

FINANCE COMMITTEE

10-0597R

RESOLUTION AUTHORIZING THE ISSUANCE AND SALE OF A  
\$3,534,265 GENERAL OBLIGATION WATER UTILITY REVENUE  
NOTE, SERIES 2010D, AND PROVIDING FOR ITS PAYMENT.

CITY PROPOSAL:

BE IT RESOLVED, by the city council of the city of Duluth, Minnesota (the "City"), as follows:

Section 1. Note Purpose and Authorization.

1.01 Under and pursuant to the provisions of Section 55 of the City Charter, Minnesota Statutes, Section 444.075 and Chapter 475, and other pertinent provisions of said Charter and statutes, the City is authorized to issue its general obligation bonds or notes to provide funds for the payment of costs of improvements to the municipal water utility, which bonds or notes shall be a specific lien upon the water utility and are payable primarily from net revenues to be derived from the operation of the municipal water utility and pledged for their payment. The City has applied for and received a commitment from the Minnesota Public Facilities Authority (the "PFA") for a loan for the Project, as hereinafter defined.

1.02 The city council has, by Ordinance No. 10035 adopted July 12, 2010 (the "Ordinance"), ordered the issuance, sale and delivery of a general obligation water utility revenue note, in one or more series, in the maximum amount of \$5,500,000 of the City, for the payment of the costs of rehabilitation of the Highland pump station and for construction and equipping of a new Highland water tank. The City has previously issued its \$1,371,653 General Obligation Water Utility Revenue Note, Series 2010C, for construction and equipping of the Highland pump station pursuant to the Ordinance. The PFA has authorized a loan to the City in the amount of \$3,534,265 for a new Highland water tank consisting of the demolition of two elevated water storage tanks and replacement with one elevated tank with a one million gallon capacity and a single pedestal, spheroid design (the "Project").

1.03 The general obligation water utility revenue note to be issued under

the Ordinance shall be issued in the principal amount of \$3,534,265 (the "Note") to pay the costs of the Project.

1.04 The City hereby authorizes the issuance and sale of the Note, in substantially the form on file in the office of the clerk as Public Document No. \_\_\_\_\_, for the Project to the PFA pursuant to a Minnesota Public Facilities Authority Bond Purchase and Project Loan Agreement dated October 26, 2010, between the PFA and the City, in substantially the form presented to the Council and on file in the office of the clerk (the "Loan Agreement"), as Public Document No. \_\_\_\_\_ which is hereby authorized, ratified and approved.

Section 2. Execution and Delivery of Note and Loan Agreement.

2.01 The Note to be issued hereunder shall be dated as of the date of delivery to PFA, shall be issued in the principal amount of \$3,534,265, in fully registered form and lettered and numbered R-1. Interest on the Note shall be at the rate of 1.076% per annum. Principal and interest payments shall be made in the respective years and amounts set forth on Exhibit A to the Note, subject to adjustment as provided in the Loan Agreement. If the principal and interest payments are paid by check and mailed to the registered holder of the Note, such payment shall be mailed by the City at least five business days prior to the payment date.

2.02 The Note shall be prepared for execution in accordance with the approved form and shall be signed by the manual signature of the Mayor and attested by the manual signature of the Clerk. In case any officer whose signature shall appear on the Note shall cease to be an officer before delivery of the Note, such signature shall nevertheless be valid and sufficient for all purposes, the same as if such officer had remained in office until delivery. All actions of the officers of the City regarding the Loan Agreement, including but not limited to, the officers of the City executing the Loan Agreement, are ratified, confirmed and approved as of the date of the Loan Agreement.

2.03. The City will cause to be kept at its offices a register in which, subject to such reasonable regulations as the City may prescribe, the City shall

provide for the registration of transfers of ownership of the Note. The Note shall be initially registered in the name of the PFA and shall be transferable upon the register by the PFA in person or by its agent duly authorized in writing, upon surrender of the Note, together with a written instrument of transfer satisfactory to the Clerk, duly executed by the PFA or its duly authorized agent.

2.04. Delivery of the Note shall be made at a place mutually satisfactory to the City and the PFA. The Note shall be furnished by the City without cost to the PFA. The Note, when prepared in accordance with this Resolution and executed, shall be delivered to the PFA by and under the direction of the Treasurer. Disbursement of the proceeds of the Note shall be made pursuant to the Loan Agreement.

2.05. In the event of an inconsistency between a provision of this Resolution and a provision of the Loan Agreement, the provision of the Loan Agreement shall govern.

### Section 3. Revenues, Accounts and Covenants.

3.01 The city council covenants and agrees with the PFA and with its taxpayers that it will impose and collect just and equitable charges for all use and for the availability of all facilities of the municipal water utility at the times and in the amounts required to pay the normal, reasonable and current expenses of operating and maintaining such facilities, and also to produce net revenues at least adequate at all times to pay the principal and interest due on the Note and on all other bonds and notes heretofore or hereafter issued and made payable from said net revenues, and will operate the utility and segregate and account for the revenues thereof as provided in this section.

The City will place all such charges, when collected, and all money received from the sale of any facilities or equipment of the municipal water utility in a separate Water Utility Operating Account within the Public Utility Water Fund maintained under Section 54 of the City Charter. Except as provided in this section, this account shall be used only to pay claims duly approved and

allowed for payment of expenses which, under generally accepted accounting principles, constitute normal, reasonable and current expenses of operating and maintaining the municipal water utility, and to maintain such reasonable reserves for such expenses as the proper City official shall determine to be necessary from time to time in accordance with policies established by the city council. Sums from time to time on hand in this account, in excess of sums required to make such payments and maintain such reserves, constitute the net revenues which are herein pledged and appropriated first to pay the principal of and interest on all water utility bonds or notes when due.

