

**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.**

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 large residential development known as Morningstar (the “Project”) on land generally located south of Highway 44 and immediately to the west of Reservoir Road; and

WHEREAS, the City currently has inadequate water infrastructure in this area to support the Project; and

WHEREAS, to be feasible, the Project will require the City to move forward with construction of a water reservoir and booster station; and

WHEREAS, the City has previously identified this area as the site of a future water reservoir; and

WHEREAS, the cost of constructing a water reservoir is normally a City expense; and

WHEREAS, if the City agrees to build the reservoir now, the Developer has offered to pay for the design of the water reservoir and booster station along with their supporting infrastructure, contribute to the cost of actually constructing the reservoir and booster station and donate the land on which they will be located; and

WHEREAS, the proposed reservoir and booster station will benefit water service in this area by providing a new water pressure zone resulting in stabilized water pressure and increased water volume which may benefit Rapid City Regional Airport, improved fire protection, and the ability of the City to provide water service to additional areas outside the Project boundaries; and

WHEREAS, the purpose of this Agreement is to enumerate the parties mutual rights and obligations with respect to the design and construction of the water reservoir and booster station.

NOW THEREFORE, in consideration of the mutual promises made herein the parties hereby agree as follows:

1. The Developer shall retain a professional engineering firm (the “Consultant”) to design a one and one-half to two million gallon water reservoir (actual size to be determined during

design), telemetry to allow integration with City's SCADA system and a booster station, based on design criteria and capacity requirements furnished by the City. The booster station shall be a non-skid mount type booster station. The reservoir and booster station shall be designed and constructed in accordance with the Scope of Services which has been attached hereto as Exhibit "A." The City's Public Works Dept. will perform preliminary reviews of drawings and specifications and have final approval of the construction drawings for these improvements. The Public Works Dept. will coordinate submitting the 11-6-19 review application to the City's Growth Management Dept with the Consultant.

2. The Developer will provide sufficient land on which to locate the water reservoir and the booster station and any other related appurtenant facilities in the form of a permanent utility easement or utility lot. Such easements, shall be in a form acceptable to the City Attorney's Office and will be provided to the City prior to the advertising of bids for construction of the public improvements contemplated in this Agreement. If the Developer is unable to acquire the land required under this paragraph, the parties are released from all of their respective obligations to be performed under this Agreement.

3. The Developer's Consultant will provide the City bid letting services, including but not necessarily limited to, preparation of bid documents for the City's review and approval and award recommendation once bids are received. The Consultant will provide recommendations to, and follow the directions given by the City's Public Works Dept. on all aspects of designing the water reservoir and booster station. Upon the preparation of the bid documents by the Consultant and acceptance of the documents by Public Works Staff, the project will be bid by the City. Per State bid law, the City Council shall be responsible for approving the City's bid authority and awarding the construction contract to the lowest responsible bidder. The City Council will also need to approve any payment requests and change orders. Preparation of payment requests and change orders will be the responsibility of the City.

4. The Developer shall contribute \$1,020,600 to construct the water reservoir and \$430,300 to construct the booster station. The Developer shall pay to design the reservoir and booster station. The Developer's estimated cost to design the reservoir is \$170,100 and the booster station \$80,000. The parties acknowledge the approved Project Plan for TID #66 identifies \$510,300 as the amount the Developer is eligible to be reimbursed out of the TID for constructing the booster station. No proceeds from the TID were allocated to designing the booster station. If the Developer wants to be reimbursed for the \$80,000 in booster station design costs, the Project Plan will need to be amended. The City has agreed to pay any construction costs over the amount contributed by the Developer up to \$1,000,000. The parties acknowledge \$1,000,000 is the entire amount the City currently has budgeted to contribute to the construction of these improvements. Should the bids for construction exceed \$2,450,900, the City will need to identify additional funds prior to awarding the contract for construction. The City may, but is under no obligation to provide additional funds. If the cost of construction is less than \$2,450,900, or if the City is able to identify additional funds to cover construction costs in excess of that amount, it shall notify the Developer, and within Ten (10) days of being notified by the City, the Developer will remit to the City's Finance Office \$1,450,900. The Developer acknowledges the City cannot legally award the construction contract until all construction funds are in the possession of the City. If the cost of construction exceeds the amount previously

