

CONTRACT FOR CONSTRUCTION OF PUBLIC IMPROVEMENTS THROUGH
PRIVATE DEVELOPER
TAX INCREMENT DISTRICT NUMBER SEVENTY

Between

ALTA TERRA DEVELOPMENT, LLC

and the

CITY OF RAPID CITY, SOUTH DAKOTA

THIS AGREEMENT, is made and entered into on this ____ day of _____, 2013, by and between Alta Terra Development, LLC, a South Dakota limited liability company located at 601 West Boulevard, Rapid City SD 57701-2643, herein after referred to as the “Developer,” and the City of Rapid City, a municipal corporation and political subdivision of the State of South Dakota, located at 300 Sixth Street, Rapid City, South Dakota 57701, herein after referred to as the “City.”

RECITALS

WHEREAS, pursuant to the power and authority granted to it under Chapter 11-9 of the South Dakota Codified Laws, the City created Tax Increment District Number Seventy by resolution on September 15, 2008.

WHEREAS, on February 6, 2012, the City adopted by resolution a Project Plan for Tax Increment District Number Seventy which identifies expenditures for public improvements which qualify as project costs pursuant to SDCL 11-9-14 and SDCL 11-9-15.

WHEREAS, the purpose of this agreement is to establish under what conditions the Developer can be reimbursed from the proceeds of the tax increment district for the cost of the improvements which are included in the Project Plan. It further establishes the procedures by which the Developer may assign its right to any proceeds from the district in order to secure private financing for the project improvements. Pursuant to SDCL 11-9-2(5), the City is empowered to enter into contracts or agreements necessary and convenient to implement the provisions and effectuate the purposes of the Project Plan.

NOW THEREFORE, the parties hereby agree as follows:

SECTION 1. The estimated project costs for which the Developer can be reimbursed from Tax Increment District Number Seventy, as set forth in the approved Project Plan, are as follows:

TOTAL ESTIMATED PROJECT COSTS TO BE PAID BY THE DEVELOPER:

Capital Costs:

12” Sanitary Sewer Main	\$	264,000.00
Grading	\$	1,000,000.00
Salvage and Place Top Soil	\$	137,500.00
Mobilization	\$	20,000.00
Sewer Manholes	\$	63,200.00
Turn Lanes at Moon Meadows Drive	\$	200,000.00
Traffic Signal	\$	250,000.00
Water Main at Hwy 16 Crossing	\$	100,000.00
Moon Meadows Drive	\$	792,000.00

Professional Costs:

Surveying	\$	20,000.00
Testing	\$	10,000.00
Engineering	\$	178,920.00
Financing Costs:		
Financing Interest	\$	3,071,346.30
Contingency Costs:	\$	212,493.00
Relocation Costs:	\$	0
Organizational Costs:	\$	0
Necessary and Convenient Costs:	\$	<u>91,069.00</u>
 Total	\$	 6,410,528.30
Imputed Administrative Costs*		
City of Rapid City	\$	22,000.00

*The imputed administrative costs are interest-free, are not included in the total project costs, and are to be paid from the balance remaining in the Tax Increment District #70 fund available to the City Finance Officer beginning on September 1, 2013. The Finance Officer may withdraw monies from the fund until such time as this fee is paid in full.

The parties agree that Developer may seek to revise the Project Plan to reallocate the project costs without increasing the total project costs of \$6,410,528.30.

The parties agree that Developer can only seek reimbursement for improvements made within the geographical boundaries of Tax Increment District Seventy. The parties agree that any improvements made outside of the boundaries of Tax Increment District Seventy are not reimbursable from the Tax Increment District Seventy Fund, and Developer agrees that it will not seek reimbursement from City for any such improvements made outside of the district.

SECTION 2. The cost of constructing the improvements contained in Section 1 of this agreement is the responsibility of the Developer, and Developer agrees to construct the improvements described in Section 1. The Developer acknowledges that these improvements must be started or under contract for construction within 5 years of the approval of this tax increment district (i.e. by September 15, 2013) in order to be eligible for reimbursement under this Agreement.

