STATE OF MICHIGAN

ARBITRATION PURSUANT TO AGREEMENT

SALEM SPRINGS, LLC,

Petitioner,

v

SALEM TOWNSHIP,

Respondent.

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ARBITRATORS' DECISION

This matter was referred to the Arbitration Panel in March of 2009. Hearings were conducted by the Arbitrators on July 20, 2009, July 22, 2009, August 12, 2009, August 13, 2009, September 9, 2009, September 10, 2009 and September 30, 2009.

Witnesses called by Salem Springs, LLC were:

1. Robert Schostak
2. Steven Fisher
3. Jarvis Stewart
4. Joyce Duncan
5. Gary Tressel
6. John T. Alfonsi
7. David Schostak

Witnesses called by Salem Township were:

1. Peter S. Ecklund, Jr.

2. Robert Bendzinski

3. Chip Heckathorn

4. Dan Meyers

5. Robert Heyl

6. Dima S. El-Gamal

Written closing briefs were submitted by the parties on October 28, 2009. Oral closing arguments occurred on November 16, 2009.

At issue in the case is the interpretation of two separate First Amended and Restated Development Agreements, one for approximately 59.9 acres of residential property and a second Agreement for approximately 50 acres of retail property, each dated June 10, 2008 (collectively the "Agreements"). Salem Springs, LLC contends that the Agreements were breached by Salem Township and that Salem Springs, LLC should be awarded damages in the amount of $30,500,000.00. In addition, Salem Springs, LLC has requested an award that permits Salem Springs, LLC, at its option, to construct a community well and smaller wastewater treatment plant which Petitioner estimates will save approximately $10,000,000.00 in costs. Salem Township contends that each of the Agreements has not been breached by Salem Township and that the claims of Salem Springs, LLC should be dismissed. Both parties to the Arbitration have requested that they be awarded actual attorney fees and costs.

Section 9.9 of the Agreements state, in pertinent part, as follows:

> Review Procedure.
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> * * *
>
> ...If the Developer Representatives and Township Representatives fail to amicably resolve the dispute at such meeting, each Party agrees to select a designated person (a **"Designated Person"**) with experience in dispute resolution who shall each be immediately available to consider and resolve the

dispute(s) to completion. These Designated Persons will, within seven (7) days of their appointment, select an immediately available third Designated Person with comparable qualifications and/or expertise in dispute resolution. Such Designated Persons, within thirty (30) days of the selection of the third Designated Person (or a longer period if and to the limited extent required by the particular subject matter), shall arbitrate and resolve the dispute(s) on a final and binding basis, in lieu of judicial proceedings between Developer and the Township, by written and signed determination, with the signatures of such persons affixed to the determination. If mutually agreed, a single Designated Person, rather than a panel of three may be utilized. **The Designated Persons shall fairly resolve the dispute in accordance with the letter, spirit and intent of this Agreement and/or otherwise determine whether the parties have complied with this Agreement.** Developer and the Township agree that the non-prevailing Party shall pay all costs and fees associated with the Review Procedure, including, but not limited to, the fees of the Designated Persons and the fees and costs, including attorneys' fees, of the prevailing Party. Each party shall enter the dispute resolution process on equal footing, and shall not have a presumption in its respective favor. The decision of the Designated Persons shall be enforced by the courts as a binding decision. The election of the review as provided in this Section 10.9 by the Township shall not require approval by the Board.

(emphasis added)

The Arbitration is also governed by MCR 3.602 and MCL 600.5001-600.5035. Further, the common law of the State of Michigan provides Arbitration Panels with plenary authority. An arbitrator's choice of remedy is generally broad. As set forth by the Michigan Court of Appeals, "[w]hen parties agree to submit a matter to arbitration, they invest the arbitrator with sufficient discretion to resolve their dispute in a manner which is appropriate under the circumstances." Michigan Ass'n of Police v. City of Pontiac 177 Mich.App. 752, 760, 442 N.W.2d 773, 777 (Mich.App.,1989).

