



MAYOR & COUNCIL COMMUNICATION

DATE: 8/4/15
REGULAR
ITEM # 12
MOTION

AGENDA ITEM: Eastern Village Trunk Sewer and Watermain Developer’s Agreement

SUBMITTED BY: Kyle Klatt, Community Development Director

THROUGH: Clark Schroeder, Interim City Administrator

REVIEWED BY: Jack Griffin, City Engineer
Dave Synder, City Attorney

SUGGESTED ORDER OF BUSINESS:

- Introduction of ItemCommunity Development Director
- Report/Presentation.....Community Development Director
- Questions from Council to Staff Mayor Facilitates
- Call for Motion Mayor & City Council
- Discussion..... Mayor & City Council
- Action on Motion..... Mayor Facilitates

POLICY RECCOMENDER: Staff is recommending that the City Council approve revisions to the Eastern Village Trunk Sewer and Watermain development contract that will change the name of the developer associated with the project and make other revisions as negotiated by Staff and the developer.

FISCAL IMPACT: Direct Payments to Developer – None (no change from approved agreement).

SUMMARY AND ACTION REQUESTED: The City Council is being asked to consider amendments to the approved developer’s agreement for a project to install trunk sewer and watermain facilities from the 30th Street lift station to the southern edge of the railroad right-of-way line within the southern portion of the Village Planning Area. This trunk infrastructure will connect to the line previously constructed by the City within the 39th Street right-of-way and that was extended to the railroad right-of-way in the northern part of the Village. The revisions will change the developer of the project from Chase Development, Inc. to two separate parties: Robert Engstrom Companies and GWSA Land Development, LLC (Gonyea). In addition to the

developer change, the two new parties to the agreement have asked for revisions to the document to extend the completion date from September 15th to November 1st.

The recommended motion to take action on the request is as follows:

“Move to amend the developer’s agreement for the Eastern Village Trunk Sewer and Watermain as drafted and documented in the attached amended Development Agreement”

LEGISLATIVE HISTORY/STAFF REPORT: The City Council approved a developers’ agreement for trunk sewer and watermain project on June 9th of this year after separating out this specific project from the overall work planned within the Easton Village subdivision. In the time since the Council’s approval of an agreement, the private parties that will be building this project have failed to come to an agreement that would allow work to commence on the project as initially proposed. At this time, two of the parties that will directly benefit from the installation of the trunk infrastructure, Robert Engstrom Companies and Gonyea Development, have asked that the City name them as the developer for the project so that they can assume responsibility to build the line and move forward with their respective development projects that are ultimately connecting to this line.

In addition to changing the name of the developer, the parties involved with this project have asked for some additional changes to the agreement, the most significant of which is the moving back of the original project completion date from September 15th to November 1, 2015. The November 1st date was selected because it is the latest date that the sewer connection could be made and still allow the City to assess properties along 39th Street that will be connecting to this line. Staff has been in discussions all parties associated with the trunk sewer line, and is recommending approval of the request with the following considerations:

- That Section 9 of the agreement concerning the time of performance be revised to include additional language that will require the developer to track progress towards completion of the project.
- That the project include a penalty for failure to complete the sewer work by November 1st. The suggested \$15,000 penalty represents the City’s carrying costs for bond interest payments if the 39th Street sewer work cannot be assessed to benefitting property owners.
- That this section include additional clarification concerning the circumstances under which an extension may be considered by the City.
- That in consideration of the later completion date, some of the previous provisions concerning notification requirements for default be removed.

The developer has also asked that the project construction cost estimates be updated to reflect the most recent information available from their contractor. These updated estimates have slightly lowered the amounts from the agreement as originally drafted.

All proposed changes from the approved agreement are tracked in the attached document.

BACKGROUND INFORMATION (SWOT):

Strengths: The revisions will allow the responsibility for the project to transfer to developers that will be able to mobilize and begin construction on the trunk infrastructure.

The agreement includes additional language that offers additional protection to the City if the sewer line is not installed prior to November 1st. There is no such protection in the current agreement.

