

RESOLUTION NO. 06-425

**A RESOLUTION APPROVING AN AGREEMENT  
BETWEEN THE CITY OF PORT ARTHUR, CITY OF PORT  
ARTHUR SECTION 4A ECONOMIC DEVELOPMENT  
CORPORATION AND THE NATIONAL DEVELOPMENT  
COUNCIL FOR THE GROW PORT ARTHUR FUND**

**WHEREAS**, the City of Port Arthur Section 4A Economic Development Corporation, incident to its mission to promote economic development within the City of Port Arthur desires to enter into an agreement with the National Development Council for the Grow Port Arthur Fund; and

**WHEREAS**, the City of Port Arthur also desires to enter such agreement for the administration of its Revolving Loan Program; and

**WHEREAS**, the Agreement, as denoted in Exhibit "A", was approved by the PAEDC Board of Directors at its October 4, 2006 regular meeting; and

**WHEREAS**, the City Attorney, Germer Gertz, and the CEO of the City of Port Arthur Section 4A Economic Development Corporation have made suggested changes thereto which have been accepted by the National Development Council for the Grow Port Arthur Fund, and are as denoted in Exhibit "B"; and

**WHEREAS**, the Agreement attached hereto as Exhibit "B" is being presented for approval.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY  
OF PORT ARTHUR:**

**Section 1.** That the facts and opinions in the preamble are true and correct.

**Section 2.** That the Agreement attached hereto as Exhibit "B" is hereby approved, subject to the confirmation by the EDC Board.

**Section 3.** That this Resolution is contingent upon the City Manager or his designee verifying the financial feasibility of the project.

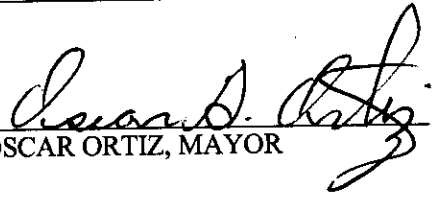
**Section 4.** That a copy of the caption be spread upon the minutes of the City Council.

**READ, ADOPTED AND APPROVED** on this 10<sup>th</sup> day of October, A.D. 2006, at a


Special Meeting of the City Council of the City of Port Arthur, Texas by the following vote:


AYES: Mayor Ortiz; Mayor Pro Tem Prince;  
City Council Barker, Henderson, Flood, Beard  
and Williamson.

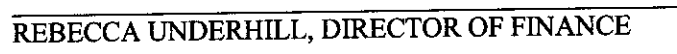
NOES: None.

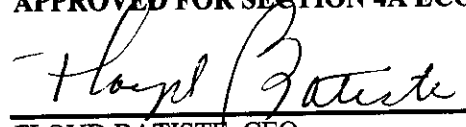
  
OSCAR ORTIZ, MAYOR

ATTEST:  
  
EVANGELINE GREEN, CITY SECRETARY

APPROVED AS TO FORM:  
  
MARK T. SOKOLOW, CITY ATTORNEY

APPROVED FOR ADMINISTRATION:  
  
STEPHEN FITZGIBBONS, CITY MANAGER

APPROVED AS TO THE AVAILABILITY OF FUNDS:  
  
  
REBECCA UNDERHILL, DIRECTOR OF FINANCE

APPROVED FOR SECTION 4A ECONOMIC DEVELOPMENT CORPORATION:  
  
FLOYD BATISTE, CEO

**EXHIBIT "A"**

**TO THE RESOLUTION**

**AGREEMENT BY AND BETWEEN**

**CITY OF PORT ARTHUR**

**AND**

**THE PORT ARTHUR SECTION 4A ECONOMIC DEVELOPMENT CORPORATION**

**AND**

**THE GROW AMERICA FUND, INC.**

**AND**

**THE NATIONAL DEVELOPMENT COUNCIL**

**TO ESTABLISH THE**

**GROW PORT ARTHUR FUND**

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**AGREEMENT BY AND BETWEEN**

**CITY OF PORT ARTHUR**

**AND**

**THE PORT ARTHUR SECTION 4A ECONOMIC DEVELOPMENT CORPORATION**

**AND**

**THE GROW AMERICA FUND, INC.**

**AND**

**THE NATIONAL DEVELOPMENT COUNCIL**

**TO ESTABLISH THE**

**GROW PORT ARTHUR FUND**

**THIS AGREEMENT** (hereinafter referred as the "Agreement") is entered into as of the \_\_\_ day of \_\_\_\_\_ 2006 by and between the City of Port Arthur, Texas, a municipal corporation and the Port Arthur Section 4A Economic Development Corporation (hereinafter called "PAEDC"), a non-profit corporation, whose address is 4173 39th Street, Port Arthur, Texas 77642 (hereinafter called "Clients" or "Community Partners"), the National Development Council, a corporation organized and existing under the laws of the State of New York and having its principal office at 708 Third Avenue, Suite 710, New York, New York, 10017 (hereinafter referred to as "NDC") and the Grow America Fund, Inc., a corporation organized and existing under the laws of the State of Delaware and having its principal office at 708 Third Avenue, Suite 710, New York, New York, 10017 (hereinafter referred to as "GAF").

