

**GRAND TRAVERSE COUNTY
SEPTAGE TREATMENT FACILITY LOAN AGREEMENT**

This **LOAN AGREEMENT** (“Agreement”) is made on _____, 2011, between the **GRAND TRAVERSE COUNTY BOARD OF PUBLIC WORKS (“BPW**), Grand Traverse County (“GT County”), Acme Township, East Bay Township, Elmwood Township, Garfield Township and Peninsula Township (collectively the “Townships”).

RECITALS

The BPW has constructed a Septage Treatment Facility. Grand Traverse County bonded to finance the cost of constructing the Facility, and the Townships have agreed and pledged to finance the payment of the bonds in the event that there is a revenue shortfall at the Facility.

Because there are projected shortfalls in revenue for financing the operation, maintenance and bond payments for the Facility, GT County and the Townships have agreed to loan the BPW money pursuant to this Loan Agreement in order to cover any shortfall in revenue for the Facility.

The intention of the parties is for GT County and the Townships to loan money to the BPW pursuant to this Agreement. GT County will be paid back its portion of the loan in full pursuant to the terms of this Agreement. The Townships shall also be paid back their portion of the loan so long as there is sufficient revenue to do so.

Therefore, in consideration of the covenants and promises contained herein, the parties mutually agree to legally bind themselves to one another as follows:

LOAN TERMS AND CONDITIONS

1.0 Loan. GT County and the Townships agree to loan up to Seven Hundred and Fifty Thousand Dollars and No/100 Dollars (\$750,000.00) to BPW, subject to and as provided by the conditions of this Agreement and the other Loan documents. As evidenced in the **Promissory Note**, the BPW promises to pay to the order of the Grand Traverse County at 400 Boardman Ave., Traverse City, Michigan 49682, or such other place GT County and the Townships may designate in writing to the BPW, the following amounts in lawful money of the United States of America: (1) the principal sum of up to Seven Hundred and Fifty Thousand Dollars and No/100 Dollars (\$750,000.00) (“Loan”); and (2) interest charges (defined in §2.0) on the Loan. “Unpaid Balance” is defined as the sum of (1) and (2), net of all payments made by the BPW under this Loan. GT County shall provide fifty percent (50%) of the Loan, and the Townships shall pay the other fifty percent (50%) according to their proportionate share as established in the Septage Treatment Facility Operating Agreement. The proceeds of the Loan shall be used only for bond payments or other costs incurred by the BPW directly related to the Facility.

2.0 Interest Charges. The Unpaid Balance on the Promissory Note shall bear an interest charge at the rate of _____ and 00/100 percent (____%) per annum (the “Interest Charge”) computed on each Transaction Date by multiplying the Unpaid Balance by _____% and then dividing by 360 days (“Daily Interest”) and then multiplying the Daily Interest by the number of days that have occurred since the immediately preceding Transaction Date. The Interest Charge shall not exceed the maximum permitted by law.

3.0 Use of Loan Proceeds. The BPW shall only use loan proceeds to cover any deficit in operating, maintaining and paying bond payments for the Facility. GT County and the Townships shall provided BPW loan proceeds, up to the total amount of the Loan, upon written request of the BPW. The loan amounts paid by each party are as provided in Section 1.0, above.

4.0 Loan Payments. The Loan shall be paid as excess revenue is available at the end of each calendar year. To accommodate BPW's revenue and projections, there is no Scheduled Monthly or yearly Installments. Payments shall be made to GT County first, until the entire amount of GT County's portion of the Loan (plus interest) is paid in full. After GT County has been paid in full, then the Townships shall be paid back according to their proportionate share as established in the Second Amended Operating Agreement between the Parties.

5.0 Loan Term. The term of the loan begins when the loan funds are disbursed and shall end no later than December 31, 2016, when the unpaid balance shall be immediately due and payable in full.

6.0 Application of Payment. All sums received from BPW under the Note shall be applied first to interest charges then due, and second to the previous Transaction Date's Unpaid Balance.

7.0 Prepayment. BPW shall be entitled to prepay any portion of the Unpaid Balance at any time without penalty. However, no prepayment relieves BPW's obligations to make subsequent Scheduled Monthly Installments when due if any Unpaid Balance remains payable.

8.0 Promissory Note. The BPW shall evidence its obligation to repay the Loan by execution of the Promissory Note, all of the terms of which are incorporated herein by reference (**Exhibit A**).