The revised agreement is a key part of all parties being able to move forward with their developments and to execute the private agreements necessary to build the trunk sewer line.

The three affected parties have provided their signed agreement for review by the City to document their intent to move forward with construction.

Weaknesses: Work must commence soon in order to ensure the November 1st deadline can be met.

Opportunities: The proposed revisions will further the City's interests in completing a major piece of trunk sewer infrastructure that is funded by private developers.

Threats: Failure to execute an agreement that is acceptable to all parties could lead to delays in connecting individuals to the trunk sewer line, the inability of the City to assess the sewer portion of the 39th Street project, and three developments that will be unable to move forward with building permits.

RECOMMENDATION: Based on the above Staff report, Staff is recommending that the City Council approve the proposed amendments to the Eastern Village Trunk Sewer and Watermain Developers Agreement as documented in the attached agreement. The suggested motion to adopt the Staff recommendation is as follows:

“Move to amend the developer’s agreement for the Eastern Village Trunk Sewer and Watermain as drafted and documented in the attached amended Development Agreement”

ATTACHMENTS:

1. Amended Eastern Village Trunk Sewer and Watermain Developers Agreement

(reserved for recording information)

DEVELOPMENT CONTRACT

(Trunk Sewer)

Eastern Village Trunk Sewer and Watermain Line

AGREEMENT dated _____, 2015, by and between the **CITY OF LAKE ELMO** a Minnesota municipal corporation ("City"), and ~~Chase Development, Inc~~ GWSA Land Development, LLC, and Robert Engstrom Companies, (each sometimes individually referred to as a "Party" and collectively referred to as the "Developer").

1. REQUEST FOR PUBLIC IMPROVEMENT PROJECT APPROVAL. The Developer has asked the City to approve the final plans for the Eastern Village Trunk Sewer and Watermain Line (referred to in this Contract as the "project"). The land is on which the project is situated in the County of Washington, State of Minnesota, and is legally described in the attached Exhibit "A":

2. CONDITIONS OF PROJECT APPROVAL. The City hereby approves the project on condition that the Developer enter into this Contract and furnishes the security required by it.

3. RIGHT TO PROCEED. Unless separate written approval has been given by the City the Developer may not grade or otherwise disturb the earth, remove trees, and construct utilities, until all the following conditions have been satisfied: 1) this agreement has been fully executed by both

parties and filed with the City Clerk, 2) the necessary security has been received by the City, 3) all required easements have been recorded with the Washington County Recorder's Office, and 4) the City's Community Development Director has issued a letter that all conditions have been satisfied, a preconstruction conference has been held, and that the Developer may proceed.

4. DEVELOPMENT PLANS. The project shall be constructed in accordance with the following plans and at the Developer's sole expense. The plans shall not be attached to this Contract. If the plans vary from the written terms of this Contract, the written terms shall control. The plans are:

Plan A – Eastern Village Trunk Sewer and Watermain Line

5. IMPROVEMENTS. The Developer shall install and pay for the following:

- A. Sanitary Sewer - Eastern Village Trunk Sewer and Watermain Line.
- B. Watermain - Eastern Village Trunk Sewer and Watermain Line.

The improvements shall be installed in accordance with the City subdivision ordinance and the City's Engineering Design and Construction Standards Manual and pursuant to the direction of the City Engineer. The Developer shall submit plans and specifications which have been prepared by a competent registered professional engineer to the City for approval by the City Engineer. 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 City 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 and a soil engineer inspect the 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. The Developer or his engineer shall schedule a pre-construction meeting at a mutually agreeable time at the Lake Elmo Public Works Facility with all parties concerned, including the City staff, to review the program for the construction work.

All labor and work shall be done and performed in the best and most workmanlike manner and in strict conformance with the approved plans and specifications. No deviations from the approved plans and specifications will be permitted unless approved in writing by the City Engineer. The Developer agrees to furnish to the City a list of contractors being considered for retention by the Developer for the performance of the work required by the Contract. The Developer shall not do any work or furnish any materials not covered by the plans and specifications and special conditions of this Contract, for which reimbursement is expected from the City, unless such work is first ordered in writing by the City Engineer as provided in the specifications.

