

**VILLAGE OF YELLOW SPRINGS**

**RESOLUTION #2007-11**

**AUTHORIZING AN AGREEMENT BETWEEN THE VILLAGE AND THE YELLOW SPRINGS AND MIAMI TOWNSHIP COMMUNITY IMPROVEMENT CORPORATION REGARDING THE PROJECT COOPERATION AGREEMENT WITH THE ARMY CORP OF ENGINEERS.**

**WHEREAS**, The Village of Yellow Springs and Miami Township Community Improvement Corporation (“CIC”) have agreed to work on the Center for Business and Education; and

**WHEREAS**, the parties have received approval for a Grant from the US Army Corp of Engineers; and

**WHEREAS**, The Village must act as the local public authority ultimately responsible for the Grant Agreement; and

**WHEREAS**, the Village Council now wishes to authorize the Village to proceed with these matters.

**NOW, THEREFORE, THE COUNCIL FOR THE VILLAGE OF YELLOW SPRINGS, OHIO HEREBY RESOLVES THAT:**

**Section 1.** The Village Manager is authorized to enter into the Project Cooperation Agreement with the U.S. Army Corp of Engineers to provide funds for utility infrastructure needed for the Center for Business and Education.

**Section 2.** The Village Manager is authorized to enter into an Agreement with the CIC, a copy of which is on file with the Clerk of Council, under which the CIC will provide the local match for the Grant and the Village will administer the Grant, either directly or through an agent.

**Section 3.** This Resolution is hereby effective immediately upon its adoption.

\_\_\_\_\_  
Karen Wintrow, President of Council

Passed: April 16, 2007

Attest: \_\_\_\_\_  
Deborah Benning, Clerk

Roll Call:

Karen Wintrow	<u>Yes</u>
Bruce Rickenbach	<u>Yes</u>
Judith Hempfling	<u>Yes</u>
Kathryn Chase	<u>Yes</u>
Kathryn Van der Heiden	<u>Absent</u>

## DEVELOPMENT AND FUNDING AGREEMENT

THIS DEVELOPMENT AND FUNDING AGREEMENT is entered into as of this \_\_\_\_ day of \_\_\_\_\_, 2007, between the VILLAGE OF YELLOW SPRINGS (“Village”) and THE YELLOW SPRINGS AND MIAMI TOWNSHIP COMMUNITY IMPROVEMENT CORPORATION, an Ohio non-profit corporation (referred to herein as the “Developer”).

A. The Village has determined it in the best interest of the community to promote economic development within the area designated in that certain Community Economic Development Agreement between the Village and Miami Township, Greene County, Ohio (the “CEDA District”).

B. The Village and the Developer have previously entered into a Development Agreement dated May 5, 2003, wherein the Developer agreed to perform certain economic development activities within the CEDA District.

C. Education Village, Inc., a 501(c)(2) non-profit corporation (“Education Village”) is a supporting organization to the Developer and is the owner of the property described on Exhibit A attached hereto (the “Project Property”), which Project Property is within the CEDA District.

D. The Developer desires to undertake the Yellow Springs Center for Business and Education, Water and Sewer Project (the “Project”) on the Project Property.

E. The Project, with the assistance of the Village, has qualified for a federal funding (“Grant”) from the Department of the Army (the “Government”) through the U.S. Army Engineers, Louisville District (“District Engineer”)

F. In order to qualify for the federal funds, the Village must act as a conduit between the Government and Developer for administering the Grant, disbursement of the funds and monitoring of the Project.

G. The Village is willing to act in this capacity to facilitate the Project obtaining the Government funding, subject to the terms of this Agreement.

H. The Developer is a duly formed and validly existing non-profit corporation and has the due authorizations and authority to enter into and perform this Agreement.

NOW THEREFORE, the parties agree as follows:

1. Project Cooperation Agreement; Developer Obligated. Subject to the terms of this Agreement, the Village hereby agrees to enter into the Project Cooperation Agreement with The Department of the Army for the Project in substantially the form attached hereto as Exhibit B (the “PCA”). The Developer acknowledges and agrees that the PCA requires the Village to perform certain obligations in order for the Project to qualify for reimbursement of the Government’s share of the Project costs under the PCA. The Village agrees that it shall fully and faithfully perform all obligations required of the Village under the PCA. The Developer is and shall remain throughout the term of the Project, responsible to the Village for a) full compliance with the terms and conditions of the PCA as they pertain to Developer, b) full reporting and