**WITNESSETH:**

**WHEREAS**, the Clients desire to expand economic opportunity for residents of Port Arthur so that these residents may become economically self-sufficient; and

**WHEREAS**, the Clients desire to encourage sustainable community and economic development activities so that various neighborhoods in its geography may can revitalize themselves; and

**WHEREAS**, the Clients desire to establish a community investment fund for small business financing known as the Grow America Fund-Port Arthur (Grow Port Arthur) to achieve these goals; and

**WHEREAS**, GAF is recognized and certified by the U.S. Treasury Department as a Community Development Financial Institution (CDFI) and Community Development Entity (CDE) as a domestic corporation having a primary mission of serving or providing investment capital for low income communities or low income persons; and

**WHEREAS**, GAF, a U.S. Small Business Administration ("SBA") licensed and regulated Small Business Lending Company (hereinafter "SBLC") entitled to make SBA guaranteed loans to eligible small businesses, is the nation's only SBLC devoted solely to economic and community development financing; and

**WHEREAS**, NDC, a national 501 (c) (3) not-for-profit corporation engaged in economic and community development, GAF its wholly owned subsidiary, and the Clients, intend to enter into an Agreement to create a self-sustaining community development investment fund for small business financing in the Port Arthur geography of operation.

**NOW, THEREFORE**, in consideration of the mutual promises, covenants and agreements herein contained the parties hereto, intending to be legally bound, hereby agree as follows:

**A. GENERAL PROVISIONS AND RESPONSIBILITIES**

1. Grow Port Arthur will be capitalized with funds provided by the Clients (as described in Section C below). These funds will be used solely for loans within the areas identified by the Clients, which are sponsored by the Clients and which meet the purposes of Grow Port Arthur, as determined by the Clients.
2. GAF will use its SBLC license to make SBA guaranteed loans sponsored by Grow Port Arthur, provide staff to operate Grow Port Arthur in conjunction with the local staff provided by the Clients to operate the fund in a prudent and businesslike manner.

Staff provided by GAF will perform the following services:

- a) Assist in marketing the Grow Port Arthur program
- b) Assist in originating and packaging loans

- c) Underwrite all loans
- d) Obtain GAF and SBA approvals
- e) Close, service, and collect loans
- f) Perform appropriate periodic reviews of each loan
- g) Provide reporting as required by the Clients in a form acceptable to Clients. (The parties agree that acceptable form and format for this documentation is the complete GAF quarterly portfolio status report to the County and the loan report for each Grow Port Arthur borrower including all relevant information as provided by the borrower.)

3 GAF has a fiduciary responsibility to underwrite, approve, close, and service all program loans, and otherwise operate Grow Port Arthur in a prudent and businesslike fashion. In addition, the SBA requires all SBLC's to follow SBA regulations and to use SBA documents and procedures in making and servicing loans. These fiduciary responsibilities and SBA regulations cannot be delegated or waived and they are hereby incorporated by reference into this Agreement

**B. COMMENCEMENT, DURATION, COMPENSATION**

- 1. GAF and NDC shall commence services for Clients effective \_\_\_\_\_ and shall provide services co-terminus with the Clients-NDC Technical Assistance Agreement to which this Agreement is a sub-part.
- 2. This Agreement shall be renewable upon written notice provided thirty (30) days prior to the end of the term of the Clients-NDC Technical Assistance Agreement.
- 3. GAF shall be compensated during the initial term and any renewal term solely from revenue generated from loans made to eligible businesses participating in GAF-Port Arthur.

**C. CAPITALIZING Grow Port Arthur AND THE INVESTMENT PERIOD**

- 1. The Parties agree that Grow Port Arthur will be capitalized with an investment provided by the Clients. This investment will be used solely for funding eligible SBA-guaranteed loans within the targeted areas identified by the Clients in attachment A hereto.
- 2. On or by \_\_\_\_\_, 2006, the Clients shall either invest or set-aside the funds to invest \$500,000 required to capitalize the GAF- Port Arthur program. It is anticipated that the \$500,000 investment will be provided by Clients, but the actual source, disbursement, and breakdown of the capitalization of the Grow Port Arthur

*is at the sole discretion of the Clients.*

The Clients may elect to invest additional equity from time to time, all of which will be governed by the terms and conditions of this Agreement unless otherwise agreed to in writing. Payments made under this section shall be made by check or electronic funds transfer payable to "Grow America Fund – Port Arthur."