9.0 Events of Default. Either of the following events shall constitute an "Event of Default":

- (a) BPW fails to comply with or perform when due any material term, obligation, covenant, or condition contained in the Agreement or any other written representation related to the Loan; or
- (b) BPW fails to provide, within sixty (60) days, other financial information and statements that are reasonably requested by GT County or the Townships.

10.0 Waiver. Any waiver of GT County or the Townships's rights shall only be effective if made in writing by GT County or the Townships. A waiver of any Event of Default shall not excuse any other default or excuse the same default on a future occasion. GT County or the Townships's forbearance, delay or failure to exercise its rights under the Agreement or under any other Loan document shall not be construed as a waiver.

11.0 Default Declaration. Upon occurrence of an Event of Default which is not cured by the BPW within forty-five (45) days after written notice to the BPW by the GT County or the Townships, then immediately, without necessity of further notice or any other action by the GT County or the Townships, unless waived in writing by GT County or the Townships, all or any part of the Unpaid Balance shall be immediately due and payable at GT County or the Townships's option (the "Payment Demand"). Unless all of the Payment Demand is then fully paid, GT County or the Townships shall have and may exercise any rights and remedies provided in this Agreement, or granted secured or unsecured lenders under the Michigan Uniform Commercial Code, or provided under any mortgage, security agreement, or other Loan document.

12.0 State of Michigan. The Loan shall be governed by, and construed in accordance with the laws of the State of Michigan (the "State") and applicable federal law. BPW consents to GT County or the Townships's choice of venue in any state or federal court located in Michigan.

13.0 Information Requirements. BPW agrees to provide financial statements to GT County or the Townships no later than April 15th following the end of each calendar year and further agrees to provide any business related information that GT County or the Townships reasonably requests. BPW warrants that all financial statements and other business related information it provides to GT County or the Townships are, or will be, accurate, correct, and complete in all material respects.

14.0 Notification. All notices, demands, waivers, requests, and other communications under the Agreement or under any other Loan document must be in writing and shall only be effective if addressed and mailed, postage prepaid, to the applicable party's address as stated at the beginning of the Agreement or to such other address as shall be designated by such party in a written notice to the other party(s) that complies with the terms of this section.

15.0 Obligations of the Townships. This Loan Agreement shall not modify, amend or in any way alter the obligations of the Townships in any separate Agreement pertaining to the Septage Treatment Facility, including but not limited to the Townships' obligation to pay any shortfall in bond payments pursuant to the Septage Treatment Facility Operating Agreement.

16.0 Assignment. This Agreement may be assigned by the BPW to any other entity that takes ownership or title to the Facility. The BPW shall provide GT County and the Townships written notice of any assignment pursuant to this paragraph.

17.0 General Provisions.

- (a) The headings of the numbered sections are for convenience only and do not limit, define or construe the contents of such sections.
- (b) Each separately identified section or subsection of the Agreement or any other Loan document(s) shall be treated as severable. If any section or subsection of the Agreement or any other Loan document(s) is judicially declared to be illegal, invalid, or unenforceable, then the remaining sections of the Agreement and the other Loan document(s) shall be unaffected and remain in full force.
- (c) In the event that any section or subsection of the Agreement conflicts with any other Loan document(s), the Agreement's term(s) shall prevail.
- (d) Wherever used, words of singular neuter import shall be read as if written in the plural, masculine, or feminine whenever the circumstances so require.
- (e) The Agreement and the other loan documents shall be binding upon BPW, its successors and assigns, and shall inure to GT County or the Townships's benefit and to GT County or the Townships's successors and assigns.
- (f) This Agreement and the Loan documents constitute the entire agreement between the parties with respect to the loan, and supersede all prior agreements and understandings, both written and oral, between the parties with respect to the loan.

PRIOR TO SIGNING THIS AGREEMENT, BPW HAS READ, UNDERSTANDS, AND AGREES TO THE AGREEMENT'S TERMS AND CONDITIONS.

As Witnessed below, BPW has signed executed the Agreement on the _____ day of _____, 2011.

