

DEVELOPMENT AGREEMENT
BRANCH CREEK LLC

THIS AGREEMENT, made as of _____, 2024, by and between the City of Brookings, a municipal corporation of the State of South Dakota, (referred to as the “City” herein), and Branch Creek LLC, a South Dakota Limited Liability Company, with its principal office located at Brookings, South Dakota 57006, (referred to herein as the “Developer”).

Whereas, the Developer certifies that it is the owner of a tract of land legally described as set forth in Exhibit “A” and incorporated by reference; and

Whereas, the Developer certifies that it has the legal authority to enter into this agreement; and

Whereas, the Developer has caused the plat of said property to be prepared in accordance with City’s subdivision regulations; and

Whereas, the City subdivision regulations require that all infrastructure improvements essential to the proper development of any subdivision, or portion thereof, be completed by the Developer; and

Whereas, the City subdivision regulations require, as a prerequisite to the approval of a plat, written assurances from the Developer fixing responsibility for the required public improvements; and

Whereas, this agreement is given for the benefit of the City as well as successors in interest of lots in the subdivision, as shown on the plat; and

Whereas, the City of Brookings created Tax Increment (“TIF”) District Number Fourteen (14), and the legal description and map of TIF District Number 14 is attached, marked Exhibit “B” and made a part hereof; and

Whereas, Tax Increment Revenue will be used to assist in providing for certain of TIF District Number 14’s project costs; and

1 Whereas, the City hereby establishes certain requirements applicable to the Branch
 2 Creek Development in exchange for use of tax increment funds for infrastructure abutting and
 3 serving workforce housing within TIF District Number 14.

4 **NOW THEREFORE**, in consideration of the mutual covenants contained in this
 5 Agreement, the parties, for themselves, their successors and assigns, hereby agree as follows:

6 **Section 1 - Developer’s Obligations and Improvements Required**

7 **A. General**

8 a. Developer agrees to install, or cause to be installed, the following subdivision
 9 improvements: curb and gutter, granular street base, woven textile fabric, and asphalt surface,
 10 water service lines, sanitary sewer, storm sewer, drainage, drainage facilities, sidewalks, ADA
 11 ramps, improvements to 20th Street South, street signage, and all other improvements
 12 necessary to develop the area in accordance with the Subdivision Regulations, Engineering
 13 Design Standards and Specifications, Zoning Ordinance, and all other applicable ordinances of
 14 the City. All public improvements shall be installed in accordance with the Construction Plans
 15 filed with and approved by the City Engineer, as applicable.

16 b. A cost estimate of required improvements is attached as Exhibit C.

17 c. Required improvements will be accepted as dedications to, and shall become the
 18 property of the City when completed to City standards and upon approval by the City Engineer,
 19 along with formal acceptance by the City.

20 **B. Streets**

21 a. Streets and improvements to 20th Street South shall be constructed in each and
 22 every platted right-of-way and shall be built to the exterior lot lines of the subdivision and
 23 constructed as the sections are shown in the approved construction plans on file at the office
 24 of the City Engineer. The following streets are included in the required improvements: Branch
 25 Creek Avenue, Oak Branch Avenue, Willow Branch Avenue, Brook Street, Spring Street, and
 26 Creek Street.

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C. Sanitary Sewer

a. Developer shall install, or cause to be installed, sanitary sewer and services to the property line for each lot served and shall be built to the exterior lot line of the subdivision, as shown on the approved construction plans.

D. Storm Sewer, Drainage and Facilities

- a. Developer shall construct or cause to be constructed, to City standards, all storm sewers, catch basins, drop inlets, culverts, drainage-ways, detention ponds, spill-ways, and other related and required drainage improvements.
- b. Developer shall comply with all City and State stormwater regulations.

E. Municipal Utilities

- a. Developer will, prior to installation, coordinate with the local municipal utilities to ensure that the electric, natural gas, and water supply utilities are installed according to policies and standards established by the local municipal utilities.
- b. Developer shall install, or cause to be installed, water services to the property line for each lot so served.

