



STAFF REPORT

DATE: December 17, 2019
REGULAR

AGENDA ITEM: Four Corners Development
SUBMITTED BY: Kristina Handt, City Administrator
REVIEWED BY: Sarah Sonsalla, City Attorney

BACKGROUND:

At the November Work Session, Council reviewed a request from Nick Dragisich on behalf of Terry Emerson of EN Properties related to EN Properties' development of the Four Corners project (Four Corners 1st and 2nd Additions). Staff had also provided an analysis of the requests and options for providing assistance to the developer so that these projects can be completed in a timely manner, as the developer is currently in default of the Development Agreement for the 1st Addition (all public improvements were to be completed no later than October 31, 2019). At the work session there was discussion of the City taking ownership of the stormwater pond and also the City charging different connection charges for the properties benefitted by the availability of water and sewer utilities and passing charges collected by the City along to the developer when those properties connected to water and sewer in the future. The developer would otherwise front all of the other costs. After further discussion with the City Attorney, it was learned the City could only charge these different connection charges if the City led a 429 public improvement project instead of the developer constructing the public improvements. Since the developer owns at least 35 percent of the property in the improvement project area, he could petition the City to do the project, but he would need to agree that his property is to be assessed for the full costs of the project. The City would need to do both 1st and 2nd Additions because the developer does not own any property within the 1st Addition and he must own at least 35 percent of the property in the project area in order to petition for the project without requiring any additional property owners to sign the petition for the project.

ISSUE BEFORE COUNCIL:

Should the City Council proceed with a 429 public improvement project for Four Corners 1st and 2nd Addition?

Alternatively, should the City exercise its remedies that are available to it in the Development Agreement for Four Corners 1st Addition which would be to find the developer in default and proceeding with completing the public improvements, the costs of which would be paid by drawing on the letter of credit and assessing any additional costs on the property?

PROPOSAL DETAILS/ANALYSIS:

For the last month or so City staff has been trying to put together project costs to complete Four Corners 1st and 2nd Additions. The project costs would not only include the actual construction costs but also the costs related to easement acquisition and possible eminent domain, potential legal challenges from the utilities with respect to utility relocation and their relocation costs, the cost of borrowing the funds, etc. Staff has not received good, clear numbers/quantities from the developer to estimate the construction costs so we have added some contingencies to the estimate. The developer must agree in the petition and waiver agreement for the project that the City may assess up to a certain amount of the costs against the developer's property. This means that if the actual costs come in over the amount in the petition and waiver agreement, the City will not be able to assess those costs and they would be costs borne by the City. At this time we are estimating the cost for Four Corners 1st and 2nd Addition as described above to be about \$8.25 million.

The Council should understand there is some risk associated with this option. For example, a \$8.25 million assessment would be levied only against the parcel owned by the developer. Should that parcel go into tax forfeiture, the City would likely lose the assessment revenue, as it will most likely not want to reassess it to future buyer of the property. Since the City would need to bond for the funds, the loss of the assessment revenue in this case means that the taxpayers would be levied a tax to cover the bond payments. The Council could also require the developer to provide a letter of credit for some of the \$8.25 million in order to cover the costs should the developer be unable to pay the full assessments over time. In addition, while it has been used successfully at least once before in a city, the practice of charging higher connection charges to some properties could result in another legal challenge to the City as it is not a common practice.

To reduce the risks to the City, staff would recommend the City direct staff to provide notice to the developer that he is in default of the Development Agreement since the public improvements were not completed by October 31, 2019. The City would then commence the work on the public improvements required by the Development Agreement and use the developer's letter of credit to cover some of the costs. If there are costs that exceed the amount of the letter of credit (which is anticipated), the City may then pursuant to Section 29 of the Development Agreement, specially assess those costs against the properties in the subdivision. In the case of Four Corners 1st Addition, the only other property in the subdivision is the property owned by the Stillwater School District. The letter of credit is in the amount of \$1,136,805. Staff's best estimates for constructing the public improvements in Four Corners 1st Addition range from \$1,415,000 to \$2,070,000 depending on easement acquisition costs, receiving engineering construction documents from the developer's and the School District's engineer and obtaining favorable bids. The Development Agreement waives the developer's rights under the 429 process so the City could proceed with competitively bidding the project after obtaining easements. Unlike the petition and waiver process discussed under Option 1 of this staff report, the City is not limited to recovering a predetermined amount. The School District would bear the cost of any expenses beyond the letter of credit and could pursue its own remedies against the developer if it chooses to do so.

It is important to note that per Section 28 of the Development Agreement, the City may initiate action to secure performance of any provision of the Development Agreement and may draw upon the letter of credit. The Development Agreement does not require the City to do so.

FISCAL IMPACT:

Depends upon direction from the Council.

OPTIONS:

- 1) If Mr. Emerson signs the petition and waiver agreement and produces a letter of credit for some amount of the \$8.25 million, Council could direct staff to begin the 429 public improvement project for Four Corners 1st and 2nd Additions.
- 2) Council could direct staff to provide notice of default to developer and proceed with drawing on the letter of credit to cover some costs of the City completing the public improvements in Four Corners 1st Addition.
- 3) Take no action to involve the City further in the development of Four Corners 1st Addition. This would be consistent with the City's policies and practices of having development costs be borne by the developer or development not occur.

RECOMMENDATION:

Motion to direct staff to provide notice of default to the developer and proceed with preparing Four Corners 1st Addition to be completed by the City utilizing the developer's letter of credit and authority in the Development Agreement to recover the costs in excess of the letter of credit.

ATTACHMENTS:

- Four Corners 1st Addition Development Agreement

(reserved for recording information)

DEVELOPMENT AGREEMENT

(Public sewer and water)

Four Corners 1st Addition

THIS DEVELOPMENT AGREEMENT is dated October 22, 2018, by and between the **CITY OF LAKE ELMO**, a Minnesota municipal corporation (the "City") and EN Properties, LLC, a Minnesota limited liability company (the "Developer").

