

**NORTHWEST ASSOCIATED CONSULTANTS, INC.**

4150 Olson Memorial Highway, Ste. 320, Golden Valley, MN 55422  
Telephone: 763.957.1100 Website: [www.nacplanning.com](http://www.nacplanning.com)

**MEMORANDUM**

TO: Mayor Moynagh and Montrose City Council  
FROM: Stephen Gritman  
DATE: April 7, 2022  
MEETING DATE: April 11, 2022  
RE: Montrose – Ouverson 2<sup>nd</sup> Addition  
Preliminary and Final Plat, Final PUD, Development Agreement  
NAC FILE NO: 273.03 – 21.07

This memorandum forwards a copy of the proposed resolution for the Ouverson 2<sup>nd</sup> Addition. The resolution includes findings and recommendations relating to the Preliminary and Final Plat, the Final PUD, and the Development Agreement.

The resolution incorporates the Planning Commission's recommended PUD conditions from its public hearing last summer as a component of the approval. The applicant has submitted plans that illustrate compliance with the terms of that recommendation, and they are repeated in this resolution to ensure that final construction plans meet those terms.

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**DEVELOPMENT AGREEMENT**  
**BY AND BETWEEN**  
**THE CITY OF MONTROSE**  
**AND**  
**AA PROPERTIES 2 LLC**  
**FOR**  
**OUVERSON SECOND ADDITION**

---

This document drafted by:

Kennedy & Graven, Chartered  
Fifth Street Towers  
150 South Fifth Street, Suite 700  
Minneapolis, MN 55402  
(612) 337-9300

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This Development Agreement (the “**Agreement**”) is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2022 by and between the city of Montrose, a municipal corporation under the laws of Minnesota (the “**City**”), and AA Properties 2 LLC, a Minnesota limited liability company (the “**Developer**”).

#### Recitals

**WHEREAS**, the Developer is the fee owner of that certain real property legally described on the attached **Exhibit A** (the “**Property**”) and desires to develop the land as a thirteen-lot, multi-family residential development (the “**Development**”); and

**WHEREAS**, in order to facilitate the Development, the Developer has submitted a preliminary and final plat of Ouverson Second Addition (the “**Subdivision**”);

**WHEREAS**, the City issued various approvals related to the development of the Property as listed in **Exhibit B** (collectively, the “**City Approvals**”).

**WHEREAS**, the City’s approval of the Subdivision is contingent upon the Developer entering into a development agreement satisfactory to the City regarding the Subdivision and development of the Property.

#### Terms of the Agreement

**NOW, THEREFORE**, based on the mutual covenants and obligations contained herein, the parties agree as follows:

1. Right to Proceed. The Property is approximately 1.32 acres in size and the Subdivision consists of thirteen lots intended for multi-family residential purposes. The Developer may not construct public or private improvements or any buildings within the Subdivision or otherwise contemplated herein until all the following conditions precedent have been satisfied:

- a) the final plat of Ouverson Second Addition has been filed with Wright County;
- b) this Agreement has been executed by the Developer and the City and recorded against the Property;
- c) the required Letter of Credit (as hereinafter defined) has been received by the City from or on behalf of the Developer;
- d) final engineering and construction plans in digital form have been submitted by the Developer and approved by the city engineer;
- e) the Developer has reimbursed the City for all legal, engineering, and administrative expenses incurred to date by the City regarding the Subdivision and has given the City the additional escrow required by this Agreement;
- f) the Developer has submitted and executed that certain Private Driveway



Easement and Maintenance Agreement in a form acceptable to the City as contemplated in Section 6 herein;

- g) the Developer has executed the Stormwater Maintenance Agreement in the form attached hereto as Exhibit D;
- h) the Developer has submitted and the City has approved the certified grading plan;
- i) all erosion control measures are in place;
- j) the Developer has received all required permits from the City, Wright County, the Minnesota Pollution Control Agency, and any other entity having jurisdiction;
- k) the Developer or the Developer's engineer has initiated and attended a preconstruction meeting with the city engineer and staff; and
- l) the City has issued a notice that all conditions precedent have been satisfied and that the Developer may proceed.

2. Plans; Improvements. a) The Developer agrees to develop the Subdivision in accordance with this Agreement, the final plat of Ouverson Second Addition, the City's engineering standards and the terms and conditions of the City Approvals, which are hereby incorporated by reference into this Agreement and made a part hereof. The Developer also agrees to construct all required improvements related to the Subdivision in accordance with the approved engineering and construction plans (collectively, the "**Plans**"). The documents which constitute the Plans are those on file with and approved by the City and are listed on the attached **Exhibit C**. The Plans may not be modified by the Developer without the prior written approval of the City.

b) In developing the Subdivision in accordance with the Plans, the Developer shall make or install at its sole expense the following private improvements (collectively, the "**Subdivision Improvements**"):

- 1. site grading and erosion controls;
- 2. Private Driveway (as hereinafter defined);
- 3. sanitary sewer;
- 4. stormwater facilities;
- 5. watermain;
- 6. landscaping;
- 7. setting of Iron Monuments.

c) All work performed by or on behalf of the Developer on or related to the Subdivision, including construction of the Subdivision Improvements and construction of houses on the lots, shall be restricted to the hours of 7:00 a.m. through 8:00 p.m., Monday through Friday and 8:00 a.m. through 5:00 p.m. on Saturday.

3. Erosion Control. a) All construction regarding the Subdivision Improvements shall be conducted in a manner designed to control erosion and in compliance with all City ordinances and other requirements, including the City's permit with the Minnesota Pollution Control Agency and the Wright County Soil and Water Conservation District. Before any portion of the Property is rough graded, an erosion control plan shall be implemented by the Developer as approved by

the City. The City may impose reasonable, additional erosion control requirements after the City's initial approval if the City deems such necessary due to a change in conditions. All areas disturbed by the excavation shall be reseeded promptly after the completion of the work in that area unless construction of streets or utilities, buildings or other improvements is anticipated immediately thereafter. Except as otherwise provided in the erosion control plan, seed shall provide a temporary ground cover as rapidly as possible. All seeded areas shall be mulched, and disc anchored as necessary for seed retention. The parties recognize that time is of the essence in controlling erosion.

b) If the Developer does not comply with the erosion control plan and schedule or supplementary instructions received from the City, the City may take such action as it deems reasonably appropriate to control erosion based on the urgency of the situation. The City agrees to provide reasonable notice to the Developer in advance of any proposed action, including notice by telephone or email in the case of emergencies, but limited notice by the City when conditions so dictate will not affect the Developer's obligations or the City's rights hereunder.

c) The Developer agrees to reimburse the City for all expenses it incurs in connection with any action it takes to control erosion. No grading or construction of the Subdivision Improvements will be allowed, and no building permits will be issued within the Subdivision unless the Developer is in full compliance with the erosion control requirements. The erosion control measures specified in the Plans or otherwise required within the Property or adjacent areas shall be binding on the Developer and its successors and assigns.

4. Site Grading. In order to construct the Subdivision Improvements and otherwise prepare the Property for development, it will be necessary for the Developer to grade the Property based on the approved Plans and specifications for the Subdivision. All site and other grading must be done in compliance with the Plans. The parties agree and acknowledge that the Property was graded for development in 2005. The City reserves the right to inspect such grading work to ensure compliance with the Plans. The City may withhold issuance of a building permit for any structure within the Subdivision until the approved certified grading plan is on file with the City and all erosion control measures are in place as determined by the City. Within 30 days after execution of this Agreement, the completion of any supplemental grading required after City inspection, or such other period as acceptable to the City's engineer, the Developer shall provide the City with an "as constructed" grading plan and a certification by a registered land surveyor or engineer.

5. Construction of Subdivision Improvements. a) All Subdivision Improvements shall be installed in accordance with the Plans, the City Approvals, the City's subdivision regulations, the City's engineering standards for utility construction (as hereinafter defined). The parties acknowledge and agree that construction of the sanitary sewer, watermain, and storm sewer are all substantially complete. The Developer shall submit plans, specifications, and "as constructed" drawings for the Subdivision Improvements prepared by a registered professional engineer. The Developer shall obtain any necessary permits from Wright County, the Minnesota Pollution Control Agency, the Wright County Soil and Water Conservation District, the Minnesota Department of Health, and any other agency having jurisdiction over the Subdivision before proceeding with any additional construction that may be needed in order to comply with the Plans.

The City shall inspect all work at the Developer's expense. The Developer, its contractors, and subcontractors, shall follow all instructions received from the City's inspectors. Prior to beginning any construction, the Developer or the Developer's engineer shall schedule a preconstruction meeting with all parties concerned, including the City staff and engineers, to review the program for the construction work.

b) Within 60 days after the completion of the Subdivision Improvements, the Developer shall supply the City with a complete set of reproducible "as constructed" plans prepared in accordance with City standards in PDF format and in AutoCAD format based on Wright County coordinates. Iron monuments must be installed in the Subdivision in accordance with state law. The Developer's surveyor shall submit a written notice to the City certifying that the monuments have been installed. All Subdivision Improvements required by this Agreement, including the final wear course of bituminous on the Private Driveway, as defined herein, must be approved by the City. No Certificate of Occupancy will be issued until the improvements have been completed and approved by the City.

c) No building permit shall be issued for structures within the Subdivision until adequate street access is available to the lots in question. If building permits are issued prior to the completion and acceptance of all Subdivision Improvements serving any lot, the Developer assumes all liability and costs resulting in delays in completion of the Subdivision Improvements and damage to the Subdivision Improvements caused by the City, the Developer, its contractors, subcontractors, materialmen, employees, agents, or third parties. No temporary or permanent certificate of occupancy shall be issued for any structure within the Subdivision until all street access, except for the final wear course of bituminous, and all proper utilities have been completed for the lot in question.

6. Private Driveway. Pursuant to the Plans, the Developer proposes to utilize a shared driveway for access to the lots within the Subdivision off of Garfield Avenue. The Developer agrees to construct this private driveway over what is shown as Lot 14 of the Subdivision to serve all of the lots within the Subdivision (the "**Private Driveway**"). The Private Driveway shall remain private and shall be maintained by the Developer or by the HOA, as hereinafter defined. Additionally, the Developer shall prepare and provide to the City one or more shared driveway easement and maintenance instrument which shall provide (i) perpetual access rights to the owners of the lots within the Subdivision, which access shall run over and across Lot 14 all in accordance with the Plans; and (ii) provide for the maintenance of the Private Driveway. Such instrument(s) shall be in a form acceptable to the city attorney and, upon review and approval by the City, the Developer shall be responsible for recording such instruments against the affected lots, and shall provide the City with evidence of such recording prior to conveying the lots within the Subdivision to any third party. The City shall not issue a building permit for any such lots until such instruments have been recorded to its satisfaction.

The Developer acknowledges that (i) the Private Driveway will not be accepted by the City; (ii) the City does not plan to maintain or pay for maintenance, repair or replacement of the Private Driveway and that the Developer initially and the HOA ultimately will have responsibility for such work; (iii) the City has the right but not the obligation to perform necessary work upon the failure or refusal by the Developer or the HOA to do so; and (iv) if the City performs any work on the

Private Driveway, the City has the right to specially assess or otherwise recover the cost of such work against the lots within the Development that are served by the Private Driveway. The Developer agrees to inform purchasers of lots served by the Private Driveway that i) the City does not plan to maintain or pay for maintenance, repair or replacement of the Private Driveway and that the HOA will have primary responsibility for such work; ii) the City has the right but not the obligation to perform necessary work upon the failure or refusal by the HOA to do so; and iii) if the City performs any work on the Private Driveway, the City intends to recover the cost of such work from the owners of the lots served by the Private Driveway.

7. Sanitary Sewer and Water Improvements. The Developer agrees to construct sanitary sewer and water lines to serve the buildings within the Subdivision. The Developer's work in constructing and extending the utilities must be in accordance with the Plans and must comply with all City requirements regarding such utilities. The parties acknowledge and agree that construction of the sanitary sewer and watermain are substantially complete and that the same still require testing of all said utilities by the City. Upon the completion of all testing as required herein, the Developer agrees to make, at its sole cost and expense, any additional improvements, modifications, or repairs as deemed necessary by the City.

8. Stormwater Improvements. The Developer agrees to construct the stormwater facilities in accordance with the Plans and in compliance with all City requirements regarding such improvements. The stormwater facilities include but are not limited to a filtration basin, drainageways, and emergency overflows, together with all related facilities, as shown on the Plans. The parties acknowledge and agree that construction of the stormwater improvements are substantially complete and that the same require additional testing and approval by the City.

9. Utilities are Private Improvements.

a) The sanitary sewer, water, and stormwater facilities ("Utilities") serving the Subdivision will remain private and will be maintained by the Developer at its sole expense until taken over by the HOA, as hereinafter defined. The City does not intend to accept the Utilities as public and does not intend to maintain them. The Developer acknowledges that i) the Utilities have not and will not be accepted by the City; ii) the City does not plan to maintain or pay for maintenance, repair or replacement of the Utilities and that the Developer and ultimately the HOA will have primary responsibility for such work; iii) the City has the right but not the obligation to perform necessary work upon the failure or refusal by the Developer or HOA to do so; and iv) if the City performs any work on the Utilities, the City intends to specially assess or otherwise recover the cost of such work against the lots within the Subdivision.

b) The Developer will make the HOA responsible for the maintenance, repair, or replacement of the Utilities as needed and the HOA documents recorded with Wright County shall so require. The HOA shall thereafter be responsible for the maintenance, repair or replacement of all Utilities serving the Subdivision. The Developer agrees to inform purchasers of lots within the Subdivision that i) the City does not plan to maintain or pay for maintenance, repair or replacement of the Utilities and that the HOA will have primary responsibility for such work; ii) the City has the right but not the obligation to perform necessary work upon the failure or refusal by the HOA to do so; and iii) if the City performs any work on the Utilities, the City intends to recover the cost

of such work against the lots within the Subdivision.

c) In order to meet the requirements of the City code and the obligations in this Agreement, the Developer agrees to enter into a Utilities Maintenance Agreement with the City in the form attached hereto as Exhibit D. The purpose of the Utilities Maintenance Agreement is to ensure that the Developer maintains the Utilities and to give the City the right but not the obligation to do so if the Developer fails in its obligations. The Utilities Maintenance Agreement will be recorded against all land within the Subdivision and will run with the land.

