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Anne Zellhoefer
Anne Zellhoefer
Assistant City Attorney

Enclosed please find for filing the Tax Incremental Financing Loan Agreement By and Between the City of Madison and The Constellation Project, LLC and the TIF Disbursing Agreement. Execution of these Agreements was authorized by Resolution No. RES-12-00191, File No. 25561 adopted March 20, 2012.

If you should have any questions, please feel free to contact me.

TO: City Clerk
FROM: Anne Zellhoefer, Assistant City Attorney
RE: ATTACHED LOAN AGREEMENT and TIF DISBURSING AGREEMENT

MEMORANDUM

Date: June 11, 2012

CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511

KRISTI CHLEBOWSKI
DANE COUNTY
REGISTER OF DEEDS

DOCUMENT #

4879254

06/11/2012 08:05 AM

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Exempt #:

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Return to:

Anne Zilkofsky
City of Madison
210 Martin Luther King, Room 401
Madison, WI 53703

251/0709-133-0211-6

TIF Loan Agreement
Recording Cover Page

**TAX INCREMENT FINANCING
LOAN AGREEMENT
BY AND BETWEEN
THE CITY OF MADISON AND
THE CONSTELLATION PROJECT, LLC**

This Tax Increment Financing Loan Agreement (the "Agreement") is entered into as of the 1st day of June, 2012, by and between **THE CONSTELLATION PROJECT, LLC**, a Wisconsin limited liability company ("Developer"), its permitted successors and assigns, and the **CITY OF MADISON**, a Wisconsin municipal corporation, located in Dane County, Wisconsin ("City").

W I T N E S S E T H :

WHEREAS, the Common Council of the City of Madison, on May 1, 2012, adopted Enactment No. RES-12-00281, File No. 25641, amending Tax Incremental District No. 36, Capitol Gateway Corridor (the "District") and approving the amended Project Plan for the development of the District (the "Project Plan"), which amended Project Plan, as so approved, and as it may hereinafter be further amended from time to time pursuant to law, is hereby incorporated in this Agreement and made a part hereof by reference; and

WHEREAS, Developer wishes to enter into this Agreement for the purpose of developing certain real property in the District, which real property is described in Exhibit A, attached hereto and incorporated herein by reference (the "Property"); and

WHEREAS, this Agreement is intended to provide for certain duties and responsibilities of the City and Developer and for Developer's construction on the Property of a mixed use building encompassing approximately 217 residential apartment units, and approximately 36,000 gross square feet of space to be developed and leased for commercial, retail or other uses as permitted by the zoning text, and structured parking including approximately 280 individual parking stalls and related improvements (collectively, the "Project"); and

WHEREAS, because the Property is blighted and contaminated, the costs to construct the structured parking have made the Project infeasible but for the Loan (as defined below) from the City to the Developer;

NOW, THEREFORE, in consideration of the foregoing recitals, the mutual covenants hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed by and between the parties hereto as follows:

1. Loan. Pursuant to the terms of this Agreement, the City will provide tax increment financing assistance to Developer in the form of a zero percent (0%) interest loan in the amount of Three Million Four Hundred and Thirty-Two Thousand Dollars (\$3,432,000) (the "Loan") to partially finance Developer's redevelopment of the Property. The Loan is to assist Developer with TIF eligible expenses, as defined by Sec. 66.1105(2), Wis. Stats.

2. Conditions Precedent to Disbursement of Loan Proceeds. The City shall cause the Loan proceeds to be disbursed to the Title Company (as identified below) for the benefit of Developer, to be disbursed in accordance with a separate Disbursing Agreement between the Developer, the City and Title Company.

- a. Disbursement to Title Company. The City shall disburse the TIF Loan to the Title Company after each and every one of the following terms, covenants and conditions have been satisfied or waived, in the sole opinion of the City Attorney:
- (i). Execution of Loan Documents. Developer shall have executed the following loan documents, as approved by the City Attorney (collectively, "Loan Documents");
 - (A) Note in the amount of the Loan ("Note");
 - (B) Real estate mortgage on the Property securing the Loan and Equity Participation Payment described in Section 6 below ("Mortgage") for the benefit of the City. The Mortgage shall be recorded in the office of the Dane County Register of Deed at Borrower's expense prior to or simultaneous with the disbursement of the Loan Proceeds. The lien of the Mortgage shall be subject to and subordinate in all respects to (i) a first mortgage lien from Borrower to BMO Harris Bank N.A. ("Lender") in the original principal amount not to exceed Twenty-Three Million Dollars (\$23,000,000) (the "First Mortgage"), (ii) a second mortgage from Borrower to BMO Harris Bank, N.A. ("Lender") in an amount not to exceed Five Million Six Hundred Thousand Dollars (\$5,600,000) (the "Second Mortgage") (together with the First Mortgage, the "Bank Mortgages"), (iii) restrictions and easements of record shown on Exhibit B attached hereto, and (iv) municipal and zoning ordinances, current taxes and assessments not due as of the date of the Mortgage, the rights of tenants in possession, and other encumbrances acceptable to the City (collectively, the "Permitted Encumbrances");
 - (C) Personal Guaranty executed by Otto C. Gebhardt III ("Guarantor") guaranteeing Developer's obligations to make payments pursuant to Sections 5, 6 and 31 herein ("Personal Guaranty").
 - (ii) Certificates of Insurance. Developer shall have provided to the City all certificates of insurance required by the Mortgage.
 - (iii) Release of Liens and Encumbrances. Developer shall have provided to the City releases of all easements, liens, encumbrances or claims against the Property or any part thereof which may in any way conflict with construction of the Project or with any of the terms and conditions of this Agreement, or title insurance affirmatively insuring against any loss or damage resulting from such easements, liens, encumbrances or claims.
 - (iv) Title Commitment. Developer shall have provided, at Developer's sole cost and expense, an ALTA commitment for marketable title insurance for the Property issued by First American Title Insurance Company (the "Title Company") to issue a lender's policy of title insurance insuring the City in the amount of the Loan, showing liens, encumbrances and other matters of record, as of a date that is within thirty (30) days of the date of this Agreement. The City shall have ten (10) days following receipt of the commitment to notify Developer in writing of any liens, encumbrances or

3. Use of Loan Proceeds. Developer shall use the Loan proceeds to pay for TIF eligible expenses. Developer shall redevelop and construct the Project in accordance with the approved PUD-GDP-SIP, the TIF application submitted by Developer, and all demolition and construction permits issued for the Project.