documentation of all work under the PCA, c) payment of all local match (“Match”) required under the PCA to the Village, or where the Match is to be based on work already performed by Developer or its agents in the Project qualifying as Match, full documentation needed by the Village to meet the applicable PCA Match requirements. The parties agree that approximately Forty Two Thousand Dollars (\$42,000) of cash shall be required from the Village under the PCA in addition to work already performed or to be performed by Developer. The Developer agrees to deposit in a manner acceptable to the Village this Forty Two Thousand Dollars (\$42,000) or an agreed actual amount the Village and Developer agree is the final cash match anticipated to be required, with the Village within three (3) business days of executing this Agreement. The Village will not submit the executed PCA to the Government until this Agreement has been fully executed and the matching funds have been deposited with the Village. If the matching funds have not been deposited as required herein, the Village Manager may declare this Agreement terminated and the Village shall have no further obligations under their Agreement.

2. Village to Remit Invoices. The Village agrees to submit to the Government all pay request invoices relating to the Project. Such invoices shall be prepared by the Village in the form required by the Government. Developer shall deliver suitable documentation to the Village to allow the Village to deliver invoices to the Government, accompanied by the following additional documentation:

(a) a signed certificate from the development contractor, certifying to the Village (and to the Government, if required by the Government) that the work has been completed in compliance with the plans and specifications for the Project approved by the Government and approved by the Village pursuant to Section 5 hereof (the “Plans”); and

(b) a signed certificate from an authorized officer of the Developer certifying to the Village: (i) that the invoices are accurate; (ii) that the work reflected on the invoice(s) has been completed, (iii) the amount of the Developer’s share of the Project cost with respect to the work and that such amounts have been accounted for by the Developer, (iv) the amount, if any, of retainage to be held by the Village from any reimbursement amounts received from the Government, and (v) the remittance directions for the Village with respect to disbursement of the Government funds received by the Village in reimbursement of the Government’s share of the Project costs reflected in the invoices.

Developer acknowledges and agrees that the Village will rely upon the above certifications and the accuracy of the information set forth therein in submitting all invoices to the Government.

3. Term. The term of this Agreement shall commence on the date of execution of this Agreement and shall terminate upon the earlier to occur of (i) December 31, 2008 or (ii) the date Government funds appropriated for this purpose have been exhausted.

4. Disbursements. Attached hereto as Exhibit C is a Project Budget and Uses and Sources of Funds Statement (“Budget”) prepared by the Developer with respect to the Project. The Developer hereby certifies that, to the best of its knowledge, the Budget accurately reflects the expected costs associated with the Project and the sources of and uses of funds relating to the Project. The Developer shall maintain a ledger and other applicable records to record the Project costs and the respective shares of such Project costs attributable to the Government and to the Developer. The Village shall have the right at any time to inspect such ledger and other applicable records relating to the Project and the Project costs. All records shall (to the full

extent possible) incorporate and comply with the standards for financial management systems set forth in the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (32 CFR Section 33.20).

5. Plans; Scope of Work. The Developer agrees to provide the Village with any design and construction contracts and amendments. The Developer agrees to promptly complete the Plans for the Project and to submit such Plans to the Village for the approval of the Village. Any modifications or revisions to the Plans must also be approved by the Village. Approval by the Village of the Plans or any amendments or modifications to the Plans shall not constitute a representation or warranty by the Village of the appropriateness, quality or sufficiency in any way, of the Plans or any work called for by such Plans. Upon approval of the Plans by the Village, the Developer agrees to cause the Project to be expeditiously completed in a quality, workmanlike manner in accordance with the Plans. The Developer shall be responsible at its cost to obtain all necessary licenses, permits and approvals in compliance with all applicable local laws, rules and regulations. The Village shall have the right to inspect the work performed on the Project at any time and from time to time during the course of the Project

6. Source of Funds and Use of Proceeds. The Developer shall be responsible for providing an accounting of all funds necessary for “Non-Federal Sponsors” share of the total Project costs, as referenced in the PCA, plus any additional costs associated with the Project which may not be included as part of the Project cost for purposes of the Government funding, but which nonetheless are costs associated with work or materials necessary in order to complete the Project in accordance with the Plans. From time to time upon request by the Village, the Developer shall provide to the Village evidence in form satisfactory to the Village, that the Developer have available funds (or accounted for eligible matching costs) sufficient to cover the Developer’s share of the Project costs plus reasonable amounts for contingencies. The Government funds shall be used by the Developer exclusively for the Project.