WITNESSES: "BPW"

Print:

By:
Its: Chairman

Print:

WITNESSES:

Grand Traverse County

Print

Chairman:

Print

WITNESSES:

Acme Township

Print:

By:
Its: Supervisor

Print:

WITNESSES:

East Bay Township

Print:

By:
Its: Supervisor

Print:

WITNESSES:

Elmwood Township

Print:

By:
Its: Supervisor

Print:

WITNESSES:

Garfield Township

Print:

By:
Its: Supervisor

Print:

WITNESSES:

Pensinsula Township

Print:

By:
Its: Supervisor

Print:



Wayne Kladder <wjktcm@gmail.com>

STF Township Liability

1 message

Tony Ansoerge <tansor01@yahoo.com>**Wed, May 4, 2011 at 2:57 PM**

Reply-To: Tony Ansoerge <tansor01@yahoo.com>

To: Chuck Korn <ckorn@garfield-twp.com>, Rob Manigold <Supervisor@peninsulatownship.com>, Glen Lyle <glile@eastbaytwp.org>, Wayne Kladder <wjktcm@gmail.com>, Jack Kelly <elmwoodsuptervisor@charterinternet.com>

From: Tony Ansoerge

To: G5 Township Supervisors

Date: 5/4/11

Subject: STF Township Liability

I am sending out this note, including a copy of a note I sent individually to my Township Board back in March, as information in preparation for May's Sewer & Water Committee meeting. I had assumed that my Supervisor had forwarded this to the rest of you, but I am told this may not have happened. This relates to the matter of a township (either a Charter Township or a regular Township) not being able to incur a debt or liability under the general powers authorized to a township under state law, unless authorized by a vote of the electors of the township. While I know that such a vote did **not** occur in Elmwood Township when the Second Amended Operating Agreement (which included the STF) was signed, I suppose it is possible some other township put this agreement to a vote of their electors (but I would rather doubt it). Assuming that none of the G5 Townships had obtained voter approval, in order to incur or pay a debt or liability for the STF would require voter approval going forward (I doubt that this would be an easy sell to the voters).

The current operating plan and financial model shows the STF losing money every year going forward. The financial model needs to be rerun to comprehend the investigation settlement, but even with the settlement, the STF will lose money every year going forward. While there was discussion before the settlement about the County and G5 Township "loaning" the STF funds, without a new plan and financial model showing how this money would be paid back, the "loan" would **never** be paid back – and so is not a loan at all. Furthermore, under state law, the Townships can not pay or incur a debt or liability without a vote of their electors. If any one Township failed to get voter approval, any agreement would be moot (as no other Township would be willing to pay for the non-approving Township(s) share). Bottom line, I don't see the concept of the G5 Townships "loaning" money to the STF as being a viable option under state law.

I personally see only three alternatives for paying for the STF deficits in the short term:

1. Raise the user fees/rates sufficient to pay for the operations of the STF with the expected waste volumes. This is what was called for in the contract between the Townships and the BPW, and could be done with 30 days notice to the state.
2. Reduce operations at the STF and divert septage and holding tank waste to the WWTP. This is

option 4.21 from the Plante/Moran study, or some variation thereof. This is basically what occurred for 1 ½ years during the reconstruction of the plant (only with the option of continuing to treat grease which couldn't be treated during reconstruction -- but could now). This would drastically cut operations cost at the STF while maintaining expected revenues.

3. Have GT County continue to "loan" the STF funds to make up deficits. The County is not limited by the statutory restrictions placed on townships, and is the party (both via the bond payments and the BPW budgets) who incur the deficits. They are also the party (through their BPW) who has not fulfilled their portion of the contract with the Townships (all the Townships were required to do was keep the ordinances in place, the BPW was to operate and run the STF to break-even).

Regardless of how we move forward, we need to have a viable business plan and financing in place for the short term. If nothing changes, I see alternative three above as the default. While the County could attempt to bill the G5 Townships, they would probably have to sue under the contract in order to collect. Even if the County were to win a court decision (doubtful in my opinion), their insurance would then need to pay first under the contract before the G5 Townships. It should be clear to everyone the consequences of delaying making a decision on financing the STF moving forward.

The following is the letter I sent my Township Board, with a more detailed discussion of the pertinent state law. I have not included Ross Childs on distribution as this is **not** an advance copy of my public comments for the upcoming meeting. I have no objection to your forwarding this note as you deem appropriate (including your Township Boards, attorneys and/or Ross). I don't feel this letter is necessarily appropriate for inclusion in the Sewer & Water Committee minutes.