1. REQUEST FOR PLAT APPROVAL. The Developer has asked the City to approve a plat for Four Corners 1st Addition (referred to in this Agreement as the "Subdivision"). The property being platted is situated in the County of Washington, State of Minnesota, and is legally described on **Exhibit A**.

2. CONDITIONS OF PLAT APPROVAL. The City hereby approves the Subdivision on condition that the Developer enter into this Agreement, furnish the security required by it, and record the plat with the County Recorder or Registrar of Titles within 180 days after the City Council approves the final plat.

3. RIGHT TO PROCEED. This Agreement is intended to regulate the development of the Property and the construction therein of certain public and private improvements. The Developer may not grade or otherwise disturb the earth, remove trees or construct public or private improvements or any buildings within the Subdivision until all the following conditions precedent have been satisfied:

- A. the Developer has executed and recorded with Washington County all drainage and utility easements required for the Subdivision by the City Engineer and Public Works Director in the City's standard form or the easements have been dedicated to the City on the plat;
- B. the Developer has executed and recorded with Washington County the Storm Water Maintenance and Easement Agreement in the City's standard form;
- C. this Agreement has been executed by the Developer and the City;
- D. the required Security (as hereinafter defined) have been received by the City from or on behalf of the Developer;
- E. final construction plans and specifications have been submitted by the Developer and approved by the City Engineer;
- F. the Developer has paid the City for all legal, engineering, and administrative expenses incurred by the City regarding the City approvals and has given the City the additional City Engineering Administration Escrow required by this Agreement;
- G. the Developer has paid any outstanding assessments and taxes for the property or property being deeded to the City;
- H. the Developer has fulfilled any park dedication requirements as specified under this Agreement;
- I. the Developer has received all necessary permits from the MPCA, MDH, DNR, applicable

watershed, Washington County, and any other agency having jurisdiction over the Subdivision;

J. the Developer has provided the City with a certificate of insurance required by this Agreement;

K. the Developer or the Developer's engineer and the Developer's contractor(s) have initiated and attended a preconstruction meeting with the City Engineer and City staff;

L. the final plat has been recorded with Washington County;

M. a title insurance policy has been issued in the amount of \$100,000 in favor of the City insuring the City's interests as they appear on the plat; and

N. the City has issued a written notice that all above conditions have been satisfied and that the Developer may proceed;

4. PHASED DEVELOPMENT. If the plat is a phase of a multi-phased preliminary plat, the City may refuse to approve final plats of subsequent phases of the development if the Developer is not in compliance with any term of this Agreement and the non-compliance has not been remedied. Development of subsequent phases of the development may not proceed until development agreements for such phases are approved by the City. Park dedication charges and availability charges for sewer and water referred to in this Agreement are not being imposed on outlots that are designated in the plat for future subdivision into lots and blocks, if any, in the plat. Such charges will be calculated and imposed when these outlots, if any, are platted into lots and blocks.

5. PRELIMINARY PLAT STATUS. If the Subdivision is a phase of a multi-phased preliminary plat, the preliminary plat approval for all phases not final platted shall lapse and be void unless final platted into lots and blocks, not outlots, within five years after preliminary plat approval.

6. CHANGES IN OFFICIAL CONTROLS. For five years from the date of this Agreement,

no amendments to the City's Comprehensive Plan or official controls shall apply to or affect the use, development density, lot size, lot layout or dedications of the approved final plat unless required by state or federal law or agreed to in writing by the City and the Developer. Thereafter, notwithstanding anything in this Agreement to the contrary, to the full extent permitted by state law, the City may require compliance with any changes to the City's Comprehensive Plan, official controls, platting, or dedication requirements enacted after the date of this Agreement.

7. DEVELOPMENT PLANS. The Developer agrees to develop the Property in accordance with the City approvals, including the terms and conditions of approval of the final plat as detailed in City Council Resolution No. 2018-076, and to construct all improvements in accordance with the approved construction plans and specifications (collectively, the "Plans") prepared by a professional engineer registered in the State of Minnesota at its sole expense. All terms and conditions of the City approvals are hereby incorporated by reference into this Agreement. The documents which constitute the Plans are those on file with and approved by the City and are listed on **Exhibit B** attached hereto. The Plans may not be modified by the Developer without the prior written approval of the City.

8. IMPROVEMENTS. In developing the Subdivision in accordance with the Plans, the Developer shall make or install at its sole expense the following public and private improvements (collectively, the "Subdivision Improvements"):

- A. Grading and erosion control;
- B. Sanitary sewer;
- C. Water system improvements;
- D. Stormwater improvements (storm sewer pipe, control structures, ponds, BMPs, etc.);
- E. Hudson Boulevard improvements;
- F. Streets;
- G. Trails;
- H. Underground private utilities;
- I. Landscaping;

- J. Intersection improvements (turn lanes, by pass lanes, traffic control, etc.);
- K. Tree preservation and reforestation; and
- L. Monuments required by Minnesota Statutes.

All improvements shall be installed in accordance with the approved Plans, the City approvals, the City Code, the City's Engineering Design and Construction Standards Manual, and the City's Landscape and Irrigation Standards. The Developer shall instruct its engineer to provide adequate field inspection personnel to assure an acceptable level of quality control to the extent that the Developer's engineer will be able to certify that the construction work meets the approved Plans, the City approvals, the City Code, the City's Engineering Design and Construction Standards Manual, and the City's Landscape and Irrigation Standards as a condition of City acceptance. In addition, the City may, at the City's discretion and at the Developer's expense, have one or more City inspectors or a soil engineer inspect the Developer's work on a full or part-time basis. The Developer's engineer shall provide for on-site project management. The Developer's engineer is responsible for design changes and contract administration between the Developer and the Developer's contractor.