(ii) Construction Commencement Deadline. Developer shall have commenced construction of the Project on or before December 31, 2012. If Developer fails to do so, this Agreement shall be null and void and the City shall have no obligation to disburse the Loan proceeds. Commencement of construction shall be evidenced by the issuance of a demolition and foundation permit.

(i) Prepaid Developer Expenses. Developer shall have provided documentary evidence to the City that Developer has expended Developer funds on the Project in an amount not less than the amount of the Loan. Such evidence may include, but not be limited to, copies of paid invoices or other documentation of pre-paid project costs paid by Developer and/or a financial statement demonstrating Developer's financial capacity to invest equity in the Project.

b. As a condition of disbursement of Loan proceeds by the Title Company to the Developer pursuant to the Disbursing Agreement between the Developer, the City and Title Company, each and every one of the following terms, covenants and conditions shall have been satisfied or waived, in the sole opinion of the City Attorney:

(vi) Company Authorizations. Developer shall have provided a copy of Developer's Operating Agreement, and all amendments thereto, and all company resolutions authorizing the execution of the Project loan documents.

(v) Financing Commitment. Developer shall have provided evidence of Project financing, Developer equity and prior Project costs incurred by Developer in the aggregate amount of not less than Thirty-Six Million Dollars (\$36,000,000) (the "Financing") in the form of statements showing amounts previously incurred by Developer for Project costs, bank statements or other documents or evidence showing Developer's financial capacity to invest equity in the Project, construction loan commitments or other evidence of the amount to be disbursed by Lender at closing simultaneous with funding of the Loan, bond financing, and associated lender commitments, or other documentary evidence acceptable to the City.

Defects to which the City objects. In the event the City does not notify the Developer of any objections to title matters in the commitment, all such matters shall be deemed included in and approved Permitted Encumbrances. Simultaneous with recording the Mortgage, Borrower shall cause the Title Company to issue a lender's title insurance policy naming the City as an insured lender in the amount of the Loan, together with gap coverage, subject only to the Permitted Encumbrances (the "Title Policy").

6. Equity Participation Payment. In addition to all other payments required to be made by Developer to the City as required by the Loan Documents, Developer shall pay the City: (i) eight and one half percent (8.5%) of the gross sale proceeds of the Property, not to exceed the amount of the Loan, on the day of sale or other transfer title to the Property, or any portion or Unit thereof, including all improvements thereon; or (ii) if the Property has not sold prior to September 6, 2032, eight and one half percent (8.5%) of the appraised value of the Property, including all improvements thereon, not to exceed the amount of the Loan, on September 6, 2032 ("Equity Participation Payment"). Any Equity Participation Payment owing by Developer shall be reduced by the amount of any Clawback Payment, as described in Section 32 herein. Notwithstanding the foregoing, if Developer, on the date of sale or September 6, 2032, provides evidence to the City that indebtedness encumbering the Property exceeds the amount of its appraised value, Developer shall not be obligated to make an Equity Participation Payment, and the City shall waive this requirement upon receipt of an appraisal, commissioned by Developer and prepared by a Wisconsin licensed appraiser in accordance with applicable industry standards.

b. Developer's obligations under this Section 5 shall terminate when the City has collected from the tax increment generated by the Property, or has been paid under Developer's guarantee in 5.a., or has been paid by Developer pursuant to Section 31 below the aggregate amount of Three Million Four Hundred Thirty-Two Thousand Dollars (\$3,432,000).

a. Commencing with the 2015 tax year and for each calendar year thereafter until the Loan is fully recovered, Developer shall pay to the City the difference between (i) the Guaranteed Tax Increment plus any excess tax increment. Excess tax increment means any tax increment generated by the Property that exceeds the Guaranteed Tax Increment in any year. The City shall account for any excess tax increment and shall carry it forward to be applied, if necessary, to Developer's obligation under this Section 5. The basis for computing the tax increment shall be the combined assessed value of the Property as of January 1, 2012. The City shall provide Developer with an itemization of the tax increment received from the Property and a calculation of the difference between the tax increment and the Guaranteed Tax Increment following the end of each calendar year. Developer shall pay the amount of any Guaranteed Tax Increment deficiency to the City for receipt of payments hereunder by the following August 31st. Notwithstanding any other provisions hereof to the contrary, Developer guarantees the City shall receive the Guaranteed Tax Increment from the Property in the amounts shown on Exhibit B or Developer shall, by August 31st following any tax year, pay the difference to the City by.

5. Developer Guarantee. Developer hereby guarantees that the City will receive the guaranteed annual tax increment from the Project as shown on Exhibit B attached hereto ("Guaranteed Tax Increment"). The Guaranteed Tax Increment shall be paid in the following manner:

4. Subordination. This Agreement and any interest the City may have in and to the Property pursuant to this Agreement and the Mortgage is at all times and shall remain subordinate to the Bank Mortgages, as they may be renewed, extended or refinanced from time to time. The City agrees to execute from time to time, within twenty (20) days of request, subordination agreements or acknowledgements in a form approved by the City Attorney, which approval shall not be unreasonably withheld.

10. Disclaimer of Relationships. Developer acknowledges that nothing contained in this Agreement or any contract between Developer and the City, nor any act by the City, shall be deemed or

nor shall any charge be made in any form by any party for the access provided in this section.
Access for Inspection. Developer shall permit the representatives of the City to have access to the Property at all reasonable times when the City deems access necessary to insure compliance with the terms and conditions of this Agreement, including but not limited to access for inspection of all work being performed in connection with the construction of the Project. No compensation shall be payable

c.
Covenant to Not Build. Developer agrees to not construct any building or other structure or part thereof on, over, under or across any existing public or private easement or right-of-way therefore unless such construction has first been approved in writing by the City and all other public bodies having jurisdiction on the Property.

b.
Utilities Access. The City does hereby reserve for itself the unqualified right to enter upon the Property at all reasonable times for the purpose of reconstructing, maintaining, repairing or servicing any public utilities now located within the Property boundary lines, pursuant to specifically located easements.

