

AGREEMENT FOR PUBLIC IMPROVEMENTS

THIS AGREEMENT FOR PUBLIC IMPROVEMENTS (the “Agreement”) is made and entered into this ___ day of _____, 20__ by and between the CITY OF RAPID CITY, , a municipal corporation of the State of South Dakota whose address is 300 Sixth Street, Rapid City, South Dakota 57701 (the “City”), and **{INSERT COMPANY OR DEVELOPER NAME, ADDRESS AND ENTITY TYPE (E.G., SOUTH DAKOTA CORPORATION, DELAWARE LIMITED LIABILITY COMPANY, ETC) HERE}** (hereinafter, “Developer” or “Owner”).

WHEREAS, the Developer owns certain real property within the City generally located at **{address}** and more specifically described in **Exhibit A** attached hereto and incorporated herein by this reference, also known as **{Subdivision Name}** (the “Property”);

WHEREAS, the Developer intends to subdivide and/or develop the Property, the effect of which will directly impact and generate the need for on-site and off-site improvements;

WHEREAS, the Developer acknowledges that the public infrastructure improvements (also referred to as the “Improvements”) required herein are reasonably attributable to the special impacts that will be generated by the proposed uses of the Property and that the terms and conditions set forth in this agreement are reasonable, necessary and appropriate; and

WHEREAS, the City has the authority to regulate the subdivision of land within its jurisdiction pursuant to SDCL 11-6-27; and

WHEREAS, pursuant to its statutorily authorized authority, the City has enacted ordinances which require the Developer to construct and/or install certain Improvements necessitated by subdivision and/or development of the Property.

NOW THEREFORE, in consideration of the mutual covenants and agreements contained herein, the parties hereby agree as follows:

I. IMPROVEMENTS REQUIRED

A. The Developer shall provide for the construction/installation of the Improvements or other performance requirements set forth in Exhibit B as follows:

1. Exhibit B, attached hereto and incorporated herein by this reference, contains all required Improvements related to the proposed subdivision covered by this agreement.
2. Exhibit B includes a description of Improvements and a schedule of the estimated costs of the Improvements to be accepted by the City.
3. Exhibit B provides for surety estimates only and shall not be used to establish construction standards or specifications. If there is a conflict between Exhibit B and the construction plans approved by the City, the approved plans shall govern.

Return Original Document to: City of Rapid City
300 6th St.
Rapid City, SD 57701

B. The Developer shall, at its sole expense, design, construct and install the Improvements for initial acceptance as provided in Section V herein (“Initial Acceptance”) and shall repair the Improvements as necessary until final acceptance by the City as provided in Section VI herein (“Final Acceptance”).

C. Engineering Construction Plans for public right-of way and/or or public improvements must be approved by the City prior to construction, or installation of the Improvements.

D. If the City is required to use the Infrastructure Security or the Infrastructure Warranty to construct any of the Improvements contemplated by this agreement, it is understood by the parties that the surety can be used to cover any additional engineering, surveying, testing or other professional services costs necessarily incurred in completing the Improvements.

II. CONSTRUCTION PHASING

A developer may divide the required Improvements contemplated by this agreement into three (3) construction phases. Phasing of the Improvements shall be permitted subject to the terms and conditions of this agreement. The Developer shall identify the phasing of the Improvements in Exhibit C, attached hereto and incorporated herein by this reference. The Developer, at its discretion, may modify the sequence of the phase of construction if approved administratively by the City Engineer.

