

BOX ELDER RESOLUTION NO. 04-25

A RESOLUTION APPROVING AN AGREEMENT FOR WATER AND SEWER SERVICES

BE IT RESOLVED by the Common Council of the City of Box Elder as follows:

WHEREAS, Atlantis, LLC, a South Dakota limited liability company, has requested water and sewer services for certain real property located at I-90 Exit 61 in the City of Box Elder, Pennington County; and

WHEREAS, the City of Box Elder currently does not have the water and sewer service lines extended to the property; and

WHEREAS, the City of Rapid City is able to provide water and sewer services immediately to Atlantis, LLC for the purpose of building a motel at Exit 61 on property adjacent to property currently within the City of Rapid City; and

WHEREAS, Atlantis, LLC, the City of Rapid City, and the City of Box Elder are desirous of entering into an agreement for the temporary providing of water and sewer services by Rapid City to Atlantis, LLC until such time as the City of Box Elder can extend its lines to the property in question, and have crafted an agreement which is attached hereto as "Exhibit A";

NOW THEREFORE, BE IT RESOLVED by the Common Council of the City of Box Elder that the Agreement is hereby approved, and the Mayor shall have authority on behalf of the City of Box Elder to execute the attached Agreement for Water and Sewer Service to be furnished by the City of Rapid City to the Atlantis, LLC property according to the terms of the Agreement.

Approved this 21st day of December, 2004.

COMMON COUNCIL OF THE CITY OF BOX ELDER

By: Carolyn Haddenham
Carolyn Haddenham, Mayor
On behalf of Box Elder City Council

ATTEST:

Jim Schweigert
Jim Schweigert,
Finance Officer

(SEAL)



Prepared by:
George J. Nelson, Esq.
2693D Commerce Rd.
Rapid City, SD 57702
Ph.: 605-719-9470

AGREEMENT FOR WATER AND SEWER SERVICE

This agreement, made on this 29 day of December, 2004, by and between Atlantis, LLC, a South Dakota limited liability company ("Atlantis"), the City of Rapid City, a municipal corporation of the State of South Dakota ("Rapid City"), and the City of Box Elder, a municipal corporation of the State of South Dakota ("Box Elder").

RECITALS:

A. Atlantis is in the process of developing a seven (7) acre tract (referred to herein as the "Subject Property") located at the intersection of I-90 and Exit 61, in Pennington County, South Dakota, as more particularly described on Exhibit "A" attached hereto and made part hereof. Approximately four (4) acres of the Subject Property belonging to Atlantis are located within the Rapid City municipal limits (legally described as Lots 1 and 2 of Tract F of W-Y Addition in the City of Rapid City, Pennington County, South Dakota) and the remaining three (3) acres are located within the Box Elder municipal limits (legally described as Lots 1 and 2 of Davis Subdivision in the City of Box Elder, Pennington County, South Dakota, and referred to herein as the "3-Acre Parcel"). In order to facilitate the commercial development on the property, it is necessary that Atlantis has sewer and water service available, as development occurs;

B. The Subject Property is located in an area in which Rapid City is readily capable of providing water and sewer service and Box Elder is not;

C. Rapid City is under no obligation to furnish water and sewer services to the 3-Acre Parcel:

D. Atlantis wishes to obtain Utility Services (defined below) to the Subject Property without the necessity of waiting until Box Elder expands its Utility Services to make such available to the 3-Acre Parcel;

E. Atlantis requests Rapid City to furnish such Utility Services to the Subject Property, including that portion of the Subject Property that is referred to herein as the 3-Acre Parcel and which borders the City of Rapid City but which is actually in the City of Box Elder:

F. Box Elder will use its best efforts during the next five years to provide such Utility Services to the 3-Acre Parcel; and

G. The parties seek to facilitate the immediate development of the Subject Property even though Box Elder cannot immediately accommodate the Utility Service needs of Atlantis for that 3-Acre Parcel of the Subject Property located in the City of Box Elder.

