AGREEMENT CONCERNING TRANSFER OF WATER SYSTEM BETWEEN TERRACOTTA ESTATES HOMEOWNERS ASSOCIATION AND CITY OF RAPID CITY

This Agreement ("Agreement") is entered into this ___ day of ___________, 2016, by and between TERRACOTTA ESTATES HOMEOWNERS ASSOCIATION, ("Terracotta") a South Dakota nonprofit corporation, of 6655 Zamia St, Rapid City, SD 57703, and the CITY OF RAPID CITY (the "City"), a South Dakota municipal corporation, of 300 Sixth Street, Rapid City, SD 57701.

WHEREAS, City is a municipal corporation organized and existing under the laws of the State of South Dakota; and

WHEREAS, Terracotta is the owner of a water system located in the Prairiefire Subdivision, hereinafter called the "Subdivision;" and

WHEREAS the Subdivision are generally located in the NE¼ Section 26, T1N, R8E, BHM, in Pennington County, South Dakota, referred to herein as the "Property"; and

WHEREAS the City desires to acquire the water distribution system as described herein; and

WHEREAS, Terracotta desires to convey to the City its water system upon the terms defined herein; and

WHEREAS the City desires to provide water service to the Subdivision currently served by the Terracotta; and

WHEREAS, it is the intent of the parties to enter into this agreement stating the conditions under which Terracotta will transfer the water system to the City and the City will take over the water distribution system.

NOW THEREFORE, for and in consideration of the mutual promises, covenants, and agreements herein contained, the parties covenant and agree as follows:

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

2. Acquisition of Water System. The City agrees to acquire from Terracotta, and Terracotta agrees to convey to City, components of Terracotta’s water distribution system as described in Paragraph 3 below, subject to the terms and conditions contained herein.

3. Description of System. The water system that shall be transferred by Terracotta to the City shall include the water mains, valves, appurtenances and system components as shown and described on Exhibit A, referred to herein as the "System."

4. Transfer of System. Terracotta shall transfer and convey the System described herein by a good and sufficient bill of sale, to be delivered at Closing. The transfer shall be made free of all liens and encumbrances.
5. **Consideration.** The parties agree that there will be no monetary consideration exchanged for the City’s acquisition of the System. The parties agree that the City’s agreement to operate and maintain the System, make improvements to the System as described herein, abandon portions of Terracotta’s system as described in Paragraph 12, and provide a supply of municipally treated water shall be good and sufficient consideration for the transfer of the System to the City.

6. **Taxes.** Terracotta shall be responsible for any and all taxes and assessments on or relating to the System, excluding those taxes and associated fees paid by the City in exchange for ownership of the Well Lot, as described in that certain Purchase Agreement for Well Lot Between Terracotta and the City dated August 1, 2016 (the “Well Lot Purchase Agreement”).

7. **Closing.** The closing of this transaction shall take place at the office of the City Attorney at such time as mutually agreed.

8. **Terracotta’s Obligations.** Terracotta agrees it will perform the following items to the satisfaction of the City:

   A. **Operation and Maintenance of the System until Closing.** Terracotta shall be responsible for operating the System as a public water system in compliance with all state and federal requirements until Closing. Terracotta shall also maintain the System in good working order until it is transferred at Closing.

   B. **Meter Coordination.** Terracotta shall cooperate with its water customers and the City’s utility billing personnel to facilitate the installation of City water meters prior to Closing.

   C. **Terracotta System Asset Inventory.** Terracotta shall provide an inventory of its system assets, including but not limited to water mains, fire hydrants, service lines, water meters, curb stops, meter pits, and flushing hydrants. Terracotta agrees that the inventory will include a general description of the condition of each asset as well as a general map of the same. For service lines, meter pits, and curb stops, the inventory shall also include a listing of the property served by such asset. Terracotta agrees to complete and provide this inventory to the City within 60 days after execution of this Agreement. Terracotta agrees to use its best efforts to assist the City and its consultant in locating the water system assets, and this obligation shall survive Closing of the transaction as contemplated herein.

   D. **Terracotta Accounts.** Terracotta shall furnish the City a listing, by address, of all water accounts and service connections to Terracotta’s distribution system within 60 days after execution of this Agreement.

   E. **Curb stops and Valves.** Terracotta agrees to ensure that all service line curb stops and distribution system valves are visible. Terracotta further agrees to coordinate with and assist the City and its consultant to demonstrate such curb stops and distribution system valves are in working order with the City or its consultant’s personnel present. Curb stops and distribution system valves not found to be in working order will be replaced by the City.
F. Easements. Terracotta agrees to assign, convey or transfer all easements and rights of way for the System.

9. City Obligations. The City agrees it will perform the following:

A. Meter Coordination. The City shall cooperate with Terracotta and its water customers to facilitate the installation of City water meters prior to Closing. The City shall coordinate meter reading with Terracotta to furnish usage reports to Terracotta on a monthly basis to allow Terracotta to accurately invoice its customers.