Specifically, at issue in this dispute, is the legal construction of the financing paragraphs of each of the Agreements, being Section 3.4.1.7 and 3.4.1.8 which state, in pertinent part:

3.4.1.7 Financing. The Parties are advised that tax exempt municipal financing is available through the Washtenaw County

Department of Public Works, pursuant to the Act to finance the cost of the Water Tower, the Transmission System, the Booster Station and more particularly the Initial Infrastructure (collectively, the "**Project**"). The Township shall request the County for assistance in the financing of the Project through the issuance of Bonds pursuant to said Act, so long as the Developer agrees to an Assessment Agreement for the repayment of the Bonds, subject to the approval of the Assessment Agreement by the County's bond counsel, such approval not to be unreasonably withheld, conditioned or delayed. The Bonds shall mature not less than twenty (20) years from the date of issuance. Under the Act, the Township will create a special assessment district and, subsequently confirm a special assessment roll. **In the event the financing of the Project is not available through the County, the Parties agree to use their best efforts to find an alternative funding source to finance the Project.** As required by the Act, the County will maintain a separate construction account for the Project.

(emphasis added)

3.4.1.8 Assessment Agreement

* * *

... Developer further agrees not to transfer or sell any interest in any of the properties so assessed with out prior written approval of the Township and the County, which approval shall not be unreasonably withheld, conditioned or delayed; provided, however, the Developer shall not be required to obtain the consent of the Township and the County, if any one of the following are satisfied: (i) all or a portion of the Residential Property is being sold to the ultimate owner; (ii) the purchaser pays all of the remaining balance of the assessment(s) at time of transfer of ownership for that portion of the Residential Property being transferred to such purchaser (i.e. the closing), **(iii) the purchaser provides the Township with an irrevocable letter of credit from a financial institution approved by the Township in an amount sufficient to pay the remaining balance of the assessment(s) allocable to that portion of the Residential Property transferred to such purchaser, or** (iv) such transfer is to a person or entity that demonstrates to the reasonable satisfaction of the Township and the County (not to be unreasonably withheld, conditioned or delayed) its financial ability to perform the Developer's obligations under this Development Agreement with respect to the portion of the Residential Property transferred to such person or entity (each a "**Permitted Transferee**").

(emphasis added)

Salem Springs, LLC claims that Salem Township breached the "best efforts" provision of Section 3.4.1.7 of the Agreements by failing to pass an appropriate resolution on January 13, 2009 to apply for federal stimulus funds under the American Recovery and Reinvestment Act of 2009 (the "Recovery Act") and/or other grants when it became apparent that municipal bond financing for infrastructure was not available. Salem Township contends that the "best efforts" clause of the above-referenced Agreements was not violated by the Township in that the Township merely tabled the proposed resolution to apply for federal stimulus funding and that Salem Springs, LLC did not provide the list of information that was requested by Washtenaw County bond counsel, including an irrevocable letter of credit to properly initiate, issue and collateralize a Washtenaw County bond issue in the approximate amount of $30,500,000.00.

The Agreements were originally executed by the parties on June 10, 2006 and subsequently amended and restated on June 10, 2008. Upon reviewing the testimony, it is the conclusion of the Arbitrators that the parties clearly assumed and intended to implement approximately $30,500,000.00 of municipal bonds, under certain terms and conditions, to design and construct both water and sewer infrastructure for the both the residential and retail developments proposed under the Agreements. Further, the Arbitrators find that although a "best efforts" clause was incorporated in Section 3.4.1.7 of the Agreements, neither of the parties, at the time of the execution of the Contracts, anticipated the economic real estate and financing calamity which occurred in the fall of 2008, nor the resulting potential availability of federal stimulus funds under the Recovery Act. Both the economic and banking calamity and the availability of federal stimulus funds were, at the time of the execution of the Agreements, unforeseen and unanticipated events.

It can be argued that Salem Springs, LLC could have been more candid with regard to the fact that it never intended to offer additional collateral to Salem Township and/or to Washtenaw County to collateralize the municipal bonds in excess of the two parcels of real estate involved in the Agreements and that Salem Township should have been more amenable to assisting in the application for federal stimulus funds. However, it is clear to the Arbitrators that neither party anticipated the circumstances in which they found themselves beginning in the fall of 2008 and continuing to the present. Furthermore, neither party, in the opinion of the Arbitrators, anticipated that the "best efforts" clause set forth in 3.4.1.7 of the Agreements would be applicable to the situation with which they were confronted with in the fall of 2008 and up to the present, being a collapse of both the residential and commercial real estate development markets in southeastern Michigan. Moreover, both Salem Springs, LLC and Salem Township now find themselves in a situation where they have executed, and relied upon, extensive Agreements that are now neither practical nor feasible with respect to the infrastructure and its financing.

By way of explanation, in the Agreements Salem Springs, LLC is required to design and construct water and sewer facilities, costing approximately $30,500,000.00, not only for Salem Springs, LLC's own developments but also to service the USD in Salem Township. The Agreements also require Salem Springs, LLC to connect to the Detroit Municipal Water System rather than construct a properly permitted well system which would subsequently be dedicated to Salem Township and made part of a municipal system.