To: Elmwood Township Board

From: Tony Anson

Date: 3/15/11

Subject: STF Liability and Contract

There have been repeated statements made regarding the obligations of the five townships (which include Elmwood Township) who contracted with the GT County Board of Public Works (BPW) to build and operate the Septage Treatment Facility (STF). The statements made generally state that the five townships have guaranteed the bonds, and are obligated to pay any cost overruns which may occur regarding the STF. This potential liability, however, may not even exist –under either the contract or state law. I suggest that the Township consider action to protect its rights under law.

A previous Township Board entered into a contract with the BPW to construct, operate and maintain the STF. This contract (the Second Amended Restated Operating Agreement of 2006) was actually an amendment to a previous contract which covered the municipal sewer and water operations, and added provisions regarding the STF while incorporating the previous contract provisions. The Elmwood Township sewer and water operations were performed by the BPW, and billed monthly to the Township. The Township set user rates and fees, collected the money from customers, and paid the monthly charges to the

BPW. The Township was authorized to initiate these water and sewer projects by Township Board resolution under the *Public Improvements Act of 188 of 1954* (which includes provisions for special assessments) without an approval vote by residents. While it was obviously the intent that the user fees and charges would cover all of the costs to the Township (and they have), a liability to the Township was created and allowed under the separate state law.

When the contract with the BPW was amended to include the STF, it also was approved by resolution by the Township Board without an approval vote by residents. The *Public Improvements Act of 188 of 1954*, however, does not authorize the Township to initiate a septage treatment plant (it is not one of the public improvements listed in the Act – in fact no type of treatment plant is listed). So when the Township Board approved the amended contract including the STF, it approved the contract (at least the STF portion) under its authorization provided by the Charter Township Act 359 of 1947. The Charter Township Act specifically includes (under section 1) the Powers and Duties of Townships, Revised Statutes of 1846, sections 41.1a to 41.110c. Under this statute, Section 3 states “*The inhabitants of a township shall have the power, by a vote of the registered electors of the township, to grant and vote sums of money, not exceeding amounts limited by law, that they consider necessary for defraying proper charges and expenses arising in the township. The township board or a township officer shall not create a debt or liability against the township, or issue a warrant, certificate, or order for the payment of money, unless the creation of the debt or liability or the payment of the money has been authorized by vote of the registered electors of the township or by law.*” Therefore, the previous Township Board, in approving the contract by resolution without a vote of the residents of the Township, **could not create a liability against the Township.**

This does not mean that the entire contract with the BPW is necessarily invalid. As long as the user rates and fees (set and collected by the BPW) are sufficient to cover the entire costs of the STF (which is what is explicitly called for in the contract), there is no problem. No liability against the Township, however, can be created by the portion of the contract concerning the STF (regardless of what the contract may say) under state law. It is well understood that no provision of a contract can be enforced if it violates state law. It is my opinion that the Township could not be forced to make any direct payments for the STF as a result of signing the contract with the BPW. Said another way, the previous Township Board had no authority to commit to building the STF without approval by the voters.

Beyond the issue of a liability under state law, the contract with the BPW itself provides protections to the Township which may preclude any direct charges to Township. The first consideration is that the contract calls for user rates and fees sufficient to cover all costs of the STF. The BPW approved a business plan calling for an increase in rates to eliminate the deficit within six years, and the Township agreed to provide a proportional loan (at least for 2010 deficit) based on this business plan. The BPW did not, however, approve the rate increases (despite support by our Township Supervisor). This is a material breach by the BPW of the contract, and may invalidate the contract or a portion thereof.

The contract provision which would potentially obligate the Township to directly make payments for deficits at the STF reads as follows: “*Part One, 3.C Limitation The Board in its undertakings is acting for the benefit of the Townships and neither Board nor County shall be liable for any loss or damage to the Townships arising out of or related to the activities of the Board under this Agreement. The Townships agree to hold Grand Traverse County, its Boards, Commissions, officers, agents,*

employees, and consultants harmless from any liability, not covered y insurance, arising out of or attributable to the Board's activities under this Agreement." The contract specifically includes **"not covered by insurance"** in its limitation. Any claim to the Township, therefore, would need to occur **after** the county as exhausted its insurance coverage (which I would assume is in the millions of dollars). The Township should require the county to exhaust its insurance coverage prior to any billing.

After its own examination, the Township Board may wish to have the Township attorney review the above issues and draft a resolution stating the Board's intent with regard to any STF direct payments by the Township. This letter is meant to provide information to the Township Board, which may consider this topic at a future Board meeting.