B. Payments. The City agrees to make all payments contemplated by this Agreement in a timely manner.

10. Switchover of Water. The parties agree to coordinate the exact dates and times of the switchover from Terracotta supplying water to the System to the City supplying water to the System (the “Switchover”). The Switchover may occur over the course of up to a week, at the City’s discretion. The parties agree to work together to give appropriate notice to water users, read all meters, open and close appropriate valves, and flush water lines.

A. Time for Switchover. It is anticipated that Switchover will begin on or before, July 31, 2017. In the event that the City is unable to provide water service by July 31, 2017, the Switchover may be postponed, at the City’s option, for up to another one hundred eighty (180) days.

B. Switchover Prior to Closing. Switchover shall occur prior to Closing. The Closing shall take place no more than thirty days following the Switchover.

C. Liability upon Switchover. Any liability that may arise from operation of the System, or any portion thereof, shall transfer to the City upon City water supplying the System, or any portion thereof.

D. Risk of Loss following Switchover. If there is any loss or damage to the System, or a portion thereof, between the date of this Agreement and the Switchover, for any reason, the risk of loss shall be borne by Terracotta. Prior to commencement of the Switchover, if the System is destroyed or damaged in an amount more than 50% of the total purchase price, the City may, at its option, cancel this Agreement by written notice to the Seller. The City shall bear all risk of loss or damage after the Switchover is complete. If damage occurs during the course of the Switchover, the party supplying water to that portion of the System shall bear the risk of loss or damage for such portion.

11. Well Lot. Terracotta currently owns Lot 1, Block 7 of Prairiefire Subdivision, Pennington County, South Dakota (the “Well Lot”). Terracotta and the City have entered into that certain Purchase Agreement for Well Lot Between Terracotta and the City dated August 1, 2016, attached hereto and incorporated herein as Exhibit B. Prior to transfer of the Well Lot to the City, Terracotta agrees that the City, its officers, employees, and contractors shall have a license to enter the Well Lot for all purposes related to the transfer of the System and performance of the obligations under this Agreement.
12. Abandonment of Water Supply Infrastructure. Terracotta’s current water source is a well located on the Well Lot. In addition, Terracotta operates and maintains a pumping facility and a storage tank on the Well Lot. The City’s Project shall include disconnecting the Well Lot infrastructure from the distribution system. The City agrees to abandon the well, demolish the pumping facility and dispose of the storage tank.

13. Terracotta’s Debts and Expenses. The parties agree that City will not be responsible for any debts or obligations of Terracotta incurred prior or subsequent to this Agreement or the Closing as described above. Furthermore, nothing in this Agreement limits Terracotta’s rights to collect amounts due and owing on its accounts or to recover costs or other expenses incurred from its customers.

14. 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
- Terracotta Estates HOA
  Attn: President
  6655 Zamia Street
  Rapid City, SD 57703

with a copy to

- City Attorney
  Attn: Wade Nyberg
  300 Sixth Street
  Rapid City, SD 57701
- Ms. Kelsey Parker
  Attorney at Law
  PO Box 2670
  Rapid City, SD 57709

15. 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.

16. 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.

17. Amendments. This Agreement may only be amended by a written document duly executed by all parties.
18. 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.

19. 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.

20. 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.

21. Cumulative Remedies. The rights and remedies under this Agreement are in addition to and not exclusive of any other rights, remedies, powers and privileges, whether at law or in equity, under this Agreement or otherwise, that any party may have against another. 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.

22. 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.

23. 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.

24. 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.

25. 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.
26. Construction. 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.

27. 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.

28. 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.

29. Jurisdiction and Venue. The parties hereby 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 state circuit court located in Rapid City, South Dakota.

[Signature pages follow]
Dated this 3rd day of October, 2016.

TERRACOTTA ESTATES HOMEOWNERS ASSOC.

By [Signature]

Its [Signature]

State of South Dakota )
) ss.
County of Pennington )

On this the 3rd day of October, 2016, before me, the undersigned officer, personally appeared [Signature], who acknowledged himself to be the President of Terracotta Estates Homeowners Association, a corporation, and that he, as such President, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as President.

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

[Signature]
Notary Public—South Dakota
My Commission Expires October 2, 2021
Dated this ____ day of ______________, 2016.

CITY OF RAPID CITY

________________________________________________________
Steve Allender, Mayor

Attest

________________________________________________________
Pauline Sumption, Finance Officer

(seal)

State of South Dakota )
) ss.
County of Pennington )

On this the ____ day of ____, 2016, before me, the undersigned officer, personally appeared Steve Allender and Pauline Sumption, who acknowledged themselves to be the Mayor and Finance Officer, respectively, of the City of Rapid City, and that they, as such Mayor and Finance Officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the City of Rapid City by themselves as Mayor and Finance Officer.

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

(seal)                                      Notary Public – South Dakota
                                           My Commission Expires ____________________________