III. SECURITY FOR CONSTRUCTION/INSTALLATION OF IMPROVEMENTS

A. Prior to filing of a final plat, the Developer shall provide to the City cash-in-lieu of bond, an irrevocable letter of credit, or a performance surety bond payable to the City to secure completion of the Improvements contemplated by this agreement (the “Infrastructure Security”). The Developer shall not be required to post the Infrastructure Security required by this section for any Improvements which have been completed and for which Initial Acceptance by the City has been obtained. Upon completion and Initial Acceptance of any phase, the Developer may provide the City with an updated cost estimate of the remaining improvements and have its surety reduced to reflect the value of the outstanding Improvements. If the Developer is providing cash-in-lieu or a irrevocable letter of credit, the amount of the surety shall be equal to one hundred fifteen percent (115%) of the estimated cost of the Improvements. A bond or letter of credit shall be valid until Initial Acceptance. The Developer shall obtain Initial Acceptance of the improvements contemplated in this agreement at least six (6) months before the expiration of any instrument provided under this section. If the Developer fails to do so, the City may draw on the instrument and complete the improvements or may require that the Developer extend the expiration date of the original surety or provide a new surety to replace the original instrument. If a letter of credit is provided, it shall be drawn on a local South Dakota institution, or if issued by an out of state financial institution, one that has been approved by the City Attorney’s Office.

B. Upon issuance of the letter of Initial Acceptance described in Section V(D), the City shall release the Infrastructure Security so long as all releases of any mechanic’s liens have

been filed with respect to the project and an acceptable Warranty Security as provided in Section IV of this agreement has been executed and delivered to the City.

C. Developer Default.

1. In the event Developer fails to obtain Initial Acceptance within the time frame outlined in this agreement, subject to any timeframe adjustments agreed upon by the City and the Developer, the City may use the Infrastructure Security and apply such funds to completion of the Improvements.

2. In the event of a default, the City will provide the Developer written notice of such default at its last known address by first class mail. The Developer shall have ninety (90) days from the written notice of default to cure such default.

3. The City shall refund any Infrastructure Security not applied to completion of the Improvements within 60 days of accepting the Improvements constructed with the Infrastructure Security. Any remaining funds will be returned to the bank or surety, or in the case of cash in lieu of a surety, to the Developer.

4. The method and manner in which the City elects to construct or install the Improvements shall be consistent with the plans previously approved by the City; provided, that nothing herein shall obligate the City to install or complete the Improvements and nothing herein shall prevent, prohibit or limit the remedies available to the City to enforce the obligations of this agreement.

IV. WARRANTY

A. Developer hereby warrants the Improvements to be constructed pursuant to this agreement will be free from defects, including, but not limited to, defects of materials, workmanship and design and that the Improvements otherwise fully comply with all applicable City standards and specifications per the approved plans. The warranty period begins to run at Initial Acceptance of the Improvements per Section V(D) of this agreement.

B. Prior to Initial Acceptance of the Improvements, Developer shall execute and deliver to the City a warranty performance guarantee equal to ten percent (10%) of the total estimated cost of the Improvements (the "Infrastructure Warranty"). The City agrees to work with the Developer to either reduce, or convert the Infrastructure Security to cover the Warranty Period if the Developer so desires.

C. The Infrastructure Warranty shall be in the form of an irrevocable letter of credit, warranty bond or cash escrow and shall provide security for costs that may be incurred in repairing or replacing the respective Improvements for twenty-four (24) months from the date of issuance of the letter of Initial Acceptance (the "Warranty Period").

1. Any entity issuing a warranty bond shall have at least an "A" rating from Moody's, or an equivalent rating as designated by a nationally recognized ratings firm, and shall be included in the most recent listing of companies holding Certificates of

Authority as Acceptable sureties on Federal Bonds and as Acceptable Reinsuring Companies, Department of Treasury, Circular 570.

2. If a letter of credit is provided, it shall be drawn on a local South Dakota institution, or if issued by an out of state financial institution, one that has been approved by the City Attorney's Office.

D. In the event any substantial repair or replacement is required to any of the Improvements during the Warranty Period and such repair or replacement is not timely made upon notice of defect, or in any event before the expiration of the Warranty Period, the City Engineer may elect to exercise one or more of the options listed below:

1. Extend the Warranty Period of any Improvement(s) which have been repaired or replaced for up to an additional one (1) year after acceptance of the completed repair or replacement and require the Developer to extend the term of the appropriate Warranty Security;

2. Call the appropriate Warranty and secure repair or replacement of the non-conforming Improvements.

V. INITIAL ACCEPTANCE

Initial Acceptance of Improvements.