9. CITY ADMINISTRATION AND CONSTRUCTION OBSERVATION. At the time of the City's approval of the final plat for the Subdivision, the Developer shall submit to the City an amount to be escrowed by the City for City administration and construction observation costs in an amount provided under paragraph 33 of this Agreement - Summary of Cash Requirements. Thereafter, the Developer shall reimburse the City each month, within 30 days of receiving an invoice, for all administration and construction observation costs incurred by the City during the construction of the Subdivision Improvements by the City's engineering, public works, planning, and landscape architecture staff and consultants. After 30 days of the invoice, the City may draw upon the escrow and stop the work on site until the escrow has been replenished in its full amount. City administration and oversight will include monitoring of construction progress and construction observation, consultation with the Developer and the Developer's professionals on status or

problems regarding the project, coordination for testing, final inspection and acceptance, project monitoring during the warranty period, and processing of requests for reduction in the Security. Construction observation shall include, at the discretion of the City, part or full time inspection of proposed public utilities and street construction. Services will be billed by the City on an hourly basis.

The direction and review provided by the City through the inspection of the Subdivision Improvements should not be considered a substitute for the Developer-required management of the construction of the Subdivision Improvements. The Developer must require the Developer's contractor(s) to furnish the City with a schedule of proposed operations at least five days prior to the commencement of construction of each type of Subdivision Improvement. The City shall inspect all Developer-installed Subdivision Improvements during and after construction for compliance with the Plans, the City approvals, the City Code, the City's Engineering Design and Construction Standards Manual, and the City's Landscape and Irrigation Standards. The Developer will notify the City at such times during construction as the City requires for inspection purposes. Such inspection is pursuant to the City's governmental authority, and no agency or joint venture relationship between the City and the Developer is thereby created.

10. CONTRACTORS/SUBCONTRACTORS. City Council members, City employees, and City Planning Commission members, and corporations, partnerships, and other entities in which such individuals have greater than a 25 percent ownership interest or in which they are an officer or director may not act as contractors or subcontractors for the Subdivision Improvements identified in Paragraph 8 above.

11. TIME OF PERFORMANCE. The Developer shall install all required Subdivision Improvements by October 31, 2019, The Developer may, however, request an extension of time from the City. If an extension is granted, it shall be conditioned upon updating the Security posted by the Developer to reflect cost increases and amending this Agreement to reflect the extended

completion date.

12. MAINTENANCE DURING CONSTRUCTION. The Developer shall be responsible for all maintenance of the Subdivision Improvements until the Subdivision Improvements are accepted by the City in writing. The Developer is also responsible to locate all underground utilities until the Subdivision is accepted in writing by the City. Warning signs shall be placed by the Developer when hazards develop in streets to prevent the public from traveling on same and to direct attention to detours. If and when streets become impassable, such streets shall be barricaded and closed by the Developer. Hudson Boulevard must remain open to traffic at all times unless a right-of-way obstruction permit is obtained from the City. The Developer shall be responsible for keeping streets within and outside of the Subdivision clean and clear of dirt and debris that may spill, track, or wash onto the street from the Developer's operations. The Developer shall contract for street cleaning for streets within and immediately adjacent to the Subdivision. At a minimum, scraping and sweeping shall take place on a weekly basis and on a daily basis during heavy tracking days.

13. LICENSE. The Developer hereby grants the City, its agents, employees, officers, and contractors a license to enter the Property to perform all work and inspections deemed appropriate by the City in conjunction with the development of the Property and this Agreement.

14. CONSTRUCTION ACCESS. Construction traffic access and egress for all work on the site including grading, public utility construction, and site improvements is restricted to access the Subdivision via Hudson Boulevard North at the designated rock construction entrances per the approved erosion control plans. No construction traffic is permitted on other adjacent local streets. All construction parking, and loading and unloading of equipment and supplies must be completed interior to the Subdivision and is not allowed to occur within any public right-of-way without a right-of-way obstruction permit.

15. CONSTRUCTION SEQUENCE AND COMPLIANCE. The City will require the

Developer to construct the Subdivision Improvements in a sequence which will allow progress and compliance points to be measured and evaluated. The Developer and the Developer's representatives are required to supervise and coordinate all construction activities for all Subdivision Improvements and must notify the City in writing stating when the work is ready for the inspection at each of the measurable points defined in the following paragraphs.

16. EROSION CONTROL. All construction regarding the Subdivision Improvements shall be completed in a manner designed to control erosion and in compliance with the City Code, the City's Engineering Design and Construction Standards Manual, all watershed district permits, the Minnesota Pollution Control Agency's best management practices, and other requirements including the City's permit with the Minnesota Pollution Control Agency for the municipal separate storm sewer system program. Prior to initiating any work on the site, an erosion control plan must be implemented by the Developer and inspected and approved by the City. Erosion and sediment control measures shall be coordinated with the various stages of development. The City may impose additional erosion control requirements at any stage in development as deemed necessary to maintain a compliant site. All areas disturbed for site improvements must be reseeded by the Developer promptly after the work in the area is complete unless construction of the next stage of the improvements will begin in that area within seven days. The parties recognize that time is of the essence in controlling erosion.

If the Developer does not comply with the erosion control plan and schedule or supplementary instructions received from the City, the City may take such action as it deems appropriate to control erosion. The City will endeavor to notify the Developer in advance of any proposed action, but failure of the City to do so will not affect the Developer's and City's rights or obligations hereunder. If the Developer does not reimburse the City for any cost the City incurred for such work within 10 days, the City may draw down the Security to pay any costs. No development, utility, or street construction will be allowed and no building permits will be issued by the City unless the Subdivision is in full compliance with the approved erosion control plan.

If building permits are issued prior to the acceptance of public Subdivision Improvements, the Developer assumes all responsibility for erosion control compliance throughout the Subdivision and the City may take such action as allowed by this Agreement against the Developer for any noncompliant issue as stated above. Erosion control plans for individual lots will be required in accordance with the City's building permit requirements, or as required by the City or City Engineer.

17. STREET AND UTILITY IMPROVEMENTS. All storm sewers, sanitary sewers, watermain improvements, and streets (including, but not limited to, turn lanes) shall be installed in accordance with the approved Plans, the City approvals, the City Code, and the City's Engineering Design and Construction Standards Manual. Installation of curb and gutter, installation of the first lift of the bituminous streets, the grading of boulevards, the installation of street signs, and restoration work on the site must be completed in accordance with the approved Plans. Once the work is completed, the Developer or the Developer's representative shall submit a written request to the City asking for an inspection of the initial improvements. The City will then schedule a walk-through to create a punch list of outstanding items to be completed. Upon receipt of the written punch list provided by the City, the punch list items must be completed by the Developer and the City notified to re-inspect the improvements.

