations under the Development Agreement and to cure the grounds asserted by the City for

termination of the Development Agreement. The Development Agreement shall not be terminated by the City while Lender is promptly, diligently and actively prosecuting such a cure. Borrower shall not terminate the Development Agreement without Lender's prior written consent.

5. Security Interest in Agreement. In addition, as security for the payment and performance of Borrower's obligations under the Construction Loan Agreement, the Note and the Mortgages, Borrower hereby grants to Lender a security interest in Borrower's rights, title and interests in the Development Agreement, if and to the extent that a security interest may be granted therein under the Wisconsin Uniform Commercial Code – Secured Transactions, and Borrower acknowledges that Lender shall have all of the rights and remedies with respect thereto provided for by the Wisconsin Uniform Commercial Code – Secured Transactions, in addition to the other rights and remedies herein granted to Lender, in the event of the occurrence of an Event of Default under the Note or Mortgage.

6. Default Under Development Agreement. Borrower covenants to perform its obligations under the Development Agreement, and to give immediate notice to Lender of any notice of default served upon Borrower with respect to its obligations under the Development Agreement. If Borrower defaults under the Development Agreement, Lender shall have the right, but not the obligation, in its sole discretion, to assume Borrower's rights and obligations under the Development Agreement and to cure the default of Borrower.

7. Successors and Assigns. Subject to the provisions hereof, this Assignment and the Development Agreement shall be binding upon Borrower and its successors and assigns, and shall inure to the benefit of Lender, its successors and assigns. Borrower shall not assign its obligations or interests under the Development Agreement or under this Assignment without the prior written consent of Lender.

8. Notices. Any notice required or permitted to be given by any party hereto to any other party hereto under the terms of this Assignment shall be given in accordance with the terms of the Loan Agreement.

9. Headings. The headings or captions of the sections set forth herein are for convenience only.

IN WITNESS WHEREOF, the undersigned has caused this instrument to be executed as of the day and year first above written.

BORROWER:

RIVERHEATH, LLC

By: Tanesay Development LLC, its
Manager

By: _____
Mark Geall, Manager

LENDER:

NATIONAL EXCHANGE BANK & TRUST

By: _____
David R. Moody, Vice President

CONSENT OF CITY, SUBORDINATION AND AGREEMENT TO MAKE
PAYMENTS TO LENDER

Pursuant to Section 13.1 of the Development Agreement, the undersigned City of Appleton (the "City") hereby consents to the collateral assignment set forth above.

Pursuant to Section 13.2 of the Development Agreement, the City hereby subordinates its interest in the Development to any amounts owed by the Developer to National Exchange Bank and Trust (the "Lender"), and any refinancings, extensions or renewals of such debt (the "Superior Debt"). Any interest the City may have in and to the Development is and at all times shall remain subordinate to the Superior Debt, including any mortgages or other liens which Developer may now or hereafter place against the Development for the purpose of securing the Superior Debt. Pursuant to the Third Amendment to the Development Agreement, the City confirms that it will not suspend tax incremental payments to the Developer in the event of a delinquency on the City loan (the "Subordinate Debt"). Until all Superior Debt is paid in full: (i) the Developer shall not, directly or indirectly, make any payments on account of or grant a security interest in, mortgage, assign, or transfer, any properties to secure or satisfy any part of Subordinate Debt; (ii) the City shall not demand or accept from the Developer or any other person any such payment or collateral or cancel, set off or otherwise discharge any part of the Subordinate Debt; and (iii) neither the Developer nor the City shall otherwise take or permit any action prejudicial to or inconsistent with the Lender's priority position over the City. Notwithstanding the foregoing, so long as there is no default under any instrument or agreement evidencing or securing Superior Debt, the Developer may make and the City may accept regularly scheduled payments of principal and interest on the Subordinate Debt (provided that neither the schedule therefor nor the applicable interest rate thereunder shall be revised without the prior written consent of the Lender).

