



Staff Report

Agenda Item: **ESCROW AGREEMENT BETWEEN THE TOWN OF CLARKDALE, PTM ENTERPRISES, L.L.C. AND FIRST AMERICAN TITLE INSURANCE COMPANY ALONG WITH APPROVAL OF CONSULTANT** – Discussion and consideration regarding the execution of the Escrow Agreement between the Town/PTM Enterprises, L.L.C/ First American Title Insurance Company and approval of Dr. Fred Goldman, P.E./Southwestern Environmental Consultants, Inc as a qualified and capable consultant to perform the design work for the new Wastewater Treatment Plant per Section 2.2 of the Escrow Agreement.

Staff Contact: Gayle Mabery, Town Manager
Wayne Debrosky, Utilities Director
Sherry Bailey, Community Development Director

Meeting Date: February 22, 2011

Background:

When the Town approved the Second Amendment to the Development Agreement with PTM, Enterprises LLC. on August 31, 2010, it was for a short term solution for the provision of wastewater service to The Highlands and the commitment to implement a long-term solution that benefits the Town, its residents and the Developer. Part of the long-term solution was the design and construction of a new wastewater plant. How to manage the design, construction and permitting in the most cost effective way was the intent of the Escrow Agreement approved as part of the Second Amendment.

Before the council is a proposal by SEC that begins the process for the preliminary design and analysis work, which is necessary before moving onto the construction and permitting that is all based on using equipment from the Desert Oasis Treatment Plant located in Surprise, Arizona that is scheduled to be decommissioned. Sections 1.2 and 2.2 of the Escrow Agreement provide for the process proposal that is before the Council for approval.

*1.2 Escrow; New Plant Design Work. As an accommodation to the Town, Developer has agreed to place into escrow funds to be used to pay invoices associated with the design of the New Plant, as provided in Section 16.1.1 of the Development Agreement. Pursuant to the Development Agreement, the Developer is to deposit with the Escrow Agent **\$100,000.00**, which amount is to be deposited by Escrow Agent in a separate interest-bearing escrow account (the “Escrow Account”), with the funds therein to be disbursed by the Escrow Agent as hereinafter set forth for the costs incurred by the Developer in connection with the design of the New Plant.*

2.2 Mutual Approval Rights. Either Party may solicit interest, proposals or bids to perform the design work for the New Plant. The Parties agree, however, that only consultants deemed qualified and capable by both Parties, for a bid amount acceptable to both Parties, shall be accepted and approved. The Parties shall mutually approve a “scope of work”, and shall approve a process to solicit and review

the bids. The Parties shall agree who – between them both - will be deemed the “owner” and who will enter into the contract with the mutually acceptable bidding consultant.

The Town Attorney has reviewed the proposal and the intended process and agrees that the Engineering services, the purchase of used equipment and the special circumstances all fall within the Town’s purchasing policy.

Recommendation: Approval of the Escrow Agreement between the Town/PTM Enterprises, L.L.C/ First American Title Insurance Company and approval of Dr. Fred Goldman, P.E./Southwestern Environmental Consultants, Inc as a qualified and capable consultant to perform the design work for the new Wastewater Treatment Plant per Section 2.2 of the Escrow Agreement.

ESCROW AGREEMENT

THIS ESCROW AGREEMENT (this "Agreement") is made this ____ day of _____, 2011, by and between the **PTM ENTERPRISES, LLC**, an Arizona limited liability company (the "Developer"), **TOWN OF CLARKDALE**, an Arizona municipal corporation (the "Town"), and **FIRST AMERICAN TITLE INSURANCE COMPANY** ("Escrow Agent"). Developer, Town and Escrow Agent are collectively referred to herein as the "Parties" and separately as a "Party."

ARTICLE I GENERAL

1.1 Development Agreement. The Parties acknowledge and agree that this Agreement is executed pursuant to the terms of that certain Development Agreement by and between the Parties dated February 22, 2005 and recorded in the official records of the Yavapai County Recorder at Book 4241, Page 316, Fee Number 3830246, as amended by that certain First Amendment to Development Agreement dated March 23, 2006 and recorded in the Official Records of the Yavapai County Recorder at Book 4399, Page 472, Fee Number 4015985, and that certain Second Amendment to Development Agreement dated December 22, 2010 and recorded in the Official Records of the Yavapai County Recorder at Book 4784, Page 421, Fee Number 2010-4435133 (collectively, the "Development Agreement").

1.2 Escrow; New Plant Design Work. As an accommodation to the Town, Developer has agreed to place into escrow funds to be used to pay invoices associated with the design of the New Plant, as provided in Section 16.1.1 of the Development Agreement. Pursuant to the Development Agreement, the Developer is to deposit with the Escrow Agent **\$100,000.00**, which amount is to be deposited by Escrow Agent in a separate interest-bearing escrow account (the "Escrow Account"), with the funds therein to be disbursed by the Escrow Agent as hereinafter set forth for the costs incurred by the Developer in connection with the design of the New Plant.