7. Village to Hire Agent. Developer and Village agree that the Village shall hire an agent acceptable to the Village to assist the Village with administration of the PCA. The Village and Developer agree that the cost of this agent shall be paid out of the PCA grant proceeds, even though this reduces the amount of grant funds otherwise available for the Project. The Developer may choose to reimburse the Village directly for part or all of the expense of this agent if it prefers that the grant funds be used for other grant-eligible expenses. The Village reserves the right to use a Village employee or former Village employee for this task if the Village deems this appropriate. Developer agrees to provide full cooperation to the Village and its agent in all administrative matters related to the PCA and to use its best efforts to provide all needed documentation, materials, and assistance as requested in a prompt and efficient manner to allow the Village to comply with its requirements under the PCA in the manner the Village determines to be most effective for the Village.

8. Required Terms and Conditions; Compliance with Laws. The Developer hereby represents, warrants, certifies and agrees to the following terms and conditions which are incorporated in and made a part of this Agreement pursuant to federal, state or local regulations and pursuant to the requirements of the PCA and are not subject to negotiation:

- a. The Developer shall comply with all applicable federal and state environmental laws and regulations, including, but not limited to NEPA and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341).

- b. The Developer shall comply with applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended by Title IV of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law 100-17), and the Uniform Regulations contained in 49 C.F.R. Part 24, and shall inform all affected persons of applicable benefits, policies and procedures in connection with said Act.
- c. The Developer shall comply with and shall cause its contractors and subcontractors to comply with all applicable federal labor laws covering the Project, including, but not limited to the Davis Bacon Act (40 USC 276a et seq), the Contract Work Hours and Safety Standards Act (40 USC 327 et seq), and the Copeland Anti-Kickback Act (40 USC 276c).
- d. The Developer shall comply (to the full extent possible) with the Single Audit Act of 1984, 31 USC Sections 7501-7507, as implemented by the Office of Management and Budget (OMB) Circular No. A-133 and Department of Defense Directive 7600.100.
- e. The Developer shall comply with applicable provisions of the Civil Rights Act of 1964 and the Department of Defense Directive 5500.11 issued pursuant thereto, as well as Army Regulation 600-7 entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army."

9. Conditions. The Village's obligations under this Agreement to enter into the PCA and perform its obligations hereunder are subject to the fulfillment of each of the following conditions:

9.1 Deliveries. The Developer shall have delivered to the Village such information, data, plans, and other records relating to the Project Property and the Project as and when such information is available, which information shall be acceptable in form and content to the Village in its reasonable discretion.

9.2 Policies of Insurance. Developer shall furnish to the Village copies of the policies of casualty and liability insurance, builders risk insurance and workers' compensation insurance with respect to the Developer or the Project, as applicable, with limits and coverage acceptable to the Village and naming the Village as an additional insured thereon.

9.3 Authorizing Resolutions. The Developer shall provide the Village with certified minutes or resolutions authorizing the Project, this Agreement, the performance of the obligations of the Developer under this Agreement, and the acceptance of Government funds pursuant to the PCA.

9.4 Work Progress. The Developer shall make diligent and satisfactory progress on the Project, with time being of the essence.

10. Representations and Warranties. The Developer represents and warrants to the Village that the following statements are true and correct as of the date of this Agreement and shall at all times remain true and correct throughout the term of this Agreement:

10.1 Both the Developer and the Education Village are duly formed, validly existing non-profit corporation under the laws of the State of Ohio; and are in compliance with all

applicable laws of the State of Ohio and all other governmental entities with jurisdiction over the Developer, its business, contracting practices or assets. The Developer has full power and authority to enter into and carry out the terms of this Agreement, the obligations of the Village under the PCA, and the other documents to which Developer is a party pursuant to this Agreement.

10.2 Enforceability of the Documents, Etc. This Agreement and the other documents to which Developer is a party have all been duly executed and delivered to the Village by Developer and, to the best of Developer's knowledge, constitute legal, valid and binding obligations of Developer, as applicable, enforceable in accordance with their respective terms.

11. Indemnity. Developer shall protect, defend, indemnify and hold the Village harmless from and against all claims, loss, costs, liability, damage and expense, whether direct, consequential or incidental, suffered or incurred by the Village on account of any injury to the person or property of the parties hereto or to third parties by reason of the performance of Project, or on account of the act or omission of the Developer in any way connected with its performance of this Agreement.