NOW THEREFORE, in consideration of the foregoing and the promises, undertakings and mutual agreements contained herein, Atlantis, Rapid City, and Box Elder covenant and agree as follows:

1. **Recitals Incorporated.** The above recitals are hereby incorporated in and made a part of this Agreement as fully as if set forth verbatim herein. By signing this Agreement, Atlantis, Rapid City and Box Elder acknowledge reading, understanding and agreeing to all of these recitals.
2. **Use of the Subject Property.** Although subject to the sole discretion of Atlantis, Atlantis presently intends to build on the Subject Property two limited service lodging facilities, two restaurants, a lounge, and/or some other facilities suitable for commercial use.
3. **Utility Services.** As used in this Agreement, "Utility Services" means and refers to adequate water and/or sewer services provided by Rapid City or Box Elder, including but not limited to: (i) ongoing water and/or sewer service; (ii) a service tap from existing water and/or sewer lines; and (iii) an extension of water and/or sewer mains.
4. **Covenants by Rapid City.** Rapid City makes the following covenants, warranties, agreements and representations, each of which shall be deemed material to this Agreement:
 - a. Rapid City will furnish Utility Services to the 3-Acre Parcel for a period of five years and upon the terms, conditions and covenants set forth herein.
 - b. Rapid City will furnish Utility Services to the 3-Acre Parcel beyond five years in the event Box Elder fails to provide such Utility Services within five years so long as Atlantis pursues with due diligence the deannexation from Box Elder and subsequent annexation into Rapid City of the 3-Acre Parcel.
 - c. Rapid City will furnish Utility Services to the rest of the Subject Property under its normal terms and conditions as said property is already within the municipal limits of Rapid City.
5. **Covenants by Box Elder.** Box Elder makes the following covenants, warranties, agreements and representations, each of which shall be deemed material to this Agreement:
 - a. Box Elder will use its best efforts to provide Utility Services to the 3-Acre Parcel within five years of the date of this Agreement.
 - b. In the event it is unsuccessful, Box Elder agrees:
 - i. To use its best efforts to accommodate and will execute any documents required to facilitate the deannexation of the 3-Acre Parcel from Box Elder and the annexation of said 3-Acre Parcel into Rapid City.

- ii. To pay Atlantis after the fifth year of this Agreement, or after the end of any extension granted pursuant to Paragraph 6(e) herein, as liquidated damages an amount equal to the real property, sales and use taxes it receives from all businesses located on the 3-Acre Parcel, provided the 3-Acre Parcel continues to lie within Box Elder's municipal limits.
 - c. Box Elder agrees that its obligations under this Agreement are specifically enforceable.
- 6. **Covenants by Atlantis.** Atlantis makes the following covenants, warranties, agreements and representations, each of which shall be deemed material to this Agreement:
 - a. Atlantis agrees to pay all costs for extending the service lines to the 3-Acre Parcel.
 - b. Atlantis covenants and agrees that in the event Box Elder has not provided Utility Services to the 3-Acre Parcel within five years from the date hereof, Atlantis has an obligation to execute the required deannexation petition from the City of Box Elder and to execute the subsequent annexation petition into the City of Rapid City of the 3-Acre Parcel. Atlantis acknowledges that a purpose of this Agreement is to ensure, as a material benefit and consideration to Rapid City, Atlantis' full and complete cooperation with any effort to deannex and subsequently annex the 3-Acre Parcel; and Atlantis agrees it will do, execute, acknowledge and deliver, all such further acts, agreements, and assurances as may be requested and reasonably necessary for the full completion and consummation of the purposes contemplated herein. These further acts shall specifically include, but are not limited to, signing successive deannexation petitions and/or annexation petitions in the event prior deannexation/annexation efforts are unsuccessful and initiating and aggressively pursuing litigation to enforce the terms of this Agreement.
 - c. Atlantis agrees to pay Rapid City all charges, deposits, and rates for service and equipment in connection with water and sewer service outside the municipal limits of Rapid City applicable under Rapid City's ordinances and rate schedules, which are now applicable or as may be changed from time to time. It is contemplated that, until the 3-Acre Parcel is annexed by Rapid City, Atlantis will pay Rapid City 150% of the normal utility fees for the first five years of this agreement, 300% of the normal utility fees for years six and seven, 400% during year eight, and 500% of the normal utility fees for each year thereafter. After the fifth year of this Agreement, Atlantis will also pay Rapid City as an additional fee an amount equal to the liquidated damages Atlantis is entitled to receive from Box Elder and which Atlantis actually recovers from Box Elder, either through litigation or otherwise, less the difference between the normal water and sewer rates paid by property owners within Rapid City and the rates paid by Atlantis pursuant to this Agreement.
 - d. Atlantis, at its sole cost and expense, will disconnect the water and sewer utility services provided by Rapid City to the 3-Acre Parcel pursuant to this Agreement and will connect to Box Elder's water and sewer utility services if Box Elder has in fact provided water and sewer utility services to the 3-Acre

