

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

Between

YASMEEN DREAM, LLC

&

THE CITY OF RAPID CITY, SOUTH DAKOTA

THIS AGREEMENT, is made and entered into by and between Yasmeen Dream, LLC, a South Dakota limited liability company, located at 528 Kansas City Street, Suite #4, Rapid City SD 57701, (“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 (“City”).

RECITALS

WHEREAS, on October 3, 2016, the City approved a resolution creating Tax Increment District Number Seventy-Eight pursuant to Chapter 11-9 of the South Dakota Codified Laws; and

WHEREAS, on October 3, 2016, the City also adopted by resolution a Project Plan for Tax Increment District Number Seventy-Eight 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; and

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

TOTAL ESTIMATED PROJECT COSTS TO BE PAID BY THE DEVELOPER:

Unnamed Tributary Channel Construction¹

Construction Costs	\$	929,182.70
Professional Fees	\$	200,580.59
Contingency Costs	\$	64,534.35

Traffic Signal Construction

Construction Costs	\$	300,000.00
Professional Fees	\$	30,000.00
Contingency Costs	\$	30,000.00

Financing Costs:

Financing Interest	\$	682,714.41
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Total Reimbursable Costs **\$ 2,237,012.05**

Imputed Administrative Costs*

City of Rapid City	\$	20,000.00
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*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 #78 Fund available to the City Finance Officer beginning on October 3, 2021. The Finance Officer may withdraw monies from the fund until such time as this fee is paid in full.

Developer may request a revision of the Project Plan to reallocate the project costs without increasing the total project costs of \$2,237,012.05 once the improvements are complete and accepted by the City. However, the parties agree that the City is not obligated to revise the Project Plan if Developer seeks a revision, and Developer understands that City does not guarantee that it will approve any revision if requested. Developer agrees not to seek an amendment to the Project Plan that would reestablish the base value of the property as set forth in Section 3, pursuant to SDCL 11-9-23.

The parties agree that any improvements made outside of the boundaries of Tax Increment District Seventy-Eight are not reimbursable from the Tax Increment District Seventy-Eight Fund, and Developer agrees that it will not seek reimbursement from City for any such improvements made outside of the district.

¹ City and Developer have entered into an *Agreement Between the City of Rapid City and Yasmeeen Dream, LLC for Oversize Stormwater Drainage Channel Improvements*, whereby the City will reimburse Developer for oversize costs for the drainage channel not to exceed \$361,504.30 for channel reconstruction costs and \$28,920.34 for design costs. These City costs are also Project Costs within Tax Increment District Seventy-Eight Project Plan and will be reimbursed to the City from the Fund once Developer has received payment in full for its certified Project Costs, pursuant to Section 5.

Section 2. Construction of Improvements. Developer is responsible for all costs to design and construct the improvements in Section 1 of this Agreement as well as all costs to obtain necessary permits and federal approvals for the improvements. Developer agrees to construct the improvements described in Section 1. The Developer acknowledges that these improvements must be completed and accepted by the City no later than October 3, 2021 in order to be eligible for reimbursement under this Agreement.

The parties agree that the Project Costs in Section 1 include a traffic signal at Highway 44 and Elderberry Boulevard. Developer agrees to install the traffic signal in accordance with Section 91 of the Standard Specifications for Public Works Construction and with all pertinent criteria and specifications. The Developer acknowledges that the required traffic signal warrants are a direct result of anticipated development as presented within its TIF application. The parties agree that the Developer is responsible for ensuring that the development occurs as presented within the timeframe presented within Developer's TIF application, and that Developer's development will create the need for the traffic signal at SD Highway 44 and Elderberry Boulevard. The parties agree that if the Developer is unsuccessful in implementing the anticipated development targets as submitted within the TIF application and the development does not meet the required signal warrants within five years of creating Tax Increment District Seventy-Eight, the Developer shall be responsible for all costs associated with purchasing and installing the signal when the signal warrants are met.