6. CITY ENGINEERING ADMINISTRATION AND CONSTRUCTION

OBSERVATION. Prior to the commencement of any construction activity authorized under this agreement, the Developer shall submit an escrow for City Engineering Administration and Construction Observation in an amount provided under paragraph 29, Summary of Cash Requirements (City Engineering Administration Escrow). The escrow account will be used to reimburse the City for all engineering administration and construction observation performed during the construction of the improvements until the escrow has been reduced to half of its original amount. Thereafter, the Developer shall reimburse the City each month, within 30 days of receiving an invoice, for all engineering administration and construction observation performed during the construction of the improvements (at normal City rates for such services) and will maintain the account at half of the original balance. If Developer fails to pay the invoiced amount within such 30-day period, and such failure continues for an additional five (5) business days after written notice from the City of such failure, the City may draw upon the escrow and stop the work on site until said escrow has been replenished in accordance with this Section. City engineering administration will include monitoring of construction progress and construction observation, consultation with Developer and his engineer 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 security. Construction observation may be performed by the City's in-house staff or consulting engineer. 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 on an hourly basis at normal City rates therefor.

The direction and review provided through the inspection of the improvements should not be considered a substitute for the Developer required management of the development. Developer will cause the contractor(s) to furnish the City with a schedule of proposed operations at least five (5) days prior to the commencement of construction of each type of Improvement. City shall inspect all Developer Installed Improvements during and after construction for compliance with approved plans and specifications. Developer will notify the City Engineer at such times during construction as the City Engineer 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 Developer is thereby created.

7. 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% ownership interest or in which they are an officer or director may not act as contractors or subcontractors for the public improvements identified in Paragraph 5 above.

8. PERMITS. The Developer shall obtain or require its contractors and subcontractors to obtain all necessary permits, including but not limited to:

- A. Right-of-Way Excavations and Obstructions:
 - City of Lake Elmo, Right-of-Way Utility Installation(s)
 - City of Lake Elmo, Right-of-Way Obstruction(s)
 - Washington County, Utility Installations(s)
 - Washington County, Street or Driveway Access(s)
 - Minnesota Department of Transportation, Utility Installation
 - Minnesota Department of Transportation, Right-of-Way Permit

- B. Watermain Extensions:
 - Minnesota Department of Health

- C. Sanitary Sewer Extensions:
 - Minnesota Pollution Control Agency
 - Metropolitan Council Environmental Services

- D. Stormwater Management:

- Valley Branch, Brown's Creek or South Washington Watershed District Permit
- E. Erosion, Sedimentation Control:
- Minnesota Pollution Control Agency, General NPDES Stormwater Permit
 - SWPPP (Stormwater Pollution Prevention Plan)
- F. Wetland Mitigation:
- Board of Water and Soil Resources, WCA
- G. Construction Dewatering:
- Minnesota Department of Natural Resources

9. TIME OF PERFORMANCE. ~~The Developer shall install all public improvements by September 15, 2015. 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. The Developer understands that time is of essence for the City to complete the Trunk Sanitary Sewer portion of these improvements by November 1, 2015 and therefore hereby waives any right to appeal or contest any remedies, penalties or fines imposed by the City as allowed within this agreement. The Developer shall complete the installation of the trunk sanitary sewer improvements by November 1, 2015. The Developer shall complete the trunk watermain improvements by December 1, 2015. The Developer may, however, request an extension of time from the City. The City has no obligation to grant an extension and will consider granting an extension only if work progresses diligently, in the sole opinion of the City, and every effort is made to meet the completion deadline, including, but not limited to, the mobilization of additional pipe crews. The City inspection staff will maintain daily work logs to track progress of the work and said work logs will be referenced by the City when determining if an extension is warranted. 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. If Developer fails to complete the installation of the trunk sanitary sewer improvements prior to November 1, 2015, Developer shall pay to the City a fee in the amount of Fifteen Thousand Dollars (\$15,000.00) regardless of whether the City grants an extension for the improvements or not. This fee is to provide reimbursement to the City for the interest costs on the bond payments of the sanitary sewer~~

portion of the 39th Street: Street and Sanitary Sewer Improvement Project in the event the City is unable to assess the sewer because the connection is incomplete. If the sewer line is completed prior to November 1, 2015, or the City is able to assess for the sewer portion of the 39th Street Project, Developer shall pay no fee.