F. Grading and Erosion Control

- a. Developer shall complete grading of all utility easements and drainage ways to within two-tenths (0.2) feet of the elevation as shown on the approved final grading plan.
- b. No grading or other improvements shall take place until such time that a Stormwater Pollution Prevention Plan (SWPPP) is completed and approved by the City Engineer and a General Permit for Stormwater Discharges Associated with Construction Activities is obtained from the State DANR.
- c. Developer shall implement the Erosion Control Plan approved by the City Engineer. Developer agrees to maintain the erosion control devices and employ additional measures as necessary if the installed measures fail to retain soil on the site, until such time as the site is fully stabilized.

1 d. All erosion control devices shall be removed by the Developer after the site is
2 fully stabilized and approved by the City Engineer.

3 **G. Sidewalks**

4 a. Developer shall install all pedestrian ramps at street intersections with the curb
5 and gutter improvements. Ramps shall comply with current ADA standards, including
6 installation of detectable warning panels.

7 b. All sidewalks shall be installed by Developer, in accordance with City standards.

8 **Section 2 - Maintenance and Acceptance**

9 **A. Maintenance of Gravel Streets Under Development**

10 a. For streets under construction, the Developer will provide maintenance and snow
11 removal on gravel and first lift asphalt streets to provide for all-weather vehicular passage and
12 provide street sweeping on asphalt streets, as needed. If there is any damage to manholes,
13 valves, curb and gutter, valley gutters, or other appurtenances, repairs shall be done at the
14 Developer's expense. Gravel streets will be allowed through one winter season only.

15 **B. Completion of Final Lift on Street/Infrastructure Inspection Report**

16 a. No sooner than one (1) year after the first lift has been applied or at any time
17 when requested by the City, the Developer shall place the final lift of asphalt on the street.
18 Prior to this action, the Developer will notify the City and state its intentions. The City Engineer
19 or their representative will inspect the public improvements and make an inspection report to
20 the Developer as to the necessary work needed for the project to meet City specifications. This
21 inspection report will encompass all aspects of the water, sanitary sewer, storm sewer, curb
22 and gutter, or any other part of the construction as provided for in the preliminary plan as
23 approved. Adjustments or repairs will be the responsibility of the Developer and shall be made
24 prior to the placement of the final lift.

25 **C. Final Acceptance of Improvements**

26 a. After the Developer deems that all the street and utility improvements have been
27 completed and has placed the final lift of asphalt, the Developer will notify the City and local
28 municipal utilities in writing that the street and utility improvements are completed. The City

1 Engineer and local municipal utilities will then inspect all the public improvements and inform
2 the Developer of any deficiencies. Any deficiencies shall be remedied by the Developer at the
3 Developer's expense. Prior to final acceptance, the Developer shall furnish a complete set of
4 "As-Built" drawings in AutoCAD format to the City Engineer. Upon the recommendation of the
5 City Engineer, the City will then issue a Certificate of Completion noting any deficiencies and
6 setting a date as to when the one (1) year warranty will end.

7 **D. Developer's Warranty Responsibilities**

8 a. The Developer shall warranty the water, sanitary sewer, storm sewer, drainage
9 infrastructure, curb and gutter, valley gutter or any other part of the construction specified in
10 the preliminary plan for a period of one year from the date as stated in the Certificate of
11 Completion. Prior to the end of the one (1) year warranty period, the City Engineer and local
12 municipal utilities will inspect the public improvements and report the findings to the City. The
13 City shall confirm or reject the Acceptance Certificate. If confirmed, the Developer's
14 responsibility for the public improvements ends and the public improvements become the
15 responsibility of the City. If any portion is rejected, the Developer will repair or replace the
16 rejected portion and a one (1) year warranty period will begin again on the rejected portion and
17 the Developer shall again comply with the provisions as stated in this agreement.