- a. During the term of this Agreement, the Clients will be paid a preferred return on its equity, which is invested in small business loans. As of the date this Agreement, the preferred return is two (2%) percent. That return may be changed from time to time at the sole discretion of GAF, but will at all times be the same rate of preferred return as paid to other comparable investors in GAF.
  - b. The Clients investment represents the "unguaranteed portion" of each outstanding loan funded under the program. The parties acknowledge that the Clients investment is therefore fully at risk of loss. It is anticipated that as principal is repaid by the small business borrowers, it will be relent in the same capacity to other borrowers eligible under the program.
  - c. GAF using its SBLC license shall fund the "guaranteed portion" of each outstanding loan funded under the program. The parties acknowledge that the intent of the Clients investment is to realize total loans funded of \$2,000,000, approximately 4 times the amount of the initial Clients investment).
  - d. NDC "Match" Investment - In addition, NDC has petitioned the NDC Foundation for a "match" to the potential new \$500,000 Clients' investment in 2006 into GAF for Grow Port Arthur. The result of those efforts is that the National Development Council is pleased to report the approval of a half million dollar in-kind contribution to the Grow Port Arthur program. In an effort to increase available resources and expand the program's reach, NDC will contribute a one time "match" of \$500,000 to the Clients' proposed new \$500,000 investment into GAF. Although NDC's \$500,000 contribution will not earn a return to the Clients, when taken in the context of our anticipated leverage of 4 to 1, the small business loans made under the Grow Port Arthur program are anticipated to total as much as \$4,000,000.
3. The Clients' investment period shall commence on the date above. The investment period will remain in effect until the final receipt by GAF of the final payment of principal and interest from all outstanding loans in the Grow Port Arthur Loan Portfolio (the Termination of the Investment Period).
  4. No party to this Agreement may terminate the Clients' investment period earlier than 24 months from the date of the initial investment or set-aside of funds to capitalize the Grow Port Arthur as referenced in Paragraph C-2 above. It is agreed by all parties that this initial period will give all parties adequate time to perform under the terms of this contract.



5. After 24 months from the initial investment or set-aside date, any party to this Agreement may terminate this Agreement by giving ninety (90) days prior written notice to the other parties.

#### **D. RETURN OF INVESTMENT**

The Clients has elected, and GAF and NDC have agreed to accept, the Clients' investment to capitalize Grow Port Arthur as a "recoverable grant investment." Accordingly the City of Port Arthur, PAEDC, GAF, and NDC agree that if the program is successful, the funds will be "permanently" invested in GAF, supporting a revolving series of small business loans.

1. If the program is not successful, or if it is only moderately successful in Port Arthur, the Clients' recoverable grant investment will be returned in part or in its entirety in accordance with paragraphs D1a or D1b below. If the program is successful, the Clients will be entitled to a return of all or a portion of its \$500,000 investment, in accordance with paragraph D1b below.

- a. If GAF terminates the Agreement, or if the CLIENTS terminates the Agreement and total GFCF loans are less than 100% of the equity invested, GAF will not retain any portion of the CLIENTS' investment (except losses and reserves for losses) at the Termination of the Investment Period. The principal collected from the borrowers (net of losses and reserves for losses) will be returned to the CLIENTS at the Termination of the Investment Period.
- b. If the CLIENTS terminate this Agreement and total Grow Port Arthur loans exceed the amount of the equity invested, then GAF will retain a portion of the CLIENTS' investment to continue its small business lending activities in accordance with the following formula:

If the loans under GFCF are more than 100% but less than 200% of the equity invested, GAF will retain 10% of the CLIENTS' investment equity (net of losses and reserves for losses), collected from debt service payments made by borrowers.

If the loans under GFCF equal or exceed 200% but are less than 400% of the equity invested, GAF will retain 25% of the CLIENTS' investment equity (net of losses and reserves for losses), collected from debt service payments made by borrowers.

If the loans under GFCF exceed 400% of the equity invested, GAF will retain 35% of the CLIENTS investment equity (net of losses and reserves for losses), collected from debt service payments made by borrowers.

- c. The CLIENTS shall not be obligated to make payments to GAF beyond the equity invested into GFCF, and GAF shall not be obligated to return to the CLIENTS any portion of the investment due beyond the principal repayments received by the borrowers under the Grow Port Arthur program.
4. All principal and interest payments and any other assets not due to GAF under this section shall be paid to the CLIENTS at the Termination of the Investment Period.

## **E. MISCELLANEOUS PROVISIONS**

### **1. Ownership of Material and Documents.**

All final reports and other materials prepared by NDC for the Clients shall be the property of the Clients, however all work papers and other source materials not provided to the Clients shall be the property of NDC. NDC shall deliver such materials to the Clients in accordance with the terms and conditions of this Agreement.

The Clients shall not, without NDC's written consent, associate NDC's name with the report/product, if a subsequent change is made in such report/product after submission to the Clients.

### **2. Right to Audit.**

NDC and GAF shall establish and maintain appropriate procedures which will ensure the proper accounting of all funds paid to it under this Agreement.

The Clients or any of their duly authorized representatives shall have access to any books, documents, papers and records of NDC and GAF which are directly pertinent to a specific program for the purpose of making an audit, an examination excerpts and transcriptions. All such books and records shall be retained for such periods of time as required by law, provided, however, notwithstanding any short periods of retention, all books, records and supporting details shall be retained for period of at least three (3) years after the expiration of the term of this Agreement.

### **3. Confidentiality of Reports.**

NDC and GAF shall keep confidential all reports, information and data given to, prepared or assembled by NDC and GAF pursuant to their performance hereunder and the Clients designates as confidential. Unless required by STATE Law, such information shall not be made available to any person, firm, corporation or entity without first obtaining the prior written consent of the Clients.

**4. Equal Opportunity.**

NDC and GAF shall comply with all provisions of Title VI of the Civil Rights Act of 1964 and of the rules, regulations and relevant orders of the Secretary of Labor regarding discrimination. In the event a party is determined by the final order of an appropriate agency or court to be in violation of any non-discrimination provision of federal, state, or local law, this Agreement may be cancelled, terminated or suspended in whole or in part by the Clients, and that party may be declared ineligible for further Clients contracts.

