

BILL NO. 2230ORDINANCE NO. 1994

**AN ORDINANCE APPROVING AN AGREEMENT BETWEEN THE CITY OF CHESTERFIELD AND DIERBERGS MARKETS, INC. FOR THE DONATION OF PARK PROPERTY AND THE DEVELOPMENT THEREOF AND THE FINANCING THEREOF.**

**WHEREAS**, Dierbergs Markets, Inc. ("Dierbergs") has offered to donate the City of Chesterfield, approximately 1.88 acres of land located on the corner of Olive Street Boulevard and River Valley Drive located in the City of Chesterfield; and

**WHEREAS**, Dierbergs desires to contribute said park property and in order to enhance said property for the enjoyment of the citizens of Chesterfield has agreed to fund certain amenities all in accordance with the Agreement Regarding Park Donation and Development, which is attached hereto; and

**WHEREAS**, in addition to the contribution to be made by Dierbergs and its affiliates, the parties have agreed that Dierbergs shall construct the park improvements all in accordance with the attached agreement.

**NOW THEREFORE BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHESTERFIELD, ST. LOUIS COUNTY, MISSOURI, AS FOLLOWS:**

**Section 1.** The City of Chesterfield hereby accepts the donation of certain park lands from Dierbergs Markets, Inc. to the City of Chesterfield in accordance with the agreement regarding the Agreement Regarding Park Donation and Development, which is attached hereto, marked Exhibit A and made a part hereof as if fully set out herein.

**Section 2.** The City Administrator is authorized to enter into this Agreement.

**Section 3.** This Ordinance shall be in full force and effect from and after its passage and approval.

Passed and approved this 1<sup>st</sup> day of December, 2003.

  
MAYOR

ATTEST:

DEPUTY   
CITY CLERK

## AGREEMENT REGARDING PARK DONATION AND DEVELOPMENT

THIS AGREEMENT REGARDING PARK DONATION AND DEVELOPMENT ("Agreement") is made between **Dierbergs Markets, Inc.** ("Dierbergs") and the **City of Chesterfield, Missouri**, a 3<sup>rd</sup> CLASS municipality (the "City") and is dated the 1<sup>st</sup> day of December, 2003.

### RECITALS:

1. Dierbergs is the present owner of certain property located in the City of Chesterfield, St. Louis County, Missouri, comprised of approximately 1.88 acres, as more fully described on Exhibit A attached hereto (the "Park Property").
2. Dierbergs desires to preserve and enhance the Park Property for the enjoyment of the citizens of Chesterfield, and accordingly, to donate the Park Property to the City, to be used exclusively and perpetually as a meditation public park, dedicated to the memory of William F. Dierberg.
3. After donation of the Park Property to the City, either Dierbergs or an affiliated entity or principals of Dierbergs also desires to donate certain funds to the City for the purposes of developing and making improvements to the public park.
4. The City also desires to pay a portion of the costs for the development and improvements to the park.
5. The City and Dierbergs desire to establish an escrow account for the donations for the improvements for the park, to enhance the orderly construction, development and funding for such improvements.

### AGREEMENT

NOW THEREFORE, for valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

#### Article One Recitals

1. Recitals. The Recitals are incorporated in their entirety into this Agreement.

#### Article Two Park Property and Donation for Public Park.

2.1. Donation of Park Property. On or about January 15, 2004 (or such later date as determined by Dierbergs), Dierbergs shall execute a Quit Claim Deed (the "Deed") to the City, donating and conveying title in the Park Property to the City, to be used continually and exclusively as a public park, dedicated to the memory of William F. Dierberg. The Deed shall contain a restrictive covenant, which shall run with the land and be binding on all future owners and successors, that the Park Property will be used solely and exclusively as a public park and in compliance with the remaining requirements of this Agreement. The City acknowledges the

generosity of such donation and covenants it is accepting the donation of the Park Property and shall use the Park Property solely for a public park for the benefit of the residents of the City and in compliance with this Agreement and agrees the deed restriction is fair, necessary to protect Dierbergs, and a material consideration for the Deed and donation of the Park Property. The City, by its acceptance of the Deed, shall be deemed to acknowledge its acceptance of the donation of the Park Property in accordance with this Agreement, including without limitation the restrictive covenant described in this Section.

2.2. Name of Park. After the City acquires the Park Property pursuant to the Deed, the City shall accept the donation of the Park Property and shall use and develop the Park Property as a neighborhood park. The City shall name the park developed on the Park Property the "William F. Dierberg Meditation Park," in honor of and in the memory of William F. Dierberg, deceased. The William F. Dierberg Meditation Park (the "Park") shall be dedicated in his memory and the City shall not change the name of William F. Dierberg Meditation Park, unless specifically notified in writing by Robert J. Dierberg, if living, otherwise Sharon Dierberg, if living; otherwise the most senior descendant of Robert J. Dierberg who is sui juris (the "Successors"). Appropriate signage and plaque as shown on Exhibit B, attached hereto and incorporated herein, shall be installed at the Park.