9. Rights of Access to Property.

a.
Enforceability. Developer represents and warrants to the City that this Agreement and all other documents required to be executed and delivered by Developer at closing have been duly and validly authorized, executed and delivered by Developer and will be enforceable against Developer in accordance with their respective terms, except as limited by applicable bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance or similar laws generally affecting creditor's rights and subject to general equity principles.

b.
Organizational Authority. Developer represents and warrants to the City that it is a Wisconsin limited liability company duly organized and existing under the laws of the State of Wisconsin, and that all company proceedings necessary to authorize the execution of this Agreement and the consummation of the transaction contemplated by this Agreement have been taken in accordance with applicable law.

8. Representations and Warranties of Developer.

7. Sale to Tax Exempt Entity. Developer agrees to not transfer, sell or convey the Property or any portion or Unit thereof to any entity that is exempt from the general property tax ("Buyer") prior to September 6, 2032 without the prior written approval of the City. Developer agrees and understands that such City approval shall be withheld and the City shall not provide a partial release of its mortgage unless and until Buyer executes an agreement with the City under which Buyer shall agree to make payments in lieu of taxes to the City in the amount of property tax last levied on the property to be conveyed as of the date of conveyance from Developer to Buyer through 2032 ("PILOT Agreement"). Such PILOT Agreement shall be evidenced by a Note and secured by a mortgage from Buyer in favor of the City.

construed by any of the parties, or by third persons, to create any relationship of third-party beneficiary, principal or agent, limited or general partnership, or joint venture, or of any association or relationship involving the City.

11. Obligation to Maintain and Repair. Developer agrees that at all times after construction of the Project, it will keep and maintain, or cause to be kept and maintained, the Property and all improvements thereon owned or operated by Developer in good repair and working order and will make, or cause to be made, from time to time all necessary repairs thereto (including external and structural repairs) and renewals and replacements thereof.

12. Recording of Documents. Developer shall, on the same day or on the next subsequent day following execution of this Agreement, promptly record this Agreement and the Mortgage in the office of the Register of Deeds for Dane County, Wisconsin. Developer shall pay all recording fees.

13. Accessibility Accommodations. Developer agrees to comply with the provisions of Exhibit D attached hereto and to ensure the Project will be accessible to persons with disabilities, and that the Project is in compliance with Sec. 39.05, Madison General Ordinances, and the Americans with Disabilities Act, where applicable.

14. Indemnification.

a. Developer shall be liable to and hereby agrees to indemnify, save harmless and defend the City, its officers, officials, agents and employees against all loss or expense (including liability costs and reasonable attorney's fees) from any and all claims, demands, liabilities and causes of action of whatever kind or nature related to the Project or Property, to the extent occasioned in whole or in part by any act or omission of Developer or its officers, members agents, contractors, subcontractors, invitees or employees, which may now or hereafter be made against them, whether caused by or contributed to by the negligent acts of the City, its agents or employees.

b. The provisions of this Section 15 shall survive termination of this Agreement and shall be in addition to any other rights and remedies of the City.

15. Damage and Condemnation. Developer shall procure and maintain continuously in effect all proper insurance with respect to the Property, including but not limited to the insurance required by the Mortgage. Developer agrees to perform all the terms and covenants of the Mortgage as fully as if set forth in the Agreement. If there is any amount remaining unpaid on the Loan or Equity Participation Payment when all or any of the Property is taken by eminent domain, or destroyed or damaged, and unless Developer exercises its option to prepay the entire amount owing on Note, then the following subsections shall apply.

a. Repair and Rebuild. Except as otherwise required under the Bank Mortgages, as they may be renewed, extended or refinanced from time to time, Developer shall proceed promptly to replace, repair, rebuild and restore the Property to substantially the same condition as existed before the taking or event causing the damage or destruction, and Developer will pay all costs thereof and be entitled to retain all net proceeds of the condemnation award or insurance claim, subject to the provisions of paragraph b.

- a. Nonpayment. If payment due under any of the Loan Documents is not paid when due and the nonpayment shall continue for fifteen (15) days after written notice to Developer;
- b. Misrepresentation. Any representation by the Developer to the City regarding the Project which shall prove to have been false in any material respect;
- c. Noncompliance with Covenants. Nonperformance by Developer of any covenant, agreement, term or condition in this Agreement not involving the payment of money, and the continuation thereof for a period of thirty (30) days after receipt by Developer of written notice from the City specifying such nonperformance and demanding that it be corrected, provided, however, if such nonperformance is not a health or safety violation, and if the nature of the nonperformance reasonably requires more than thirty (30) days to fully cure, Developer shall not be deemed to be in default if Developer commences and diligently proceeds to cure within a reasonable period of time;
- d. Breach of Mortgage. Noncompliance or breach of the performance or observance of any of the material terms or conditions of the Mortgage after the expiration of any applicable cure period;
- e. Insolvency. If Developer or Guarantor becomes insolvent or the subject of state insolvency proceedings, fails generally to pay debts as they become due or makes

this Agreement;

16. Events of Default. Any one or more of the following events is an Event of Default under

- d. Lien of Mortgage. All buildings, improvements, and equipment acquired in the repair, rebuilding, replacement, or restoration of the Property, together with any interest in land acquired by Developer necessary for such restoration, shall be deemed a part of the Property and subject to the lien of the Mortgage, and available for use by Developer without the payment of any additional amounts other than those provided in this Agreement and the Note, to the same extent as if they had been specifically described in the Mortgage; provided that no land, interest in land, buildings or improvement shall be acquired subject to any lien or encumbrance other than permitted encumbrances.
- c. Balance of Insurance Proceeds. Developer shall not, by reason of the payment of any costs of repair, rebuilding, replacement or restoration, be entitled to any reimbursement from the City or any abatement or diminution of the amounts payable under the Loan Documents. Any balance of net proceeds remaining after payment of all costs of any repair, rebuilding, replacement or restoration shall be paid to the mortgagees under the Bank Mortgages, as they may be renewed, extended or refinanced from time to time, and then to the City, which will apply such proceeds against any amounts payable under the Loan Documents.
- b. Insurance Proceeds. The net proceeds of the insurance claim shall be paid or applied in accordance with the provisions of the loan documents for the Bank Mortgages. If the net proceeds are not sufficient to pay such costs in full, Developer will nonetheless complete the repairs or rebuilding and pay that portion of the costs in excess of the amount of the net proceeds.

20. Affirmative Action. As used in this Section 20, the term "Developer" means Developer and all contractors, subcontractors who perform work on the Project whenever said persons, firms or corporations are not exempt under the provisions of Sec. 39.02 of the Madison General Ordinances.

