



Waukesha Water Utility

SERVING WAUKESHA SINCE 1886

115 DELAFIELD STREET
WAUKESHA, WI 53188-3615

Telephone: (262) 521-5272 • Fax: (262) 521-5265 • E-mail: contactus@waukesha-water.com

MEMORANDUM

Date: November 12, 2021

To: Dan Duchniak, P.E.

From: Chris Walter, P.E.

Re: Coldwater Creek Drive to Shagbark Trail
Developer Reimbursement Agreement

Last month, the Commission approved bids for the above project which is a water main and sanitary sewer extension between Coldwater Creek Drive to Shagbark Trail. Due to the need for this project by the water utility, we proposed to fund the water main work and a portion of the grading. The rest will be reimbursed by the developer, R.F. Smart Development, LLC.

This item is for approval of the attached agreement with the developer, which outlines responsibilities and the process for reimbursement. City legal counsel has reviewed and approved this agreement, however, there may be additional changes requested by the developer. Therefore we are requesting approval pending legal review by the City Attorney.

Recommended Motion: Move to approve of the reimbursement agreement with R.F. Smart Development, LLC for the Coldwater Creek to Shagbark Trail utility extension project pending legal review by the City Attorney.

Enc.

**AGREEMENT TO REIMBURSE COSTS OF
PUBLIC IMPROVEMENTS IN LIEU OF SPECIAL ASSESSMENT LEVY
FOR
SHAGBARK TO COLDWATER CREEK DRIVE SEWER AND WATER
EXTENSION**

THIS AGREEMENT, made this _____ day of November, 2021, between R.F. Smart Development, LLC, 144 W. Broadway, Waukesha, WI 53186 hereinafter referred to as "SMART DEVELOPMENT", and the City of Waukesha Water Utility hereinafter referred to as the "UTILITY".

WITNESSETH:

WHEREAS, the UTILITY desires to construct water transmission and other utility facilities and improvements; in the utility easement of Shagbark Trail to Coldwater Creek Drive in the City of Waukesha, hereinafter referred to as the "PROJECT"; and

WHEREAS, the UTILITY agrees to construct Improvements as herein described in accordance with the terms of this Agreement, the UTILITY Specifications for Installation of Water Main and Appurtenances, as well as the rules and regulations of the UTILITY on file with the State of Wisconsin Public Service Commission, all laws and regulations governing the Improvements for the PROJECT, and the final approved plans hereinafter referred to as the "PLANS" on file in the UTILITY'S office; and

WHEREAS, SMART DEVELOPMENT has an ownership interest in certain land that is within the territory served by the UTILITY, said land being described on EXHIBIT A (a legal description with a map showing the described lot configurations) attached hereto and incorporated herein, hereinafter referred to as the "SUBJECT LAND";

WHEREAS, the UTILITY is providing the construction of the PROJECT at the UTILITY's expense subject to reimbursement from SMART DEVELOPMENT in lieu of levying special assessments against the SUBJECT LAND as set forth in this Agreement; and

WHEREAS, The UTILITY has awarded a contract for the construction of the PROJECT to MJ Construction, Inc. for Five Hundred Twenty-Four Thousand, Two Hundred Twenty-Eight Dollars (\$524,228.00).

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the UTILITY and SMART DEVELOPMENT agree as follows:

DEFINITIONS

Throughout this Agreement, the following terms shall have the described meaning, unless the context clearly indicates a different meaning:

Commission shall mean the Waukesha Water Utility Commission of the City of Waukesha, Wisconsin.

Specifications shall mean the requirements, obligations, and conditions set forth within the body of this Agreement, pertaining to the method or matter of performing the work to construct the Improvements, the quantities and the quality of materials to be furnished under this Agreement.

UTILITY shall mean the City of Waukesha Water Utility and/or the designated representative of the City of Waukesha Water Utility, Waukesha, Wisconsin.

SMART DEVELOPMENT shall mean the reimbursement entity or Smart Development, LLC, as identified within this Agreement.

Water main shall mean buried pipe located in right-of-way or easement by which water is delivered to more than one customer.

Water service shall mean the furnishing of public water supply for fire protection and domestic uses.

Improvements shall be all construction activities described in the attached PLANS and Specifications.

Sewer main shall mean buried pipe located in right-of-way or easement by which sewer is transported from more than one customer to the Clean Water Plant.