2.3 Maintenance. From and after the date of the Deed, the City assumes responsibility for the Park Property. The City, at its sole cost and expense, shall operate and maintain the Park Property (and the Park, when constructed) and all Park Improvements (as defined herein) in a safe, clean, healthy, and attractive condition and state of repair for the use and the enjoyment of the public and all residents of the City, and consistent with other municipal parks owned by the City. Dierbergs shall convey, and the City shall accept, the Park Property in its then AS IS condition, without representation or warranty, express or implied.

### **Article Three Development of the William F. Dierberg Meditation Park**

3.1 Development of Park Plans. The Park shall be developed and improved pursuant to and in accordance with the plans and specifications prepared by The Clayton Engineering Company (the "Engineer"), dated as of November 21, 2003 (the "Approved Park Plans"). The City and Dierbergs acknowledge they have each reviewed and approved the Approved Park Plans. Dierbergs shall develop the Park Property in accordance with such Approved Park Plans, as in final form. All design and site work and all improvements installed at the Park (collectively, the "Park Improvements") shall conform to the Approved Park Plans, unless otherwise approved by Robert Dierberg or his Successor.

3.2 Proposed Park Improvements. The anticipated Park Improvements shall include appropriate grading and related site work, and other landscaping, improvements and facilities shown on the preliminary concept plan dated November 21, 2003, as prepared by the Engineer. All hard and soft costs for the initial development of the Park and for the initial installation of the Park Improvements shall be collectively referred to in this Agreement as the "Park Improvements Costs".

3.3. Park Improvement Costs. The Park Improvement Costs will be paid for by donations to the City, to be held in an escrow account titled *Donations to Construction of the*

*William F. Dierberg Mediation Park in the City of Chesterfield, MO*, as described in Section 3.4 (the “Escrow Account”) and as otherwise provided herein. Prior to the donation of the Park Property, Dierbergs, or an affiliate of either Dierbergs or the principals of Dierbergs (in either case, an “Affiliated Entity”), shall make a cash donation in the amount of \$193,640 to the Escrow Account and a like amount of \$193,640 shall be contributed to the Escrow Account from another donor or donors. After these contributions have been made and not later than June 1, 2004, the City, as funds become available as set forth in Section 5.2, shall contribute an amount of \$160,000 to the Escrow Account and, at the same time, Dierbergs will contribute an additional \$33,640 to the Escrow Account.

3.4 Establishment of Escrow Account An escrow account, titled *Donations to Construction of the William F. Dierberg Mediation Park in the City of Chesterfield, MO*, will be established by the City at U.S. Title Company which shall be the escrow agent (the “Escrow Agent”), pursuant to an escrow agreement in the form of Exhibit C, attached hereto, among Dierbergs and the City. Among other provisions, the Escrow Agreement shall provide: (i) the donations to Park Improvement Costs, described in Section 3.3, shall be deposited into the Escrow Account, (ii) the escrow funds shall be used exclusively for the Park Improvement Costs, (iii) disbursement requests from the escrow funds shall be submitted in the form of payment applications to the Escrow Agent and the supervising engineer from the Engineer, with copies to the other parties to the Escrow Account, and disbursements will be made, on a monthly basis, after approval of the payment application by the Engineer, (iv) all interest earned on the escrow funds shall be made available for the Park Improvement Costs, (v) such other provisions as are mutually acceptable and desired by the parties thereto. The fees for the Escrow Agent shall be part of the Park Improvement Costs.

3.5 Construction of Park Improvements. The Park Improvements will be constructed by H.B.D. Company, as general contractor (the “Contractor”), pursuant to the Approved Park Plans. By execution of this Agreement, the City hereby grants to Dierbergs, the Contractor, and any subcontractors or design professionals performing under the construction contract or other agreements for the Park Improvements a temporary license to enter on the Park for purposes of performing the construction contract and such related agreements. Dierbergs shall enter into a construction contract with the Contractor (the “Construction Contract”) on terms consistent with this Agreement for the Park Improvements to be constructed on the Park, which shall then be owned by the City. The funds contributed to the escrow account referred to in Section 3.3 hereof shall be used to pay the Contractor and other companies which shall work or supply material for the construction of the Park. During the construction of the Park, Dierbergs shall have the right, but not the obligation, to upgrade the material of any improvements, or the size or quantity or species of plant life. Such upgrades and changes which cause the Park Improvement Costs to exceed \$580,920 shall be borne solely by Dierbergs.

