

**AGREEMENT BETWEEN THE CITY OF RAPID CITY AND
YASMEEN DREAM, LLC, FOR CONSTRUCTION OF
DRAINAGE CHANNEL ON JOHNSON RANCH PROPERTY**

This Agreement is made by and between the **CITY OF RAPID CITY**, a municipal corporation of 300 Sixth Street, Rapid City, SD 57701 (the “City”), and **YASMEEN DREAM, LLC**, a South Dakota limited liability company, of 528 Kansas City Street, Ste. 4, Rapid City, SD 57701 (the “Developer”).

WHEREAS, the Developer intends to develop property described below; and

WHEREAS, such development cannot occur without the construction of certain drainage improvements described in this Agreement; and

WHEREAS, the City agrees that it is responsible for construction of the required drainage improvements; and

WHEREAS, the parties have come to an agreement on design and construction of the improvements to allow development of the property.

NOW THEREFORE, in consideration of the mutual promises and covenants of the parties contained herein, it is agreed by the parties as follows:

1. Recitals. The parties agree that the recitals stated above constitute an integral part of this Agreement and are incorporated herein as if fully set forth as agreements of the parties.

2. Purpose. The purpose of this Agreement is to set forth the terms and conditions under which the Developer agrees to construct a public improvement and the City agrees to reimburse the Developer for the cost of such improvement.

3. Drainage Improvements. The improvements that are the subject of this Agreement are to be located on property owned by the Developer known as the Johnson Ranch Property, which is generally located southeast of E. Saint Patrick Street, southwest of SD Highway 44, and west of Elk Vale Road/US Highway 16B. The public improvement to be constructed is a drainage channel, sometimes referred to as Element 8A in the Unnamed Tributary Drainage Basin Plan, which is to generally run in a southeasterly direction along SD Highway 44, turning south to carry drainage to Rapid Creek. This channel, and all necessary appurtenances, is hereinafter referred to as the “Drainage Improvements.”

4. Design Contract. The Developer agrees to secure the services of a professional engineer to design the Drainage Improvements. The City shall have the right to concur in any award of a contract to a design engineer. The City designates its Public Works Director as its representative for purposes of such concurrence. The City may not unreasonably withhold its concurrence. All costs of design shall be borne by the Developer, subject to reimbursement according to the terms of this Agreement.

5. Design of Improvements. The parties agree that the size of the channel is to be determined by the findings of FMG Engineering, Inc., which firm the City has engaged to study the drainage basin. Developer's design consultant shall include separate bid schedules for excavation and embankment of soil. The parties agree that the excavated soil may be used by the Developer on its property. As such, all costs of excavation shall be the responsibility of the City, and all costs of embankment of the excavated soil shall be the responsibility of the Developer. All plans and specifications for the Drainage Improvements must be approved by the City prior to bidding and construction. The City agrees to promptly review plans submitted, and to do so at no cost to the Developer.

6. Competitive Bidding. Upon approval of the design, the Developer shall bid the project according to the South Dakota competitive bidding statutes, including but not limited to SDCL ch. 5-18A through 5-18D and SDCL ch. 5-21. In addition to the performance bond required by SDCL ch. 5-21, the warranty bond requirements of the City's Standard Specifications for Public Works Construction (the "Standard Specifications") shall apply to this project. The City shall have the right to concur in any award of a contract to the lowest responsible bidder prior to such award. The City designates its Public Works Director as its representative for purposes of such concurrence. The City may not unreasonably withhold its concurrence.

7. Construction. Upon award of a contract to the lowest responsible bidder, the Developer shall cause its contractor to construct the Drainage Improvements according to the approved design. Any deviations from the approved design must first be approved by the City. Any change orders shall be subject to the requirements of state law, and such change orders must be approved by the Public Works Director. All costs of construction shall be borne by the Developer, subject to reimbursement according to the terms of this Agreement.

8. Construction Administration. The Developer agrees to engage the design engineering firm or another competent professional to carry out construction administration/construction observation services for the project. The City shall have the right to concur in any award of a contract to a construction administrator. The City designates its Public Works Director as its representative for purposes of such concurrence. The City may not unreasonably withhold its concurrence. All costs of construction administration shall be borne by the Developer, subject to reimbursement according to the terms of this Agreement.

9. Drainage Lot Acquisition. The Developer agrees to convey to the City a drainage lot for the Drainage Improvements to be constructed pursuant to this Agreement. The City agrees to utilize the procedure in SDCL ch. 43-21, commonly referred to as the H-lot process, to plat such drainage lot at its expense. The City agrees to pay to the Developer the fair market value of such drainage lot. The parties agree that the fair market value shall be determined by an appraiser certified by the State of South Dakota to perform real estate appraisals. The parties agree that the City shall engage the services of the appraiser, and it shall pay all costs of the appraiser's services.

10. Reimbursement. The parties agree that the Developer shall be entitled to reimbursement from the City for the costs of designing and constructing the Drainage Improvements, with the exception of embankment of soil as discussed in Paragraph 5, provided that the terms of this Agreement have been met. The parties agree that reimbursement shall be made as follows:

- a. Upon approval by the City of the design plans and specifications for the Drainage Improvements, the Developer may invoice the City for the cost of such design according to the approved Design Contract.
- b. During the course of construction, the Developer may present pay requests no more frequently than once per month. Payments to the Developer shall be made according to the procedure in Section 7.59 of the Standard Specifications, substituting the Developer for “Contractor” as provided therein.
- c. Upon completion of construction, the Developer shall notify the Public Works Director of such completion. Upon such notification, the City shall utilize the process in the Standard Specifications for acceptance of the improvements.