The parties agree that the Project Costs in Section 1 include improvements to the Unnamed Tributary Drainage Channel, *see Exhibit 1, KTM Cost Estimate dated October 25, 2016*. Specifically, that improvement will realign a portion of the channel and reconstruct approximately 3,900 feet of Element #8, a 900 foot wide grass-lined channel. This reconstruction includes two future street crossings with box culverts, utility connections, a twelve-foot-wide maintenance access road approximately 3,900 feet in length, and the reconstruction of approximately 1,600 feet of a private access drive crossing the channel. The reconstruction shall comply with the plans for the Unnamed Tributary – Element 8 Drainage Channel Improvements, KTM Job Number 12-0654.2 dated October 3, 2016 as approved by the City's Project Engineering Manager, as those plans are altered or amended with the approval of the parties. The reimbursable Project Costs include improvements to property conveyed to Developer subject to a life estate.

The parties acknowledge that pursuant to an *Agreement Between the City of Rapid City and Yasmeen Dream, LLC for Oversize Stormwater Drainage Channel Improvements* ("Oversize Agreement"), the City has agreed to reimburse Developer a maximum of \$28,920 for design of the Unnamed Tributary Drainage Basin Design Plan Element #8 and a maximum of \$433,805 for the oversize portion of the Unnamed Tributary Drainage Basin Element #8. Developer agrees that it will not request or receive any reimbursement from the Tax Increment Seventy-Eight Fund for construction or design costs that are covered by and reimbursed by the City under the Oversize Agreement.

Developer acknowledges that since receiving the property in 2013, it has incurred professional fees for several designs of the Unnamed Tributary Channel. The parties agree that the professional fees reimbursable from the Tax Increment Seventy-Eight Fund for the channel shall include only professional fees expended for the current working design of the Unnamed Tributary Channel Construction as discussed in Section 1, necessary studies including preliminary designs, layouts and surveys, and calculations required to appropriately size and locate the channel and comply with Corp and FEMA requirements of the CLOMR, and professional fees incurred in the future. Professional fees shall not include Developer costs, including layouts and surveys, for future platting.

The parties acknowledge that the *Agreement Between the City of Rapid City and Yasmineen Dream 2, LLC, to exchange the Wally Byam Site for Land Adjacent to the Rapid City Regional Airport* (“Exchange Agreement”) executed in 2013 provides that Developer will dedicate to the City all areas of the transferred property that are within the 100 year flood plain. The parties agree that the Project Costs under Section 1 include a maximum of \$10,000 for easements that are required for the channel improvements from the life estate to the Developer or to the City. Developer may not seek reimbursement for any easements dedicated by it, or dedicated by a successor in interest, to the City as part of the improvements described in Section 1.

The parties also acknowledge that once the improvements to the Unnamed Tributary Channel are complete, Developer will seek a Letter of Map Revision (LOMR) for the channel from FEMA, and that the LOMR is needed before the City can accept the improvements to the channel. City agrees to cooperate in a timely manner with requests for review of LOMR and associated materials and agrees to timely provide all information and documentation required from the City as part of the LOMR process. Accordingly, the parties agree that Developer may certify its costs pursuant to Section 6 only after the improvements are complete, the LOMR for the Unnamed Drainage Channel is received from FEMA, the City accepts the improvements, and Developer dedicates the improvements and all areas within the 100 year flood plain to the City in accordance with the Exchange Agreement and any pertinent City standards and specifications.

The parties acknowledge that the City will reimburse the Developer from the tax increment funds upon the Developer certifying to the Finance Office the amounts actually paid for these improvements in accordance with Section 6. Developer may submit for reimbursement all costs at one time, or if the Traffic Signal is not warranted within five years of creation of Tax Increment District Seventy-Eight, then Developer may submit costs for the Unnamed Tributary Channel Construction only. The parties agree that no reimbursement will exceed the specific costs listed in the Project Plan and in Section 1 of this Agreement without the consent of the parties.

Section 3. Base Value. The base value of the property located in Tax Increment District Number Seventy-Eight has been certified by the South Dakota Department of Revenue as Six Million Three Hundred Ten Thousand Four Hundred Dollars (\$6,310,400).

Section 4. Private Financing. The Developer may secure private financing to fund the improvements contemplated in the approved Tax Increment District Number Seventy-Eight 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 percent (7%) 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.

Developer agrees to invite the Finance Officer to meet with Developer's financing institution to discuss the terms of the financing and to permit her to seek relevant information regarding the loan terms and conditions. The Developer will provide to the City Finance Office a Tax Increment Financing proposal from a prospective lender of its choosing which addressed 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, he/she may approve the rate to be reimbursed under this Agreement. The Finance Officer's approval will not be unreasonable 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 is renegotiated or otherwise changes, Developer agrees to solicit competitive interest rates from three or more lenders, which will be submitted to the City Finance Officer no later than the time of certification of costs as discussed in Section 5.