10. Cash Escrow. In order to cover certain City costs and fees related to the Subdivision, the Developer agrees to deliver to the City prior to beginning any construction or work within the Subdivision a cash escrow in the amount of \$20,000.00 which represents an amount needed to cover legal, engineering, and administrative costs of the City. If the actual City costs and fees exceed this amount, the Developer shall pay the additional costs to the City within thirty (30) business days of the request. If actual City costs and fees are lower than this amount, any surplus funds will be returned to Developer when the project fund is reconciled upon construction completion.

11. Homeowners' Association. a) The Developer agrees to establish a homeowners' association (the "HOA"), which shall include all land within the Subdivision. The Developer agrees to record covenants against said land for this purpose, which covenants must be in form and substance acceptable to the City. The covenants shall be filed by the Developer with Wright County prior to any building permits being issued for the Subdivision.

b) The HOA covenants must provide, among other things, for HOA maintenance of the Private Driveway and the stormwater facilities. The City must approve the HOA covenants and will require that certain provisions thereof may not be amended or deleted without prior written City approval.

12. Fees, Rates, Charges, and Costs. The Developer agrees to pay the following fees, rates, charges, and costs in addition to any other amounts required to be paid by the Developer under this Agreement.

(a) Sanitary Sewer.

(1) Trunk Area Sewer Charge. The Developer agrees to pay a trunk area sewer charge of \$3,000.00 per acre prior to the release of the final plat of Ouverson Second Addition. The number of acres for the Sewer Trunk Area Charges shall be 1.32 acres.

(2) Sewer Access/Connection Fee. Sanitary sewer connection fees are \$5,600.00 per unit and shall be due at the time of issuance of the building permit.

(b) Water.

- (1) Trunk Area Water Charge. The Developer agrees to pay a trunk area water area charge of \$875.00 per acre prior to the release of the final plat of Ouverson Second Addition for recording. The number of acres for the Water Trunk Area Charges shall be 1.32 acres.
  - (2) Water Connection Fee. Water connection fees are determined by the specific connection pipe sizing and metering equipment specified by the engineer for the project and shall be due at the time of issuance of the building permit(s) for the number of unit(s) which shall be as reasonably determined by the City.
- (c) Storm Water:
- (1) Trunk Area Stormwater Charge. The Developer agrees to pay a trunk area storm water area charge of \$800.00 per acre prior to the release of the final plat of Ouverson Second Addition for recording. The number of acres for the Stormwater Trunk Area Charges shall be 1.32 acres.
  - (2) Stormwater Connection Fee. Stormwater connection fees are determined by the specific connection pipe sizing and metering equipment specified by the engineer for the project and shall be due at the time of issuance of the building permit(s) for the number of unit(s) which shall be as reasonably determined by the City.
- (d) Park Dedication Fee. The park dedication fee for the plat of Ouverson Second Addition is \$ 20,800.00 (\$1,600.00/unit x 13).

13. Responsibility for Costs; Escrow for Construction Inspection.

(a) The Developer agrees to pay to the City an administrative fee in the amount necessary to reimburse the City for its reasonable costs and expenses in reviewing the Subdivision, including the drafting and negotiation of this Agreement and all associated documents. The Developer agrees to reimburse the City in full for such reasonable costs within 45 days after notice in writing by the City. The Developer agrees to reimburse the City for the reasonable cost incurred in the enforcement of any provision of this Agreement, including reasonable engineering and attorneys' fees.

(b) The Developer shall also pay a fee for City construction observation and administration relating to construction of the Subdivision Improvements. Construction observation shall include inspection of all the Subdivision Improvements. In order to reimburse the City for the reasonable cost of inspection of the Subdivision Improvements, the Developer shall deposit an additional \$6,000 into an escrow account with the City, which shall receive and hold such funds solely under the terms of this Agreement. The City shall reimburse itself for expenses from the escrow and will provide the Developer with a copy of any invoice from the city engineer or evidence of other cost or expense attributed to the escrow prior to deducting such funds from the escrow. If any funds held under this escrow exceed the amount necessary to reimburse the City

for its costs under this section, such funds shall be returned to the Developer without interest. If it appears that the actual costs incurred will exceed the estimate, the Developer and the City shall review the costs required to complete the project and the Developer shall deposit additional sums with the City.

(c) The Developer agrees to pay a fee for preliminary and final plat approval of \$3,250.00 (\$250.00/lot x 13) prior to the release of the final plat of Ouverson Second Addition for recording.

14. Developer's Default. In the event of default by the Developer as to construction or repair of any of the Subdivision Improvements or any other work or undertaking required by this Agreement, after providing 30 days' notice to the Developer of the nature of the default pursuant to the notice requirements in this Agreement, the City may, at its option, perform the work and the Developer shall promptly reimburse the City for any expense incurred by the City. This Agreement is a license for the City to act, and it shall not be necessary for the City to seek an order from any court for permission to enter the Property for such purposes. If the City does any such work, the City may, in addition to its other remedies, levy special assessments against the land within the Subdivision to recover the costs thereof. For this purpose, the Developer, for itself and its successors and assigns, expressly waives any and all procedural and substantive objections to the special assessments, including but not limited to, hearing requirements and any claim that the assessments exceed the benefit to the land so assessed. The Developer, for itself and its successors and assigns, also waives any appeal rights otherwise available pursuant to Minnesota Statutes, section 429.081. The City may also withhold the issuance of building permits and certificates of occupancy if the Developer is in default of any of the terms and conditions of this Agreement or afford itself to any other rights that it may have whether in law or in equity.

15. Insurance. The Developer agrees to take out and maintain or cause to be taken out and maintained until six months after the City has accepted the specific Subdivision Improvements as agreed upon herein, public liability and property damage insurance covering personal injury, including death, and claims for property damage which may arise out of Developer's work or the work of its contractors or subcontractors. Liability limits shall not be less than \$500,000 when the claim is one for death by wrongful act or omission or for any other claim and \$1,500,000 for any number of claims arising out of a single occurrence. The City shall be named as an additional insured on the policy. The certificate of insurance shall provide that the City must be given the same advance written notice of the cancellation of the insurance as is afforded to the Developer.

16. Floodplain Regulations. No structures, including fences and accessory structures, may be constructed within the Subdivision below the regulatory flood protection elevation. The Developer must comply with the requirements of the City with regard to flood protection. Any utilities which are installed by the Developer on ground the surface of which is below the regulatory flood protection elevation must be flood proof in accordance with the state building code and City requirements.

17. No Building Permits Approved; Certificates of Occupancy. a) Approvals granted to date by the City regarding the Subdivision do not include approval of a building permit for any structure within the Subdivision. The Developer must submit, and the City must approve building



plans prior to an application for a building permit for a structure on any lot within the Subdivision. All building pads must be certified prior to initiation of construction of a home on a lot. The Developer or the party applying for a building permit shall be responsible for payment of the customary fees associated with the building permit and all other deferred fees, if any, as specified in this Agreement.

b) No certificate of occupancy shall be issued for any home constructed in the Subdivision unless prior thereto the lot has been graded and all buffer plantings installed in accordance with the Plans, the septic system or sanitary sewer, well and driveway have been installed, and an as built survey of the lot has been submitted and approved by the City. In cases in which seasonal weather conditions make compliance with these conditions impossible, the City may accept an escrow of sufficient amount to ensure completion of the work during the following construction season.

18. Clean up and Dust Control. The Developer shall clean on a daily basis dirt and debris from streets adjoining the Subdivision resulting from construction work by the Developer, its contractors, agents or assigns, including any party constructing houses within the Subdivision. Prior to any construction on the Property or adjacent areas, the Developer shall identify to the City in writing a responsible party for erosion control, street cleaning, and street sweeping. The Developer shall provide dust control to the satisfaction of the City's engineer throughout construction within the Subdivision.

19. Compliance with Laws. The Developer agrees to comply with all laws, resolutions, ordinances, regulations and directives of the state of Minnesota and the City applicable to the Subdivision. This Agreement shall be construed according to the laws of Minnesota. Breach of the terms of this Agreement by the Developer shall be grounds for denial of building permits for lots within the Subdivision.

20. Agreement Runs with the Land. This Agreement shall run with the Property and shall be recorded against the title thereto and shall bind and inure to the benefit of the City and the Developer and their successors and assigns. The Developer warrants that there are no unrecorded encumbrances or interests relating to the Property. The Developer agrees to indemnify and hold the City harmless for any breach of the foregoing covenants.

21. Indemnification. The Developer hereby agrees to indemnify and hold the City and its officers, employees, and agents harmless from claims made by it and third parties for damages sustained or costs incurred resulting from approval of the Subdivision or the other City Approvals. The Developer hereby agrees to indemnify and hold the City and its officers, employees, and agents harmless for all costs, damages, or expenses which the City may pay or incur in consequence of such claims, including attorneys' fees, except matters involving acts of gross negligence by the City.

22. Assignment. The Developer may not assign this Agreement without the prior written permission of the City, which consent shall not be unreasonably withheld, conditioned or denied. It is the intention of the parties that any assignee be subject to this Agreement.

23. Notices. Any notice or correspondence to be given under this Agreement shall be deemed to be given if delivered personally or sent by United States certified or registered mail, postage prepaid, return receipt requested:

a) as to Developer: AA Properties 2 LLC  
4525 Omer Avenue SW  
Cokato, MN 55321  
Attention: Anthony P. Janckila

b) as to City: City of Montrose  
311 Buffalo Ave S,  
Montrose, MN 55363  
Attention: City Administrator

With a copy to: Montrose City Attorney  
Kennedy & Graven, Chartered  
Fifth Street Towers  
150 South Fifth Street, Suite 700  
Minneapolis, MN 55402

or at such other address as either party may from time to time notify the other in writing in accordance with this section. The Developer shall notify the City if there is any change in its name or address.

24. Severability. In the event that any provision of this Agreement shall be held invalid, illegal or unenforceable by any court of competent jurisdiction, such holding shall pertain only to such section and shall not invalidate or render unenforceable any other section or provision of this Agreement.

25. Non-waiver. Each right, power or remedy conferred upon the City by this Agreement is cumulative and in addition to every other right, power or remedy, express or implied, now or hereafter arising, or available to the City at law or in equity, or under any other agreement. Each and every right, power and remedy herein set forth or otherwise so existing may be exercised from time to time as often and in such order as may be deemed expedient by the City and shall not be a waiver of the right to exercise at any time thereafter any other right, power or remedy. If either party waives in writing any default or nonperformance by the other party, such waiver shall be deemed to apply only to such event and shall not waive any other prior or subsequent default.

26. Estoppel Certificate; Partial Release. a) The City agrees to execute a certification in writing and in such form as will enable it to be recorded in the proper office for the recordation of deeds and other instruments that (i) this Agreement is unmodified and in full force and effect, or if there have been modifications, the identify of such modifications and that the same are in full force and effect as modified; (ii) no party is in default under any provisions of this Agreement or, if there has been a default, the nature of such default; (iii) all Subdivision Improvements to be constructed under this Agreement have been constructed, or, if not, specifying the Subdivision Improvements yet to be constructed; and (iv) as to any other matter that the requesting party shall reasonably request. Any such statement on behalf of the City may be executed by the city administrator without city

council approval.

b) Following completion of the Subdivision Improvements and at the written request of the Developer, the City agrees to execute a certification in writing releasing the lot or lots from the Developer's obligations under this Agreement. Such certification shall not release the lot or lots from any obligations to the HOA, the liability under the storm sewer maintenance agreement or any other ongoing obligations regarding the Subdivision.

27. Counterparts. This Agreement may be executed simultaneously in any number of counterparts, each of which shall be an original and shall constitute one and the same Agreement.

\*\*\*\*\*

**IN WITNESS WHEREOF** the parties hereto have caused this Agreement to be executed on the day and year first above written.

**CITY OF MONTROSE**

By: \_\_\_\_\_  
Kirby Moynagh, Mayor

By: \_\_\_\_\_  
Jessica Bonniwell, City Administrator

STATE OF MINNESOTA     )  
  ) ss.  
COUNTY OF WRIGHT     )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2022, by Kirby Moynagh and Jessica Bonniwell, the mayor and city administrator, respectively, of the city of Montrose, a Minnesota municipal corporation, on behalf of the municipal corporation.

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

**AA PROPERTIES 2 LLC**

By: \_\_\_\_\_

Its: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

STATE OF MINNESOTA    )  
   ) ss.  
 COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me on \_\_\_\_\_ 2021, by  
 \_\_\_\_\_ and \_\_\_\_\_, the  
 \_\_\_\_\_ and \_\_\_\_\_, respectively, of AA Properties 2 LLC, a  
 Minnesota limited liability company, on behalf of the company.

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

**THIS DOCUMENT DRAFTED BY:**

Kennedy & Graven, Chartered  
 Fifth Street Towers  
 150 South Fifth Street, Suite 700  
 Minneapolis, MN 55402  
 (612) 337-9300

**EXHIBIT A**  
Legal Description of the Property

Lots 1-14, Block 1, Ouverson Second Addition, Wright County, Minnesota.

**EXHIBIT B**  
List of Approvals



**EXHIBIT C**  
List of Plan Documents

**EXHIBIT D**  
Form of Stormwater Maintenance Agreement

**THIS AGREEMENT** (the “**Agreement**”) is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2021, by and between the city of Montrose, a Minnesota municipal corporation (the “**City**”) and AA Properties 2 LLC, a Minnesota limited liability company (the “**Developer**”).

Recitals

**WHEREAS**, the Developer is the fee owner of that certain real property located in Wright County, Minnesota, legally described on the attached **Exhibit A** (the “**Property**”); and

**WHEREAS**, the City has obtained drainage and utility easements over portions of the Property (the “**Easement Areas**”); and

**WHEREAS**, by a separate development agreement (the “**Development Agreement**”), the Developer has agreed to construct and maintain certain stormwater facilities (the “**Stormwater Improvements**”) for the benefit of the Property; and

**WHEREAS**, the Stormwater Improvements which are the subject of this Agreement include, but are not necessarily limited to, a filtration basin, drainageways, and emergency overflows and all related facilities. The location of the Stormwater Improvements are shown on the attached **Exhibit B**; and

**WHEREAS**, the City requires permanent provisions for handling of runoff, including terms and conditions for operation and maintenance of all Stormwater Improvements, and requires such provisions to be set forth in an agreement to be recorded against the Property; and

**WHEREAS**, the City and the Developer intend to comply with certain conditions, including entering into a maintenance agreement regarding the Stormwater Improvements.

