



March 9, 2020

Council Meeting of March 17, 2020
Subject: Bid Award – Atwater Springs
Off-Site Improvements

The Honorable Mayor
and
Members of the City Council

Ladies and Gentlemen:

The developer of Atwater Springs has received three (3) bids for the development for off-site improvements. The bids are:

West Michigan Dirtworks Muskegon, MI	\$1,035,701.04
Schippers Excavating West Olive, MI	\$1,053,769.00
Connan Inc. Zeeland, MI	\$1,420,962.00

If approved, the funding would come from the Sewer fund. The previously approved development agreement with Livingstone Development, LLC has been revised to reflect the low bid price from West Michigan Dirtworks of Muskegon, MI as well as the paving of Harvey Street and the developer’s financial participation.

City Council is requested to enter into a revised development agreement with Livingstone Development, LLC to provide City sewer to the Atwater Springs development and to award the bid for the off-site improvements to West Michigan Dirtworks of Muskegon, MI in an amount of \$1,035,701.04. A prepared resolution is attached for Council’s consideration.

Respectfully submitted,

Mark C. Meyers
City Administrator

GAB/SR

Administration/City Clerk (231) 798-4391	Assessing Division (231) 799-6806	Building Division (231) 799-6801	Finance/Treasurer (231) 799-6805	Fire Prevention (231) 799-6809	Fire Department (231) 798-2255
Parks/Recreation (231) 799-6802	Planning/Zoning (231) 799-6800	Police Department (231) 733-2691	Public Works (231) 799-6803	Streets Division (231) 798-2156	Water/Sewer (231) 799-6804

RESOLUTION

WHEREAS, three bids were received for the off-site improvements for the Atwater Springs Development, and

WHEREAS, the bids were found to be in order and meet City specifications,

NOW, THEREFORE, BE IT RESOLVED that the bid for the off-site improvements is awarded to the low bidder, West Michigan Dirtworks, of Muskegon, MI in the amount of \$1,035,701.04.

At a regular meeting of the City Council of the City of Norton Shores, held at the Norton Shores Branch Library, 705 Seminole Road, on the 17th day of March 2020, the foregoing resolution was moved for adoption by Council Member. The motion was supported by Council Member.

Ayes:

Nays:

Resolution declared adopted/denied.

Shelly Stibitz, City Clerk



Internal Memo

March 5, 2020

TO: Mark C. Meyers, City Administrator

FROM: Gerald A. Bartoszek, Public Works Director **GAB**

SUBJECT: Atwater Springs Cost Sharing

In June 2019, the Council approved a development agreement with Livingstone Development, LLC related to the construction of a 53 unit single family residential community at 7381 S. Harvey Street and their cost participation in extending public sewer to serve the development. Initially, the developer proposed to contribute 12.5% of the cost of the off-site sewer. This percentage was based on the size of the development compared to the service area of the public sewer. At the time of the agreement, the estimated cost of the sewer, including the sewer on the development site and professional services, was \$779,020 with the City's share estimated at \$454,646.

In November bids were received from two contractors with a low bid for the off-site sewer installation of \$1,225,075. This cost does not include the cost of professional services which is estimated at an additional \$53,100 which would put the City's share at \$1,118,403 providing the developer still pays 12.5% of the off-site improvements. Based on the bids received, both the developer and the City staff felt that the costs were too high. Through the efforts of the developer, another interested contractor was located. As a result, the whole project was rebid. Three bids were received with the low bid being received from West Michigan Dirtworks of Muskegon. Their bid for the off-site work is \$1,035,701.04. While this bid is still considerably higher than the original estimate it is \$189,374 less than the first bid. In addition, the second bid includes the paving of Harvey Street from Judson Road to Wilson Road, at a bid cost of \$149,165.91. The paving is necessary due to a design change to place the sewer in the middle of Harvey Street which is the typical location of sewer within the right-of-way. The paving of Harvey Street is a significant added value since the road is just a chip sealed road which would need major work done to it within the next couple of years. The resultant savings and added value from the original bid totals \$338,540.