The final bituminous wear course shall be installed by the Developer after the first bituminous course has weathered a winter season. Prior to placement of the final bituminous wear course, the Developer shall repair or replace all broken or failing curbs, sidewalks, and damaged or settled streets as determined by the City from a pre-wear course walk-through inspection.

18. LANDSCAPING AND TREE REPLACEMENT IMPROVEMENTS.

- A. The Developer agrees to install landscaping in accordance with the approved Plans, the City approvals, the City Code, the City's Engineering Design and Construction

Standards Manual, and the City's Landscape and Irrigation Standards. All landscaping materials such as trees, shrubs, grasses, or other vegetation installed by the Developer must be warranted and maintained for a period of two years. The two year warranty period shall be deemed to start once all required landscaping identified as responsibility of Developer in the approved Plans has received acceptance by the City. The Developer agrees to have the installer of the landscaping complete an inspection 30 days prior to the end of the two year warranty period and provide the City with a written report identifying the condition of all landscaping. In the event any landscaping installed by the Developer is deemed to be in poor condition or dead, the Developer is to replace the landscaping with like kind materials or as otherwise approved by the City. \

- B. The Developer shall be responsible for maintaining regular watering, fertilizing, and over-seeding necessary to establish final lawns and yards as identified in the approved Plans for outlots, public rights-of-way, and any disturbed areas outside the Subdivision boundaries according to a landscape maintenance plan approved by the City. The Developer agrees to achieve "substantial performance" on all seeded or sodded areas disturbed during the construction of Subdivision Improvements. For the purpose of this Agreement "substantial performance" shall be defined for areas seeded or sodded with a turf or lawn mix as "square foot turf areas with an average blade height of three inches free of eroded, bare, or dead spots and free from perennial weeds or unwanted grasses with no visible surface soil." For areas seeded with a native grass or flower mix "substantial performance" shall be defined as "square foot native grass or flower areas with an average height of eight inches free of eroded, bare, or dead spots and no visible surface soil."

19. SIGNAGE, PAVEMENT MARKINGS, AND OTHER UTILITIES. The Developer

agrees to install street signs, traffic and parking signs, and pavement markings along Hudson Boulevard all in accordance with the approved Plans and the City Engineering Design Standards Manual. Street and traffic sign details shall be submitted by the Developer to the City for approval prior to installation. In addition, the Developer shall be responsible for the cost and all coordination work to extend private utilities along with street lighting within the Subdivision all in accordance with the approved plans and right-of-way permits.

20. OWNERSHIP OF IMPROVEMENTS. Upon completion of the work and construction required by this Agreement, the Subdivision Improvements lying within public easements shall become City property. Prior to acceptance of the public Subdivision Improvements by the City, the Developer must furnish the City with a complete set of reproducible "record" plans and an electronic file of the "record" plans in accordance with the City's Engineering Design and Construction Standards Manual together with the following affidavits:

- Developer/Developer Engineer's Certificate
- Land Surveyor's Certificate

certifying that all construction has been completed in accordance with the terms of this Agreement. All necessary forms will be furnished by the City. Upon receipt of "record plans" and affidavits, and upon review and verification by the City Engineer that the public Subdivision Improvements have been completed in accordance with the terms of this Agreement, the City Engineer will accept the completed public Subdivision Improvements.

21. PARK DEDICATION. The Developer shall pay a cash contribution of \$49,500 in satisfaction of the City's park dedication requirements. The charge was calculated as follows: \$4,500 per acre at 11 acres.

22. SANITARY SEWER AND WATER UTILITY AVAILABILITY CHARGES (SAC AND WAC). The Developer shall be responsible for the payment of all sewer availability charges (SAC) and all water availability charges (WAC) with respect to the Subdivision Improvements required by the City and any state or metropolitan government agency.

The sewer availability charge (SAC) in the amount of \$3,000.00 per REC shall be payable and collected by the City at the time the building permit is issued for the building to connect to City sewer.

The Developer has previously paid \$200,000 to the City in connection with the placement of municipal water services to the terminus located at the northeast corner of the Air Lake Property as per the WAC Prepayment Agreement between the Developer and the City dated June 2, 2014 (the "Prepayment Agreement").

The water availability charge (WAC) in the amount of \$3,000.00 per REC shall be payable and collected by the City at the time the building permit is issued for each building. Actual payments for WAC fees for the Subdivision will be deducted from the fees otherwise owed annually under the Prepayment Agreement if the WAC fees are more than the minimum amount owed of \$50,000 per year.

In addition, a sewer connection charge in the amount of \$1,000.00 per REC, a Metropolitan Council sewer availability charge in the amount of \$2,485.00 per REC, and a water connection charge in the amount of \$1,000.00 per REC will be payable by the Developer and collected by the City at the time the building permit is issued for each lot.

23. RESPONSIBILITY FOR COSTS.

- A. In the event that the City receives claims from labor, materialmen, or others that work required by this Agreement has been performed and the amounts due to them have not been paid, and the laborers, materialmen, or others are seeking payment from the City, the Developer hereby authorizes the City to commence an Interpleader action pursuant to Rule 22, Minnesota Rules of Civil Procedure for the District Courts, to draw upon the Security in an amount up to 125 percent of the claim(s) and deposit the funds in compliance with the Rule, and upon such deposit, the Developer shall release, discharge, and dismiss the City from any further proceedings as it

pertains to the funds deposited with the District Court, except that the Court shall retain jurisdiction to determine attorneys' fees pursuant to this Agreement.

