

ORDINANCE NO. 2015 - 11

AN ORDINANCE OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BARNEGAT, COUNTY OF OCEAN, STATE OF NEW JERSEY, AMENDING AND SUPPLEMENTING CHAPTER 74-35 (ARTICLE VI) OF THE TOWNSHIP CODE IN ORDER TO AUTHORIZE ACCEPTANCE AND EXECUTION OF THE FIRST AMENDMENT TO THE JUNE 5, 2006 WATER FACILITIES AGREEMENT ("FIRST AMENDMENT")

WHEREAS , the Owner and the Township are Parties to a June 5, 2006 Water Facilities Agreement (the "Agreement ");

WHEREAS , the Agreement generally provided that the Owner was required to construct certain improvements, referred to in the Agreement as the "Water Facilities," which Facilities included the construction of an additional well ("Well #9), the associated water treatment plant and an elevated water storage tank with a capacity of one million gallons (the "Water Tank");

WHEREAS , the Owner has constructed Well #9 and the associated water treatment plant at significant cost to Owner;

WHEREAS , upon the execution of the Agreement it was believed by the Parties that the construction of the Water Tank was necessary in order to provide sufficient water pressure and capacity within the Township Water System (the "Water System") to serve Owner's Projects (as such terms is defined in the Agreement) as well as other, future users of the Water System;

WHEREAS , since the execution of the Agreement, it is understood and agreed by the Parties that the Water Tank is not the preferred method of achieving additional water pressure within the Water System;

WHEREAS , in lieu of constructing the Water Tower as envisioned by the Agreement, the Parties agree that the construction of alternate improvements, hereinafter defined as the "Pressure Improvements" are the preferred means of upgrading the water pressures within the Water System;

WHEREAS, this First Amendment is intended to eliminate the construction of the Water Tower as a component of the Water Facilities as set forth in the Agreement and provide for the construction of the Pressure Improvements in lieu of the Water Tower;

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WHEREAS, the Pressure Improvements provide an overall improvement to the Water System as the draw of water supplies over time has had a negative impact to pressure levels within the Water System;

WHEREAS, the Agreement further provided a manner of reimbursement to the Owner for the costs of the Water Facilities that were in excess of the Owner's pro rata share of those Water Facilities;

WHEREAS, this First Amendment is intended to revise Owner's reimbursement entitlements to more accurately reflect Owner's actual pro rata share of the Water Facilities.

NOW, THEREFORE, BE IT ORDAINED by the Township Committee of the Township of Barnegat, County of Ocean, State of New Jersey as follow:

SECTION 1. The "First Amendment" to the Water Facilities Agreement is hereby adopted. A true copy of the Water Facilities Agreement is on file at the office of the Township Clerk and can be reviewed during normal business hours.

SECTION 2. The Township finds that the "First Amendment" to the Water Facilities Agreement is an appropriate and proper method by which Mark Madison, LLC will be reimbursed for off-site improvements referenced in the original Agreement and the First Amendment thereto.

SECTION 3. This Agreement, a true copy of which is on file at the Office of the Township Clerk and can be reviewed during normal business hours, is in accordance with the provisions of N.J.S.A. 40:55D-42.

SECTION 4. The Township authorizes and directs the Mayor, Township Clerk and Township Administrator to execute any and all necessary documents in order to implement the intent of this Ordinance.

SECTION 5. The various parts, sections and clauses of this Ordinance are hereby declared to be severable. If any part, sentence, paragraph, section or clause is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of the Ordinance shall not be affected thereby.

SECTION 6. Any Ordinances or parts thereof in conflict with the provisions of this Ordinance are hereby repealed to the extent of such conflict.

SECTION 7. This Ordinance shall take effect upon publication in an official newspaper of the Township, as required by and in conformance with law.

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NOTICE

NOTICE IS HEREBY GIVEN that the foregoing Ordinance was introduced and passed on the first reading by the Township Committee of Barnegat, County of Ocean, State of New Jersey on **August 17, 2015 at 6:30 p.m.**, or as soon thereafter as the matter may be reached and considered, at the Barnegat Township Municipal Building located at 900 West Bay Avenue, Barnegat, New Jersey. The Ordinance will be considered for second and final reading at a meeting of the Township Committee on **September_21__**, 2015 **at 6:30 p.m.**, or as soon thereafter as the matter may be reached and considered, at the Barnegat Township Municipal Building located at 900 West Bay Avenue, Barnegat, New Jersey. At that time the public is invited to ask questions, raise objections or provide public comment with regard to the proposed adoption of this Ordinance.

