



## Staff Summary Report

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Council Meeting Date: June 11, 2009

Agenda Item Number: \_\_\_\_\_

**SUBJECT:** Approval of ANCILLARY AGREEMENT between Chicanos Por La Causa and City of Tempe. Reimbursement to the City of Tempe as part of New Markets Tax Credit application process

**DOCUMENT NAME:** 20090611cdaws01 **COMMUNITY DEVELOPMENT (0403)**

**COMMENTS:** Reimbursement to City of Tempe in the amount of \$100,000

**PREPARED BY:** Alex Smith, Technology Development Specialist Ext. 2708.

**REVIEWED BY:** Sheri Wakefield-Saenz, Deputy Manager, Community Development Ext. 8812.

**LEGAL REVIEW BY:** Cynthia McCoy, Assistant City Attorney Ext. 8227

**FISCAL NOTE:** General reimbursement

**RECOMMENDATION:** Approval of the agreement

**ADDITIONAL INFO:** The City of Tempe and Chicanos Por La Causa, Inc. (CPLC) jointly made applications to the United States Treasury Department for the New Markets Tax Credit (NMTC) program. The parties were subsequently awarded \$15M from Treasury for the New Markets Tax Credit program. The attached Ancillary Agreement defines the terms of repayment by CPLC to the City of Tempe for NMTC application costs.

ANCILLARY AGREEMENT  
(C2001-168)

This Ancillary Agreement ("Agreement") is entered into as of June \_\_\_\_\_, 2009, by and between the City of Tempe, an Arizona municipal corporation ("Tempe"), and Chicanos Por La Causa, Inc. ("CPLC"). Tempe and CPLC are collectively (the "Parties").

R E C I T A L S :

A. Tempe and CPLC are parties to various agreements, including without limitation a New Markets Tax Credit Application and Program Development Agreement dated as of September 25, 2003, as amended (C2003-168) (the "Program Agreement"), and a Memorandum of Understanding dated September 30, 2003, as amended (C2003-168A)(the "MOU"). The Program Agreement and the MOU are sometimes collectively referred to as the "Agreements".

B. The parties desire to set forth herein their understandings and agreements regarding repayment of certain funds advanced by Tempe pursuant to the Agreements.

A G R E E M E N T :

NOW THEREFORE, in consideration of the premises and promises hereinafter set forth, the parties hereto agree as follows:

1. Recitals. The Parties hereby acknowledge that the Recitals are true and accurate in every respect.

2. Definitions. Capitalized terms used herein without definition shall have the meanings given such terms in the Agreements.

3. Repayment. Pursuant to the Program Agreement and the MOU, Tempe advanced the sum of \$100,000.00 (the "Advance"), which was used to pay application and other costs, fees, and expenses associated with submission to the United States Treasury Department of one or more applications for New Markets Tax Credits (the "Advance").

CPLC hereby promises to pay to Tempe, at such place as Tempe may from time to time designate, the Advance by making a payment of US\$10,000.00 within 30 days after execution of this Agreement, and thereafter by making successive installments of US\$12,850.00 each, commencing September 30, 2009 and continuing on the last day of each calendar quarter thereafter until December 31, 2010, at which time the remaining unpaid balance shall be paid in full.

So long as payments are made on their scheduled due date, no interest shall be charged on the Advance. The Advance may be prepaid in whole or in part at any time and from time to time without penalty or premium.

Upon "default" the Advance shall bear interest, until paid in full, at the rate of 5% per annum. All payments shall be made in immediately available funds, and when made shall be first applied to accrued costs, expenses and fees, if any, then to interest due, and then to the reduction of the principal balance.

At Tempe's option, any of the following shall constitute a "default" hereunder, and, upon the occurrence of any of the following, the Advance shall, at the option of Tempe, become immediately due and payable, without presentment for payment, diligence, grace, exhibition, protest, further demand or notice of any kind, all of which CPLC hereby expressly waives: (i) any payment due hereunder is not paid within five (5) days after it is due; (ii) any petition or application for a custodian, as defined by Title 11, United States Code, as amended from time to time (the "Bankruptcy Code") or for any form of relief under any provision of the Bankruptcy Code or any other law pertaining to reorganization, insolvency or readjustment of debts is filed by or against CPLC, its assets or affairs, and such petition or application is not dismissed within ninety (90) days of such filing, (iii) CPLC makes an assignment for the benefit of creditors, is not paying material debts as they become due, or is granted an order for relief under any chapter of the Bankruptcy Code; (iv) a custodian, as defined by the Bankruptcy Code, takes charge of any property of CPLC; or (v) the dissolution or termination of existence of CPLC.