Although there is significant savings from the original bid, Livingstone Development has indicated that the cost is still too high to make their project viable and have asked if they can reduce their percentage of financial participation in the off-site improvements. In reviewing the improvements, and through my discussion with you, I would like to offer two areas of consideration to address the developer's request. The first of these is to remove the Harvey Street paving from their area of participation. This would reduce the project amount that would be used to compute their participation amount. The reason for this is that Harvey Street would

need to be addressed in the near future regardless of the development, and most likely be at the total expense of the City anyway. Additionally, the bid cost to pave the street now seems very reasonable at approximately \$150,000; I would have expected the cost to be closer to \$250,000, additionally, a post-bid cost was obtained from the original bidder with a price of \$195,000. The paving of Harvey Street as part of the project can be paid from the Sewer fund as it can be considered restoration of the sewer installation. The second reason is that the lift station service area covers 260 acres of property. The developer's cost share of 12.5% is based on the development parcel amount of the total service area. The service area contains 95 acres within Fruitport Township; if this area is taken away from the developer's responsibility it would lower their participation rate to 8.375%. Fruitport Township could be charged a buy in if or when they want to connect to our sewer system.

Using these criteria and adding in the estimated professional services the developer's share of the off-site improvements would equal \$87,540 leaving the City cost at \$1,122,216. This amount can be paid from the Sewer fund which has adequate funds available.

By developing this property as proposed, the City may recoup its investment within 10 years (see the attachment). Furthermore, there will be additional water and sewer usage within the community, as well as, through opening up property for development along Harvey Street north of Atwater Springs.

With your concurrence, I would like to take this revised proposal to the March 17 Council meeting for their consideration on awarding the off-site construction bid and approving an amended development agreement.

Please advise me accordingly on how you would like me to proceed.

CITY OF NORTON SHORES
DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT ("Agreement") made and entered into the ____ day of _____, 2020 ("Commencement Date"), by and between LIVINGSTONE DEVELOPMENT, LLC, a Michigan limited liability company, whose address is 2789 Lakeshore Blvd., Twin Lake, MI 49457 ("Developer"), and the CITY OF NORTON SHORES, a Michigan municipal corporation, whose address is 4814 Henry Street, Norton Shores, MI 49441 ("City").

RECITALS:

The Developer owns and desires to develop the real property described in Exhibit "A" (legal description) attached hereto and incorporated herein into a site condominium project known as Atwater Springs(hereinafter referred to as the "Development"), being a proposed site condominium located in the City of Norton Shores, Muskegon County, Michigan, as will be further described and detailed in the Master Deeds to be recorded.

The Condominium Act (Act 59 of 1978), Home Rule Act (279 of 1909), Michigan Zoning Enabling Act (110 of 2006) and various other acts authorize the City to promote the public health, safety, and general welfare; to further the orderly layout and use of land; to require that the land be suitable for building sites and public improvements and that there be adequate drainage of the land; to provide for proper ingress and egress to lots and parcels; to provide public utilities; to provide for the collection of fees to defray the City's expenses to include examination and inspection of condominium(s) and the land proposed for development; and to provide for performance guarantees.

The City requires Developer to install certain improvements as a condition of final site plan approval, and may be required to deposit funds to assure that the costs and expenses incurred by the City to process and inspect the Development will be borne by Developer (and not the City), and post a guarantee to insure against contingencies which may arise during the Development and assure the improvements meet approved plans, applicable standards and specifications when the Development is completed.

Developer desires to develop the Development in accordance with the provisions and conditions of applicable ordinances and published rules and this Agreement.