3.6 Compliance with Federal State and Local Laws. The Construction Contract shall require the Contractor to comply with all applicable Federal and State laws and regulations, and any political subdivision thereof, including but not limited to unemployment and workers’ compensation, occupational safety, equal employment and affirmative action and wage and price laws insofar as applicable to the performance of the contract. Dierbergs shall require the Contractor to obtain a performance bond and to name the City as an additional insured on the

liability insurance provided by the Contractor, with limits of no less than \$2,000,000 per occurrence or that required by RSMo Section 537.610.

3.7 Construction Schedule. The Park Improvements shall be constructed pursuant to the construction schedule which shall be part of the construction contract with Contractor (the "Construction Schedule"). The Construction Schedule shall establish a start date for grading to coincide with the construction activity of an adjacent owner next to the Park so that there is a unified grading of the site work with such adjacent property owner's construction. The Construction Schedule shall further include a phased construction of the Park Improvements to the extent of available funds, with phasing to commence with grading, then park improvements, and followed by a water feature as funds are available.

**Article Four Release and Indemnification.** The indemnifications and covenants contained in this Section 4 shall survive termination or expiration of this Agreement.

4.1 Release from the City. The City releases, and neither Dierbergs nor the Affiliate (collectively, the "Contract Parties") shall be liable for, and the City agrees to indemnify and hold harmless such Contract Parties, and each one's officers, agents, directors, employees and independent contractors, from and against any loss or damage to property or any injury to or death of any person occurring at or about the Park Property or other liability arising from or in connection with the Park Property after its donation to the City or the performance or completion of the Park Improvements work, including all costs of defense, including attorneys fees, except for those matters arising out of the negligence or willful misconduct of such Contract Parties and except for any loss or damage to property or any injury to or death of any person occurring or arising on the Park Property that arises from the installation of the Park Improvements under the Construction Contract.

4.2 Release from Dierbergs. Dierbergs releases, and the City shall not be liable for, and Dierbergs agrees to indemnify and hold harmless the City and its officers, agents, directors, employees and independent contractors, from and against any loss or damage to property or any injury to or death of any person or other liability occurring at or about the Park Property prior to its donation to the City or as specified to be Dierberg's responsibility in Section 4.1, including all costs of defense, including attorneys fees, except for those matters arising out of the negligence or willful misconduct of the City.

#### **Article Five Permitted Delays**

5.1 Whenever performance is required of any party hereunder, such party shall use all due diligence to perform and take all necessary measures in good faith to perform; provided, however that if completion of performance shall be delayed at any time by reason of acts of God, war, civil commotion, riots, work stoppages arising out of collective bargaining strikes, unavailability of materials or damage to work in progress by reason of fire or other casualty or causes beyond the reasonable control of a party (other than financial reasons), then the time for performance as herein specified shall be appropriately extended by the time of the delay actually caused. However, in order for a party to be entitled to make a claim for any such delays, the party must give written notice of the conditions or events giving rise to the delay and the number of days claimed to be due to such conditions or events within fifteen (15) days from the date of

the occurrence of the condition or event giving rise to the delay. The provisions of this Section shall not operate to excuse any party from the prompt payment of any monies required by this Agreement.

5.2 The parties acknowledge the City's financial obligation to contribute funds to the Escrow in Section 3.3 of this Agreement for Park Improvements shall be funded from funds or sale proceeds the City receives from all sales of excess right of way made by the City during the period from the date of this Agreement through September 1, 2004, but in no event in excess of \$160,000. All funds the City receives from any sale of excess right of way property shall be used solely to fund the City's share of Park Improvements under this Agreement and the City shall direct all such funds be deposited into the escrow account. Nonetheless, construction will proceed under Article Three by June 1, 2004 regardless of the availability of funds from the City to the extent funds are available from the Escrow Agreement until exhausted.

### **Article Six Miscellaneous Provisions.**

6.1 Authorization of Dierbergs. Dierbergs represents and warrants to the City that: (i) Dierbergs has the full right, power, and authority to enter into this Agreement and consummate the transactions contemplated hereby; (ii) the execution, delivery and performance of this Agreement by Dierbergs has been duly authorized by all necessary corporate action; and (iii) this Agreement constitutes a legal, valid and binding agreement of Dierbergs enforceable against Dierbergs in accordance with its terms.

6.2 Authorization of the City. The City represents and warrants to Dierbergs that: (i) the City has the full right, power, and authority to enter into this Agreement and consummate the transactions contemplated hereby; (ii) the execution, delivery and performance of this Agreement by the City has been duly authorized by all necessary municipal corporate action; and (iii) this Agreement constitutes a legal, valid and binding agreement of the City enforceable against the City in accordance with its terms.

6.3. Successors. All provisions in this Agreement shall inure to the benefit of the successors, permitted assigns, and heirs and personal representatives of the parties.

6.4. Exhibits. All Exhibits are incorporated in their entirety into this Agreement.

6.5. Counterparts. This Agreement may be signed in counterparts, each of which shall be deemed an original and all of which when taken together shall constitute one instrument.