10. LICENSE. The Developer hereby grants the City, its agents, employees, officers and contractors a license to enter the project area to perform all work and inspections deemed appropriate by the City in conjunction with project construction.

11. CONSTRUCTION ACCESS. Construction traffic access and egress for public utility construction is restricted to access the subdivision via the planned construction access off of Lisbon Avenue. No construction traffic is permitted on other adjacent local streets.

12. CONSTRUCTION SEQUENCE AND COMPLIANCE. The City will require the developer to construct the improvements in a sequence which will allow progress and compliance points to be measured and evaluated. The Developer and/or their representatives are required to supervise and coordinate all construction activities for all 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 13, 14 and 15. For the purpose of this paragraph, Electronic message (email) shall be deemed an acceptable method of notification provided it is captioned "Notice pursuant to Development Agreement".

13. EROSION CONTROL. Prior to initiating construction activity, all erosion control measures shall be implemented by the Developer and inspected and approved by the City. Erosion control practices must comply with the approved plans and specifications for the project, with all watershed district permits and with Minnesota Pollution Control Agency's Best Management Practices. The City may impose additional erosion control requirements as deemed necessary. 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 ten (10) days, the City may draw down the security to pay any costs. No construction activity will be allowed unless the project is in full compliance with the approved erosion control plan.

14. GRADING PLAN. The project shall be graded in accordance with the approved plans. The plans shall conform to Engineering Design and Construction Standards Manual. All grading shall be completed within the project area prior to the acceptance of the public improvements.

15. UTILITY IMPROVEMENTS. All sanitary sewers and watermain shall be installed in accordance with the approved Plans and Specifications for Public Improvements, Plan "A" and Plan "B". The plan shall conform to the City's Engineering Design and Construction Standards Manual. All restoration work on the site shall be completed in accordance with the approved plans. Once the work is completed, the developer or its representative shall submit a written request to the City asking for an inspection of the 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.

16. STREET MAINTENANCE DURING CONSTRUCTION. The developer shall be responsible for keeping public streets within and adjacent to the project area clean of dirt and debris that may spill, track, or wash onto the street from Developer's operation. A copy of this contract shall be approved by the City before construction activity is started. The contract shall provide that the City may direct the contractor to clean the streets and the contractor will bill the Developer.

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

- a. Developer/Developer Engineer's Certificate
- b. Land Surveyor's Certificate

certifying that all construction has been completed in accordance with the terms of this Contract. 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, the City Engineer will accept the completed public improvements.

18. WETLAND MITIGATION. The Developer shall complete any required wetland mitigation/restoration in accordance with the approved Plans and Specifications and in accordance with any applicable Watershed or agency Permits. If any required mitigation work is found to be incomplete or restoration is unsuccessful, and if Developer fails to remedy such default within fifteen (15) days after written notice from the City (provided, however, that in the event of a bona fide emergency, the City shall only be required to give such notice as is practicable under the circumstances), the City may draw down the security at any time during the warranty period if the Developer fails to take corrective measures to be used by the City to perform the work.

19. RESPONSIBILITY FOR COSTS.

A. In the event that the City receives claims from labor, materialmen, or others that work required by this Contract has been performed, the sums due them have not been paid, and the laborers, materialmen, or others are seeking payment from the City, and in the further event that such claims have not been resolved by Developer within thirty (30) days after written notice 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 letters of credit 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 letters of credit deposited with the District Court, except that the Court shall retain jurisdiction to determine payment of attorneys' fees pursuant to this Contract.