No provision of this Agreement is intended to or shall require or permit Tempe, directly or indirectly, to take, receive, contract for or reserve, in money, goods or things in action, or in any other way, any interest (including amounts deemed by law to be interest, such amounts to then be deemed to be an addition to the rate of interest agreed upon) in excess of the maximum rate of interest permitted by law in the State of Arizona as of the date hereof. If any such excess shall nevertheless be provided for, or be adjudicated by a court of competent jurisdiction to be provided for, CPLC shall not be obligated to pay such excess but, if paid, then such excess shall be applied against the unpaid principal balance of the Advance or, to the extent that the Advance has been paid in full by reason of such application or otherwise, such excess shall be remitted to CPLC.

CPLC hereby agrees: (i) to any and all extensions (including extensions beyond the original term hereof) and renewals hereof, from time to time, without notice, and that no such extension or renewal shall constitute or be deemed a release of any obligation of CPLC to Tempe; (ii) that the acceptance by Tempe of any performance which does not comply strictly with the terms hereof shall not be deemed to be a waiver or bar of any of its rights, nor a release of any of CPLC's obligations; (iii) to offsets of any sums or property owed to CPLC by Tempe at any time; and (iv) to pay Tempe upon demand any and all costs, expenses and fees (including reasonable attorneys fees) incurred in enforcing or attempting to recover payment of the amounts due hereunder, irrespective of the existence of an event of default, and including costs, expenses and fees incurred before, after or irrespective of whether suit is commenced, and in the event suit is brought to enforce payment hereof, such costs, expenses and fees and all other issues in such suit shall be determined by a court sitting without a jury.

4. Due Authorization. Each of the Parties represents and warrants that it has properly granted authority to the persons or entities reflected on the signature pages to execute

this Agreement on its behalf. Each signatory below personally represents and warrants that such authority has been properly granted to such signatory.

5. Inurement. This Agreement shall be binding upon and inure to the benefit of the Parties, their successors and assigns.

6. Integration. This Agreement together with all documents referred to or described in this Agreement are collectively an integration of the total agreement of the Parties, embody and encompass all agreements between the parties and supersede all negotiations, prior discussions or preliminary agreements between the Parties and there are no other agreements between the Parties with respect to the same subject matter. No modification of the terms of this Agreement shall be valid unless made in writing and signed by all the Parties.

7. Construction. The Parties hereto acknowledge and agree that this Agreement is the product of negotiation and that the Agreement shall not be construed against the principal drafter.

8. Severability. In the event that any portion of this Agreement is found to be unenforceable for any reason, the unenforceable provision(s) shall be considered to be severable. The remainder of this Agreement shall continue in full force and effect as fully as though such invalid, illegal, or unenforceable portion had never been part of this Agreement. Further, any Court considering any term alleged to be invalid, illegal, or unenforceable shall modify any challenged provision to the extent required to make it valid, legal, and enforceable and thereby give as much effect as possible to the intentions of the Parties to this Agreement.

9. Counterparts. This Agreement may be executed by the parties in one or more counterparts, and any number of counterparts signed in the aggregate by the parties shall constitute a single instrument.

10. Cancellation. This Agreement is subject to A.R.S. § 538-511.

[SIGNATURE PAGE FOLLOWS]

**“CPLC”**

Chicanos Por La Causa, Inc.

By: \_\_\_\_\_

Its: \_\_\_\_\_

**“Tempe”**

CITY OF Tempe, an Arizona  
municipal corporation

By: \_\_\_\_\_

Charles Meyer, City Manager

ATTEST:

\_\_\_\_\_

City Clerk

APPROVED AS TO FORM:

By \_\_\_\_\_

City Attorney