- B. Except as otherwise specified herein, the Developer shall pay all costs incurred by it or the City in conjunction with the development of the Subdivision, including but not limited to legal, planning, engineering, and inspection expenses incurred in connection with the City's approval and acceptance of the plat and the Subdivision, the preparation of this Agreement, the City's review of construction plans and documents, and all costs and expenses incurred by the City in monitoring and inspecting development of the Subdivision. All amounts incurred and due to the City at the time of the recording of the final plat must be fully paid by the Developer prior to the City executing and releasing the final plat for recording.
- C. The Developer shall hold the City and its officials, employees, and agents harmless from claims made by itself and third parties for damages sustained or costs incurred resulting from the City's approval of the plat and the development of the Subdivision. The Developer shall indemnify the City and its officials, employees, and agents for all costs, damages, or expenses which the City may pay or incur in consequence of such claims, including attorneys' fees.
- D. The Developer shall reimburse the City for costs incurred in the enforcement of this Agreement, including reasonable engineering and attorneys' fees.
- E. The Developer shall pay, or cause to be paid when due, and in any event before any penalty is attached, all special assessments referred to in this Agreement. This is a personal obligation of the Developer and shall continue in full force and effect even if the Developer sells one or more lots, the entire Property, or any portion of it.
- F. The Developer shall pay in full all bills submitted to it by the City for obligations incurred under this Agreement within 30 days after receipt. Bills not paid within 30 days shall be assessed a late fee per the City adopted fee schedule. Upon request,

the City will provide copies of detailed invoices of the work performed by the City and its consultants.

24. CITY PAYMENTS. The City shall reimburse the Developer in the amount of \$70,150 for oversizing costs associated with the installation of a trunk water main, \$120,760 for oversizing costs associated with the installation of a trunk sanitary sewer main, and \$18,200 for mill and overlay of the south side of Hudson Blvd as identified in the Plans. City payments shall be made within 30 days of the City's final acceptance of the Improvements, but only if the Developer is not in default with respect to any terms of this Agreement. This payment by the City shall be the City's only responsibility with regard to construction of the Improvements and in no case shall act as a waiver of any other right of the City under this Agreement or under applicable laws, ordinances or rules.

25. SPECIAL PROVISIONS. The following special provisions shall apply to the Subdivision:

- A. Implementation of the recommendations listed in the May 30, 2018, Engineering memorandum and all subsequent Engineering memorandums.
- B. The Developer must obtain a sign permit from the City prior to installation of any subdivision identification signs.
- C. All public trails shall be located within outlots, be at least 30 feet in width and either be dedicated to the City in the plat or granted to the City in an easement in a form acceptable to the City.
- D. The Developer shall enter into a Landscape License Agreement with the City that clarifies the individuals or entities responsible for maintenance of any landscaping installed in areas outside of land dedicated as public park and open space on the final plat.
- E. The Developer shall pay the City a cash contribution of \$150,000 in recognition of

lost tax revenue that will be caused due to the fact that the intended use of the property will be tax exempt. Said cash contribution shall be paid in full prior to the recording of the Plat.

- F. The Developer shall reimburse the City for all costs incurred by the City for the City's cost share in the installation of a future traffic signal at the intersection of Hudson Boulevard and Manning Avenue (CSAH 15) and the construction of a southbound right turn lane and a northbound left turn lane along Manning Avenue (CSAH 15) to be designed and constructed by Washington County. The Developer shall pay the City \$250,000, which is the estimated City cost share for the future traffic signal and turn lanes. Said payment shall be made to the City in full prior to the recording of the Plat. If the actual City cost share exceeds this estimated amount, the Developer shall be responsible for reimbursing the City for the remaining portion of the City cost share within 30 days of being invoiced for such amount by the City. If the actual City cost share is less than \$250,000, the City shall return the remaining portion to the Developer within 30 days of the City paying Washington County's final invoice for the project.

26. MISCELLANEOUS.

- A. The Developer may not assign this Agreement without the written permission of the City Council. The Developer's obligations hereunder shall continue in full force and effect even if the Developer sells one or more lots, the entire Property, or any portion of it.
- B. Retaining walls that require a building permit shall be constructed in accordance with plans and specifications prepared by a professional engineer licensed by the State of Minnesota. Following construction, a certification signed by the design engineer shall be filed with the City Engineer evidencing that the retaining wall was constructed in accordance with the approved Plans. All retaining walls identified on

the Plans or by special conditions referred to in this Agreement shall be constructed before any other building permit is issued for a lot on which a retaining wall is required to be built.

- C. Legal documents regarding any covenants and restrictions, if applicable, shall be submitted to the City prior to recording of the final plat for review and approval by the City Attorney.
- D. The Developer shall take out and maintain or cause to be taken out and maintained until six months after the City has accepted the public Subdivision Improvements, public liability and property damage insurance covering personal injury, including death, and claims for property damage which may arise out of Developer's work or the work of its subcontractors or by one directly or indirectly employed by any of them.

Limits for bodily injury and death shall be not less than \$500,000 for one person and \$1,500,000 for each occurrence; limits for property damage shall be not less than \$200,000 for each occurrence; or a combination single limit policy of \$1,500,000 or more. The City shall be named as an additional insured on the policy, and the Developer shall file with the City a certificate of insurance evidencing coverage prior to the City signing the plat. The certificate shall provide that the City must be given 30 days' advance written notice of the cancellation of the insurance.

- E. Third parties shall have no recourse against the City under this Agreement.
- F. If any portion, section, subsection, sentence, clause, paragraph, or phrase of this Agreement is for any reason held invalid, such decision shall not affect the validity of the remaining portion of this Agreement.
- G. The action or inaction of the City shall not constitute a waiver or amendment to the provisions of this Agreement. To be binding, amendments or waivers shall be in

writing, signed by the parties and approved by written resolution of the City Council. The City's failure to promptly take legal action to enforce this Agreement shall not be a waiver or release.

- H. This Agreement shall run with the land and may be recorded against the title to the Property at the Developer's expense. The Developer covenants with the City, its successors and assigns, that the Developer has fee title to the Property being final platted and has obtained consents to this Agreement, in the form attached hereto, from all parties who have an interest in the Property, including, but not limited to, mortgagees; that there are no unrecorded interests in the Property being final platted; and that the Developer will indemnify and hold the City harmless for any breach of the foregoing covenants.
- I. Each right, power, or remedy herein conferred upon the City is cumulative and in addition to every other right, power or remedy, express or implied, now or hereafter arising, available to City, at law or in equity, or under any other agreement, and each and every right, power, and remedy herein set forth or otherwise so existing may be exercised from time to time as often and in such order as may be deemed expedient by the City and shall not be a waiver of the right to exercise at any time thereafter any other right, power or remedy.
- J. The Developer represents to the City that the Subdivision and the Subdivision Improvements comply or will comply with all City, County, metropolitan, state, and federal laws and regulations, including but not limited to: subdivision ordinances, zoning ordinances, and environmental regulations. If the City determines that the Subdivision is not in compliance, the City may, at its option, refuse to allow construction or development work in the Subdivision until it is brought into compliance. Upon the City's demand, the Developer shall cease work until there is compliance.