The parties agree that the Project Costs in Section 1 include constructing approximately 6,600 lineal feet of 12” Sanitary Sewer Main between Catron Boulevard and Moon Meadows Drive. Developer agrees to construct this sanitary sewer main as described in Section 1 and in the submittal documents. If any such improvements made are outside of the boundaries of Tax Increment District Seventy, Developer agrees not to seek reimbursement for such costs from the Tax Increment District #70 fund.

The parties agree that the Project Costs in Section 1 include alterations to the intersection of U.S. Highway 16 at Moon Meadows Drive that are regional improvements. Developer agrees to construct these alterations in accordance with South Dakota Department of Transportation requirements, the findings of a traffic impact analysis, and City specifications which are inside the boundaries of Tax Increment District Seventy. Regional alterations that are reimbursable under this agreement include, but are not limited to, the construction of one new east bound turn lane on U.S. Highway 16; construction of one new west bound turn lane on U.S. Highway 16; construction of paved medians between the through lanes and the turn lanes; modification of storm sewer utilities; and performance of necessary grading, removals, striping, etc.

The parties agree that the Project Costs in Section 1 include a traffic signal at South U.S. Highway 16 and Moon Meadows Drive. Developer agrees that, if the traffic signal is warranted at this intersection based upon traffic studies, Developer will purchase all necessary equipment and install the traffic light as part of its improvements. If the traffic signal is not warranted by area traffic studies at the time the improvements are made, Developer agrees to purchase all necessary equipment for the traffic signal, to install all components at the intersection that can be installed in advance to prepare the intersection for the traffic signal, and to deliver to the City any remaining traffic signal equipment for City to store until the signal is warranted.

The parties agree that the Project Costs in Section 1 include construction of a water main at the intersection of U.S. Highway 16 and Moon Meadows Drive. Developer agrees to install a sixteen inch water main that crosses U.S. Highway 16 and to extend the water main to the east along Moon Meadows Drive.

The parties agree that the Project Costs in Section 1 include the construction of Moon Meadows Drive and the construction and relocation/vacation of the western portion of Sammis Trail. As part of these improvements, Developer agrees to connect Moon Meadows Drive to Sammis Trail as part of the elimination of the Sammis Trail / Highway 16 intersection, in favor of a Moon Meadows Drive / Highway 16 intersection provided in City's Major Street Plan. Developer agrees that the access from Highway 16 to the existing Sammis Trail east of Highway 16 will be equivalent to or better than the existing Sammis Trail in substance and nature, and that such access will be in accordance with City specifications regarding that sort of roads.

The parties acknowledge that the City will reimburse the Developer from the tax increment funds upon the Developer certifying to the Finance Office the amounts actually paid for these improvements. The parties agree that no reimbursement will exceed the specific costs listed in the Project Plan and in Section 1 of this Agreement without the consent of the parties. The Developer may certify those project costs listed under Phase I in the Project Plan upon these improvements being completed. Phase I improvements include but are not limited to the 12" Sanitary Sewer Main (\$264,000), Grading (\$1,000,000), Salvage and Place Top Soil (\$137,500), and Sewer Manholes (\$63,200) as well as associated mobilization, professional, financing, and other costs.

The Developer may certify those project costs listed under Phase II in the Project Plan upon these improvements being completed. Phase II improvements include but are not limited to Turn Lanes on U.S. Highway 16 (\$200,000), Traffic Signal at U.S. Highway 16 and Moon Meadows Drive (\$250,000), Water Main Crossing at U.S. Highway 16 (\$100,000), and Moon Meadows Drive construction (\$792,000), as well as associated mobilization, professional, financing, and other costs.

SECTION 3. The base value of the property located in Tax Increment District Number Seventy has been certified by the South Dakota Department of Revenue as Twenty-Two Million, Eight Hundred Ninety-Four Thousand, Four Hundred Dollars (\$22,894,400).