On the other hand, Salem Springs, LLC has committed itself in the Agreements to design and construct approximately $30,500,000.00 worth of sewer and water infrastructure to be dedicated to Salem Township with no reasonable opportunity to finance the municipal infrastructure with either Salem Township and/or Washtenaw County municipal bonds and the implementation of a special assessment district. Further, in the ensuing months, the appraised

value of both development parcels have fallen dramatically making both public and private financing for public infrastructure improvements virtually impossible utilizing collateral from only the real estate under the Agreements, without pledging other assets outside the ownership of Salem Springs, LLC in the form of an irrevocable letter of credit. The net result is that despite years of negotiation, both Salem Springs, LLC and Salem Township find themselves in a circumstance in which some of the terms and conditions of the Agreements that were executed on June 10, 2008 can no longer be implemented. As a result, the Arbitrators find it necessary to work toward a solution to unlock the deadlock that has been created by certain provisions of the Agreements in consideration of the current economic environment.

The Arbitrators find that the "best efforts" clause of Section 3.4.1.7 of the Agreements was properly invoked. The Arbitrators also find that the parties did not respond to each others required needs in a timely fashion and pursuant to their obligations under the Agreements. Specifically, Salem Township failed to pass an appropriate resolution to allow for the application for federal stimulus funds under the Recovery Act. Conversely, Salem Springs, LLC failed to fully disclose its economic condition, declining appraisals and lack of ability to provide an irrevocable letter of credit. Had each party fully exercised its "best efforts" to achieve financing, the Agreements would have been amended by the parties in the manner described below to adapt to the rapidly declining economic conditions and to achieve substantial infrastructure cost savings. As a result, the Arbitrators deem it necessary to enforce the parties best efforts obligations by modifying the Agreements in accordance with, and to effect, their original spirit and intent.

Section 3.4 of the Agreements addresses both water and sewer utilities for the projects contemplated by the parties. With regard to water, Section 3.4.1 of the Agreement states as follows:

> 3.4.1.1 DWSD. It is the intention of the parties that water be provided by the Detroit Water and Sewage Department ("**DWSD**") under agreement with the Township. Developer shall be liable for the capital, operating, maintenance and repair costs associated with its use. The Township agrees to use its best efforts to expedite the negotiation process with DWSD and enter into a written agreement with the DWSD so that DWSD will provide water to the USD, and more particularly the Residential Property.

Further, Sections 3.4.1.3 and 3.4.1.4 are recited below:

> 3.4.1.3 Emergency Water Source. The Township shall use its best effort to initiate discussions with one or more adjacent municipalities and the Township shall determine whether to enter into an agreement with such adjacent municipality to permit connection to each others respective water system for the sole purpose of having a secondary water source only to be utilized in the event of an emergency, subject to the approval of such interconnection by DWSD.
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> 3.4.1.4 DWSD Contract. The Parties have been advised that water service can be made available and recognizing that DWSD contracts with municipalities for the provision of water service, the Township agrees to enter into a contract with DWSD. The standard contract is for a period of 25 years, renewable at that time and with projections as to requirements in 10 year increments. The Township agrees to advise Developer with respect to the proposed contract and to use its best efforts to negotiate and execute an agreement that will provide adequate service to the Residential Property and reserve capacity for the extension and availability of water to the entire USD.

With regard to both water and sewer, the Agreements required Salem Springs, LLC to finance, design and construct facilities to service not only Salem Springs, LLC's projects but also so that the utilities are capable of being expanded to service the entire USD in Salem Township. Also, the Agreements require that Salem Springs, LLC connect to the Detroit Water and Sewer Department (DWSD). Considering today's current economic times, the Arbitrators find that the requirement that Salem Springs, LLC build a system that serves more than it needs or that connects to the DWSD is no longer either practical or feasible.

As a result, the Arbitrators find with regard to the water utility for the two developments, that Salem Springs, LLC be permitted to design and install:

i. A fully permitted, expandable, municipal well system, water transmission system and, if necessary, water tower, with the option to do so in phases. The initial transmission system shall be sized to accommodate expansion of the well system by the Township. The water tower, if necessary, shall also be reasonably sized to accommodate some future expansion.

ii. Thereafter, the municipal well system, transmission system and water tower, shall be expandable by the Township, at its expense, to service the remainder of the USD.

