city of Norton Shores

Internal Memo

January 21, 2020

TO: Mark C. Meyers, City Administrator

FROM: Gerald Bartoszek, Public Works Director GAB

RE: Atwater Springs Development

In June, the City Council approved a development agreement with Livingstone Development for Atwater Springs. The Atwater Springs development is a proposed single-family community on the site of Lake Fran on Harvey Street at the southernmost section of the city. The developer desires to have the community connected into the City's sewer system; however, sewer does not currently exist south of Pontaluna Road. Part of the development agreement requires the developer to pay 12.5% of the cost to make sanitary sewer available to Atwater Springs. To provide sewer service a sewer needs to be extended north on Harvey Street from the development to Judson Road at which point a lift station would be installed to pump the sewage to our existing system on the west side of US-31. The preliminary cost estimate for the sanitary sewer system, including that within the development and engineering costs, was $779,020. The cost sharing outlined within the development agreement was based on this cost with the resultant amount of the City's participation estimated at $452,646.

Bids were obtained for the entire project in November. The low bidder for the City portion of work (gravity sewer, lift station and force main) had a bid price of $1,225,075. At 87.5%, the City's share excluding engineering would be $1,071,941. Staff has been working with the developer and the contractor(s) in an effort to modify the project and reduce the cost. The bid obtained covered the entire project; the site development and utilities, as well as, the City's sewer and lift station. The off-site work would be done by a sub-contractor which resulted in the prime contractor adding additional carrying costs to cover the work of the sub-contractor. The modification revolves around decreasing the depth of the gravity sewer and lift station and splitting the contract into two to eliminate the carrying costs. This would result in the elimination of basement gravity sewer within the Atwater Springs development, as well as, the off-site work being contracted directly. While the modified costs have not yet been obtained from the contractor it will be undoubtedly much higher than originally projected.

I would like to discuss the City's participation in the project and an eventual request for an amendment to the development agreement with the City Council at the January Work Session.

Please contact me if you have any questions or concerns.

GAB

CITY OF NORTON SHORES

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT ("Agreement") made and entered into the ____ day of _____, 2019 ("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 Lake Fran (hereinafter referred to as the "Development"), being a proposed site condominium located in the City of Norton Shores, Muskegon County, Michigan, as more particularly described and detailed in the latest Master Deeds recorded at Liber _____, Pages _____, and Liber _____, Pages _____.

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 Lake Fran Site Condominiums which have been submitted by the Developer and approved by the City as part of the site plan approval process. 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 acting on the resolution, 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 preliminary cost estimate for the gravity sewer, lift station and force main is $779,020. This cost includes the sewer within the Development. The Developer is proposing to pay for the entire sewer within the Development, as well as 12.5%, of the Harvey Street gravity sewer, lift station and force main. The 12.5% is based on service area of the new lift station. Under this proposal, the City cost share of the infrastructure estimated to be $452,646.00. The Developer would also pay a trunkage/connection charge for each new home. The current trunkage charge is $1,860.00 per house that would generate another estimated $98,580.00 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 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.

The Developer will be responsible for payment to the Contractor and Engineer. The City will reimburse its share upon invoice by the Developer. The invoice shall be accompanied by a schedule of completed work and proof of payment to the Contractor and Engineer. Upon receipt of an invoice and verification of the completed work, the City shall reimburse the Developer within three (3) weeks.

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 Harvey Street sewer, lift station and force main.

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 24th, 2019, May, 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.

_____

PAULA L. GOWELL
Notary Public, State of Michigan
County of Muskegon
My Commission Expires Jun. 09, 2023
Acting in the County of Muskegon

Notary Public
Muskegon County, Michigan
My Comm. Exp. 06/09/2023
Acting in Muskegon County

CITY OF NORTON SHORES

By_____
Gary Nelund, Mayor

By_____
Shelly Stibitz, Clerk

STATE OF MICHIGAN)
) ss.
COUNTY OF MUSKEGON)

On _____, 2019, Gary Nelund and Shelly Stibitz appeared before me, and stated under oath that they are the Mayor and Clerk of the City of Norton Shores, a Michigan municipal corporation.

_____

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

Prepared by:
Douglas M. Hughes
Williams Hughes, PLLC
120 W. Apple Ave., P.O. Box 599
Muskegon, MI 49443-0599
(231) 726-4857