12. Default.

12.1 Events of Default. Any one or more of the following shall constitute an Event of Default hereunder:

(1) Default by Developer in the due and punctual payment of any Project costs for which it is responsible hereunder;

(2) Default by Developer in the due and punctual performance of any term, covenant, condition, obligation or agreement of Developer under this Agreement, now existing or hereafter arising, on the date such performance is due under this Agreement, which default is not cured within thirty (30) days after written notice (or, if the matter cannot reasonably be cured within thirty (30) days, Developer's failure to promptly commence and diligently proceed to effect the cure within a reasonable time); or

(3) Default by the Village in the due and punctual performance of any term, covenant, condition, obligation or agreement of the Village under this Agreement, which default is not cured within thirty (30) days after written notice (or, if the matter cannot reasonably be cured within thirty (30) days, Village's failure to promptly commence and diligently proceed to effect the cure within a reasonable time).

12.2 Remedies Upon Event of Default.

(1) Village's Remedies. After any applicable cure period, at any time as of which an Event of Default shall have occurred and be continuing on the part of Developer, Village, at its option, may, but shall not be obligated to, exercise any one or more of the following remedies without notice or demand, which notice and demand Developer hereby expressly waive:

(a) Terminate or suspend its obligation to submit invoices to the Government for reimbursement or disburse funds to the Developer; and/or

(b) The Village may enforce, or avail itself of, any other remedies available to it at law or in equity.

(2) Developer's Remedies. After any applicable cure period, at any time as of which an Event of Default shall have occurred and be continuing on the part of the Village, Developer, at its option, may enforce, or avail itself of any remedies available to it at law or in equity.

12.3 Remedies Cumulative. All powers and remedies given by this Section 12 shall be cumulative and not exclusive of one another or of any other right or remedy or of any other powers and remedies available to the Village under the applicable laws to enforce the performance or observance of the covenants and agreements of Developer contained in this Agreement. No delay or omission of Village to exercise any right or power accruing upon the occurrence of any Event of Default shall constitute a waiver of any subsequent Event of Default or impair any rights or remedies consequent thereto. Every power and remedy given to Village may be exercised from time to time and as often as may be deemed necessary by the Village, and such powers and remedies may be exercised by the Village simultaneously or in such order as the Village may determine in its sole discretion.

### 13. Miscellaneous.

13.1 Sole Parties. This Agreement is made exclusively for the benefit of and solely for the protection of the Village and Developer, and no other person or persons shall have the right to enforce the provisions hereof by action or legal proceedings or otherwise or to rely on any representations, certificates, warranties or determinations which are required to be made or may be made hereunder.

13.2 Binding Effect and Amendment; Assignment. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns and may be amended, altered or changed only by an instrument in writing signed by the parties hereto.

13.3 Captions. The captions used in this Agreement are inserted solely for convenience of reference and are not a part of, nor intended to govern, limit or aid in the construction of, any term or provision hereof.

13.4 Time of the Essence. Time shall be of the essence in every obligation of Developer under this Agreement.

13.5 Applicable Law; Severability. This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio. If any provision of this Agreement shall be held or deemed to be or shall, in fact, be inoperative or unenforceable as applied in any particular case for any reason, such circumstances shall not have the effect of rendering the provision in question inoperative or unenforceable in any other case or circumstance, or of rendering any other provision or provisions herein contained invalid, inoperative or unenforceable to any extent whatsoever. The invalidity or unenforceability of any one or more provisions of this Agreement shall not affect the remaining provisions of this Agreement, or any part thereof.

13.6 Entire Agreement; Counterparts. This Agreement and the other loan documents executed pursuant hereto represent the entire agreement between the parties with respect to the Funds and either embody or supersede all prior agreements, commitments and negotiations with respect thereto. This Agreement may be executed in one or more counterparts, each of which shall be a duplicate original, but all of which shall constitute the same Agreement.

13.7 References; Pronouns. Any and all references in this Agreement to any other document or documents shall be references to such other document or documents as the same may from time to time be modified, amended, renewed, consolidated or extended. Except as required by the context, the singular includes the plural and the masculine includes the feminine or the neuter and vice versa.

13.8 Notices. All notices given under this Agreement shall be given to the parties at their addresses set forth above.

IN WITNESS WHEREOF, the parties have executed this Agreement to be effective the day and year first aforesaid.

**THE VILLAGE OF YELLOW  
SPRINGS AND MIAMI  
SPRINGS, OHIO**

**YELLOW  
TOWNSHIP COMMUNITY  
IMPROVEMENT CORPORATION**

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

**By** \_\_\_\_\_

**Name: Eric Swansen**

**Name:** \_\_\_\_\_

Title: Village Manager

Title: \_\_\_\_\_

**Approved as to form:**

\_\_\_\_\_  
**John C. Chambers, Esq.**

EXHIBIT A  
PROJECT PROPERTY

EXHIBIT B  
PCA

EXHIBIT C  
PROJECT BUDGET

EXHIBIT D  
PERMITTED LIENS