Storm sewer shall mean buried pipe located in right-of-way or easement by which storm water is transported to the City of Waukesha's storm sewer system.

Utility Infrastructure shall mean any aggregate of piping and appurtenances associated with furnishing public water, sanitary, and storm sewer service to the customers of the UTILITY or City of Waukesha.

Roadway Infrastructure shall mean roadway components including, but not limited to, pavement and base course, curb, gutter, sidewalk, pavement marking, street lighting, and signage.

SECTION I. DESIGN AND CONSTRUCTION OF FACILITIES

A. UTILITY shall cause the construction of the PROJECT in the utility easement of Shagbark Trail to Coldwater Creek Drive in the City of Waukesha in substantial compliance with the PLANS, a copy of which are attached hereto and incorporated herein as EXHIBIT B.

B. UTILITY shall obtain all state and local permits and approvals necessary to construct the PROJECT in accordance with the PLANS.

C. SMART DEVELOPMENT shall grant any easements on the SUBJECT LAND deemed necessary by the UTILITY, which shall comply with UTILITY standards, and shall be in a recordable form acceptable to the UTILITY. The UTILITY will register all easements with the Register of Deeds at the SMART DEVELOPMENT'S expense.

SECTION II. PAYMENT OF COSTS

A. In lieu of the UTILITY levying special assessments for the costs of the PROJECT in accordance with Sections 66.0701 et. seq., SMART DEVELOPMENT agrees to reimburse the UTILITY for item numbers one through twelve, one half of item number twenty-two, and one

third of item number twenty-three, the costs of construction of the PROJECT as set forth in EXHIBIT C (including without limitation to all change orders relating to the item numbers listed above and all professional fees and expenses in collection with contracting, construction management, and construction) (the "Costs of Construction").

The UTILITY agrees to pay for item numbers fourteen through twenty, one half of item number twenty-two, and two thirds of item number twenty-three, the Costs of Construction for water Improvements, as set forth in EXHIBIT C, including all change orders relating to the item numbers listed in II B. Outside consultant staking costs and internal UTILITY costs will also be paid by the UTILITY.

B. The Costs of Construction shown in EXHIBIT C are estimates, and the parties acknowledge that the actual amounts may exceed these estimates. SMART DEVELOPMENT and the UTILITY shall pay all Costs of Construction, as outlined above and in EXHIBIT C, that are necessarily incurred in the construction of the PROJECT according to the PLANS, including costs in excess of the original contract amount incurred due to unforeseen conditions beyond the control of the parties. However, SMART DEVELOPMENT shall not be required to pay any additional Costs of Construction resulting from a voluntary amendment of the PLANS by the UTILITY after the execution of this Agreement. The UTILITY shall pay the Costs of Construction of the PROJECT at the time they are incurred and shall invoice SMART DEVELOPMENT in accordance with the terms of this Agreement.

C. Sanitary sewer inspection costs will be contracted by the UTILITY and performed by an outside consultant. These costs will be the responsibility of SMART DEVELOPMENT. The UTILITY will invoice SMART DEVELOPMENT at the rate the consultant charges the UTILITY.

D. Payment of invoices issued to SMART DEVELOPMENT by the UTILITY shall be made within thirty (30) days of receipt. Any invoice not paid by SMART DEVELOPMENT within thirty (30) days may be imposed against the SUBJECT LAND as a lien on behalf of the UTILITY to the same extent as a lien for a tax levied upon real property in accordance with Section 66.0717 of the Wisconsin Statutes.

E. Upon request, the UTILITY will provide SMART DEVELOPMENT with an accounting of the costs incurred as a result of this Agreement.

F. Upon request, SMART DEVELOPMENT will provide UTILITY with an accounting of any construction costs incurred by SMART DEVELOPMENT in connection with the PROJECT.

G. SMART DEVELOPMENT for itself and its successors and assigns by executing this Agreement acknowledges that the SUBJECT LAND is benefitted by the PROJECT and expressly waives any notice, right to a hearing, right to object, and the right to appeal any determination of the UTILITY to the Circuit Court as SMART DEVELOPMENT may be entitled to in accordance with Sections 66.0701 et. seq. of the Wisconsin Statutes.

