



MEMORANDUM

AGENDA ITEM # 6b)3

DATE: AUGUST 3, 2009

TO: EXECUTIVE COMMITTEE

FROM: STAFF

SUBJECT: EASTWARD HO! BROWNFIELDS CLEANUP REVOLVING LOAN FUND
DECLARATION OF RESTRICTIVE COVENANT

Background

On April 20, 2001, the U.S. Environmental Protection Agency (EPA) awarded a \$2 million grant to the South Florida Regional Planning Council to establish a revolving loan fund that would be used to assist in the cleanup and reuse of brownfields sites in Miami-Dade, Broward, and Palm Beach Counties. The South Florida Regional Planning Council serves as the lead agency and fund manager for the grant. Loan funds can be used for brownfields cleanup activities only. A loan in the amount of \$800,000 was disbursed to Executive Trust, LTD on March 4, 2004. The loan was for the purpose of abatement and removal of identified environmental contamination on real property located in Palm Beach County, Florida for the development of an affordable housing complex called Malibu Bay.

Attached is a Declaration of Restrictive Covenant issued by the Florida Department of Environmental Protection that imposes restrictions on the areas of soil contamination that is still located on the property that the Council holds as collateral for the loan. The Department of Environmental Protection requires that the Declaration of Restrictive Covenant be recorded with the county courts after the Site Remediation Activities report is completed.

Recommendation

Authorize the Executive Director to sign Declaration of Restrictive Covenant for the Brownfields Revolving Loan to Executive Trust, LTD.

This instrument prepared by:
Shawn Wilson
c/o Executive Trust, Ltd.
3250 Mary Street
Suite 500
Miami FL 33133

DECLARATION OF RESTRICTIVE COVENANT

THIS DECLARATION OF RESTRICTIVE COVENANT (hereinafter "Declaration") is made as of this ____ day of _____, 2009, by EXECUTIVE TRUST, LTD., A Florida Limited Partnership (hereinafter "GRANTOR") and the Florida Department of Environmental Protection (hereinafter "FDEP").

RECITALS

A. GRANTOR is the fee simple owner of that certain real property situated in the County of Palm Beach, State of Florida, more particularly described as

ALL OF MALIBU BAY, AS RECORDED IN THE OFFICIAL RECORDS OF PALM BEACH COUNTY, FLORIDA, AT PLAT BOOK 101, PAGES 54-56 (the "Property").

B. The FDEP Facility Identification Number for the Property is BF500101002. The facility name at the time of this Declaration is Malibu Bay Apartments.

C. The Property was previously used as a golf course. The golf course operators used products containing arsenic as pesticides. This use resulted in arsenic levels in the soil and groundwater above the exposure limit for residential use. Grantor remediated the arsenic contamination according to the Remedial Action Plan listed below, as approved by the FDEP on June 4, 2003. The present status of the Property is documented in the following reports which are herein incorporated by reference:

1. Completion of Site Remediation Activities, prepared by Kimley-Horn and Associates, Inc., January 3, 2005.

2. Site Assessment Report prepared by Kimley-Horn and Associates, Inc., December 20, 2002.

3. Site Assessment Report Addendum, prepared by Kimley-Horn and Associates, Inc., March 14, 2003.

D. The reports noted in Recital C set forth the nature and extent of the remaining contamination on the Property. These reports confirm that contaminated soil and groundwater as

defined by Chapter 62, Florida Administrative Code, exists on the Property. In summary, Report 1 above states that all contaminated soils are covered by either 2 feet of clean soil or by an impervious cap such as concrete or asphalt. Also, these reports document that the groundwater contamination extends to several contiguous parcels, which are also parts of the former golf course; and that the groundwater contamination shall be addressed in concert with the other applicable landowners when all parts of the former golf course are developed. Pursuant to Section 2 (a) below, there shall be no use of the groundwater until this occurs. It is unknown at this time whether a long-term restriction on the use of the groundwater will be required after the remediation is complete. This Declaration imposes restrictions on the area of soil contamination. The criteria for direct exposure of contamination in the soil was based upon an average soil contaminant concentration calculated based on a 95% Upper Confidence Limit (UCL) approach using an exposure unit (EU) of 14 acres pursuant to Rule 62-785, F.A.C. Therefore, the Property may not be subdivided without prior approval from the FDEP. See also paragraph 6 below.

E. It is the intent of the restrictions in this Declaration to reduce or eliminate the risk of exposure of the contaminants to the environment and to users or occupants of the Property and to reduce or eliminate the threat of migration of the contaminants.

