

**CITY OF PEORIA, ARIZONA
COUNCIL COMMUNICATIONS**

CC: 4C
Amend No. _____

Date prepared:

Council Meeting Date:

TO: Honorable Mayor and Council

FROM: Steve Kemp, City Attorney

SUBJECT: Case Settlement, Desert Winds Assisted Living v. Peoria

RECOMMENDATION: That the Mayor and Council approve the settlement of Desert Winds Assisted Living v. City of Peoria (TX 2006-000334) in the amount of \$50,000.00.

Additionally, staff recommends the approval of a budget transfer in the amount of \$50,000 from the General Fund Contingency Account to the Settlement Claims Account.

SUMMARY: Desert Winds Assisted Living (DWAL), an assisted living facility, filed a tax appeal challenging the imposition of transaction privilege taxes for food service to directed and personal care patients on December 5, 2006. After cross motions for summary judgment, DWAL received a successful ruling from the tax court on the issue of exemptions. The recommendation is that Peoria make a \$50,000.00 payment to DWAL to settle the case (Audit Period 1/1/00 – 12/31/03) and refund additional excess taxes paid by the taxpayer (Audit Period 3/1/05 - 2/28/09), saving future litigation expenses and exposure.

FISCAL NOTE: (if applicable)

Budget transfer in the amount of \$50,000 from the General Fund Contingency Account (1000-0000-570000) to the Settlement Claims Account (1000-0420-523104).

ATTACHMENT: (if applicable)

CONTACT: Steve Kemp

CITY CLERK USE ONLY:

- Consent Agenda
- Carry Over to Date: _____
- Approved
- Unfinished Business (Date heard previous: _____)
- New Business
- Public Hearing: No Action Taken

ORD. # _____ RES. # _____
LCON# 03710 LIC. # _____
Action Date:

DRAFT

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into as of this ___ day of April, 2010, by and between Desert Winds Independent Living, L.P. ("DWAL") and The City of Peoria ("Peoria"), collectively referred to as the "Parties".

RECITALS

A. Peoria initiated an audit of DWAL and issued an assessment letter to DWAL for the period January 1, 2000 through December 31, 2003 ("First Audit").

B. DWAL protested the First Audit and an administrative hearing commenced before the MTHO. The Hearing Officer issued a decision in favor of Peoria on September 26, 2006.

C. DWAL filed a "Complaint and Notice of Appeal" on December 4, 2006 in the Arizona Tax Court (Case No. TX2006-000334) ("Action") seeking judicial review of the decision of the hearing officer on the issue of exemption for personal and directed care pursuant to Peoria City Code 12-445(q).

D. DWAL filed a Motion for Partial Summary Judgment on October 10, 2008.

E. The Court ruled on the Partial Motion for Summary Judgment in favor of DWAL on March 13, 2009.

F. Thereafter, in accordance with the Tax Court's decision, on September 16, 2009, Peoria issued an amended audit directed to DWAL. The amended audit showed a total credit to DWAL during the First Audit of \$8,419.27.

G. Thereafter, per the agreement of the parties, Peoria completed a second assessment for the period March 1, 2005 through February 28, 2009 ("Second Audit"). The Second Audit showed a total credit to DWAL during the Second Audit Period of \$26,291.31.

H. The Parties now wish to amicably resolve the Action. It is understood that this Agreement relates solely the Parties to the Action and the First and Second Audits during the First and Second Audit periods **and**

not to the potential tax liability of any other person or entity, including but not limited to Senior Living Services:

AGREEMENT

NOW, THEREFORE, in consideration of the premises and the promises hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Recitals Are Part of the Agreement.** The Parties acknowledge the truth, accuracy and correctness of the foregoing recitals.
2. **Payment.** Within fourteen (14) calendar days following the execution of this Agreement, Peoria shall pay \$50,000.00 ("Settlement Funds") to DWAL.
3. **Dismissal.** Upon payment of the Settlement Funds to DWAL, and once the Settlement Funds clear, the Parties will file a stipulation to dismiss the Action, with each side to bear its own costs and attorneys fees.
4. **Release.** The Parties agree that acceptance of the Settlement Funds by DWAL shall finally and forever release, dismiss and discharge Peoria from all claims, including but not limited to, any actual or potential refund claims, claims for costs and/or attorney fees related to or involving the Action, including but not limited to the First Audit. The parties additionally agree that acceptance of the Settlement Funds by DWAL shall finally and forever release, dismiss and discharge Peoria from all claims or suits, including but not limited to, any actual or potential refund claims, claims for costs and/or attorney fees related to or involving the Second Audit.
5. **Entire Agreement.** This Agreement represents the entire agreement between the Parties and supersedes any other agreements between the Parties, unless otherwise stated herein. No provision of this Agreement shall be waived or modified except in writing signed by the Parties.
6. **Arizona Law Applies.** This Agreement is made under and shall be construed in accordance with the laws of the State of Arizona.
7. **Forum Selection.** The Parties agree that any cause of action relating to or arising out of this Agreement shall be filed in Maricopa County, Arizona.

8. **Counterparts/Facsimiles.** This Agreement may be executed in any number of counterparts. Facsimile signatures may be used, and each executed counterpart shall have the same force and effect as an original document.

9. **Agreement Binding.** This Agreement shall be binding upon the Parties, as well as their perspective heirs, successors and assigns.

10. **Authority to Agree.** The undersigned each warrant and represent that they have the authority to enter into and execute this Agreement on behalf of the Parties.

11. **Attorneys' Fees and Costs.** In the event of litigation arising out of this Agreement instituted by a Party, the prevailing party shall be entitled to recover all costs and expenses, including reasonable attorney's fess, incurred by the prevailing party in that litigation.

IN WITNESS WHEREOF, the Parties have each executed this Agreement as of the day and year first above written.

DESERT WINDS ASSISTED LIVING, L.P. ("DWAL")

By: _____

Its: _____

THE CITY OF PEORIA ("Peoria")

By: _____

Its: _____