

SEWRPC Planning Report No. 54
A REGIONAL HOUSING PLAN FOR SOUTHEASTERN WISCONSIN: 2035

Appendix H

**CONSENT DECREE FOR THE SETTLEMENT REACHED BETWEEN
THE CITY OF NEW BERLIN AND THE U.S. DEPARTMENT OF JUSTICE**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

MSP REAL ESTATE INC., et al.)
)
Plaintiff,)
) Civil Action No. 11-cv-281
v.)
)
CITY OF NEW BERLIN, et al.)
)
Defendants.)
_____)

UNITED STATES OF AMERICA,)
)
Plaintiff,)
) Civil Action No. 11-cv-608
v.)
)
CITY OF NEW BERLIN,)
)
Defendant.)
_____)

CONSENT DECREE

1. The United States initiated this action on June 23, 2011, to enforce the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended (“the Fair Housing Act” or “the FHA”), 42 U.S.C. 3601-3631. In its Complaint, the United States alleges that the City of New Berlin (“City” or “New Berlin”) has made unavailable or denied dwellings to persons on the basis of race or color in violation of 42 U.S.C. 3604(a) of the FHA and has interfered with the exercise or enjoyment of rights under the FHA in violation of 42 U.S.C. 3617.
2. In 2010, MSP Real Estate, Inc. (“MSP”) contacted the City with a proposal to construct a 180-unit affordable housing development – with 100 units reserved for seniors and 80

units designated for general or family occupancy (also known as “workforce housing”) on a site it owned in the City Center area of New Berlin zoned for the construction of medium-to-high density residential dwellings. Financing for this development was provided under the federal Low Income Housing Tax Credit Program (“LIHTC”), 42 U.S.C. 26 *et seq.*, and pursuant to LIHTC requirements, occupancy was to be restricted to those households earning 60% or less of the area’s median income, with rents below market-rate. On May 3, 2010, the City’s Plan Commission voted to approve MSP’s application for a zoning permit, with certain conditions, finding that MSP’s proposal satisfied the City’s zoning requirements, including use, site, and architecture requirements.

3. The United States’ Complaint alleges that after the Plan Commission vote on May 3, 2010, the City took several actions in response to community opposition to MSP’s proposed development that were based on race or color, including, but not limited to: (1) reconsidering the Plan Commission vote and later denying zoning approval for MSP’s project on July 12, 2010; (2) denying in January 2011 MSP’s request to use existing City approvals and building permits to construct a previously-approved but un-built 102-unit condominium development on the same site and lease those units as workforce housing, subject to the income restrictions and rent restrictions required by the LIHTC program; and (3) applying its zoning and land use laws, and approving changes to these laws for the City Center area, in a manner that the United States alleges, restricts or prevents the building of affordable housing. The Complaint alleges that New Berlin took these actions with the intent and with the effect of discriminating against prospective African-

American tenants of MSP's proposed development. In so doing, the Complaint alleges that New Berlin has engaged in a pattern or practice of discrimination on the basis of race or color and a denial of rights to a group of persons that raises an issue of general public importance, in violation of the FHA. In its Answer to the Complaint, New Berlin has denied the foregoing allegations and the material allegations of the Complaint, in particular that its actions constitute a violation of the Fair Housing Act, 42 U.S.C. 3601, *et seq.*, or a violation of 42 U.S.C. 1981, 1982 and 1983. The City denies that any of its actions were undertaken with any discriminatory motive, intent or result.

4. On March 21, 2011, MSP filed its own lawsuit alleging that the City's actions described above violated the FHA. On July 19, 2011, New Berlin and MSP entered into a Memorandum of Understanding ("MOU") containing the terms of settlement of MSP's claims against the City. Under the terms of the MOU, New Berlin was required to issue a building permit to MSP for construction of the 102-unit development, and New Berlin did so on July 27, 2011. Of the 102 units, 90 units will be income-restricted and rent-restricted as required by the LIHTC program. The remaining twelve units will not be income or rent-restricted. The MOU further provides, *inter alia*, that: (a) the City will not take any actions to delay or obstruct completion of the 102-unit development; (b) the City will work in good faith with MSP in processing its application for the necessary approvals for construction of a 34-unit condominium project reserved for seniors on land adjacent to the 102 unit development, which is also subject to the income restrictions and below-market rate rents of the LIHTC program; and (c) MSP will dismiss its lawsuit with prejudice upon final completion of both components of the proposed development and

the issuance of occupancy permits by the City. The MOU is appended hereto as Appendix A. On July 27, 2011, the City issued building permits to MSP for completion of the 102-unit Workforce Housing Project, and MSP notified the Court that it has resolved its claims with the City. MSP has commenced construction of the 102-unit workforce housing project.

5. On July 25, 2011, the Court consolidated MSP's action with that of the United States. The United States and the City have determined to avoid the costs and risks of further litigation, and therefore have agreed to the terms of this Consent Decree and to request its entry by the Court. No provision of this Decree is intended to be, nor shall any provision be construed as, an admission by the City that its actions with respect to MSP's proposed affordable housing development have violated the FHA.

THEREFORE, IT IS HEREBY ORDERED:

I. DEFINITIONS

6. The following terms when used in this Decree, shall have the following meaning:
 - (a) "Affordable housing" means housing, any portion of which is income-restricted and rent-restricted and is designed to serve low-to- moderate income persons. This includes, but need not be limited to, housing financed through the federal Low Income Housing Tax Credit program ("LIHTC"). 26 U.S.C. 42 *et seq.*
 - (b) "Area Median Income" refers to the term that is used in the LIHTC program.