F. The FDEP will not issue a Site Rehabilitation Completion Order with Conditions upon recordation of this Declaration because contaminated groundwater remains at the site at levels above any cleanup target levels. Cleanup of the groundwater is ongoing. If cleanup target levels are met, GRANTOR and FDEP may agree in writing to amend this Declaration.

G. GRANTOR deems it desirable and in the best interest of all present and future owners of the Property that the Property be held subject to certain restrictions and changes, all of which are more particularly hereinafter set forth.

NOW, THEREFORE, in accordance with the Remedial Action Plan, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each of the undersigned parties, GRANTOR agrees as follows:

1) The foregoing recitals are true and correct and are incorporated herein by reference.

2) GRANTOR hereby imposes on the Property the following restrictions:

a) There shall be no use of the groundwater on the Property. There shall be no drilling for water conducted on the Property nor shall any wells be installed on the Property other than monitoring wells pre-approved by the FDEP. For any dewatering activities, a plan must be in place to address and ensure the appropriate handling, treatment, and disposal of any extracted groundwater that may be contaminated. Additionally, there shall be no stormwater swales, stormwater detention or retention facilities (except the lake depicted on Exhibit A) or ditches on the Property.

b) All portions of the Property shall be permanently covered and maintained with a cap that prevents human exposure.

i) Exhibit A attached hereto and made a part hereof, depicts the areas that are and shall permanently be covered and maintained with an impermeable material that prevents human exposure and limits water infiltration.

ii) The remaining portion of the Property other than the portion described in 2(b)(i) above shall be permanently covered and maintained with two (2) feet of clean and uncontaminated soil that prevents human exposure.

c) Excavation and construction below two feet surface elevations is not prohibited provided any contaminated soils that are excavated are removed and properly disposed of pursuant to Chapter 62, F.A.C. (or subsequent contamination site cleanup criteria rule(s)). Nothing herein shall limit or conflict with any other legal requirements regarding construction methods and techniques that must be taken to minimize risk of exposure while conducting work in contaminated areas. For any dewatering activities, a plan must be in place to address and ensure the appropriate handling, treatment, and disposal of any extracted groundwater that may be contaminated.

3) For the purpose of monitoring the restrictions contained herein, FDEP or its respective successors and assigns shall have site access to the Property at reasonable times and with reasonable notice to the GRANTOR and its successors and assigns.

4) It is the intention of GRANTOR that the restrictions contained in this Declaration shall touch and concern the Property, run with the land and with the title to the Property, and shall apply to and be binding upon and inure to the benefit of the successors and assigns of GRANTOR, and to FDEP, its successors and assigns, and to any and all parties hereafter having any right, title or interest in the Property or any part thereof. The FDEP, its successors and assigns may enforce the terms and conditions of this Declaration by injunctive relief and other appropriate available legal remedies. Any forbearance on behalf of the FDEP to exercise its right in the event of the failure of the GRANTOR, its successors and assigns to comply with the provisions of this Declaration shall not be deemed or construed to be a waiver of the FDEP rights hereunder. This Declaration shall continue in perpetuity, unless released or otherwise modified in writing by GRANTOR, its successors and assigns and the FDEP, its successors and assigns as provided in paragraph 6 hereof. These restrictions may also be enforced in a court of competent jurisdiction by any other person, firm, corporation, or governmental agency that is substantially benefited by this restriction.

5) In order to ensure the perpetual nature of these restrictions, GRANTOR, its successors and assigns, shall reference these restrictions in any subsequent deed of conveyance, including the recording book and page of record of this Declaration.

6) This Declaration is binding until a release of covenant is executed by the FDEP Secretary (or designee) and GRANTOR and is recorded in the county land records. To receive prior approval from FDEP to remove any requirement herein, cleanup target levels established pursuant to Florida Statutes and FDEP rules must have been achieved. This Declaration may be modified in writing only. Any subsequent amendment must be executed by both GRANTOR and the FDEP or their respective successors and assigns and be recorded by GRANTOR or its successors and assigns, and be recorded as an amendment hereto.

7) In the event of the enforcement of these restrictions as provided in paragraph 4 hereof, and/or in the event of the modification or amendment in writing of this Declaration as provided in paragraph 6 hereof, GRANTOR will provide notice to the subordinate lienholders hereunder, as follows:

U.S. Bank National Association
500 West Cypress Creek Road, Suite 560
Fort Lauderdale, Florida 33309
Attention: Corporate Trust Department

Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329
Attention: Executive Director
FAX: (850) 488-9809

South Florida Regional Planning Council
Attn: Cheryl Cook
3440 Hollywood Boulevard, #140
Hollywood, Florida 33021

MMA Financial TC Corp.
101 Arch Street
Boston, MA 02110
Attention: Asset Management Department
and Legal Department

Housing Finance Authority
100 Australian Avenue, Suite 410
West Palm Beach, FL 33406

8) If any provision of this Declaration is held to be invalid by any court of competent jurisdiction, the invalidity of such provision shall not affect the validity of any other provisions thereof. All such other provisions shall continue unimpaired in full force and effect.