MICHELE RIVERS, RMC, Township Clerk

Prepared by:

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FIRST AMENDMENT TO THE JUNE 5, 2006 WATER FACILITIES AGREEMENT

("FIRST AMENDMENT")

Made as of this ____ day of _____, 2015;

BY AND BETWEEN:

TOWNSHIP OF BARNEGAT, in the County of Ocean, a Municipal Corporation of the State of New Jersey, with offices located at 900 West Bay Avenue, Barnegat, New Jersey 08005

(hereinafter referred to as the "Township");

AND

MARK MADISON, LLC, with offices located at 500 Barnegat Boulevard, North, Building 400, Suite 402, Barnegat, New Jersey 08005

(hereinafter referred to as the "Owner")

The Township and the Owner shall be referred to individually as "Party" and collectively as the "Parties."

WITNESSETH:

WHEREAS (1st), the Owner and the Township are Parties to a June 5, 2006 Water Facilities Agreement (the "Agreement ");

WHEREAS (2nd), the Agreement generally provided that the Owner was required to construct certain improvements, referred to in the Agreement as the "Water Facilities," which Facilities included the construction of an additional well ("Well #9), the associated water treatment plant and an elevated water storage tank with a capacity of one million gallons (the "Water Tank");

WHEREAS (3rd), the Owner has constructed Well #9 and the associated water treatment plant at significant cost to Owner;

WHEREAS (4th), upon the execution of the Agreement it was believed by the Parties that the construction of the Water Tank was necessary in order to provide sufficient water pressure and capacity within the Township Water System (the "Water System") to serve Owner's Projects (as such terms is defined in the Agreement) as well as other, future users of the Water System;

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WHEREAS (5th), since the execution of the Agreement, it is understood and agreed by the Parties that the Water Tank is not the preferred method of achieving additional water pressure within the Water System;

WHEREAS (6th), in lieu of constructing the Water Tower as envisioned by the Agreement, the Parties agree that the construction of alternate improvements, hereinafter defined as the "Pressure Improvements" are the preferred means of upgrading the water pressures within the Water System;

WHEREAS (7th), this First Amendment is intended to eliminate the construction of the Water Tower as a component of the Water Facilities as set forth in the Agreement and provide for the construction of the Pressure Improvements in lieu of the Water Tower;

WHEREAS (8th), the Pressure Improvements provide an overall improvement to the Water System as the draw of water supplies over time, has had a negative impact to pressure levels within the Water System;

WHEREAS (9th), the Agreement further provided a manner of reimbursement to the Owner for the costs of the Water Facilities that were in excess of the Owner's pro rata share of those Water Facilities;

WHEREAS (10th), this First Amendment is intended to revise Owner's reimbursement entitlements to more accurately reflect Owner's actual pro rata share of the Water Facilities;

NOW, THEREFORE, BE IT AGREED, by and between the Township and the Owner, in consideration of the mutual promised contained herein and for other good and valuable consideration, receipt of which is mutually acknowledged, the Parties agree as follows:

1. Other than as specifically modified herein all terms and conditions of the aforementioned Agreement dated June 5, 2006 will remain in full and effect.

2. Section 1, "Defined Terms," of the Agreement are modified and amended as follows:

(a) Revised Defined Terms

"Installation Costs" mean the actual costs of the Water Facilities has installed by Owner, including material, labor, engineering, permit application fees, inspection fees, bonding costs and fees, insurance premiums, and all professional fees for which the Owner reimburses the Township, as well as the actual costs of all work, if any, performed by the Owner pursuant to the Maintenance Warranty for in Section 7, herein, all as documented by invoices received by Owner from its vendors and subcontractors, which shall list with particularity all labor, machinery and materials involved, including field engineering, office engineering, subcontractors and general contractor costs, a

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breakdown by unit and item of the costs thereof, but expressly excluding general, administrative and field overhead costs of Owner."

