

**AGREEMENT BETWEEN THE CITY OF RAPID CITY AND OS
DEVELOPMENT, INC., FOR PAYMENT OF OVERSIZE COSTS FOR PUBLIC
WATER MAINS.**

This Agreement is made and entered into by and between the CITY OF RAPID CITY, a municipal corporation of the State of South Dakota, located at 300 Sixth Street, Rapid City, SD 57701, herein after referred to as the “City,” and OS DEVELOPMENT, INC., a South Dakota corporation, located at P.O. Box 6400, Rapid City, SD 57709, herein after referred to as the “Developer.”

RECITALS

WHEREAS, the Developer has proposed constructing a residential housing development known as Morningstar in an area generally located south of Highway 44 and west of Reservoir Rd.; and

WHEREAS, the Developer is required by the City Code to install public water mains to serve its development; and

WHEREAS, in order to meet the needs of future development in this area, the City has requested the Developer install several public water mains larger than what is necessary to serve the needs of its proposed development; and

WHEREAS, the City is required to pay for the Developer for the additional cost of the oversize public water mains; and

WHEREAS, it is the intent of this Agreement to establish the terms of the City’s participation in the construction and payment for the oversize public water mains.

NOW THEREFORE, the parties hereby agree as follows:

1. The Developer shall retain a professional engineering firm (the “Consultant”) to design a public water main to run from the City water main located in Highway 44 south along Reservoir Rd. to a water reservoir being constructed in conjunction with the proposed Morningstar development. The Developer will also be responsible for designing several oversize public water mains which will be located within the proposed development. The oversize water mains contemplated by this agreement include approximately 12,962 linear feet of 14” line, 700 linear feet of 16” line, 2,201 linear feet of 12” line, and 3,707 linear feet of 20” line. The approximate location of these water mains is shown on Exhibit “A,” which has been attached hereto and incorporated herein. The exact location of the public water mains within the development will be determined during the subdivision review process for the various phases of the proposed development. The water main will be designed and constructed in accordance with the City’s design criteria manuals, Standard Specifications for Public Works Construction and State and City codes. The Developer will submit the water main design plans to the City for the City’s review and concurrence prior to commencing construction. The City

may enter into a separate contract with a professional engineering firm for additional construction observation services related to the oversized water mains or may use its own staff to conduct additional construction observation. The City shall be solely responsible for paying for the additional construction observation services.

2. The Developer is responsible for providing any necessary right-of-way or permanent utility easements in which to locate the public water mains. Such dedications or easements, shall be in a form acceptable to the City Attorney's Office. Acquisition of any land from other landowners, if necessary, is the sole responsibility of the Developer and will be accomplished solely at the Developer's expense.

3. The Developer will be responsible for obtaining a contractor to construct the water mains and for paying the contractor for the cost of construction. The Developer must advertise and award the contract for constructing the water mains through competitive bids. The Developer shall award the contract to the lowest responsible bidder. The City must concur in the award of the contract as well as any change orders which become necessary over the life of the project. The Developer's professional engineer will prepare all contract documents and detailed specifications for the water main. The Developer is required to construct an 8" inch water main to serve its development. The Developer will bid at least 1000 feet of 8" water main to establish a base from which to determine the oversized cost to the City. The Developer will provide the City with the bid tabs for all items bid. The 8" inch base price will be established by averaging the 8" bid cost from all bids received. The cost to the City for the oversized mains will also be based on the average cost for those mains from all the bids received. A percentage which represents the City's oversized portion of each main will be established based on the average bid for the 8" main and the average bid for the main actually constructed. Using this percentage, the City will reimburse the Developer per the terms of Paragraph 5.

4. In order to construct the water main which will run south from Highway 44 along Reservoir Road, the Developer will need to pass under a railroad right-of-way. The State is requiring that a pipeline license agreement be entered into prior to the water main being allowed within the right-of-way. The State is further requiring that the City of Rapid City be the applicant on the license agreement. The license agreement has provisions which require the City to cause its contractor to defend, indemnify, and hold the State, the Regional Railroad Authority Operator, any permitted users etc. harmless. The license agreement also requires that the City provide a significant amount of insurance coverage. The Developer agrees that because its contractor will be doing the actual construction of the water main through the railroad right-of-way, that it will assume the City's responsibilities and liabilities and obtain from its contractor liability insurance sufficient to cover the amount required under the license agreement until such time as the water main has been formally accepted by the City. The Developer has the option, once the water main has been constructed from Highway 44 to the PRV valve, to request that the line be tested and that the City formally accept this portion of the line if it passes final inspection. Once the water main has been formally accepted by the City, the City will assume all obligations under the license agreement which arise after the date of

the formal acceptance. The Developer further agrees to defend, indemnify and hold the City harmless from any claims arising or occurring out of the license agreement prior to the date the City formally accepts the water main.