9) GRANTOR covenants and represents that on the date of execution of this Declaration that GRANTOR is seized of the Property in fee simple and has good right to create, establish, and impose this restrictive covenant on the use of the Property. GRANTOR also covenants and warrants that the Property is free and clear of any and all liens, mortgages, or encumbrances that could impair GRANTOR'S rights to impose the restrictive covenant described in this Declaration or that would be superior to the restrictive covenant described in this Declaration.

[SIGNATURES CONTAINED ON FOLLOWING PAGES]

IN WITNESS WHEREOF, EXECUTIVE TRUST, LTD. has executed this instrument, this ____ day of _____, 2009.

Signed, sealed and delivered in the presence of:

EXECUTIVE TRUST, LTD.

By: Executive Trust Associates, L.L.C, its General Partner

Print Name: _____

By: _____
Shawn Wilson, Vice President

Print Name: _____

STATE OF FLORIDA)
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of _____, 2009, by Shawn Wilson, as Vice President of Executive Trust Associates, LLC, a Florida limited liability company, the General Partner of Executive Trust, Ltd., a Florida limited partnership. Personally Known ___ OR Produced Identification ____.
Type of Identification Produced _____.

Signature of Notary Public

Print Name of Notary Public

Commission No. _____

Commission Expires: _____

Approved as to form by the
Florida Department of Environmental Protection,
Office of General Counsel.

IN WITNESS WHEREOF, the Florida Department of Environmental Protection has executed this instrument, this ____ day of _____, 2009.

Signed, sealed and delivered in the presence of:

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

Print Name: _____

Print Name: _____

By: _____
Print Name: _____
Title: _____
Division of _____
Bureau of _____

STATE OF FLORIDA)
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of _____, 2009, by _____ as representative for the Florida Department of Environmental Protection. Personally Known ___ OR Produced Identification ___. Type of Identification Produced _____.

Signature of Notary Public
Print Name of Notary Public
Commission No. _____
Commission Expires: _____

**CONSENT AND JOINDER TO
DECLARATION OF RESTRICTIVE COVENANT**

U.S. Bank National Association, as the holder of the following described instrument:

First Mortgage and Security Agreement from Executive Trust, Ltd., a Florida limited partnership, to Florida Housing Finance Corporation, a public body corporate and politic duly created and organized under the laws of the State of Florida (the "Lender"), recorded November 12, 2003, in Official Records Book 16174, Page 1115; as assigned to Housing Finance Authority of Palm Beach, County, Florida (the "Authority"), by Assignment of First Mortgage and Security Agreement, UCC Financing Statement, Promissory/Mortgage Note and Assignment of Leases and Rents from Lender to Authority, recorded in Official Records Book 16174, Page 1190, and re-recorded in Official Records Book 16259, Page 0763, as further assigned to U.S. Bank National Association, as Trustee (the "Trustee"), by that Assignment of First Mortgage and Security Agreement, UCC Financing Statement, Promissory/Mortgage Note and Assignment of Leases and Rents from Authority to Trustee recorded in Official Records Book 16174, Page 1195, and re-recorded in Official Records Book 16259, Page 0768; all of the foregoing instruments being recorded in the Public Records of Palm Beach County, Florida

(collectively the "Mortgage"), hereby consents and joins the foregoing Declaration of Restrictive Covenant by and between Executive Trust, Ltd. and the Florida Department of Environmental Protection.

IN WITNESS WHEREOF, the undersigned has executed and delivered this consent and joinder to Declaration of Restrictive Covenant as of the ____ day of _____, 2009.

U.S. BANK NATIONAL ASSOCIATION

WITNESS:

Print Name: _____

By: _____
Name: _____
Title: _____

Print Name: _____

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this ____ day of _____
2009 by _____, as _____ of U.S. Bank National
Association, on behalf of U.S. Bank National Association, who is personally known to me or
who produced _____ as identification.

Notary Public, State of Florida

Printed Notary Name
Commission No. _____
My Commission Expires: _____

CONSENT AND JOINDER

FLORIDA HOUSING FINANCE CORPORATION, a public body corporate and politic
duly created and organized under the laws of the State of Florida, executes this document to
acknowledge its consent to the foregoing consent and joinder to Declaration of Restrictive
Covenant.