"Projects" mean Owner's 850 single family lots within Ocean Acres owned to anticipated to be owned, Whispering Hills' parcel, consisting of Block 144.01, Lots 7, 7.01, 8, 11, 12, 14 through 23, 25, 27, 30.10 and 31.01, Laurel Oaks, Barnegat Senior Affordable Project and the seven (7) lot subdivision referred to and commonly known as Pennsylvania Avenue. The Projects, in total, represent 1,030 EDUs.

"Water Facilities" means the construction of an additional well (Well #9), the associated water treatment plant and the Pressure Improvements (as such terms is defined herein).

(b) Additional Defined Terms

"Pressure Improvements" mean the design, engineering and construction of those improvements set forth at Recommendations 1, 4 5 and 7 of Section D - Hydraulic Grade (System Pressures) of the August 18, 2011 "Water System Hydraulic Analysis for the Township of Barnegat" prepared by Birdsall Services Group, Inc.

3. Section 8A of the Agreement is replaced with the following:

"A. Fee-ownership interest for those portions of the land upon which the Water Facilities are being constructed, to include (1) the site for Well #9, (2) the site of the water treatment facility."

4. Section 11 of the Agreement "Reimbursement of the 'Reimbursement Amount' to Owner" is replaced with the following:

"Reimbursement of the 'Reimbursement Amount" to Owner. Township

acknowledges that while the Water Facilities are required in order to provide water service to the Projects and the dwelling units therein, the Water Facilities when completed will provide sufficient firm capacity during times of peak daily demand and enhanced water pressure to provide and enhance service to other properties utilizing the Township water supply system (the "Other Properties") in excess of Owner's need for water allocation and water pressure. Accordingly, while Owner is advancing the entire Installation Costs under this Agreement because the Projects require, in part, the Water Facilities, it is agreed and acknowledged that Owner is entitled, in addition to a credit in lieu of payment of all Water Connection Fees for each and all anticipated 1030 EDUs units within the Projects, to other credits and/or reimbursements, pursuant to the provisions herein. The parties agree that this Agreement shall provide two means, individually and/or collectively, by which the Owner will be reimbursed for the Reimbursement Amount as defined herein. Payment of the Reimbursement Amount to Owner shall commence for each respective component of the Water Facilities as construction of the component is substantially completed.

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The "Reimbursement Amount" shall be defined as the total of the actual "Installation Costs" for the Water Facilities as defined herein, plus all accrued interest. Interest shall be calculated on the entire Installation Costs. The rate of interest shall be adjusted annually on the first business day of each calendar year and set at two percent (2%) over the prime rate as published in the Wall Street Journal on the first business day of each calendar year. Interest on the Installation Costs for each component of the Water Facilities shall begin to run from the date of substantial completion of the respective component. Well #9, the water treatment plant, and the Pressure Improvements shall each be deemed a separate component of the Water Facilities.

The Parties acknowledge and agree that the Installation Costs for Well #9 and the water treatment Plant is \$2,213,896.34. For commencement of interest calculations for Well #9 and the water treatment plant, the Parties acknowledge and agree that substantial completion with respect to both improvements occurred on December 3, 2008. The interest referred to in this Section and elsewhere in this Agreement shall be simple interest.

Within thirty (30) days of the date of this First Amendment, Owner shall provide to Township a current cost itemization, including all supporting documentation, providing a complete breakdown of Installation Costs (as defined herein) for the Pressure Improvements, paid by Owner as of said date (the "Cost Itemization"). Owner shall thereafter update the Cost Itemization quarterly. At such time as the Township has accepted all Water Facilities as provided in Section 6, herein, the Maintenance Warranty period has expired, and all Maintenance Warranty work, if any, has been completed, Owner shall provide to Township a final Cost Itemization. Upon receipt of the initial Cost itemization for the Pressure Improvements and each quarterly update, Owner and Township mutually agree upon the then current Installation Costs for the Pressure Improvements. Upon issuance of the final Cost Itemization, the Owner and Township shall mutually agree upon the final Reimbursement Amount. If Township fails to provide specific, written objections to the initial Cost Itemization for the Pressure Improvements, any Quarterly or Final Cost Itemization within thirty (30) days of receipt, the Township shall be deemed to have agreed to such Cost Itemization for purposes of determining the Reimbursement Amount.