**NOW, THEREFORE**, in consideration of mutual covenants of the parties set forth herein and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Maintenance of the Stormwater Improvements. The Developer, for itself and its successor or assigns, agrees to maintain the Stormwater Improvements and observe all drainage laws governing the operation and maintenance of the Stormwater Improvements. The Developer shall make periodic inspection and perform maintenance of the Stormwater Improvements as described in the attached **Exhibit C**. The Developer shall make all such scheduled inspections and maintenance, keep record of all inspections and maintenance activities, and submit such records annually to the City. The cost of all inspections and maintenance, including but not limited to skimming and cleaning of the Stormwater Improvements, shall be the obligation of the Developer and its successors or assigns as the fee owner of the Property, which obligation shall be assigned to the HOA, as defined hereinafter, in accordance with section 7 of this Agreement.

2. City's Maintenance Rights. The City may inspect the Stormwater Improvements at any time and shall have the right to enter upon the Easement Areas and such portions of the Property as may reasonably be necessary to gain access to the Easement Areas to perform such inspections. Additionally, the City may maintain the Stormwater Improvements, as provided in this paragraph, if the City reasonably believes that the Developer or its successors or assigns has failed to maintain the Stormwater Improvements in accordance with applicable drainage laws and other requirements and such failure continues for 30 days after the City gives the Developer written notice of such failure or, if such tasks cannot be completed within 30 days, after such time period as may be reasonably required to complete the required tasks provided that Developer is making a good faith effort to complete said task. The City's notice shall specifically state which maintenance tasks are to be performed. If Developer does not complete the maintenance tasks within the required time period after such notice is given by the City, the City shall have the right to enter upon the Easement Areas and such portions of the Property as may reasonably be necessary to gain access to the Easement Areas to perform such maintenance tasks. In such case, the City shall send an invoice of its reasonable maintenance costs to the Developer or its successors or assigns, which shall include all reasonable staff time, engineering and legal and other reasonable costs and expenses incurred by the City. If the Developer or its successors or assigns fails to reimburse the City for its costs and expenses in maintaining the Stormwater Improvements within 30 days of receipt of an invoice for such costs, the City shall have the right to assess the full cost thereof against the Property. The Developer, on behalf of itself and its successors and assigns, acknowledges that the maintenance work performed by the City regarding the Stormwater Improvements benefits the Property in an amount which exceeds the assessment and hereby waives any right to hearing or notice and the right to appeal the assessments otherwise provided by Minnesota Statutes, Chapter 429. Notwithstanding the foregoing, in the event of an emergency, as determined by the city engineer, the 30-day notice requirement to the Developer for failure to perform maintenance tasks shall be and hereby is waived in its entirety by the Developer, and the Developer shall reimburse the City and be subject to assessment for any expense so incurred by the City in the same manner as if written notice as described above has been given.

3. Hold Harmless. The Developer hereby agrees to indemnify and hold harmless the City and its agents and employees against any and all claims, demands, losses, damages, and expenses (including reasonable attorneys' fees) arising out of or resulting from the Developer's, or the Developer's agents' or employees' negligent or intentional acts, or any violation of any safety law, regulation or code in the performance of this Agreement, without regard to any inspection or review made or not made by the City, its agents or employees or failure by the City, its agents or employees to take any other prudent precautions, except to the extent of intentional or grossly negligent acts of the City, its employees, agents and representatives. In the event the City, upon the failure of the Developer to comply with any conditions of this Agreement, performs said conditions pursuant to its authority in this Agreement, the Developer shall indemnify and hold harmless the City, its employees, agents and representatives for its own negligent acts in the performance of the Developer's required work under this Agreement, but this indemnification shall not extend to intentional or grossly negligent acts of the City, its employees, agents and representatives.

4. Costs of Enforcement. The Developer agrees to reimburse the City for all

reasonable costs prudently incurred by the City in the enforcement of this Agreement, or any portion thereof, including court costs and reasonable attorneys' fees after providing written notice to Developer and a reasonable opportunity to cure.

5. Rights Not Exclusive. No right of the City under this Agreement shall be deemed to be exclusive and the City shall retain all rights and powers it may have under Minnesota Statutes, sections 444.16 to 444.21 to acquire, construct, reconstruct, extend, maintain and otherwise improve the Stormwater Improvements.

6. Notice. All notices required under this Agreement shall either be personally delivered or be sent by United States certified or registered mail, postage prepaid, and addressed as follows:

- a) as to Developer: AA Properties 2 LLC  
4525 Omer Avenue SW  
Cokato, MN 55321  
Attention: Anthony P. Janckila
- b) as to City: City of Montrose  
311 Buffalo Ave S,  
Montrose, MN 55363  
Attention: City Administrator

With a copy to: Montrose City Attorney  
Kennedy & Graven, Chartered  
Fifth Street Towers  
150 South Fifth Street, Suite 700  
Minneapolis, MN 55402

or at such other address as either party may from time to time notify the other in writing in accordance with this paragraph.

7. Successors and Assigns. All duties and obligations of Developer under this Agreement shall also be duties and obligations of Developer's successors and assigns. The terms and conditions of this Agreement shall run with the Property. Notwithstanding the foregoing, upon creation of a homeowners' association for the Property (the "HOA") by an instrument in a form satisfactory to the City which assumes and agrees to perform the obligations and responsibilities of the Developer under this Agreement, the HOA shall be bound by all terms and conditions of this Agreement as if it were the original signatory hereto and the Developer, its successors and assigns, shall be released from all personal liability under this Agreement but the Property shall remain subject to the terms and conditions of this Agreement.

8. Effective Date. This Agreement shall be binding and effective as of the date first written above.

**IN WITNESS WHEREOF** the parties hereto have caused this Agreement to be executed on the day and year first above written.

**CITY OF MONTROSE**

By: \_\_\_\_\_  
Kirby Moynagh, Mayor

By: \_\_\_\_\_  
Jessica Bonniwell, City Administrator

STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF HENNEPIN    )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2021, by Kirby Moynagh and Jessica Bonniwell, the mayor and city administrator, respectively, of the city of Montrose, a Minnesota municipal corporation, on behalf of the municipal corporation.

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

## AA PROPERTIES 2 LLC

By: \_\_\_\_\_

Its: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

[illegible]

The foregoing instrument was acknowledged before me on \_\_\_\_\_ 2021, by \_\_\_\_\_ and \_\_\_\_\_, the \_\_\_\_\_ and \_\_\_\_\_, respectively, of AA Properties 2 LLC, a Minnesota limited liability company, on behalf of the company.

Notary Public

**THIS DOCUMENT DRAFTED BY:**

Kennedy & Graven, Chartered  
Fifth Street Towers  
150 South Fifth Street, Suite 700  
Minneapolis, MN 55402  
(612) 337-9300

**EXHIBIT A TO  
STORMWATER MAINTENANCE AGREEMENT**

Legal Description of the Property

Lots 1-14, Block 1, Ouverson Second Addition, Wright County, Minnesota.



**EXHIBIT B TO  
STORMWATER MAINTENANCE AGREEMENT**

Depiction of Location of Stormwater Improvements

D-B-1

**EXHIBIT C TO  
STORMWATER MAINTENANCE AGREEMENT**

Inspection and Maintenance Schedule

**CITY OF MONTROSE  
WRIGHT COUNTY, MINNESOTA  
RESOLUTION NO. 2022-18**

Date: Resolution No.

Motion By: Seconded By:

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MONTROSE  
APPROVING A PRELIMINARY AND FINAL PLAT AND FINAL PUD, ALONG  
WITH A DEVELOPMENT AGREEMENT REGULATING AND CONTROLLING  
USES AND DEVELOPMENT WITHIN THE PUD, FOR A THIRTEEN UNIT  
TOWNHOUSE RESIDENTIAL PROJECT IN TWO BUILDINGS**

**PID: 112-035-000010, 112-500-354322**

**PROPOSED LEGAL: LOTS 1-8, BLOCK 1, LOTS 1-5, BLOCK 2, AND OUTLOT A  
OUVERSON 2<sup>ND</sup> ADDITION**

*WHEREAS*, the applicant proposes to plat the parcel identified above for 13 townhouse units on individual residential lots, as well as a common outlot; and

*WHEREAS*, the subject property is zoned R-3, Medium Density Residence District, in which such lots are allowed uses; and

*WHEREAS*, the applicant has requested a Preliminary and Final Plat for the subdivision, and necessary easements for public use; and

*WHEREAS*, the applicant is seeking approval of a Final Stage Planned Unit Development under which approval the subdivision would be developed in two buildings and a controlling common interest, according to final PUD plans and development agreement on file with the City; and

*WHEREAS*, the proposed use and site improvements, subject to the conditions identified in the staff reports prepared for the Planning Commission agenda of June 9, 2021, and as later may have been supplemented, are consistent with the intent and requirements of the R-3 zoning district and the City's land use objectives for the site; and

*WHEREAS*, the subject plat, known as "Ouverson 2<sup>nd</sup> Addition", is consistent with the original preliminary plat for the area, and furthers the arrangement of required public improvements as provided for in the subject neighborhood; and

**WHEREAS**, the Planning Commission held a public hearing to consider the matter at its regular meeting on June 9, 2021 and the applicant and members of the public were provided the opportunity to present information to the Planning Commission; and

**WHEREAS**, the City Council has considered all of the comments and the staff report, which are incorporated by reference into the resolution; and

**WHEREAS**, the City Council of the City of Montrose makes the following Findings of Fact in relation to the preliminary plat approval, pursuant to the conditions identified by staff and others:

1. The proposed plat is consistent with the intent of the Montrose Comprehensive Plan.
2. The proposed plat will not create undue burdens on public systems, including streets and utilities, or parking supply or access.
3. The property will be used in a manner consistent with the requirements of the R-3 Zoning District and the controlling PUD documents, plans, and restrictive covenants.
4. The elements recommended by staff, and as adopted and recommended by the Planning Commission, are necessary conditions for approval of said plat.
5. With approval of the plat as designed, reasonable use of the property is feasible, and the objectives of the City's economic and housing development plans are met.
6. The plat as designed will not overwhelm the ability of the site, surrounding roadways, or other public services to serve the property.

**NOW, THEREFORE, BE IT RESOLVED**, by the City Council of the City of Montrose, Minnesota that the proposed Preliminary Plat, Final Plat, and Final PUD are hereby approved, and the Mayor and City Administrator are authorized to execute the accompanying Development Agreement, subject to verification of compliance with the following conditions as recommended by the Planning Commission:

- a. The City approve the Ouverson 2nd Addition Preliminary and Final Plat.
- b. The rear yard (east) building setback of the 5-unit building be 20 feet as required by ordinance.
- c. The submitted building elevations be modified to illustrate the staggering of units, consistent with the submitted plat drawing.
- d. The submitted building elevations be modified to include a minimum of twenty five percent (25%) of the area of all building facades shall have an exterior finish of brick, stucco and/or natural or artificial stone.
- e. "Wing walls" or projecting privacy fences be constructed between the rowhouse units (5-unit building). Such features shall project approximately 10 feet from the rear building wall.
- f. A homeowner's association shall be established in accordance with Section 1060-9 (b), subject to review and approval by the City Attorney.
- g. The following landscaping conditions shall be satisfied, each subject to the approval of the City Engineer:
  - i. Specific planting varieties and species and container sizes shall be specified.

- ii. Trees along the north property line shall be of a size and location that they not encroach upon neighboring properties or required easements.
- iii. Additional overstory trees shall be added along the east lot line.
- iv. Additional plantings shall be provided within unit front yard areas to provide attractive frontages.
- h. All other approvals of the City Engineer and other City staff and consultants, as required in this Resolution or the Development Agreement, shall be satisfied. Requirements include, but are not limited to, the following Engineering comments:
  - 1. Construction of the sanitary sewer, watermain, and storm sewer is substantially complete. Inspection by the City Engineer during construction was completed in 2005.
  - 2. Testing of the sanitary sewer and watermain has not been completed. The Developer will be required to test all utilities per city standards. The City Engineer shall monitor and approve all testing.
  - 3. Final Inspection of all site and utility improvements shall be completed by the City Engineer. The Developer shall address all items as noted by the City Engineer during final inspection.
  - 4. A PUD/Developer Agreement between the City and Developer shall be drafted, executed and recorded with the property.
  - 5. Ownership and maintenance responsibilities of the utilities and common areas shall be addressed in the PUD agreement.

**ADOPTED** this 11<sup>th</sup> day of April, 2022 by the City Council of the City of Montrose, Minnesota.

#### MONTROSE CITY COUNCIL

By: \_\_\_\_\_  
Kirby Moynagh, Mayor

ATTEST:

\_\_\_\_\_  
Jessica Bonniwell, City Administrator

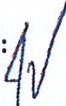


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Willmar, MN 56201-5818

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Fax: (320) 231-9710  
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## MEMORANDUM

**Date:** April 4, 2022  
**To:** Honorable Mayor Moynagh  
Members of the City Council  
City of Montrose, Minnesota  
**From:**  Jared Voge, P.E.  
City Engineer  
**Subject:** 2021 Downtown Improvement Phase 2  
City of Montrose, Minnesota  
BMI Project No.: W13.120514

---

On March 22, 2022, we received seven (7) bids for the 2021 Downtown Improvement Phase 2 project. The bids ranged from \$2,588,459.78 to \$3,250,592.48. The low bidder for the project is Northdale Construction Company, Inc. of Albertville, Minnesota. A bid tabulation for the project is attached for your review. We recommend that the City Council award the bid for the 2021 Downtown Improvement Phase 2 project to Northdale Construction Company, Inc. of Albertville, Minnesota in the amount of \$2,588,459.78. A resolution has been enclosed for council consideration.

Please feel free to contact me if you have any questions.