- Parcel within the time frame set forth in this Agreement.
- e. In the event Atlantis or any other developer applies for and is granted a tax increment financing district from Box Elder that encompasses the 3-Acre Parcel, Atlantis agrees to finance its proportionate share of any water and sewer improvements granted to the district directly benefiting the 3-Acre Parcel so long as Atlantis' real estate taxes are used to fund said improvements. Should any such improvements be approved and construction thereon commenced by the end of the fifth year contemplated by this Agreement, then in that event the five-year limitation shall automatically be extended for a period of one year.
 - f. Atlantis agrees that at such time water and sewer lines are extended to a point south of Interstate 90 and within 400' of the 3-Acre Parcel, then and in that event Atlantis shall connect to Box Elder line(s) at its sole cost and expense. Atlantis shall also pay any and all connection fees, charges and deposits normally charged by Box Elder to other connecting customers.
7. **Recording.** All parties hereby agree that this Agreement may be recorded in the Office of the Register of Deeds of Pennington County.
 8. **Default; Remedies.** Any party shall be deemed to be in default of its obligations under this Agreement upon any breach, failure or nonoccurrence of any material covenant, promise, or obligation contained in this Agreement. In the event of any default by any party of this Agreement, the non-breaching parties shall be entitled to recover from the breaching party the costs and attorneys' fees incurred by the non-breaching party as a result of or in response to the breaching party's default. In the event of any default by any party hereto, the non-breaching party may pursue, in addition to the remedies set forth herein, any and all available remedies in law or equity.
 9. **Entire Agreement.** The parties acknowledge that no representations or inducements have been made other than those expressed herein; that this Agreement supersedes any and all prior memoranda, correspondence, conversations, negotiations and agreements pertaining to the matters herein expressed; and that this Agreement constitutes the entire agreement between them.
 10. **Modification.** The terms of this Agreement may be modified in whole or in part only by a written instrument signed by all of the parties. Any oral agreement to modify this Agreement shall be void and of no force and effect.
 11. **Captions.** The captions and headings of the Paragraphs of this Agreement are for convenience only and may not be used to interpret or define the provisions of this Agreement.
 12. **No Waiver.** No waiver of a breach or any of the covenants or promises of this Agreement shall be construed as a waiver of any succeeding breach of the same or other covenant or promise.
 13. **Severability.** In the event that any provision or clause of this Agreement conflicts with any applicable law, the other provisions of this Agreement shall be given effect as fully as possible without the conflicting provision, and to this end the provisions of this Agreement are declared to be severable.
 14. **Further Assurances.** The parties agree to take all steps and do everything reasonably

- required to give effect to any of the transactions contemplated by this Agreement.
- 15. **Successors and Assigns.** The covenants and agreements contained in this Agreement and the obligations created hereunder shall inure to the benefit of and be binding upon the respective heirs, successors and assigns of the parties and will run with the land.
- 16. **Governing Law and Forum.** The validity, construction and effect of this Agreement shall be governed by the laws of the State of South Dakota, and the parties hereby consent to the exclusive jurisdiction of the courts of the state of South Dakota for resolution of any dispute arising hereunder.
- 17. The parties agree that nothing herein shall be deemed to impair or compromise any right the City of Box Elder may have under SDCL 9-47, 9-48, 9-49, or 11-9.
- 18. This Agreement shall be effective upon the date of the last party affixing its signature.

