

CONTRACT FOR CONSTRUCTION OF PUBLIC IMPROVEMENTS  
THROUGH PRIVATE DEVELOPER  
TAX INCREMENT DISTRICT NUMBER SEVENTY-SIX

Between

KS WEST, L.L.C. AND SK EAST, L.L.C.

&

THE CITY OF RAPID CITY, SOUTH DAKOTA

THIS AGREEMENT, is made and entered into on this \_\_\_\_ day of \_\_\_\_\_, 2016, by and between KS West, L.L.C. & SK East, L.L.C., both of which are South Dakota limited liability companies located at 528 Kansas City Street, Suite #4, Rapid City SD 57701, herein after referred to as the “Developer,” and the City of Rapid City, a municipal corporation and political subdivision of the State of South Dakota, located at 300 Sixth Street, Rapid City, South Dakota 57701, herein after referred to as the “City.”

**RECITALS**

WHEREAS, on March 21, 2016, the City approved a resolution creating Tax Increment District Number Seventy-Six pursuant to Chapter 11-9 of the South Dakota Codified Laws; and

WHEREAS, on March 21, 2016, the City also adopted by resolution a Project Plan for Tax Increment District Number Seventy-Six which identifies expenditures for public improvements that qualify as project costs pursuant to SDCL 11-9-14 and SDCL 11-9-15; and

WHEREAS, Pursuant to SDCL 11-9-2(5), the City is empowered to enter into contracts or agreements necessary and convenient to implement the provisions and effectuate the purposes of the Project Plan; and

WHEREAS, the purpose of this Agreement is to establish the conditions under which the Developer can be reimbursed from the proceeds of the tax increment district for the cost of the public improvements identified in the approved Project Plan. This Agreement 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 cost of the public improvements contained in the Project Plan.

NOW THEREFORE, the parties hereby agree as follows:

SECTION 1. The estimated project costs for which the Developer can be reimbursed from Tax Increment District Number Seventy-Six, as set forth in the approved Project Plan, are as follows:

**TOTAL ESTIMATED PROJECT COSTS TO BE PAID BY THE DEVELOPER:**

Capital Costs:

|                                 |    |              |
|---------------------------------|----|--------------|
| Healing Way Street Improvements | \$ | 1,980,000.00 |
| Turn lane at Wellington Drive   | \$ | 180,000.00   |
| Traffic Signal                  |    |              |
| Traffic signal/electrical       | \$ | 440,000.00   |
| Traffic signal installation     | \$ | 80,000.00    |
| Lights and control              | \$ | 150,000.00   |

|                                 |                 |
|---------------------------------|-----------------|
| Professional Costs:             |                 |
| Roadway components              | \$ 216,000.00   |
| Traffic signal components       | \$ 54,000.00    |
| Financing Costs:                |                 |
| Financing Interest              | \$ 1,938,525.00 |
| Contingency Costs:              | \$ 0.00         |
| Necessary and Convenient Costs: | <u>\$ 0.00</u>  |
| Total                           | \$ 5,038,525.00 |
| Imputed Administrative Costs*   |                 |
| City of Rapid City              | \$ 20,000.00    |

\*The imputed administrative costs are interest-free and are not included in the total project costs. The administrative costs will be paid from the balance remaining in the Tax Increment District #76 Fund available to the City Finance Officer beginning on May 15, 2017. The Finance Officer may withdraw monies from the fund until such time as this fee is paid in full.

The parties agree that Developer can only seek reimbursement for improvements made within the geographical boundaries of Tax Increment District Seventy-Six. The parties agree that any improvements made outside of the boundaries of Tax Increment District Seventy-Six are not reimbursable from the Tax Increment District Seventy-Six Fund, and the Developer further agrees it will not seek reimbursement from City for any such improvements made outside of the district. Furthermore, the Developer shall only be reimbursed for the actual design and/or construction costs of the improvements listed above. No reimbursements shall be made for design costs for public improvements not listed above or for construction costs for public improvements that are not specifically listed in this Agreement. To the extent that Developer's design plans or charges that the Developer submits include costs for designing and building public improvements that are not specifically include in the Project Plan, or this Agreement, it is the Developer's responsibility to separate out the non-reimbursable charges and provide the City with the documentation necessary to show that any payments from the Fund identified in Section 6 are only for approved project costs.

