

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

This Agreement ("Agreement") is entered into this _____ day of _____, 2017, 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 sanitary sewer 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 sanitary sewer system as described herein; and

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

WHEREAS the City desires to provide sanitary sewer 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 sanitary sewer system to the City and the City will take ownership of the sanitary sewer 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 Sanitary Sewer System. The City agrees to acquire from Terracotta, and Terracotta agrees to convey to City, components of Terracotta's sanitary sewer system as described in Paragraph 3 below, subject to the terms and conditions contained herein.

3. Description of System. The sanitary sewer system that shall be transferred by Terracotta to the City shall include the sanitary sewer mains, manholes, 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 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.

7. Closing. The closing of this transaction shall take place contemporaneously with the closing of the transfer of Terracotta's water system.

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 Switchover. Terracotta shall be responsible for operating the System as a public sanitary sewer system in compliance with all state and federal requirements until Switchover.
- B. Terracotta System Asset Inventory. Terracotta shall provide an inventory of its system assets, including but not limited to sewer mains, manholes, service lines, and cleanouts. 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, 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 prior to closing. Terracotta agrees to use its best efforts to assist the City and its consultant in locating the sanitary sewer system assets, and this obligation shall survive Closing of the transaction as contemplated herein.
- C. Terracotta Accounts. Terracotta shall furnish the City a listing, by address, of all sewer accounts and service connections to Terracotta's collection system as soon as practicable upon execution of this Agreement.
- D. Cleanouts. Terracotta agrees to ensure that all service line cleanouts are visible. Cleanouts not found to be in good working order will be replaced by Terracotta prior to Closing.
- E. Easements. Terracotta agrees to assign, convey or transfer all easements and rights of way for the System.
- F. Corporate Organization. Terracotta agrees to make any changes necessary in its corporate governing documents to remove any purpose or power to operate a water and/or sewer system. This obligation shall survive the closing of this transaction.

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

- A. Inspection. The City shall inspect the System at its cost, as provided in Paragraph 10.

B. Coordination. The City shall coordinate the transfers of the water and sewer systems, and all associated projects.

C. Closing. The City shall prepare all transfer documents and conduct the Closing of this transaction.

10. Inspection of Collection System. It is believed by the parties that the System was constructed in accordance with City specifications. The City shall inspect the System for general compliance with City specifications regarding presence of chimney seals and structural failures in mains, service taps, and manholes. The City will notify Terracotta of any non-compliant components of the System. Terracotta agrees to correct any deficiencies or failures prior to Closing. Should the deficiencies or failures require repairs of more than \$25,000, the parties agree that this Agreement shall be subject to renegotiation by the parties, and it may be terminated by either party upon written notice to the other.

11. Switchover. The parties agree to coordinate the exact dates and times of the switchover from Terracotta operating the System to the City operating the System (the "Switchover"). The Switchover shall occur contemporaneously with the switchover of the water system, which 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 customers. Any liability that may arise from operation of the System, or any portion thereof, shall transfer to the City upon City operating the System, or any portion thereof. 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.

12. 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.

13. 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

14. 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.

15. 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.

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

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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 state circuit court located in Rapid City, South Dakota.

[Signature pages follow]

Dated this 6 day of Sept., 2017.

TERRACOTTA ESTATES HOMEOWNERS ASSOC.

By MJLW
Its President

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

On this the 6th day of September 2017, before me, the undersigned officer, personally appeared Marken Lentaugh 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.

Vesper Ann Wright

Notary Public – South Dakota

My Commission Expires _____

My Commission Expires
September 14, 2021