ARTICLE II DEPOSITS

2.1 Deposits; Escrow Account. Simultaneously with the execution of this Agreement, Developer shall deposit with Escrow Agent the total amount of **\$100,000.00**, which amount is to be held by Escrow Agent into the Escrow Account. All of the monies received by Escrow Agent from the Developer pursuant to this Section 2.1 (including all interest and earnings thereon) shall hereinafter be collectively referred to as the "Escrow Deposit". The Escrow Deposit shall be held at a bank mutually acceptable to the Developer, the Town, and the Escrow Agent (referred to herein as the "Bank"). The Escrow Deposit shall be treated in all respects as escrowed funds. Escrow Agent shall cause a separate account at the Bank to be created for the Escrow Deposit and to designate on the name of such account that the funds are held in trust on behalf of the Developer, so that no portion thereof shall be subject to claims of the Escrow Agent's general

creditors. The interest shall accrue for the benefit of Developer, and shall be reported as income to Developer.

2.2 Mutual Approval Rights. Either Party may solicit interest, proposals or bids to perform the design work for the New Plant. The Parties agree, however, that only consultants deemed qualified and capable by both Parties, for a bid amount acceptable to both Parties, shall be accepted and approved. The Parties shall mutually approve a “scope of work”, and shall approve a process to solicit and review the bids. The Parties shall agree who – between them both - will be deemed the “owner” and who will enter into the contract with the mutually acceptable bidding consultant.

2.3 Deposit and Disbursement Procedures The Party contracting with the consultant (the “Contracting Party”) shall be entitled to request a withdrawal of funds from the Escrow Account, from time to time, with the approval of the other Party (the “Reviewing Party”) in accordance with and subject to the following procedures and limitations:

(i) The Contracting Party shall deliver invoices and payment requests to the Reviewing Party, and the Reviewing Party shall be responsible for reviewing (for its own account, only) each payment request and invoice and confirming that the design work described therein has been performed or delivered.

(ii) Upon receipt of each payment request or invoice, as applicable, by the Reviewing Party, the Reviewing Party shall have ten (10) business days from the receipt of such payment request or invoice to raise any objections it may have with respect to the disbursement of funds from the Escrow Account for the payment of such invoice, which objections must be in writing and delivered to the Contracting Party and the Escrow Agent within the ten (10) business day period to be effective. If no written objections to the disbursement of funds relating to such payment request or invoice are received within the ten(10) business day period, the Reviewing Party shall be deemed to have consented to disbursement of the funds relating to the specific payment request or invoice. Each Party covenants and agrees to act promptly and reasonably with respect to its review, as permitted herein, of all payment requests and invoices received from the Contracting Party and further agree not to object to such payment request or invoice so long as it is within the scope of work and budget for such work as contained in the construction contract. Payment requests by the Contracting Party to the Escrow Agent shall not occur more frequently than once a month, unless the Parties hereto otherwise agree.

(iii) Escrow Agent shall promptly withdraw funds from the Escrow Account, in the order of priority described below, and make payment with checks payable either (A) to the design consultant, or (B) jointly to the Reviewing Party and to the design consultant, and as specified by the Reviewing Party, upon its receipt of all the following:

(A) Payment request or invoice; and

Contracting Party, or an invoice executed by both the Reviewing Party and the Contracting Party if a previous written objection to such disbursement has been sent.

2.4 Final Disbursement. Upon completion of the design work for the New Plant, and if and to the extent the Escrow Agent is still holding funds for such project subsequent to the final written approval of such design work by the Reviewing Party and the Contracting Party, the Escrow Agent shall disburse all funds, including interest accrued on such amounts, remaining in the Escrow Account, to Developer, after receipt of certification by the Contracting Party that the final payment has been made.

2.5 Audit. The Developer and the Town shall have the right, at their respective sole expense and at reasonable times, to conduct or to cause to be conducted an audit of any or all Escrow Accounts and all disbursements for the any of the work.

2.6 Expenses Relating to Escrow. The Escrow Agent shall be entitled to deduct from the Escrow Account all administrative fees of such Escrow Agent relating to the Escrow Account so long as the administrative fees and expenses are in accordance referenced in Section 5.7.