JAV/kg

## BID TABULATION

**PROJECT:** 2021 DOWNTOWN IMPROVEMENT PROJECT – PHASE 2  
MONTROSE, MN

**DATE:** March 22, 2022

**PROJECT NO.** W13.120514

**TIME:** 1:00 P.M.

**ENGINEER'S ESTIMATE:** \$2.66 million

**QUEST PROJECT NO.** 8136350

| BIDDERS  | BASE BID       |
|--|----------------|
| 1. Northdale Construction Company, Inc.<br>Albertville, MN | \$2,588,459.78 |
| 2. Kuechle Underground Inc.<br>Kimball, MN                 | \$2,697,415.48 |
| 3. Park Construction Company<br>Minneapolis, MN            | \$2,714,695.00 |
| 4. LaTour Construction, Inc.<br>Maple Lake, MN             | \$2,917,079.10 |
| 5. Valley Paving, Inc.<br>Shakopee, MN                     | \$2,929,432.20 |
| 6. Geislinger & Sons<br>Watkins, MN                        | \$2,992,964.00 |
| 7. Meyer Contracting, Inc.<br>Maple Grove, MN              | \$3,250,592.48 |



## RESOLUTION

2022-19

Councilmember \_\_\_\_\_ introduced the following resolution and moved for its adoption:

### RESOLUTION ACCEPTING 2021 DOWNTOWN IMPROVEMENT PHASE 2 BID AND AWARDING CONTRACT

WHEREAS, pursuant to an advertisement for bids for the 2021 Downtown Improvement Phase 2, bids were received, opened and tabulated according to law, and the following bids were received complying with the advertisement:

| <u>Company</u>  | <u>Bid</u>     |
|---|----------------|
| Northdale Construction Company, Inc., Albertville, MN | \$2,588,459.78 |
| Kuechle Underground Inc., Kimball, MN                 | \$2,697,415.48 |
| Park Construction Company, Minneapolis, MN            | \$2,714,695.00 |
| LaTour Construction, Inc., Maple Lake, MN             | \$2,917,079.10 |
| Valley Paving, Inc., Shakopee, MN                     | \$2,929,432.20 |
| Geislinger & Sons, Watkins, MN                        | \$2,992,964.00 |
| Meyer Contracting, Inc., Maple Grove, MN              | \$3,250,592.48 |

AND WHEREAS, it appears Northdale Construction Company, Inc. of Albertville, Minnesota is the lowest responsible bidder;

**NOW, THEREFORE, BE IT RESOLVED** that the City Council of Montrose, Wright County, Minnesota resolves as follows:

1. The Mayor and City Clerk are hereby authorized and directed to enter into a contract with Northdale Construction Company, Inc. of Albertville, Minnesota in the name of the City of Montrose for such construction, according to the plans and specifications therefore approved by the City Council and on file in the office of the City Clerk, for a total contract amount of \$2,588,459.78.
2. The City Clerk is hereby authorized and directed to return forthwith to all bidders the deposits made with their bids, except that the deposits of the successful bidder and the next lowest bidder shall be retained until a contract has been signed.

The foregoing resolution was duly seconded by Councilmember \_\_\_\_\_, upon a vote being taken thereon, the following members voted in favor thereof:

\_\_\_\_\_, the following members voted against:  
\_\_\_\_\_; the following members abstained: \_\_\_\_\_; the following members were absent: \_\_\_\_\_.

WHEREUPON, said resolution was declared duly passed and adopted this 11<sup>th</sup> day of April, 2022.

---

Robert W. Moynagh, III, Mayor

ATTEST:

---

Michael Sommerfeld, City Clerk/Treasurer




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Willmar, MN 56201-5818

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Bolton-Menk.com

## MEMORANDUM

**Date:** April 4, 2022  
**To:** Honorable Mayor Moynagh  
Members of the City Council  
City of Montrose, Minnesota  
**From:**  Jared Voge, P.E.  
City Engineer  
**Subject:** 2021 Downtown Improvements Phase 2  
BNSF Easement Agreement  
City of Montrose, Minnesota  
BMI Project No.: W13.120514

---

The Downtown Improvements Project Phase 2 requires that an easement be obtained from BNSF as a result of limited city right-of-way on 1<sup>st</sup> Street N between County Road 12 and just west of Center Avenue North. BNSF has provided an easement agreement which is attached for your review. The agreement identifies costs associated with the easement (\$7,500) as well as the required insurance premium (\$3,045.50).

We recommend that council pass a motion authorizing the City Administrator to execute the agreement contingent on City Attorney review and approval.

If you have any questions, please call.

JAV/sj  
Enclosures

## EASEMENT AGREEMENT FOR ROADWAY CONSTRUCTION, MAINTENANCE AND USE

THIS EASEMENT AGREEMENT FOR ROADWAY CONSTRUCTION, MAINTENANCE AND USE ("**Easement Agreement**") is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_ 2022 ("**Effective Date**"), by and between BNSF RAILWAY COMPANY, a Delaware corporation ("**Grantor**"), and CITY OF MONTROSE, a municipality ("**Grantee**").

A. Grantor owns or controls certain real property situated at or near the vicinity of Montrose, County of Wright, State of Minnesota, BNSF Line Segment 0022-7 at Mile Post 45.29, as described or depicted on **Exhibit "A"** attached hereto and made a part hereof (the "**Premises**").

B. Grantee has requested that Grantor grant to Grantee an easement over the Premises for the Easement Purpose (as defined below).

C. Grantor has agreed to grant Grantee such easement, subject to the terms and conditions set forth in this Easement Agreement.

NOW, THEREFORE, for and in consideration of the foregoing recitals which are incorporated herein, the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

### **Section 1      Granting of Easement.**

1.1 **Easement Purpose.** The "**Easement Purpose**" shall be the construction, maintenance and use of a public roadway and related surface improvements (collectively, "**Improvements**") to be constructed, located, configured and maintained by Grantee in strict accordance with the terms of this Easement Agreement and the Plans and Specifications (as hereinafter defined) approved as set forth in **Section 5**. Grantee expressly acknowledges and agrees that the Easement Purpose does not include, and no rights are granted hereunder, for an elevated roadway or related improvements or any subsurface rights.

1.2 **Grant.** Grantor does hereby grant unto Grantee a non-exclusive easement ("**Easement**") over the Premises for the Easement Purpose and for no other purpose. The Easement is granted subject to any and all restrictions, covenants, easements, licenses, permits, leases and other encumbrances of whatsoever nature whether or not of record, if any, relating to the Premises and subject to all Laws (as hereinafter defined), including without limitation zoning laws, regulations, and ordinances of municipal and other governmental authorities, if any.

1.3 **Reservations by Grantor.** Grantor excepts and reserves the right, to be exercised by Grantor and any other parties who may obtain written permission or authority from Grantor:

- (a) to install, construct, maintain, renew, repair, replace, use, operate, change, modify and relocate any existing pipe, power, communication, cable, or utility lines and appurtenances and other facilities or structures of like character (collectively, "**Lines**") upon, over, under or across the Premises;
- (b) to install, construct, maintain, renew, repair, replace, use, operate, change, modify and relocate any tracks or additional facilities or structures upon, over, under or across the Premises; and
- (c) to use the Premises in any manner as the Grantor in its sole discretion deems appropriate, provided Grantor uses all commercially reasonable efforts to avoid material interference with the use of the Premises by Grantee for the Easement Purpose.

1.4 Term of Easement. The term of the Easement, unless sooner terminated under provisions of this Easement Agreement, shall be perpetual.

**Section 2** Compensation. Grantee shall pay Grantor, prior to the Effective Date, the sum of Five Thousand and No/100 Dollars (\$5,000.00) as compensation for the grant of this Easement.

**Section 3** No Warranty of Any Conditions of the Premises. Grantee acknowledges that Grantor has made no representation whatsoever to Grantee concerning the state or condition of the Premises, or any personal property located thereon, or the nature or extent of Grantor's ownership interest in the Premises. Grantee has not relied on any statement or declaration of Grantor, oral or in writing, as an inducement to entering into this Easement Agreement, other than as set forth herein. GRANTOR HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE DESIGN OR CONDITION OF ANY PROPERTY PRESENT ON OR CONSTITUTING THE PREMISES, ITS MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF ANY SUCH PROPERTY, OR THE CONFORMITY OF ANY SUCH PROPERTY TO ITS INTENDED USES. GRANTOR SHALL NOT BE RESPONSIBLE TO GRANTEE OR ANY OF GRANTEE'S CONTRACTORS FOR ANY DAMAGES RELATING TO THE DESIGN, CONDITION, QUALITY, SAFETY, MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY PROPERTY PRESENT ON OR CONSTITUTING THE PREMISES, OR THE CONFORMITY OF ANY SUCH PROPERTY TO ITS INTENDED USES. GRANTEE ACCEPTS ALL RIGHTS GRANTED UNDER THIS EASEMENT AGREEMENT IN THE PREMISES IN AN "AS IS, WHERE IS" AND "WITH ALL FAULTS" CONDITION, AND SUBJECT TO ALL LIMITATIONS ON GRANTOR'S RIGHTS, INTERESTS AND TITLE TO THE PREMISES. Grantee has inspected or will inspect the Premises, and enters upon Grantor's rail corridor and property with knowledge of its physical condition and the danger inherent in Grantor's rail operations on or near the Premises. Grantee acknowledges that this Easement Agreement does not contain any implied warranties that Grantee or Grantee's Contractors (as hereinafter defined) can successfully construct or operate the Improvements.

**Section 4** Nature of Grantor's Interest in the Premises. GRANTOR DOES NOT WARRANT ITS TITLE TO THE PREMISES NOR UNDERTAKE TO DEFEND GRANTEE IN THE PEACEABLE POSSESSION OR USE THEREOF. NO COVENANT OF QUIET ENJOYMENT IS MADE. In case of the eviction of Grantee by anyone owning or claiming title to or any interest in the Premises, or by the abandonment by Grantor of the affected rail corridor, Grantor shall not be liable to refund Grantee any compensation paid hereunder.

**Section 5** Plans and Specifications for Improvements. Grantee shall submit to Grantor for its review and approval detailed information concerning the design, location and configuration of the Improvements ("Plans and Specifications"). As soon as reasonably practicable after Grantor's receipt of the Plans and Specifications and other information required by Grantor about the proposed location of the Improvements, Grantor will notify Grantee in writing whether Grantor has approved or disapproved the design, location and configuration of the proposed Improvements or the Plans and Specifications, and shall include one or more reasons for any disapproval. Grantor may disapprove the Plans and Specifications only where, in Grantor's sole judgment, construction, maintenance, operation or removal of all or any part of the Improvements constructed in accordance with the Plans and Specifications would cause Grantee to violate any of the provisions of Section 6.3 hereof. Following any disapproval, Grantee shall have the right to modify the location, configuration or other aspects of the Plans and Specifications of the proposed Improvements and to resubmit such modified information to Grantor for its further review and approval. Grantor may approve or disapprove the Plans and Specifications in Grantor's sole discretion. Any approval or consent by Grantor of any of such plans shall in no way obligate Grantor in any manner with respect to the finished product design and/or construction. Any such consent or approval shall mean only that such Plans and Specifications meet the subjective standards of Grantor, and such consent or approval by Grantor shall not be deemed to mean that such Plans and Specifications or construction are structurally sound and appropriate or that such Plans and Specifications or construction meet the applicable construction standards or codes. Any deficiency in design or construction, notwithstanding the prior approval of Grantor, shall be solely the responsibility of Grantee.

## **Section 6      Improvements.**

6.1      Construction of Improvements. Grantee, and Grantee's Contractors, at Grantee's sole cost and expense, shall locate, configure, construct and maintain the Improvements: (i) in a good and workmanlike manner and in strict accordance with the Plans and Specifications approved by Grantor pursuant to the provisions of **Section 5** above, (ii) in conformance with applicable building uses and all applicable engineering, safety and other Laws, (iii) in accordance with the highest accepted industry standards of care, skill and diligence, and (iv) in such a manner as shall not adversely affect the structural integrity or maintenance of the Premises, any structures on or near the Premises, or any lateral support of structures adjacent to or in the proximity of the Premises. The construction of the Improvements within the Premises shall be completed by Grantee and Grantee's Contractors within one (1) year after the Effective Date. Grantee shall provide as built drawings of all Improvements to Grantor promptly upon completion of construction and shall use its best efforts to cause such as built drawings to be electronically accessible to Grantor.

6.2      Maintenance of Improvements. Grantee shall at all times during the term of this Easement Agreement, at Grantee's sole cost and expense, keep and maintain the Improvements located upon the Premises in a structurally safe and sound condition, in good repair and in compliance with the Plans and Specifications and this Easement Agreement. Grantee shall also promptly repair any damage to the Premises or the Improvements caused, either in whole or in part, by Grantee Parties (as hereinafter defined). Grantee shall not cause or permit another person to cause any damage to the Premises or the Improvements, and Grantee shall be responsible for any such damage which may occur as a result of any Grantee Party's action or inaction. Grantee shall not permit the existence of any nuisance or the accumulation of junk, debris or other unsightly materials on the Premises and shall keep the Premises in a clean and safe condition. Grantee shall, at its sole cost and expense, remove ice and snow from the Premises. Grantee shall keep the Premises free and clear from combustible materials and to cut and remove or cause to be cut and removed at its sole expense all weeds and vegetation on the Premises, said work of cutting and removal to be done at such times and with such frequency as to comply with local Laws and regulations and abate any and all hazard of fire. Grantor shall have no obligation whatsoever, monetary or non-monetary, to maintain the Improvements in the Premises.

6.3      No Interference. During the construction of, and any subsequent maintenance performed on, operation of, or removal of, all or any portion of the Improvements, Grantee, at Grantee's sole cost, shall perform all activities and work on or near Grantor's rail corridor or property and/or the Premises in such a manner as to preclude injury to persons or damage to the property of Grantor, or any party on or with property on Grantor's rail corridor or property, and shall ensure that there is no interference with the railroad operations or other activities of Grantor, or anyone present on Grantor's rail corridor or property with the authority or permission of Grantor. Grantee shall not disturb any improvements of Grantor or Grantor's existing lessees, licensees, license beneficiaries or lien holders, if any, or interfere with the use of such improvements. Grantor may direct one of its field engineers to observe or inspect the construction, maintenance, operation or removal of the Improvements, or any portion thereof, at any time to ensure such safety and noninterference, and to ensure that the Improvements comply with the Plans and Specifications. If any Grantee Party is ordered at any time to leave the Premises or to halt any activity on the Premises, then the party conducting that activity immediately shall cease such activity and leave the Premises, if the order was issued by Grantor's personnel to promote safety, such noninterference with other activities or property, or because the Improvements were not in compliance with this Easement Agreement. Notwithstanding the foregoing right of Grantor, Grantor has no duty or obligation to observe or inspect, or to halt work on, the Premises, it being solely Grantee's responsibility to ensure that the Improvements are constructed, maintained, operated and removed in strict accordance with all Laws, safety measures, such noninterference and the Plans and Specifications and in compliance with all terms hereof. Neither the exercise nor the failure by Grantor to exercise any right set forth in this **Section 6.3** shall alter the liability allocation set forth in this Easement Agreement.