The Parties agree that Owner shall be reimbursed and/or credited for the Reimbursement Amount by any or more of the following methods:

(a) A credit in lieu of connection fees for all units within the Projects. See Section 11.01 herein.

(b) Payment to the Owner, via the Township, of monies from developers of Other Properties representing those developers' pro rata share for construction of the oversized Water Facilities, pursuant to the formula set forth herein. See Section 11.02 herein.

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Payment of the Reimbursement Amount to the Owner under the provision herein, shall commence on a component-by-component basis as construction of each individual component of the Water Facilities is substantially completed, provided, however, that at no time shall the total amount of combination of credits and reimbursements exceed the actual Installation Costs as provided herein, documented in the most recent Cost Itemization, plus accrued interest.

5. Section 11.02 of the Agreement titled "Unit Reimbursement Amount from the 'Future Users'" is replaced with the following:

"11.02 Unit Reimbursement Amount from the 'Future Users.'" It is acknowledged between the Township and the Owner that as a result of the construction of the Water Facilities, the Township will have firm capacity to meet peak daily demand for water supply, additional water allocation and additional water pressure within the Water System that will exceed that required by the Projects. Also, the Owner's Reimbursement Amount as defined herein is in excess of the amount of Water Connection Fee which would normally be paid by Owner to the Township as the Projects are developed, and therefore the Parties have agreed to adopt additional mechanisms to reimburse the Owner for that excess. As further set forth herein, Owner's Unit Reimbursement Amount is to be paid by Future Users and consists of the sum of the following amounts: (i) the Well # 9 Reimbursement Amount; and (ii) the Pressure Improvement Reimbursement Amount attributable to each Future User.

**A. Reimbursement Amount from the Future Users for Use of Well #9
and Associated Water Treatment**

The Parties agree that the Owner's construction of Well #9 and the associated water treatment plant (the "Well #9 Improvements") has benefited not only Owner's Projects, but additional users and future users of the Water System (hereinafter "Future Users"). The Parties agree that the Well 9 Improvements shall serve approximately 2,530 EDUs of which the Projects are 1,030 EDUs (40.71%) and the Future Users are 1,500 EDUs (59.29%). The total costs of the Well #9 Improvements are certified at \$2,213,896.34 plus interest as permitted by the Agreement and this First Amendment. As a result, each EDU is responsible to contribute \$875.06 toward the costs of the Well #9 Improvements, plus interest as permitted by the Agreement and this First Amendment. Accordingly, the Owner is responsible for \$901,277.20 of the total costs of the Well #9 Improvements and the Future Users are responsible for \$1,312,619.14, plus interest as permitted by the Agreement and this First Amendment, of the total costs of the Well #9 Improvements.

To date, Owner has contributed \$640,440.23 for only 461 EDUs (a per EDU charge of \$1,389.24), which is in excess of the appropriate per EDU charge for Owner's pro rata share of the Well #9 Improvements. Owner's overpayment is reflective of the fact that the Agreement required a contribution on the

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anticipated construction of the Water Tower, an improvement that the Parties have now recognized was not necessary. As a result of the Menk Litigation (hereinafter defined) no other Future Users paid pursuant to the Agreement, so no overpayments have been collected from Future Users under the Agreement. However, in order to both correct the overcharging of the Projects' units, and address Owner's pro rata share of the Pressure Improvements, the Owner's per EDU charge within the Projects must be adjusted within the remaining EDUs within the Projects to an EDU charge of \$664.95 per EDU for the remaining 561 EDUs within Owner's Projects. This results in Owner's contribution of an amount reflective of its pro rata share of both the Well #9 Improvements and the Pressure Improvements. The per EDU charge owed by Future Users shall remain \$875.06, plus interest as permitted by the Agreement and this First Amendment (the "Well #9 Reimbursement Amount").