2.7 Rights of the Parties Upon Default by the Other. In the event that the Contracting Party defaults in the performance of its obligations to produce a mutually acceptable design for the New Plant as provided in this Agreement (and provided the termination of this Agreement pursuant to Section 2.8, below does not apply), such that the Reviewing Party undertakes to cause to be performed and completed the work that was to be performed by Contracting Party, then the Reviewing Party shall be entitled to undertake the responsibilities of the Contracting Party for the design of the New Plant and to submit to the Escrow Agent a request for withdrawal of funds from the Escrow Account in the place and stead of the Party then in default, and the Escrow Agent is hereby authorized to make disbursements upon the request of the Reviewing Party in connection with the completion of the design of the New Plant pursuant to the terms of this Agreement. The Reviewing Party shall give written Notice of Default and of the Reviewing Party's intent to undertake the performance and completion of the work to the Escrow Agent and to the Contracting Party. Upon receipt of said Notice, the Escrow Agent shall honor and comply with the Reviewing Party's request for disbursements from the Escrow Account.

2.8 Termination. In the event Developer or Town believes that the Parties are unable to reach a mutually acceptable: (i) design of the New Plant (as contemplated in the Development Agreement), (ii) a scope of work for the design work, a mutually or a Permanent Wastewater Treatment Agreement (as contemplated in the Development Agreement) then notice can be provided to the other Party (i.e., Developer or Town, as the case may be) and if the Party are unable to resolve the areas of disagreement within ten (10) business days of such notice, then either Party can elect, by subsequent notice to the other and to the Escrow Agent, to terminate this Agreement, in which event the work then being performed by any consultant in furtherance of the design work shall cease, all outstanding invoices and bills and the obligations due for accrued but not yet paid work shall be satisfied, and any remaining funds will be immediately refunded to Developer.

**ARTICLE III
NOTICES**

3.1 Notices. All notices to be given or served upon any Party hereto in connection with this Agreement must be in writing, and delivered to the other Parties (i) in person, (ii) by facsimile transmission that has been confirmed (with the original following in the United States mail), (iii) by a reliable overnight delivery service, or (iv) by certified mail, return receipt requested. If such notice is given in person or via facsimile transmission, such notice shall be deemed to have been given when personal delivery was received by the Party or when the facsimile transmission was transmitted. If such notice is given by overnight delivery service, such notice is deemed received the first business day following transmittal of such notice. If such notice is given by certified mail, such notice shall be deemed received three (3) days after a certified letter containing such notice, properly addressed with postage prepaid, is deposited in the United States mail. Notice shall go to the Parties at the addresses given below or at such other addresses as the Parties may designate by written notice in the aforesaid matter.

Notices to the Developer:

PTM Enterprises, LLC
ATTN: John Tobias
190 Crystal Sky Drive
Sedona, Arizona 86351

With a Copy to:

Gallagher & Kennedy, P.A.
ATTN: James B. Connor, Esq.
2575 East Camelback Road
Phoenix, Arizona 85016

Notice to the Escrow Agent:

First American Title Insurance Company
National Commercial Services
2425 East Camelback Road, Suite 300
Phoenix, Arizona 85016
Attention: Carol Peterson
Phone: (602) 567-8109
FAX: (602) 567-8101
Email: cpeterson@firstam.com

Notice to the Town:

Town of Clarkdale
ATTN: Office of the Town Clerk
Post Office Box 308
Clarkdale, Arizona 86324

With a Copy to:

Boyle, Pecharich, et. al
ATTN: Robert S. Pecharich, Esq.
125 North Granite Street
Prescott, Arizona 86301

And:

Town of Clarkdale
ATTN: Office of the Town Manager
Post Office Box 308
Clarkdale, Arizona 86324

**ARTICLE IV
GENERAL CONDITIONS**

4.1 Mediation. If a dispute arises out of or relates to this Agreement, or breach thereof, and if the dispute cannot be settled through negotiation, the Party agree first to attempt to settle the dispute through mediation before resorting to arbitration, litigation, or some other dispute resolution procedure. In the event that the Party cannot agree upon the selection of a mediator within ten (10) days, either Party may request the Presiding Judge of the Superior Court of Yavapai County to assign a mediator from a list of real estate experienced mediators maintained by the Arizona Municipal Risk Retention Pool.

4.2 Authority. Each of the Parties represents and warrants to the others that all administrative and other approvals and consents necessary for the valid execution and delivery of this Agreement have been obtained and that upon execution and delivery hereof, this Agreement shall be binding and enforceable against each of the signatories hereto in accordance with its terms.

4.3 Time of Essence. Time is of the essence in the performance of this Agreement.

4.4 Governing Law. This Agreement shall be governed by and interpreted under the laws of the State of Arizona. Venue of any action shall be Yavapai County, Arizona.

4.5 Amendment. This Agreement cannot be varied except by written agreement executed by the Parties.

4.6 Severable Provisions. The provisions of this Agreement are severable, and if any provision or part hereof or the application thereof to any person or circumstances shall ever be held by any court of competent jurisdiction to be invalid or unconstitutional for any reason, the remainder of this Agreement and the application of such provisions or part hereof to other persons or circumstances shall not be affected thereby.