3.02 The City hereby creates a separate construction account (the "Construction Account") within the Public Utility Water Fund to which there shall be credited the proceeds of the Note as received, together with investment income thereon and any additional funds which may be available and are appropriated for improvements to the Project. This account shall be used only to pay expenses duly approved and allowed which, under generally accepted accounting principles, constitute capital expenditures for the completion of the Project and costs of the issuance of the Note.

3.03 Until the Note issued hereunder is fully paid or duly called for redemption, or otherwise discharged, the City will also maintain a separate debt service account (the "Water Debt Service Fund") in the Public Utility Water Fund to be used solely for the payment of the principal and interest, as such principal and interest become due and payable, on the Note and on any other bonds or notes which have been or may be issued and made payable from said net revenues of the water utility. All investment income on funds in the Water Debt Service Fund are pledged to payment of the Note and other bonds and notes payable from the Water Debt Service Fund. The treasurer shall transfer from the Water Utility Operating Account to the Water Debt Service Fund amounts of the net revenues sufficient for the payment of all interest and principal then due on the Note and other bonds and notes payable from the Water Debt Service Fund. Such transfers shall be made at the times and in the amounts determined by the treasurer, in

accordance with policies established by resolutions of the city council.

3.04 Surplus utility revenues from time to time received in the Water Utility Operating Account, in excess of payments due from and reserves required to be maintained in the Water Utility Operating Account and in the Water Debt Service Fund, may be used for necessary capital expenditures for the improvement of the municipal water utility, for the prepayment and redemption of bonds or notes constituting a lien on the municipal water utility, and for any other proper municipal purpose consistent with policies established by resolutions of the city council.

3.05 A. In the event the monies and payments appropriated to the Water Debt Service Fund are insufficient to pay principal of and interest on the Note and the bonds and notes payable from such fund as the same become due, the City is required by law and by contract with the holders of the Note and such bonds and notes and hereby obligates itself to levy and cause to be extended, assessed and collected any additional taxes found necessary for full payment of the principal of and interest on the Note.

B. The full faith and credit and taxing powers of the City are irrevocably pledged for the prompt and full payment of the principal of and interest on the Note, as such principal and interest respectively become due. However, the net revenues of the water utility appropriated to the Water Debt Service Fund are estimated to be not less than five percent in excess of the principal of and interest on the Note and the other bonds and notes payable from such fund, and accordingly, no tax is levied at this time.

3.06 Monies on deposit in the Construction Account and the Water Debt Service Fund may, at the discretion of the City, be invested in securities permitted by Minnesota Statutes, Chapter 118A; provided, that any such investments shall mature at such times and in such amounts as will permit payment of the Project costs and/or the principal and interest on the Note and bonds or notes payable from the Water Debt Service Fund when due, as applicable.

Section 4. Tax Covenants; Miscellaneous.

4.01 The city council covenants and agrees with the holders of the Note that the City will (i) take all action on its part necessary to cause the interest on the Note to be exempt from federal income taxes including, without limitation, restricting, to the extent necessary, the yield on investments made with the proceeds of the Note and investment earnings thereon, making required payments to the federal government, if any, and maintaining books and records in a specified manner, where appropriate, and (ii) refrain from taking any action which would cause interest on the Note to be subject to federal income taxes, including, without limitation, refraining from spending the proceeds of the Note and investment earnings thereon on certain specified purposes.

4.02 A. No portion of the proceeds of the Note shall be used directly or indirectly to acquire higher yielding investments or to replace funds which were used directly or indirectly to acquire higher yielding investments, except (i) for a reasonable temporary period until such proceeds are needed for the purpose for which the Note was issued, and (ii) in addition to the above, in an amount not greater than the lesser of five percent of the proceeds of the Note or \$100,000. To this effect, any proceeds of the Note and any sums from time to time held in the Water Debt Service Fund (or any other City account which will be used to pay principal and interest to become due on the Note) in excess of amounts which under the applicable federal arbitrage regulations may be invested without regard as to yield shall not be invested at a yield in excess of the applicable yield restrictions imposed by the arbitrage regulations on such investments after taking into account any applicable temporary periods or minor portion made available under the federal arbitrage regulations.

B. In addition, the proceeds of the Note and money in the Water Debt Service Fund shall not be invested in obligations or deposits issued by, guaranteed by or insured by the United States or any agency or instrumentality thereof if and to the extent that such investment would cause the Note to be federally guaranteed within the meaning of Section 149(b) of the Internal Revenue Code of 1996, as amended (the "Code").

C. The City hereby covenants not to use the proceeds of the Note, or to cause or permit them to be used, in such a manner as to cause the Note to be a "private activity bond" within the meaning of Sections 103 and 141 through 150 of the Code.

4.03 A. Pursuant to Section 1.148-7(d) of the Treasury Regulations, relating to exception from rebate, the City hereby reasonably expects that with respect to the gross proceeds of the Note, the following schedule will be met: (i) at least 15% of the gross proceeds of the Note will be allocated to expenditures for the governmental purpose of the Note within six months of the date of issue of the Note; (ii) at least 60% of such proceeds will be allocated for such purposes within the one-year period of such date; and (iii) 100% of such proceeds will be allocated for such purposes within the 18-month period beginning on such date; subject to an exception for reasonable retainage of 5% of the available proceeds of the Note, and that 100% of the available proceeds of the Note will be allocated within 30 months from the date of issue of the Note.

