FD AGR 245 10-14-08 TIDS4

SECOND AMENDMENT TO THE

CONTRACT FOR PRIVATE DEVELOPMENT

TAX INCREMENT DISTRICT NUMBER FIFTY-FOUR

Between

DTH, LLC.

and the

CITY OF RAPID CITY, SOUTH DAKOTA

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THIS AGREEMENT, is made and entered into on this 14th day of October, 2008, between DTH, LLC., 3220 West Main Street, Rapid City, SD 57709, a limited liability company, herein after referred to as the "Developer," and the City of Rapid City, 300 Sixth Street, Rapid City, SD 57701, a municipal corporation and political subdivision of the State of South Dakota, herein after referred to as the "City."

SECTION 1. The City created Tax Increment District Number Fifty-Four by resolution on October 3, 2005.

SECTION 2. The City approved the Project Plan for Tax Increment District Number Fifty-Four on October 3, 2005. The City approved by resolution a Revised Project Plan for Tax Increment District Number 54 on April 7, 2008.

SECTION 3. The purpose of this agreement is to allow the Developer to be reimbursed from the proceeds of the tax increment district for the cost of the improvements that are included in the revised project plan. It further establishes the procedures by which the Developer may assign its right to any proceeds from the district in order to secure private financing for the project improvements.

SECTION 4. The estimated project costs to be paid by the district, as set forth in the revised project plan, are as follows:

Capital Costs:		
Booster Station		$ 540,000.00
Water Main in Bunker Drive		$ 135,000.00
Water Main		$ 315,000.00
Grading over water mains		$ 270,000.00
Park Improvements		$ 400,000.00
Professional Service Costs:		$ 315,000.00
Booster Station	$ 60,000.00	
Water Main in Bunker Drive	$ 15,000.00	
Water Main	$ 35,000.00	
Grading over water mains	$ 30,000.00	
Reservoir	$ 75,000.00	
Park Design & Construction Administration	$100,000.00	
Financing Costs:		
Financing Interest		$ 2,456,456.72
Contingency Costs:		$ 0

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Relocation Costs:		$ 0
Organizational Costs:		$ 0
Other Necessary and Convenient Costs:		
Water Storage Reservoir		$ 675,000.00
TOTAL:		$ 5,106,456.72
Imputed Administrative Costs*		
City of Rapid City	$ 2,050.00	

*The imputed administrative costs are interest-free, are not included in the total project costs, and are to be paid from the balance remaining in the TID #54 fund available to the City Finance Officer on October 15, 2010.

SECTION 5. The costs of constructing the improvements contained in Section 4 of this agreement are the responsibility of the Developer. The Developer agrees to construct the improvements based on the following timeline:

Water Main in Bunker Drive –Completed
Park Improvements – Have Been Paid For By Developer
Water Booster Station – Within 14 Months of Council Approval of this Agreement
Water Storage Reservoir –Within 15 Months of Council Approval of this Agreement
Balance of the Improvements – By June 1, 2010

If the Developer does not complete the improvements in accordance with the above timeline the City has the option to terminate this agreement as to any improvements that have not been constructed or on which construction has not been started. Prior to the City terminating the agreement, the City shall provide at least seven days written notice to the Developer and/or any entity that has an assignment interest in the proceeds of the tax increment funds of the date of the meeting at which the City Council will consider terminating the agreement.

A. The City acknowledges that the Developer has satisfied its obligation in regard to making the Park Improvements by paying the City $500,000.

B. The City acknowledges that the Developer will satisfy its obligation in regard to the Water Storage Reservoir upon paying the City $675,000.

C. The City acknowledges that the Developer will satisfy its obligation in regard to the Water Booster Station upon paying the City $540,000.

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SECTION 6. The base value of the property located in Tax Increment District Number Fifty-Four has been certified by the South Dakota Department of Revenue as Five Hundred Forty Seven Thousand One Hundred Ninety Dollars ($547,190).

SECTION 7. It is anticipated that the Developer will secure private financing to fund the improvements contemplated in the approved Revised Tax Increment District Number Fifty-Four project plan. This private financing is anticipated to be a bond or note, at an average interest rate over the life of the loan not to exceed Nine Percent (9%) per annum. It is understood by the parties that the financing amount included in the project plan is based on an interest rate of Nine Percent (9%) per annum and that the Developer will not receive any reimbursement for interest that it pays in excess of Nine Percent (9%) per annum. It is further understood that should the Developer receive a loan with an interest rate of less than Nine Percent (9%) per annum, that the City will only reimburse the Developer for the actual amount of interest paid.

SECTION 8. The Developer shall complete the improvements described in the approved Revised Project Plan per Section 5 of this agreement. The improvements included in the project plan shall be broken into two phases. Phase I will include the improvements that are required to be completed by December 31, 2007. Phase II will include the balance of the improvements which are required to be completed by June 1, 2010. Upon completion of a phase, the Developer shall certify to the City's Finance Office that the improvements included in that phase have been completed and shall certify the amount of money disbursed therefore. The City shall have the right to require reasonable documentation to establish that the amounts set forth in the Tax Increment District Number Fifty-Four Revised Project Plan have, in fact been disbursed in payment for the improvements and interest thereon.

SECTION 9. It is understood by the parties that the boundaries of Tax Increment District Fifty-Four may overlap the boundaries of other tax increment districts. Any increments generated from areas within overlapping districts will be used to pay for the improvements in the districts based on the chronological order in which the districts were created. Only after the disbursements required of the City in the project plans or developer's agreements for any previously created districts have been satisfied, will the City have a duty to disburse funds under this agreement.