6.6 Headings. Heading of sections are for convenience only and shall not be considered in construing the meaning of the content or meaning of any section.

6.7. Merger and Amendments. This Agreement, together with the provisions in the Deeds, constitutes the entire agreement between the parties relating to the subject matter hereof and supersedes and cancels all prior negotiations between the parties, and any changes, amendments, and/or modifications hereto must be in writing signed by the party against whom enforcement is sought.

6.8. No Waiver. The failure to enforce any particular provision of this Agreement on any particular occasion shall not be deemed a waiver by any party of any of its rights hereunder, nor shall it be deemed to be a waiver of subsequent or continuing breaches of that provision, unless such waiver be expressed in a writing signed by the party to be bound.

6.9 Governing Law. This Agreement shall be governed by and construed, interpreted and applied in accordance with the laws of the State of Missouri.

6.10. Severability. In the event any provision or portion of this Agreement is held by any court of competent jurisdiction to be invalid or unenforceable, such holding will not effect the remainder hereof, and the remaining provisions shall continue in full force and effect to the same extent as would have been the case had such invalid or unenforceable provision or portion never been a part hereof.

6.11 Assignment. None of the parties may assign or transfer its rights or obligations under this Agreement without the prior written consent of the other parties.

6.12 No Third Party Rights. This Agreement is solely for the benefit of the parties hereto and their respective successors and permitted assigns, and no other person or entity has any right, benefit, priority or interest under, or because of the existence of, this Agreement.

6.13 Survival. Notwithstanding the closing date, the delivery of the deed contemplated hereunder, or the expiration, termination or breach of this Agreement by a party, all covenants, agreements, representations and warranties contained herein shall, except as otherwise expressly set forth herein, survive the closing date, the delivery of any deed contemplated hereunder, or such expiration, termination or breach of this Agreement by either party.

6.14 Notices. Except as otherwise provided in this Agreement, any notice required to be given pursuant to the terms and conditions of this Agreement shall be in writing, postage prepaid, and shall be personally delivered or sent by mail or reputable overnight carrier, to the address set forth below or such other address as a party provides in accordance with the provisions of this Section. The notice shall be effective on the date indicated on the postage or delivery invoice for overnight carrier.

To the City:                   City of Chesterfield  
  City Administrator  
  690 Chesterfield Parkway West  
  Chesterfield, Missouri 63017-2079

With a copy to:               Douglas R. Beach  
  Attorney for City of Chesterfield  
  222 S. Central Avenue, Suite 900  
  St. Louis, Missouri 63105

To Dierbergs:                 Dierbergs Market, Inc.  
  16690 Swingley Ridge Road  
  P.O. Box 1070

Chesterfield, Missouri 63006-1070  
Attention: Jerry Ebest

With a copy to: Sarah Siegel, Esq.  
Vice President and General Counsel  
Dierbergs Market, Inc.  
16690 Swingley Ridge Road  
P.O. Box 1070  
Chesterfield, Missouri 63006-1070

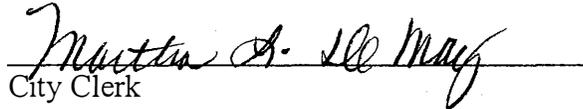
IN WITNESS WHEREOF, the parties have caused this Agreement to be executed in their respective names and the City has caused its seal to be affixed thereto, and attested as to the date first above written.

**CITY OF CHESTERFIELD, MISSOURI**

(SEAL)

Attest:

By:   
Mayor

  
City Clerk

**DIERBERGS MARKETS, INC.**

By:   
Name: Robert J. Dierberg  
Title: President

**EXHIBIT A**

**PARK PROPERTY DESCRIPTION**

A tract of land being part of Lot 2 of "Chesterfield Fire Protection District Subdivision", according to the Plat thereof recorded in Plat Book 341, Pages 28 and 29 of the St. Louis County Records, situated in U.S. Survey 207, Township 46 North, Range 5 East, in the City of Chesterfield, St. Louis County, Missouri, being more particularly described as follows:

Commencing at the Southeastern corner of Lot 1 of said Chesterfield Fire Protection District Subdivision, being a point on the Northern Right of Way Line of Olive Boulevard, variable width; thence Northeasterly, along the Eastern Line of said Lot 1, North 16 degrees 42 minutes 32 seconds East 289.63 feet to the Point of Beginning of the tract of land hereon described; thence Northeasterly, continuing along the Northeastern Line of said Lot 1, North 16 degrees 42 minutes 32 seconds East 158.41 feet to an angle point therein; thence Southeasterly, continuing along the Eastern Line of said Lot 1, South 78 degrees 48 minutes 45 seconds East 340.96 feet to its intersection with a point on the Western Right of Way Line of River Valley Drive; thence Southwesterly, along the Western Right of Way Line thereof, South 20 degrees 16 minutes 00 seconds West 334.21 feet to a point; thence South 60 degrees 52 minutes 05 seconds West 46.10 feet to a point; thence South 20 degrees 16 minutes 00 seconds West 55.00 feet to a point; thence South 77 degrees 14 minutes 02 seconds West 77.71 feet to a point on the Northern Right of Way Line of Olive Boulevard, variable width; thence Northwesterly, along the Northern Right of Way Line thereof, North 78 degrees 50 minutes 00 seconds West 151.42 feet to a point; thence Northeasterly, departing the Northern Right of Way Line of said Olive Boulevard, North 16 degrees 42 minutes 32 seconds East 55.70 feet to a point; thence South 78 degrees 50 minutes 00 seconds East 129.46 feet to a point of curvature; thence Northeasterly, along a curve to the left having a radius of 68.00 feet, an arc distance of 106.81 feet (North 56 degrees 10 minutes 00 seconds East 96.17 feet on its chord) to a point of tangency; thence North 11 degrees 10 minutes 00 seconds East 91.67 feet to a point of curvature; thence Northwesterly, along a curve to the left having a radius of 73.00 feet, an arc distance of 114.67 feet (North 33 degrees 50 minutes 00 seconds West 103.24 feet on its chord) to a point of tangency; thence North 78 degrees 50 minutes 00 seconds West 166.94 feet to the point of beginning, containing 2.006 acres, more or less.

**EXHIBIT B**

**SIGNAGE**

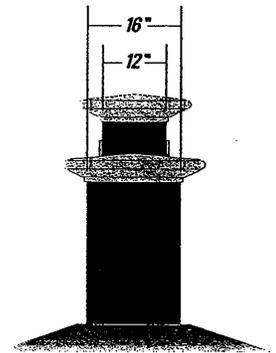
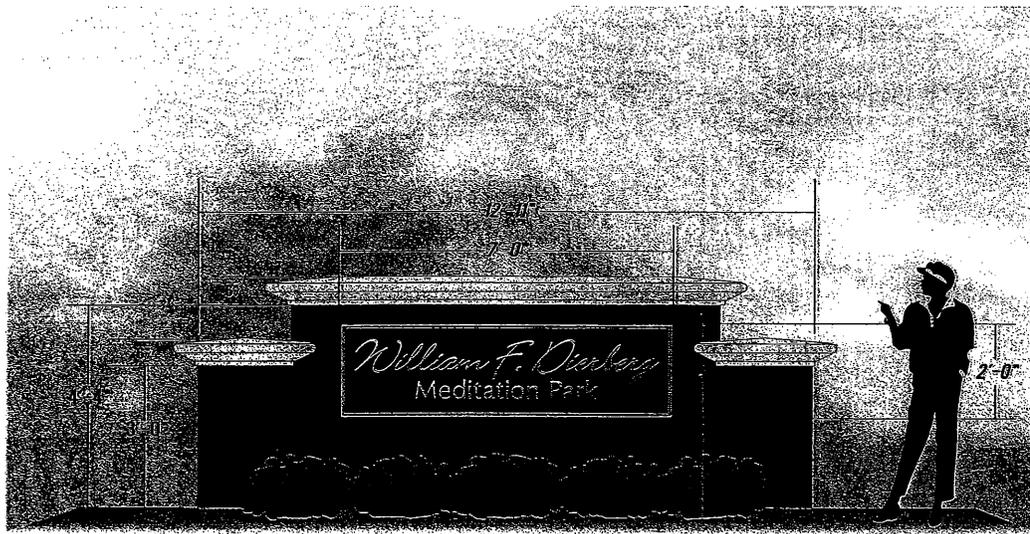
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## SPECIFICATIONS

Furnish & install two cast bronze plaques with raised gold border and copy with a black pebble finish inset.

Plaques to be mounted to brick monument with precast stone caps.

Monument to be provided by others.



### SIGN ELEVATION

1/2" = 1'-0"

CLIENT: WILLIAM F. DIERBERG MEDITATION PARK

LOCATION: OLIVE BLVD., CHESTERFIELD, MO

DATE: 02/03/03

REVISION

PROJECT # 68011203

PREPARED BY: Keith Hampen

MONUMENT EXECUTIVE: Bill Behrens



SIGN PICTORIAL  
**PAINTERS**  
AND DECORATORS  
UNION LOCAL 774

FOR BIDDING ONLY

REVISED

APPROVED



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**EXHIBIT C**

**FORM OF ESCROW AGREEMENT**

**ESCROW AGREEMENT**

**Escrow Account for Donations to Construction of the  
William F. Dierberg Meditation Park in the City of Chesterfield**

THIS ESCROW AGREEMENT ("Agreement") is made and entered into as of the \_\_\_\_\_, 2003, by and among **Dierbergs Markets, Inc.** ("Dierbergs"), the **City of Chesterfield, Missouri**, a \_\_\_\_\_ municipality (the "City") and **U.S. Title Guaranty Insurance Company** ("Escrow Agent"). (Each of the foregoing is a "Party").