IN WITNESS WHEREOF, we have hereunto executed this Agreement this 29 day of December, 2004.

CITY OF RAPID CITY

By: Jim Shaw
Jim Shaw, Mayor

ATTEST:

[Signature]
Finance Officer

(SEAL)

CITY OF BOX ELDER

By: Carolyn Haddenham
Carolyn Haddenham, Mayor

ATTEST:

[Signature]
Finance Officer

(SEAL)



ATLANTIS LLC

By: Paul Braasky
Paul Braasky, Managing Member

STATE OF SOUTH DAKOTA)
)SS
County of PENNINGTON)

On this the 29 day of December, 2004, before me, the undersigned officer, personally appeared Jim Shaw and James F. Preston, who acknowledge themselves to be the Mayor and Finance Officer of the City of Rapid City, a municipal corporation, and tat they as such Mayor and Finance Officer, being authorized to do so, executed the foregoing instrument for the purposes terein 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.

Dated this 31 day of January 2005.

[Signature]
Notary Public
My Commission Expires: 7-15-2006

(SEAL)

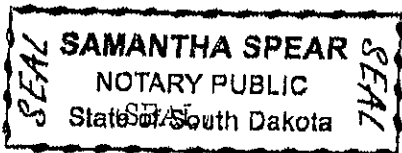
STATE OF SOUTH DAKOTA)
)SS
County of PENNINGTON)

On this the 29 day of December, 2004, before me, the undersigned officer, personally appeared Carolyn Haddenham and Jim Schweigerdt, who - acknowledge themselves to be the Mayor and Finance Officer of the City of Box Elder, a municipal corporation. and tat they as such Mayor and Finance Officer, being authorized to do so, executed the foregoing instrument for the purposes terein contained by signing the name of the City of Box Elder by themselves as Mayor and Finance Officer.

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

Dated this 29 day of December 2004.

[Signature]
Notary Public
My Commission Expires: Oct 26, 2010



3005

(Agreement)
Water
(used)

CITY COUNCIL

DECEMBER 20, 2004

West River Electric Association, electricity	4,703.07
United States Postmaster, postage	1,600.00
Computer Bill List	<u>2,822,681.60</u>
Sub-Total	\$3,190,428.07
City of Rapid City, postage	12.29
City Health Insurance Trust, November health	351.00
Dakota Business Center, Copier usage	12.21
Johnson Machine, auto repair	22.50
K-Mart, gift wrap supplies	170.30
Simpson's Printing, newsletters	83.25
SD Retirement System, November retirement	271.12
Standard Life, December life	<u>7.92</u>
Total	\$3,191,358.66

CITY ATTORNEY'S ITEMS

Hadley moved, second by French and carried to go into Executive Session to discuss pending litigation, contractual and personnel matters.

The Council reconvened at 11:40 P.M. with all members present.

City Attorney Green outlined the proposed modification to the Atlantis, LLC Agreement explaining the five year completion deadline will extend to a sixth year should a TIF be approved and the construction of the water and sewer lines has commenced. Waugh moved, second by Olson and carried to approve the Atlantis, LLC Agreement with the proposed modifications. Motion carried.

Waugh moved, second by French and carried to place Dirk Jablonski, Public Works Director on the City's salary scale at Grade 27, Step I.

Waugh moved, second by French and carried to place Rich Sagen, Rapid Transit System Director on the City's salary scale at Grade 21, Step M.

As there was no further business to come before the Council at this time, the meeting adjourned at 11:42 P. M.

CITY OF RAPID CITY

ATTEST:

Mayor

Finance Officer

(SEAL)