**FLORIDA HOUSING FINANCE
CORPORATION**

By: _____
Print: _____
Title: _____

CONSENT AND JOINDER

HOUSING FINANCE AUTHORITY OF PALM BEACH COUNTY, FLORIDA
executes this document to acknowledge its consent to the foregoing consent and joinder to
Declaration of Restrictive Covenant.

**HOUSING FINANCE AUTHORITY OF
PALM BEACH COUNTY, FLORIDA**

By: _____
Print: _____
Title: _____

**CONSENT AND JOINDER TO
DECLARATION OF RESTRICTIVE COVENANT**

South Florida Regional Planning Council, a body corporate and politic and an agency of the State of Florida, as the holder of the following described instrument:

Second Mortgage to Secure a Loan, from Executive Trust, Ltd., a Florida limited partnership, to South Florida Regional Planning Council dated November 21, 2003, and recorded on December 10, 2003, in Official Records Book 16296, Page 1527 of the Public Records of Palm Beach County, Florida

(the "Mortgage"), hereby consents and joins the foregoing Declaration of Restrictive Covenant by and between Executive Trust, Ltd. and the Florida Department of Environmental Protection.

IN WITNESS WHEREOF, the undersigned has executed and delivered this consent and joinder to Declaration of Restrictive Covenant as of the ____ day of _____, 2009.

SOUTH FLORIDA REGIONAL
PLANNING COUNCIL

WITNESS:

Print Name: _____

By: _____
Name: _____
Title: _____

Print Name: _____

STATE OF FLORIDA)
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of _____ 2009 by _____, as _____ of South Florida Regional Planning Council, on behalf of South Florida Regional Planning Council, who is personally known to me or who produced _____ as identification.

Notary Public, State of Florida

Printed Notary Name
Commission No. _____
My Commission Expires: _____

**CONSENT AND JOINDER TO
DECLARATION OF RESTRICTIVE COVENANT**

The City of West Palm Beach, a municipal corporation organized under the laws of the State of Florida, as the holder of the following described instrument:

Mortgage and Security Agreement, from Executive Trust, Ltd., a Florida limited partnership, in favor of the City of West Palm Beach, dated May 18, 2005, and recorded on June 24, 2005, in Official Records Book 18806, Page 206 of the Public Records of Palm Beach County, Florida

(the "Mortgage"), hereby consents and joins the foregoing Declaration of Restrictive Covenant by and between Executive Trust, Ltd. and the Florida Department of Environmental Protection for the sole and limited purpose of acknowledging and consenting to the imposition of the restrictions imposed on the Property by Grantor in Section 2 of said Declaration. The City of West Palm Beach assumes no responsibility for any remediation required for the site by executing this Consent and Joinder.

IN WITNESS WHEREOF, the undersigned has executed and delivered this consent and joinder to Declaration of Restrictive Covenant as of the ____ day of _____, 2009.

WITNESS:

CITY OF WEST PALM BEACH
By its City Commission

Print Name: _____

By: _____
Name: _____
Title: _____

Print Name: _____

STATE OF FLORIDA)
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of _____ 2009 by _____, as _____, who is personally known to me or who produced _____ as identification.

Notary Public, State of Florida

Printed Notary Name
Commission No. _____
My Commission Expires: _____

**CONSENT AND JOINDER TO
DECLARATION OF RESTRICTIVE COVENANT**

Palm Beach County, a political subdivision of the State of Florida, as the holder of the following described instrument:

Mortgage and Security Agreement, from Executive Trust, Ltd., a Florida limited partnership, in favor of Palm Beach County, dated March 30, 2005, and recorded on April 6, 2005, in Official Records Book 18373, Page 865 of the Public Records of Palm Beach County, Florida

(the "Mortgage"), hereby consents and joins the foregoing Declaration of Restrictive Covenant by and between Executive Trust, Ltd. and the Florida Department of Environmental Protection.

IN WITNESS WHEREOF, the undersigned has executed and delivered this consent and joinder to Declaration of Restrictive Covenant as of the ____ day of _____, 2009.

WITNESS:

PALM BEACH COUNTY, FLORIDA,
By its Board of County Commissioners

Print Name: _____

By: _____
Name: _____
Title: _____

Print Name: _____

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

The foregoing instrument was acknowledged before me this ____ day of _____ 2009 by _____, as _____, who is personally known to me or who produced _____ as identification.

Notary Public, State of Florida

Printed Notary Name
Commission No. _____
My Commission Expires: _____