B. The City shall use its best efforts to comply with any federal procedural requirements which may apply in order to effectuate the designation made by this section.

Section 5. Certificate of Proceedings.

5.01 The clerk is directed to file with the county auditor a certified copy of this resolution and such other information as the county auditor may require, and to obtain from the county auditor a certificate stating that the Note herein authorized has been duly entered on his register.

5.02 The officers of the City are authorized and directed to prepare and furnish to the Purchaser and to bond counsel certified copies of all proceedings and records of the City relating to the authorization and issuance of the Note and other affidavits and certificates as may reasonably be requested to show the facts relating to the legality and marketability of the Note as such facts appear from the official books and records of the officers' custody or otherwise known to them. All of such certified copies, certificates and affidavits, including any heretofore furnished, constitute representations of the City as to the correctness of facts recited therein and the actions stated therein to have been taken.

Approved:

  
\_\_\_\_\_  
Department Director

Approved for presentation to council:

  
\_\_\_\_\_  
Chief Administrative Officer

Approved as to form:

  
\_\_\_\_\_  
Attorney

Approved:

  
\_\_\_\_\_  
Auditor

FINANCE      RET:CW:rb      11/23/2010

STATEMENT OF PURPOSE: This resolution establishes the terms and form of the \$3,534,265 General Obligation Water Utility Revenue Note, Series 2010D, to be issued to the Minnesota Public Facilities Authority (the "Authority"). The interest rate on the Note is 1.076%. The proceeds of the Note will be used for construction of a new Highland water tank.

**MINNESOTA PUBLIC FACILITIES AUTHORITY  
BOND PURCHASE AND PROJECT LOAN AGREEMENT**

**DRINKING WATER REVOLVING FUND**

(Tax Exempt Note from Borrower)

**MPFA-10-0020-R-FY11**

THIS BOND PURCHASE AND PROJECT LOAN AGREEMENT (the "Agreement"), is made October 26, 2010 between the Minnesota Public Facilities Authority (the "Authority") and the City of Duluth (the "Borrower").

**ARTICLE I - TERMS AND CONDITIONS**

**Section 1.1. Terms.** The Authority hereby commits, subject to the availability of funds and the conditions hereinafter set forth, and pursuant to Minnesota Statutes, Section 446A.081, as amended, and Minnesota Rules Chapter 7380, as amended to provide **THREE MILLION FIVE HUNDRED THIRTY FOUR THOUSAND TWO HUNDRED SIXTY FIVE DOLLARS (\$3,534,265)** to the Borrower for the purpose of financing eligible project costs of the Drinking Water Revolving Fund project described as follows: demolition of two elevated water storage tanks and replacement with one elevated tank with a one million gallon capacity and a single pedestal, spheroid design (the "Project"). The Project is further described in the Borrower's application which is incorporated herein.

The Project financing consists of a loan from the Drinking Water Revolving Fund in the amount of **\$3,534,265** (the "Loan") which shall be evidenced by the note described in Section 1.3 of this Agreement. The final maturity date of the Loan will be August 20, 2025. The aggregate principal amount of the Loan disbursed and outstanding will bear interest and servicing fees collectively at the rate of 1.076% per annum for the period accruing from and after the date of the note described in Section 1.3 through the date on which no principal of the Loan remains unpaid.

**Section 1.2. Authority Sources of Funds.** The Borrower acknowledges that the Loan provided by the Authority may be funded with the proceeds of one or more series of its Drinking Water Revenue Bonds or State Revolving Fund Revenue Bonds (the "Bonds"), federal capitalization grants, state bond funds or other funds of the Authority, or a combination thereof, and that the Authority may, at any time, pledge the Loan as security for its bonds. The Authority in its sole option and discretion may reallocate the Loan to another source of funds, refund the Bonds from which the Loan was funded or deemed to be funded, or sell the Loan if permitted by the documents relating to its Bonds.

**Section 1.3. Security.** (a) The Borrower must issue to the Authority its General Obligation Revenue Note (the "Note"), evidencing its obligation to repay the Loan. It is a condition of any disbursements hereunder that the Borrower deliver to the Authority the executed Note, a certified copy of resolutions or other authority by the appropriate governing body or bodies as shall legally authorize the execution and performance of this Agreement and the Note, and such opinions, certificates and documents as requested by and in a form acceptable to the Authority.

(b) The Borrower hereby represents and specifically agrees that the Note constitutes a general obligation debt of the Borrower and will be shown as such on its financial statements and be treated in all respects as a general obligation debt of the Borrower. For purposes of permitting sale of the Note to the Authority, the Authority represents that it is a "board, department or agency" of the State of Minnesota within the meaning of Minnesota Statutes, Section 475.60, subdivision 2, clause (4), as amended.

(c) The obligations of the Borrower under the Note evidence amounts payable under the Loan. Each payment made pursuant to the Note will be deemed to be a credit against the corresponding obligation of the Borrower under the Loan and any such payment will fulfill the Borrower's obligation to pay such amount hereunder.

**Section 1.4. Disbursements.** (a) No funds will be disbursed by the Authority to the Borrower until the Borrower has delivered its Note to the Authority as set forth in Section 1.3.