27. EVENTS OF DEFAULT. The following shall be "Events of Default" under this Agreement and the term "Event of Default" shall mean, whenever it is used in this Agreement, any one or more of the following events:

- A. Subject to unavoidable delays, failure by the Developer to commence and complete construction of the public Subdivision Improvements pursuant to the terms, conditions, and limitations of this Agreement.
- B. Failure by the Developer to substantially observe or perform any material covenant, condition, obligation, or agreement on its part to be observed or performed under this Agreement.

28. REMEDIES ON DEFAULT. Whenever any Event of Default occurs, the City, subject to any rights of third parties agreed to by the City pursuant to this Agreement, or otherwise by written, executed instrument of the City, may take any one or more of the following:

- A. The City may suspend its performance under the Agreement until it receives assurances from the Developer, deemed adequate by the City, that Developer will cure its default and continue its performance under the Agreement. Suspension of performance includes the right of the City to withhold permits including, but not limited to, building permits.
- B. The City may initiate such action, including legal or administrative action, as is necessary for the City to secure performance of any provision of this Agreement or recover any amounts due under this Agreement from the Developer, or immediately draw on the Security, as set forth in this Agreement.

29. ENFORCEMENT BY CITY; DAMAGES. The Developer acknowledges the right of the City to enforce the terms of this Agreement against the Developer, by action for specific performance or damages, or both, or by any other legally authorized means. In the event of a default by the Developer as to construction or repair of any of the Subdivision Improvements or

any other work or undertaking required by this Agreement, the City may, at its option, perform the work and the Developer shall promptly reimburse the City for any expense incurred by the City. This Agreement is a license for the City to act, and it shall not be necessary for the City to seek an order from any court for permission to enter the Subdivision for such purposes. If the City does such work, the City may, in addition to its other remedies, levy special assessments against the land within the Subdivision to recover the costs thereof. For this purpose, the Developer, for itself and its successors and assigns, expressly waives any and all procedural and substantive objections to the special assessments, including, but not limited to, hearing requirements, and any claim that the assessments exceed the benefit to the land so assessed. The Developer, for itself and its successors and assigns, also waives any appeal rights otherwise available pursuant to Minnesota Statutes Section 429.081.

The Developer also acknowledges that its failure to perform any or all of the Developer's obligations under this Agreement may result in substantial damages to the City; that in the event of default by the Developer, the City may commence legal action to recover all damages, losses, and expenses sustained by the City; and that such expenses may include, but are not limited to, the reasonable fees of legal counsel employed with respect to the enforcement of this Agreement.

30. WARRANTY. During the warranty period, the Developer warrants that all Subdivision Improvements will be free from defects and that they will continue to meet all technical specifications and standards. During the warranty period, the Developer agrees to repair or replace any Subdivision Improvement, or any portion or element thereof, which shows signs of failure, normal wear and tear excepted. If the Developer fails to repair or replace a defective Subdivision Improvement during the warranty period, the City may repair or replace the defective portion and may use the Security to reimburse itself for such costs. The Developer agrees to reimburse the City fully for the cost of all Subdivision Improvement repair or replacement if the cost thereof exceeds the remaining amount of the Security. Such reimbursement must be made

within 45 days of the date upon which the City notifies the Developer of the cost due under this paragraph. The Developer hereby agrees to permit the City to specially assess any unreimbursed costs against any lots in the Subdivision which have not been sold to home buyers if the Developer fails to make required payments to the City. The Developer, on behalf of itself and its successors and assigns, acknowledges the benefit to the lots within the Subdivision of the repair or replacement of the Subdivision Improvements and hereby consents to such assessment and waives the right to a hearing or notice of hearing or any appeal thereon under Minnesota Statutes, Chapter 429.

- A. The required warranty period for all work relating to the public sewer and water shall be two years from the date of final written City acceptance of the work.
- B. The required warranty period for all work relating to the Hudson Boulevard Improvements shall be one year from the date of final written City acceptance of the work.
- C. The required warranty period for sod, trees, and landscaping shall be two years from the date of final written City acceptance of the installation.

31. SUMMARY OF SECURITY REQUIREMENTS. To guarantee compliance with the terms of this Agreement, payment of special assessments, payment of the costs of all public Subdivision Improvements, and construction of all public Subdivision Improvements, the Developer shall furnish the City with an irrevocable letter of credit or a cash escrow or a combination of a cash escrow and letter of credit (the "Security") in the amount of \$1,136,805. The bank originating the letter of credit shall be determined by the City to be solvent and creditworthy. The letter of credit shall substantially be in the form attached to this Agreement and must be approved by the City. The amount of the Security was calculated as itemized on **Exhibit C**. If at any time the City reasonably determines that the bank issuing the letter of credit no longer satisfies the City's requirements regarding solvency and creditworthiness, the City shall notify the

Developer and the Developer shall provide to the City within 45 days a substitute for the letter of credit from another bank meeting the City's requirements. If the Developer fails to provide the City within 45 days with a substitute letter of credit from an issuing bank satisfactory to the City, the City may draw under the existing letter of credit.

This breakdown is for historical reference; it is not a restriction on the use of the Security. The City may draw down the Security, without notice, for any violation of the terms of this Agreement or if the Security is allowed to lapse prior to the end of the required term. If the required public Subdivision Improvements are not completed at least 30 days prior to the expiration of the Security, the City may also draw it down. If the Security is drawn down, the proceeds shall be used by the City to cure the default.