- (c) “The City” and “the City of New Berlin” refer to the City of New Berlin, its elected or appointed officials, including the Common Council, Mayor and Plan Commissioners, its employees, officers, agents, consultants, and any and all persons or entities acting in active concert or participation with the City of New Berlin.
- (d) The “City Center” is the geographic area in New Berlin described in the New Berlin City Center Planned Unit Development (“City Center PUD”), New Berlin Ordinance No. 2122. For purposes of this document, it shall not include those other areas identified as being part of City Center in the City’s comprehensive plan.
- (e) “Comprehensive Plan” refers to the “2020 New Berlin Comprehensive Plan,” adopted by the Plan Commission on November 2, 2009, and developed pursuant to Wisc. State Statute 66.1001.
- (f) “Date of entry of this decree,” or words to that effect, refers to the date the Court enters this Decree.
- (g) “Future land use map” refers to the future land use map in the 2020 New Berlin Comprehensive Plan and shows the intended land use for all parcels of land in New Berlin. The City requires that all development and redevelopment in New Berlin be consistent with its future land use map.
- (h) The “Moratorium” means the City’s suspension of development applications in the City Center area, authorized by Common Council

Resolution No. 2010-19 on June 8, 2010, extended several times since then, and which expired on August 4, 2011.

- (i) “MOU” refers to the Memorandum of Understanding entered into between MSP and the City of New Berlin on July 19, 2011, and attached here as Appendix A.
- (j) “Senior Housing Development” refers to a 34-unit multi-family project that is described in the MOU, all units of which are reserved for seniors who are 55 years-old and older and which are income-restricted and rent-restricted pursuant to the requirements of the LIHTC program.
- (k) “Workforce Housing Development” is a 102-unit multi-family project reserved for general occupancy that is described in the MOU, 90 units of which are income-restricted and rent-restricted pursuant to the requirements of the LIHTC program.

II. GENERAL INJUNCTION

7.. During the term of this Consent Decree, the City of New Berlin is hereby enjoined from:

- (a) making unavailable or denying a dwelling to any person because of race or color;¹
- (b) interfering with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right protected by the Fair Housing Act;

¹ “Dwelling” and “person” have the meanings set out in the FHA, 42 U.S.C. 3602(b) and (d).

- (c) interfering with the funding, development, or construction of any affordable housing units because of race or color; and
- (d) discriminating on the basis of race or color in any aspect of the administration of its zoning, land use, or building ordinances, policies, practices, requirements, or processes relating to the use, construction, or occupancy of dwellings.

III. THE WORKFORCE HOUSING DEVELOPMENT AND THE SENIOR HOUSING DEVELOPMENT

8. The City has agreed to permit the construction of the Workforce Housing Development and Senior Housing Development and has issued building and zoning permits for these projects. The City shall not obstruct or delay any aspect of construction or completion of the Workforce Housing Development or the Senior Housing Development, including with respect to the timing, level, and issuance, as applicable, of inspections, approvals, occupancy permits, and other similar matters. If permits or approvals are required from Waukesha County, the State of Wisconsin, or other entity for the construction or completion of the Workforce Housing Development or Senior Housing Development, the City shall work with MSP and these entities to obtain as promptly as possible, in the normal and ordinary course of business, the necessary permits and approvals. If modifications, changes, or clarifications to the plans for, or construction of, the Workforce Housing Development or Senior Housing Development become necessary during the pendency of its construction, the City shall work cooperatively and in good faith with MSP to handle these matters reasonably and in the ordinary course of permitting and construction. Nothing in this paragraph shall be construed to prevent the City from applying its zoning requirements in a non-discriminatory manner and from

ensuring that the Workforce Housing Development and Senior Housing Development comply with valid requirements of applicable law.

IV. FAIR HOUSING POLICY

9. Within thirty (30) days of entry of the Decree, the City shall adopt a “Fair Housing Policy,” the text of which would be in the form of Appendix B. The Fair Housing Policy shall list the name and contact information for the City’s Fair Housing Compliance officer (Section VII *infra*). The City shall include the Fair Housing Policy in all literature and information or application packets to residential developers, including developers of multi-family housing projects. The City shall include the Fair Housing Policy as a readily accessible link on its website.
10. Within thirty (30) days of entry of the Decree, the City shall place the phrase “Equal Housing Opportunity” or the fair housing logo on its website. The City shall place the same in all future published notices and advertisements related to housing or residential development and submit copies of all such notices and advertisement to the United States within six (6) months of publishing, as required by Section VIII. Compliance with this paragraph may be achieved by forwarding to the Department of Justice links to the downloadable documents which evidence compliance with this paragraph.

 (“Compliance, Record-Keeping and Reporting”).