6.4      No Alterations. Except as may be shown in the Plans and Specifications approved by Grantor for the Easement, Grantee may not make any alterations to the Premises, or permanently affix anything to the Premises, without Grantor's prior written consent. If Grantee desires to change either the location of any of the Improvements or any other aspect of the Plans and Specifications of any of the Improvements, Grantee shall submit such change and modified Plans and Specifications to Grantor in writing for its approval in the same manner as provided for in **Section 5**. Grantee shall have no right to commence any such change until after Grantee has received Grantor's approval of such change in writing.



#### 6.5 Approvals; Compliance with Laws and Safety Rules.

- (a) Grantee shall take, in a timely manner, all actions necessary and proper to the lawful establishment, construction, operation, and maintenance of the Improvements, including such actions as may be necessary to obtain any required approvals or authorizations from applicable governmental authorities.
- (b) Prior to entering the Premises, and at all times during the term of this Easement Agreement, Grantee shall comply, and shall cause its contractor, any subcontractor, any assignee, and any contractor or subcontractor of any assignee performing work on the Premises or entering the Premises on behalf of Grantee (collectively, "**Grantee's Contractors**"), to comply, with all applicable federal, state and local laws, regulations, ordinances, restrictions, covenants and court or administrative decisions and orders, including Environmental Laws (defined below) (collectively, "**Laws**"), and all of Grantor's applicable safety rules and regulations including those found on the website noted below in **Section 6.5(c)**.
- (c) No Grantee Party may enter the Premises without first having completed Grantor's safety orientation found on the website: [www.BNSFcontractor.com](http://www.BNSFcontractor.com).

6.6 Other Improvements. In the event any construction, repair, maintenance, work or other use of the Premises by Grantee will affect any Lines, fences, buildings, improvements or other facilities (collectively, "**Other Improvements**"), Grantee will be responsible at Grantee's sole risk to locate and make any adjustments necessary to such Other Improvements. Grantee must contact the owner(s) of the Other Improvements notifying them of any work that may damage these Other Improvements and/or interfere with their service and obtain the owner's written approval prior to so affecting the Other Improvements. Grantee must mark all Other Improvements on the Plans and Specifications and mark such Other Improvements in the field in order to verify their locations. Grantee must also use all reasonable methods when working on or near Grantor property to determine if any Other Improvements (fiber optic, cable, communication or otherwise) may exist.

6.7 Flagging and Other Costs. Grantee shall not conduct any activities on, or be present on, any portion of the Premises or Grantor's rail corridor or property that is within twenty-five (25) feet of any active railroad track, except in the presence of a flagman. In any case where a flagman or flagmen are required in connection with the presence of individuals on Grantor's rail corridor or the Premises, Grantee shall provide as much advance notice as possible prior to any entry upon the Premises. Grantor shall arrange for the presence of the flagman or flagmen as soon as practicable after receipt of such notice from Grantee. Grantee shall reimburse to Grantor, within thirty (30) days following Grantee's receipt of each bill therefor, Grantor's costs in arranging for and providing the flagman or flagmen, which shall be billed to Grantee at Grantor's then applicable standard rate. The estimated cost of one flagger as of the Effective Date is \$600 for an eight hour basic day with time and one-half or double time for overtime, rest days and holidays, plus the cost of any vehicle rental costs or other out-of-pocket costs. Grantee agrees to reimburse Grantor (within thirty (30) days after receipt of a bill therefor) for all other costs and expenses incurred by Grantor in connection with Grantee's use of the Premises or the presence, construction, maintenance, and use of the Improvements situated thereon.

6.8 No Unauthorized Tests or Digging. Grantee, and Grantee's Contractors, must not conduct any tests, investigations or any other activity using mechanized equipment and/or machinery, or place or store any mechanized equipment, tools or other materials, within twenty-five (25) feet of the centerline of any railroad track on Grantor's rail corridor or property (whether or not such centerline is located within the Premises), except after Grantee has obtained written approval from Grantor, and then only in strict accordance with the terms and any conditions of such approval.

6.9 Boring. Prior to conducting any boring work on or near Grantor's rail corridor or property (which shall only be permitted within the Premises), Grantee and Grantee's Contractors shall explore the proposed location for such work with hand tools to a depth of at least three (3) feet below the surface of the ground to determine whether pipelines or other structures exist below the surface, provided, however, that in lieu of the

foregoing, Grantee shall have the right to use suitable detection equipment or other generally accepted industry practice (e.g., consulting with the Underground Services Association) to determine the existence or location of pipelines and other subsurface structures prior to drilling or excavating with mechanized equipment. Upon Grantee's written request, which shall be made thirty (30) business days in advance of Grantee's proposed construction or modification of Improvements, Grantor will provide to Grantee any information that Grantor has in the possession of its Engineering Department concerning the existence and approximate location of Grantor's underground utilities and pipelines at or near the vicinity of the proposed Improvements. Prior to conducting any boring work, Grantee, and Grantee's Contractors, shall review all such material. Grantor does not warrant the accuracy or completeness of information relating to subsurface conditions and Grantee's, and Grantee's Contractors', operations at all times shall be subject to the liability provisions set forth herein. For all bores greater than 20 inches in diameter and at a depth less than ten (10) feet below the bottom of a rail, Grantee, and Grantee's Contractors, shall perform a soil investigation which must be reviewed by Grantor prior to construction. This study is to determine if granular material is present, and to prevent subsidence during the installation process. If the investigation determines in Grantor's reasonable opinion that granular material is present, Grantor may select a new location for Grantee's use, or may require Grantee, and Grantee's Contractors, to furnish for Grantor's review and approval, in Grantor's sole discretion, a remedial plan to deal with the granular material. Once Grantor has approved any such remedial plan in writing, Grantee, and Grantee's Contractors, at Grantee's sole cost, shall carry out the approved plan in accordance with all terms thereof and hereof. Any open hole, boring or well constructed on the Premises by Grantee, or Grantee's Contractors, shall be safely covered and secured at all times when anyone who is not creating it, working in it or using it as permitted hereunder is present in the actual vicinity thereof. Following completion of that portion of the work, all holes or borings constructed on the Premises shall be promptly filled in by Grantee and Grantee's Contractors to surrounding ground level with compacted bentonite grout, or otherwise secured or retired in accordance with any applicable Laws. No excavated materials may remain on Grantor's rail corridor or property for more than ten (10) days, and must be properly disposed of by Grantee and Grantee's Contractors in accordance with applicable Laws.

6.10 Drainage of Premises and Property. Any and all cuts and fills, excavations or embankments necessary in the construction, maintenance, or future alteration of the Premises shall be made and maintained by Grantee in such manner, form and to the extent as will provide adequate drainage of and from the Premises and Grantor's adjoining right of way; and wherever any such fill or embankment shall or may obstruct the natural and pre-existing drainage from the Property and Grantor's adjoining right of way, Grantee shall construct and maintain such culverts or drains within the Premises as may be requisite to preserve such natural and pre-existing drainage. Grantee shall wherever necessary, construct extensions of existing drains, culverts or ditches through or along the Premises, such extensions to be of adequate sectional dimensions to preserve flowage of drainage or other waters, and/or material and workmanship equally as good as those now existing.

6.11 Taxes and Recording Fees. Grantee shall pay when due any taxes, assessments or other charges (collectively, "Taxes") levied or assessed upon the Improvements by any governmental or quasi-governmental body or any Taxes levied or assessed against Grantor or the Premises that are attributable to the Improvements. Grantee agrees to purchase, affix and cancel any and all documentary stamps in the amount prescribed by statute, and to pay any and all required transfer taxes, excise taxes and any and all fees incidental to recordation of the Memorandum of Easement. In the event of Grantee's failure to do so, if Grantor shall become obligated to do so, Grantee shall be liable for all costs, expenses and judgments to or against Grantor, including all of Grantor's legal fees and expenses.

6.12 Modification, Relocation or Removal of Improvements. If at any time, Grantor desires the use of its rail corridor in such a manner that, in Grantor's reasonable opinion, would be interfered with by any portion of the Improvements or the Easement, Grantee, at Grantee's sole cost, shall make such changes in the Improvements and/or Premises that, in the sole discretion of Grantor, are necessary to avoid interference with the proposed use of Grantor's property, including, without limitation, Grantee relocating or removing all or a portion of the Improvements from the Premises. Grantor acknowledges that, in some instances, Improvements will not need to be moved or removed from the Premises, but can be protected in place, subject to approval by Grantor's engineering department. Grantee hereby waives any rights that it may have to use condemnation Laws to keep Improvements in place and not relocate or remove the Improvements where relocation or removal is required by Grantor. Where it is practicable to do so, Grantor shall provide to Grantee at least one hundred twenty (120) days prior written notice that Improvements must be modified, removed or relocated, and in



circumstances where one hundred twenty (120) days notice is not practicable, Grantor shall provide to Grantee as much notice as it reasonably can, and in no case less than twenty (20) days prior written notice. Grantee shall ensure that all Improvements are modified, removed or relocated as required on or before the date set forth in Grantor's written notice.

## **Section 7      Indemnification.**

7.1      TO THE FULLEST EXTENT PERMITTED BY LAW, GRANTEE SHALL, AND SHALL CAUSE GRANTEE'S CONTRACTORS, SUBCONTRACTORS, AGENTS, INVITEES, LESSEES, LICENSEES AND PERMITTEES TO, RELEASE, INDEMNIFY, DEFEND AND HOLD HARMLESS GRANTOR AND GRANTOR'S AFFILIATED COMPANIES, PARTNERS, SUCCESSORS, ASSIGNS, LEGAL REPRESENTATIVES, OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS (COLLECTIVELY, "INDEMNITEES") FOR, FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, FINES, PENALTIES, COSTS, DAMAGES, LOSSES, LIENS, CAUSES OF ACTION, SUITS, DEMANDS, JUDGMENTS AND EXPENSES (INCLUDING, WITHOUT LIMITATION, COURT COSTS, ATTORNEYS' FEES AND COSTS OF INVESTIGATION, REMOVAL AND REMEDIATION AND GOVERNMENTAL OVERSIGHT COSTS) ENVIRONMENTAL OR OTHERWISE (COLLECTIVELY, "LIABILITIES") OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO (IN WHOLE OR IN PART):

- (i)      THIS EASEMENT AGREEMENT, INCLUDING, WITHOUT LIMITATION, ITS ENVIRONMENTAL PROVISIONS,
- (ii)      ANY RIGHTS OR INTERESTS GRANTED PURSUANT TO THIS EASEMENT AGREEMENT,
- (iii)      OCCUPATION AND USE OF THE PREMISES BY GRANTEE'S OR GRANTEE'S CONTRACTORS, SUBCONTRACTORS, AGENTS, INVITEES, LESSEES, LICENSEES AND PERMITTEES, OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY ANY OF THEM, OR ANYONE THEY CONTROL OR EXERCISE CONTROL OVER (INDIVIDUALLY, A "GRANTEE PARTY," AND COLLECTIVELY, "GRANTEE PARTIES"),
- (iv)      THE ENVIRONMENTAL CONDITION AND STATUS OF THE PREMISES CAUSED BY OR CONTRIBUTED TO BY GRANTEE PARTIES, OR
- (v)      ANY ACT OR OMISSION OF GRANTEE PARTIES,

EVEN IF SUCH LIABILITIES ARISE FROM OR ARE ATTRIBUTED TO, IN WHOLE OR IN PART, ANY NEGLIGENCE OF ANY INDEMNITEE. THE ONLY LIABILITIES WITH RESPECT TO WHICH GRANTEE'S OBLIGATION TO INDEMNIFY THE INDEMNITEES DOES NOT APPLY ARE LIABILITIES TO THE EXTENT PROXIMATELY CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF AN INDEMNITEE.

7.2      TO THE FULLEST EXTENT PERMITTED BY LAW, NOTWITHSTANDING THE LIMITATION IN SECTION 7.1, GRANTEE SHALL, AND SHALL CAUSE GRANTEE'S CONTRACTORS, SUBCONTRACTORS, AGENTS, INVITEES, LESSEES, LICENSEES AND PERMITTEES TO, NOW AND FOREVER WAIVE ANY AND ALL CLAIMS, REGARDLESS WHETHER BASED ON STRICT LIABILITY, NEGLIGENCE OR OTHERWISE, THAT GRANTOR IS AN "OWNER", "OPERATOR", "ARRANGER", OR "TRANSPORTER" WITH RESPECT TO THE IMPROVEMENTS FOR THE PURPOSES OF CERCLA OR OTHER ENVIRONMENTAL LAWS. GRANTEE WILL INDEMNIFY, DEFEND AND HOLD THE INDEMNITEES HARMLESS FROM ANY AND ALL SUCH CLAIMS REGARDLESS OF THE NEGLIGENCE OF THE INDEMNITEES. GRANTEE FURTHER AGREES THAT THE USE OF THE PREMISES AS CONTEMPLATED BY THIS EASEMENT AGREEMENT SHALL NOT IN ANY WAY SUBJECT GRANTOR TO CLAIMS THAT GRANTOR IS OTHER THAN A COMMON CARRIER FOR PURPOSES OF ENVIRONMENTAL LAWS AND EXPRESSLY AGREES TO INDEMNIFY, DEFEND, AND HOLD THE INDEMNITEES HARMLESS FOR ANY AND ALL SUCH CLAIMS. IN NO EVENT SHALL GRANTOR BE RESPONSIBLE FOR THE ENVIRONMENTAL CONDITION OF THE PREMISES.

