

CONTRACT FOR CONSTRUCTION OF PUBLIC IMPROVEMENTS  
THROUGH PRIVATE DEVELOPER  
TAX INCREMENT DISTRICT NUMBER EIGHTY

Between

THE NORTH ATLANTIC DEVELOPERS, LLC

and the

CITY OF RAPID CITY, SOUTH DAKOTA

THIS AGREEMENT, is made and entered into on this \_\_\_\_ day of \_\_\_\_\_, 2018, by and between THE NORTH ATLANTIC DEVELOPERS, LLC, a South Dakota limited liability company located at 1935 Samco Road, Suite 102, Rapid City, South Dakota 57702 (“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 (the “City”).

## RECITALS

WHEREAS, the City has a strong interest in promoting economic development and is authorized pursuant to SDCL Chapter 11-9 to create tax increment districts when the creation will stimulate and develop the general economic welfare and prosperity of the state; and

WHEREAS, pursuant to that authority, on December 4, 2017 the City approved a resolution creating Tax Increment District Number Eighty pursuant to Chapter 11-9 of the South Dakota Codified Laws; and

WHEREAS, on December 4, 2017, the City also adopted by resolution a Project Plan for Tax Increment District Number Eighty which identifies the project costs which are payable from the tax increment, 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 may be reimbursed from the proceeds of the tax increment district for the project costs 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 project costs 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 Eighty, as set forth in the approved Project Plan, are as follows:

TOTAL ESTIMATED PROJECT COSTS TO BE PAID BY THE DEVELOPER:

Capital Costs Total:		\$ 2,862,470.00
<i>Promise Road</i>	\$ 2,262,470.00	
<i>Reconstruct roads/utilities on Promise Road and Golden Eagle Drive</i>	\$ 500,000.00	
<i>Traffic Signal Adjustments</i>	\$ 100,000.00	
Professional Services Costs:		\$ 286,247.00
Contingencies:		\$ 286,247.00
Financing Costs:		\$ 2,087,076.00
<b>Total Project Costs</b>		<b>\$ 5,522,040.00</b>
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 Eighty Fund available to the City Finance Officer beginning on December 4, 2022. The Finance Officer may withdraw monies from the fund until such time as this fee is paid in full.

The parties agree that any improvements made outside of the boundaries of Tax Increment District Eighty are not reimbursable from the Tax Increment District Eighty Fund, and the Developer further agrees that it will not seek reimbursement from the City for any 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 Developer's costs submitted for certification include costs for designing and building public improvements that are not included 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.

Developer may request a revision of the Project Plan to reallocate the project costs so long as the revision does not include additional project costs or increase the total project costs beyond \$5,522,040.00. Any revision to the Project Plan shall not reallocate financing costs to any other costs. 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.

**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 December 4, 2022 in order to be eligible for reimbursement under this Agreement.

The parties agree that the Project Costs in Section 1 include the construction of a portion of Promise Road, and that these costs are for grading and constructing a three-lane collector road; completing vertical road and utility realignments at the intersection of Promise Road and Golden Eagle Drive; and constructing a drainage pipe crossing of Promise Road. In accordance with the Government Accounting Standards Board, the Developer shall create separate bidding schedules for each project type (water, sewer, road, sidewalk, storm sewer, etc.). Any additional turn lanes required on Catron Boulevard at the intersection of Promise Road and Catron Boulevard to accommodate the proposed development within the Promise Road TID boundary shall be the sole responsibility of the Developer. The parties agree that the Project Costs do not include any payments Developer makes for temporary or permanent easements necessary to construct the improvements within the Project Plan, and that any cost for such easements or property acquisition are the sole responsibility of the Developer.