(b) All Borrower disbursement requests will be subject to Authority approval and will be disbursed on a cost reimbursement basis, consistent with the budget presented in the Borrower's application. The Authority may withhold or disallow all or part of the amount requested if the Authority determines the request is not in compliance with this Agreement, applicable federal and state laws, regulations or rules as then in effect.

(c) The Authority will disburse funds pursuant to approved disbursement requests complying with the provisions of this Agreement. Each disbursement request must be for eligible costs for completed work on the Project and must be submitted at such deadlines established by the Authority and on a form prescribed by the Authority. Each disbursement request must include supporting invoices and billing statements and be signed by an employee or elected official of the Borrower.

(d) The Authority will reimburse the Borrower for eligible Project costs incurred prior to the execution of this Agreement only to the extent approved in connection with the Authority's approval of the Borrower's application. The Authority reserves the right to reimburse the Borrower for approved costs incurred prior to the execution of this Agreement by making disbursements therefor over a two-year period in eight equal quarterly payments.

(e) Disbursements will be made by the Authority to the Borrower within 30 days of receipt of the Borrower's request, unless the Authority determines to withhold disbursement in accordance with the provisions of this Agreement.

(f) If the entire amount specified in Section 1.1 is not fully disbursed by June 30, 2013, no further disbursements will be made. In such event or if final eligible Project costs are less than the total financing amount specified in Section 1.1, the Loan amount not disbursed will be applied to the outstanding principal installments of the Loan on a pro rata basis or as otherwise determined by the Authority. The Authority will revise Exhibit A to this Agreement to reflect the reduction in principal amount and promptly deliver a copy to the Borrower.

**Section 1.5. Mandatory Payments.** (a) The principal amount of the Loan, together with interest and service fees collectively, will be repaid in the amounts and on the dates set forth in the schedule in Exhibit A hereto (notwithstanding the rate of disbursement of the proceeds of the Loan), subject to adjustment as set forth in Section 1.4 or 1.6. The Authority will be entitled to retain for its own purposes any interest earnings on Loan proceeds that are not disbursed and will not be obligated to credit against any required repayment of principal or payment of interest and service fees any such interest earnings. Any payment of principal or interest received by the Authority in excess of the amounts set forth in Exhibit A, as then in effect, which is not a mandatory payment as designated in paragraph (b), or not expressly designated by the Borrower to be treated as an optional prepayment may, in the sole option and discretion of the Authority, be (i) held without interest payable by the Authority and applied to a future payment due on the Loan in a manner determined by the Authority, (ii) treated as a prepayment of principal on the Loan, or (iii) returned to the Borrower as an overpayment.

(b) In the event that special assessments and/or connection charges from another municipality are pledged to the repayment of the Loan and the Borrower receives prepayments or lump sum payments of such special assessments and/or connection charges, the Borrower agrees, to immediately notify the Authority and

transmit the funds within ten days to the Authority for payment on the Loan, unless the Authority, in its sole option and discretion, directs the Borrower to use the funds for the payment of eligible construction costs of the Project, or transmit the funds at a later date to the Authority for payment on the Loan. Any such payment received by the Authority may be applied to reduce each unpaid annual principal installment of the Loan in the proportion that such installment bears to the total of all unpaid principal installments, or, in the sole option and discretion of the Authority, may be applied to one or more future principal payments on the Loan in a manner determined by the Authority.

**Section 1.6. Optional Prepayments.** (a) Upon 45 days' prior written notice to the Authority and subject to approval by the Authority in its sole option and discretion, the Borrower may prepay the Loan and the Note, in whole or in part, on any February 20 or August 20 at a price equal to 100% of the principal amount to be prepaid, together with accrued interest thereon to the redemption date and a premium equal to all fees and expenses of the Authority, if any, in connection with the prepayment and the payment and redemption of its Bonds as determined by the Authority.

(b) The Authority may require that the Borrower, at its sole cost and expense, deliver to the Authority an opinion from a law firm, selected by the Authority, having a national reputation in the field of municipal law whose legal opinions are generally accepted by purchasers of municipal bonds ("Bond Counsel") to the effect that such prepayment will not cause the interest on the Note to be included in the gross income of the recipient thereof for federal income tax purposes.

(c) The principal amount of a partial prepayment will, in the sole option and discretion of the Authority, (i) be applied to one or more future principal payments of the Loan in a manner determined by the Authority, or (ii) be applied to reduce each unpaid annual principal installment of the Loan in the proportion that such installment bears to the total of all unpaid principal installments (i.e., the remaining principal payment schedule shall be re-amortized to provide proportionately reduced principal payments in each year).

## **ARTICLE II – BORROWER RESPONSIBILITIES AND PROJECT COMPLIANCE**

**Section 2.1. Borrower Responsibilities with Respect to the Project.** (a) The Borrower agrees to commence construction and complete the Project with reasonable diligence, regardless of the sufficiency of loans or grants therefor from the Authority to pay eligible project costs.

(b) The Borrower will not enter into a sale, lease, transfer or other use agreement of any part of the Project, or change the use of the Project, without the prior written approval of the Authority if such sale, lease, transfer, agreement or change in use would (i) violate the covenants set forth in Article III or Article IV, or (ii) violate the conditions under which any capitalization grants were furnished by the United States Environmental Protection Agency (the "EPA"), or (iii) otherwise violate any terms or conditions of this Agreement.

(c) The Borrower must maintain adequate property insurance coverage or a self insurance program for the Project in such amounts with such limits as it determines in good faith to be reasonable or in such amounts and with such limits as may be required by the Authority from time to time.