SECTION III. DEDICATION

Upon notification by the UTILITY to SMART DEVELOPMENT that the PROJECT has been

completed and accepted by the UTILITY, SMART DEVELOPMENT shall unconditionally dedicate any public Improvements that are on the SUBJECT LAND to the UTILITY or City of Waukesha, its successors and assigns forever. SMART DEVELOPMENT agrees that all Improvements installed upon or under the SUBJECT LAND in accordance with the PLANS, if any, shall be the property of the UTILITY or the City of Waukesha.

The UTILITY shall have the right to connect or integrate other Improvements as the UTILITY decides with no payment or award to, or consent required of, SMART DEVELOPMENT.

SECTION IV. SERVICE TO SUBJECT LAND

Upon the completion of the Improvements and acceptance by the UTILITY, and SMART DEVELOPMENTS' payment of the UTILITY's final invoice, water service to the SUBJECT LAND will be granted by the UTILITY.

SECTION V. FUTURE IMPROVEMENTS TO SUBJECT LAND

A. Future installation of Utility Infrastructure associated with furnishing public water, and sanitary and storm sewer to customers of the UTILITY or the City of Waukesha, for final development of SUBJECT LAND, not included in EXHIBIT B, will be the responsibility of SMART DEVELOPMENT. This includes, but is not limited to, water and sanitary laterals, storm sewer piping and appurtenances, and Roadway Infrastructure.

B. SMART DEVELOPMENT will follow all requirements of the UTILITY and the City of Waukesha when installing future Utility Infrastructure and Roadway Infrastructure on SUBJECT LAND. All costs incurred to meet the requirements of the UTILITY and the City of Waukesha will be the responsibility of SMART DEVELOPMENT.

C. All construction costs associated with the future Utility Infrastructure and Roadway Infrastructure on SUBJECT LAND will be the responsibility of SMART DEVELOPMENT.

SECTION VI. MISCELLANEOUS

A. Exculpation of Utility Corporate Authorities

The parties mutually agree that the UTILITY's signatories hereto have entered into and are signatory to this agreement solely in their official capacity and not individually, and shall have no personal liability or responsibility hereunder; and personal liability as may otherwise exist, being expressly released and/or waived.

B. Default for Nonpayment

In the event that SMART DEVELOPMENT defaults on any payments referenced in Section II above, the UTILITY shall have every available legal remedy at its disposal in its sole discretion for the collection of the amount in default. SMART DEVELOPMENT shall have sixty (60) days after notice of default in which to cure. In any dispute over payment by SMART DEVELOPMENT, the UTILITY shall be entitled to its reasonable costs of collection including,

without limitation, attorneys' fees.

C. Recitals

The UTILITY and SMART DEVELOPMENT agree and acknowledge that the recitals contained in this Agreement are accurate and true.

D. Survival of Representations, Warranties and Covenants.

The representations, warranties and covenants contained herein are and will be deemed and construed to be continuing representations, warranties and covenants and will survive the completion of the Project.

E. Indemnification

The UTILITY hereby agrees to indemnify and save SMART DEVELOPMENT, and its members, officers, directors, employees, officials, agents, licensees, permittees, invitees, and authorized representatives (collectively, "Indemnitees"), from and against any -and all loss, damage, injury, liability, cost and expense ("Claims") that such Indemnitees may suffer or incur as a result of or in connection with construction of the PROJECT by the UTILITY or UTILITY'S contractors on the SUBJECT LAND; provided, however, the right to indemnification (a) shall not include any Claims resulting from the Indemnitees' negligent acts or omissions or gross misconduct with respect thereto, and (b) if the loss, damage, injury or liability results from the joint negligence of such Indemnitees and UTILITY, then the liability therefor shall be borne by UTILITY and the Indemnitees in proportion to each Party's respective degree of negligence; provided, further, however, that these provisions are subject to the legal defenses and notice requirements that, under law or in equity, the Parties hereto are respectively entitled to raise.

F. Benefit and Assignment

This Agreement shall be binding upon and shall insure to the benefit of the Parties hereto and their respective successors and permitted assigns. Neither Party hereto may voluntarily or involuntarily assign its interest under this agreement without the prior written consent of the other Party. The assignee must agree to all terms and conditions of this document in writing.

G. Successors and Assigns; Amendment Waiver, and Release

The Parties hereby agree that this Agreement sets forth the entire understanding and agreement of the Parties with respect to the subject matter set forth herein. The Parties, and each Party's successors and assigns, shall be bound by the terms and covenants set forth in this Agreement. The terms of this Agreement may only be amended or altered and the respective rights of the Parties may only be waived or released, pursuant to a written agreement executed by all Parties hereto.