18 **Section 3 - Tax Increment District Number 14**

19 **A. Project Costs**

20 a. The Developer shall fund and construct such public improvements as set forth in
21 the Tax Increment District Number 14 Project Plan, with TIF reimbursement based on actual
22 project costs. Reimbursement of actual Project costs to the Developer shall not exceed the
23 sum of Seven Million Three Hundred Thousand Dollars (\$7,300,000) The City of Brookings will
24 only reimburse Developer the actual costs per itemized construction contracts plus financing
25 costs, and the total reimbursement to Developer with TIF proceeds as they are received shall
26 not exceed an aggregate amount of Seven Million Three Hundred Thousand Dollars
27 (\$7,300,000).
28

1 b. The City will also bid and construct certain public improvements within the District
2 and certain rights-of-way for drainage facilities, a recreational trail, and park improvements as
3 are set forth in the Project Plan for Tax Increment District Number 14. Specifically, the City will
4 construct park and pedestrian/biking connectivity improvements. The City may elect to make
5 drainage improvements and pay for other TIF-eligible project costs. The choice to make TIF-
6 eligible improvements shall be solely within the City's discretion. The cost of any City-provided
7 public improvements will not exceed Tax Increment District Number 14 Project Plan eligible
8 project costs, net of any reimbursements to Developer under this Agreement. Accordingly, the
9 total sum of eligible project costs, including reimbursements to Developer pursuant to this
10 Agreement, shall not exceed the sum of Nine Million Dollars (\$9,000,000).

11 **B. Guarantee**

12 a. The Developer agrees to fund all public improvements as specified in the final
13 construction plans, subject to reimbursement with TIF proceeds. It is understood that if there
14 are not sufficient Tax Increment Revenues for the Developer's debt service for the public
15 improvements, that the City will not be responsible for any shortfall.

16 **C. Tax Increment Revenue**

17 a. The Developer will receive all of the tax increment revenue up to \$7.3 Million or
18 actual TIF costs as it is received, subject to the maximum payment provision to Developer,
19 with such revenue to be utilized to pay for public improvements as described in this
20 Agreement, until such time as the public improvements have been paid in full or the district is
21 decertified per state law. The use of tax increment revenue to reimburse Developer shall be
22 based upon actual construction and financing costs, with a "not to exceed" amount of Seven
23 Million Three Hundred Thousand Dollars (\$7,300,000) for the Developer's public
24 improvements. After the Developer has been fully reimbursed for its actual costs (not to
25 exceed the lesser of \$7,300,000 or actual costs), all remaining TIF funds shall be retained by
26 the City to pay the City's Project Costs under TIF District Number 14.

1 **D. Payment Agent**

2 a. The City will act as the paying agent of the Tax Increment Revenue to the
3 Developer.

4 **E. Draw Down**

5 a. The City and Developer agree Tax Increment Revenue will be reimbursed to
6 Developer in accordance with this Agreement to the extent revenue is available in the Tax
7 Increment Financing District Number 14 Fund once the following have been completed:

- 8 i. Developer shall have demonstrated in writing to the reasonable
9 satisfaction of the City that the public improvements described herein have
10 been made consistent with the Tax Increment Financing District Number
11 14 Project Plan and this Agreement.
- 12 ii. Developer shall have submitted invoices showing the services / public
13 improvements have been made.

14 **F. Financing Costs**

15 a. The Developer shall be eligible to receive reimbursement from TIF # 14 for actual
16 financing costs associated with financing the public improvements set forth in this agreement,
17 subject to available TIF #14 revenue. Developer agrees to provide a copy of the financing
18 terms and amortization schedule as documentation of financing costs. Developer further
19 agrees that if the financing terms or conditions change, an updated copy of the financing terms
20 and amortization schedule shall be provided to the City.

21 **G. Discretionary Tax Formula**

22 a. The Developer agrees to waive the discretionary tax formula on platted lots
23 within the development in accordance with the Brookings County discretionary tax formula
24 policies and procedures during the duration of Tax Increment Financing District Number 14.

25 **Section 4 - General Provisions**

26 **A. Bidding of Public Improvements by Developer**

27 a. Upon review and approval by the City and local municipal utilities of the
28 Developer's final construction plans and specifications for the public improvements as detailed

1 in the TIF Number 14 Project Plan, Developer agrees to obtain competitive quotes for the
2 project improvements through Banner Associates, Developer's consulting engineer. The
3 consulting engineer shall be responsible for soliciting quotes from multiple contractors, and
4 providing tabulations to the satisfaction of the City Engineer for review and approval prior to
5 awarding such quote or quotes to the lowest responsible bidders. The consulting engineer
6 shall provide to the City Engineer copies of all advertising notices, plan holders lists, and any
7 direct marketing efforts such as mailings, email, telephone solicitations as proof of obtaining
8 competitive quotes for the public improvements.