B. Except as otherwise specified herein, the Developer shall pay all costs incurred by it or the City in conjunction with the project, including but not limited to legal, planning, engineering and inspection expenses incurred in connection with approval and acceptance of the project, the preparation of

this Contract, review of construction plans and documents, and all costs and expenses incurred by the City in monitoring and inspecting project, all at normal City rates therefor. All amounts incurred and due at the time, must be fully paid prior to acceptance of the improvements.

C. The Developer shall hold the City and its officers, employees, and agents harmless from claims made by itself and third parties for damages sustained or costs incurred resulting from project approval and development. The Developer shall indemnify the City and its officers, employees, and agents for all costs, damages, or expenses which the City may pay or incur in consequence of such claims, including attorneys' fees. Notwithstanding anything to the contrary, Developer's obligation to indemnify, hold harmless and defend the City shall not extend to any claim, liability, loss, costs, damages or expenses, including attorney's fees, which relate to, result from or are caused by the City's violation of applicable law, this Agreement or the negligence of the City and/or its officers, employees, consultants or agents.

D. The Developer shall reimburse the City for costs incurred in the enforcement of this Contract, including reasonable engineering and attorneys' fees.

E. The Developer shall pay in full all bills submitted to it by the City for obligations incurred under this Contract within thirty (30) days after receipt. Bills not paid within thirty (30) days shall be assessed a late fee per the City of Lake Elmo adopted Fee Schedule. Upon request, the City will provide copies of detailed invoices of the work performed.

20. CITY PAYMENTS. There are no City payments for oversizing.

21. SPECIAL PROVISIONS. The following special provisions shall apply to the project.

A. Implementation of recommendations and plan revisions as directed by the City Engineer.

22. MISCELLANEOUS.

A. The Developer may not assign this Contract without the written permission of the City Council. The Developer's obligation hereunder shall continue in full force and effect even if the Developer subdivides the property.

B. Developer shall take out and maintain or cause to be taken out and maintained until six (6) months after the City has accepted the public 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 \$1,000,000 for each occurrence; limits for property damage shall be not less than \$200,000 for each occurrence; or a combination single limit policy of \$1,000,000 or more. The City shall be named as an additional insured on the policy, and the Developer shall file with the City a certificate evidencing coverage prior to the commencement of construction activity. The certificate shall provide that the City must be given thirty (30) days advance written notice of the cancellation of the insurance.

C. Third parties shall have no recourse against the City under this Contract.

D. If any portion, section, subsection, sentence, clause, paragraph, or phrase of this Contract is for any reason held invalid, such decision shall not affect the validity of the remaining portion of this Contract.

E. The action or inaction of the City shall not constitute a waiver or amendment to the provisions of this Contract. 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 Contract shall not be a waiver or release.

F. This Contract shall run with the land and may be recorded against the title to the property. The Developer covenants with the City, its successors and assigns, that the Developer has fee title to the project property and/or has obtained consents to this Contract, in the form attached hereto, from all parties who have an interest in the property; that there are no unrecorded interests in the project property; and that the Developer will indemnify and hold the City harmless for any breach of the foregoing covenants.

G. 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.

H. The Developer represents to the City that the project complies 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 project does not comply, the City may, at its option, refuse to allow construction or development work in the project area until the Developer does comply. Upon the City's demand, the Developer shall cease work until there is compliance.

23. 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 Developers to commence and complete construction of the Public Improvements pursuant to the terms, conditions and limitations of this Agreement ~~and the continuance of such failure for a period of thirty (30) days after written notice thereof (provided, however, that in the event of a bona fide emergency, the City shall only be required to give such notice as is practicable under the circumstances).~~

B. Failure by Developers to substantially observe or perform any material covenant, condition, obligation or agreement on their part to be observed or performed under this Agreement. ~~and the continuance of such failure for a period of thirty (30) days after written notice thereof (provided, however, that in the event of a bona fide emergency, the City shall only be required to give such notice as is practicable under the circumstances).~~

24. 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 Developers, deemed adequate by the City, that Developers will cure their default and

continue their 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 Developers, or immediately draw on the Letter of Credit, as set forth in this Agreement.