W I T N E S S E T H:

WHEREAS, Dierbergs and the City have previously entered into that certain Agreement Regarding Park Donation and Development (the "Park Agreement") dated as of \_\_\_\_\_, 2003; and

WHEREAS, in accordance with and in order to implement the terms of the Park Agreement, Dierbergs desires to donate certain funds to the City to be used for Park Improvements ("Park Improvements as defined in Section 7 below), and Dierbergs and the City wish to establish an escrow account to hold and disburse such funds for the escrow account to be entitled: "Donations to Construction of the William F. Dierberg Meditation Park in the City of Chesterfield" (the "Escrow Account").

WHEREAS, Escrow Agent has agreed to serve as escrow agent and to enter into this Agreement regarding the holding, disbursements and other agreements regarding the Escrow Funds (as defined in Section 5 below) and the Park Improvements.

**AGREEMENT**

NOW, THEREFORE, for and in consideration of the recitals, mutual covenants and agreements herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Park Agreement. A true and correct copy of the Park Agreement is attached hereto and incorporated herein by reference as Exhibit A . Pursuant to the Park Agreement, Dierbergs intends to donate to the City certain real property located in the City and more fully described in Exhibit B, attached hereto and incorporated herein by reference (the "Park Site"), which Park Site is to be improved and used as a public park bearing the name *William F. Dierberg Meditation Park* (the "Park").

2. Deposit of Dierbergs Donated Funds. Dierbergs has, as of the date of this Escrow Agreement, deposited with the Escrow Agent funds in the amount of \$193,640 (the "Dierbergs

Donated Funds”), which funds are donated to the City but, at the direction of the City, are payable to and deposited into the Escrow Account. By its execution hereof, the Escrow Agent acknowledges the Dierbergs Donated Funds are deposited into the Escrow Account.

3. Deposit of Other Donations. Montgomery First National Bank (the “Bank”) has, as of the date of this Escrow Agreement, deposited funds with the Escrow Agent in the amount of \$193,640 (the “Bank’s Donated Funds”), which funds are donated to the City for the Park Improvements but, at the direction of the City, payable to and deposited into the Escrow Account. By its execution hereof, the Escrow Agent acknowledges the Bank’s Donated Funds are deposited into the Escrow Account.

4. Deposit of Funds by the City. The City covenants and agrees that it shall deposit into the Escrow Account all funds it receives from the sale or disposition of excess right of way property in the City from the date hereof until June 1, 2004, to be used for the Park Improvements; however, the maximum amount of funds to be deposited by the City is \$160,000 (the “City Deposited Funds”). Immediately upon the deposit of such City Deposited Funds, the Escrow Agent shall notify Dierbergs thereof, in accordance with the requirements of Section 17 of this Escrow Agreement.

5. Deposit of Additional Donated Funds. Not later than the date on which the City deposits the City Deposited Funds, Dierbergs or the Affiliate Entity shall donate additional funds in the amount of \$33,640 (the “Additional Donated Funds”) to the City for the Park Improvements, which funds will be donated to the City and payable to and deposited into the Escrow Account at the direction of the City. The Escrow Agent shall notify all Parties hereto at such time as it receives the Additional Donated Funds. Collectively, the Dierbergs Donated Funds, Bank Donated Funds, City Deposited Funds and the Additional Donated Funds are the “Escrow Funds.” The Escrow Funds shall be held and disbursed in accordance with this Agreement.

6. Escrow Account. The Escrow Agent shall establish an interest-bearing escrow account with Montgomery First National Bank for the Escrow Funds, entitled “Donations to Construction of the William F. Dierberg Meditation Park in the City of Chesterfield” (the “Escrow Account”) which Escrow Account will be held for the benefit of the parties hereof and strictly in accordance with this Agreement. The Escrow Agent shall not be responsible for any interest except for such as is actually received. All interest earned on Escrow Funds shall be used for the Park Improvements, with each party donating to the City all interest earned on the portion of the Escrow Funds donated by such party.

7. Park Plans. As set forth in the Park Agreement, the Park is to be developed in accordance with the plans and specifications prepared by The Clayton Engineering Company (the “Engineer”), dated as of November 21, 2003 (the “Approved Park Plans”). All design and site work and all improvements installed at the Park (collectively, the “Park Improvements”) will be made pursuant to the Approved Park Plans, unless otherwise approved by Robert Dierberg or his Successor (as defined in the Park Agreement). A copy of the Approved Park Plans is attached to this Agreement and incorporated herein as Exhibit C.