SECTION 2. The cost of constructing the improvements contained in Section 1 of this Agreement are the sole responsibility of the Developer. One of the justifications for the creation of this district is that it would accelerate the rate at which the Developer's project will be completed. In order to ensure that the district serves its intended purpose, the Developer acknowledges that these improvements must be started or under contract for construction by June 1, 2017 to be eligible for reimbursement under this Agreement.

The parties acknowledge that the City will reimburse the Developer from the tax increment funds upon the Developer certifying to the City's Finance Office the amounts

actually paid for the public improvements identified above. The Developer shall submit for reimbursement all costs at one time and may not submit costs for various public improvements in phases. The parties agree that no reimbursement will exceed the specific costs listed in the Project Plan and Section 1 of this Agreement without the consent of the parties.

SECTION 3. The base value of the property located in Tax Increment District Number Seventy-Six has yet to be certified by the South Dakota Department of Revenue. Both parties understand that before any increment can be generated by the district that the base valuation of the property within the district must be certified by the Department of Revenue. It is further understood that this Agreement is contingent upon certification of the value of the land in the district by the South Dakota Department of Revenue. When the certified land value has been received by the City from the Department of Revenue it will be incorporated into and become part of this Agreement. The Developer assumes any and all risk that may result from entering into this Agreement prior to receiving a certified land value from the Department of Revenue.

SECTION 4. The Developer may secure private financing to fund the improvements contemplated in the approved Tax Increment District Number Seventy-Six Project Plan. The City will only reimburse the Developer for the amount of interest actually paid to a financial institution providing funding for the public improvements contained in the Project Plan. If the Developer obtains private financing, the interest rate shall not exceed seven (7%) percent per annum during the life of the loan. At no time shall the actual interest paid exceed the maximum amount of financing interest identified in Section 1 of this Agreement and the Project Plan. The Developer will provide to the City Finance Office a Tax Increment Financing proposal from a prospective lender of its choosing which addresses these loan terms and conditions:

1. Fixed or variable interest rate, if variable state frequency of pricing adjustments
2. Interest rate index
3. Interest rate spread over/under index, if any
4. Loan term
5. Collateral
6. Guaranty requirements from the developer
7. All identity of interests between developer and lender

The City Finance Officer will review and analyze the proposed financing terms in order to determine that the terms are reasonable and competitive with financing available in this area. If the Finance Officer finds that the financing terms are acceptable they may approve the rate to be reimbursed under this Agreement. The Finance Officer's approval will not be unreasonably withheld. If the Finance Officer rejects the proposed financing, the Developer may appeal the Finance Officer's decision to the City Council. If the interest rate on the financing for the public improvements contained in this Agreement is renegotiated or otherwise changes, the Developer agrees to solicit competitive interest rates from three or more lenders, which will be submitted to the City Finance Officer for their review and approval in the same manner as the original financing proposal.

The City further reserves the right to require the refinancing of any existing tax increment finance loan utilizing whatever means the City decides most beneficial to the taxpayers, including the issuance of revenue or other bonds, at any time during the term of this Agreement. This shall include the City's right to require the Developer to assign and/or reassign the Tax Increment Finance loan to the City or any other entity designated by the City. If the City chooses to finance or refinance the Tax Increment Finance loan the City will be eligible for reimbursement from the Tax Increment District Seventy-Six fund for the amount of any project or financing costs the City actually expends.

SECTION 5. The Developer shall complete the public improvements described in Section 1 of this Agreement. Healing Way shall be constructed as a three-lane facility with a concrete surface approximately 2,100 linear feet in length from the connection at Catron Boulevard to the southern boundary of the tax increment district. The amount shown for Healing Way includes the cost of the 12" water main. Upon completion of the improvements the Developer shall certify to the City Finance Officer that such improvements have been completed and shall certify the amount of money disbursed therefore. The certification for the improvements to be reimbursed for Healing Way shall be based off of the detailed cost estimate submitted by the Developer in conjunction with the TID application. The parties acknowledge that the actual costs for the component line items that make up the improvement may vary from the estimate and that the reimbursable amount is based on the overall cost identified above to construct Healing Way and not the amount identified for the individual line items contained in the preliminary cost estimate. The Developer shall provide sufficient documentation to certify that the terms of Section 10 of this Agreement are complied with. The City shall have the right to require reasonable documentation to establish that the amounts set forth in the Tax Increment District Number Seventy-Six Project Plan have, in fact, been disbursed for the costs contemplated in the Project Plan and that state bid law has been complied with. Submission of the final costs certification shall be made to the Finance Office no later than 120 days after acceptance of the final project and receipt of warranty surety, if required.