V. FURTHER RELIEF TO REMEDY AND PREVENT LAND USE PRACTICES THAT VIOLATE THE FAIR HOUSING ACT

11. Wisconsin State Statutes Section 66.1001(2)(b) (*Housing Element*) requires communities to “provide a range of housing choices that meet the needs of persons of all income levels” and to “promote the availability of land for the development or redevelopment of

low-income and moderate-income housing. . . .” In Chapter 7 of the 2020 Comprehensive Plan, the City acknowledged its obligation to “provide an adequate supply of affordable housing for individuals of all income levels” as part of its planning process. Comp. Plan at 7:1. The City recognizes that “lack of affordable housing or ‘workforce’ housing is considered by many to have negative effects on a community’s overall health.” Comp. Plan 7:23. The City has committed itself to “continu[ing] to support ‘affordable’ or ‘workforce’ housing options to accommodate young families, the elderly, and other low and moderate income residents” and to “allow[ing] a diverse array of housing options. . . .” Comp. Plan 7:25. As part of the resolution of this case, and consistent with the statutory obligations and the commitments in its planning documents to support the future development of affordable housing, the City has agreed to undertake the actions set forth below.

12. Moratorium. The City agrees that the Moratorium on development applications in the City Center expired on August 4, 2011, has not been extended by the City Council, and is legally terminated.
13. Housing Trust Fund. During the term of this Consent Decree, the City will create and operate a Housing Trust Fund, which will be established by an ordinance with the language contained in Appendix C. The purpose of the Housing Trust Fund will be to provide resources for the support of developers and governmental entities in the acquisition, construction, rehabilitation, and modification of affordable housing for low income and moderate income households and to finance support services that assist low income households in obtaining and maintaining affordable housing. In addition, a sum

of at least \$50,000, and not less than half of any additional amounts placed in the Housing Trust Fund, shall be used for projects or programs designed to promote integration and equal housing opportunity for all, regardless of race, within the City of New Berlin. The City will use all reasonable efforts to encourage applications for projects that serve this purpose. Acceptable examples of such projects include a housing mobility program or a program designed to educate and encourage the participation of private landlords in the Housing Choice Voucher program.

14. The City will initially fund the Housing Trust Fund by contributing the sum of Seventy-Five Thousand Dollars (\$75,000.00). The City will use all reasonable efforts to look for other sources of private and public funding for the Housing Trust Fund for the duration of the Decree. The City will review all Tax Increment Financing (“TIF”) projects that may be approved within the City of New Berlin and initiated within the term of this agreement as a potential source of funding, and, if financially feasible, will extend the duration of the TIF as permitted pursuant to Wisconsin Statute Section 66.1005, with the proceeds derived therefrom to be placed in the Housing Trust Fund. The creation of the housing trust fund shall occur not less than three months from the date of execution of this Consent Decree.

15. Future Multi-Family Development in the City Center PUD. The parties acknowledge that in 2011 the City made amendments to the City Center PUD, as well as to the 2020 Comprehensive Plan, which the United States challenged in its Complaint. The parties further acknowledge that there are three (3) areas in the City Center PUD that are vacant and available for the construction of multi-family units and that have a future land use

designation that supports multi-family units. These are: (1) the park out lot at approximately 3575 S. 147th Street, which comprises 5.37 acres and is owned by the City; (2) the “Anchor Bank” parcel, along National Avenue, with a specific address of 14901-5055 W. National Avenue, which comprises 8.13 acres; and (3) the “Decade” parcel, which comprises approximately 9.89 acres of developable land. Each of these parcels is shown on the City's future land use map as having a mixed use designation of “Suburban Commercial,” “Mixed-Use Residential” and “Commercial Center” and therefore may be developed consistent with any of these uses, including multi-family.

16. As part of the amendments to the City Center PUD, the City limited the number of dwelling units that could be constructed within the City Center PUD to a maximum of the total number of units already built, or approved to be built, at the time of the PUD amendments, which the City calculates to be a total of 235 units. The City agrees to increase this limit by 75, for a total of 310 residential units.
17. ◦ The City also agrees to allow the construction of multi-family units on these three parcels to occur at or up to the same density and building height applicable to the MSP Workforce Housing Development under construction, which is 18.89 units/acre and 42 feet, respectively. The parties acknowledge that each of these parcels may be developed for uses other than residential because of their future land use designation. Although the City makes no commitment as to how these parcels will be developed, it acknowledges that if a multi-family residential application is made for these parcels, the parcels would support such use, subject to the applicable City codes and other requirements set forth in this Decree. The City agrees not to modify the City Center PUD to limit or restrict those

areas where multi-family housing could be constructed within the City Center PUD for the duration of the Decree.

18. Future Changes to Zoning for Multi-Family Developments. The City represents that the only other land currently available for the development of multi-family units in the City of New Berlin (other than the parcels identified in paragraph 15 above in the City Center PUD) is a 30-acre parcel located at approximately 1500-1800 South Moorland Road, owned by Highland Memorial Park and zoned I-1. During the pendency of this Decree, the City shall not adopt or approve any changes to its future land use map that would limit or restrict construction of multi-family units on this parcel or on any other area where multi-family units would otherwise be possible, consistent with its future land use map, for the duration of this Decree.
19. Fair Housing Outreach. Within ninety (90) days of entry of the Decree, the City shall submit a Fair Housing Outreach Plan for approval by the United States. The objective of this outreach plan shall be to counter negative public perception following the City's actions on MSP's affordable housing development and perception that the City of New Berlin does not welcome residents regardless of race or color to live in New Berlin or that it does not welcome the development of affordable housing because of the race or color of the prospective residents. The parties agree that the City shall not be required to retain a consultant in order to implement this plan and that the requirements set forth in that plan may be performed by current City staff members. The Fair Housing Outreach Plan should include at a minimum: (1) a description of the specific outreach activities the City will undertake, entities the City will contact, and materials that the City will use to

encourage multi-family housing developers to propose and construct affordable housing in New Berlin; (2) a description of the specific outreach activities the City will undertake, entities the City will contact, and materials that the City will use to advertise affordable housing opportunities available in New Berlin to all households, regardless of race; and (3) an estimated timetable for implementing the Fair Housing Outreach Plan. The Fair Housing Outreach plan shall not be funded by money from the Housing Trust Fund.