(d) The Borrower must complete the Project in accordance with all applicable federal, state and local statutes, rules, regulations, ordinances, reporting requirements, approvals, and Minnesota Department of Health (the "MDH") certifications governing the design and construction of the Project, and will operate its drinking water system in compliance with MDH requirements and all applicable federal and state laws and regulations.

(e) The Borrower agrees to exert all reasonable efforts to investigate claims which the Borrower may have against third parties with respect to the construction of the Project and, in appropriate circumstances, take whatever action, including legal action, the Borrower reasonably determines to be appropriate.

**Section 2.2. Construction Compliance.** (a) The Borrower will comply with the provisions of prevailing wage requirements set forth in Minnesota Statutes, Sections 177.41 to 177.44, as then in effect.

(b) In addition to the prevailing wage requirements under subsection (a), the Borrower will comply and require that all laborers and mechanics employed by contractors and subcontractors on the Project be paid wages at rates not less than those prevailing on projects of a similar character in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act (40 U.S.C., sec. 276a through 276a-5), as amended.

(c) If requested, the Borrower will submit to the Authority, within 20 days of the end of the semi-annual reporting period, EPA Form 5700-52A to report on the award of prime contracts or subcontracts to any certified Minority and Women Business Enterprise (MBE/WBE) firms until the Project is complete.

(d) The Borrower will comply with Minnesota Statutes, Section 290.9705, as then in effect, by withholding to the extent so required eight percent (8%) of payments made to all out-of-state contractors once cumulative payments made to the contractor for work done in Minnesota exceed \$50,000 in a calendar year, unless an exemption is granted by the Department of Revenue. Withheld amounts are required to be deposited with the Minnesota Department of Revenue.

### ARTICLE III - TAX EXEMPTION

**Section 3.1. Covenants.** The Borrower acknowledges that the Note is intended to bear interest which is excluded from gross income of the owner thereof for federal and State of Minnesota income tax purposes (a "Tax-exempt Note") and may be funded by the Authority from the proceeds of the Authority's Bonds which are intended to bear interest which is excluded from gross income of the owner thereof for federal and State of Minnesota income tax purposes ("Tax-exempt Bonds"). The Borrower also acknowledges that, regardless of the source of funding, the Authority may pledge the Loan and the related Note as security for, and as a source of, the payment of debt service on any or all of its Tax-exempt Bonds. In consideration of these facts, the Borrower covenants and agrees with the Authority, whether or not strict compliance with such agreements is required to maintain the Note as a Tax-exempt Note or the Authority's Bonds as Tax-exempt Bonds, as follows:

(a) The Borrower will not take, or to the extent under its control, permit, any action which would cause the Note not to be a Tax-exempt Note or any Authority Bonds not to be Tax-exempt Bonds and will not omit from taking, or cause to be taken, any action required to maintain the Note as a Tax-exempt Note or the Authority's Bonds as Tax-exempt Bonds.

(b) The Borrower will take all actions with respect to the Note necessary to comply with all instructions and requests of the Authority relating to maintaining the Authority's Bonds as Tax-exempt Bonds and the Note as a Tax-exempt Note or compliance with the agreements set forth in this section or in any Tax Compliance Certificate (hereinafter defined).

(c) The Borrower agrees to comply with all requirements of any certificate or agreement ("Tax Compliance Certificate") executed and delivered by it in connection with the issuance of the Note.

(d) The Borrower will promptly notify the Executive Director of the Authority in writing of any action or event which adversely affects the status of the Note as a Tax-exempt Note or any of the Authority's Bonds as Tax-exempt Bonds.

(e) None of the proceeds of the Loan may be used to pay the costs of any facility used for any private business use or to make a private loan within the meaning of Section 141 of the Internal Revenue Code of 1986, as amended (the "Code"), except as specifically permitted in writing by the Authority.

(f) No Loan repayments may be made from, or secured by, property used or to be used for a private business use or payments in respect of such property within the meaning of Section 141 of the Code, except as specifically permitted in writing by the Authority.

(g) The Borrower will not establish any fund or account, other than a bona fide debt service fund, securing the payment of the Tax-exempt Note or Tax-exempt Bonds or from which the Borrower reasonably expects to pay debt service on the Loan, or in any other respect create "gross proceeds," within the meaning of the Code, of the Tax-exempt Note or Tax-exempt Bonds, except as specifically permitted in writing by the Authority. In addition, any gross proceeds shall not be invested in obligations or deposits issued by, guaranteed by or insured by the United States or any agency or instrumentality thereof if and to the extent such investment would cause the Tax-Exempt Note or Tax-exempt Bonds to be "federally guaranteed" within the meaning of Section 149(b) of the Code.

(h) The Borrower will not invest any moneys constituting "gross proceeds" of the Tax-exempt Note or Tax-exempt Bonds other than in a fair market, arms' length transaction and at a yield, within the meaning of the Code, in excess of the lesser of the yield on the Tax-exempt Note or the Tax-exempt Bonds applicable to the Loan and shall apply all Loan proceeds within five days of the receipt thereof by the Borrower consistent with the terms of the Borrower's disbursement request.

(i) Except as permitted under Treasury Regulations, Section 1.150-2, the Borrower will not use Loan proceeds to reimburse itself for any payments of project costs which the Borrower made from other funds, if the original payment was made prior to the earlier of the issuance of the Authority Bonds used to fund the Loan or the execution and delivery of this Agreement or if the original payment was made from the proceeds of other debt of the Borrower.