Developer further agrees that, for at least twelve (12) months after the effective date of this Agreement, it will notify the City of Madison Affirmative Action Department of each of its job openings at facilities in Dane County for which applicants not already employees of Developer are to be considered. The notice will include a job description, classification, qualifications, and application procedures and deadlines. Developer agrees to interview and consider candidates referred by the Affirmative Action Department if the candidate meets the minimum qualification standards established by the Developer, and if the referral is timely. A referral is timely if it is received by Developer on or before the date stated in the notice.

If this Agreement is still in effect, or if the City enters into a new agreement with Developer, within one year after the date on which the form was required to be provided, Developer will provide updated workforce information using a second form, also to be furnished by the City. The second form will be submitted to the City Affirmative Action Department no later than one year after the date on which the first form was required to be provided.

19. Workforce Utilization. Developer agrees that, within thirty (30) days after the effective date of this Agreement, Developer will provide to the City of Madison Affirmative Action Department certain workforce utilization statistics, using a form to be furnished by the City.

18. Non-Discrimination. In the performance of its obligations hereunder, Developer agrees not to discriminate against any employee or applicant for employment because of race, religion, marital status, age, color, sex, handicap, national origin or ancestry, income level or source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, political beliefs or student status. Developer further agrees not to discriminate against any subcontractor or person who offers to subcontract on this Agreement because of race, religion, color, age, disability, sex or national origin.

17. Remedies. Upon the occurrence of an Event of Default, the City shall, by written notice to the Developer, declare the Loan and Note to be immediately due and payable and/or may pursue any available remedy by suit at law or in equity to insure or realize the payment of the Guaranteed Tax Increments, the Loan, the Equity Participation Payment and the PILOT Payments, including such remedies as are provided in the Mortgage. No remedy conferred upon or reserved to the City under this Agreement is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or now or hereafter existing at law or in equity or by statute. In the event Developer should default under any of the provisions of this Agreement and the City should employ or assign attorneys or incur other expenses for the collection of any payments due hereunder or the enforcement of performance of any obligation on the part of Developer under this Agreement, Developer will on demand pay to the City the reasonable costs, charges or fees of such attorneys and such other expenses so incurred.

f. Tax Exemption. If the Property, or any portion or Unit thereof, becomes exempt from the general property tax.

an assignment for the benefit of creditors; or a receiver, trustee, custodian or other similar official is appointed for, or takes possession of any substantial part of the property of Developer or Guarantor.

Article VI

(This article is not applicable)

Article V

Within thirty (30) days after the effective date of this contract, it will complete an affirmative action plan that meets the format requirements of Federal Revised Order No. 4, 41 CFR Part 60-2, as established by 43 CFR 51400, November 3, 1978, including appendices required by City of Madison ordinance or within thirty (30) days after the effective date of this contract, it will complete a model affirmative action plan approved by the Madison Common Council.

B.

It has prepared and has on file an affirmative action plan that meets the format requirements of Federal Revised Order No. 4, 41 CFR part 60-2, as established by 43 CFR 51400 November 3, 1978, including appendices required by City of Madison ordinance or it has prepared and has on file a model affirmative action plan approved by the Madison Common Council.

A.

The Developer agrees that it will comply with all provisions of the Affirmative Action Ordinance of the City of Madison including the contract compliance requirements. The Developer warrants and certifies that, of the following two paragraphs, paragraph A or B is true (check one):

(This article applies only to non-public works contracts.)

Article IV

The Developer shall send to each labor union or representative of workers with which it has a collective bargaining Agreement or other contract or understanding a notice to be provided by the City advising the labor union or workers representative of the Developer's equal employment opportunity and affirmative action commitments. Such notices shall be posted in conspicuous places available to employees and applicants for employment.

Article III

The Developer shall in all solicitations or advertisements for employees placed by or on behalf of the Developer state that all qualified or qualified applicants will be employed without regard to race, religion, color, age, marital status, disability, sex or national origin.

Article II

The Developer shall take affirmative action in accordance with the provisions of this contract to insure that applicants are employed, and that employees are treated during employment without regard to race, religion, color, age, marital status, disability, sex or national origin and that the employer shall provide harassment-free work environment for the realization of the potential of each employee. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation and selection for training including apprenticeship insofar as it is within the control of the Developer. The Developer agrees to post in conspicuous places available to employees and applicants notices to be provided by the City setting out the provisions of the nondiscrimination clauses in this contract.

Article I

25. Severability. If any term or provision of this Agreement or the application thereof to any person or circumstance, shall, to any extent, be held invalid, unlawful or otherwise unenforceable, the remainder of this Agreement, or the application of such term or provisions to the persons or

24. No Waiver. Failure of the City to insist upon the strict performance of any of the terms, covenants or conditions here to be performed by Developer shall not be deemed a waiver of any rights or remedies which the City shall have and shall not be deemed a waiver of any subsequent default of any such terms, conditions and covenants to be performed by Developer.

23. Wisconsin Law. This Agreement shall be deemed to have been made in the State of Wisconsin and its validity, construction, performance, breach and operation shall be governed by the laws of the State of Wisconsin.

22. Notification of Position Openings. Developer agrees to notify the State of Wisconsin Department of Workforce Development and the local workforce development board established under 29 USC 2832 of any positions to be filled in Dane County, as required by Sec. 66.1105(6c), Wis. Stats.

21. Living Wage. Developer agrees to pay all employees employed by Developer in the performance of this Agreement, whether on a full-time or a part-time basis, a base wage of not less than the City minimum hourly wage as required by Section 4.20, Madison General Ordinances.

The Developer shall allow the maximum feasible opportunity to small business enterprises to compete for any subcontracts entered into pursuant to this contract. (In federally funded contracts the terms "DBE, MBE and WBE" shall be substituted for the term "small business" in this article.)

Article IX

(This article is not applicable)

Article VIII

3. Recover on behalf of the City from the prime Developer 0.5 percent of the contract award price for each week that such party fails or refuses to comply, in the nature of liquidated damages, but not to exceed a total of five percent (5%) of the contract price, or five thousand dollars (\$5,000), whichever is less. Under public works contracts, if a subcontractor is in noncompliance, the City may recover liquidated damages from the prime Developer in the manner described above. The preceding sentence shall not be construed to prohibit a prime Developer from recovering the amount of such damage from the noncomplying subcontractor.