20. Upon receipt of the Fair Housing Outreach Plan, the United States will have thirty (30) days to approve or recommend changes to the Plan. The United States and the City will work cooperatively, and in good faith, to resolve any differences regarding provisions of the Plan. If the United States and the City cannot agree on provisions of the Plan, the parties will follow the dispute resolution process set forth in paragraph 34 *infra*. New Berlin will implement the Plan within thirty (30) days after all parties have executed this agreement.

VI. FAIR HOUSING TRAINING

21. Within sixty (60) days of the entry of this Decree, the City shall provide in-person training on the requirements of this Decree and of the FHA to all City officials or employees who have duties related to the planning, zoning, permitting, construction, or occupancy of residential housing, including, but not limited to, the Mayor and all members of the Common Council and all staff members or employees of the Plan Commission and Department of Community Development. The training shall be conducted by a qualified, independent third-party person or organization that has been

approved by the United States in advance. The City shall bear all costs associated with this training.

22. The City shall provide a copy of the attendance log evidencing that those persons required to receive such training hereunder have done so. Such log shall be provided with the City's reports. Within thirty (30) days of the date a City official or employee is newly hired for a position or undertakes new duties that would require him or her to attend fair housing training under the terms of this Decree, the City shall distribute to each such person a copy of this Decree and copies of all written materials from the most recent fair housing training session.

VII. COMPLIANCE AND RECORD-KEEPING

23. Within thirty (30) days of the entry of this Decree, the City shall designate a City employee or official as its Fair Housing Compliance Officer ("FHCO"). In addition to any responsibilities set forth above, the FHCO shall be the City official designated to receive complaints of alleged housing discrimination against the City, and participate in fair housing meetings and training. The FHCO shall maintain copies of the Decree, the Fair Housing Policy, the HUD Complaint Form and the HUD pamphlet entitled "Are you a victim of housing discrimination?" (HUD official form 903 and 903.1, respectively) and make these materials freely available to anyone, upon request, including all persons making a fair housing complaint.
24. During the term of the Decree, the FHCO shall provide an initial report within three months of the approval of this Decree and annually thereafter of his or her activities taken in compliance with the Decree. The City shall, in its first Compliance Report as set forth

in paragraph 28, below, notify the United States of the name, address, and title of the FHCO.

25. For the duration of the Decree, the City shall notify counsel for the United States in writing within thirty (30) days of receipt by the Fair Housing Compliance Officer of any complaint, whether written, oral, or in any other form, against the City of New Berlin, or against any of its employees or agents, regarding discrimination based on race or color in housing. If complaints are made verbally, the City shall make a contemporaneous written record of those complaints. The City shall inform counsel for the United States of any efforts the City undertook or plans to undertake to resolve each complaint, and shall promptly inform the United States of the terms of the resolution of the complaint or the failure to resolve the complaint.
26. The City shall preserve all records, including, but not limited to, electronic records and files created in association with complying with this Decree. The City shall be responsible for maintaining and preserving, or supervising the maintenance and preservation of, these records.
27. The City will use all reasonable efforts to notify individual Alderpersons and Plan Commissioners of their obligation to maintain and preserve records related to this case and compliance with the Decree. Under Wisc. Stat. 19.33(1), individual Alderpersons and Plan Commissioners have personal responsibility for the maintenance of records regarding their official duties. The City does not have access to, or control of, the personal e-mail accounts or personal computers of Alderpersons and Plan Commissioners. The City's responsibility to ensure that individual Alderpersons and

- Commissioners comply with their record-retention obligations is therefore limited accordingly.

VIII. REPORTING

28. The City shall be responsible for the preparation of annual reports, beginning six months after the entry of this Decree, to be submitted to counsel for the United States identifying all actions taken by the City to comply with the terms of this Decree. These reports will include, at a minimum:
 - a. The status of the City's compliance with paragraph 8 above concerning construction and completion of the Workforce Housing Development and Senior Housing Development, including permits, approvals, licenses and inspections that remain to be issued or conducted. The City has issued zoning and building permits for the Workforce Housing Development, and therefore, the City need not include these two items in its report;
 - b. A copy of the Fair Housing Policy distributed by the City of New Berlin pursuant to paragraph 9 and a print-out from the City's website showing a link to this Policy;
 - c. Representative copies of the advertising, notices, and print-out of the website showing the "Equal Housing Opportunity" logo referenced in paragraph 10;
 - d. An update on the activities of the Housing Trust Fund, including the identity of persons selected to serve on Housing Trust Fund Board, or any subcommittee thereof; efforts at fund-raising; and any projects that have applied for, or received funding from, the Trust Fund;

- e. The Fair Housing Outreach Plan, and any updates thereto, referenced in paragraphs 19-20;
 - f. The training log referenced in paragraphs 21-22;
 - g. The name and contact information for the FHCO as set forth in paragraph 23, and any reports prepared by the FHCO for the City, as required by paragraph 24; and
 - h. Any complaints of housing discrimination based on race or color made to the City, as described in paragraph 25.
29. Upon reasonable notice to counsel for the City, the United States shall be permitted to inspect and copy any records associated with compliance with this Decree or, upon request by the United States, the City shall provide copies of such documents.