city of Norton Shores 50th Anniversary 1968-2018

Internal Memo

January 15, 2019

TO: Mark Meyers, City Administrator

FROM: Gerald A. Bartoszek, Public Works Director GAB

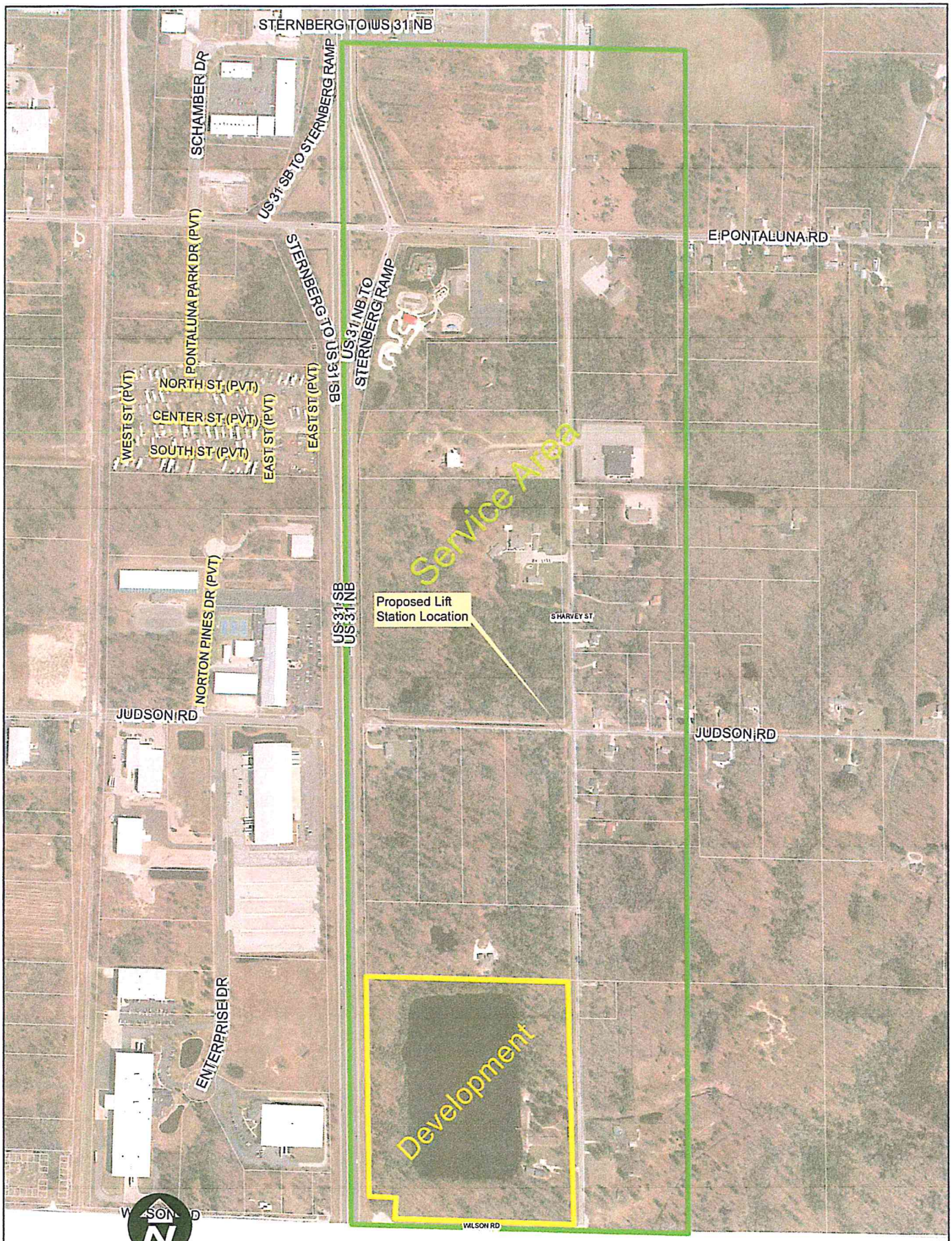
SUBJECT: Harvey Street Sewer

We have been working with a developer that is looking to develop residential housing at the Lake Fran area located at the far southeast corner of the city. The proposed development could have as many as 45 residential homes.

Currently, there is no sanitary sewer available south of Pontaluna Road. While septic systems could be constructed for this development the developer would prefer to connect to a municipal sewer system. We have been working with the developer to come up with a plan to provide City sewer. The plan would include the construction of a lift station at the corner of Harvey Street and Judson Road with a force main to pump the sewage across US-31 to tie into our gravity sewer on the west side of the highway. A gravity sewer would be extended south from the lift station to the development along the west side of Harvey Street. As the east side of Harvey Street is Fruitport Township, it is proposed to keep the sewer out of the paved area to reduce installation costs.

The preliminary cost estimate for the gravity sewer, lift station and force main is $779,020. This cost includes the sewer within the development. The developer is proposing to pay for the entire sewer within the development, as well as 12.5%, or an estimated $87,424 of the gravity sewer, lift station and force main. The 12.5% is based on service area of the new lift station. Under this proposal, the City cost share of the infrastructure would $452,646. The developer would also pay a trunkage/connection charge for each new home. The current trunkage charge is $1,860 per house that would generate another $87,300 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 chances for future development. Without the addition of a lift station, we are unable to provide sewer to Harvey Street south of Pontaluna Road, as well as an area just north of Pontaluna Road.

I would ask that this item be included in the January 22 Work Session to discuss with the City Council and to obtain their interest in expanding the City sewer system.



CITY OF NORTON SHORES

Proposed Harvey Sewer District

1/16/2019 11:18:01 AM