A. In order to obtain Initial Acceptance of Improvements for a phase or an entire project, Developer shall submit to the City a request for Initial Acceptance of Improvements on a form provided by the City and one (1) copy of "as built" drawings. A developer may divide the required Improvements contemplated by this agreement into three (3) phases. The phases will be identified pursuant to Section II of this agreement. The Developer may obtain Initial Acceptance of each phase as it is completed. Upon Initial Acceptance of a phase, the warranty period for the Improvements constructed in that phase will begin to run.

B. Within fifteen (15) business days of receipt of a request for Initial Acceptance, the City shall review the "as built" drawings and shall either approve the drawings or return the drawings to the Developer with comments.

1. In the event the "as built" drawings are returned to Developer with comments, the Developer shall resubmit "as built" drawings to the City incorporating the revisions contained in the comments.

2. Once the "as built" drawings are approved, Developer shall submit to the City "certified as built" drawings and electronic AutoCAD files.

C. Within fifteen (15) business days of receipt of a request for Initial Acceptance of Improvements, the City shall inspect the Improvements.

1. During, or subsequent to, inspection of the Improvements, the City shall generate a written "punch list" of items requiring correction, repair or replacement in

compliance with all applicable ordinances and standards of the City. The City shall generate and return the written “punch list” to the Developer within five (5) business days after the inspection.

2. In the event Developer fails to correct, repair or replace the punch list items within thirty (30) days of the date of the punch list, the City shall not grant Initial Acceptance, but shall instead conduct a subsequent inspection of the Improvements and generate a revised punch list based on the items identified in the original punch list until all punch list items have been corrected, repaired or replaced to the satisfaction of the City. If the Developer fails to complete the punch list repairs in a reasonable time, the City may draw on the Infrastructure Security in Section III of this agreement and complete the items identified on the punch list.

3. The City Engineer may authorize the Initial Acceptance of the Improvements if they find the Improvements to be substantially complete. This provision is meant to allow for Initial Acceptance to be granted when only a few minor items from the punch list remain to be completed. The remaining Improvements will be completed within a timeframe agreed to by the City Engineer and the Developer. Any remaining Improvements will be covered by the warranty surety and the City may use the warranty surety to complete the improvements if the Developer fails to do so within the timeframes agreed to, or any reasonable extensions thereof.

D. Upon a finding of satisfactory completion of the Improvements in compliance herewith and with all applicable ordinances and standards of the City, and upon execution and delivery to the City of the Infrastructure Warranty, the City shall grant Initial Acceptance of the Improvements via certified letter to the Developer, the date of which shall constitute the date of commencement of the Warranty Period for the Improvements as identified in Section III(C).

E. Building permits may be issued prior to Initial Acceptance if Infrastructure Security has been issued and all required fire hydrants, water for fire suppression, and reasonable emergency access to the lots on which building permits are requested are satisfactory as determined by the City

VI. FINAL ACCEPTANCE OF IMPROVEMENTS

A. Procedure for Final Acceptance. Not earlier than ninety (90) days or later than sixty (60) days prior to the date of expiration of a Warranty Period for any phase, The City will initiate a final inspection. The City will make reasonable attempts to notify the Developer of the date and time of the final inspection and will allow the Developer, or its representative, to observe the inspection.

1. After the final inspection has been completed, the City shall generate a written “punch list” of items requiring correction, repair or replacement in compliance with all applicable ordinances and standards of the City. If there are no items in need of correction, repair or replacement, the City shall issue the Letter of Completion and Final Acceptance pursuant to paragraph 4 of this section. The City shall send the Developer the

“punch list” or Letter of Completion and Final Acceptance within ten (10) business days of completing the final inspection.

2. In the event repairs are needed and the Developer fails to correct, repair or replace the punch list items within thirty (30) days of the date of the punch list, the City shall not grant Final Acceptance, but shall instead conduct a subsequent inspection of the Improvements and generate a revised punch list based on the items identified in the original punch list until all punch list items have been corrected, repaired or replaced to the satisfaction of the City. If the Developer fails to complete the punch list repairs in a reasonable time, the City may draw on the Warranty Security in Section IV of this agreement and complete the items identified on the punch list.