- 1. Cancel, terminate or suspend this contract in whole or in part.
- 2. Declare the Developer ineligible for further City contracts until the Affirmative Action requirements are met.
- 3. Recover on behalf of the City from the prime Developer 0.5 percent of the contract award price for each week that such party fails or refuses to comply, in the nature of liquidated damages, but not to exceed a total of five percent (5%) of the contract price, or five thousand dollars (\$5,000), whichever is less. Under public works contracts, if a subcontractor is in noncompliance, the City may recover liquidated damages from the prime Developer in the manner described above. The preceding sentence shall not be construed to prohibit a prime Developer from recovering the amount of such damage from the noncomplying subcontractor.

In the event of the Developer's or subcontractor's failure to comply with the Equal Employment Opportunity and Affirmative Action Provisions of this contract or Sections 39.02 and 39.03 of the Madison General Ordinances, it is agreed that the City at its option may do any or all of the following:

Article VII

The Developer will maintain records as required by Section 39.02 (9)(f) of the Madison General Ordinances and will provide the City's Department of Affirmative Action with access to such records and to persons who have relevant and necessary information, as provided in Section 39.02(9)(f). The City agrees to keep all such records confidential, except to the extent that public inspection is required by law.

circumstances other than those as to which it is invalid, unlawful or otherwise unenforceable shall not be affected thereby and every other term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

26. Inspection of Records. The City shall, from the date of this Agreement, have the right upon reasonable notice and during business hours to audit and inspect any and all records, contracts, financial statements, ledgers or written documents from, to or in the possession of Developer which relate to and are generated by the responsibilities of this Agreement. The City's rights hereunder shall apply to not only those records and documents that are within the physical control and custody of Developer but also any records, statements and documents that may be within the custody and control of third parties or generated by third parties in the performance of the obligations and responsibilities hereunder, including but not necessarily limited to the architect, contractor and all subcontractors of Developer.

27. Notices and Demands. A notice, demand or other communication under this Agreement by any party to any other party shall be sufficiently and deemed received three (3) days after deposit if sent by registered or certified mail, postage prepaid, return receipt requested, or delivered personally to:

City:

City of Madison
Director of Planning and Development
P.O. Box 2983
215 Martin Luther King, Jr. Blvd., LL-100
Madison, WI 53701-2983

With copy to:

City Attorney
City County Building, Rm. 401
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703

Developer:

The Constellation Project, LLC
Attn: Otto C. Gebhardt III
222 North Street
Madison, WI 53704

With a copy to:

Angela Black
Michael, Best & Friedrich, LLP
One South Pinckney Street, Suite 700
PO Box 1806
Madison, WI 53701-1806

or such other addresses as the parties may designate to each other in writing from time to time.

28. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall constitute an original.

29. Amendments, Supplements. This Agreement may be supplemented or amended only by written instrument executed by the parties.

30. Noncertification of the Project Plan and District. If the Wisconsin Department of Revenue fails or refuses to certify the base value and amended Project Plan of the District in 2013, Developer and the City agree to perform and observe all rights and requirements of this Agreement, as though the amended District had been certified, including, but not limited to Sections 5, 6 and 32, and the City shall credit Developer for the total annual property taxes levied on the Property, as set forth in Section 6 herein, as though the amended District was successfully certified, until the Loan is repaid. If in any year the actual property tax generated and paid by Developer for the Property is less than the amount set forth on Exhibit B, Developer shall pay to the City the difference, on or before each succeeding August 31st; Developer shall pay any remaining principal on the Loan, if any, on September 6, 2032.

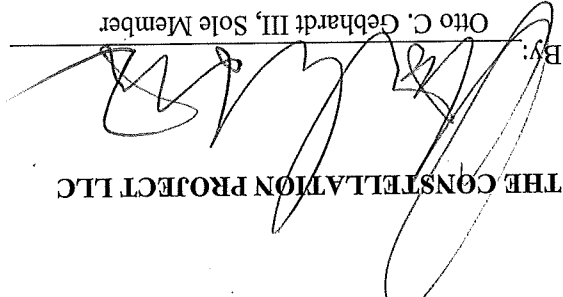
31. Clawback Payments. Upon completion of the Project, as evidenced by certificates of occupancy for the residential unit and all space within the commercial unit, Developer shall provide the City, for its review and approval, with an audit of the total Project Cost (as set forth in Developer's TIF Application to the City) and Financing. If the City does not approve the Developer's audit of the Project Cost, the City may request additional information from Developer and may perform its own audit of Developer's books and records related to Project Cost and Financing. In the event that the actual audited Project Cost is less than \$39,000,000, Developer shall pay to the City, on or before July 1, 2015, a clawback payment equal to fifty percent (50%) of the difference between the audited actual Project Cost and the greater of \$36,000,000 or the audited actual Financing (the "Clawback Payment"). Any Clawback Payment made by Developer shall be applied as a credit to Developer's Guaranteed Tax Increment payments in Section 5 herein.

32. Termination. This Agreement and Developer's obligations under the Note and Mortgage shall terminate at such time as Developer's obligations as set forth in Sections 3, 5, 6, 7, 31 and 32 herein have been performed. At such time, the City shall execute an acknowledgment of termination or a release of this Agreement, the Note, the Personal Guaranty, and a satisfaction of the Mortgage in recordable form.

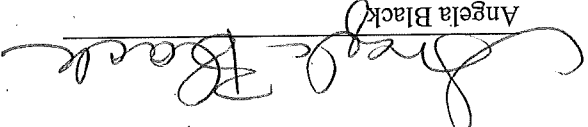
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed

as of the date first above written.

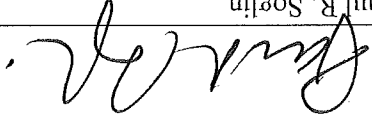
THE CONSTELLATION PROJECT LLC

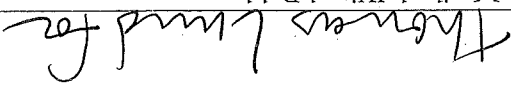
By: 
Otto C. Gebhardt III, Sole Member

AUTHENTICATION

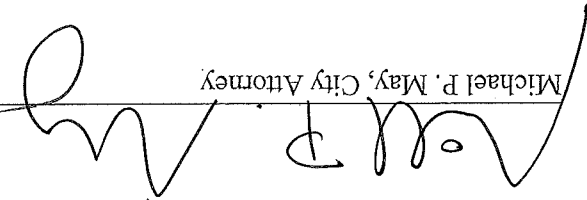
Signature of Otto C. Gebhardt III, authenticated this 4th day of June, 2012.