NOW, THEREFORE, in consideration of the premises and the mutual covenants of the parties described in this Agreement, and with the express understanding that this Agreement contains important and essential terms as part of the final approval of the Developer's final site plan of the Development, and the parties agree as follows:

ARTICLE I
GENERAL TERMS

A. Recitals Part of Agreement. Developer and the City acknowledge and represent that the foregoing recitals are true, accurate and binding on the respective parties and are an integral part of this Agreement. The Developer acknowledges that he, she or it owns full legal and equitable title to the real property described in Exhibit "A" and has authorized Developer to perform the tasks contemplated by this Agreement.

B. Zoning District. The City acknowledges and represents that the proposed Lake Fran Development is zoned PURD and for purposes of recordation shall be referred to as Livingstone Development.

C. Approval of Final Site Plan. The final site plan for the Development, a reduced copy of which is attached hereto as Exhibit "B" (approved site plan) and made a part hereof, has been approved pursuant to the authority granted to and vested in the City.

D. Conditions of Final Site Plan Approval. Developer and the City acknowledge that the approved final site plan for the Development incorporates the City's approved conditions and requirements that were adopted by the City Planning Commission and Council, consultants and departments of the City, Exhibit "C" (actual SUP).

E. Agreement Running with the Land. The terms, provisions and conditions of this Agreement shall be deemed to be of benefit to the Development described herein, shall be deemed a restrictive covenant which shall run with the land and be binding upon and inure to the benefit of the parties, their successors and assigns; and may not be modified or rescinded except as may be agreed to in writing by the City, the Developer and/or their respective successors and assigns. This restrictive covenant shall be incorporated by recordation into the chain of title of the Development. Anything to the contrary herein notwithstanding, no person who is not a party hereto or the successor or assignee of a party shall be deemed an intended contractual beneficiary of this Agreement or have the right to commence any lawsuit or proceeding to enforce this Agreement or any portion thereof.

F. Bylaws and Deed Restrictions. The bylaws and deed restrictions for the Development, as contained within the Master Deeds of Atwater Springs Site Condominiums which will be submitted by the Developer. The City shall retain the right, but shall have no obligation, to enforce the provisions of the documents if the City determines enforcement to be necessary in the interests of public health, safety or welfare. The documents are hereby incorporated and

made a part of the approved final site plan for the Development. Any amendments to the bylaws or deed restrictions must be approved by the City in those instances where the bylaws or deed restrictions provide for City's approval, which approval shall not be unreasonably withheld.

ARTICLE II **SITE IMPROVEMENTS**

A. Developer's Obligations. Developer shall bear final responsibility for the installation and construction of all required improvements as shall be depicted as improvements on the final site plan attached as Exhibit B, as approved by the City Planning Commission and Council and the costs and expenses associated with the development of the project.

B. Required Improvements. Developer agrees that they shall furnish all labor, materials, equipment, tools and services necessary to perform and complete, in a workmanlike manner, which conforms to City standards and requirements, all work required to install improvements as depicted on the site plan, to include by way of example and not limitation monuments, streets, curbs, water and sanitary sewer systems, drainage facilities, retention/detention basins, gas, wire and cable utilities, street name signs, sidewalks and pedestrian ways, trees, street lighting, retaining walls, erosion and sedimentation controls, landscaping, final grading and swales.

C. Strict Compliance. All required improvements and all other improvements shall be installed and completed in strict compliance with the approved site plan, and the standards and specifications of the City and various public agencies. These standards shall be met when the Development is completed.

D. Development Completed. The Development is completed when all improvements depicted on the site plan and Special Use Permit appear to fully comply with the approved site plan, standards and specifications of the City to the satisfaction of the Director of Public Works, or to the satisfaction of various public agencies if the improvement is under the jurisdiction of another public agency; and all construction debris, equipment and materials attendant to construction of the site plan improvements are removed from the Development site.

ARTICLE III **MUNICIPAL SERVICES**

A. Provide Services. Developer requests and the City agrees to make available municipal services, such as potable water, sanitary and storm sewer services, to the Development prior to the completion of the Development under the following terms and conditions.

B. Not Acceptance of Dedication. Developer acknowledges that by providing such services to Developer the City has not accepted the improvement for purposes of dedication.