(j) The Borrower agrees that the allocation by the Authority of funds it uses to purchase the Loan, including different series of Tax-exempt Bonds, shall be at the sole discretion of the Authority and such allocation shall be binding on the Borrower.

(k) With respect to any gross proceeds of the Tax-exempt Bonds created by the Borrower, the Borrower shall be liable to the Authority for the amount required to be rebated as excess investment earnings to the United States.

(l) The Authority may, in its sole option and discretion and only upon receipt of an opinion of counsel to the Authority, waive any of the agreements set forth in this Article III.

#### ARTICLE IV – COMPLIANCE WITH STATE BOND REQUIREMENTS

**Section 4.1. State Bond Financed Property.** The Borrower and the Authority acknowledge and agree that the Borrower's interest in the Project and real property is, or when acquired by the Borrower will be, "state bond financed property", as such term is used in Minnesota Statutes, Section 16A.695, Subdivision 1(b) and the applicable Order of the Commissioner of Minnesota Management and Budget as such may be amended, modified, supplemented, or replaced from time to time (the "Order"). The Borrower agrees that the proceeds of the Loan must be used and the Project must be operated in a manner that complies with Minnesota

Statutes, Section 16A.695 as then in effect and the Order. Unless this requirement is waived in writing by the Commissioner of Minnesota Management and Budget, the Borrower must file a real property declaration and provide an executed declaration to the Authority that identifies the real property as state bond financed property, as such term is used in the Order.

**Section 4.2. Lease or Management Contract.** The Borrower agrees that: any lease or management or similar contract (each a "Use Agreement") entered into by the Borrower with respect to property constituting all or a part of the Project must comply with the following requirements:

- (a) It must be for the express purpose of carrying out of a governmental program established or authorized by law and established by official action of the Borrower.
- (b) It must be approved, in writing, by the Commissioner of Minnesota Management and Budget.
- (c) It must be for a term, including any renewals that are solely at the option of the lessee or manager, that is substantially less than the useful life of the property subject to such lease or management contract, but may allow renewal beyond that term upon determination by the Borrower that the use continues to carry out the governmental program.
- (d) It must be terminable by the Borrower if the other contracting party defaults under the contract, or if the governmental program is terminated or changed.
- (e) It must provide for oversight by the Borrower of the operation of the property that is the subject of the Use Agreement.
- (f) It must specifically identify the statute that provides the Borrower authority to enter into the Use Agreement.
- (g) It must contain a provision stating that the Use Agreement is being entered into in order to carry out a governmental program and must specifically identify the governmental program.

**Section 4.3. Sale.** The Borrower must not sell any property constituting all or a part of the Project unless the sale complies with the following requirements:

- (a) The Borrower determines by official action that such property is not longer usable or needed by the Borrower to carry out the governmental program for which it was acquired or constructed.
- (b) The sale must be made as authorized by law.
- (c) The sale must be for fair market value as defined in Minnesota Statutes, Sections 16A.695 as then in effect.
- (d) The Borrower must obtain the prior written consent of the Commissioner of Minnesota Management and Budget.

**Section 4.4. Changes to Minnesota Statute 16A.695 or the Order.** In the event that Minnesota Statutes Section 16A.695 or the Order is amended in a manner that reduces any requirement imposed upon the Borrower, or if the Borrower's interest in the Project is exempt from Minnesota Statutes, Section 16A.695 or the Order, then upon written request by the Borrower, the Authority will enter into and execute an amendment to this Agreement to implement herein such amendment to or exempt the interest in the Project from Minnesota Statutes, Section 16A.695 and the Order or both.

**Section 4.5. Waiver.** The Authority may waive the requirements of Article IV at any time upon determination by the Authority that the Loan has not been and will not be funded from the proceeds of state general obligation bonds.

## ARTICLE V - DISCLOSURE

**Section 5.1. Information for Disclosure Documents.** (a) The Borrower agrees to provide to the Authority such information with respect to the Borrower, its duties, operations and functions as may be reasonably requested by the Authority, and hereby consents to its inclusion in the Authority's official statement(s) used in connection with issuance and sale or the re-marketing of its Bonds or continuing disclosure with respect to its Bonds (collectively, the "Disclosure Documents"), whether or not all or a portion of the proceeds of Bonds were or will be loaned to the Borrower.

(b) At the request of the Authority, the Borrower will certify and represent that such information with respect to the Borrower in any Disclosure Document does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading; provided, however, that in no event shall the Borrower be required to make any representation about any other information in the Disclosure Documents or as to any Disclosure Document in its entirety. If for any reason the Borrower determines that it shall not be able to make such certification and representation, it will provide such information to the Authority as is necessary for inclusion in the Disclosure Documents so as to enable it to make such certification and representation.

(c) If at any time during the period ending 90 days after the date the Borrower provides information to Authority for inclusion in a Disclosure Document any event occurs which the Borrower believes would cause the information with respect to the Borrower in the Disclosure Document to omit a material fact or make the statements therein misleading, the Borrower shall promptly notify the Authority in writing of such event and provide information for inclusion in the Disclosure Document or an amendment thereof or a supplement thereto. At the request of the Authority, the Borrower will also provide the certification and representation required in (b) above with respect to such information.

(d) The Borrower will provide such information as may be reasonably requested by any rating agency in connection with rating the Bonds of the Authority.