Angela Black
Member, State Bar of Wisconsin

CITY OF MADISON, WISCONSIN
A municipal corporation

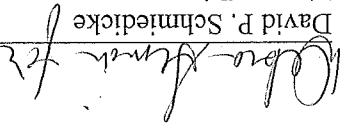
By: 
Paul R. Soglin
Mayor

By: 
Maribeth Witzel-Behl
City Clerk

APPROVED AS TO FORM:

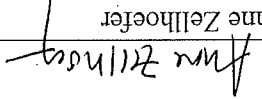

Michael P. May, City Attorney

APPROVED:


David P. Schmiedicke
Finance Director

AUTHENTICATION

Signatures of Paul R. Soglin and Maribeth Witzel-Behl, Mayor and City Clerk, respectively, of the City of Madison, authenticated this 31st day of May, 2012.
Thomas Lund for


Anne Zellhoefer
Member, State Bar of Wisconsin

This Agreement was drafted by Assistant City Attorney Anne Zellhoefer.

The execution of this Agreement by City officials was authorized by Enactment No. RES-12-00191, File No. 25561, adopted March 20, 2012.

EXHIBIT A
Legal Description of Property

Units 1, 2 and 3, together with the undivided interests in the common elements appurtenant thereto, including, but not limited to, the exclusive use of the limited common elements and facilities appurtenant to said Units, in the Constellation Condominium, being a condominium created under the Condominium Ownership Act of the State of Wisconsin by a "Declaration of Condominium of Constellation Condominium", dated June 1, 2012 and recorded June 7, 2012 in the Office of the Register of Deeds for Dane County, Wisconsin ("Register of Deeds"), as Document No. 4878770 and by the Constellation Condominium Plat recorded in the Register of Deeds on June 7, 2012 as Document No. 4878771 in Vol. 1526 of Condominium Plats, as pages 1-15.

Developer shall receive a credit against the Guaranteed Tax Increments due above for all tax increments generated by the Property and received by the City in the years 2013 through 2021.

<u>Tax Year</u>	<u>Guaranteed Tax Increment</u>	<u>Guaranteee Payment Due Date</u>
2015	\$ 76,959	August 31, 2016
2016	\$ 416,799	August 31, 2017
2017	\$ 750,484	August 31, 2018
2018	\$ 751,051	August 31, 2019
2019	\$ 751,618	August 31, 2020
2020	\$ 752,185	August 31, 2021

EXHIBIT B
Guaranteed Tax Increment

EXHIBIT C
Permitted Encumbrances

1. Taxes, general and special for the year 2012, not now due and payable.
2. Rights of tenants now in possession under unrecorded leases or otherwise.
3. Rights of tenants, if any, in possession under unrecorded leases.
4. Public or private rights in such portion of the subject premises as may be presently used, laid out or dedicated in any manner whatsoever, for street, highway, and/or alley purposes.
5. Right of Way Grant to Madison Gas and Electric Company recorded February 2, 1987, in Volume 9474 of Records, Page 85, as Document No. 1994731.
6. Easements for utilities.
7. A Resolution approving the creation of the Redevelopment Plan and District Boundary for the East Washington Avenue Redevelopment District recorded February 20, 2012, as Document No. 4844375.
8. 4' Wide Public Sidewalk Easement as dedicated on Certified Survey Map No. 13279.
9. Notes as shown on Certified Survey Map No. 13279.
10. Plans recorded June _____, 2012 as Document No. _____, and constituting the PUD-SIP for the Constellation Project.
11. Declaration of Conditions and Covenants (Securing Completion of Public Improvements), dated June _____, 2012 and recorded as Document No. _____.
12. Parking Use Restriction, dated June _____, 2012 and recorded as Document No. _____.
13. Repurchase Option Agreement, dated June _____, 2012 and recorded as Document No. _____.
14. Declaration of Conditions and Covenants for the Development of 741 East Mifflin Street and 754 East Washington Avenue (Street Lights & Trees), dated June _____, 2012 and recorded as Document No. _____.
15. Declaration of Conditions and Covenants for the Development of 741 East Mifflin Street and 754 East Washington Avenue (Signals & Roundabouts), dated June _____, 2012 and recorded as Document No. _____.

16. Maintenance Agreement for portions of the public right of way at 754 E Washington Avenue, dated _____, 2012 and recorded as Document No. _____.
17. Encroachment Agreement (Privilege in Streets) with City of Madison, dated _____, 2012 and recorded as Document No. _____.
18. Terms and conditions in the Declaration of Condominium of Constellation Condominium, dated _____, 2012 and recorded _____, 2012 as Document No. _____, and by the Constellation Condominium Plat recorded _____, 2012 as Document No. _____ in Vol. _____ of Condominium Plats, as pages _____.
19. Construction Mortgage, Security Agreement and Fixture Filing in the amount of \$22,900,000 from The Constellation Project LLC to BMO Harris Bank N.A. dated _____, 2012 and recorded _____, 2012 as Document No. _____.
20. Assignment of Leases and Rents from The Constellation Project LLC to BMO Harris Bank N.A. dated _____, 2012 and recorded _____, 2012 as Document No. _____.
21. Land Use Restriction Agreement by and among Mortgagor, BMO Harris Bank N.A. and Mortgagee dated _____, 2012 and recorded _____, 2012 as Document No. _____.
22. Construction Mortgage, Security Agreement and Fixture Filing in the amount of \$5,600,000 from The Constellation Project LLC to BMO Harris Bank N.A. dated _____, 2012 and recorded _____, 2012 as Document No. _____.
23. Assignment of Leases and Rents from The Constellation Project LLC to BMO Harris Bank N.A. dated _____, 2012 and recorded _____, 2012 as Document No. _____.
24. Cross Collateral Cross Default Agreement between The Constellation Project LLC to BMO Harris Bank N.A. dated _____, 2012 and recorded _____, 2012 as Document No. _____.

**EXHIBIT D
Nondiscrimination Based on Disability**

Developer hereby makes the following assurances: Developer assures and certifies that it will comply with section 39.05 of the Madison General Ordinances, "Nondiscrimination Based on Disability in City Facilities and City-Assisted Programs and Activities," and agrees to ensure that any subcontractor who performs any part of this Agreement complies with sec. 39.05, where applicable. This includes but is not limited to assuring compliance by Developer and any subcontractor, with section 39.05(4) of the Madison General Ordinances, "Discriminatory Actions Prohibited."