IX. CIVIL PENALTY

30. Within thirty (30) days after the entry of this Decree, the City shall pay a total of \$5,000 to the United States as a civil penalty, pursuant to 42 U.S.C. 3614(d)(1)(C). This payment shall be delivered to counsel for the United States, by overnight mail, in the form of a cashier's check payable to the "United States Treasury."

X. SCOPE AND DURATION OF DECREE

31. The provisions of the Consent Decree shall apply to the City, its officers, agents, employees, consultants, and all persons acting in active concert or participation with them.
32. The Consent Decree shall remain in effect for four (4) years after the date of its entry. The United States and the City agree that in the event City engages in any future violation of the Fair Housing Act, such violation shall constitute a "subsequent violation" pursuant

to 42 U.S.C. 3614(d)(1) (C)(ii). This provision applies to any future violation, whether resolved voluntarily or through judicial proceedings.

33. The Court shall retain jurisdiction of this action for the duration of this Decree to interpret and enforce its terms as necessary, after which time the case shall be dismissed with prejudice. The United States may move the Court to extend the duration of the Decree in the event of noncompliance, whether intentional or not, with any of its terms, or if it believes the interests of justice so require.

XI. REMEDIES FOR NON-COMPLIANCE

34. The United States and the City shall endeavor in good faith to resolve informally any differences regarding interpretation of and compliance with this Decree. After such good faith efforts, if either party contends that there has been a failure by the other to perform in a timely manner any act required by this Decree, or otherwise to act in conformance with any provision thereof, it may move this Court for relief and for any remedy authorized by law or equity.

XII. TIME FOR PERFORMANCE


35. Any time limits for performance imposed by this Decree may be extended by mutual written agreement of the parties. The other provisions of this Consent Decree may be modified by written agreement of the parties or by motion to the Court. If the modification is by written agreement of the parties, then such modification will be effective within (30) days of filing the written agreement with the Court, and shall remain in effect for the duration of the Consent Decree, or until such time as the Court indicates

through written order that it has not approved the written agreement to modify the Consent Decree.

XIII. COSTS OF LITIGATION

36. The United States and the City will each bear its own costs and attorneys' fees associated with this litigation.
37. The parties acknowledge that HUD is engaged in an investigation in Waukesha County arising from a Complaint brought by the Metropolitan Milwaukee Fair Housing Council. That Complaint involved the County's management and disbursement of C.D.B.G. funds. As part of that investigation, HUD has sought records from sub-recipients of block grant funding, including the City of New Berlin. The United States acknowledges that the existence of this pending investigation shall not in and of itself be considered a breach of the terms of this Consent Decree in general or the injunction established hereunder in particular.

Dated: April 19th, 2012


HONORABLE RUDOLPH T. RANDA
UNITED STATES DISTRICT JUDGE

The undersigned hereby consent to and apply for entry of this Decree:

For the United States

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MEMORANDUM OF UNDERSTANDING

This memorandum of understanding (“MOU”) is entered into as of July 19, 2011 between MSP Real Estate, Inc., a Minnesota corporation (which, together with its shareholders and affiliates, is hereinafter referred to as “MSP”), and the City of New Berlin, a Wisconsin municipal corporation (which, together with its elected officials, employees, and constituent bodies, is hereinafter referred to as “the City”).

WHEREAS, MSP and its affiliate, Deer Creek Homes, a Wisconsin Limited Partnership, have commenced litigation against the City and its Mayor in the United States District Court for the Eastern District of Wisconsin as Civil Action No. 11-CV-281 (hereinafter referred to as “the federal litigation”); and

WHEREAS, MSP and the City are desirous of resolving the federal litigation upon the following terms and conditions,

The parties hereto enter into the following Memorandum of Understanding:

1. In 2004, the City issued a zoning permit to Deer Creek Homes, a Wisconsin Limited Partnership, for the construction of a 118-unit condominium development within New Berlin City Center and in 2005, the City and the same entity entered into a development agreement dated June 14, 2005 respecting construction of public infrastructure related to that development (the “2005 Development Agreement”).

2. When MSP, as agent for Deer Creek Homes, a Wisconsin Limited Partnership, applied for a building permit to build the remaining 102 condominium units in February 2011, the City declined to issue it on the ground that the existing Deer Creek Homes, a Wisconsin Limited Partnership, is a different legal entity than the entity to which the 2004 zoning permit was issued and which was party to the 2005 Development Agreement.

3. Because a federal judge, as part of an early neutral mediation, has issued an opinion that the existing Deer Creek Homes, a Wisconsin Limited Partnership, is the same entity, the City will promptly issue a building permit to MSP for construction of the condominium development in accordance with the plans submitted to the City in January 2011, which include three 34-unit buildings for a total of 102 units and certain modifications to correct construction-related issues and further pursuant to the terms of the 2005 Development Agreement and subject to the tender by MSP of a letter of credit or other surety acceptable to the City in the sum of \$724,291.58 (the "MSP Surety"). No Plan Commission or Common Council approval is needed to permit the build-out of the 102 units within City Center Condominiums.