SECTION 4. The Developer may secure private financing to fund the improvements contemplated in the approved Tax Increment District Number Seventy Project Plan. The City will only reimburse the Developer for the amount of interest actually paid to a financial institution providing funding for the public improvements contained in the Project Plan. If the Developer obtains private financing, the interest rate shall not exceed nine (9%) percent per annum during the life of the loan. At no time shall the actual interest paid exceed the maximum amount of financing interest identified in Section 1 of this agreement and the Project Plan. Prior to approval of this agreement, the Developer shall provide to the City Finance Office a Tax Increment Financing proposal from a prospective lender of its choosing which shall address these loan terms and conditions:

1. Fixed or variable interest rate, if variable state frequency of pricing adjustments
2. Interest rate index
3. Interest rate spread over/under index, if any
4. Loan term
5. Collateral
6. Guaranty requirements from the developer
7. All identity of interests between developer and lender

The City Finance Officer will review and analyze the proposed financing terms and forward a recommendation for approval or disapproval to the City Council along with this Agreement. If the City Finance Officer concludes that the proposal is not competitive with current market conditions or is otherwise unsatisfactory, a report detailing the deficiencies shall also be forwarded to the City Council. The Developer will also be required to submit this information and have the Finance Officer review and make a recommendation to the City Council prior to approval of any request for refinancing. The City further reserves the right to require the refinancing of any existing tax increment finance loan utilizing whatever means the City decides most beneficial to the taxpayers, including the issuance of revenue or other bonds, at any time during the term of this Agreement. This shall include the City's right to require the Developer to assign and/or reassign the Tax Increment Finance loan to the City or any other entity designated by the City. If the City chooses to finance or refinance the Tax Increment Finance loan the City will be eligible for reimbursement from the Tax Increment District Seventy fund of any project or financing costs it actually incurs.

SECTION 5. Developer shall complete the improvements described in the approved Project Plan and consistent with the costs in Section 1. Upon completion of the improvements the Developer shall certify to the City Finance Officer that such improvements have been completed and shall certify the amount of money disbursed therefore. The Developer shall provide sufficient documentation to certify that the terms of Section 9 of this Agreement are complied with. The City shall have the right to require reasonable documentation to establish that the amounts set forth in the Tax Increment District Number Seventy Project Plan have, in fact, been disbursed for the costs contemplated in the Project Plan and that state bid law has been complied with. Submission of the final costs certification shall be made to the Finance Office no later than 120 days after acceptance of the final project within the phase and receipt of warranty surety, if required.

On an annual basis accumulated amounts in the Tax Increment Number Seventy Fund may be released to pay Developer's accrued financing costs. Any such request by Developer shall be accompanied by documentation that any financing on which interest accrued was received by Developer for work within the scope of the Project Plan and this agreement, and the City shall have the right to require reasonable documentation that financing costs for which Developer seeks disbursement under this paragraph are directly tied to work within Project Plan. The Developer shall also provide sufficient documentation to certify that the terms of Section 9 of this Agreement are complied with. At the end of any phase of the project, if City determines that Developer is not entitled to disbursement from Tax Increment District Number Seventy for amounts disbursed under this paragraph, such as if the work is not completed or if Developer fails to comply with state bid laws, Developer shall reimburse City for all such amounts paid in error.

SECTION 6. All positive tax increment payments for Tax Increment District Number Seventy shall, upon receipt by the City, be deposited in a special fund to be known as the "Tax Increment District Number Seventy Fund," hereinafter referred to as the "Fund." Subject to Sections 2, 5, 8 and 9 of this Agreement and the limitation that at no time shall the cumulative total of payments made from the fund exceed the lesser of the total amount of disbursements certified pursuant to Section 5 of this Agreement or the total of the estimated project costs set forth in Section 1 of this Agreement and the Tax Increment District Number Seventy Project Plan as well as any other limitations contained herein, the City shall, within thirty (30) days after the receipt of each tax increment payment from the Treasurer of Pennington County, disburse the total amount in the Fund to the Developer or their designee.

SECTION 7. It is contemplated by the parties that the Developer may assign its interest under this Agreement as security for the note or loan agreement, or other financing described in Section 4 hereof. It is understood and agreed, by and between the parties, that any such assignment shall be in writing and that if the City shall make disbursement pursuant to such assignment that it shall, to the extent of such disbursement, relieve the City of the obligations to make such disbursement to Developer. Any assignee shall agree to be bound by the terms and conditions contained in this Agreement. The City shall have the right to refuse any subsequent assignment if it will result in an increase in

the amount of interest being paid to a financial institution, even if the interest rate being charged by the new lender complies with the terms of Section 4.