**5. Conflicts of Interest.**

No board member, officer or employee of the Clients or its designees or agents, and no other public official who exercises any functions or responsibilities with respect to any requested technical assistance, shall be permitted to financially benefit from this Agreement or have any interest, direct or indirect, in any contract or subcontract, or the proceeds thereof, for work to be performed in connection with this Agreement.

**6. Notices.**

All notices shall be sent by certified mail, hand-delivery or overnight mail and in all events with a written acknowledgment of receipt to the address set forth at the beginning of this Agreement.

**7. Responsibility for Claims.**

To the extent permitted by state statutes, the Clients agrees to indemnify and save harmless NDC and GAF, their agents, officials, and employees from any liability, damage, expense, cause of action, suit, claim, judgment or expenses (including attorneys fees) arising from injury to person, including death, or personal property or otherwise caused by or resulting from the bad faith, willful, negligent or unlawful act of the Clients in its performance of this Agreement. Provided, however, that such indemnity shall not apply to any actions, claims or damages arising as a result of NDC/GAF's bad faith, willful misconduct or gross negligence.

NDC and GAF agrees to indemnify and save harmless the Clients, their agents, officials and employees, from any liability, damage, expense, cause of action, suit, claim, judgment or expenses (including attorneys' fees) arising from injury to person, including death, or personal property or otherwise caused by or resulting from the bad faith, willful, negligent or unlawful act of NDC in its performance under this Agreement. Provided, however, that such indemnity shall not apply to any actions, claims or damages arising as a result of the Clients' bad faith, willful misconduct or gross negligence.

NDC and GAF will furnish a Certificate of Insurance verifying the existence of any insurance coverage required by the Clients. The Certificate will name the Clients as an additional insured and will provide for thirty (30) days advance notice in the event of termination or cancellation of coverage. The insurance coverage, which NDC shall maintain during the term of this Agreement, shall be no less than the following amount:

- a. Commercial General Liability - \$1,000,000 per occurrence, including product/completed operations, broad form contractual liability, broad form property damage and XCU coverage.
- b. Commercial Auto Liability – Statutory, plus \$1,000,000 per occurrence, for all motor vehicles used in the performance of this Agreement.
- c. Workers Compensation – Statutory, plus employers’ liability, with no less than \$1,000,000 per injury or illness and \$500,000 per occurrence.
- d. Professional Liability/Errors and Omissions - \$1,000,000 per occurrence.

**8. Release of News Information.**

No news release, including photographs, public announcements or confirmation of same, or any part of the subject matter of this Agreement or any phase of any program hereunder shall be made without prior written approval of both NDC and the Clients.

**9. Compliance with Laws, Venue.**

NDC and GAF agree to comply with all applicable federal, state and local laws in the conduct of the work hereunder. This Agreement shall be construed, interpreted and the rights of the parties determined, in accordance with the laws of the State of Nevada. The parties hereby irrevocably and unconditionally consent to submit to the jurisdiction of the courts of the State of New York and of the United States of America located in New York which shall have the exclusive jurisdiction for any actions, suits or proceedings arising out of or relating to this Agreement and the transactions contemplated hereby. The parties agree not to commence any action, suit or proceeding relating thereto except in such courts.

**10. Assignment.**

Neither this Agreement or any rights, duties or obligations described herein may be assigned by either party without the prior express written consent of the other party.

**11. Severability.**

A determination that any part of this Agreement is invalid shall not invalidate or impair the force of the remainder of this Agreement.

**12. Dispute Resolution.**

At the request of either party, any disputes or claims under this Agreement shall be submitted to arbitration in a manner provided under the Commercial Arbitration Rules of the American Arbitration Association then in effect; such arbitration is to be conducted before three arbitrators chosen in accordance with the rules of the State of Nevada.

**13. Amendments.**

No amendments to this Agreement shall be binding on either party unless in writing and signed by both parties.

**14. Acknowledgement.**

The Clients expressly acknowledges that all opinions and advice (written or oral) given by NDC and GAF to the Clients in connection with the Agreement are intended solely for the benefit and use of the Clients in considering financing strategies and the Clients agrees that no such opinion or advice shall be used for any other purpose.

**15. Disclaimer.**

The Clients is a sophisticated business enterprise and has retained NDC and GAF for the purposes set forth in this Agreement and the parties acknowledge and agree that their respective rights and obligations are contractual in nature. Each party disclaims an intention to impose fiduciary agency rights or obligations on the other by virtue of the engagement hereunder.

**16. Entire Agreement.**

This Agreement contains the final agreement between the parties regarding the matters covered and supersedes any and all other agreements, either oral or in writing regarding the matters contained herein.

**17. Notices.**

All notices or other communications required under this Agreement shall be in writing and shall be given by hand-delivery or by registered or certified U.S. Mail, return receipt requested, addressed to the other party at the address indicated herein or to such other address as a party may designate by notice given as herein provided. Notice shall be deemed given on the day on which personally delivered, or, if by mail, on the fifth day after being posted or the date of actual receipt, whichever is earlier.