11. Payment for Drainage Lot. The parties acknowledge that the City’s funding for the project has been allocated by its Capital Improvements Plan (CIP) for years 2019 and 2021. The Developer agrees that the payment for the City’s acquisition of a drainage lot as detailed above may be made in two separate payments. The City agrees to exhaust available funds allocated and appropriated for 2019 first to reimburse costs of design, construction, and construction administration of the Drainage Improvements. Any remaining unexpended 2019 funds shall then be paid to the Developer as a down payment for the acquisition of the drainage lot. The remaining balance of the fair market value of the drainage lot, as established by the appraisal, shall be paid in 2021. The Developer shall have the option of delivering a deed to the drainage lot upon payment by the City of the down payment or upon payment of the remaining balance in 2021.

12. Notices. All notices and other communications required or permitted by this Agreement shall be in writing and shall be deemed given to a party when either (a) delivered to the appropriate address by hand or by nationally recognized overnight courier service (costs prepaid) or (b) received or rejected by the addressee, if sent by certified mail, return receipt requested, in each case to the addresses designated below (or such other address as a party may designate by notice to the other parties):

City of Rapid City
Attn: Public Works Director
300 Sixth Street
Rapid City, SD 57701

Yasmeen Dream, LLC
Attn: Hani Shafai
528 Kansas City Street, Ste. 4
Rapid City, SD 57701

13. Relationship between the Parties. The relationship of the parties is that of independent contractors. The parties are not, by virtue of this Agreement or otherwise, in an employer-employee, principal-agent, joint venture or partnership relationship with each other, and each party agrees not to represent to any other person, or to assert in any form or forum to the contrary.

Neither party is authorized to act as an agent for, or legal representative of, the other party and neither party shall have the authority to assume or create any obligation on behalf of, in the name of, or binding upon the other party.

14. Integration. This Agreement and the agreements and documents referred to herein (including any exhibits and schedules incorporated herein) contain the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersede all prior agreements, negotiations, and understandings, whether written or oral, relating to the subject matter hereof. This Agreement may only be amended by a written document duly executed by all parties.

15. Third Parties. This Agreement is for the sole benefit of the parties hereto and their respective successors and permitted assigns. Nothing herein shall give or be construed to give any person or entity, other than the parties hereto, their respective successors, and permitted assigns, any legal or equitable rights hereunder.

16. Assignment. This Agreement and the rights, duties, and obligations hereunder may not be transferred or assigned by either of the parties, whether directly or indirectly by merger, consolidation, reorganization, dissolution, operation of law or otherwise, without the prior written consent of the other party. Any attempted transfer or assignment without consent in violation of the foregoing shall be void. Subject to the foregoing, this Agreement and the provisions hereof shall be binding on the parties and their respective permitted successors and assigns.

17. Waivers. No waiver of any term or provision of this Agreement shall be binding unless executed in writing by the party waiving such term or provision. No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege preclude the exercise of any other right, power or privilege. No waiver of any breach or default of any covenant or agreement hereunder shall be deemed a waiver of any preceding or subsequent breach or default of the same or any other covenant or agreement.

18. Time of the Essence. Time is of the essence with respect to all provisions of this Agreement in which a definite time for performance is specified; provided, however, that the foregoing shall not be construed to limit or deprive a party of the benefits of any grace or use period provided for in this Agreement.

19. Force Majeure. Neither party shall be liable for any delay or failure in performance due to any reason or unforeseen circumstance beyond the affected party's reasonable control, including shortages or delays in obtaining materials from suppliers that cannot reasonably be cured by obtaining the needed materials from another source, work stoppages not involving employees of either party that cannot reasonably be overcome, fires, riots, rebellions, wars, acts of terrorism, accidents, explosions, floods, storms, acts of God, and similar occurrences. The obligations and rights of the excused party shall be extended on a day-to-day basis for the time period equal to the period of the excusable delay.

20. Counterparts. This Agreement may be executed in counterparts; each such counterpart shall be deemed an original and when taken together with other signed counterparts, shall constitute one Agreement.

21. Further Action. The parties covenant and agree that each shall execute and deliver such further instruments or documents as shall be necessary or convenient to effectuate the purposes contemplated by this Agreement.

22. Interpretation. The language in all parts of this Agreement shall in all cases be construed as a whole according to its fair meaning and not strictly for nor against any party. The headings and numbering of the different paragraphs of this Agreement are inserted for convenience only and are not to control or affect the meaning, construction or effect of each provision. The parties agree that each party has reviewed this Agreement and has had the opportunity to have its counsel review the same. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

23. Severability. The invalidity of all or any part of any section of this Agreement shall not render invalid the remainder of this Agreement or the remainder of such section. If any provision of this Agreement is held to be unenforceable for any reason, it shall be modified rather than voided, if possible, in order to achieve the intent of the parties to this Agreement to the extent possible.

24. Choice of Law. This Agreement shall be governed and construed in accordance with the laws of the state of South Dakota, without regard for its choice-of-law principles, and all claims relating to or arising out of this Agreement, or the breach of the terms thereof, whether sounding in contract, tort or otherwise, shall likewise be governed by the laws of the state of South Dakota, without regard for its choice-of-law principles.

25. Jurisdiction and Venue. The parties hereto explicitly agree to submit to the personal jurisdiction of South Dakota state courts, and any dispute relating to or arising out of this Agreement, or the breach of the terms thereof, whether sounding in contract, tort or otherwise, shall be decided solely and exclusively by the Circuit Court located in Rapid City, South Dakota.

Dated this _____ day of _____, 2019.

CITY OF RAPID CITY

By _____
Steve Allender, Mayor

Attest

Pauline Sumption, Finance Officer

(seal)