4. After the building permit for the 102-unit development is issued, the City and its consultants will not obstruct or delay the project, in particular with respect to the timing, level, and issuance, as applicable, of inspections, approvals, occupancy permits, and other similar matters. Matters with respect to the existing plans that require modification or clarification will be handled reasonably, in good faith, and in the ordinary course of permitting and construction.

5. The City will immediately apply for all necessary approvals from all county and state agencies, including, without limitation, the Wisconsin Department of Natural Resources, to allow for construction of the public infrastructure related to the 102-unit development and the senior housing development, next discussed.

6. MSP will receive a letter from the City Attorney that confirms that the development of a 34-unit multi-family project suited for senior housing (the "Senior Housing Development") on the remaining portion of the property to be acquired by MSP and located outside of the current boundaries of City Center Condominiums (the "Senior Housing Parcel")

was contemplated as part of the approval relating to the condominium development. The Senior Housing Parcel and the property on which the condominium development is to be located is referred to as the "Property".

7. The Common Council of the City of New Berlin (the "Common Council") will terminate the moratorium on development impacting the Property, and if the Common Council elects to amend the planned unit development overlay district (the "PUD") in which the Property is located or otherwise adopt, amend, or revise any zoning, building, or other ordinance that impacts the Property or the development thereof, any such adoption, amendment, or modification shall expressly state that it does not apply to or impact any projects or developments approved or contemplated prior to the effective date of the existing moratorium. No moratorium affecting the Property shall be reinstated until all construction on the Property has been completed, certificates of occupancy have been issued for all such construction, and all of the public infrastructure has been dedicated and accepted by the City. No zoning change or amendment to the PUD or otherwise will be enacted that in any way precludes the construction of the MSP projects or results in either of such projects becoming non-conforming.

8. MSP will submit complete plans as that term is used in the New Berlin Municipal Code to the City for the Senior Housing Development which shall consist of one 34-unit building on or before July 22, 2011. City staff will accept such application and expeditiously review and approve the application, working cooperatively with MSP to achieve a submission which is compliant with the New Berlin municipal code for approval of the Senior Housing Development, so that the Senior Housing Development can be submitted for City Plan Commission approval at or before its September 6, 2011 meeting. Common Council approval will not be required for the Senior Housing Development as the Senior Housing Development

will only necessitate use, site and architectural approval by the Plan Commission. Senior Housing is defined as serving persons 55 and older.

9. The Senior Housing Development and Senior Housing Parcel, and only that project and parcel, will be submitted to Plan Commission for approval with staff recommendation.

10. At such time as the Senior Housing Development has been approved by the Plan Commission and all conditions attendant thereto are or will be satisfied in the ordinary course, MSP promptly, in the ordinary course, will be granted a building permit to commence construction of the Senior Housing Development. After the building permit for the Senior Housing Development is issued, the City and the consultants will not obstruct or delay the project, in particular with respect to the timing, level, issuance, as applicable, of inspections, approvals, occupancy permits and other similar matters. Matters with respect to the approved plans that require modification or clarification will be handled reasonably, in good faith, and in the ordinary course of permitting and construction.

11. Upon the posting of the MSP Surety, the deposit (the "Deposit") held pursuant to that certain Settlement Agreement dated November 16, 2009 (the "Settlement Agreement") between the City and AnchorBank, f.s.b. ("AnchorBank") shall be reduced to \$510,000 and the City and AnchorBank will promptly enter into a joint release direction that directs the escrow agent under the Settlement Agreement to release to AnchorBank all but \$510,000 of the Deposit.

12. MSP agrees to promptly commence or cause the commencement of construction of the extension of Deer Creek Parkway from Library Lane to National Avenue (the

“Road Extension”) and to complete or cause the completion of the same in the ordinary course, provided that the City is able to obtain (i) all approvals for the Road Extension, including any required signals, roundabouts, or other intersection treatments from all governmental agencies with jurisdiction, including the Wisconsin Department of Transportation and the County of Waukesha; (ii) any and all property or property rights needed to construct the extension in accordance with said plans, so that the extension can be undertaken and completed by MSP in a commercially reasonable manner and cost and without MSP’s having to acquire any third-party consents or property interests; and (iii) the plans and specifications for the Road Extension are reasonably acceptable to MSP or the then developer of the Road Extension, as applicable (collectively, the “Road Extension Requirements”). If the City is unable to obtain said approvals and property rights by September 1, 2013, then the obligations of MSP to build and/or fund the Road Extension will terminate and any remaining Deposit shall be released to AnchorBank and the Settlement Agreement shall be terminated and City and AnchorBank shall have no rights or obligations under the Settlement Agreement and AnchorBank shall have no obligations to build and/or fund the Road Extension except as expressly set forth in Paragraphs 14 and 15.

13. If MSP builds the Road Extension pursuant to Paragraph 11, then (i) AnchorBank and the City shall execute a joint release direction directing the escrow agent under the Settlement Agreement to release the remaining Deposit to MSP on a draw basis to pay for construction of the Road Extension on terms reasonably satisfactory to MSP, the City and AnchorBank and (ii) upon construction of the Road Extension, any remaining Deposit shall be released to AnchorBank.