Robert W. Davenport, President  
National Development Council  
708 Third Avenue, Suite 710  
New York, NY 10017

Robert W. Davenport, Chairman  
Grow America Fund, Inc.  
708 Third Avenue, Suite 710  
New York, NY 10017

City of Port Arthur

Port Arthur, TX

Floyd Batiste,  
Port Arthur Section 4A Economic Development Corporation  
4173 39<sup>th</sup> Street  
Port Arthur, Texas 77642

**IN WITNESS WHEREOF**, the parties have caused this Agreement to be executed as of the day and year first written above

City of Port Arthur  
By:

\_\_\_\_\_  
Its: \_\_\_\_\_

Attest: \_\_\_\_\_

Port Arthur Economic Development Corporation  
By:

\_\_\_\_\_  
Its: \_\_\_\_\_

Attest: \_\_\_\_\_

GROW AMERICA FUND, INC.  
By:

\_\_\_\_\_  
Robert W. Davenport, Chairman

Attest: \_\_\_\_\_

NATIONAL DEVELOPMENT COUNCIL  
By:

\_\_\_\_\_  
Robert W. Davenport, President

Attest: \_\_\_\_\_

## **EXHIBIT 1**

### **Eligible Grow Port Arthur Lending Areas**

The Grow Port Arthur loan program will be available to eligible businesses located throughout the City of Port Arthur.

Other eligibility criteria, if applicable, (job creation or retention, etc) is to be determined and documented by the CLIENTS.



**EXHIBIT "B"**

**TO THE RESOLUTION**

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**AGREEMENT BY AND BETWEEN**

**CITY OF PORT ARTHUR**

**AND**

**THE PORT ARTHUR SECTION 4A ECONOMIC DEVELOPMENT CORPORATION**

**AND**

**THE GROW AMERICA FUND, INC.**

**AND**

**THE NATIONAL DEVELOPMENT COUNCIL**

**TO ESTABLISH THE**

**GROW PORT ARTHUR FUND**

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**AGREEMENT BY AND BETWEEN**

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**THE GROW AMERICA FUND, INC.**

**AND**

**THE NATIONAL DEVELOPMENT COUNCIL**

**TO ESTABLISH THE**

**GROW PORT ARTHUR FUND**

**THIS AGREEMENT** (hereinafter referred as the "Agreement") is entered into as of the 24<sup>th</sup> day of October 2006 by and between the City of Port Arthur, Texas, a municipal corporation and the Port Arthur Section 4A Economic Development Corporation (hereinafter called "PAEDC"), a non-profit corporation, whose address is 4173 39th Street, Port Arthur, Texas 77642 (hereinafter called "Clients" or "Community Partners"), the National Development Council, a corporation organized and existing under the laws of the State of New York and having its principal office at 708 Third Avenue, Suite 710, New York, New York, 10017 (hereinafter referred to as "NDC") and the Grow America Fund, Inc., a corporation organized and existing under the laws of the State of Delaware and having its principal office at 708 Third Avenue, Suite 710, New York, New York, 10017 (hereinafter referred to as "GAF").

**WITNESSETH:**

**WHEREAS**, the Clients desire to expand economic opportunity for residents of Port Arthur so that these residents may become economically self-sufficient; and

**WHEREAS**, the Clients desire to encourage sustainable community and economic development activities so that various neighborhoods in its geography may can revitalize themselves; and

**WHEREAS**, the Clients desire to establish a community investment fund for small business financing known as the Grow America Fund-Port Arthur (Grow Port Arthur) to achieve these goals; and

**WHEREAS**, GAF is recognized and certified by the U.S. Treasury Department as a Community Development Financial Institution (CDFI) and Community Development Entity (CDE) as a domestic corporation having a primary mission of serving or providing investment capital for low income communities or low income persons; and

**WHEREAS**, GAF, a U.S. Small Business Administration (“SBA”) licensed and regulated Small Business Lending Company (hereinafter “SBLC”) entitled to make SBA guaranteed loans to eligible small businesses, is the nation's only SBLC devoted solely to economic and community development financing; and

**WHEREAS**, NDC, a national 501 (c) (3) not-for-profit corporation engaged in economic and community development, GAF its wholly owned subsidiary, and the Clients, intend to enter into an Agreement to create a self-sustaining community development investment fund for small business financing in the Port Arthur geography of operation; and

**WHEREAS**, the EDC has funds available of \$385,000 for Section 4A projects and NDC agrees to utilize said funds as invested herein for Section 4A Article 5190.6 projects within the City of Port Arthur; and

**WHEREAS**, the City has funds available of \$115,000 for economic development and NDC agrees to utilize said funds as invested herein for economic development within the City of Port Arthur.

**NOW, THEREFORE**, in consideration of the mutual promises, covenants and agreements herein contained the parties hereto, intending to be legally bound, hereby agree as follows:

**A. GENERAL PROVISIONS AND RESPONSIBILITIES**

1. Grow Port Arthur will be capitalized with funds provided by the Clients (as described in Section C below). These funds will be used solely for loans within the areas identified by the Clients, for projects that are individually approved in writing by the Clients and which also meet the purposes of Grow Port Arthur, as determined by the Clients.
2. GAF will use its SBLC license to make SBA guaranteed loans sponsored by Grow Port Arthur, provide staff to operate Grow Port Arthur in conjunction with the local staff provided by the Clients to operate the fund in a prudent and businesslike

*manner.*

Staff provided by GAF will perform the following services:

- a) Assist in marketing the Grow Port Arthur program
  - b) Assist in originating and packaging loans
  - c) Underwrite all loans
  - d) Obtain GAF and SBA approvals
  - e) Close, service, and collect loans and make quarterly payments, if any are due under this contract, to the EDC/City
  - f) Perform appropriate periodic reviews of each loan
  - g) Provide quarterly reports as required by the Clients in a form acceptable to Clients, which includes, but is not limited to, the following:
    - a. the total loan package made available to projects in the City of Port Arthur wherein City/EDC funds have been utilized;
    - b. the status of the project;
    - c. the amount of jobs created; and
    - d. the improvements being made; and
    - e. the status of repayment of principal and interest; and
    - f. the status of marketing programs.
3. GAF has a fiduciary responsibility to underwrite, approve, close, and service all program loans, and otherwise operate Grow Port Arthur in a prudent and businesslike fashion. In addition, the SBA requires all SBLC's to follow SBA regulations and to use SBA documents and procedures in making and servicing loans. These fiduciary responsibilities and SBA regulations cannot be delegated or waived and they are hereby incorporated by reference into this Agreement.

## **B. COMMENCEMENT, DURATION, COMPENSATION**

1. GAF and NDC shall commence services for Clients effective October 24, 2006 and shall provide services co-terminus with the Clients-NDC Technical Assistance Agreement to which this Agreement is a sub-part.
2. This Agreement shall be renewable upon written notice provided thirty (30) days prior to the end of the term of the Clients-NDC Technical Assistance Agreement.
3. GAF shall be compensated during the initial term and any renewal term solely from revenue generated from loans made to eligible businesses participating in GAF-

Port Arthur.

**C. CAPITALIZING Grow Port Arthur AND THE INVESTMENT PERIOD**

1. The Parties agree that Grow Port Arthur will be capitalized with an investment provided by the Clients. This investment will be used solely for funding eligible SBA-guaranteed loans within the targeted areas identified by the Clients in Exhibit 1.
2. On or by October 24, 2006, the EDC shall either invest or set-aside funds in the amount of \$385,000 and the City shall either invest or set-aside funds in the amount of \$115,000 to capitalize the GAF- Port Arthur program. It is anticipated that the \$500,000 investment will be provided by Clients, but the actual source, disbursement, and breakdown of the capitalization of the Grow Port Arthur is at the sole discretion of the Clients.

The Clients may elect to invest additional equity from time to time, all of which will be governed by the terms and conditions of this Agreement unless otherwise agreed to in writing. Payments made under this section shall be made by check or electronic funds transfer payable to "Grow America Fund – Port Arthur."

- a. During the term of this Agreement, the Clients will be paid a preferred return on its equity, which is invested in small business loans. As of the date this Agreement, the preferred return is two (2%) percent per annum. That return may be changed from time to time at the sole discretion of GAF, but will at all times be the same rate of preferred return as paid to other comparable investors in GAF. The Clients may from time to time elect in writing to waive its return to reduce loan rates to the borrowers.
- b. The Clients investment represents the "unguaranteed portion" of each outstanding loan funded under the program. The parties acknowledge that the Clients investment is therefore fully at risk of loss. It is anticipated that as principal is repaid by the small business borrowers, it will be relent in the same capacity to other borrowers eligible under the program.
- c. GAF using its SBLC license shall fund the "guaranteed portion" of each outstanding loan funded under the program. The parties acknowledge that the intent of the Clients investment is to realize total loans funded of \$2,000,000, approximately 4 times the amount of the initial Clients investment).
- d. NDC "Match" Investment - In addition, NDC has petitioned the NDC Foundation for a "match" to the potential new \$500,000 Clients' investment in 2006 into GAF for Grow Port Arthur. The result of those efforts is that the National Development Council is pleased to report the approval of a half million dollar investment of NDC funds to the Grow Port Arthur program. In an effort to increase available resources and expand the program's reach, NDC

*will contribute a one time "match" of \$500,000 to the Clients' proposed new \$500,000 investment into GAF. Although NDC's \$500,000 contribution will not earn a return to the Clients, when taken in the context of our anticipated leverage of 4 to 1, the small business loans made under the Grow Port Arthur program are anticipated to total as much as \$4,000,000.*

3. The Clients' investment period shall commence on the date above. The investment period will remain in effect until the final receipt by GAF of the final payment of principal and interest from all outstanding loans in the Grow Port Arthur Loan Portfolio (the Termination of the Investment Period).
4. No party to this Agreement may terminate the Clients' investment period earlier than 24 months from the date of the initial investment or set-aside of funds to capitalize the Grow Port Arthur as referenced in Paragraph C-2 above. It is agreed by all parties that this initial period will give all parties adequate time to perform under the terms of this contract.
5. After 24 months from the initial investment or set-aside date, any party to this Agreement may terminate this Agreement by giving ninety (90) days prior written notice to the other parties.

#### **D. RETURN OF INVESTMENT**

The Clients has elected, and GAF and NDC have agreed to accept, the Clients' investment to capitalize Grow Port Arthur as a "recoverable grant investment." Accordingly the City of Port Arthur, PAEDC, GAF, and NDC agree that if the program is successful, the funds will be "permanently" invested in GAF, supporting a revolving series of small business loans.