In the event that the actual number of units constructed within the Projects is less than 1,030 4-bedroom single-family homes or EDUs, then all calculations herein based on the figure of 1,030 EDUs will be changed to reflect the correct number of actual EDUs constructed within the Projects. The changing of the 1030 EDUs shall not occur until and unless the Owner notifies the Township, in writing, certifying as to the reduced number exact number of units constructed and/or to be constructed within the Projects.

B. Reimbursement Amount from the Future Users for Use of the Pressure Improvements.

In addition to the benefit afforded Future Users through the construction of the Well #9 Improvements, the construction of the Pressure Improvements is required because the connection of additional Future Users to the Water System will have a negative impact of water pressures within that Water System. As the Water System is an integrated System, any additional connections to that System will necessarily impact the balance of that Water System. In order to for the Township to provide the same level of water service that currently exists within Water System, the construction of the Pressure Improvement should be accomplished. The Parties agree that the Owner will be constructing the Pressure Improvements and that those Pressure Improvements will provide the Water System sufficient pressure upgrades to accommodate an addition one thousand (1,000) four-bedroom single-family homes or EDUs and still maintain current pressure levels across the Water System. The Parties further agree that Owner's overpayments toward Owner's pro rata share of the costs of the Well #9 Improvements (as set forth at Section 11.02(A) above), as well as Owner's agreeing to construct the Pressure Improvement in a prompt manner in accordance with this Amendment, serve as the Owner's pro rata share toward the costs of the Pressure Improvements. Accordingly, for purposes of reimbursement it is understood that the Owner shall be reimbursed 100% of the Installation Costs for the Pressure Improvements, plus the cost of maintenance guaranty work, plus interest calculated on the entire Installation Costs and the costs of maintenance

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guaranty work, from the proceeds of payments made to the Township by the Future Users (the "Pressure Improvement Reimbursement Amount"). The Installation Costs for the Pressure Improvements are anticipated to be \$850,000, thus requiring a charge to each Future User anticipated to be served by the Pressure Improvements of \$850 per EDU, plus interest as permitted by the Agreement and this First Amendment.

C. Owner's Total Unit Reimbursement Amount from the Future Users

In accordance with the above Sections 11.02(A) and (B), the Unit Reimbursement due to the Owner under the Agreement and First Amendment shall consist of the per EDU sum of Well #9 Reimbursement Amount and the Pressure Improvement Reimbursement Amount. The following is an example illustrating the calculation of that Unit Reimbursement Amount for each EDU to be developed by the Future Users.

- The Well #9 Reimbursement Amount, exclusive of interest as permitted by the Agreement and this First Amendment, is 875.06 per EDU.
- The Pressure Improvement Reimbursement Amount, exclusive of interest permitted by the Agreement and this First Amendment, is anticipated to be \$850.00 per EDU.

Using the above example, a Future User as of the date of this First Amendment shall pay a principal total Unit Reimbursement Amount of \$1,725.06. It is to be noted that the above calculations relative to the Pressure Improvements are illustration only as the Installation Costs associated with the Pressure Improvements are estimated only. The actual Unit Reimbursement Amount shall be calculated based on the actual Installation Costs, the actual dates of completion, the varying interest rates, any amounts reimbursed to Owner, actual amount outstanding and the period or periods during which such amounts are outstanding. Until the date when the Final Installation Cost is determined and agreed to following the final Cost Itemization, Future Users shall pay the interim Unit Reimbursement Amount based on the amount of \$1,725.06 per EDU. If following review of any quarterly Cost Itemization, it reasonably appears that the final Unit Reimbursement Amount determined in accordance with Section 11.03 herein, is likely to be higher or lower than the \$1,725.06 per EDU, Owner and Township shall agree to appropriate adjustment in the interim Unit Reimbursement Amount. Any such adjustment in the interim Unit Reimbursement amount shall be prospective, and shall apply only to Unit Reimbursement Amounts paid subsequent to the date of said adjustment.