5. The City agrees to pay the oversize costs for the water mains contemplated in this Agreement, with the exception of the 14" water main located within the development for which the Developer is being reimbursed through TID #66. The Developer will be responsible for paying the cost to construct an 8" main for all of the water mains contemplated in this Agreement whether they are located inside or outside the development. The City agrees to make progress payments pursuant to SDCL 9-42-12. The Developer agrees to make regular payments directly to the contractor for successfully completed work. The City must verify that the work has been successfully completed and concur in the payment. Once the City has concurred in the payment, the Developer shall pay the contractor and submit proof of such payment to the City. The amount the City owes for oversizing will be determined by establishing the percentage of the total construction costs which are attributable to the oversize portion of the project, based on the method described in Paragraph 3 and multiplying this percentage by the amount the Developer pays the contractor for constructing the water mains. The City shall remit the oversize funds to the Developer within forty-five (45) days of the proof of payment being received by the City. The City shall retain 10% of each payment to the Developer, until the water mains contemplated in this Agreement have been formally accepted by the City. Within forty-five (45) days of the water mains being accepted by the City, the City will remit the final 10% owed for the oversize costs to the Developer. The City will reimburse the Developer for 100% of the difference between the bid price for the 8" water main and the actual cost of constructing the larger main. The City's oversize reimbursement is limited to the actual costs of construction, not to exceed \$1,329,000, without prior written authorization from the City. An estimated oversize cost amount has been identified in Exhibit A for each water main. The actual amount of oversize payments allocated between the various sewer mains may vary from that shown in Exhibit A, so long as it does not exceed the total amount allocated by the City for payment of oversize costs. By making progress payments the City is not indicating final acceptance of the work. The final acceptance of the public improvements contemplated under this Agreement shall only be made after the work is completed and necessary testing of the improvements has been made.

6. The parties recognize that the exact size and location of the lines will be based on final plans approved by the City. It is anticipated that the development will be built in phases. If the sanitary sewer mains as built are smaller than those contemplated by this Agreement, the City will only pay the difference between the size of main the Developer would have been required to build and the size of main actually built up to the amounts specified in Paragraph 3 of this Agreement. If the lines are designed and built larger than the lines currently contemplated, the Developer will receive written approval from the City in order to be reimbursed for any oversize costs which exceed the amounts contained in Paragraph 3 of this Agreement. If the Developer proceeds with construction of the mains without prior written authorization of the City, the Developer will be responsible

for any additional oversize costs above the amounts contained in Paragraph 3 of the Agreement.

7. It is the City's intent to establish connection fees to recoup any of the funds expended by the City in constructing the oversize water mains which are not otherwise being reimbursed through TID #66. The City will not charge connection fees to any land or subdivided lots within Morningstar Subdivision as evidenced by the Layout Plat approved by the Rapid City Common Council on April 16, 2007. If the final configuration of the Lots and/or streets in the Final Plat(s) differs from the Layout Plat, it is the intent of the parties that no connection fees be charged to any of the Lots located within the boundaries of Morningstar as evidenced by the Layout Plat previously referred to.

8. Upon completion of the water main and its acceptance by the City, the water main shall belong to the City and any future maintenance and needed expansion shall be the responsibility of the City.

9. The parties' obligations under this Agreement are contingent upon full performance of their respective obligations contained in the sewer oversizing agreement, the reservoir and booster station agreement and the Contract for Private Development between the City and OS Development for Tax Increment District #66. The parties acknowledge the mutual promises they have made would not have been made without the Developer's promise to construct both the reservoir and oversize water and sewer mains and the City's promise to pay the amounts set out in the agreements. Should either of the parties fail to perform any of their respective obligations under the agreements the other party may seek specific performance of the other parties' obligations or, may seek to terminate any remaining obligations to the extent that they have not already been performed. To the extent that performance has occurred, the party may seek to be compensated for the value of such performance.