**Section 5.2. Continuing Disclosure.** If the Authority, in its sole discretion, determines, at any time prior to payment of the Loan in full, (i) that the Borrower is a material "obligated person," as the term "obligated person" is defined in Rule 15c2-12 promulgated by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934, as amended or supplemented, including any successor regulation or statute thereto ("Rule 15c2-12") or (ii) that a material event has occurred with respect to the Borrower or the Loan, as that term is defined in Rule 15c2-12, or that any other action of the Borrower has occurred which the Authority determines in its sole discretion is material to an investor in Bonds of the Authority, with materiality under clause (i) being determined by the Authority pursuant to criteria established, from time to time, by the Authority in its sole discretion and set forth in a resolution or official statement of the Authority, the Borrower hereby covenants that it will authorize and provide to the Authority, for inclusion in a Disclosure Document, all statements and information relating to the Borrower deemed material by the Authority for the purpose of satisfying Rule 15c2-12 as well as Rule 10b-5 promulgated pursuant to the Securities Exchange Act of 1934, as amended or supplemented, including any successor regulation or statute thereto ("Rule 10b-5"), including certificates and written representations of the Borrower evidencing satisfaction of the requirements of Rule 15c2-12 and Rule 10b-5; and the Borrower hereby further covenants that the Borrower (if determined to be such a material obligated person) shall execute and deliver a continuing disclosure agreement, in such form as the Authority shall determine to be necessary, desirable or convenient, in its sole discretion, for the purpose of meeting the requirements of Rule 15c2-12, and pursuant to the terms and provisions of such continuing disclosure agreement, the Borrower shall thereafter provide

ongoing disclosure with respect to all annual and event information and financial statements relating to the Borrower required by a continuing disclosure undertaking under Rule 15c-12 and pursuant to the terms and provisions of such continuing disclosure agreement, and the Borrower further agrees that the Authority shall have the right to disclose any information about the Borrower or the Loan, whether or not received from the Borrower, determined by the Authority in its sole discretion, to be material with respect to any of its Bonds.

## ARTICLE VI DEFAULT AND REMEDIES

**Section 6.1. Events of Default.** Any of the following are events of default under this Agreement:

(a) Failure of the Borrower to make a payment when due;

(b) Failure of the Borrower to comply with any other provision of this Agreement or the Note after written notice from the Authority and the Borrower fails for a three-month period to cure such default or provide a written plan acceptable to the Authority providing for such cure or, if the Authority accepts a plan for cure, the Borrower fails to cure any defaults within the time period specified therein.

**Section 6.2 Remedies.** (a) For an event of default under Section 6.1(a) of this Agreement, the Authority shall impose an interest penalty as provided in Minn. Rules Part 7380.0296, Subpart 1. The Authority may also exercise one or more of the following remedies: (1) withhold approval of any disbursement request, (2) reject any pending application by the Borrower for financial assistance, (3) to the extent permitted by law, demand immediate payment of the Loan and the Note in full and, upon such demand, the outstanding principal amount of the Loan and Note will be immediately due and payable, with interest accrued thereon to the date of payment, or (4) exercise any other remedy available to the Authority at law or in equity, including under Minnesota Rules, Chapter 7380, as amended.

(b) For an event of default under Section 6.1(b) of this Agreement, the Authority shall impose an immediate increase in the interest rate on the Loan by eliminating all interest rate discounts that were applied in determining the interest rate under Minnesota Rules, Part 7380.0272. The Authority may also exercise one or more of the following remedies: (1) withhold approval of any disbursement request, (2) reject any pending application by the Borrower for financial assistance, (3) to the extent permitted by law, demand immediate payment of the Loan and the Note in full and, upon such demand, the outstanding principal amount of the Loan and Note will be immediately due and payable, with interest accrued thereon to the date of payment, or (4) exercise any other remedy available to the Authority at law or in equity, including under Minnesota Rules, Chapter 7380, as amended. If the Authority subsequently determines that the Borrower has cured all events of default, the interest rate on any unpaid Loan principal will revert back to the original interest rate.

## ARTICLE VII - FINANCIAL RECORDS AND AUDITS

**Section 7.1. Financial Recordkeeping.** For all expenditures of funds made pursuant to this Agreement, the Borrower must keep financial accounts and records in accordance with generally accepted accounting principles including invoices, contracts, receipts, vouchers and other documents sufficient to evidence in proper detail the nature and propriety of the expenditures and any investments made with proceeds of the Loan or other "gross proceeds" of the Note or the Tax-exempt Bonds of the Authority. Such accounts and records shall be accessible and available for a minimum of six years from the date of initiation of operation of the Project and for so long as the Note is outstanding for examination by authorized representatives of the Authority, the Legislative Auditor, Office of the State Auditor and the EPA Office of Inspector General.

**Section 7.2. Annual Audit Requirements.** (a) The Borrower must annually provide to the Authority for the term of the Loan a copy of its independent annual audit. All audit reports must be submitted within 30 days after the completion of the audit but no later than one year after the end of the fiscal year to be audited. The audits must be conducted in accordance with generally accepted government auditing standards and in compliance with the single audit act requirements of the federal Office of Management and Budget, circular A-133.

(b) The Borrower must list the Note as general obligation debt of the Borrower in its annual audits for the term of the Loan.

**ARTICLE VIII - THIS ARTICLE INTENTIONALLY LEFT BLANK**

**ARTICLE IX - ADMINISTRATION**

**Section 9.1. Amendments.** Any amendments to this Agreement must be in writing and be executed by the Borrower by the same officials who signed the Agreement, or their successors.

**Section 9.2. Fee.** The Borrower acknowledges that the Authority may apply up to 2% of any loan repayment to payment of administrative costs and that such application shall not increase the amount of any repayments or extend the period of repayment.