14. If the Road Extension Requirements have not been met at the time of any proposal with respect to the development of any of the property or any parcel thereof along

National Avenue and generally depicted on Exhibit A attached hereto (the “National Avenue Parcels”), then the City shall not require that the Road Extension be built as part of the development of any such National Avenue Parcel. However, the City may impose as part of the development agreement for said National Avenue Parcel (a “National Avenue Development Agreement”) a requirement that said National Avenue Parcel contribute to the cost of said Road Extension at such time as the Road Extension Requirements have been met based upon the anticipated pro-rata share of the traffic being generated by that National Avenue Parcel as compared with anticipated traffic generated by the other properties contributing to the traffic on said Road Extension or on such other terms as may be agreed to by the City and the parties thereto. Notwithstanding the foregoing, the agreement to contribute shall apply only if the Road Extension Requirements are met after September 1, 2013 and the Road Extension has not been built and shall terminate if the Road Extension Requirements have not been met or the Road Extension substantially constructed on or before the third anniversary of the date of the applicable National Avenue Development Agreement.

15. If the Settlement Agreement is still in place at the time of the execution of any National Avenue Development Agreement, then the amount of the required Deposit shall be reduced by the amount of the contribution for the Road Extension set forth in the applicable National Avenue Development Agreement and AnchorBank and the City shall sign a joint release direction directing the escrow agent under the Settlement Agreement to release the applicable amount to AnchorBank. Upon the execution of National Avenue Development Agreements for all of the National Avenue Parcels, then any remaining Deposit shall be released to AnchorBank.

16. The City Attorney will provide a letter to MSP and to any title insurance company designated by MSP, that states that the following is consistent with and in compliance with City ordinances and any other regulations applicable thereto: the submittal of the Senior Housing Parcel to a new condominium declaration and the conveyance of any units created pursuant thereto, without the need for a new certified survey map.

17. The City Attorney and the Director of City Development will provide a letter to MSP that states that (i) a certified survey map that provides for the separation of the City Center Condominiums from the Senior Housing Parcel and/or (ii) subject to obtaining any signatures required under the Wisconsin Condominium Ownership Act and Chapter 236 of the Wisconsin Statutes, as applicable, a certified survey map that separates Building 1 of City Center Condominiums consisting of the currently built condominium units (“Building 1”) from the remainder of the Property or (iii) a Certified Survey Map(s) that separates the Senior Housing Parcel from the City Center Condominiums and, subject to obtaining the signatures required under the Wisconsin Condominium Ownership Act and Chapter 236 of the Wisconsin Statutes, as applicable, the 102 Unit Development from Building 1, should be approved in the ordinary course by the Common Council and will be approved by City staff subject to the other terms of the City municipal code applicable to certified survey maps. The parties acknowledge that the City Center PUD provides that the lands within the PUD may be divided in any manner pursuant to the Code.

18. No additional staff fees, application fees, review fees or similar fees will be required to be paid to the City, any of its instrumentalities, agencies, departments or consultants with respect to the review and approval of either the development of the 102 unbuilt units within City Center Condominiums or the Senior Housing Development or the Road

Extension, including, without limitation, in connection with the review of any certified survey maps. All such fees shall be deemed waived or paid based on the fees paid to date by MSP. Notwithstanding the foregoing, the construction of the units shall be subject to applicable impact fees as well as building permit fees and construction inspection fees as provided for in the 2005 Development Agreement and construction inspection fees as applied to the Road Extension.

19. Upon issuance of the building permits for construction of the condominium development and provided the City remains in compliance with its undertakings set forth in this MOU, MSP will withdraw without prejudice its motion for preliminary injunction, pending receipt of all the necessary approvals for the Senior Housing Development, at which point MSP will agree to a stay of further proceedings in the federal litigation. Upon actual completion of the entire project, including the 102-unit development and the Senior Housing Development, issuance of occupancy permits for the entire project and acceptance and dedication of all public infrastructure for the entire project, except the Road Extension, the disbursement of all but \$510,000.00 of the Deposit to AnchorBank, and the payment of all fees to be paid by the City to MSP or on behalf of MSP, MSP will dismiss the federal litigation with prejudice. The parties will then execute and deliver complete releases, in the customary form. The terms of this MOU will survive any such dismissal.

20. This MOU is the product of a unique set of circumstances and shall not be considered as precedent for any future agreements between the parties. Should the MOU terminate pursuant to Paragraph 4, this MOU and the representations made thereunder may not be offered or used for any other purposes in this litigation.


21. Nothing in this MOU shall be considered as limiting the right of the City to enforce the terms of the zoning permit, building, grading, utility and storm water management plans or the 2005 Development Agreement consistent with this MOU and its intent, provided such enforcement is in good faith, reasonable and in the ordinary course.

22. MSP shall notify the U.S. Department of Justice that the terms set forth in this MOU are satisfactory to MSP and that MSP is willing to settle the case on the terms set forth in this MOU.

23. The parties acknowledge that phased occupancy of the condominium units is acceptable provided that the units being occupied and the related common areas have passed building inspection review, except for minor or seasonal completion issues.

IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives, have executed this MOU effective as of the date stated above.

MSP REAL ESTATE, INC.

By 
Milo S. Pinkerton
President

CITY OF NEW BERLIN

By _____
Jack Chiovaturo
Mayor

Attest: _____
Kari Morgan
Clerk

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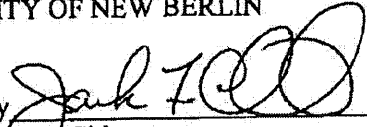
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MSP REAL ESTATE, INC.