1. If the program is not successful, or if it is only moderately successful in Port Arthur, the Clients' recoverable grant investment will be returned in part or in its entirety in accordance with paragraphs D1a or D1b below. If the program is successful, the Clients will be entitled to a return of all or a portion of its \$500,000 investment, in accordance with paragraph D1b below.
  - a. If GAF terminates the Agreement, or if the CLIENTS terminates the Agreement and total GPAF loans are less than 100% of the equity invested, GAF will not retain any portion of the CLIENTS' investment (except losses and reserves for losses) at the Termination of the Investment Period. The principal collected from the borrowers (net of losses and reserves for losses) will be returned to the CLIENTS at the Termination of the Investment Period. Ex: Grow PA loan totals \$400,000, \$500,000 or 100% is returned.
  - b. If the CLIENTS terminate this Agreement and total Grow Port Arthur loans (Grow Port Arthur funds with matched EDC/City funds) exceed the amount

*of the equity invested (EDC/City funds), then GAF will retain a portion of the CLIENTS' investment to continue its small business lending activities in accordance with the following formula:*

If the loans under GPAF are more than 100% but less than 200% of the equity invested, GAF will retain 10% of the CLIENTS' investment equity (net of losses and reserves for losses), collected from debt service payments made by borrowers. Give hypothetical/example. Ex: Grow PA loan totals \$750,000, then \$450,000 would be return over time as the principal is collected from debt service payments made by borrowers.

If the loans under GPAF equal or exceed 200% but are less than 400% of the equity invested, GAF will retain 25% of the CLIENTS' investment equity (net of losses and reserves for losses), collected from debt service payments made by borrowers. Ex: Grow PA loan totals 1.5 million, then \$375,000 would be returned over time as principal is collected from debt service payments made by borrowers.

If the loans under GPAF exceed 400% of the equity invested, GAF will retain 35% of the CLIENTS investment equity (net of losses and reserves for losses), collected from debt service payments made by borrowers. Ex: Grow PA loan totals \$5 million, then \$325,000 would be returned over time as principal is collected from debt service payments made by borrowers.

- c. The CLIENTS shall not be obligated to make payments to GAF beyond the equity invested into GPAF, and GAF shall not be obligated to return to the CLIENTS any portion of the investment due beyond the principal repayments received by the borrowers under the Grow Port Arthur program.
2. All principal and interest payments and any other assets not due to GAF under this section shall be paid to the CLIENTS at the Termination of the Investment Period.

## **E. MISCELLANEOUS PROVISIONS**

### **1. Ownership of Material and Documents.**

All final reports and other materials prepared by NDC for the Clients shall be the property of the Clients, however all work papers and other source materials not provided to the Clients shall be the property of NDC. NDC shall deliver such materials to the Clients in accordance with the terms and conditions of this Agreement.



The Clients shall not, without NDC's written consent, associate NDC's name with the report/product, if a subsequent change is made in such report/product after submission to the Clients.

**2. Right to Audit.**

NDC and GAF shall establish and maintain appropriate procedures which will ensure the proper accounting of all funds paid to it under this Agreement.

The Clients or any of their duly authorized representatives shall have access to any books, documents, papers and records of NDC and GAF which are directly pertinent to a specific program for the purpose of making an audit, an examination excerpts and transcriptions. All such books and records shall be retained for such periods of time as required by law, provided, however, notwithstanding any short periods of retention, all books, records and supporting details shall be retained for period of at least three (3) years after the expiration of the term of this Agreement.

**3. Confidentiality of Reports.**

NDC and GAF shall keep confidential all reports, information and data given to, prepared or assembled by NDC and GAF pursuant to their performance hereunder and the Clients designates as confidential. Unless required by STATE Law, such information shall not be made available to any person, firm, corporation or entity without first obtaining the prior written consent of the Clients.

**4. Equal Opportunity.**

NDC and GAF shall comply with all provisions of Title VI of the Civil Rights Act of 1964 and of the rules, regulations and relevant orders of the Secretary of Labor regarding discrimination. In the event a party is determined by the final order of an appropriate agency or court to be in violation of any non-discrimination provision of federal, state, or local law, this Agreement may be cancelled, terminated or suspended in whole or in part by the Clients, and that party may be declared ineligible for further Clients contracts.

**5. Conflicts of Interest.**

No board member, officer or employee of the Clients or its designees or agents, and no other public official who exercises any functions or responsibilities with respect to any requested technical assistance, shall be permitted to financially benefit from this Agreement or have any interest, direct or indirect, in any contract or subcontract, or the proceeds thereof, for work to be performed in connection with this Agreement.

**6. Notices.**

All notices shall be sent by certified mail, hand-delivery or overnight mail and in all events with a written acknowledgment of receipt to the address set forth at the beginning of this Agreement.

**7. Responsibility for Claims.**

To the extent permitted by state statutes, the Clients agrees to indemnify and save harmless NDC and GAF, their agents, officials, and employees from any liability, damage, expense, cause of action, suit, claim, judgment or expenses (including attorneys fees) arising from injury to person, including death, or personal property or otherwise caused by or resulting from the bad faith, willful, negligent or unlawful act of the Clients in its performance of this Agreement. Provided, however, that such indemnity shall not apply to any actions, claims or damages arising as a result of NDC/GAF's bad faith, willful misconduct or gross negligence.