C. Normal Wear and Tear. Developer agrees that the fees collected by the City from the owners or occupants does not alleviate Developer's responsibilities under this Agreement or applicable ordinances and published rules and that except as to normal wear and tear, Developer agree to pay any and all costs associated with or arising during the development of the

Development, to include, but not limited to, damages caused to an improvement during the construction of other improvements, buildings, facilities or other structures. The City in its discretion shall determine whether an expense or cost constitutes wear or tear or is attributed to the Development.

D. Developer' Liability. In the event the condition of the improvements constructed pursuant to this Agreement pose a threat to the health, safety and welfare of those persons using the system, and the City determines the condition is a result of the construction of the Development, then the Developer shall be liable for and indemnify the City against any claims raised by those persons using the system.

ARTICLE IV
ACCEPTANCE OF DEDICATION

A. City Council Resolution. The City on its own initiative or petition of Developer shall consider a resolution to accept an improvement for purposes of dedication after the installation of the improvement is approved by the Public Works Director, all sums due the City are paid and at least six (6) months has elapsed since completion of all Development site improvements.

B. Transfer of Improvement. Prior to applying for building permits, Developer shall provide a copy of and shall have recorded the master deeds (or other form of conveyance) showing all easements and restrictive covenants, provide title insurance (if requested).

ARTICLE V
DEFECTS IN CONSTRUCTION

Neither the City's approval of the final site plan, nor its approval of an installation or construction, or expiration of the guarantee alleviates Developer's responsibility or liability for defects (design, workmanship, materials) in construction.

ARTICLE VI
COMPLETION OF PUBLIC IMPROVEMENTS

A. Completion Date. The public infrastructure improvements as depicted in the site plan shall be completed in accordance with the final Site Plan and Special Use Permit approval.

B. Cost Sharing. The bid cost for the off-site gravity sewer, lift station, force main and Harvey Street paving is \$1,035,705.04. The Developer is proposing to pay for 8.375% of the Harvey Street gravity sewer, lift station and force main. The 8.375% is based on service area of the new lift station. The City would pay for the cost of paving Harvey Street. Under this proposal, the City cost share of the infrastructure construction is estimated to be \$961,457.73 with the Developer portion estimated at \$74,287.31. The Developer would also pay a trunkage/connection charge for each new home. The current trunkage charge is \$1,900.00 per house that would generate another estimated \$100,700.00 which would help offset the City's cost. The addition of a lift station will allow the extension of sewer north of Judson Road, which will improve the opportunity for future Development. Without the addition of a lift station, the

City is unable to provide sewer to Harvey Street south of Pontaluna Road, as well as an area just north of Pontaluna Road.

C. Process. The Developer, with City concurrence, will select an Engineer to design and oversee the construction of the public improvements. The Engineer shall submit a cost proposal for engineering services relative to the public portion of the project. A full-time construction inspector will be required during the construction of all of the public infrastructure. All public improvements shall be designed and constructed to City standards. The estimated engineering costs for the off-site improvements is \$176,200 of which the City share is estimated to be \$162,907.00 with the Developer portion estimated at \$13,293.00.

The Developer will obtain a minimum of three competitive construction bids for the public improvements. A bid will be awarded to the contractor that provides the most advantageous bid when considering all factors including the bid price, schedule and performance history. The award of the project to the selected contractor must be approved by both the Developer and the City Council.

The Developer will be responsible for payment to the Engineer for the on-site improvements. The Engineer's invoice shall be accompanied by a schedule of completed work. Upon receipt of an invoice and verification of the completed work, the City shall pay the Contractor and Engineer for the offsite improvements and invoice the Developer for their agree upon share of the offsite improvements.

A minimum of 10% shall be withheld as a retainer from payment to the Contractor until the public infrastructure is 75% complete then reduced to a minimum of 5% until the infrastructure is completed and accepted by the City. An affidavit from the Contractor stating that all sub-contractors and material suppliers have been paid is required before final payment is made and the retainer is released.