32. REDUCTION OF SECURITY. Upon written request by the Developer and upon receipt of proof satisfactory to the City Engineer that work has been completed in accordance with the approved Plans and the terms of this Agreement and that all financial obligations to the City have been satisfied, the City Engineer may approve reductions in the Security in the following instances:

A. Up to 75 percent of the Security associated with the itemization on **Exhibit C** may be released upon completion of the following key milestones of the project as determined by the City Engineer:

1. Construction Categories 2 and 3: The amount of \$565,092 may be released when all sanitary sewer and watermain utilities have been installed, all testing and televising has been successfully completed, sanitary sewer as-built inverts have been verified, and the utilities are considered ready for use by the City Engineer.
2. Construction Categories 4 and 5: The amount of \$223,718 may be released when the Hudson Boulevard Improvements, including street and drainage, turn

lanes, pavement markings and signage, and bituminous trail has been installed and has been found to be complete to the satisfaction of the City Engineer including all corrective work for any identified punch list items and including verification of storm sewer as-built inverts, but not including the final wear course.

3. Construction Categories 6-10 and 14-17: The amount of \$57,231 may be released when all remaining Developer's obligations under this Agreement have been completed including: (1) bio retention facilities; (2) iron monuments for lot corners have been installed; (3) all financial obligations to the City satisfied; (4) the required "record" plans in the form of the City standards have been received and approved by the City; and (5) the public Subdivision Improvements are accepted by the City Engineer and the City Council.
 4. Construction Categories 11-13: The amount of \$6,563 may be released when landscaping Subdivision Improvements have been installed to the satisfaction of the City including all corrective work for any identified punch list items.
- B. Twenty-five percent of the original Security amount, excluding grading and landscaping improvements shall be retained until: (1) all Subdivision Improvements have been fully completed and accepted by the City, including all corrective work and warranty punch list items; (2) all financial obligations to the City have been satisfied; and (3) the warranty period has expired.
- C. Twenty-five percent of the original Security amount associated with landscaping shall be retained by the City until: (1) all landscaping Subdivision Improvements have been fully completed and accepted by the City, including all corrective work and warranty punch list items being completed by the Developer; (2) all financial obligations to the City have been satisfied; and (3) the warranty period has expired.
- D. It is the intent of the parties that the City at all times have available to it Security in an

amount adequate to ensure completion of all elements of the Subdivision Improvements and other obligations of the Developer under this Agreement, including fees or costs due to the City by the Developer. To that end and notwithstanding anything herein to the contrary, all requests by the Developer for a reduction or release of the Security shall be evaluated by the City in light of that principle.

33. SUMMARY OF CASH REQUIREMENTS. The following is a summary of the cash requirements under this Agreement which must be paid to the City prior to recording the final plat:

Park Dedication:	\$49,500
Special Assessments Due:	\$0
City Base Map Upgrading (\$25.00 per REU):	\$25
City Engineering Administration Escrow:	\$10,000
Cash Contribution for Payment in Lieu of Taxes	\$150,000
City Cost Share of Hudson Boulevard and Manning Avenue (CSAH 15) Traffic Signal/Turn Lanes	\$250,000
TOTAL CASH REQUIREMENTS:	\$459,525

34. NOTICES. Required notices to the Developer shall be in writing, and shall be either hand delivered to the Developer, its employees or agents, or mailed to the Developer by certified mail at the following address: 11530 Hudson Boulevard North, Lake Elmo, MN 55042. Notices to the City shall be in writing and shall be either hand delivered to the City Administrator, or mailed to the City by certified mail in care of the City Administrator at the following address: Lake Elmo City Hall, 3880 Laverne Avenue N, Suite 101, Lake Elmo, Minnesota 55042.

35. EVIDENCE OF TITLE. The Developer shall furnish the City with evidence of fee ownership of the property being platted by way of an a title insurance policy dated not earlier than 30 days prior to the execution of the plat.

36. COMPLIANCE WITH LAWS. The Developer agrees to comply with all laws, ordinances, regulations, and directives of the state of Minnesota and the City applicable to the Subdivision. This Agreement shall be construed according to the laws of the Minnesota.

37. SEVERABILITY. In the event that any provision of this Agreement shall be held invalid,

illegal, or unenforceable by any court of competent jurisdiction, such holding shall pertain only to such section and shall not invalidate or render unenforceable any other provision of this Agreement.

38. NON-WAIVER. Each right, power, or remedy conferred upon the City by this Agreement is cumulative and in addition to every other right, power, or remedy, express or implied, now or hereafter arising, or available to the City at law or in equity, or under any other agreement. Each and every right, power, and remedy herein set forth or otherwise so existing may be exercised from time to time as often and in such order as may be deemed expedient by the City and shall not be a waiver of the right to exercise at any time thereafter any other right, power, or remedy. If either party waives in writing any default or nonperformance by the other party, such waiver shall be deemed to apply only to such event and shall not waive any other prior or subsequent default.

39. COUNTERPARTS. This Agreement may be executed simultaneously in any number of counterparts, each of which shall be an original and shall constitute one and the same Agreement.

CITY OF LAKE ELMO

By: [Signature]

Its: Mike Pearson
Mayor

By: [Signature]

Its: Julie Johnson
City Clerk

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

The foregoing instrument was acknowledged before me this 16th day of October, 2018, by Mike Pearson and Julie Johnson, the Mayor and City Clerk, respectively, of the City of Lake Elmo, a Minnesota municipal corporation, on behalf of the corporation and pursuant to the authority granted by its City Council.

[Signature]
NOTARY PUBLIC



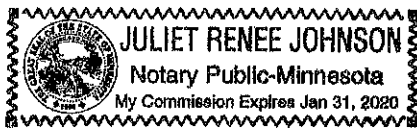
EN PROPERTIES, LLC

By: _____

Its: _____

STATE OF MINNESOTA)
) ss.
COUNTY OF Washington

The foregoing instrument was acknowledged before me this 22nd day of October, 2018, by Terry Emerson, the Chief Manager of EN Properties, LLC, a Minnesota limited liability company on behalf of the company.