The Park Improvements shall be constructed by H.B.D. Company as “General Contractors,” pursuant to a contract between Dierbergs and such General Contractor. The Escrow Funds shall be used to pay General Contractor and other companies or entities which shall supply work or materials for the Park Improvements.

8. Disbursements from Escrow Account. No Escrow Funds may be disbursed unless Dierbergs has donated the Park Site, as set forth in the Park Agreement. After donation of the Park Site, and following commencement of the Park Improvements, the Escrow Agent shall periodically disburse a portion of the Escrow Funds within ten (10) days after receipt of all of the following:

(1) A draw request complying with the requirements hereof, including those set forth in Section 9 below;

(2) Lien waivers bearing a then current date, in the amount of the current draw, and prepared on forms provided by Escrow Agent from the General Contractor and lien waivers from the prior draw from all subcontractors and any other person or persons entitled to assert lien rights against the Park in connection with the work.

(3) The Contractor’s Application for Payment, AIA Form G702 (1992 version), executed and attested by the Contractor and Engineer, stating the construction of that portion of the Park Improvements described in the draw request have been performed in accordance with the Approved Park Plans and verifying the amount of the draw request applicable to each element.

(4) A certificate from the General Contractor certifying that all sums due in connection with the construction of the Park Improvements have been paid in full (or will be paid out of the Escrow Funds requested to be advanced) and that no party claims or has a right to claim any statutory or common law lien or other claim arising out of the design or construction of the Park Improvements or the supplying of labor, material, and/or services in connection therewith; and

If all of the foregoing conditions are not satisfied, Escrow Agent shall notify Dierbergs of the failure of such conditions and shall not disburse Funds under such draw request until written authorization from Dierbergs approving disbursement.

9. Method of Disbursement of Escrow Funds. Escrow Agent agrees to make disbursements to the General Contractor of the amount of the Escrow Funds in accordance with the following procedures:

(1) At such time as the General Contractor shall desire to obtain, subject to the other requirements hereof, a disbursement of any portion of the Escrow Funds, General Contractor shall (i) submit the payment applications to the Engineer and Dierbergs for review and approval, together with a notice that work for which payment is requested is available for inspection and approval by Engineer, and (ii) complete, execute and deliver to Escrow Agent a request for payment on the application for payment signed by General Contractor, together with all supporting schedules contemplated thereby (collectively, a “draw request”), with a copy to Dierbergs.

(2) All draw requests shall include a separate breakdown of each element of the Park Improvements, the following categories: (i) total costs applicable to such improvements, (ii) all amounts previously disbursed applicable to such improvements, (iii) the balance remaining applicable to such improvements, (iv) the requested disbursement applicable to such improvements, and (v) the balance to remain after the requested disbursement applicable to such improvements. The total of such monthly percentages will equal 100% of the final draw request.

(3) General Contractor is required to withhold 10% of each payment due to its contractors and subcontractors until final completion of the Park Improvements; therefore, the balance of the Escrow Funds shall be no less than 100% of the cost of the Park Improvements not yet completed plus the amount of retainage yet to be disbursed until such time as all such Park Improvements have been finally completed. Escrow Agent shall not release any of the retainage until approved by the Engineer and Dierbergs.

(4) Disbursements shall be made no more frequently than within thirty (30) day periods, and all disbursements shall be made at the office of Escrow Agent or at such other place as Escrow Agent may designate.

10. Fees and Expenses. The Escrow Agent's fee schedule is set forth on Exhibit D attached hereto. Each party shall equally share in the cost and fees charged by Escrow Agent for its services.

11. Limitation of Liability. Except as otherwise set forth herein, in performing any of its duties hereunder, Escrow Agent shall not incur any liability to anyone for any damages, losses or expenses, including, without limitation: (i) any action taken or omitted upon advice of its legal counsel given with respect to any questions relating to the duties and responsibilities of Escrow Agent under this Agreement; (ii) any loss resulting from, in connection with, or arising from the Escrow Funds; or (iii) any action taken or omitted in reliance upon any instrument, including any written notice or instruction provided for in this Agreement.

12. Interpleader. Notwithstanding anything in this Agreement to the contrary, in the event of a dispute between the City, Dierbergs and/or Escrow Agent hereunder, which dispute shall be sufficient, in the discretion of Escrow Agent, to justify its doing so, Escrow Agent shall be entitled to either: (i) hold the Escrow Funds until receipt by the Escrow Agent of an authorization in writing, executed by all persons having an interest in said dispute, directing the disposition of the Escrow Funds, or (ii) tender the Escrow Funds into the registry or custody of any court of competent jurisdiction located in St. Louis County, Missouri, together with such legal pleadings as it may deem appropriate, and thereupon Escrow Agent shall be discharged from all further duties and liabilities under this Agreement. Any such legal action may be brought in such court of Escrow Agent shall determine to have jurisdiction thereof. All costs and expenses incurred by Escrow Agent in taking any action pursuant to this paragraph shall be covered by and paid pursuant to the indemnification of Escrow Agent contained in the following paragraph.