3. If the Improvements subject to the inspection request fully conform to this agreement and the City’s applicable standards and specifications, and/or all repairs or replacements, if any are needed, have been made to bring the Improvements into conformance, the City shall issue to the Developer via certified letter, a Letter of Completion and Final Acceptance.

4. Subject to the provisions of this agreement, the City shall release the Warranty only after Final Acceptance of the Improvements related thereto. The expiration or failure of any surety and or other security provided to secure the Improvements contemplated herein shall not release or excuse the Developer from performing the obligations contained herein.

C. Developer’s failure to obtain Final Acceptance of Improvements prior to expiration of the Warranty Period related thereto shall constitute a breach of this agreement, and the City may exercise its rights to secure performance as provided in Section XIII(B) of the agreement.

D. Nothing herein shall be construed or deemed as requiring the City to finally accept and release from Warranty any Improvements that are defective or damaged with the exception of normal wear and tear as identified by the City Engineer.

VII. DEVELOPMENT STANDARDS AND PROCEDURES

A. Engineering Services. Developer shall procure at its sole expense all engineering and landscaping services necessary and appropriate in conjunction with the development of the Property, which services shall fully conform to the City’s applicable ordinances, standards and specifications. Professional services shall be performed by engineers, surveyors, architects or other professionals duly licensed by the State of South Dakota as may be appropriate.

B. Review. All applicable plans shall be reviewed by the City for conformance to the City’s ordinances, regulations and design standards. No construction of any Improvements shall occur without prior plan approval.

C. Right-of-Way Permit. Prior to commencing construction of the Improvements, Developer shall obtain all required Right-of-Way permits, pay all fees related thereto and pay any associated City fees as required.

D. Testing. Developer shall employ at its sole expense a professional qualified, independent testing company to perform all testing of materials or construction that may reasonably be required by the City to ensure compliance with City standards and specifications. Developer shall furnish the City with certified copies of test results and shall release and authorize full access to the City and its designated representatives to all work-up materials, procedures and documents used in preparing test results.

E. Inspection. During construction of the Improvements and until Final Acceptance, Developer shall request and coordinate with the City all inspections thereof. The City will provide to the Developer or its representative a list of the required inspections. The City will have two (2) business days in which to conduct an inspection when requested. Upon completion of the required inspection, the City will provide the Developer or their representative a notification verifying that the inspection was completed. If the Developer does not request a required inspection, the City shall have the right to require the Developer to remove and replace any Improvements which were installed without the required inspection. The Developer shall reasonably cooperate and assist the City to gain access to the areas designated for inspection. The Developer shall also notify the City upon discovery that any Improvements were not installed, or constructed in conformance with the approved plans, or the City's standards and specifications. Inspection and acceptance of work by the City shall not relieve Developer of any responsibility under this agreement.

F. Erosion Control. All work associated with the installation or construction of the Improvements shall conform to the City's requirements for erosion control and the approved erosion and sediment control drawings associated with the Property.

1. Developer shall, at its own expense, keep on-site and adjacent streets and rights-of-way used as construction routes clean of mud, rocks and debris at all times during construction.

2. Within twenty-four (24) hours of verbal notification by the City of non-compliance with this subsection F, Developer shall commence clean-up operations and diligently pursue completion of such clean-up operations to the satisfaction of the City.

3. If Developer fails to respond within 24 hours, the City is unable to contact Developer after reasonable effort or Developer fails to diligently pursue clean-up operations to the satisfaction of the City, the City may take corrective action to clear the affected streets and rights-of-way and invoice Developer at the City's prevailing rate for which Developer shall be liable for prompt payment.

VIII. CONTRACTORS, SUBS AND SUPPLIERS; PAYMENT, REMOVAL OF LIENS

A. Developer shall ensure that all contractors and/or subcontractors employed by Developer are licensed by the City before any work on the Improvements is commenced.