The mechanism for reimbursing the Owner utilizing the "Unit Reimbursement Amount" provided for in this Section shall operate as follows:

Every Future User of any property served by the Township's water distribution system and that will

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benefit from the Water Facilities shall pay to the Owner via the Township, an amount calculated by multiplying the Unit Reimbursement Amount (including accrued interest) by the total number of EDUs for which such Future User obtains subdivision or site plan approval or for lots in Ocean Acres or other lots that already have subdivision or site plan approval, for which such Future User obtains a building permit. Such payment or payments shall act as a reimbursement against the Reimbursement Amount. The manner and time of payments by such developers shall be in accordance with the provisions of Section 11.03 hereinbelow. A Future User will benefits from the Water Facilities if its property is serviced directly or indirectly by any of the components of the Water Facilities, or if, in the absence of any component of the Water Facilities, the Township's water system would lack: (i) the adequate firm capacity to meet daily peak demand; (ii) adequate monthly or annual allocation; or (iii) adequate serve pressure needed to secure the Future User's property.

It is agreed that the combination of the total reimbursements and/or credits under the provisions of section 11.02 shall not exceed, excluding interest as permitted by the Agreement and this First Amendment, the sum calculated by adding 59.29% of the Installation Costs of Well #9 Improvements and 100% of the Installation Costs of the Pressure Improvements."

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7. Section 11.03 of the Agreement titled "Payments by Others" is replaced by the following.

"11.03 Payments by Others and Release of Water Escrow. It is understood that by virtue of both the Menk Litigation (hereinafter defined) and agreeing to undertake the Water Facilities, the Owner may not achieve total reimbursement pursuant to this Agreement. The Township agrees to adopt an appropriate ordinance requiring the Future Users who are served by the Water System, as a condition of approval, to pay that developer's pro rata share of the costs of the Water Facilities, as represented by the Unit Reimbursement Amount described above. The condition to be placed on the Future Users as to subdivision or site plan approval or building permits in Barnegat Township shall provide that the Unit Reimbursement Amount shall be paid by all Future Users to the Owner via the Township as follows:

A. 100% of the Unit Reimbursement Amount shall be paid prior to signing of the final subdivision plat or site plan and filing same with Ocean County Clerk.

B. For any Future Users having subdivision plats or site plans filed with the Ocean County Clerk, as to which construction has not yet commenced as of the date of this Agreement, 100% of the Unit Reimbursement Amount shall be paid at the time building permits are issued.

C. For any Future Users on properties within the Service Area which do not require filing with the Ocean County Clerk, and as to which construction has not commenced as of the date of this Agreement, 100% of the Unit Reimbursement Amount shall be paid at the time building permits shall be issued.

D. This Reimbursement Requirement shall not apply to any user for which a Unit Reimbursement Amount is paid pursuant to the November 5, 1998 Water Facilities Agreement between the Township and Menk Corporation ("Menk").

E. In the event that the interim Unit reimbursement Amount paid by the Future User is greater than the final Unit Reimbursement Amount determined and agreed to following the final Cost Itemization, Owner shall refund the difference to Township, Township shall use same for debt payments, capital costs or operating expenses for the Township's water distribution system.

Any standard Water Connection Fee to be charged by and received by the Township for connections to subdivision or lots not within the Projects, which Water Connection Fees are in addition to the aforementioned Units Reimbursement Amount, shall be paid in accordance with the Township's Rules and Regulations. It is agreed, however, between the Parties hereto that if a Court of competent jurisdiction determines that the Township may not collect a connection fee from Future Users while the Owner is collecting the Units Reimbursement Amounts from the same Future Users, then the money received from the Future User, either from connection fees or payment of Unit Reimbursement Amounts shall be first paid to the Owner in order to reduce the amount of the outstanding Reimbursement Amount.

It is furthermore understood and agreed between the parties hereto that the Township will be under no obligation whatsoever to pay to the Owner any of the Township's funds (with the exception of the Water Escrow (hereinafter defined)) in order that Owner recoup in full the Reimbursement Amount. All such payments will come from Future Users only, pursuant to the provisions herein. Owner understands that the possibility exists that Owner may never be paid in full the Owner's Reimbursement Amount in the event that an insufficient number of buildings are

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developed within Barnegat Township, and further understands and agrees that this will in no way relieve Owner of the obligation to repay any refund otherwise due and owing pursuant to Section 11.03 herein. The Owner further understands and agrees that in the event that this Agreement were to be challenged and a Court of competent jurisdiction determines that a Future User(s) is entitled to reimbursement for funds that have been remitted by the Township to the Developer pursuant to this Agreement, the Developer shall return such funds to the Township in order to comply with any such Court order. Notwithstanding the foregoing, the Developer and/or the Township agree to defend the terms of this Agreement against any challenge by any third party, with each Party bearing their own costs and fees in connection with such defense.