SECTION 10. All positive tax increments received in Tax Increment District Number Fifty-Four shall, upon receipt by the City, be deposited in a special fund to be known as the "Tax Increment District Number Fifty-Four Fund," hereinafter referred to as the "Fund." Subject to Sections 8, 9 and 12 of this agreement and the limitation that at no time shall the cumulative total of payments made from the fund exceed the lesser of the total amount of disbursements certified pursuant to Section 8 of this agreement or the total of the estimated project costs set forth in the Tax Increment District Number Fifty-Four Revised Project Plan as well as any other limitations contained herein, the City shall, within thirty (30) days after the receipt of each tax increment payment from the Treasurer of Pennington County, disburse all amounts in the fund to the Developer or their designee.

SECTION 11. It is contemplated by the parties that Developer may assign its interest under this agreement as security for the note or loan agreement, or other financing described in Section 7 hereof. It is understood and agreed, by and between the parties, that any such assignment shall be in writing and that if the City shall make disbursement pursuant to such assignment that it shall, to the extent of such disbursement, relieve the City of the obligations to make such disbursement to Developer. Any assignee shall agree to be bound by the terms and conditions contained in this agreement.

SECTION 12. It is specifically a condition of this agreement and a condition of the City's obligation to pay that all sums payable shall be limited to the proceeds of the positive tax increment from Tax Increment District Number Fifty-Four receipted into the "Fund" specified in Section 10 hereof. The obligation of the City to pay pursuant to this agreement does not constitute a general indebtedness of the City or a charge against the City's general taxing power. The provisions of SDCL 11-9-36 are specifically incorporated herein by reference. It is also specifically agreed that the City has made no representation that the proceeds from such fund shall be sufficient to retire the indebtedness incurred by Developer under Section 7 hereof. The parties further acknowledge that SDCL 11-9-25 limits the duration of allocability of the positive tax increment payments to the fund created by Section 10 hereof. The provisions of SDCL 11-9-25 are specifically incorporated herein by this reference.

SECTION 13. It is a condition of this agreement that all provisions of South Dakota law regarding the expenditure of public funds are incorporated herein. Specifically, the requirements of Chapter 5-18 of the South Dakota Codified Laws are an integral part of this agreement. The Developer shall provide documentation of compliance with Chapter 5-18 upon the request of the City.

SECTION 14. Developer agrees to defend, indemnify and hold harmless the City of Rapid City from obligations or liability, including reasonable attorney's fees, arising out of this agreement or the construction of the improvements contemplated by the Tax Increment District Fifty-Four Revised Project Plan. Developer shall maintain a policy of liability insurance, acceptable to the City, with liability limits of at least one million dollars ($1,000,000.00) that names the City of Rapid City as an additional insured. Such a policy shall remain in effect until the City accepts the improvements.

SECTION 15. Developer agrees to immediately satisfy any and all mechanic's liens or material man's liens that arise as a result of this project. This provision shall not prevent Developer from subsequently seeking compensation from subcontractors or others who may be responsible for such liens or for such payment.

SECTION 16. The Contract for Private Development dated May 16, 2006, the Amendment to the Contract for Private Development dated January 22, 2008, this Second Amendment to the Contract for Private Development, and the Revised Project Plan for Tax Increment District Fifty-Four constitute the entire agreement of the parties. No other promises or consideration form a part of this agreement. All prior discussions and negotiations are merged into these documents or intentionally omitted. In the event of a conflict between the Revised Project Plan, the

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Contract for Private Development dated May 16, 2006, the Amendment to the Contracted for Private Development dated January 22, 2008, and this Second Amendment to the Contract for Private Development, the Contract for Private Development dated May 16, 2006, the Amendment to the Contract for Private Development dated January 22, 2008, and this Second Amendment to the Contract for Private Development shall be controlling.

SECTION 17. This agreement shall be construed and the parties' actions governed by the laws of the State of South Dakota. Any dispute arising out of or related to this Agreement shall be litigated in the Seventh Judicial Circuit Court for the State of South Dakota, located in Rapid City, Pennington County, South Dakota.

Dated this 14th day of OCTOBER, 2008.

DTH, LLC.

By: DOYLE ESTES

Its: MANAGER

CITY OF RAPID CITY

Mayor

ATTEST:

Finance Officer

(SEAL)

State of South Dakota)
ss.
County of Pennington)

On this the 14th day of October, 2008, before me, the undersigned officer, personally appeared Doyle Estes, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged themself to be the Manager of DTH, LLC, and acknowledged that they, being duly authorized to do so, executed the foregoing instrument on for the purposes therein contained.

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

Notary Public, South Dakota

My Commission Expires: My Commission Expires January 30, 2012

(SEAL) AMY D. GRAVES NOTARY PUBLIC STATE of SOUTH DAKOTA

State of South Dakota)
ss.
County of Pennington)

On this 23 day of October, 2008, before me, the undersigned officer, personally appeared Alan Hanks and James F. Preston, who acknowledged themselves to be the Mayor and Finance Officer, respectively, of the City of Rapid City and that he, as such Mayor and Finance Officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing as such Mayor and Finance Officer of the City of Rapid City.

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

Notary Public, South Dakota

My Commission Expires: 7-15-2013

(SEAL)