7.3 TO THE FULLEST EXTENT PERMITTED BY LAW, GRANTEE SHALL, AND SHALL CAUSE GRANTEE'S CONTRACTORS, SUBCONTRACTORS, AGENTS, INVITEES, LESSEES, LICENSEES AND PERMITTEES TO, REGARDLESS OF ANY NEGLIGENCE OR ALLEGED NEGLIGENCE OF ANY INDEMNITEE, INDEMNIFY AND HOLD HARMLESS THE INDEMNITEES AGAINST AND ASSUME THE DEFENSE OF ANY LIABILITIES ASSERTED AGAINST OR SUFFERED BY ANY INDEMNITEE UNDER OR RELATED TO THE FEDERAL EMPLOYERS' LIABILITY ACT ("FELA") WHENEVER EMPLOYEES OF GRANTEE, OR ANY OF ITS CONTRACTORS, SUBCONTRACTORS, AGENTS, INVITEES, LESSEES, LICENSEES OR PERMITTEES, CLAIM OR ALLEGE THAT THEY ARE EMPLOYEES OF ANY INDEMNITEE OR OTHERWISE. THIS INDEMNITY SHALL ALSO EXTEND, ON THE SAME BASIS, TO FELA CLAIMS BASED ON ACTUAL OR ALLEGED VIOLATIONS OF ANY FEDERAL, STATE OR LOCAL LAWS OR REGULATIONS, INCLUDING BUT NOT LIMITED TO THE SAFETY APPLIANCE ACT, THE LOCOMOTIVE INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT, THE RESOURCE CONSERVATION AND RECOVERY ACT, AND ANY SIMILAR STATE OR FEDERAL STATUTE.

7.4 Upon written notice from Grantor, Grantee agrees to assume the defense of any lawsuit or other proceeding brought against any Indemnitee by any entity, relating to any matter covered by this Easement Agreement for which Grantee has an obligation to assume liability for and/or save and hold harmless any Indemnitee. Grantee shall pay all costs incident to such defense, including, but not limited to, attorneys' fees, investigators' fees, litigation and appeal expenses, settlement payments, and amounts paid in satisfaction of judgments.

**Section 8 Insurance.** Grantee shall, at its sole cost and expense, procure and maintain during the life of this Easement Agreement the following insurance coverage:

A. Commercial General Liability Insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$2,000,000 each occurrence and an aggregate limit of at least \$4,000,000 but in no event less than the amount otherwise carried by Grantee.. . Coverage must be purchased on a post 1998 ISO occurrence or equivalent and include coverage for, but not limited to, the following:

- ♦ Bodily Injury and Property Damage
- ♦ Personal Injury and Advertising Injury
- ♦ Fire legal liability
- ♦ Products and completed operations

This policy shall also contain the following endorsements, which shall be indicated on the certificate of insurance:

- ♦ The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- ♦ Waiver of subrogation in favor of and acceptable to *Railway*.
- ♦ Additional insured endorsement in favor of and acceptable to *Railway and JLL RPG, Inc.*
- ♦ Separation of insureds.
- ♦ The policy shall be primary and non-contributing with respect to any insurance carried by *Railway*.

It is agreed that the workers' compensation and employers' liability related exclusions in the Commercial General Liability insurance policy(s) required herein are intended to apply to employees of the policy holder and shall not apply to *Railway* employees.

No other endorsements limiting coverage may be included on the policy.

B. Business Automobile Insurance. This insurance shall contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to the following:

- ♦ Bodily injury and property damage
- ♦ Any and all vehicles owned, used or hired

This policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

- ♦ Waiver of subrogation in favor of and acceptable to **Railway**.
- ♦ Additional insured endorsement in favor of and acceptable to **Railway**.
- ♦ Separation of insureds.
- ♦ The policy shall be primary and non-contributing with respect to any insurance carried by **Railway**.

C. Workers Compensation and Employers Liability Insurance. This insurance shall include coverage for, but not limited to:

- ♦ Grantee's statutory liability under the worker's compensation Laws of the state(s) in which the work is to be performed. If optional under State Law, the insurance must cover all employees anyway.
- ♦ Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

This policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

- ♦ Waiver of subrogation in favor of and acceptable to **Railway**.

D. Railroad Protective Liability Insurance is required if there is any construction or demolition activities. This insurance shall name only the Railway as the Insured with coverage of at least \$2,000,000 per occurrence and \$6,000,000 in the aggregate. The policy shall be issued on a standard ISO form CG 00 35 10 93 and include the following:

- ♦ Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
- ♦ Endorsed to include the Limited Seepage and Pollution Endorsement.
- ♦ Endorsed to include Evacuation Expense Coverage Endorsement.
- ♦ No other endorsements restricting coverage may be added.
- ♦ The original policy must be provided to the Railway prior to performing any work or services under this Easement Agreement

If available and in lieu of providing a Railroad Protective Liability Policy, Grantee may participate in the Railway's Blanket Railroad Protective Liability Insurance Policy available to Grantee or its contractor. The limits of coverage are the same as above. The cost is \$\_\_\_\_\_.

- ☐ I elect to participate in Grantor's Blanket Policy;
- ☐ I elect not to participate in Grantor's Blanket Policy.

Other Requirements:

Where allowable by law, all policies (applying to coverage listed above) shall contain no exclusion for punitive damages and certificates of insurance shall reflect that no exclusion exists.

Grantee agrees to waive its right of recovery against Railway for all claims and suits against Railway. In addition, its insurers, through policy endorsement, waive their right of subrogation against Railway for all claims

and suits. The certificate of insurance must reflect waiver of subrogation endorsement. Grantee further waives its right of recovery, and its insurers also waive their right of subrogation against Railway for loss of its owned or leased property or property under its care, custody, or control.

Grantee is not allowed to self-insure without the prior written consent of Railway. If granted by Railway, any deductible, self-insured retention or other financial responsibility for claims shall be covered directly by Grantee in lieu of insurance. Any and all Railway liabilities that would otherwise, in accordance with the provisions of this Easement Agreement, be covered by Grantee's insurance will be covered as if Grantee elected not to include a deductible, self-insured retention, or other financial responsibility for claims.

Prior to commencing work, Grantee shall furnish to Railway an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify Railway in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision shall be indicated on the certificate of insurance. Upon request from Railway, a certified duplicate original of any required policy shall be furnished.

Any insurance policy shall be written by a reputable insurance company acceptable to Railway or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided.

Grantee represents that this Easement Agreement has been thoroughly reviewed by Grantee's insurance agent(s)/broker(s), who have been instructed by Grantee to procure the insurance coverage required by this Easement Agreement. Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.

Not more frequently than once every five years, Railway may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

If any portion of the operation is to be subcontracted by Grantee, Grantee shall require that the subcontractor shall provide and maintain insurance coverages as set forth herein, naming Railway as an additional insured, and shall require that the subcontractor shall release, defend and indemnify Railway to the same extent and under the same terms and conditions as Grantee is required to release, defend and indemnify Railway herein.

Failure to provide evidence as required by this **Section 8** shall entitle, but not require, Railway to terminate the Easement immediately. Acceptance of a certificate that does not comply with this **Section 8** shall not operate as a waiver of Grantee's obligations hereunder.

The fact that insurance (including, without limitation, self-insurance) is obtained by Grantee shall not be deemed to release or diminish the liability of Grantee including, without limitation, liability under the indemnity provisions of this Easement Agreement. Damages recoverable by Railway shall not be limited by the amount of the required insurance coverage.

For purposes of this **Section 8**, Railway shall mean "Burlington Northern Santa Fe, LLC", "BNSF Railway Company" and the subsidiaries, successors, assigns and affiliates of each.

## **Section 9      Environmental.**

9.1 Compliance with Environmental Laws. Grantee shall strictly comply with all federal, state and local environmental Laws in its use of the Premises, including, but not limited to, the Resource Conservation and Recovery Act, as amended (RCRA), the Clean Water Act, the Oil Pollution Act, the Hazardous Materials Transportation Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Toxic Substances Control Act (collectively referred to as the "**Environmental Laws**"). Grantee shall not maintain a "treatment," "storage," "transfer" or "disposal" facility, or "underground storage tank," as those terms are defined by Environmental Laws, on the Premises. Grantee shall not handle, transport, release or suffer the release of "hazardous waste" or "hazardous substances", as "hazardous waste" and "hazardous substances" may now or in the future be defined by any Environmental Laws.

9.2 Notice of Release. Grantee shall give Grantor immediate notice to Grantor's Resource Operations Center at (800) 832-5452 of any release of hazardous substances on or from the Premises, violation of Environmental Laws, or inspection or inquiry by governmental authorities charged with enforcing Environmental Laws with respect to Grantee's use of the Premises. Grantee shall use its best efforts to promptly respond to any release on or from the Premises. Grantee also shall give Grantor immediate notice of all measures undertaken on behalf of Grantee to investigate, remediate, respond to or otherwise cure such release or violation.

9.3 Remediation of Release. In the event that Grantor has notice from Grantee or otherwise of a release or violation of Environmental Laws which occurred or may occur during the term of this Easement Agreement, Grantor may require Grantee, at Grantee's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure such release or violation affecting the Premises. If during the construction or subsequent maintenance of the Improvements, soils or other materials considered to be environmentally contaminated are exposed, Grantee will remove and safely dispose of said contaminated soils. Determination of soils contamination and applicable disposal procedures thereof, will be made only by an agency having the capacity and authority to make such a determination.

9.4 Preventative Measures. Grantee shall promptly report to Grantor in writing any conditions or activities upon the Premises known to Grantee which create a risk of harm to persons, property or the environment and shall take whatever action is necessary to prevent injury to persons or property arising out of such conditions or activities; provided, however, that Grantee's reporting to Grantor shall not relieve Grantee of any obligation whatsoever imposed on it by this Easement Agreement. Grantee shall promptly respond to Grantor's request for information regarding said conditions or activities.

9.5 Evidence of Compliance. Grantee agrees periodically to furnish Grantor with proof satisfactory to Grantor that Grantee is in compliance with this **Section 9**. Should Grantee not comply fully with the above-stated obligations of this **Section 9**, notwithstanding anything contained in any other provision hereof, Grantor may, at its option, terminate this Easement Agreement by serving five (5) days' notice of termination upon Grantee. Upon termination, Grantee shall remove the Improvements and restore the Premises as provided in **Section 12**.

**Section 10      PERSONAL PROPERTY WAIVER. ALL PERSONAL PROPERTY, INCLUDING, BUT NOT LIMITED TO, FIXTURES, EQUIPMENT, OR RELATED MATERIALS UPON THE PREMISES WILL BE AT THE RISK OF GRANTEE ONLY, AND NO INDEMNITEE WILL BE LIABLE FOR ANY DAMAGE THERETO OR THEFT THEREOF, WHETHER OR NOT DUE IN WHOLE OR IN PART TO THE NEGLIGENCE OF ANY INDEMNITEE.**

## **Section 11      Default and Termination.**

11.1 Grantor's Performance Rights. If at any time Grantee, or Grantee's Contractors, fails to properly perform its obligations under this Easement Agreement, Grantor, in its sole discretion, may: (i) seek specific performance of the unperformed obligations, or (ii) at Grantee's sole cost, may arrange for the performance of such work as Grantor deems necessary for the safety of its rail operations, activities and property, or to avoid or remove any interference with the activities or property of Grantor, or anyone or anything present on the rail

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corridor or property with the authority or permission of Grantor. Grantee shall promptly reimburse Grantor for all costs of work performed on Grantee's behalf upon receipt of an invoice for such costs. Grantor's failure to perform any obligations of Grantee or Grantee's Contractors shall not alter the liability allocation set forth in this Easement Agreement.

**11.2 Grantor's Termination Rights.** Grantor may, at its option, terminate this Easement Agreement by serving five (5) days' notice in writing upon Grantee: (i) if default shall be made in any of the covenants or agreements of Grantee contained in this Easement Agreement, (ii) in case of any assignment or transfer of the Easement by operation of law, or (iii) if Grantee should abandon or cease to use the Premises for the Easement Purpose. Any waiver by Grantor of any default or defaults shall not constitute a waiver of the right to terminate this Easement Agreement for any subsequent default or defaults, nor shall any such waiver in any way affect Grantor's ability to enforce any section of this Easement Agreement.

**11.3 Effect of Termination or Expiration.** Neither termination nor expiration will release Grantee from any liability or obligation under this Easement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or expiration, or, if later, the date the Premises are restored as required by **Section 12**.

**11.4 Non-exclusive Remedies.** The remedies set forth in this **Section 11** shall be in addition to, and not in limitation of, any other remedies that Grantor may have at law or in equity.

## **Section 12 Surrender of Premises.**

**12.1 Removal of Improvements and Restoration.** Upon termination of this Easement Agreement, whether by abandonment of the Easement or by the exercise of Grantor's termination rights hereunder, Grantee shall, at its sole cost and expense, immediately perform the following:

- (a) remove all or such portion of Grantee's Improvements and all appurtenances thereto from the Premises, as Grantor directs at Grantor's sole discretion;
- (b) repair and restore any damage to the Premises arising from, growing out of, or connected with Grantee's use of the Premises;
- (c) remedy any unsafe conditions on the Premises created or aggravated by Grantee; and
- (d) leave the Premises in the condition which existed as of the Effective Date.

**12.2 Limited License for Entry.** If this Easement Agreement is terminated, Grantor may direct Grantee to undertake one or more of the actions set forth above, at Grantee's sole cost, in which case Grantee shall have a limited license to enter upon the Premises to the extent necessary to undertake the actions directed by Grantor. The terms of this limited license include all of Grantee's obligations under this Easement Agreement. Termination will not release Grantee from any liability or obligation under this Easement Agreement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination, or, if later, the date when Grantee's Improvements are removed and the Premises are restored to the condition that existed as of the Effective Date. If Grantee fails to surrender the Premises to Grantor upon any termination of the Easement, all liabilities and obligations of Grantee hereunder shall continue in effect until the Premises are surrendered.

**Section 13 Liens.** Grantee shall promptly pay and discharge any and all liens arising out of any construction, alterations or repairs done, suffered or permitted to be done by Grantee on the Premises or attributable to Taxes that are the responsibility of Grantee pursuant to **Section 6**. Grantor is hereby authorized to post any notices or take any other action upon or with respect to the Premises that is or may be permitted by Law to prevent the attachment of any such liens to any portion of the Premises; provided, however, that failure of Grantor to take any such action shall not relieve Grantee of any obligation or liability under this **Section 13** or any other section of this Easement Agreement.

**Section 14** **Tax Exchange.** Grantor may assign its rights (but not its obligations) under this Easement Agreement to Goldfinch Exchange Company LLC, an exchange intermediary, in order for Grantor to effect an exchange under Section 1031 of the Internal Revenue Code. In such event, Grantor shall provide Grantee with a Notice of Assignment, attached as Exhibit C, and Grantee shall execute an acknowledgement of receipt of such notice.