Developer may not, in providing any aid, benefit or service, directly or through contractual, licensing or other arrangements, violate the prohibitions in Section 39.05(4), listed below:

- Discriminatory Actions Prohibited: Developer assures that, in providing any aid, benefit, or service, it shall not, directly or through contractual, licensing, or other arrangements, on the basis of disability:
1. Deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
 2. Afford a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
 3. Provide a qualified person with a disability with an aid, benefit, or service that is not as effective as that provided to others;
 4. Provide different or separate facilities, or aid, benefits, or services to persons with a disability or to any class of persons with disabilities unless such action is necessary to provide qualified persons with a disability with facilities, aid, benefits, or services that are as effective as those provided to others;
 5. Aid or perpetuate discrimination against a qualified person with a disability by providing significant assistance to any agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the Developer's program;
 6. Deny a qualified person with a disability the opportunity to participate as a member of planning or advisory boards; or
 7. Otherwise limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service from Developer.
- Developer shall post notices in an accessible format to applicants, beneficiaries, and other persons, describing the applicable provisions of Sec. 39.05 of the Madison General Ordinances, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 USCA Sec 2000e-10).

TIF DISBURSING AGREEMENT

THIS TIF DISBURSING AGREEMENT is entered into as of the 1st of June, 2012, among THE CONSTELLATION PROJECT LLC (the "Borrower"), THE CITY OF MADISON (the "Lender"), and FIRST AMERICAN TITLE INSURANCE COMPANY (the "Title Company").

WITNESSETH:

WHEREAS, Borrower and Lender have entered into a Tax Increment Financing Loan Agreement, dated today (the "Loan Agreement"), tax increment financing assistance to Developer in the form of a zero percent (0%) interest loan in the amount of Three Million Four Hundred and Thirty-Two Thousand Dollars (\$3,432,000) (the "Loan") for construction on the Property of a mixed use building encompassing approximately 217 residential apartment units, and approximately 36,000 gross square feet of space to be developed and leased for commercial, retail or other uses as permitted by the zoning text, and structured parking including approximately 280 individual parking stalls and related improvements (collectively, the "Project") on the real property described on Exhibit A; and

WHEREAS, Title Company has issued Title Insurance Commitment No. NCS-521187-MAD for a Title Policy relating to the mortgage securing the Loan and Borrower and Lender have requested that Title Company supervise the disbursement of the Loan proceeds in accordance with the terms of this Agreement.

NOW, THEREFORE, In consideration of Lender's agreement to lend funds to Borrower under the Loan Agreement, and of the mutual covenants and agreements in this Agreement, the parties hereby agree:

1. Deposit of Loan Proceeds. Upon full execution of the Loan Agreement and Borrower meeting all conditions precedent in Section 2 of the Loan Agreement, the City shall deposit the Loan proceeds with the Title Company, for disbursement in accordance with this Agreement.

2. Advances. Borrower may obtain disbursement of the Loan proceeds for disbursement to the Project "Contractor," KBS Construction, Inc. to be disbursed for TIF-eligible Project costs, as defined by Sec. 66.1105(2)(f), Wis. Stats., (a) to the extent of the amount of the contract work completed or materials actually incorporated into the Project in accordance with the construction contract, (b) materials acquired for, but not yet incorporated into, the Project if securely stored offsite in accordance with the construction contract; and (c) provided Borrower has expended, prior to or simultaneous with the applicable draw request, Borrower equity in an amount not less than the amount of Loan proceeds requested in each Application for Payment.

3. Draw Requests. Whenever Borrower desires to obtain a disbursement of Loan proceeds, Borrower shall submit a signed Application for Payment to Title Company at least ten (10) business days prior to the date on which the requested advance is to be made (the "Advance Date"), along with:

5. Changes to Disbursement Procedures. Lender and/or Title Company may take such steps as it may deem appropriate, at its option, to verify the application of Loan Proceeds to work done and material furnished for the Project, and to vary the disbursement procedures herein

4. Commencement Deadline. Borrower shall have commenced construction of the Project on or before December 31, 2012. If Borrower fails to do so, this Agreement shall be null and void and the Title Company shall have no obligation to disburse the Loan proceeds, which shall be returned to the Lender. Commencement of construction shall be evidenced by the issuance of a footing/foundation permit.

In the event Title Company shall disburse funds pursuant to this Agreement, and shall not deliver to Lender a written continuation of Lender's Title Policy, whether or not requested by Lender, Lender shall nevertheless be entitled to rely on Lender's Title Policy as in fact having been so continued without any change of record and with an affirmative guaranty against any mechanics' lien claims.

If any intervening liens or other title matters, which in Lender's reasonable judgment jeopardize the priority of the Lender's mortgage or claim an interest in the Project real estate are disclosed, Title Company shall refrain from making further disbursements until Lender notifies Title Company that such intervening liens or other matters have been waived by Lender, bonded over or satisfied. Upon demand of Lender, Borrower shall immediately cause any such liens or other matters to be satisfied of record or bonded, or shall make other arrangements with respect to the discharge thereof satisfactory to Lender.

Upon receipt of an Application for Payment and required accompanying materials, the Title Company shall then (i) give Lender immediate notice by telephone if any intervening liens are disclosed (other than those expressly listed in the Title Policy or subsequent amendments thereto previously given to Lender), and (ii) upon request of Lender, deliver to Lender a written continuation of the Title Policy, dated as of the date of the disbursement. If no such intervening liens are disclosed, Title Company shall, as promptly as possible, if all the conditions of this Agreement have been complied with in a manner satisfactory to Title Company, and if Title Company has not received notice from Lender that a default exists under the Loan Agreement, disburse Loan proceeds in the amount requested in the Application for Payment by delivering to the Contractor a check for, or wire transferring, the amounts set forth in such Application for Payment.

(b) A waiver of mechanic's lien and/or materialman's lien, executed by the Contractor in the amount of the lienable costs of the Improvements payable from the requested disbursement, together with a waiver of mechanic's lien and/or materialman's lien, executed by each subcontractor or supplier to which any portion of the immediately preceding disbursement of Loan proceeds, if any, was paid, covering liens for all work done and materials supplied and paid under the preceding disbursement.

(a) A certificate, relating to each Contractor who is to receive funds from the disbursement, signed by the Project architect, stating that such Contractor has satisfactorily completed the work for which disbursement (less any required retainage) is requested.