With regard to the wastewater treatment plant and sanitary interceptor sewers, the Agreements reference the construction and financing requirements in Section 3.4.2, which state in part as follows:

> 3.4.2 Wastewater Treatment Plant and Sanitary Interceptor Sewers.
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> 3.4.2.1 Construction of WWTP. The Township and/or County, in consultation with Developer, shall design and engineer a Waste Water Treatment Plant (the "**WWTP**") to be located on property owned by the Township or on some other location as approved by the Board of Trustees of the Township within the USD in compliance with all County and/or State regulations and requirements, and, pursuant to a separate agreement between the County and/or the State, the Township and Developer; provided, however, that ownership of any site where the WWTP is located shall be transferred to the Township. The County shall finance and construct a WWTP to handle and treat sanitary sewage in excess of the anticipated peak flow, based on a factor of four (4) of approximately 290,000 gallons per day from the Residential Property and approximately 310,000 gallons per day from the Retail Property, for an aggregate total of 600,000 gallons per day (the "**Peak Flow**"); provided, however, that the WWTP shall be engineered for the Future Expansion (as defined below). The cost of design, engineering, development and construction of the WWTP shall be through the Bonds. The Township agrees to take all necessary steps to enable the construction and financing of the WWTP, including, but not limited to, any initiating resolutions as required by the County. The WWTP shall be designed, engineered and constructed in accordance with all applicable laws and

regulations and in accordance with any permit requirements imposed by any governmental authority with the appropriate jurisdiction over such matters.

In the Agreements, Salem Township has required Salem Springs, LLC to construct a wastewater treatment plant and related infrastructure which is capable of being expanded to service not only the development projects of Salem Springs, LLC but also for the entire Salem Township USD. Considering today's economic circumstances and the absence of available financing, it is no longer either practical or feasible for Salem Springs, LLC to construct a wastewater treatment plant and related infrastructure which is currently beyond its own needs. Therefore, the Arbitrators find that the Agreements of the parties shall be modified to the extent that Salem Springs, LLC shall be permitted to construct:

i. A downsized, expandable, MBR wastewater treatment plant and sewage transmission system, with the option to do so in phases, to accommodate the residential and commercial properties within its proposed developments under the Agreements. The initial sewage transmission system, including any appurtenances, shall be sized to accommodate expansion

ii. Thereafter, the downsized MBR wastewater treatment plant and transmission system shall be expandable by the Township, at its expense, to service the remainder of the USD.

All water and sewer facilities permitted, designed and constructed by Salem Springs, LLC shall be dedicated to Salem Township, free of cost, and become part of Salem Township's municipal system.

The Arbitrators hereby impose the following additional conditions:

A. Salem Springs, LLC may finance the cost of designing and/or constructing sewage and water facilities located in the area of Salem Township outlined in the agreements either privately or, at its option, through the issuance of municipal bonds, if available. If Salem Springs, LLC wishes to use municipal bonds to finance the infrastructure, and if they are

available, Salem Springs, LLC shall provide such collateral as is reasonably recommended by Bond Counsel for Salem Township and/or the County of Washtenaw including collateral from third parties if necessary.

B. All design and construction of well water facilities and the downsized sewage facilities in Salem Township shall be supervised and approved by Salem Township, which approval shall not be unreasonably withheld or delayed.

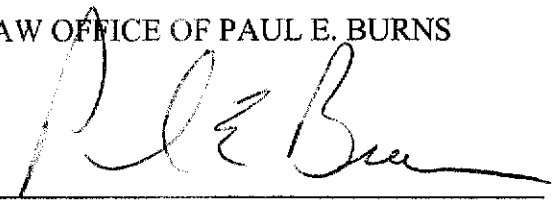
C. Within thirty (30) days, after completion of the construction of all of the sewage and water facilities located in the Township, as approved by the Township's engineer, which shall not be unreasonably withheld or delayed, the sewage and water facilities shall be dedicated to the Township free of charge.

D. All other terms and conditions of the Agreements not inconsistent with the Arbitrators' Decision shall remain in full force and effect.

The Arbitrators understand that certain unanticipated complexities may arise in the interpretation and implementation of this Opinion. As a result, the Arbitrators retain jurisdiction of this matter for the purpose of both interpretation and enforcement, if necessary. The Arbitrators further reserve their right to award money damages, actual attorney fees and costs pursuant to the Agreements.

APPROVED FOR ENTRY:

LAW OFFICE OF PAUL E. BURNS



Dated: December 30, 2009

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HOOPER HATHAWAY PRICE BEUCHE
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Dated: December 30, 2009

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