NOTARY PUBLIC

DRAFTED BY:
City of Lake Elmo
3800 Laverne Avenue North
Lake Elmo, MN 55042
(651) 747-3901

**MORTGAGEE CONSENT TO
DEVELOPMENT AGREEMENT**

Premier Bank A Minnesota Corporation, which holds a mortgage on the Property, the development of which is governed by the foregoing Development Agreement, agrees that the Development Agreement shall remain in full force and effect even if it forecloses on its mortgage.

Dated this 16th day of October, 2018.

Mark E. Novitzki

President / CEO

STATE OF MINNESOTA)
COUNTY OF Ramsey) ss.

The foregoing instrument was acknowledged before me this 16th day of October, 2018, by Mark E. Novitzki.

Victoria J. Campbell

NOTARY PUBLIC

DRAFTED BY:
City of Lake Elmo
3800 Laverne Avenue North
Lake Elmo, MN 55042
(651) 747-3901



EXHIBIT A TO DEVELOPMENT AGREEMENT

Legal Description of Property Being Final Platted

That part of the South Half of the Southeast Quarter of Section 36, Township 29 North, Range 21 West, Washington County, Minnesota, lying easterly of the West 33.00 feet (2 rods) thereof, EXCEPT that part designated as Parcel 44 (to include existing right-of-way) on Minnesota Department of Transportation Right of Way Plat No. 82-35, State Project No. 8282 (94-392), recorded as Document No. 424557 in the Office of the County Recorder, Washington County, Minnesota.

EXHIBIT B TO DEVELOPMENT AGREEMENT

List of Plan Documents

The following documents prepared by Larson Engineering constitute the Plans:

THOSE DOCUMENTS BY

AS FOLLOWS:

<u>SHEET</u>	<u>TITLE</u>	<u>REVISION</u> <u>DATE</u>
T	Title	
C1	Demolition Plan	
C2	Paving and Dimension Plan	
C3	Grading and Erosion Control Plan	
C3.1	Landscape Plan	
C4	Utility Plan	
C5	Details	
C6	Details	

EXHIBIT C TO DEVELOPMENT AGREEMENT

Subdivision Improvements Cost/Security Amount Estimate

<u>CONSTRUCTION CATEGORY</u>		<u>COST</u>	<u>125 percent</u>
1	<u>Grading</u>	\$NA	\$NA
2	<u>Sanitary Sewer</u>	\$285,105	\$356,381
3	<u>Watermain</u>	\$317,660	\$397,075
4	<u>Storm Sewer (includes pond structures and outfall pipes)</u>	\$48,958	\$61,198
5	Streets and Sidewalks	\$189,675	\$237,094
6	Trails	\$13,183	\$16,479
7	<u>Surface Water Facilities (ponds, infiltration basins, other BMPs)</u>	\$NA	\$NA
8	Street Lighting	\$NA	\$NA
9	<u>Street and Traffic Signs</u>	\$2,863	\$3,579
10	<u>Private Utilities</u>	\$NA	\$NA
11	<u>Landscaping Improvements</u>	\$7,000	\$8,750
12	<u>Tree Preservation and Restoration</u>	\$NA	\$NA
13	<u>Wetland Mitigation and Buffers</u>	\$NA	\$NA
14	<u>Monuments</u>	\$NA	\$NA
15	<u>Erosion and Sediment Control</u>	\$37,000	\$46,250
16	Miscellaneous Facilities	\$NA	\$NA
17	Developer's Record Drawings	\$8,000	\$10,000
<u>TOTALS</u>		\$909,444	\$1,136,805

CONSENT TO PLAT

Whereas, the undersigned, Premier Bank, a Minnesota corporation (the "Mortgagee") is the holder of Mortgage Liens encumbering real property located in the County of Washington, State of Minnesota, legally described on Exhibit A (the "Property") attached hereto pursuant to the terms of a Mortgage, Security Agreement, Fixture Financing Statement, and Assignment of Leases and Rents dated October 25, 2001 and recorded in the office of the Washington County Recorder on October 26, 2001 as Document Number 3189136 and a Commercial Real Estate Mortgage, dated July 1, 2014 and recorded in the office of the Washington County Recorder on July 25, 2014 as Document Number 3995126.

Whereas, the Property has been platted pursuant to the Plat of Four Corners dated October ____, 2018 and recorded on October ____, 2018 in the office of the Washington County Recorder as Document Number _____; and


Whereas, Mortgagor did not join in the dedication of the plat and desires to consent to the plat.

Now, Therefore, the undersigned Mortgagor hereby consents to the platting of the Property described on Exhibit A as a part of the Plat of Four Corners and further consents to the donation and dedication to the public for public use forever the streets, right of ways, and easements as shown on the plat.

In Witness Whereof, Mortgagor has caused this Consent to Plat to be executed as of the day and year first above written.

Premier Bank, a Minnesota Corporation

By

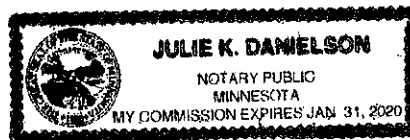

Mark E. Novitsky / President

STATE OF MINNESOTA }
 }
COUNTY OF Ramsey } ss.
 }

The foregoing instrument was acknowledged before me, a notary public, this 22nd day of October, 2018, by Mark E. Novitzki, the President of Premier Bank, a corporation under the laws of the state of Minnesota, on behalf of said corporation.



Notary Public



THIS INSTRUMENT WAS DRAFTED BY:

SJOBERG & TEBELIUS, P.A.
Woodhill Office Park
2145 Woodlane Drive, Suite 101
Woodbury, Minnesota 55125
Telephone: 651-738-3433

Error,

EXHIBIT A

Legal Description

That part of the South Half of the Southeast Quarter of Section 36, Township 29 North, Range 21 West, Washington County, Minnesota, lying easterly of the West 33.00 feet (2 rods) thereof, EXCEPT that part designated as Parcel 44 (to include existing right-of-way) on Minnesota Department of Transportation Right of Way Plat No. 82-35, State Project No. 8282 (94-392), recorded as Document No. 424557 in the Office of the County Recorder, Washington County, Minnesota

Error,