4.7 Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of the Developer and the Town, and their respective permitted successors and assigns. Except to the extent permitted herein, neither this Agreement nor any rights, duties or obligations hereunder may be assigned or delegated in whole or in part by any Party without the prior written consent of the other Parties. Any such purported assignment or delegation shall be void and ineffectual.

4.8 Cancellation. This Escrow Agreement may be canceled only upon written approval of all principals hereto except as otherwise provided in this Escrow Agreement. The Escrow Agent's action upon cancellation shall consist of final disbursement of funds upon written direction of either the Principal or by court action, which ever is applicable.

ARTICLE V
ESCROW PROVISIONS

5.1 Instructions to Escrow Agent: This Agreement shall constitute joint instructions to Escrow Agent from the Parties and the amounts deposited shall be disbursed and dealt with by Escrow Agent in strict accordance with the following:

5.2 Money Market Account: Escrow Agent may deposit or invest the amounts deposited in a money market account reasonably acceptable to Parties (provided the deposited amounts are available for immediate withdrawal, as and when required under this Agreement). Interest monies earned on such Money Market Account(s) will be added to the Escrow Account funds to be utilized for costs and fees related to this Agreement.

5.3 Limitation of Liability: Notwithstanding any other provisions of this Agreement, Escrow Agent has no responsibility or liability for completion of improvements to the Property; or to guarantee that the funds deposited into escrow are sufficient to complete the improvements; or for any mechanic's or material men's liens that may be filed except to the extent that Escrow Agent fails to properly disburse monies pursuant to these instructions. Escrow Agent shall not be liable for any action taken or omitted by it, except for its own negligence, bad faith, or willful misconduct; nor shall it be liable or responsible for the validity, enforceability or sufficiency of any document furnished to it pursuant to any provision hereof; nor shall it be responsible for any representation or statements made in any of those documents. Escrow Agent shall be entitled to rely upon advice of counsel, including its in-house counsel, concerning legal matters and upon any document or notice delivered to it hereunder which it believes to be genuine or to have been presented by a proper person. Any disbursement by Escrow Agent of any advance shall not be deemed to be an approval by Escrow Agent of any work performed or any materials furnished with respect thereto or a representation by Escrow Agent that the unused portion of the total cumulative sum is sufficient to pay remaining construction costs.

5.4 Advice of Counsel: Escrow Agent shall be entitled to rely upon advice of counsel concerning legal matters and upon any document or notice delivered to it hereunder which it believes to be genuine or to have been presented by a proper person.

5.5 Indemnification: The Parties hereto hereby indemnify and promise to hold harmless Escrow Agent against but not limited to all costs, damages, attorneys fees, expenses and liabilities which Escrow Agent may incur or sustain in connection with this Escrow Agreement, or any court action arising there from, and will pay the same upon demand, except claims arising out of Escrow Agent's negligence, bad faith, recklessness, intentional misconduct or breach of this Agreement.

5.6 Conflicts: If conflicting demands are made upon Escrow Agent, Escrow Agent may hold any money or documents subject to such conflicting demands until the rights of the parties making such conflicting demands be determined by court action. Escrow Agent may interplead said monies, whereupon Escrow Agent shall be fully relieved of any and all liability in regard to such demands and the Parties hereunder.

5.7 Compensation: Escrow Agent shall be entitled to receive compensation for its services hereunder in accordance with the following rate schedule: Set up fee: \$300.00; Check fee: \$25.00 per check. Escrow Agent is hereby authorized to deduct from first monies available its fees.

Note: A reasonable charge will be made for extraordinary services rendered.

5.8 Substitute; Resignation of Escrow Agent: Escrow Agent may, at its election, resign as Escrow Agent under this Agreement upon written notice thereof mailed to the principals thirty (30) days prior to the effective date. In the event Escrow Agent elects to resign, it shall if such right is exercised, all funds and documents shall be delivered to a mutually appointed substitute Escrow Agent or as otherwise directed by the Parties hereto.

[SIGNATURES ON FOLLOWING PAGES.]

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first set forth above.

Developer: **PTM ENTERPRISES, LLC**, an Arizona limited liability company

By: _____

Name: _____

Title: _____

Town: **TOWN OF CLARKDALE**, an Arizona municipal corporation

By: _____

Name: _____

Title: _____

Attest: _____

Kathy Bainbridge, Town Clerk

Approved as to form:

Robert S. Pecharich, Town Attorney

Escrow Agent: **FIRST AMERICAN TITLE INSURANCE COMPANY**

By: _____

Name: _____

Escrow Officer