Ms. Karen Stone

Title Company:

10. Notices. All notices, requests, demands and other communications required or permitted to be given hereunder will be sufficiently given if in writing and delivered in person, sent by overnight delivery by a nationally recognized courier service or sent by U.S. certified mail, return receipt requested, to the party being given such notice at the address below, or to such other address or fax number as any party may give to the others in writing. Notices delivered in person shall be effective upon receipt; notices delivered by overnight delivery shall be effective on the business day following delivery to the courier; and notices sent by U.S. certified mail shall be effective three (3) business days after deposit.

9. Limitation on Liability. It is expressly understood and agreed that neither Lender nor the Title Company assumes any liability or responsibility for the satisfactory completion of the Project, for the adequacy of funds advanced or disbursed by either of them pursuant hereto and to the Loan Agreement to complete the Project, for inspections during construction, or for any acts on the part of Borrower or the Contractor to be performed in the construction of the Project.

8. Borrower to Inspect Improvements. Borrower shall be responsible for making inspections of the Project during the course of construction, and shall determine to its own satisfaction that the work done or material supplied by the Contractor, and its subcontractors and suppliers to whom disbursements are to be made pursuant to each Application for Payment has been properly done or supplied in accordance with applicable contracts with Contractor. Neither the Title Company or Lender shall be required to conduct any inspection of the Project.

7. Improper Documentation. In the event that Title Company shall determine, in its reasonable judgment, that proper documentation to support a given disbursement, as required by this Agreement, has not been furnished, Title Company shall withhold payment of all or such portion of such disbursement as shall not be so supported by proper documentation, and shall promptly notify Borrower and Lender of the discrepancy in or omission of such documentation. Until such time as such discrepancy or omission is corrected to the satisfaction of Title Company, it shall withhold such amount.

6. Record Keeping. Title Company shall keep records showing the names of all Contractors and other payees to whom disbursements of Loan proceeds are made by Title Company, the date of each disbursement, and the amount of each disbursement, which records may be inspected by Borrower and Lender. Title Company shall be responsible for all record keeping and reporting requirements of applicable governmental authorities with respect to payments made to Contractor and other payees.

set forth, if the same becomes necessary or desirable to assure the proper application of Loan Proceeds and/or to preserve the lien priority status of the Mortgage with respect to disbursements made pursuant hereto, including but not limited to instructing Title Company to make disbursements directly to subcontractors. However, Lender shall not be obligated to conduct any such verification or to so vary said procedures.

[Signature Page Follows]

13. Captions. The heading captions of the articles and sections of this Agreement are set forth for convenience only and are not to be considered in interpreting this Agreement.

12. Counterparts. This Agreement may be executed in several counterparts, including by signature pages provided by facsimile or in PDF format, each of which when executed is an original, but all of which together shall constitute one instrument. Separate signature pages may be signed by various parties and each complete set of pages hereto, with a signature page signed by each party, shall constitute an original of this Agreement

11. Governing Law. This Agreement shall be deemed to have been made in the State of Wisconsin and its validity, construction, performance, breach and operation shall be governed by the laws of the State of Wisconsin.

With a copy to:
Angela Black
Michael, Best & Friedrich, LLP
One South Pinckney Street, Suite 700
PO Box 1806
Madison, WI 53701-1806

Borrower:
The Constellation Project, LLC
Attn: Otto C. Gebhardt III
222 North Street
Madison, WI 53704

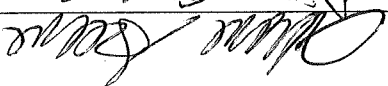
With copy to:
City Attorney
City County Building, Rm. 401
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703

City of Madison
Director of Planning and Development
P.O. Box 2983
215 Martin Luther King, Jr. Blvd., LL-100
Madison, WI 53701-2983

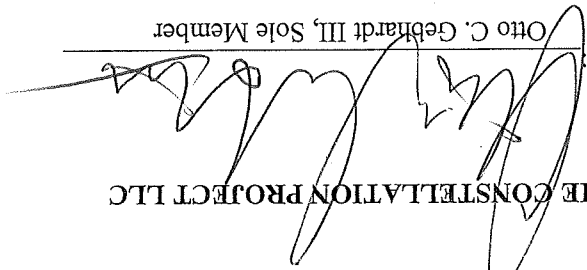
First American Title Insurance Company
10 W. Mifflin Street, Suite 302
Madison WI 53703

City:

[Signatures Continue on Following Page]

By: 
 Name: Dwayne Brown
 Title: Closing officer

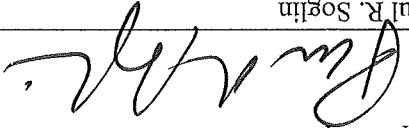
FIRST AMERICAN TITLE INSURANCE
 COMPANY

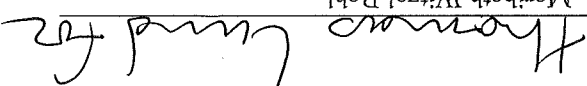
By: 
 Otto C. Gebhardt III, Sole Member

THE CONSTELLATION PROJECT LLC

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

CITY OF MADISON, WISCONSIN
A municipal corporation

By: 
Paul R. Soglin
Mayor

By: 
Maribeth Witzel-Behl
City Clerk

APPROVED AS TO FORM:

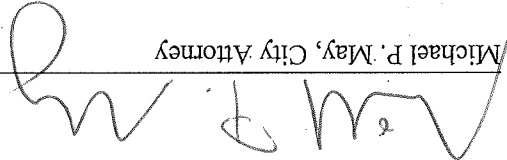

Michael P. May, City Attorney

EXHIBIT A
Legal Description of Property

Units 1, 2 and 3, together with the undivided interests in the common elements appurtenant thereto, including, but not limited to, the exclusive use of the limited common elements and facilities appurtenant to said Units, in the Constellation Condominium, being a condominium created under the Condominium Ownership Act of the State of Wisconsin by a "Declaration of Condominium of Constellation Condominium", dated June 7, 2012 and recorded in June 7, 2012 in the Office of the Register of Deeds for Dane County, Wisconsin ("Register of Deeds"), as Document No. 4878770, and by the Constellation Condominium Plat recorded in the Register of Deeds on June 7, 2012 as Document No. 4878771 in Vol. 6-1528 of Condominium Plats, as pages 1-15.

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