Pursuant to the Agreement, the Owner's reimbursement entitlements did not begin to accrue until Menk was paid Menk's full reimbursement entitlements pursuant to the November 5, 1998 Water Facilities Agreement and the April 5, 2004 Addendum thereto (collectively the "Menk Agreement"). In or about May 2009, Owner initiated litigation against the Township and Menk alleging that Menk had been reimbursed beyond Menk's entitlements under the Menk Agreement and that Owner's reimbursement entitlements under the Agreement should commence and that Menk should refund overpayments made to Menk pursuant to the Menk Agreement (the "Menk Litigation"). The Menk Litigation resulted in an Appellate Division decision that determined that Menk had been overpaid pursuant to the Menk Agreement, which Appellate Division decision was captioned Walters Development Co., LLC and Mark Madison, LLC v. Township of Barnegat and Menk Corporation (Docket No. A-3899-11T2) (the "Initial Appellate Division Decision"). Pursuant to the Initial Appellate Division Decision, the Appellate Division directed that the amount of Menk's over-reimbursement pursuant to the Menk Agreement be remanded to the trial court for calculation consistent with the Initial Appellate Division Decision. By Final Judgment dated June 18, 2014, the trial court entered an order calculating the total amount of over-reimbursement received by Menk pursuant to the Menk Agreement, which amount Menk has re-paid to the Township, subject to Menk's right to appeal that trial court determination. Menk has since appealed that June 18, 2014 trial court decision, which appeal remains pending as of the date of this Amendment (the "Menk Appeal"). For purposes of this Amendment, the Menk Appeal shall be interpreted to mean the current Menk Appeal that is pending in the Appellate Division and any further remand proceedings or further appeals by Menk.

Since the inception of the Menk Litigation, all payments due from Future Users pursuant to the Menk Agreement, and/or the Agreement, as well as Menk's reimbursement requirements resulting from the Initial Appellate Division Decision have been held in an escrow account maintained by the Township (the "Water Escrow"). As of the date of this Amendment, the amount of funds within the Water Escrow is _____. The Parties agree that funds within the Water Escrow shall, subject to: (i) the conclusion of the Menk Appeal; and (ii) the Owner's

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commencement of the Pressure Improvements in accordance with Section 11.05 of this Amendment, be released to Owner as a portion of the Reimbursement Amount owed to Owner pursuant to the Agreement and this First Amendment. The Water Escrow shall be released to Owner commiserate with Owner's completion of the Pressure Improvements. In the event that the total costs of the Pressure Improvements do not equal the costs of the Pressure Improvements, the Owner shall be entitled to a release of remaining Water Escrow as partial reimbursement of the Well #9 Reimbursement Amount.

In the event that the Menk Appeal results in an outcome that requires payment of any or all of the Water Escrow to Menk, the terms of this Amendment shall be revisited and revised by the Parties as necessary."

8. Section 11.05 is an addition to the Agreement and shall provide:

"11.05 Construction of the Pressure Improvements. The Owner agrees to commence construction of the Pressure Improvements within the earlier of: (a) thirty (30) days of conclusion of the Menk Appeal. Commencement of construction shall be construed as the design and engineering work necessary to ultimately construct the Pressure Improvements. The Owner shall diligently proceed with such design and engineering work and upon the Township Engineer's satisfaction with the design and scope of the Pressure Improvements, the Owner agrees to promptly commence actual construction of the Pressure Improvements and diligently continue with such construction until said Pressure Improvements are completed."

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their proper corporate offices and their proper corporate seals have been affixed, the day and year first above written.

ATTEST:

TOWNSHIP OF BARNEGAT

**DASTI, MURPHY
McGUCKIN, ULAKY,
KOUTSOURIS & CONNORS**

COUNSELLORS AT LAW

620 WEST LACEY ROAD
P.O. BOX 1057
FORKED RIVER, N.J. 08731

WITNESS:

MARK MADISON, LLC