10. The parties may undertake any legal or equitable action available to enforce the provisions of this Agreement in addition to any other remedies provided herein. This Agreement shall be deemed to be prepared jointly by the parties hereto and neither shall be deemed to be its sole author. In the event of any claim of ambiguity, no provision shall thereby be construed against either party.

11. If any section(s), or provision of this Agreement is declared invalid for any reason whatsoever by any competent court, such invalidity shall not affect any other section(s) or provision of this application if they can be given effect without the invalid section(s) or provisions.

12. This Agreement, along with the Agreement Between the City of Rapid City and OS Development Inc. for the Design, Construction and Dedication of Land for a Water Reservoir and Booster Station, Agreement Between the City of Rapid City and OS Development, Inc., for Payment of Oversize Costs For Sanitary Sewer Mains, Contract for Private Development Between the City of Rapid City and OS Development Inc. and

the Project Plan for Tax Increment District #66 are the entire agreement of the parties. No other writings or negotiations are part of this document. This Agreement may only be modified by mutual agreement of both parties. Any modifications or addendums to this Agreement must be in writing.

13. This Agreement shall be construed according to the laws of the State of South Dakota. Any action concerning this Agreement shall be venued in the Circuit Court for the Seventh Judicial Circuit located in Pennington County, South Dakota.

14. If the Landowner is a corporation, it has the power to enter into this agreement and its officers signing for it have full power and authority to do so.

Dated this ____ day of _____, 2008.

CITY OF RAPID CITY

Mayor

ATTEST:

Finance Officer

OS DEVELOPMENT, INC.

By:_____

Its:_____

State of South Dakota)
 ss.
County of Pennington)

On this the ____ day of _____, 2008, before me, the undersigned officer, personally appeared Allan Hanks and James F. Preston, who acknowledged themselves to be the Mayor and Finance Officer, respectively, of the City of Rapid City, a municipal corporation, and that they, as such Mayor and Finance Officer, being

authorized so to do, executed the foregoing Agreement for the purposes therein contained by signing the name of the City of Rapid City by themselves as Mayor and Finance Officer.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

Notary Public, South Dakota
My Commission Expires:

SEAL

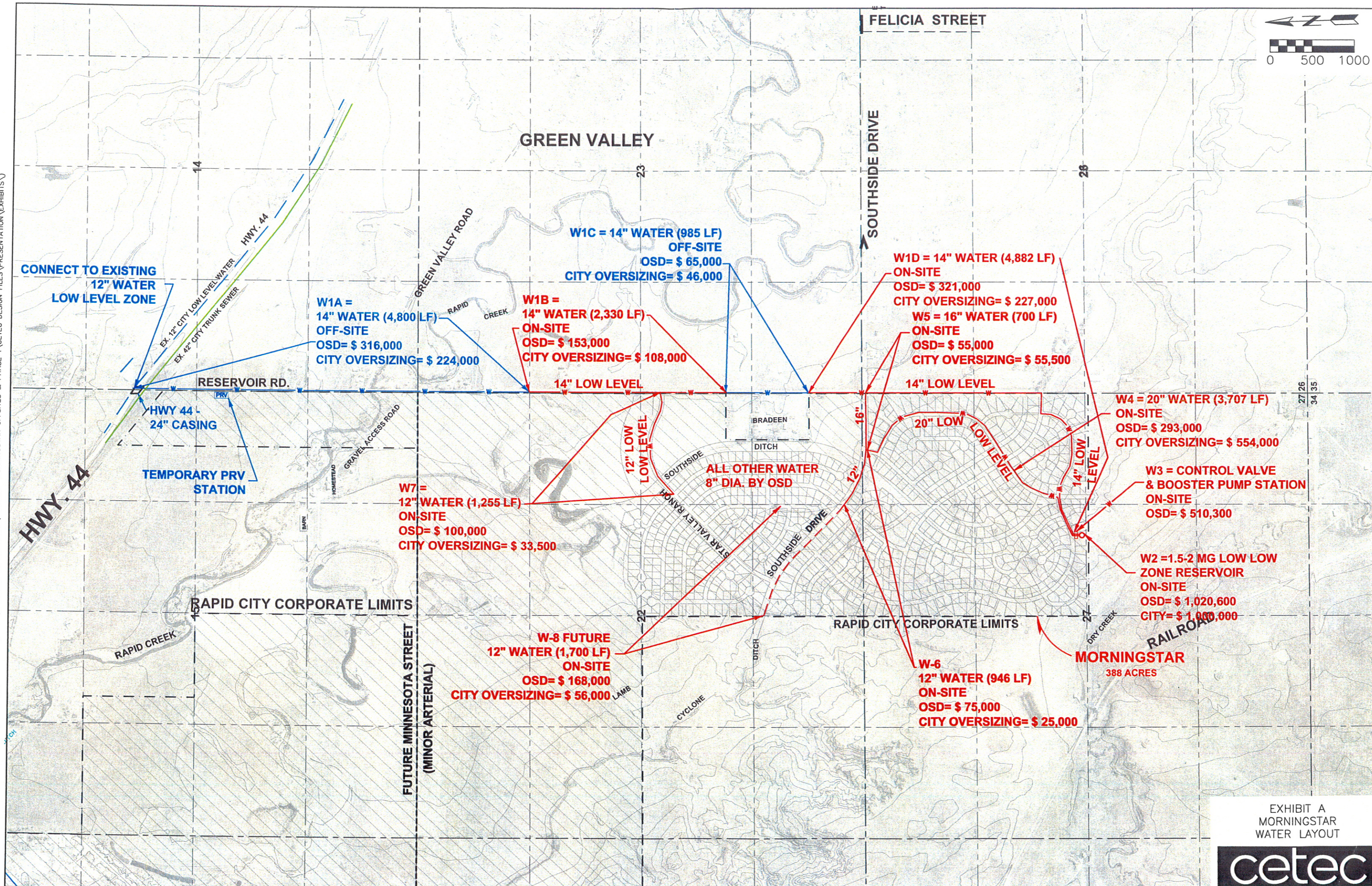
State of South Dakota)
)ss.
County of Pennington)