25. ENFORCEMENT BY CITY; DAMAGES. The Developers acknowledge the right of the City to enforce the terms of this Agreement against the Developers, by action for specific performance or damages, or both, or by any other legally authorized means. The Developers also acknowledge that their failure to perform any or all of their obligations under this Agreement may result in substantial damages to the City; that in the event of default by the Developers, 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.

26. WARRANTY. Upon the City's approval of the improvements, but prior to formal acceptance of the improvements by the City Council, ~~t~~The Developer warrants all improvements required to be constructed by it pursuant to this Contract against poor material and faulty workmanship. The Developer shall submit either a performance bond for one-hundred percent (100%) of the amount of the original cost of the improvements, subject to the approval and in the sole discretion of the City, or a cash deposit or letter of credit for twenty-five percent (25%) of the amount of the original cost of the improvements.

A. The required warranty period for materials and workmanship for the utility contractor installing public sewer and water mains shall be two (2) years from the date of final written City acceptance of the work.

27. SUMMARY OF SECURITY REQUIREMENTS. To guarantee compliance with the terms of this agreement, payment of special assessments, payment of the costs of all public improvements, and construction of all public improvements, the Developer shall furnish the City with an irrevocable letter of

credit, in the form attached hereto, from a bank, cash escrow or a combination cash escrow and Letter of Credit ("security") for the sum of \$762,007,784,280. The amount of the security was calculated as follows:

CONSTRUCTION COSTS:

Eastern Village Trunk Sewer and Watermain	<u>\$607,105.60624,924</u>
Developer's Record Drawings	\$2,500
Construction Sub-Total	\$ <u>609,605.60627,424</u>
Total Project Securities (at 125% Construction Costs)	<u>\$762,007,784,280</u>

This breakdown is for historical reference; it is not a restriction on the use of the security. The bank shall be subject to the approval of the City Administrator. The City may draw down the security, without notice, for any violation of the terms of this Contract or if the security is allowed to lapse prior to the end of the required term. If the required public improvements are not completed at least thirty (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 to cure the default.

28. REDUCTION OF SECURITY. Upon written request by the Developer and upon receipt of proof satisfactory to the City Engineer that work has been completed and financial obligations to the City have been satisfied, with City Engineer approval the security may be reduced as follows:

A. Up to a 50%, or \$381,003.50392,140 of the security provided in accordance with paragraph 27. above may be released when: (1) all utilities have been installed, all testing has been successfully completed, and the utilities are considered ready for use by the City Engineer; and (2) completion of the Improvements is done to the satisfaction of the City and evidence of such is provided by the City in writing and satisfactory evidence of payment, such as lien waivers are provided.

B. Up to an additional 25%, or \$ 190,501.75196,070 of the security provided in accordance with paragraph 27. above may be released when: (1) all Improvements under this Agreement have been completed to the satisfaction of the City Engineer including all restoration and corrective work for any identified punch list items; and (2) Improvements are accepted by the City in writing and satisfactory evidence of payment, such as lien waivers, are provided.

C. Twenty-five percent (25%) of the security provided in accordance with paragraph 27. above shall be retained as security until: (1) all improvements have been completed, (2) all financial obligations to the City satisfied, (3) the required "record" plans have been received and approved by the City, (4) a warranty security is provided in the form of a letter of credit or warranty bond acceptable to the City, and (5) the public improvements are accepted by the City.

29. SUMMARY OF CASH REQUIREMENTS. The following is a summary of the cash requirements under this Contract which must be furnished to the City at the time of project approval:

City Engineering Administration Escrow	\$20,000 (Based on two months of administration/observation)
Total Cash Requirements	\$20,000

30. 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: 10850 Old County Road 15, Suite #200, Plymouth, MN 55441. 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, 3800 Laverne Avenue N. Lake Elmo, Minnesota 55042.

31. EVIDENCE OF TITLE. Developer shall furnish the City with evidence of its fee ownership of the property on which the project will be constructed by way of an attorney's title opinion or title insurance policy dated not earlier than thirty (30) days prior to the start of construction.