identified, and the City is unable to identify additional funds to make up for the excess cost, or the Developer fails to provide its share of the funds necessary for construction by the time allowed for awarding the bid, the City may reject all bids and is under no further obligation to proceed with construction of the reservoir, booster station and/or any related appurtenant facilities. The City is also under no obligation to provide the Developer with any compensation for the services rendered by the Consultant. If the amount of the lowest responsible bid is at or less than \$2,450,900 the City agrees it will award the construction contract. The City agrees to deposit the money provided by the Developer under this paragraph in an interest bearing account. The City will have sole discretion to decide what type of account to place these funds in. The Developer on behalf of itself, its heirs, assigns and successors in interest, releases the City from any and all claims arising out of the City's collection and payment of any interest generated from these funds. The Developer acknowledges the City is doing this for the Developer's sole benefit and would not agree to place the funds in an interest bearing account absent the Developer's promise to release the City from any liability related to the payment of the interest from the account. The money provided by the Developer will be the first money used to pay for construction of the project. The City will remit to the Developer any interest generated from the account, minus any administrative expenses, or other actual costs and/or fees incurred by the City related to the account. The City will receive a periodic statement from the financial institution where the account is located itemizing the amount of interest earned on the Developer's funds. The City will have forty-five (45) days from the date it receives the statement to process and remit the interest payment to the Developer.

5. The City will work with the Developer, through the Consultant, to coordinate construction of the reservoir and booster station to serve the Project. The parties acknowledge that the reservoir and booster station may not be substantially complete by the time the Developer is ready to begin building or occupying new houses within Morningstar Subdivision. The City agrees the Developer will be allowed to obtain building permits and certificates of occupancy for residential structures within the Project under the following conditions:

- a) The construction contract for the reservoir and booster station has been awarded;
- b) The Developer, at its own expense, shall install a master pressure reducing valve (PRV) station on the 14" water transmission main going south along Reservoir Rd. from Highway 44. The Developer will also be responsible for the cost of abandoning the master PRV station when it is no longer necessary. The Developer will have ninety (90) days from the date the City provides it written notice that the master PRV is no longer necessary to abandon it.
- c) The Developer shall include in the purchase agreement for all lots a requirement that the owner of the lot shall install an individual PRV. The language in the purchase agreement shall also put the subsequent owner on notice that no water shall be provided to the residence and no certificate of occupancy will be issued prior to the individual PRV being installed. Once the reservoir has been accepted by the City and becomes operational, no further individual PRV's will need to be installed and the Developer will be released from the obligation to include this language in subsequent purchase agreements.

6. Upon completion of the water reservoir, booster station and any appurtenant facilities and their acceptance by the City, the water reservoir, booster station, and any appurtenant facilities shall belong to the City and any future maintenance and needed expansion shall be the responsibility of the City.

7. It is the City's intent to establish connection fees to recoup any of the funds expended by the City in constructing the reservoir, booster station or any related appurtenances which are not otherwise being reimbursed through TID #66. These connection fees will be established per the City's standard procedure for imposing such fees. 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. 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.

9. 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 Agreement if they can be given effect without the invalid section(s) or provisions.

10. This Agreement, along with the Agreement Between the City of Rapid City and OS Development, Inc., for Payment of Oversize Costs for a Public Water Main, Agreement Between the City of Rapid City and OS Development, Inc., for Payment of Oversize Costs for Public 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.

11. This Agreement shall be construed according to the laws of the State of South Dakota. Any action concerning this Agreement shall be venued in Rapid City, South Dakota in the Circuit Court for the Seventh Judicial Circuit.

12. 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 Alan 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