The Contractor shall provide a warranty period of 12 months from acceptance of the public infrastructure. The warranty shall cover labor and material necessary to correct any defects in the original work.

D. Remedy. If the Developer refuses or fails to complete the work, or any separate part thereof, with such diligence as will insure its timely completion of public improvements depicted on the site plan and under the jurisdiction of the City, or fails to complete the work within such time, the City may, by written notice to Developer, terminate its right to proceed with the improvements under the City's jurisdiction listed herein, or such part as to which there has been a delay. In such event, the City may complete the public improvements provided for herein by contract or otherwise, and the Developer and its sureties shall be liable to the City for any excess cost occasioned by the City thereby. If the Developer's right to proceed is so terminated, the City may take possession of and utilize for completing public improvements such materials as may be on the site, and necessary for the completion. Provided, however, that the right of the Developer to proceed shall not be terminated because of any delays in the completion of the improvements due to unforeseeable causes beyond the control and without the fault or negligence of the Developer, including, but not restricted to acts of God or of the public enemy, acts of the City, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe

weather or delays of sub-contractors due to such causes. The Developer shall, within ten (10) days from the beginning of such delay notify the City in writing of the cause of the delay, in which case the City shall ascertain the facts and the extent of the delay and may extend the time for completing the work, when in its judgment, the finding of fact justifies such an extension.

E. Completion of Public Improvements. The Developer will design, construct and provide construction oversight services to all of the public infrastructure with the City reimbursing the Developer upon a monthly invoice for the City's share of the Engineering Services.

The City shall not unreasonably withhold time for Developer to complete improvements under the City's jurisdiction.

ARTICLE VII
SUB-CONTRACTORS

The Developer agree to bind every one of their sub-contractors by the terms of this Agreement. The Agreement shall not be construed as creating any contractual relationship between the sub-contractor and the City.

ARTICLE VIII
AUTHORITY AND RESPONSIBILITY OF THE CITY

All work shall be done under the general supervision of the Director of Public Works. Based on reports submitted by them and after reviewing the facts and comparing them to the published standards of the City, the approved site plan, Special Use Permit and industry standards for materials and installation, the City shall decide any and all questions which may arise as to the quality and acceptability of materials furnished, work performed, interpretation of Plans and Specification and all questions as to the acceptance and fulfillment of this Agreement on the part of the Developer.

Developer is acting as an agent of the City relative to the public infrastructure installation. Upon acceptance of the City the Developer shall be relieved of any further liability.

The City is responsible to obtain MDOT permit for crossing US 31.

ARTICLE IX
EASEMENTS

Developer shall dedicate all on-site easements to the City for the construction and maintenance of public sewer, sanitary sewer, public water main access necessary to service the Development. All such easements shall be in accordance with the provisions of City Ordinance, as may be amended. All easements shall be recorded by the City with the Muskegon County Register of Deeds. The cost incurred to prepare and record such easements shall be borne by the Developer. Upon approval and acceptance by the City, Developer shall assign title to those public improvements which come under the jurisdiction of the City to the City, which title may

be placed in escrow with the City until such time as the City accepts dedication of the improvement, which shall occur in a timely manner after all conditions of acceptance and dedication, as set forth in City ordinances, are met.

ARTICLE X
CERTIFICATES OF OCCUPANCY

A. Certificates of Occupancy. The City may decline to issue a Certificate of Occupancy until all the improvements depicted on the site plan are completed or otherwise provided for and all sums owed the City are paid. In no event shall a certificate of occupancy be issued if any of the following are not met:

- (i) In residential projects, roadways shall be completed, at a minimum, through the base course of pavement. Pavement markings and traffic control devices that are required to direct the general public about the site shall also be completed prior to occupancy.
- (ii) All facilities for the direction and retention of storm water shall be complete. Site grading shall be generally complete.
- (iii) The installation of franchised utilities shall be completed.
- (iv) All underground utilities shall have passed the certified acceptance tests and been approved for operation by the Director of Public Works.
- (v) A City installed water meter installation must be complete.