SECTION 8. It is specifically a condition of this Agreement and a condition of the City's obligation to pay, that all sums payable shall be limited to the proceeds of the positive tax increment from Tax Increment District Number Seventy received into the "Fund" specified in Section 6 hereof. The obligation of the City to pay pursuant to this Agreement does not constitute a general indebtedness of the City or a charge against the City's general taxing power. The provisions of SDCL 11-9-36 are specifically incorporated herein by reference. It is also specifically agreed that the City has made no representation that the proceeds from such fund shall be sufficient to retire the indebtedness incurred by Developer under Sections 4 and 7 hereof. The parties further acknowledge that SDCL 11-9-25 limits the duration of allocability of the positive tax increment payments to the fund created by Section 6 hereof. The provisions of SDCL 11-9-25 are specifically incorporated herein by this reference.

SECTION 9. Selection of contractors for the construction of the public improvements described in Section 1 shall comply with all provisions of South Dakota law regarding the expenditure of public funds contained in Chapters 5-18A through 5-18D of the South Dakota Codified Laws. Upon a request by the City, the Developer shall provide documentation demonstrating that it has complied with Chapters 5-18A through 5-18D.

SECTION 10. Developer agrees to defend, indemnify and hold harmless the City from obligations or liability, including reasonable attorney's fees, arising out of this Agreement or the construction of the improvements contemplated by the Tax Increment District Seventy Project Plan, other than the negligent acts of the City. The Developer shall maintain a policy of liability insurance, acceptable to the City, with liability limits of at least one million dollars (\$1,000,000.00) that names the City as an additional insured. Such a policy shall remain in effect until the City accepts the improvements.

SECTION 11. Developer agrees to promptly satisfy or bond over any and all mechanic's liens or material man's liens that arise as a result of this project. This provision shall not prevent Developer from subsequently seeking compensation from subcontractors or others who may be responsible for such liens or for such payment.

SECTION 12. The parties acknowledge that the public improvements contemplated in Section 1 of this Agreement could not feasibly be constructed without the creation of this tax increment district and the use of private financing being secured by the Developer. Accordingly, the mutual covenants and obligations hereunder shall constitute good and sufficient consideration for the execution and performance of this Agreement.

SECTION 13. This document, along with the Project Plan for Tax Increment District Seventy, constitutes the entire agreement of the parties with respect to the payment of funds from Tax Increment District Seventy. No other promises or consideration form a part of this Agreement. All prior discussions and negotiations are merged into these

documents or intentionally omitted. This Agreement may only be amended or modified in writing by mutual agreement of the parties.

SECTION 14. This Agreement is intended solely for the benefit of the parties hereto and shall not be enforceable by, or create any claim of right or right of action, in favor of any other party. Except as allowed under Sections 4 and 7 of this Agreement, the rights and obligations of the parties hereunder shall not be assigned or transferred by either party without the express written consent of the other. Subject to that restriction, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns and legal representatives.

SECTION 15. Failure of a party to insist upon adherence to any term of this Agreement on any occasion shall not be considered a waiver, or deprive that party of the right thereafter to insist upon adherence to that term, or any other term of this Agreement.

SECTION 16. If one or more provisions 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 Agreement if they can be given effect without the invalid section(s) or provisions.

SECTION 17. 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.

SECTION 19. This Agreement shall be construed and the parties' actions governed by the laws of the State of South Dakota. The Circuit Court of Pennington County shall be the sole venue for any disputes arising under this agreement.

Dated this ____ day of _____, 2013.

CITY OF RAPID CITY

Sam Kooiker, Mayor

ATTEST:

Finance Officer
(SEAL)

State of South Dakota)
 ss.

County of Pennington)

On this the _____ day of _____, 2013, before me, the undersigned officer, personally appeared Sam Kooiker and Pauline Sumption, 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 duly authorized to do so, executed the foregoing instrument for the purposes herein 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)

Dated this _____ day of _____, 2013.

ALTA TERRA DEVELOPMENT, LLC

By: _____

Its: _____

State of _____)

ss.

County of _____)

On this the ____ day of _____, 2013, before me, the undersigned officer personally appeared _____, who acknowledged himself to be the _____ of Alta Terra Development, LLC, 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, _____

My Commission Expires:

(SEAL)