CITY OF LAKE ELMO

BY: _____, Mayor

(SEAL)

AND _____, City Clerk

DEVELOPER:

GWSA, LLC

BY: _____

Its:

ROBERT ENGSTROM COMPANIES, INC.

BY: _____

Its:

**FEE OWNER CONSENT
TO
DEVELOPMENT CONTRACT**

_____, fee owners of all or part of the subject property, the development of which is governed by the foregoing Development Contract, affirm and consent to the provisions thereof and agree to be bound by the provisions as the same may apply to that portion of the subject property owned by them.

Dated this _____ day of _____, 2_____.

STATE OF MINNESOTA)
 (ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 2_____, by _____.

NOTARY PUBLIC

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

**MORTGAGE CONSENT
TO
DEVELOPMENT CONTRACT**

_____, which holds a mortgage on the subject property, the development of which is governed by the foregoing Development Contract, agrees that the Development Contract shall remain in full force and effect even if it forecloses on its mortgage.

Dated this _____ day of _____, 2_____.

STATE OF MINNESOTA)
 (ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 2_____, by _____.

NOTARY PUBLIC

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

EXHIBIT "A" TO DEVELOPMENT CONTRACT

Legal Description of Project Property

Easton Village, LLC Property:

All that part of the Northeast Quarter of the Southeast Quarter and the Northwest Quarter of the Southeast Quarter and the Southeast Quarter of the Northeast Quarter and the Southwest Quarter of the Northeast Quarter all being in Section 13, Township 29 North, Range 21 West, Washington County, Minnesota, lying south of the southerly right-of-way line of the Union Pacific Railroad, and further described as follows:

Beginning at the East Quarter Comer of said Section 13; thence South 0 degrees 02 minutes 51 seconds East bearings based on the Washington County Coordinate System (NAO 83), along the east line of said Southeast Quarter of Section 13, a distance of 1321.17 feet to the southeast corner of said Northeast Quarter of the Southeast Quarter; thence South 89 degrees 32 minutes 18 seconds West along the south line of the North Half of said Southeast Quarter, a distance of 2637.64 feet to the southwest corner of said Northwest Quarter of the Southeast Quarter; thence North 0 degrees 00 minutes 58 seconds East along the North and South Quarter Section line of said Section 13, a distance of 1397.70 feet to the southerly right-of-way line of the Union Pacific Railroad; thence North 72 degrees 32 minutes 48 seconds East along said southerly right-of-way line, a distance of 69.19 feet to the point of intersection with a line being 66.00 feet east of, as measured at right angles to, and parallel with said North and South Quarter Section line of said Section 13; thence South 0 degrees 00 minutes 58 seconds West along said parallel line, a distance of 330.00 feet thence (at right angles) South 89 degrees 59 minutes 02 seconds East, a distance of 300.00 feet thence (at right angles) North 0 degrees 00 minutes 58 seconds East, 424.41 feet to said southerly right-of-way line of the Union Pacific Railroad; thence North 72 degrees 32 minutes 48 seconds East, along said southerly right-of-way line of the Union Pacific Railroad, a distance of 2378.80 feet to the east line of said Southeast Quarter of the Northeast Quarter; thence South 0 degrees 02 minutes 53 seconds East along said east line, a distance of 883.82 feet to the point of beginning.

Excepting therefrom that part of the Northwest Quarter of the Southeast Quarter of said Section 13, lying within the following described area: Commencing at the southwest corner of said Northwest Quarter of the Southeast Quarter; thence North along the west line of said Southeast Quarter of Section 13, a distance of 240.00 feet to the point of beginning; thence continuing North along said west line of the Southeast Quarter, a distance of 667.80 feet thence East at right angles a distance of 30.00 feet; thence southeasterly by a deflection angle to the right 46 degrees 28 minutes 00 seconds, a distance of 220.70 feet; thence southeasterly by a deflection angle to the left 20 degrees 35 minutes 00 seconds, a distance of 286.80 feet; thence south by a deflection angle to the right 64 degrees 07 minutes and parallel with said west line of the Southeast Quarter, a distance of 382.70 feet thence West at right angle, a distance of 440.00 feet to the point of beginning.