NDC and GAF agrees to indemnify and save harmless the Clients, their agents, officials and employees, from any liability, damage, expense, cause of action, suit, claim, judgment or expenses (including attorneys' fees) arising from injury to person, including death, or personal property or otherwise caused by or resulting from the bad faith, willful, negligent or unlawful act of NDC in its performance under this Agreement. Provided, however, that such indemnity shall not apply to any actions, claims or damages arising as a result of the Clients' bad faith, willful misconduct or gross negligence.

NDC and GAF will furnish a Certificate of Insurance verifying the existence of any insurance coverage required by the Clients. The Certificate will name the Clients as an additional insured and will provide for thirty (30) days advance notice in the event of termination or cancellation of coverage. The insurance coverage, which NDC shall maintain during the term of this Agreement, shall be no less than the following amount:

- a. Commercial General Liability - \$1,000,000 per occurrence, including product/completed operations, broad form contractual liability, broad form property damage and XCU coverage.
- b. Commercial Auto Liability – Statutory, plus \$1,000,000 per occurrence, for all motor vehicles used in the performance of this Agreement.
- c. Workers Compensation – Statutory, plus employers' liability, with no less than \$1,000,000 per injury or illness and \$500,000 per occurrence.
- d. Professional Liability/Errors and Omissions - \$1,000,000 per occurrence.

**8. Compliance with Laws, Venue.**

NDC and GAF agree to comply with all applicable federal, state and local laws in the conduct of the work hereunder. This Agreement shall be construed, interpreted and the rights of the parties determined, in accordance with the laws of the State of Texas. The parties hereby irrevocably and unconditionally consent to submit to the jurisdiction of the courts of Texas which shall have the exclusive jurisdiction for any actions, suits or proceedings arising out of or relating to this Agreement and the transactions contemplated hereby. The parties agree not to commence any action, suit or proceeding relating thereto except in such courts.

**9. Assignment.**

Neither this Agreement or any rights, duties or obligations described herein may be assigned by either party without the prior express written consent of the other party.

**10. Severability.**

A determination that any part of this Agreement is invalid shall not invalidate or impair the force of the remainder of this Agreement.

**11. Dispute Resolution.**

At the request of either party, any disputes or claims under this Agreement shall be submitted to arbitration in a manner provided under the Commercial Arbitration Rules of the American Arbitration Association then in effect; such arbitration is to be conducted before three arbitrators chosen in accordance with the rules of the State of Texas and arbitration shall be in Texas.

**12. Amendments.**

No amendments to this Agreement shall be binding on either party unless in writing and signed by both parties.

**13. Acknowledgement.**

The Clients expressly acknowledges that all opinions and advice (written or oral) given by NDC and GAF to the Clients in connection with the Agreement are intended solely for the benefit and use of the Clients in considering financing strategies and the Clients agrees that no such opinion or advice shall be used for any other purpose. NDC and GAF also acknowledge that all brochures and hand-outs as to their programs, services and qualifications are true and correct.

**14. Disclaimer.**

The Clients is a sophisticated business enterprise and has retained NDC and GAF for the purposes set forth in this Agreement and the parties acknowledge and agree that their respective rights and obligations are contractual in nature. Each party disclaims an intention to impose fiduciary agency rights or obligations on the other by virtue of the engagement hereunder.

**15. Entire Agreement.**

This Agreement contains the final agreement between the parties regarding the matters covered and supersedes any and all other agreements, either oral or in writing regarding the matters contained herein.

**16. Notices.**

All notices or other communications required under this Agreement shall be in writing and shall be given by hand-delivery or by registered or certified U.S. Mail, return receipt requested, addressed to the other party at the address indicated herein or to such other address as a party may designate by notice given as herein provided. Notice shall be deemed given on the day on which personally delivered, or, if by mail, on the fifth day after being posted or the date of actual receipt, whichever is earlier.

Robert W. Davenport, President  
National Development Council  
708 Third Avenue, Suite 710  
New York, NY 10017

Robert W. Davenport, Chairman  
Grow America Fund, Inc.  
708 Third Avenue, Suite 710  
New York, NY 10017

City of Port Arthur  
Attn: City Manager  
444 4<sup>th</sup> Street  
Port Arthur, TX 77640

Floyd Batiste,  
Port Arthur Section 4A Economic Development Corporation  
4173 39<sup>th</sup> Street  
Port Arthur, Texas 77642



**IN WITNESS WHEREOF**, the parties have caused this Agreement to be executed as of the day and year first written above

City of Port Arthur  
By:

\_\_\_\_\_  
Its: \_\_\_\_\_

Attest: \_\_\_\_\_

Port Arthur Economic Development Corporation  
By:

\_\_\_\_\_  
Its: \_\_\_\_\_

Attest: \_\_\_\_\_

GROW AMERICA FUND, INC.  
By:

\_\_\_\_\_  
Robert W. Davenport, Chairman

Attest: \_\_\_\_\_

NATIONAL DEVELOPMENT COUNCIL  
By:

\_\_\_\_\_  
Robert W. Davenport, President

Attest: \_\_\_\_\_

**EXHIBIT 1**

**Eligible Grow Port Arthur Lending Areas**

The Grow Port Arthur loan program will be available to eligible businesses as approved by the City and by the EDC located throughout the City of Port Arthur.

Eligibility criteria, if applicable, (job creation or retention, etc) is to be determined and documented by the CLIENTS.