On this _____ day of _____, 2008, before me, the undersigned officer, personally appeared _____, who acknowledged themselves to be the _____ of OS Development, Inc., and that as such, being duly authorized to do so, executed the foregoing instrument for the purposes herein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public, South Dakota
My Commission Expires:

SEAL



CONNECT TO EXISTING
12" WATER
LOW LEVEL ZONE

W1A =
14" WATER (4,800 LF)
OFF-SITE
OSD= \$ 316,000
CITY OVERSIZING= \$ 224,000

W1C = 14" WATER (985 LF)
OFF-SITE
OSD= \$ 65,000
CITY OVERSIZING= \$ 46,000

W1B =
14" WATER (2,330 LF)
ON-SITE
OSD= \$ 153,000
CITY OVERSIZING= \$ 108,000

W1D = 14" WATER (4,882 LF)
ON-SITE
OSD= \$ 321,000
CITY OVERSIZING= \$ 227,000
W5 = 16" WATER (700 LF)
ON-SITE
OSD= \$ 55,000
CITY OVERSIZING= \$ 55,500

W4 = 20" WATER (3,707 LF)
ON-SITE
OSD= \$ 293,000
CITY OVERSIZING= \$ 554,000

W3 = CONTROL VALVE
& BOOSTER PUMP STATION
ON-SITE
OSD= \$ 510,300

W2 = 1.5-2 MG LOW LOW
ZONE RESERVOIR
ON-SITE
OSD= \$ 1,020,600
CITY= \$ 1,000,000

W-6
12" WATER (946 LF)
ON-SITE
OSD= \$ 75,000
CITY OVERSIZING= \$ 25,000

W-8 FUTURE
12" WATER (1,700 LF)
ON-SITE
OSD= \$ 168,000
CITY OVERSIZING= \$ 56,000

W7 =
12" WATER (1,255 LF)
ON-SITE
OSD= \$ 100,000
CITY OVERSIZING= \$ 33,500

ALL OTHER WATER
8" DIA. BY OSD

October 29, 2008 3:41:48 p.m.
Drawing: WATER AND SEWER 10-1-08.DWG (MikeR) (\\MAIN-DATA\CETEC\PROJECTS & PROPOSALS\06164.01 MORNINGSTAR OFFSITES & PHASE 1\CETEC DESIGN FILES\PRESENTATION\EXHIBITS\)

EXHIBIT A
MORNINGSTAR
WATER LAYOUT