**Section 15** **Notices.** Any notice required or permitted to be given hereunder by one party to the other shall be in writing and the same shall be given and shall be deemed to have been served and given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address for such party specified below, or to such other address as the party to be notified may designate by giving the other party no less than thirty (30) days' advance written notice of such change in address.

If to Grantor:                   BNSF Railway Company  
2500 Lou Menk Dr. – AOB3  
Fort Worth, Texas 76131  
Attn:    Director of Real Estate

With a copy to:                   JLL Rail Practice Group  
4200 Buckingham Rd., Suite 110  
Fort Worth, Texas 76155  
Attention: VP Real Estate

If to Grantee:                   City of Montrose

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**Section 16** **Recordation.** It is understood and agreed that this Easement Agreement shall not be in recordable form and shall not be placed on public record and any such recording shall be a breach of this Easement Agreement. Grantor and Grantee shall execute a Memorandum of Easement in the form attached hereto as Exhibit "B" (the "**Memorandum of Easement**") subject to changes required, if any, to conform such form to local recording requirements. The Memorandum of Easement shall be recorded in the real estate records in the county where the Premises are located. If a Memorandum of Easement is not executed by the parties and recorded as described above within 90 days of the Effective Date, Grantor shall have the right to terminate this Easement Agreement upon notice to Grantee.

**Section 17** **Miscellaneous.**

17.1 All questions concerning the interpretation or application of provisions of this Easement Agreement shall be decided according to the substantive Laws of the State of Texas without regard to conflicts of law provisions.

17.2 In the event that Grantee consists of two or more parties, all the covenants and agreements of Grantee herein contained shall be the joint and several covenants and agreements of such parties. This instrument and all of the terms, covenants and provisions hereof shall inure to the benefit of and be binding upon each of the parties hereto and their respective legal representatives, successors and assigns and shall run with and be binding upon the Premises.

17.3 If any action at law or in equity is necessary to enforce or interpret the terms of this Easement Agreement, the prevailing party or parties shall be entitled to reasonable attorneys' fees, costs and necessary disbursements in addition to any other relief to which such party or parties may be entitled.

17.4 If any provision of this Easement Agreement is held to be illegal, invalid or unenforceable under present or future Laws, such provision will be fully severable and this Easement Agreement will be construed and enforced as if such illegal, invalid or unenforceable provision is not a part hereof, and the remaining provisions hereof will remain in full force and effect. In lieu of any illegal, invalid or unenforceable provision

Form 703; Rev. 02/12/10

herein, there will be added automatically as a part of this Easement Agreement a provision as similar in its terms to such illegal, invalid or unenforceable provision as may be possible and be legal, valid and enforceable.

17.5 This Easement Agreement is the full and complete agreement between Grantor and Grantee with respect to all matters relating to Grantee's use of the Premises, and supersedes any and all other agreements between the parties hereto relating to Grantee's use of the Premises as described herein. However, nothing herein is intended to terminate any surviving obligation of Grantee or Grantee's obligation to defend and hold Grantor harmless in any prior written agreement between the parties.

17.6 Time is of the essence for the performance of this Easement Agreement.

#### **ADMINISTRATIVE FEE**

18. Grantee acknowledges that a material consideration for this agreement, without which it would not be made, is the agreement between Grantee and Grantor, that the Grantee shall pay upon return of this Agreement signed by Grantee to Grantor's Broker a processing fee in the amount of **\$2,500.00** over and above the agreed upon Acquisition Price. Said fee shall be made payable to BNSF Railway Company by a separate check.

Witness the execution of this Easement Agreement as of the date first set forth above.

#### **GRANTOR:**

BNSF RAILWAY COMPANY, a Delaware corporation

By: \_\_\_\_\_  
 Name: Blaine Bilderback  
 Title: Director Real Estate

#### **GRANTEE:**

CITY OF MONTROSE,  
 a \_\_\_\_\_

By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_



EXHIBIT "A"Premises

EXHIBIT "B"

### Memorandum of Easement

**THIS MEMORANDUM OF EASEMENT** is hereby executed this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between BNSF RAIL, WAY COMPANY, a Delaware corporation ("**Grantor**"), whose address for purposes of this instrument is 2500 Lou Menk Drive, Fort Worth, Texas 76131, and CITY OF MONTROSE ("**Grantee**"), which terms "Grantor" and "Grantee" shall include, wherever the context permits or requires, singular or plural, and the heirs, legal representatives, successors and assigns of the respective parties:

#### **WITNESSETH:**

**WHEREAS**, Grantor owns or controls certain real property situated in Wright County, Minnesota as described on **Exhibit "A"** attached hereto and incorporated herein by reference (the "**Premises**");

**WHEREAS**, Grantor and Grantee entered into an Easement Agreement, dated \_\_\_\_\_ (the "**Easement Agreement**") which set forth, among other things, the terms of an easement granted by Grantor to Grantee over and across a portion of the Premises (the "**Easement**"); and

**WHEREAS**, Grantor and Grantee desire to memorialize the terms and conditions of the Easement Agreement of record.

For valuable consideration the receipt and sufficiency of which are hereby acknowledged, Grantor does grant unto Grantee and Grantee does hereby accept from Grantor the Easement over and across the Premises.

The term of the Easement, unless sooner terminated under provisions of the Easement Agreement, shall be perpetual. Provisions regulating the use and purposes to which the Easement shall be limited, are set forth in detail in the Easement Agreement and Grantor and Grantee agree to abide by the terms of the Easement Agreement.

All the terms, conditions, provisions and covenants of the Easement Agreement are incorporated herein by this reference for all purposes as though written out at length herein, and both the Easement Agreement and this Memorandum of Easement shall be deemed to constitute a single instrument or document. This Memorandum of Easement is not intended to amend, modify, supplement, or supersede any of the provisions of the Easement Agreement and, to the extent there may be any conflict or inconsistency between the Easement Agreement or this Memorandum of Easement, the Easement Agreement shall control.

[Signature page follows]

**IN WITNESS WHEREOF**, Grantor and Grantee have executed this Memorandum of Easement to as of the date and year first above written.

**GRANTOR:**

BNSF RAILWAY COMPANY, a Delaware corporation

By: \_\_\_\_\_  
 Name: Blaine Bilderback  
 Title: Director Real Estate

STATE OF \_\_\_\_\_ §  
 COUNTY OF \_\_\_\_\_ §

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 201\_\_, by \_\_\_\_\_  
 \_\_\_\_\_ (name) as \_\_\_\_\_ (title) of BNSF RAILWAY  
 COMPANY, a Delaware corporation.

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

(Seal)

My appointment expires: \_\_\_\_\_

**GRANTEE:**  
CITY OF MONTROSE,

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF \_\_\_\_\_ §  
  §  
COUNTY OF \_\_\_\_\_ §

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 201\_\_, by \_\_\_\_\_  
\_\_\_\_\_ (name) as \_\_\_\_\_ (title) of  
\_\_\_\_\_, a \_\_\_\_\_.

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

(Seal)

My appointment expires: \_\_\_\_\_



COORDINATE SYSTEM: MN S

SCALE: 1 IN = 75 FT

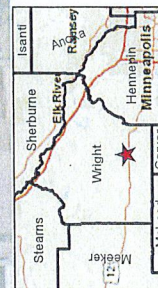
JLL TI #. -  
BW Proj. No.: 12196.003  
MAP REFERENCE:  
STA. = S61059  
RW =



TO: CITY OF MONTROSE  
 AT: MONTROSE  
 WRIGHT COUNTY,  
 MN

**LEGEND:**

-  EASEMENT AREA
-  RIGHT OF WAY LINE
-  PARCEL LINES
-  TRACK



MEASUREMENTS BASED ON PROVIDED SURVEYS  
(S) MEASUREMENTS TAKEN OFF SURVEY  
(M) MEASUREMENT

TWIN CITIES DIVISION  
SUBDIVISION - L.S. 0022-7  
VAL.SEC. 69004  
GN RY MN-04, MAP 6  
SEC. 35, T119N, R26W 5PM  
DATE: 5/25/2021  
MP 45.29

DRAWN BY:ANA DRAWING NO. 81852



**RESOLUTION NO. 2022-20**

**RESOLUTION APPROVING EASEMENT AGREEMENT AND MEMORANDUM OF  
EASEMENT WITH BNSF RAILWAY COMPANY**

**WHEREAS**, the City of Montrose (the “City”) contacted BNSF Railway Company regarding a grant to the City of a construction and maintenance easement over, under and across that part of the Northeast Quarter of the Southeast Quarter of Section 35, Township 119 North, Range 26 West, Wright County, Minnesota, legally described as:

Commencing at the northeast corner of said Northeast Quarter of the Southeast Quarter; thence South 01 degree 09 minutes 32 seconds East, assumed bearing, along the east line of said Northeast Quarter of the Southeast Quarter, a distance of 1066.96 feet to the northerly right of way line of the Burlington Northern Santa Fe Railroad; thence South 87 degrees 06 minutes 06 seconds West, along said northerly right of way line, a distance of 20.67 feet to the point of beginning of the land to be described; thence South 00 degrees 12 minutes 13 seconds East a distance of 10.35 feet; thence South 87 degrees 06 minutes 02 seconds West a distance of 718.92 feet; thence westerly along a tangential curve concave to the north having a radius of 1017.67 feet and a central angle of 2 degrees 03 minutes 54 seconds a distance of 36.68 feet; thence South 89 degrees 09 minutes 56 seconds West, tangent to said curve, a distance of 269.21 feet to said northerly right of way line of the Burlington Northern Santa Fe Railroad; thence North 87 degrees 06 minutes 06 seconds East, along said northerly right of way line, a distance of 1025.11 feet to said point of beginning.

**WHEREAS**, BNSF agreed to grant an easement to the City and presented the City Council with an easement agreement (the “Easement Agreement”) and a memorandum of easement (the “Memorandum”) for approval;

**WHEREAS**, the City Attorney has reviewed the Easement Agreement and Memorandum and determined it satisfactory; and

**WHEREAS**, the Montrose City Council finds it is in the public’s interest to approve the Easement Agreement and the Memorandum for the purposes described above.

**NOW THEREFORE, BE IT RESOLVED** by the City Council of the City of Montrose as follows:

1. The attached Easement Agreement and Memorandum is approved.
2. The Mayor and City staff are authorized to execute this Easement Agreement and Memorandum and take appropriate steps to carry out the terms of the Easement Agreement.

Adopted by the City Council of the City of Montrose, Minnesota, this 11<sup>th</sup> day of April, 2022.

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Robert W. Moynagh, III, Mayor

ATTEST:

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Michael Sommerfeld, City Clerk/Treasurer





In Control, Inc.  
10350 Jamestown St. NE  
Blaine, MN 55449

## PROPOSAL # QM22031701-01

**To:** City of Montrose

**Date:** March 30, 2022

**From:** Jeff Iverson

**Valid:** 45 days

**Page:** 1 of 6

**Attn:** Dan Remer – Public Works Director

**Re:** Influent Lift Station Replacement

In Control, Inc. is pleased to provide our proposal for materials and services as part of the project referenced above.

This proposal is based upon a request from Dan Remer to provide a proposal for replacement of the existing Influent Lift Station control panel. The existing float switches and submersible level transducer will be re-used. In Control originally furnished the existing Influent Lift Station control panel in 2004. Over the four months the control panel has had failures related to moisture and H<sub>2</sub>S gas infiltration causing control failure. The existing programmable logic controller (PLC) and operator interface terminal (OIT) are obsolete and no longer available for purchase. Most recently, In Control was called to the site on 3/17/22, and 3/19/22 to troubleshoot failures of the lift station controls. On 3/21/22 we completed several improvements to help prevent moisture and H<sub>2</sub>S gas from causing more failure with the control equipment.

The City will need to hire an electrical contractor to remove the existing control panel and install the new control panel. We recommend changing the way the pump motor leads and field instrument wires enter the bottom of the enclosure. Instead of installing conduits to the bottom of the control panel we recommend running the conductors in free air from the concrete slab to the bottom of the control panel. The electrical contractor can provide appropriate cord seals to make the connection to the bottom of the control panel. This method of wiring will prevent H<sub>2</sub>S and methane gas from entering the interior of the new control panel.

The Influent Lift Station is monitored by the PLC and OIT located in the Lab Building through a hard-wired connection. Operators have secure remote access to the Lab Building OIT and can view equipment status as well as change control setpoints. At the present time only the Influent Lift Station pump run status and common alarm are monitored at the Lab Building. We have included an option to add full monitoring and control of the new Influent Lift Station control panel. We will provide monitoring in the Lab Building OIT for the following alarms: Wetwell High Level (Float), Wetwell Low Level (Float), Wetwell High Level (Transducer), Wetwell Low Level (Transducer) Pump 1,2,3 Seal Fail, Pump 1,2,3 Overtemp, Pump 1,2,3 Fail To Start, Control Power Fail, and Three Phase Power Fail. We will also provide the ability to remotely edit the following setpoints: Wetwell High Level, Wetwell Low Level, Stage 1 Start/Stop, Stage 2 Start/Stop, Stage 3 Start/Stop.