9 b. All required public improvements shall be installed to the satisfaction of the City
10 Engineer within two (2) years of the date this instrument is fully executed. Notwithstanding any
11 contrary provision in either statute or ordinance, including those relating to the passage of
12 time, Developer acknowledges and agrees that all terms and conditions contained herein shall
13 remain a continuing obligation until satisfaction or completion.

14 c. City may undertake any legal or equitable action available to enforce the
15 provisions of this agreement in addition to any other remedy provided herein. In the event the
16 City is required to undertake any action to enforce the terms of this agreement or its
17 subdivision regulations in connection with this agreement, the Developer, its heirs, assigns or
18 successors in interest agree the City may recover its reasonable expenses, including
19 attorney's fees incurred with respect to such action.

20 **B. Workforce Housing to be Constructed**

21 a. Branch Creek plans to build a mix of three styles of units: townhouses, twin
22 homes, and single-family homes. Within each style are homes that will vary based on the
23 number of bedrooms and bathrooms. Therefore, a range of prices will apply to these units. At
24 no point will the sales price for any unit/home exceed the South Dakota Housing Development
25 Authority First Time Homebuyers limit. The specific mix of townhouses, twin homes and single-
26 family homes may vary across the five phases of home construction; not all unit designs will
27 appear in all phases. Specific to two (2) and three (3) bedroom townhouses, the price points
28 for the first phase will be between \$226,999 and \$254,999. A four (4) bedroom townhouse

1 may also be built at a price point that will not be higher than \$319,999. Twin homes and single-
2 family units will be sold at prices which are at or below the South Dakota Housing
3 Development Authority First Time Homebuyers limit. Based on current construction costs, twin
4 homes will be sold at a lower price than comparable single-family units.

5 a. After 2024, the sale prices for all types of units will be indexed to the South
6 Dakota Housing Development Authority First Time Homebuyers limit, with the prices
7 increasing or decreasing from the prior phase's prices by the change in the South Dakota
8 Housing Development Authority First Time Homebuyers' limit. Units sold in subsequent phases
9 will follow this South Dakota Housing Development Authority First Time Homebuyers change
10 in sales prices. However, Branch Creek will prefer a smaller change in the list price if
11 construction costs allow. For each phase, and prior to listing the homes, Branch Creek will
12 share list prices with the City Manager.

13 **C. Mechanics Liens**

14 a. The Developer agrees to immediately satisfy any and all mechanic's or
15 materialman's liens that arise as a result of the improvements. This provision shall not prevent
16 Branch Creek LLC from subsequently seeking compensation from a contractor, subcontractor
17 or others who may be responsible for such liens or for such payment.

18 **D. Communications**

19 a. Developer will notify the City Engineer of the results of bids submitted ("bid tabs")
20 and will communicate with the City Engineer with respect to infrastructure acceptance and other
21 matters pertaining to the construction of the development. Developer will also communicate
22 with the City Manager concerning its Financing Costs and housing matters described in Section
23 4B of this Agreement.

24 **Section 5 - Entire Agreement**

25 a. This document, along with the Project Plan for Tax Increment Financing District Number
26 14, shall constitute the entire agreement of the parties. All prior discussions and negotiations
27 are merged into the Project Plan for this District and this Developer's Agreement. In the event
28

1 of a conflict between the Project Plan and this Agreement, this Agreement shall be controlling.
 2 Any changes or addendums hereto shall be agreed to in writing by both parties.

3 **Section 6 - Successors**

4 a. To the extent any rights or obligations under this Agreement remain in effect, this
 5 Agreement shall be binding upon and enforceable against, and shall inure to the benefit of the
 6 parties hereto and their respective heirs, legal representatives, successors and permitted
 7 assigns.