B. Developer shall at all times promptly make payments of all amounts due to persons supplying labor, materials or services in connection with the Improvements and to any persons who may otherwise be entitled to assert a lien upon the Property. Developer shall

indemnify and defend the City with respect to any such lien and, regardless of the merits of the lien, shall immediately take any and all steps necessary to remove the lien from the Property.

IX. NON-LIABILITY

Developer acknowledges that the City's review and approval of plans for the development of the Property is done in furtherance of the general public health, safety and welfare and that no specific relationship with, or duty of care to, Developer or third parties is assumed by such review approval or immunity waived.

X. INDEMNIFICATION

Developer agrees to indemnify and hold harmless the City and its officers and employees from and against all liability, claims, demands and expenses, including court costs and attorney fees, on account of any injury, loss or damage, which arise out of or are in any manner connected with the work to be performed under this agreement if such injury, loss or damage is caused in whole or in part by the negligent act or omission, error, professional error, mistake, accident or other fault of Developer, any Subcontractor of Developer or any officer, employee or agent of Developer. The obligations of this Section shall not apply to the extent the City becomes liable by final judgment to pay a third party as the result of the negligent act or omission, error, professional error, mistake, accident or other fault of the City.

XI. INSURANCE

A. Coverages. The Developer agrees to provide the City with a certificate of insurance showing that the Developer has the following coverages:

1. Workers' Compensation Insurance as required by South Dakota state statute and all other insurance required by any applicable law.
2. Commercial General or Business Liability Insurance with minimum combined single limits of One Million Dollars (\$1,000,000.00) for each occurrence and Two Million Dollars (\$2,000,000.00) general aggregate.
3. Automobile Liability Insurance with minimum combined single limits for bodily injury and property damage of not less than One Million Dollars (\$1,000,000.00) for any one occurrence, with respect to each of Developer's owned, hired or non-owned vehicles assigned to or used in connection with this agreement.

The certificate shall be subject to review and approval by the City prior to commencement of any services under this agreement. The City shall review the Certificate within ten (10) working days of receipt. The certificate shall identify the City as an additional insured pursuant to this agreement. The completed certificate shall be sent to:

Public Works Department
300 Sixth Street
Rapid City, SD 57701

B. Self-Insurance. Evidence of qualified self-insured status may be substituted for one or more of the foregoing insurance coverages if first approved by the City.

C. Requirements. If not self-insured per paragraph XI(B). above, Developer shall at a minimum procure and maintain the insurance coverages listed herein. Such coverages shall be procured and maintained with forms and insurers acceptable to the City. All coverages shall be continuously maintained to cover all liability, claims, demands and other obligations assumed by Developer pursuant to retroactive dates. Coverage for extended reporting periods shall be procured to maintain such continuous coverage.

D. Failure to Obtain Insurance Constitutes Breach. Developer's failure to procure or maintain policies providing the required coverages, conditions and minimum limits shall constitute a breach of this agreement and, if said breach is not cured within ten (10) business days of written notice by the City to Developer, the City may immediately terminate this agreement, or at its discretion, the City may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the City shall be repaid by Developer to the City upon demand, or the City may offset the cost of the premiums against any monies due to Developer from the City.

E. Certified Copies. The City reserves the right to request and receive a certified copy of any policy and any endorsement thereto. Developer agrees to execute any and all documents necessary to allow the City access to any and all insurance policies and endorsements pertaining to this agreement.

XII. FEES AND CHARGES

Fees and charges shall be assessed pursuant to the provisions of the Rapid City Municipal Code and/or any fee resolutions properly adopted by the City Council at the time this agreement was entered into.

XIII. MISCELLANEOUS PROVISIONS

A. Governing Law and Venue. This agreement shall be governed by the laws of the State of South Dakota, and venue shall be in the Circuit Court for the Seventh Judicial Circuit, County of Pennington, State of South Dakota. The parties hereto agree and acknowledge that this agreement may be enforced at law or in equity.