13. Indemnity. Dierbergs and the City shall and do hereby jointly and severally indemnify, defend and hold Escrow Agent harmless from, against and in respect of: (i) any and

all demands, judgments, expenses, costs, losses, injuries or claims incurred by Escrow Agent by reason of, from or in connection with this Agreement or any action taken or not taken by Escrow Agent under or in connection with this Agreement; and (ii) any and all counsel fees sustained by Escrow Agent by reason of, any claim, demand, action, suit, investigation or proceeding incident to the matters covered by the immediately preceding clause (i); the foregoing excludes any matters in Section 14 below.

14. Willful Default. The Escrow Agent shall be responsible for its own willful default or gross negligence. The Escrow Agent shall be automatically released from all responsibility and liability under this Agreement upon the Escrow Agent's delivery or deposit of the Escrow Funds in accordance with the requirements of this Agreement, and this Agreement shall thereupon terminate.

15. Termination. If Escrow Agent shall notify the City and Dierbergs of its desire to be relieved of any further duties and liabilities hereunder, then Escrow Agent shall deliver the Escrow Funds to a successor escrow agent designated in writing by the City and Dierbergs. If the City and Dierbergs shall fail to agree upon and designate a successor escrow agent within ten (10) days after having been requested by Escrow Agent to do so, then Escrow Agent shall in its discretion designate the successor escrow agent. The successor escrow agent designated by the City and Dierbergs, shall agree to be bound by all the terms and conditions of this Agreement. Immediately upon agreement by the successor escrow agent to be bound by all the terms and conditions of this Agreement, Escrow Agent shall be relieved of any and all further duties and liabilities under or in connection with this Agreement, provided, however, that no successor escrow agent shall assume liability for the acts or omissions of its predecessor escrow agent(s) hereunder. [If Dierbergs does not donate the Park property by January 31, 2004, then, at Dierbergs' election, it may terminate this Agreement, in which event the Escrow Funds shall be returned to the party making such deposit.]

17. Notices. Any notice or communication required or permitted hereunder shall be in writing and shall be sent either by: (a) personal delivery service with charges therefor billed to shipper; (b) expedited delivery service with charges therefor billed to shipper; or (c) United States Mail, postage prepaid, certified mail, return receipt requested, addressed to the parties, as the case may be, at the address set forth below, or at such other address as such party may have designated by notice to the others give as provided above. Any notice or communication sent as above provided shall be deemed given or delivered: (a) upon receipt if personally delivered (provided that such delivery is confirmed by the courier delivery service); (b) if sent by United States Mail, on the date appearing on the return receipt therefor, or if there is no date on such return receipt, the receipt date shall be presumed to be the postmark date appearing on such return receipt or (c) on the date of delivery by any expedited delivery service. Any notice or communication required or permitted hereunder shall be addressed as follows:

To the City: City of Chesterfield  
City Administrator  
690 Chesterfield Parkway West  
Chesterfield, Missouri 63017-2079

With a copy to: Douglas R. Beach  
Attorney for City of Chesterfield  
222 S. Central Avenue, Suite 900  
St. Louis, Missouri 63105

To Dierbergs: Dierbergs Market, Inc.  
16690 Swingley Ridge Road  
P.O. Box 1070  
Chesterfield, Missouri 63006-1070  
Attention: Mr. Jerry Ebest  
Vice President, Real Estate

With a copy to: Dierbergs Market, Inc.  
16690 Swingley Ridge Road  
P.O. Box 1070  
Chesterfield, Missouri 63006-1070  
Attention: Sarah Siegel, Esq.  
Vice President and General Counsel

To Escrow Agent: U. S. Title Guaranty Company  
8135 Forsyth Blvd.  
St. Louis, MO 63105  
Attention: Mr. Stewart Kenney

18. Successors and Assigns. The provisions of this Agreement shall inure to the benefit of and shall be binding upon the parties hereto and their respective heirs, executors, administrators, personal representatives, successors and assigns.

19. Counterparts. This Agreement may be executed in any number of separate counterparts, but all such counterparts shall together constitute a single unified document.

IN WITNESS WHEREOF, the parties hereto have set forth their hands and seals as of the day and year first above written.

Dierbergs Markets, Inc.

By \_\_\_\_\_  
Robert J. Dierberg, President

Attest:

City of Chesterfield

By \_\_\_\_\_  
Title \_\_\_\_\_

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

Escrow Agent:

U.S. Guaranty Title Company

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

Exhibit A

True and Correct Copy of the Park Agreement

Exhibit B

Legal Description of Park Property

Exhibit C

Approved Plans

Exhibit D

Escrow Fees