The City shall not institute any judicial action with respect to Section 4.9 the Development Agreement without the prior written consent of the Lender, unless all Superior Debt has been paid in full. Until all Superior Debt is paid in full, the City shall not, without the prior written consent of the Lender, accelerate the maturity of Subordinated Debt, initiate or join with any other creditor of the Developer in initiating any proceedings, voluntary or involuntary, for the collection of Subordinated Debt or for the distribution, division or application of all or part of the assets of the Developer or the proceeds thereof, whether such proceedings be for the liquidation, dissolution or winding up of the Developer or its business, receivership, insolvency or bankruptcy proceedings, an assignment for the benefit of creditors of proceedings by or against the Developer for relief under any bankruptcy, reorganization or insolvency law or any law relating to the relief of debtors,

readjustment of indebtedness, reorganization, arrangement, composition, extension or otherwise.

The City hereby agrees to make the payments required by Sections 4.4, 4.5 and 4.6 of the Development Agreement, including without limitation the obligations of the City to make the City's Contributions to the Borrower or RH Ventures, Inc. plus interest thereon, directly to the Lender for the account of the Borrower. This agreement shall continue until all Superior Debt is paid in full.

The City hereby represents and warrants to the Lender as follows: (a) the Development Agreement is in full force and effect; and (b) the City is not in default of its obligations under the Development Agreement; and (c) to the knowledge of the City, the Developer is not in default of the Development Agreement; and (d) to the knowledge of the City, there are no facts or circumstances that exist which would permit the City to terminate the Development Agreement. Notwithstanding anything in the Development Agreement to the contrary, it is the intent of the City to make the City's Contribution up to a maximum amount of twenty percent (20%) of the taxable value created as determined by the City Assessor. Provided the City has collected property taxes, payment of the City Contribution, plus interest thereon as provided in the Development Agreement, will continue in the event of a default of the Development Agreement by the Borrower.

THE CITY OF APPLETON, WISCONSIN

By: _____
Timothy M. Hanna, Mayor

APPROVED AS TO FORM:

James P. Walsh, City Attorney

EXHIBIT A

See Exhibit A to each of the Mortgages

EXHIBIT B

Development Agreement

See Attached.

EXHIBIT B

Events of Default under Construction Loan Agreement

The following are the stated events of default under the Construction Loan Agreement:

[To be coordinated with final agreement]

- (i) Borrowers shall default in the payment of principal or interest due under the Notes or any other payments due pursuant to the Loan Documents and the continuance thereof for ten (10) days; provided that the Lender shall give written notice of a default to Borrowers, but not more than twice during any twelve-month period.
- (ii) Any Event of Default as defined in the Mortgage.
- (iii) An event of default has occurred and is continuing under any Loan Document.
- (iv) Any breach of any covenant or condition in this Agreement if such breach remains uncured 30 days after the date of written notice of such failure given by Lender to Borrowers.
- (v) Any representation or warranty made by Borrower or any of the Guarantors in the Loan Documents or as part of the Loan or in any certificate or document furnished as part of the Loan shall prove intentionally untrue in any material respect on the date as of which they were made or as of the date on which they were to be effective; or any financial statement or financial information delivered pursuant to this Agreement is intentionally false or misleading in any material respect as of the date thereof.
- (vi) Either any of the Borrowers or any of the Guarantors shall admit in writing their inability to pay its debts or shall make an assignment for the benefit of its creditors; or shall be adjudicated a bankrupt; or shall file a voluntary petition in bankruptcy or to effect a plan or other arrangement with creditors, or to liquidate assets of either Borrower or any of the Guarantors under court supervision; or shall have applied for the appointment of a receiver, trustee or custodian for any of their assets; or a trustee, receiver or custodian shall have been appointed for any assets of Borrower or any of the Guarantors.
- (vii) Either any of the Borrowers is dissolved or a Guarantor dies. Notwithstanding the foregoing, Borrowers shall have sixty (60) days after the death of a Guarantor to provide Lender with substitute collateral and/or guaranty from a guarantor with a net

worth comparable to the deceased Guarantor, which is satisfactory to Lender, in Lender's sole discretion.

(viii) Work on the Improvements shall, prior to completion to the extent necessary for occupancy, have either been abandoned or shall have ceased for a period of 20 consecutive days unless such cessation is the result of an Unavoidable Delay.

(ix) Title Company refuses to issue any endorsement required by this Agreement because of a change in the status of title or a survey exception and Borrowers, within 30 days after written notice, are unable to correct the condition giving rise to the refusal and procure issuance of the endorsement.