H. Headings

The headings in this Agreement are for convenience only and will not control or affect the meaning of construction of the provisions of this Agreement.

I. Governing Law

The construction and performance of this Agreement is governed by the laws of the State of Wisconsin.

J. Notices

Any notice, demand or request required or permitted to be given under the provisions of this Agreement shall be in writing and shall be deemed to have been duly delivered and received on the date of personal delivery or on the date of receipt if mailed by registered or certified mail, postage prepaid and return receipt requested, to the following addresses, or to such other address as any Party may direct in writing:

If to City of Waukesha Water Utility:

Daniel S. Duchniak, PE
General Manager
City of Waukesha Water Utility
P.O. Box 1648
Waukesha, WI 53187-1648

If to Smart Development:

David Smart
Smart Development LLC
144 W. Broadway
Waukesha, Wisconsin 53186

K. Counterparts

This Agreement may be executed in one or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

SECTION VII. AMENDMENTS

The UTILITY and SMART DEVELOPMENT may amend this Agreement by the mutual consent of the UTILITY and SMART DEVELOPMENT.

IN WITNESS WHEREOF, SMART DEVELOPMENT and the UTILITY have caused this Agreement to be signed by their appropriate officers and their corporate seals (if any) to be hereunto affixed in two original counterparts the day and year first above written.

SMART DEVELOPMENT, LLC

By: _____

Print: _____

Title: _____

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUKESHA)

Personally came before me this ____ day of _____, 2021, the above named _____, Authorized Signatory of Smart Development, LLC to me known to be the person who executed the foregoing instrument and acknowledged the same.

Notary Public, State of Wisconsin
My Commission expires: _____

WAUKESHA WATER UTILITY
WAUKESHA COUNTY, WISCONSIN

By: _____

Daniel S. Duchniak, P.E.
General Manager

By: _____

Joseph J. Piatt, Commission President

By: _____

Joan L. Francoeur, Commission
Secretary

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUKESHA)

Personally came before me this day of _____, 2021 the above named Daniel S.Duchniak, Joseph J. Piatt, and Joan L. Francoeur, of the above-named Waukesha Water Utility, to me known to be the persons who executed the foregoing instrument and to me known to be such UTILITY General Manager and UTILITY Commission President, and UTILITY Commission Secretary, respectively, of said entity and acknowledge that they executed the foregoing instrument as such officers as the deed of said entity by its authority and pursuant to the authorization by the UTILITY Commission from their meeting on the ____ day of _____, 2021.

Notary Public, State of Wisconsin
My Commission: _____

EXHIBIT "A"

MUNICIPAL UTILITY & TEMP. CONSTRUCTION EASEMENTS

BEING A PART OF THE NORTHEAST 1/4 OF SECTION 31, TOWN 7 NORTH,
RANGE 19 EAST, IN THE CITY OF WAUKESHA, WAUKESHA COUNTY, WISCONSIN.

UNPLATTED LANDS
(SMART TRUSTS)

TEMPORARY CONSTRUCTION
AND ACCESS EASEMENT

481,377 S.F.
11.0509 Ac.

40' WIDE MUNICIPAL
UTILITY EASEMENT

57,024 S.F.
1.3091 Ac.

SHAGBARK
TRAIL

WOODLAND HILLS
DRIVE

MEADOWBROOK ROAD "C.T.H. TT"

COLDWATER CREEK DRIVE

UNPLATTED LANDS
(SMART TRUSTS)

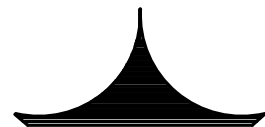
UTILITY AND SANITARY SEWER
EASEMENT AGREEMENT
RECORDED AS DOCUMENT
NO.'S 3544377 AND 3551087.
(EASEMENT IS 60' AND
66' STRIP OF LAND)

60'

LOT 1
CSM 10394

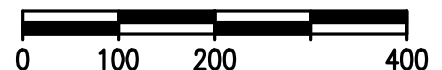


4100 N. Calhoun Rd.
Suite 300
Brookfield, WI 53005
Phone: (262) 790-1480
Fax: (262) 790-1481



NORTH

SCALE: 1"=200'



DATE: 11/11/21
SHEET 1 OF 1