By _____
Milo S. Pinkerton
President

CITY OF NEW BERLIN

By 
Jack Chiovero
Mayor

Attest: 
Kari Morgan
Clerk

Appendix B

NONDISCRIMINATION POLICY

It is the policy of the City of New Berlin (“the City”) to comply with Title VIII of the Civil Rights Act of 1968, as amended, (commonly known as the Fair Housing Act) by ensuring that its zoning and land use decisions do not discriminate against persons based on race, color, religion, national origin, disability, familial status or sex. This policy means that, among other things, the City and all its officials, agents and employees will not discriminate in any aspect of housing based on these protected class characteristics, including by:

- (a) making unavailable or denying a dwelling to any person based on race or color;
- (b) discriminating against any person in the terms, conditions or privileges of a dwelling, or in the provision of services or facilities in connection therewith based on race or color;
- (c) Making, printing, or publishing, or causing to be made, printed, or published any notice, statement, or advertisement, with respect to a dwelling that indicates any preference, limitation, or discrimination based on race or color;
- (d) Representing to persons because of race or color that any dwelling is not available when such dwelling is in fact so available;
- (e) interfering with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right protected by the Fair Housing Act;
- (f) interfering with the funding, development, or construction of any affordable housing units because of race or color; and
- (g) discriminating on the basis of race or color in any aspect of the administration of its zoning, land use, or building ordinances, policies, practices, requirements, or processes relating to the use, construction, or occupancy of dwellings.

Any person who believes that any of the above policies have been violated by the City may contact the City’s Fair Housing Compliance Officer at _____, the U.S. Department of Housing and Urban Development at 1-888-799-2085, or the U.S. Department of Justice at 1-800-896-7743 or 202-514-4713.

ORDINANCE NO. 2491

**ORDINANCE TO CREATE A HOUSING TRUST FUND
FOR THE CITY OF NEW BERLIN**

The Common Council of the City of New Berlin do ordain as follows:

SECTION I

Chapter __ of the Municipal Code of the City of New Berlin is hereby created to read as follows:

1. Establishment and Purpose

There is hereby established a Housing Trust Fund to support developers and government entities in the acquisition, construction, rehabilitation and modification of affordable and accessible housing for low income and moderate income households and to finance support services that assist low and moderate income households in obtaining and maintaining affordable housing. Of the initial amounts placed in the Housing Trust Fund, at least \$50,000, and not less than half of any additional amounts, shall be used for projects or programs designed to promote integration and equal housing opportunity for all persons, regardless of race.

2. Administration

The Housing Trust Fund shall be administered by the City of New Berlin Department of Community Development; however, final decisions regarding distribution of funds shall be made by the New Berlin Housing Trust Fund Board which shall be established as a subcommittee of the City of New Berlin Community Development Authority. It shall be the responsibility of the Board to administer the Housing Trust Fund to develop and implement appropriate rules, procedures, guidelines and regulations for the proper operation of the Housing Trust Fund, to review requests for funding from the Housing Trust Fund and make funding determinations, to establish criteria and procedures for reviewing requests for funding from the Housing Trust Fund and for allocating such funds and to prepare and submit an annual report to the Community Development Authority concerning the administration and activities of the Housing Trust Fund.

3. Housing Trust Fund Board

A Housing Trust Fund Board is hereby created consisting of the following six members who shall serve staggered two year terms: one Common Council Member appointed by the Common Council President; one member appointed by the Common Council President; a Developer appointed by the Mayor; a Representative of an advocacy group in the issue of affordable housing board in Waukesha County as determined by the Mayor; the Director of the Waukesha County Fair Housing Council; a Director of the Waukesha County Housing Authority. Members need not be City residents. The Mayor shall designate the Board chair.

4. Duties of the Housing Trust Fund Board

The Housing Trust Fund Board shall:

- i. Evaluate requests for funding from the Housing Trust Fund after the requests have been submitted to and reviewed by the City of New Berlin Department of Community Development.
- ii. Identify sources of financing the Housing Trust Fund that may be utilized for consideration by the Common Council.
- iii. Adopt rules, guidelines and criteria to assist in carrying out its responsibilities.

5. Financing the Housing Trust Fund

It is anticipated that the Housing Trust Fund is to be funded by post closure tax incremental district revenues and other funding sources that may be identified by the Common Council and the Housing Trust Fund Board.

The Housing Trust Fund shall be initially capitalized in the sum of Seventy-Five Thousand Dollars (\$75,000.00).

The Community Development Authority is hereby authorized to administer the Housing Trust Fund and to promote affordable housing through the City of New Berlin.

SECTION II

The several sections of this ordinance shall be considered severable. If any section shall be considered by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the other portions of the ordinance.

SECTION III

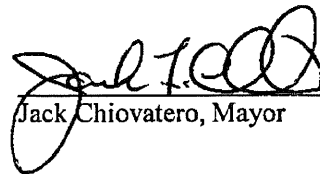
All ordinances or parts of ordinances contravening the terms and conditions of this ordinance are hereby to that extent repealed.

SECTION IV

This ordinance shall take effect upon passage and publication as approved by law, and the City Clerk shall so amend the Code of Ordinances.

PASSED AND ADOPTED by the Common Council this 12 day of June, 2012.

APPROVED:



Jack Chiovatero, Mayor

Countersigned:



Kari Morgan, City Clerk