B. Breach or Default.

1. In the event Developer should fail to timely comply with any of the terms, conditions, covenants and undertakings hereof and such non-compliance is not cured and brought into compliance within the time frames specified in this agreement, or within thirty (30) days of written notice of breach to Developer by the City in cases where no time frame is specified, the City may exercise its rights to the Infrastructure or Warranty Security provided for in this agreement to cure the breach. The City Engineer may provide a longer cure period at the request of the Developer.

2. Notice by the City to Developer shall specify the conditions of default. The Developer's cure period shall begin to run upon being notified by the City of the breach and/or default.

3. Nothing hereunder shall be construed to limit the City from pursuing any other remedy at law or in equity that may be appropriate under the City Code, applicable laws and the legal standards of the State of South Dakota or United States before any court of competent jurisdiction. Such remedies shall be cumulative.

C. Governmental Immunity Act. No term or condition of this agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections or other provisions of South Dakota State Statutes.

D. Title and Authority. Developer warrants to the City that it is the record owner of the Property, or acting in accordance with a valid and unrevoked power of attorney of the record owner which has been attached hereto. Each individual executing this agreement covenants and warrants that he or she is fully authorized to execute this agreement on behalf of the party he or she represents.

E. No Waiver. The failure of the City to take timely action with respect to the breach of any term, covenant or condition hereof shall not be deemed to be a waiver of such performance by Developer, or a waiver of any subsequent breach of the same, or any other term, covenant, or condition herein contained.

F. Binding Effect. This agreement shall be binding on the parties hereto and their respective heirs, successors and assigns. If the Developer sells, or otherwise transfers ownership of the development contemplated by this agreement to another party, the Developer must inform the City and an assignment of this agreement must be executed by the City, the Developer and the purchaser. Until a written assignment of this Agreement is executed by the parties, the Developer shall remain responsible for all of the promises and obligations contained in this Agreement. This agreement shall remain in full force and effect until all applicable provisions herein have been fulfilled. The Developer acknowledges that but for the promises made herein, the City would not approve the subdivision contemplated herein. The Developer further acknowledges that the City's approval of the proposed subdivision is good and sufficient consideration for the promises it has made herein.

G. Entire Agreement. This agreement shall constitute the entire agreement between the parties with regard to the subject matter herein. No subsequent amendment shall be valid unless made in writing and executed by the parties hereto.

H. Notice. Any notice that may be given under the terms of this agreement shall be made in writing and shall be deemed made upon personal service or upon mailing by United States Mail, postage prepaid, to the other party, unless amended by written notice, as follows:

DEVELOPER:
{Responsible Individual's Name}
{Developer's Company Name}
{Address}
{City, State Zip Code}
{Phone Number}

CITY:
Director of Public Works
City of Rapid City
300 Sixth Street
Rapid City, SD 57701
(605)

I. Severability. To the extent that this agreement may be executed and performance of the obligations of the parties may be accomplished within the intent of this agreement, the terms of this agreement are severable, and should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof.

J. No Third-Party Beneficiaries. It is expressly understood and agreed that enforcement of the terms and conditions of this agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the City and Developer, and nothing contained in this agreement shall give or allow any such claim to right of action by any other third person on such agreement. It is the expressed intention of the City and the Developer that no person other than the City or Developer receiving services or benefits under this agreement shall be deemed a beneficiary hereof.

K. No Partnership or Agency. Notwithstanding any language in this agreement or any representation or warranty to the contrary, neither the City nor Developer shall be deemed or constitute a partner, joint venturer or agent of the other. Any actions taken by the parties pursuant to this agreement shall be deemed actions as an independent contractor of the other.

IN WITNESS WHEREOF, and agreeing to be fully bound by the terms of this agreement, the parties have executed this Agreement as of the date first written above.

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EXHIBIT A

Property Legal Description

EXHIBIT B

Summary of Public Infrastructure Improvements and schedule of estimated costs.

EXHIBIT C

Phasing Diagram (If applicable)