8 **Section 7 - Independent Contractor**

9 a. In performing under this Agreement, the Developer, including its officers, agents,
 10 employees, and volunteers, is at all times acting and performing as in independent contractor,
 11 in an independent capacity, and not as an officer, agent, servant, employee, joint venturer,
 12 partner, or associate of the City.

13 **Section 8 - Notices**

14 a. All legal notices and demands shall be given in writing and shall be delivered by
 15 certified mail, postage prepaid, and return receipt requested, or by personal delivery. Notices
 16 shall be addressed as provided below for the respective party; provided that if any party gives
 17 notice in writing of a change of name or address, notices to such party shall thereafter be given
 18 as required in that notice:

<p>19 City: City of Brookings 20 520 3rd Street 21 Brookings, SD 57006 22 Attn: City Manager</p>	<p>Developer: Branch Creek LLC PO Box 5057 Brookings, SD 57006 Attn: Thomas M. Fishback</p>
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23 The Notice procedures shall not be used for regular communication (described in 4D) between
 24 the City and Developer in the development of this project.

25 **Section 9 - Amendments**

26 a. Any amendment to this Agreement shall be effective only when duly executed by
 27 Developer and City.

1 **Section 10 - Severability**

2 a. The provisions of this Agreement are severable, and, if any one or more provisions is
 3 determined to be judicially unenforceable, in whole or in part, the remaining provisions, and
 4 any partially enforceable provision, to the extent enforceable shall nevertheless be binding and
 5 enforceable.

6 **Section 11 - Default; Remedies; Termination**

7 a. Subject to extensions of time by mutual consent in writing, failure or unreasonable
 8 delay by Developer to perform any term or provision of this Agreement will constitute a
 9 default. In the event of default or breach of any terms or conditions of this Agreement, the City
 10 will give Developer not less than thirty (30) days' notice in writing specifying the nature of the
 11 alleged default and the manner in which said default may be satisfactorily cured. During any
 12 such thirty (30) day period, the Developer will not be considered in default for purposes of
 13 termination of this Agreement or the institution of legal proceedings.

14 b. After notice and expiration of the thirty (30) day period, if such default has not been
 15 cured or is not being diligently cured in the manner set forth in the notice, the City may, at its
 16 option:

- 17 i. Terminate this Agreement and terminate payments of Tax Increment
 18 received for TIF District Number 14, regardless if there are any
 19 outstanding and unreimbursed project costs resulting from improvements
 20 described in this Agreement; and/or
- 21 ii. Institute legal or equitable action to cure, correct or remedy any default,
 22 including but not limited to an action for specific performance of the terms
 23 of this Agreement.

24 **Section 12 - Litigation**

25 Any dispute arising out of or related to this Agreement shall be litigated in the Third Judicial
 26 Circuit Court for the State of South Dakota, located in Brookings, South Dakota.

1 **Section 13 - Attorney's Fees**

2 a. In the event that suit is brought for the enforcement of this Agreement or as the result of
3 any alleged breach thereof, or any other court action occurs arising out of this Agreement, the
4 prevailing party or parties in such suit shall be entitled to recover their reasonable attorneys'
5 fees, costs, and expenses from the losing party or parties, and any judgment or decree
6 rendered in such proceedings shall include an award thereof.

7 **Section 14 - No Third Party Beneficiary Rights**

8 a. This Agreement is entered into for the sole benefit of Grantor and Grantee and no other
9 parties are intended to be direct or incidental beneficiaries of this Agreement and no third party
10 shall have any right in, under or to this Agreement.

11 **Section 15 - Assignment of Agreement**

12 a. Neither City nor Developer may assign or transfer their respective rights or obligations
13 under this Agreement without first obtaining the prior written consent of the other, which
14 consent may be granted or withheld in the sole and absolute discretion of the applicable party.

15 **Section 16 - Authorized Signature**

16 a. The Developer represents and warrants to the City that: (a) The Developer is duly
17 authorized and empowered to sign and perform its obligations under this Agreement; and (b)
18 the individual signing this Agreement on behalf of the Developer is duly authorized to do so
19 and their signature on this Agreement legally binds the Developer to the terms of this
20 Agreement.