And Excepting from the first above described area, all that part lying Easterly of a line 60.00 feet West of, measured at right angle to and parallel with the center line of County State Aid Highway 15 described as follows: Commencing at the East Quarter corner of said Section 13; thence South 00 degrees 51 minutes 49 seconds East, bearing oriented to the Washington County Coordinate System, South Zone, along the East line of said Section 13 to the southeast corner of said Section 13 and the beginning of the center line to be described; thence North 00 degrees 45 minutes 51 seconds West a distance of 3571.19 feet thence North 00 degrees 54 minutes 55 seconds West a distance of 1000.00 feet and said center line there terminating, except the Chicago and Northwestern Railroad right-Of-way, Washington County, Minnesota.

Peter J. Schiltgen Property:

That part of the West half of Section Thirteen (13), Township Twenty-nine (29) North of Range Twenty-one (21), lying within the following boundaries, to-wit: Beginning at the quarter post in the center of the South line of said Section; thence running North along the Center Line of said Section to a point in the center of the Saint Paul & Stillwater Road; thence Southwesterly along the center of said road to a point forty-four (44)

Rods West of the East Line of the Northwest Quarter of said Section; thence South on a line parallel with the West line of said Section to a point in the South line thereof Forty-four (44) Rods West of the center post in said line; thence East Forty-four (44) Rods to the place of beginning, excepting, however, a strip of land One Hundred (100) Feet in width, being Forty-four (44) feet on the north side and Fifty-six (56) feet on the South side of center line of St. P.S. & T. F. Ry. track as constructed over and across East Forty-four (44) Rods of West One-half (W 1/2), and also excepting therefrom the East 726 feet of the South 1800 feet of the Southwest Quarter (SW ¼) of Section 13 Township 29 North, Range 21 West, Washington County, Minnesota, according to the United States Government Survey thereof, subject to the right of way of Minnesota Trunk Highway No. 5 (also known as Stillwater Boulevard North), and is also subject to a 20 foot road use easement recorded by Document Number 328273 in the Office of the County Recorder, Washington County, Minnesota, and is also subject to a Northern States Power Easement recorded in Book 136 of Deeds, Page 297, in the Office of the County Recorder, Washington County, Minnesota.

IRREVOCABLE LETTER OF CREDIT

No. _____
Date: _____

TO: City of Lake Elmo

Dear Sir or Madam:

We hereby issue, for the account of _____ (Name of Developer) and in your favor, our Irrevocable Letter of Credit in the amount of \$_____, available to you by your draft drawn on sight on the undersigned bank at its offices in Minnesota.

The draft must:

- a) Bear the clause, "Drawn under Letter of Credit No. _____, dated _____, 2_____, of (Name of Bank) _____";
- b) Be signed by the Mayor or City Administrator of the City of Lake Elmo.
- c) Be presented for payment at _____ (Address of Bank) _____, on or before 4:00 p.m. on November 30, 2_____.

This Letter of Credit shall automatically renew for successive one-year terms unless, at least forty-five (45) days prior to the next annual renewal date (which shall be November 30 of each year), the Bank delivers written notice to the Lake Elmo City Administrator that it intends to modify the terms of, or cancel, this Letter of Credit. Written notice is effective if sent by certified mail, postage prepaid, and deposited in the U.S. Mail, at least forty-five (45) days prior to the next annual renewal date addressed as follows: City Administrator, City Hall, 3800 Laverne Ave. N. Lake Elmo Minnesota 55042 and is actually received by the City Administrator at least thirty (30) days prior to the renewal date.

This Letter of Credit sets forth in full our understanding which shall not in any way be modified, amended, amplified, or limited by reference to any document, instrument, or agreement, whether or not referred to herein.

This Letter of Credit is not assignable. This is not a Notation Letter of Credit. More than one draw may be made under this Letter of Credit.

This Letter of Credit shall be governed by the most recent revision of the Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Publication No. 500.

We hereby agree that a draft drawn under and in compliance with this Letter of Credit shall be duly honored upon presentation.

BY: _____
Its _____