The parties agree that the Project Costs in Section 1 include a traffic signal at Catron Boulevard and Promise Road. Developer agrees to upgrade the traffic signal improvements as necessary in accordance with Section 91 of the Standard Specifications for Public Works Construction and with all pertinent criteria and specifications. Developer acknowledges that the required traffic signal improvements are a direct result of anticipated development as presented within its TIF application. The parties agree that if the signal improvements are not required within five years of the creation of Tax Increment District Eighty, the Developer shall be responsible for all costs associated with purchasing and installing the signal improvements when they are required for the intersection to function safely.

**Section 3. Base Value.** The South Dakota Department of Revenue has certified the base valuation of the property within Tax Increment District Number Eighty created on December 4, 2017 to be Four Million Eighty-Seven Thousand Nine Hundred Dollars (\$4,087,900).

**Section 4. Private Financing.** The Developer may secure private financing to fund the improvements contemplated in the approved Tax Increment District Number Eighty 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. If Developer does not secure private financing for the Project costs in Section 1, then Developer may not be reimbursed out of Tax Increment District Eighty for any Financing Costs.

The parties agree that the Finance Officer may seek relevant information from Developer's financing institution about the loan terms and conditions and may contact and/or meet with Developer's financing institution as the Finance Officer needs. 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, 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 Eighty fund for any project or financing costs it actually incurs.

**Section 5. Certification.** Developer shall complete the improvements described in the approved Project Plan consistent with the costs in Section 1. The engineer's estimated

bid item proposal for all developer initiated construction projects within the TIF boundary (excluding structural) shall identify each capital cost line item as a separate bid schedule. The engineer's estimated bid items shall also include all non-TIF eligible construction expenditures as identified on the Public Improvements Map (Project Plan page 14). 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. Submission of the final cost certification shall be made to the Finance Office no later than 120 days after the City's acceptance of the TIF eligible public improvements within the TIF boundary discussed in Section 1. 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 Eighty Project Plan have, in fact, been disbursed for the costs contemplated in the Project Plan, that state bid laws has been complied with, and that the provisions in this Agreement have been met. Professional services invoices submitted for certification shall sufficiently describe the professional activity. If an invoice references any report, study, location, design, layout, survey, or similar drawings, the referenced item shall be provided as an attachment to the invoice.

**Section 6. Fund.** All positive tax increment payments for Tax Increment District Number Eighty received within twenty (20) 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 Eighty 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 Eighty 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.

**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 complies 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 Eighty received into the "Fund" specified in Section 6. 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 any 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 to 20 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 development contemplated by the Tax Increment District Eighty 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 Eighty 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. The warranty bond referenced herein shall not be considered an eligible TIF expenditure.

**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 Eighty while the district is in existence.

**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 development of the property as contemplated in the Project Plan 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 and the Project Plan for Tax Increment District Eighty constitute the entire agreement of the parties with respect to the payment of funds from Tax Increment District Eighty. 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 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 18. Waiver.** 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 19. Severance.** 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 20. Agreement Prepared Jointly.** 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 21. Choice of Laws and Venue.** 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 \_\_\_\_\_, 2018.

CITY OF RAPID CITY

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

ATTEST:

\_\_\_\_\_  
Finance Officer  
(SEAL)  
State of South Dakota        )  
  ss.  
County of Pennington        )

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2018, 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, a municipal corporation, and that they, as such Mayor and Finance Officer, being duly authorized to do so, executed the foregoing instrument for the purposes herein 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.

\_\_\_\_\_  
Notary Public, South Dakota

My Commission Expires:  
(SEAL)

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

THE NORTH ATLANTIC DEVELOPERS,  
LLC

*By:* \_\_\_\_\_  
*Its:* \_\_\_\_\_

State of \_\_\_\_\_ )  
  ss.  
County of \_\_\_\_\_ )

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2018, before me, the undersigned officer personally appeared \_\_\_\_\_, who acknowledged himself to be the \_\_\_\_\_ of THE NORTH ATLANTIC DEVELOPERS, LLC, and that as such, being duly authorized to do so, executed the foregoing instrument for the purposes herein contained.

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

\_\_\_\_\_  
Notary Public, \_\_\_\_\_

My Commission Expires:  
(SEAL)