ARTICLE XI
ROAD AND DRAINAGE MAINTENANCE

The Developer shall be responsible for maintaining all road and drainage facilities depicted for construction on the site plan, which are located within and outside the site plan boundaries.

Once infrastructure is inspected and accepted the Developer's responsibility/liability should end. However, the site contractor shall maintain 12-month warranty period.

ARTICLE XII
INDEMNITY INSURANCE

The Developer shall indemnify, defend and hold harmless the City, its Board, members other of, employees, agents and independent contractors from and against all claims, damages, losses and expenses arising out of or resulting from the performance of the work caused in whole or in part by any act or omission of the Developer, and sub-contractor or anyone for whose acts any of them may be liable. The Developer shall procure and maintain, during the life of this Agreement, Workmen's Compensation Insurance for all employees engaged in work on the Project, and public liability insurance to an amount of not less than ONE MILLION DOLLARS

(\$1,000,000.00) for injuries, including accidental death to any one person, and subject to the same limit, for each person, in an amount not less than TWO MILLION DOLLARS (\$2,000,000.00) on account of one accident, and Contractor's Property Damage Insurance in an amount of not less than ONE MILLION DOLLARS (\$1,000,000.00). The public liability insurance shall contain a clause whereby said policy cannot be canceled until after a written notice of intention to cancel has been filed with the City at least ten (10) days prior to the date of cancellation and certificates of insurance shall be filed with the City before the work to be done under this Agreement shall commence. The insurance policy shall be issued jointly to the Developer and the City. The Developer shall provide evidence of all required insurance before commencing work on the Development.

ARTICLE XIII **MISCELLANEOUS PROVISIONS**

A. Modifications. This Agreement may not be modified, replaced, amended or terminated without the prior written consent of the parties to this Agreement.

B. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Michigan.

C. City Approval. This Agreement has been approved through action of the City Council at a duly scheduled meeting.

D. Developer Approval. The signers on behalf of Developer below represent by their signatures that they represent and have authority to bind all owners of legal and equitable title in the Development. The property owner(s) have signed to show only that they consent to the terms of this Agreement being made applicable to the Development and authorize the City, its agents, engineers, employees and independent contractors to enter upon the property and perform tasks consistent with this Agreement.

E. Execution in Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original and all of which shall constitute one Agreement. The signature of any party to any counterpart shall be deemed to be a signature to, and may be appended to, any other counterpart.

F. Continued Review. The Developer shall be required to review conformance of this Agreement with City Officials and/or designated City consultants on a yearly basis or at such time as deemed reasonably necessary by the City until completion of the project.

G. Recordation of Agreement. The City shall record this Agreement with the Muskegon County Register of Deeds. This Agreement will run with the land and shall bind and obligate successors and assigns.

H. Assignment. Developer shall not assign this Agreement without the written consent of the City, which consent shall not be unreasonably withheld.

ARTICLE XIV
BINDING AGREEMENT

This Agreement shall bind and inure to the benefit of the parties hereto and their respective successors and assigns.

THE UNDERSIGNED parties by signing this Agreement represent that they are duly authorized to act in this matter on behalf of their respective entities and by doing so bind their respective entities to this Agreement.

LIVINGSTONE DEVELOPMENT

By _____
Charlie L. Barnes
Its: Owner/Member

STATE OF MICHIGAN)
) ss.
COUNTY OF MUSKEGON)

On _____, 2020, _____, appeared before me, and stated under oath that he is the owner/member of Livingstone Development, LLC, a Michigan limited liability company, and that this document was signed on behalf of the company, and he acknowledged this document to be the free act and deed of the company by authority of its Operating Agreement.

Notary Public
Muskegon County, Michigan
My Comm. Exp. _____
Acting in Muskegon County

CITY OF NORTON SHORES

By _____
Gary Nelund, Mayor

By _____
Shelly Stibitz, Clerk