SECTION 6. All positive tax increment payments for Tax Increment District Number Seventy-Six shall, upon receipt by the City, be deposited in a special fund to be known as the "Tax Increment District Number Seventy-Six Fund," hereinafter referred to as the "Fund." Subject to Sections 2, 5, 8, 9 and 10 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 5 of this Agreement or the total of the estimated project costs set forth in Section 1 of this Agreement and the Tax Increment District Number Seventy-Six Project Plan as well as any other limitations contained herein, the City shall, generally within thirty (30) days after the receipt of each tax increment payment from the Treasurer of Pennington County, disburse the total amount in the Fund to the Developer or their designee. The parties agree that this 30-day timeframe will not apply to the first payment after certification pursuant to Section 5, as such payment is approved by the Common Council through its approval process.

SECTION 7. It is contemplated by the parties that the Developer may assign its interest under this Agreement as security for the note or loan agreement, or other financing described in Section 4 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. The City shall have the right to refuse any subsequent assignment if it will result in an increase in the amount of interest being paid to a financial institution, even if the interest rate being charged by the new lender is less than the maximum rate identified in Section 4.

SECTION 8. 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 Seventy-Six received into the "Fund" specified in Section 6 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 Sections 4 and 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 6 hereof. The provisions of SDCL 11-9-25 are specifically incorporated herein by this reference.

SECTION 9. It is understood by the parties that the boundaries of Tax Increment District Seventy-Six 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 completely satisfied, will the City have a duty to disburse funds under this Agreement which were generated in areas that are part of previously created overlapping districts.

SECTION 10. Selection of contractors for the construction of the public improvements described in Section 1 shall comply with all provisions of South Dakota law regarding the expenditure of public funds contained in Chapters 5-18A through 5-18D of South Dakota Codified Laws. The Developer shall provide City with documentation demonstrating that it has complied with Chapters 5-18A through 5-18D.

SECTION 11. Developer agrees to defend, indemnify and hold harmless the 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 Seventy-Six Project Plan, other than the negligent acts of the City. The 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 as an additional insured. Such a policy shall remain in effect until the City accepts the

improvements. The certificates of insurance shall be submitted at the time of the execution of this Agreement.

SECTION 12. Developer agrees to promptly satisfy or bond over 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 13. The parties acknowledge that the public improvements contemplated in Section 1 of this Agreement could not feasibly be constructed without the creation of this tax increment district and the use of private financing being secured by the Developer. Accordingly, the mutual covenants and obligations hereunder shall constitute good and sufficient consideration for the execution and performance of this Agreement.

SECTION 14. This document, along with the Project Plan for Tax Increment District Seventy-Six, constitute the entire agreement of the parties with respect to the payment of funds from Tax Increment District Seventy-Six. No other promises or consideration form a part of this Agreement. All prior discussions and negotiations are merged into these documents or are intentionally omitted. This Agreement may only be amended or modified in writing by mutual agreement of the parties.

SECTION 15. This Agreement is intended solely for the benefit of the parties hereto and shall not be enforceable by, or create any claim of right or right of action, in favor of any other party. Except as allowed under Sections 4 and 7 of this Agreement, the rights and obligations of the parties hereunder shall not be assigned or transferred by either party without the express written consent of the other. Subject to that restriction, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns and legal representatives.

SECTION 16. Failure of a party to insist upon adherence to any term of this Agreement on any occasion shall not be considered a waiver, or deprive that party of the right thereafter to insist upon adherence to that term, or any other term of this Agreement.

SECTION 17. If one or more provisions of this Agreement is declared invalid for any reason whatsoever by any competent court, such invalidity shall not affect any other section(s) or provision of this Agreement if they can be given effect without the invalid section(s) or provisions.

SECTION 18. This Agreement shall be deemed to be prepared jointly by the parties hereto and neither shall be deemed to be its sole author. In the event of any claim of ambiguity, no provision shall thereby be construed against either party.

SECTION 19. This Agreement shall be construed and the parties' actions governed by the laws of the State of South Dakota. The Circuit Court of Pennington County shall be the sole venue for any disputes arising under this Agreement.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2016.

CITY OF RAPID CITY

\_\_\_\_\_  
Steve Allender, Mayor

ATTEST:

\_\_\_\_\_  
Finance Officer

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