**Section 9.3. Notices.** In addition to any notice required under applicable law to be given in another manner, any notices required hereunder must be in writing, and shall be sufficient if delivered by courier or overnight delivery service or sent by certified mail (return receipt requested), postage prepaid, to the address of the party to whom it is directed. Such address shall be that address specified below or such different address as may hereafter be specified, by either party by written notice to the other:

In the case of the Authority:

Minnesota Public Facilities Authority  
Attention: Executive Director  
332 Minnesota Street, Suite E200  
St. Paul, MN 55101-1351

In the case of the Borrower:

City of Duluth  
Attention: Mayor  
411 West 1st Street  
Duluth, MN 55802-1102

**Section 9.4. Termination of Loan.** The obligations of the Borrower under this Agreement (except the obligations set forth in Section 2.1 (b), (c) and (d) and Article IV hereof) shall terminate when the Loan is fully paid and retired.

**Project Number:** MPFA-10-0020-R-FY11  
**Borrower Name:** City of Duluth

The Authority and the Borrower have caused this Agreement to be duly executed by their duly authorized undersigned representatives. Statutory Cities must execute this Agreement as provided in Minnesota Statutes, Section 412.201, as amended. Home Rule Charter Cities must execute this Agreement as provided in Minnesota Statutes, Chapter 410, as amended.

**BORROWER:** We have read and we agree to all of the above provisions of this Agreement.

By \_\_\_\_\_  
Don Ness  
Title Mayor  
Date \_\_\_\_\_

By \_\_\_\_\_  
Jeffrey Cox  
Title City Clerk  
Date \_\_\_\_\_

**S E A L**

By \_\_\_\_\_  
Gunnar Johnson  
Title City Attorney  
Date \_\_\_\_\_

By \_\_\_\_\_  
Wayne Parson  
Title City Auditor  
Date \_\_\_\_\_

**MINNESOTA PUBLIC FACILITIES**  
**AUTHORITY:**

By \_\_\_\_\_  
Dan McElroy  
Title Chair  
Date 11-19-2010

**ENCUMBERED:**  
Department of Employment and Economic  
Development

By \_\_\_\_\_  
Date Encumbered B24-453 11/16/2010  
(Individual signing certified that funds have been  
encumbered as required by Minnesota Statute 16A)

**Exhibit A**  
Loan Amortization Schedule

Duluth, City of-05th  
MPFA-10-0020-R-FY11

funding dates / amounts:

3,534,265.00

note: do not use federal \$

Loan date:

Accrual date: immediate

Rate: 1.076%

final loan amount: 3,534,265.00

Date	Effective	Source	Disbursement	Repayment	Interest	Principal	Loan Balance	Annual D.S.
projected	12/29/10	2010C_dw	3,534,265.00				3,534,265.00	
	08/20/11			129,666.74	24,401.74	105,265.00	3,429,000.00	129,666.74
	02/20/12			18,448.02	18,448.02		3,429,000.00	
	08/20/12			246,448.02	18,448.02	228,000.00	3,201,000.00	264,896.04
	02/20/13			17,221.38	17,221.38		3,201,000.00	
	08/20/13			248,221.38	17,221.38	231,000.00	2,970,000.00	265,442.76
	02/20/14			15,978.60	15,978.60		2,970,000.00	
	08/20/14			248,978.60	15,978.60	233,000.00	2,737,000.00	264,957.20
	02/20/15			14,725.06	14,725.06		2,737,000.00	
	08/20/15			250,725.06	14,725.06	236,000.00	2,501,000.00	265,450.12
	02/20/16			13,455.38	13,455.38		2,501,000.00	
	08/20/16			251,455.38	13,455.38	238,000.00	2,263,000.00	264,910.76
	02/20/17			12,174.94	12,174.94		2,263,000.00	
	08/20/17			253,174.94	12,174.94	241,000.00	2,022,000.00	265,349.88
	02/20/18			10,878.36	10,878.36		2,022,000.00	
	08/20/18			253,878.36	10,878.36	243,000.00	1,779,000.00	264,756.72
	02/20/19			9,571.02	9,571.02		1,779,000.00	
	08/20/19			255,571.02	9,571.02	246,000.00	1,533,000.00	265,142.04
	02/20/20			8,247.54	8,247.54		1,533,000.00	
	08/20/20			257,247.54	8,247.54	249,000.00	1,284,000.00	265,495.08
	02/20/21			6,907.92	6,907.92		1,284,000.00	
	08/20/21			257,907.92	6,907.92	251,000.00	1,033,000.00	264,815.84
	02/20/22			5,557.54	5,557.54		1,033,000.00	
	08/20/22			259,557.54	5,557.54	254,000.00	779,000.00	265,115.08
	02/20/23			4,191.02	4,191.02		779,000.00	
	08/20/23			261,191.02	4,191.02	257,000.00	522,000.00	265,382.04
	02/20/24			2,808.36	2,808.36		522,000.00	
	08/20/24			262,808.36	2,808.36	260,000.00	262,000.00	265,616.72
	02/20/25			1,409.56	1,409.56		262,000.00	
	08/20/25			263,409.56	1,409.56	262,000.00	-	264,819.12
totals			<u>3,534,265.00</u>	<u>3,841,816.14</u>	<u>307,551.14</u>	<u>3,534,265.00</u>		<u>3,841,816.14</u>

Weighted avg maturity (assuming issue date of 12/29/10): 8.09 years

Estimated interest savings: \$428,823