Prior to approval of any request for refinancing, the Developer agrees to submit the information listed above for the Finance Officer's review and recommendation to the City Council. 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-Eight fund of any project or financing costs it actually incurs.

Section 5. Certification. Developer shall complete the improvements described in the approved Project Plan and consistent with the costs in Section 1. Upon completion and City acceptance 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 Developer shall provide sufficient documentation to certify that the terms of Section 9 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-Eight Project Plan have, in fact, been disbursed for the costs contemplated in the Project Plan, that state bid law has been complied with, and that the provisions in this Agreement have been met. To assist with certification of costs, the parties agree that the Unnamed Tributary Channel Construction and the Traffic Signal Construction, as designated in Section 1 and identified in the Project Plan, shall be stand alone projects for bidding purposes and for record keeping of costs for design, construction, and construction administration. Professional services invoices submitted for certification shall sufficiently describe the professional activity. If an invoice references any design, layout, survey, or similar drawings, the referenced item shall be provided as an attachment to the invoice. 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.

Section 6. Fund. All positive tax increment payments for Tax Increment District Number Seventy-Eight received within ten (10) years of creation of the District shall, upon receipt by the City, be deposited in a special fund to be known as the “Tax Increment District Number Seventy-Eight Fund” (“Fund”). Subject to Sections 2, 5, 8 and 9 of this Agreement and the limitation that at no time shall the cumulative total of payments made to Developer 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-Eight 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 its 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.

The parties acknowledge that Tax Increment District Seventy-Eight Project Plan includes City Capital Costs in the amount of \$593,631.85 for the City’s obligations pursuant to an *Agreement Between the City of Rapid City and Yasmeen Dream, LLC for Oversize Stormwater Drainage Channel Improvements* and finance costs on that amount. The parties agree that the City will reimburse itself out of the Fund for these Project Costs only after Developer has received full payment for its costs as set forth in Section 1 of this Agreement and the Tax Increment District Number Seventy-Eight Project Plan.

Section 7. Assignment. 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 otherwise comply with the terms of Section 4.

Section 8. Limited Obligation to Pay. 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 positive tax increment from Tax Increment District Number Seventy-Eight receipted 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 and that the Tax Increment District Number Seventy-Eight Project Plan further limits the Fund's collection to 10 years. The provisions of SDCL 11-9-25 are specifically incorporated herein by this reference.

Section 9. Compliance with Bid Laws. 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 10. Indemnification and Hold Harmless. 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-Eight 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 11. Overlapping TIF Districts. It is understood by the parties that the boundaries of Tax Increment District Seventy-Eight 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 which were generated in areas that are part of previously-created overlapping districts.

Section 12. Acceptance of Public Improvements. The Developer agrees that the improvements under Section 1 will be dedicated to the City once they are constructed. The process for final acceptance of the improvements by the City will follow Section 7.65 of the Standard Specifications for Public Works Contracts, hereby incorporated into this Agreement. Developer agrees to warrant the improvements for two years after acceptance, in accordance with Section 7.65. Developer also agrees to provide a warranty bond or other equivalent surety in an amount equal to ten percent (10%) of the total cost of the project/improvement for a period of two years, in a manner and form approved by the City. If any easements are necessary for the City to access or maintain the improvements dedicated to the City, the Developer agrees to dedicate all necessary easements for the City across Developer's property at no cost to the City.

Section 13. Tax Abatement Waiver. Developer agrees that it will not seek any tax abatement for its property within the boundaries of Tax Increment District Seventy-Eight.

Section 14. Liens. 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. Mechanic lien waivers and materialman lien waivers shall be submitted as part of the certification as provided in Section 5.

Section 15. Consideration. 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 16. Entire Agreement. This document, along with the Project Plan for Tax Increment District Seventy-Eight, the *Agreement Between the City of Rapid City and Yasmeen Dream, LLC for Oversize Stormwater Drainage Channel Improvements*, and the *Agreement Between the City of Rapid City and Yasmeen Dream 2, LLC, to exchange the Wally Byam Site for Land Adjacent to the Rapid City Regional Airport*, constitute the entire agreement of the parties with respect to the payment of funds from Tax Increment District Seventy-Eight. 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 17. Third Party Beneficiaries. 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

