

**AGREEMENT BETWEEN THE CITY OF RAPID CITY AND OS
DEVELOPMENT, INC., FOR PAYMENT OF OVERSIZE COSTS FOR
SANITARY SEWER 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 sanitary sewer 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 public sanitary sewer 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 sanitary sewer mains; and

WHEREAS, it is the intent of the parties to establish the terms of the City's participation in the construction and payment for, the oversize public sanitary sewer mains.

NOW THEREFORE, the parties hereby agree as follows:

1. The Developer shall retain a professional engineering firm (the "Consultant") to design the sanitary sewer mains for this project. The sanitary sewer mains shall be designed to serve the both the needs of the development as well as the future needs of the City's sanitary sewer system outside of the development. The oversize sanitary sewer mains within the development include approximately 1,587 linear feet of 12" and 1,752 linear feet of 24" sanitary sewer mains. The oversize sanitary sewer lines located outside the development include approximately 3,300 linear feet of 27", 2,416 linear feet of 24", and 1,080 linear feet of 12" sanitary sewer mains. The approximate location and estimated cost for the following sanitary sewer mains are shown on Exhibit "B" which has been attached hereto and incorporated herein by this reference. The sanitary sewer mains 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 sanitary sewer 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 oversize 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 sanitary sewer 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 sanitary sewer mains and for paying the contractor for the cost of construction. The Developer must advertise and award the contract for constructing the sanitary sewer mains through competitive bids. The Developer agrees to comply with State bid law and 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 Consultant will prepare all contract documents and detailed specifications for the sanitary sewer mains. The Developer is required to construct an 8" inch sanitary sewer main to serve its development. The Developer will bid at least 1000 feet of 8" sanitary sewer main to establish a base from which to determine the oversize 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 oversize mains will also be based on the average cost for those mains from all the bids received. A percentage which represents the City's oversize portion of each main will be established based on the average bid for the 8" main and the average bid for the line actually constructed. Using this percentage, the City will reimburse the Developer per the terms of Paragraph 5.

4. The City agrees to pay the oversize costs for the sanitary sewer mains contemplated in this Agreement. 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 sanitary sewer 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 sanitary sewer mains contemplated in this Agreement have been formally accepted by the City. Within forty-five (45) days of the sanitary sewer 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" sanitary sewer 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 \$720,000, without prior written authorization from the City. An estimated oversize cost amount has been identified in Exhibit B for each sanitary sewer line. The actual amount of oversize payments allocated between the various sewer mains may vary from that shown in Exhibit B, 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.

5. 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.

6. It is the City's intent to establish connection fees to recoup any of the funds expended by the City in constructing the oversize sanitary sewer mains which are not otherwise being reimbursed through TID #66. The City has also agreed to establish connection fees and pay them to the Developer for any sanitary sewer lines built by the Developer, outside the boundaries of its development, for which the Developer is otherwise not being reimbursed through TID #66. These connection fees will be established per the City's standard procedure for imposing such fees. 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.

7. The parties' obligations under this Agreement are contingent upon full performance of their respective obligations contained in the water 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 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.

8. Upon completion of the sanitary sewer mains and their acceptance by the City, the sanitary sewer mains shall belong to the City and any future maintenance and needed expansion shall be the responsibility of the City.

9. 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.

10. 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.

11. 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 for Design and Construction of a Public Water Main, 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.

12. 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.

13. 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 himself 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