21 **Section 17 - Counterparts**

22 a. This Agreement may be signed electronically and in one or more counterparts, each of
23 which shall be deemed an original, but all of which together shall constitute one and the same
24 instrument.

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IN WITNESS WHEREOF, City and Developer have caused this Agreement to be executed as of the day and year provided on Page 1 of this Agreement.

CITY OF BROOKINGS

BRANCH CREEK LLC

Oepke Niemeyer, Mayor

Thomas M. Fishback
Its: Manager

John T. Fishback
Its: Manager

ATTEST

Bonnie Foster, City Clerk

Dated this ____ day of _____, 2024.

Exhibit A

The South Half of the Northwest Quarter (S½NW¼) and Lots Three (3) and Four (4), all in Section One (1), Township One Hundred Nine (109) North, Range Fifty (50) West of the 5th P.M., also described as the Northwest Quarter (NW¼) of Section One (1), Township One Hundred Nine (109) North, Range Fifty (50) West of the 5th P.M., Brookings County, South Dakota.

EXCEPT the North Five Hundred Forty Feet (N 540') of the East Six Hundred Fifty Feet (E 650') of Lot Three (3) in the Northwest Quarter (NW¼) of Section One (1), Township One Hundred Nine (109) North, Range Fifty (50) West of the 5th P.M., Brookings County, South Dakota; and

EXCEPT Substation Addition to the City of Brookings, Brookings County, South Dakota; and

EXCEPT the West One Hundred Fifty Feet (W 150') of the Northwest Quarter (NW¼) of Section One (1), Township One Hundred Nine (109) North, Range Fifty (50) West of the 5th P.M., City of Brookings, Brookings County, South Dakota, (now known as Trail Addition); and

EXCEPT the North Forty Feet (N 40') of Government Lots Three (3) and Four (4) except the East Six Hundred Fifty Feet (E 650') of Government Lot Three (3) AND except the West One Hundred Fifty Feet (W 150') of Government Lot Four (4) in the Northwest Quarter (NW¼) of Section One (1), Township One Hundred Nine (109) North, Range Fifty (50) West of the 5th P.M., in the City of Brookings, Brookings County, South Dakota; and

EXCEPT the West One Thousand Six Hundred Feet (W 1600') of Government Lots Three (3) and Four (4) also described as the North Half of the Northwest Quarter

1 (N½NW¼), except Block One (1) and Block Two (2) of Trail Addition, Substation Addition and
 2 previous acquired right-of-way, all in Section One (1), Township One Hundred Nine (109)
 3 North, Range Fifty (50) West of the 5th P.M., now in the City of Brookings, Brookings County,
 4 South Dakota; AND the West One Thousand Six Hundred Feet (W 1600') of the South Half of
 5 the Northwest Quarter (S½NW¼), except Block Two (2) of Trail Addition, all in Section One
 6 (1), Township One Hundred Nine (109) North, Range Fifty (50) West of the 5th P.M., Brookings
 7 County, South Dakota; and

8
 9 EXCEPT the East Six Hundred Fifty Feet (E 650') of Government Lot Three (3), except the North
 10 Five Hundred Forty Feet (N 540') thereof, in Section One (1), Township One Hundred Nine (109)
 11 North, Range Fifty (50) West of the 5th P.M., in the City of Brookings, Brookings County, South
 12 Dakota; AND the East Six Hundred Fifty Feet
 13 (E 650') of the Southeast Quarter of the Northwest Quarter (SE¼NW¼) of Section One (1),
 14 Township One Hundred Nine (109) North, Range Fifty (50) West of the 5th P.M., Brookings
 15 County, South Dakota.