## Proposed Materials and Services

### Item 1 - Influent Lift Station Control Panel

In Control will furnish the following items with coordination and installation by City and City Electrical Contractor:

- A. Free standing NEMA 4X
- B. Welded 14 gauge 304 stainless steel
- C. 18" leg kit
- D. Ventilated skirts with bug screens
- E. Doors, sides, top, bottom insulated. Doors to have removable insulation panels for summer operation.
- F. Lifting eyes
- G. Door print pocket
- H. Drip shield
- I. Stainless steel door hardware
- J. Door handle with 3 point latch and provisions for padlock
- K. Door wind catches
- L. Passive Vent with filters
- M. Alarm Light
- N. Inner doors with the following items assembled on door front:
  - 1. Utility and Transformer Circuit Breakers
  - 2. Pump Circuit Breakers with lockout attachment
  - 3. Motor Starter thermal overload reset button
  - 4. Operator Interface Terminal, Pilot Lights, Pushbuttons, Selector Switches, Hour Meters

### Item 2 - Influent Lift Station Control Panel Power Components

- A. Utility and Transformer Circuit Breakers
- B. Three Phase Power Monitor
- C. Power Distribution Blocks
- D. Surge Protection
- E. Pump Motor Circuit Breakers
- F. Pump FVNR Motor Starters with Electronic Thermal Overload Protection
- G. Control Power Transformer

### Item 3 - Influent Lift Station Control Panel Control Components

- A. Selector Switches, Pilot Lights, Pushbuttons
- B. Run Time Meters
- C. Relays
- D. Circuit Breakers
- E. Timing Relays
- F. Seal Fail/Overtemp Relays
- G. Wiring Terminal Blocks
- H. Fused Terminal Blocks
- I. 120 VAC Surge Protection
- J. Direct Current Power Supply
- K. Uninterruptible Power Supply
- L. Intrinsic Safety Barrier (Digital)
- M. Intrinsic Safety Barrier (Analog)
- N. PLC Allen Bradley MicroLogix
- O. PLC Backup Memory Module



**Item 4 - Control Panel Layout**

- A. Panel Exterior
  - 1. Alarm Light
  - 2. Passive Vent with filters
- B. Inner Door Arrangement
  - 1. Power Equipment – Left Side
    - (a) Main and Transformer Circuit Breakers
    - (b) Pump Circuit Breakers
    - (c) FVNR Motor Starters Thermal Overload Reset Pushbutton
  - 2. Control Equipment – Right Side
    - (a) Operator Interface Terminal (OIT)
    - (b) Wetwell High Level Pilot Light
    - (c) Float Backup Active Pilot Light
    - (d) Float Backup Reset Pushbutton
    - (e) Pump Hand-Off-Auto Selector Switches
    - (f) Pump Seal Fail Pilot Lights
    - (g) Pump Overtemp Pilot Lights
    - (h) Pump Overtemp Reset Pushbuttons
    - (i) Pump Running Pilot Lights
    - (j) Pump Run Time Meters
    - (k) 3 Pump Run Time Meter
- C. Backpanel Arrangement
  - 1. Power Equipment – Left Side
    - (a) Main and Transformer Circuit Breakers
    - (b) Power Distribution Blocks
    - (c) Utility Power Relay and Fuses
    - (d) Power Surge Protector
    - (e) Pump Circuit Breakers
    - (f) Pump FVNR Motor Starters
    - (g) Control Power Transformer
  - 2. Control Equipment – Right Side
    - (a) PLC and I/O Modules
    - (b) Control Relays and Timers
    - (c) 120 VAC Surge Protection
    - (d) DC Power Supply
    - (e) Panel Heater
    - (f) Intrinsic Safety Barriers
    - (i) Circuit Breakers and Fuses

**Item 5 - PLC and OIT Programming**

We will provide all PLC and OIT programming.

**Item 6 - Startup, Commissioning, and Training**

In Control will provide Startup, Commissioning, and Training of the new lift station control panel.

**Item 7 - Submittals, Drawings, O&M's**

- A. New control panel schematics will be drafted.
- B. As Built drawings will be provided electronically upon shipment of control panels
- C. Final As Started drawings and O&M documents will be provided electronically upon substantial completion.

**Optional - Lab Building Influent Lift Station Monitoring**

The Influent Lift Station is monitored by the PLC and OIT located in the Lab Building. Operators have secure remote access to the Lab Building OIT and can view equipment status as well as change control setpoints. At the present time only the Influent Lift Station pump run status and common alarm are monitored at the Lab Building. We have included this option to add full monitoring and control of the new Influent Lift Station control panel. We will provide monitoring in the Lab Building OIT for the following alarms: Wetwell High Level (Float), Wetwell Low Level (Float), Wetwell High Level (Transducer), Wetwell Low Level (Transducer) Pump 1,2,3 Seal Fail, Pump 1,2,3 Overtemp, Pump 1,2,3 Fail To Start, Control Power Fail, and Three Phase Power Fail. We will also provide the ability to remotely edit the following setpoints: Wetwell High Level, Wetwell Low Level, Stage 1 Start/Stop, Stage 2 Start/Stop, Stage 3 Start/Stop. In order to facilitate communications between the Lab Building and the Influent Lift Station we will add the necessary radio hardware in the Influent Lift Station control panel. We will furnish a directional antenna and antenna cable to be installed by the City Electrical Contractor. The antenna will need to be installed about 20' above ground level on a wood pole or antenna mast furnished by the City. We will perform a radio path study to determine actual antenna height.



## Proposal Summary

The price for all items above is \$47,362.00 USD net total excluding sales and use taxes. Freight is included, FOB shipping point.

### **Optional - Lab Building Influent Lift Station Monitoring**

The price for all items above is \$5,311.00 USD net total excluding sales and use taxes. Freight is included, FOB shipping point.

**TERMS:** 20% upon order, 70% upon equipment shipment, and 10% upon substantial completion.

Our proposal specifically excludes the following:

- Removal, demolition or disposal of existing wiring, devices, or equipment
- Field installation of equipment, enclosures, instrumentation, or other products provided
- Fasteners or mounts, wire, raceway, or fittings required for field installed products
- Termination of any field wiring such as line power, control signals, instrumentation, etc.
- Normal and customary items provided by a general or electrical contractor.
- Any equipment or services that are not defined in the scope of work detailed in this proposal.
- Shipping costs to locations other than the primary project site.

Thank you in advance for the consideration of our offer and for the opportunity to work together. Should you have any questions regarding this proposal, please contact me directly at your convenience. I look forward to hearing from you soon to secure and coordinate this project.

Best Regards,

Jeff Iverson  
Sr Technical Sales Engineer  
Mobile: 612.802.8875  
Office: 763.783.9500 x3001  
E-Mail: jeff.iverson@incontrol.net

Bob Dietrich  
Estimator  
Mobile: 612.799.9017  
Office: 763.783.9500 x2004  
E-Mail: bob.dietrich@incontrol.net

**ACCEPTANCE:** To accept this proposal please return a signed copy with purchase order. Thank you!

**Signature:** \_\_\_\_\_

**Purchase Order:** \_\_\_\_\_

**Print Name:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Title:** \_\_\_\_\_ **Proposal Number:** QM22031701-01



## Standard Terms and Conditions of Sale

These terms and conditions are in effect between the party ("Purchaser") issuing the purchase order ("Order") and In Control, Inc. ("In Control").

1. **ACCEPTANCE** – Acceptance of this Order will be in writing within 30 days of Order receipt, subject to approval of the Purchaser's credit by In Control and compliance with the acceptance criteria set forth herein. Upon acceptance, this Order will constitute the entire agreement between In Control and Purchaser, supersede all prior negotiations and discussions, and may not be modified or terminated except in writing signed by both Purchaser and In Control.
2. **TERMINATION** – Notification of termination of this Order shall be made in writing with 14 days notice. If Purchaser terminates this Order at no fault of In Control, Purchaser shall pay for services rendered at In Control's published rates, reimbursable expenses, and equipment ordered through the date of termination. This payment will also include a fee of 10% of the Order value to cover the expense of terminating the contract.
3. **ATTORNEY FEES** - If either party commences or is made a party to an action or proceeding to enforce or interpret this Order, the prevailing party in such action or proceeding will be entitled to recover from the other party all reasonable attorneys' fees, costs and expenses incurred in connection with such action or proceeding or any appeal or enforcement of any judgment.
4. **INDEMNIFICATION** - Purchaser will indemnify and hold harmless In Control from and against any and all claims, actions, proceedings, costs, expenses, losses and liability, including all reasonable attorneys' fees, costs and expenses, arising out of or in connection with or relating to any goods or services not furnished by In Control pursuant to this Order, including without limitation all product liability claims and any claims involving personal injury, death or property damage. The obligations set forth in this Section will survive the termination or fulfillment of this Order.
5. **LIMITATIONS OF LIABILITY** - In no event will In Control be liable in contract, tort, strict liability, warranty or otherwise, for any special, incidental or consequential damages, such as delay, disruption, loss of product, loss of anticipated profits or revenue, loss of use of the equipment or system, non-operation or increased expense of operation of other equipment or systems, cost of capital, or cost of purchase or replacement equipment systems or power. In particular, unless otherwise agreed to in writing between the Purchaser and In Control, In Control will not accept liquidated damages.
6. **FORCE MAJEURE** – In no event shall In Control be responsible or liable for any failure or delay in the performance of its obligations hereunder arising out of or caused by, directly or indirectly, forces beyond its control, including, without limitation, strikes, work stoppages, supply chain disruptions, accidents, acts of war or terrorism, civil or military disturbances, health crises, nuclear or natural catastrophes or acts of God, and interruptions of utilities, communications or computer services. It being understood that In Control shall use all commercially reasonable efforts to resume performance as soon as practicable under the circumstances.
7. **WARRANTY** - In Control warrants that the goods and services furnished will be of good quality, free from defects in material, design and workmanship will conform to the specifications and drawings and be suitable for their intended purpose. This warranty will be in force for eighteen (18) months after shipment or twelve (12) months from startup, whichever is shorter. Any remaining allotments for Purchaser or end owner/engineer-initiated changes and call-back expire with the warranty period and are not refundable. In Control reserves the right to terminate warranty should the Purchaser's account be in arrears.
8. **TRANSPORTATION** - Unless otherwise specified, all deliveries from In Control will be F.O.B. factory, freight prepaid.
9. **ESCALATION** – This Order is conditioned upon the ability of In Control to complete the work at present prices for material and at the existing scale of wages for labor. If In Control is, at any time during the term of the Order, unable to complete the work at the present prices and wages, then the Order sum shall be equitably adjusted by change order to compensate In Control for significant price increases, where a significant price increase is defined as a change of 10% or more between the date of quote and the date of applicable work.
10. **PAYMENT TERMS** - The payment terms are due upon invoice receipt. Any balance remaining over 31 days beyond the invoice date will be subject to a 2.0% monthly service fee until paid. Debit or credit card payment is accepted and subject to a 3.0% surcharge of the payment amount. Should a payment default occur In Control reserves the right to stop all work, including but not limited to startup of equipment. All reasonable attempts will be made between both parties to resolve the disputed portions of any invoice within the payment terms.  
Order value will be invoiced in full upon shipment unless specific terms are described in the proposal. No retainage is allowed.
11. **NONWAIVER** - The failure by In Control to enforce at any time, or for any period of time, any of the provisions hereof will not be a waiver of such provisions nor the right of In Control thereafter to enforce each and every such provision.
12. **REMEDIES** - Remedies herein reserved to In Control will be cumulative and in addition to any other or further remedies provided in law or equity.



|   |  |                           |                  |                    |
|---|--|---------------------------|------------------|--------------------|
| <b>JORDAN CONCRETE CONST. LLC</b>   |  | <b>CUSTOMER:</b>          |                  | <b>ESTIMATE:</b>   |
| 252 36 Street SW  |  | Name:                     | City of Montrose |                    |
| Montrose MN, 55363  |  | Address:                  |                  |                    |
| 763.675.3826  |  | City:                     | State:           |                    |
|   |  | Zip:                      | Phone:           |                    |
| Description of Work:  |  | Attn. Loco                |                  |                    |
| # 1   | Corner of Aspen + Wright St 12           |                           |                  |                    |
|   | Fin into Existing                        | 19' of sidewalk 5' wide   |                  | 1100 <sup>00</sup> |
| # 2.  | Along Hwy 12                             | by Emery Truck service    |                  |                    |
|   | 2-sections                               |                           |                  |                    |
|   | 15' x 6' cut and remove leftover pieces  |                           |                  |                    |
|   | from watermain repairs and replace       |                           |                  |                    |
|   | Pin into existing and expand along curb. |                           |                  | 2300 <sup>00</sup> |
|   | Eight Broom finish and sealed            |                           |                  |                    |
| Client Must Provide Access on Job Site to Place Concrete and Masonry Materials. |  | TOTAL AMOUNT OF ESTIMATE: |                  | 3400 <sup>00</sup> |
| Any Changes and/or Additions will Change Estimate Price.                        |  |                           |                  |                    |

**CITY OF MONTROSE  
COUNTY OF WRIGHT  
STATE OF MINNESOTA**

**RESOLUTION NO. 2022-11**

**RESOLUTION APPROVING THE TRANSFER OF FUNDS  
TO CLOSE THE REFUSE (GARBAGE) FUND**

**WHEREAS**, the City Council of the City of Montrose at the March 29, 2021 Special City Council Meeting approved Randy's Sanitation contract for exclusive service and the billing and service functions, and

**WHEREAS**, the City of Montrose no longer processes billing for refuse service, and

**WHEREAS**, all 2021 budgeted transactions for the Refuse (Garbage) Fund have occurred;

**NOW THEREFORE, BE IT RESOLVED**; that the Montrose City Council authorizes the transfer of \$224,525.78 to the General Capital Improvement Fund from the Refuse (Garbage) Fund to close out the Fund.

Approved this 11<sup>th</sup> day of April, 2022.

Signed: \_\_\_\_\_  
Robert Moynagh, III  
Mayor

ATTEST:

\_\_\_\_\_  
Michael Sommerfeld, City Clerk/Treasurer



**RESOLUTION # 2022-21**  
**A RESOLUTION SUPPORTING HOUSING AND LOCAL DECISION-MAKING**  
**AUTHORITY**

**WHEREAS**, local elected decision-makers are in the best position to determine the health, safety, and welfare regulations that best serve the unique needs of their constituents; and

**WHEREAS**, zoning regulation is an important planning tool that benefits communities economically and socially, improves health and wellness, and helps conserve the environment; and

**WHEREAS**, local zoning regulation allows communities to plan for the use of land transparently, involving residents through public engagement; and

**WHEREAS**, cities across the state are keenly aware of the distinct housing challenges facing their communities and they target those local housing challenges with available tools; and

**WHEREAS**, multiple bills restricting local decision-making related to housing have been introduced in the 2021-2022 biennium.

**NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF** Montrose that this Council supports local decision-making authority and opposes legislation that restricts the ability for local elected officials to respond to the needs of their communities.

**LET IT ALSO BE RESOLVED** that this Council supports housing policy that advances solutions to support full housing spectrum solutions, local innovation, incentives instead of mandates, and community-specific solutions throughout Minnesota.

**ADOPTED** by the Montrose City Council this 11<sup>th</sup> day of April, 2022.

\_\_\_\_\_  
 Robert W. Moynagh, III, Mayor

ATTEST:

\_\_\_\_\_  
 Michael Sommerfeld, City Clerk/Treasurer