Exhibit B

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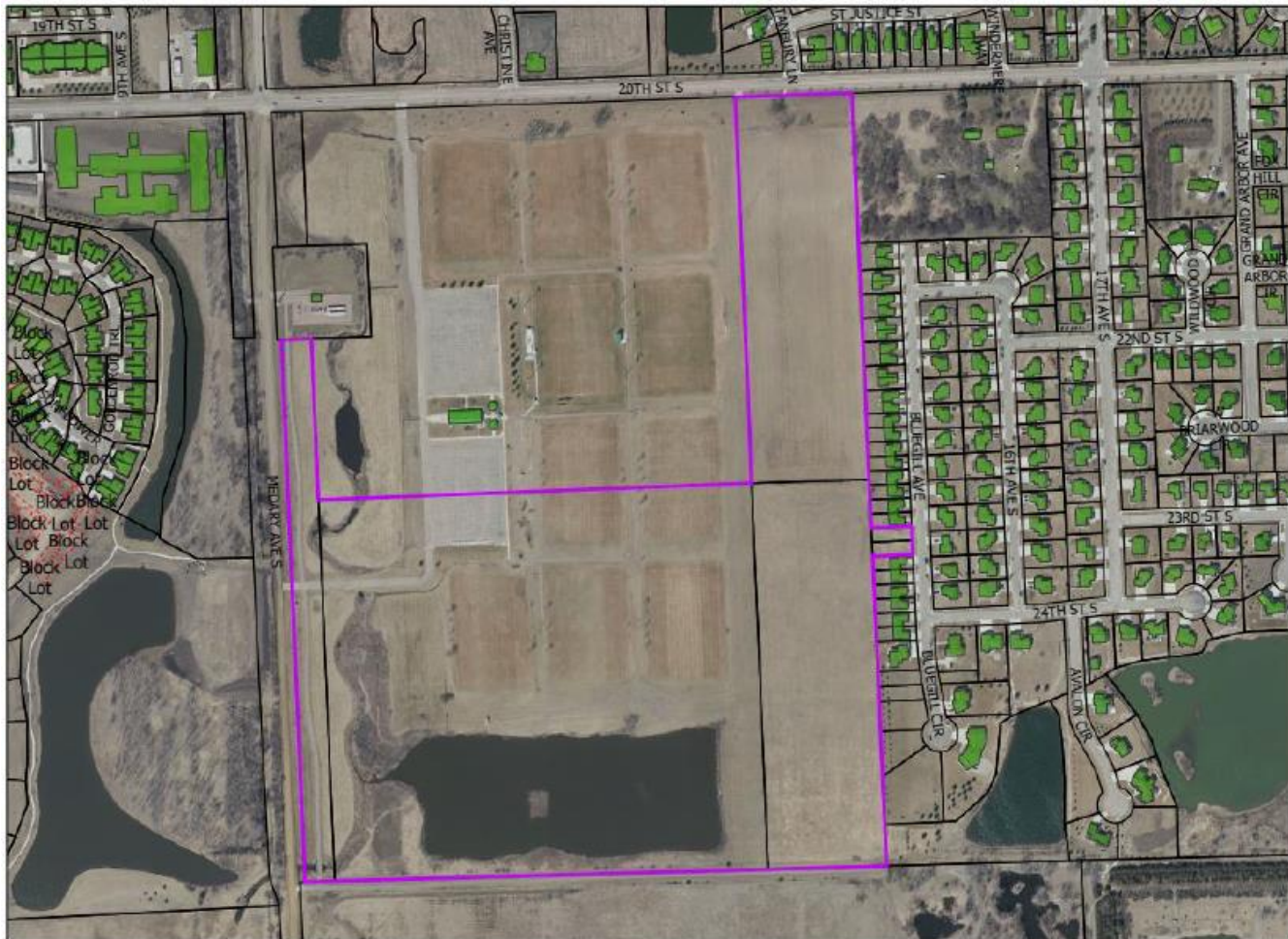


Exhibit C

Cost Estimate of Required Improvements*

Category	Cost
Infrastructure	
Grading	\$415,391.70
Site Paving, signage and concrete	\$1,434,862.30
Utilities	\$1,600,552.50
Erosion control and seeding	\$45,710.50
Lift Station	\$638,850.00
Taxes, fees and performance bond	\$614,769.01
Land costs	\$1,319,185.00
Engineering, Architecture, Consulting and Legal Fees	\$558,115.32
Total	\$6,627,436.33

*Financing costs are not included in this cost estimate.