

BILL NO. 2063

ORDINANCE NO. 1846

A FORWARD FUNDING AGREEMENT FOR THE CONSTRUCTION OF SANITARY SEWER PUMPS STATION NO.4, AND ASSOCIATED SANITARY SEWER SYSTEM, A TIF PRIORITY PROJECT.

WHEREAS, the City Council of the City of Chesterfield approved TIF funding of \$15 million for a specific list of priority infrastructure projects within Chesterfield Valley; and

WHEREAS, Sanitary Sewer Pump Station No. 4, and it's associated sanitary sewer system is on the approved list of priority infrastructure projects; and

WHEREAS, the forward funding agreement provides for the City to forward fund the construction of the pump station and sewers in conjunction with the first property that develops, and then to be subsequently reimbursed by each development as they are re-zoned and apply for building permits.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHESTERFIELD, ST. LOUIS COUNTY, MISSOURI, AS FOLLOWS:

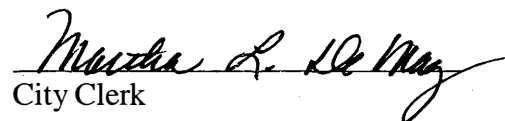
Section 1. The City Council of the City of Chesterfield hereby authorizes the City Administrator to execute the forward funding agreement for the construction of Sanitary Sewer Pump Station No. 4 , and the associated sanitary sewer system in accordance with the terms and conditions as set forth in the agreement as marked "EXHIBIT A" and made a part hereof as if fully set out herein.

Section 2. This Ordinance shall be in full force and effect from and after its passage and approval.

Passed and approved this 6th day of May, 2002.


Mayor

ATTEST:


City Clerk

FORWARD FUNDING AGREEMENT

THIS FORWARD FUNDING AGREEMENT (this "Agreement") is made and entered into this _____ day of _____, 200__, (the "Effective Date") by and between the City of Chesterfield, Missouri, a city of the third class located at 690 Chesterfield Parkway West, Chesterfield, Missouri 63017 (the "City") and _____, a _____, located at _____ (the "Developer").

RECITALS

- A. Developer owns certain unimproved real property in the City ("Property") which Developer desires to develop. The legal description of the Property is attached hereto as **Exhibit A**.
- B. In order to facilitate the development on the Property and other properties in the surrounding area (the "Project Area"), Developer desires to construct certain improvements, more specifically described in **Exhibit B** attached hereto and incorporated herein (the "Improvements").
- C. The City has determined that it is in the best interest of the residents of the City and necessary to promote the health, safety and general welfare of the City to accelerate the organized development of the Project Area and to assist Developer and other owners of real property in the Project Area (the "Owners") in financing and arranging for the construction of the Improvements in the Project Area, subject to the terms and conditions of this Agreement.

NOW, THEREFORE, for and in consideration of the premises and the mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

- 1. **Developers' Obligation to Provide for Construction of Public Improvements.**
 - (a) **Construction of the Improvements.** Developer shall cause the Improvements to be constructed in accordance with the plans and specifications to be approved by the City and _____ (the "Plans"). The cost of the Improvements is estimated to be _____ Dollars (\$_____) (the "Project Costs"). In the event that the City and the Developer fail to agree on a set of Plans within six months of the Effective Date of this Agreement, either party may terminate this Agreement by providing written notice to the other party, and thereafter, neither party shall have any further obligation hereunder.
 - (b) **Contract.** Developer shall enter into a written contract ("Contract") with a third party contractor ("Contractor") for the construction of the Improvements. The City and _____ shall have the opportunity to review and approve the Contract, provided that if the City or _____ fails to object to any provision of the Contract

in writing within thirty (30) days of receipt of said Contract, the City or ____ shall be deemed to have waived any objections thereto.

- (i) The engineer hired by the Developer, and approved by the City in the City's reasonable discretion, (the "Engineer") shall supervise the construction of the Improvements and shall prepare the certificates of payment as required by Section 3(a)(i)(2).
- (ii) The Contract shall contain a provision requiring the Contractor to obtain and maintain a policy of insurance ("Contractor's Insurance") that will provide appropriate liability coverage for property damage and personal injury occurring during the construction of the Improvements in the Project Area. Each of the Owners and the City shall be named as an additional insured on the policy or policies of Contractor's Insurance. The insurer, coverage and limits shall be subject to the written approval of the City, which shall not be unreasonably withheld or delayed. The Contract shall include a provision requiring the Contractor to provide a certificate of insurance to each of the Owners and the City certifying the coverage, coverage limits and naming the Owners and the City as additional insureds. Such certificate shall also include a provision requiring the insurer to provide thirty (30) days written notice to all of the Owners and the City of any cancellation or termination of the Contractor's Insurance.
- (iii) The Contract shall require the Contractor to provide unconditional mechanic's lien waivers to the Escrow Agent, as defined below, at or prior to the time the Contractor receives payment pursuant to the Contract. The Contract shall provide that such lien waivers shall be reasonably satisfactory to the City and the Escrow Agent.
- (iv) Notwithstanding any other provision to the contrary, the Contract shall contain a ten percent (10%) holdback provision for each progress payment due thereunder (the "Holdback"), which Holdback shall be released upon acceptance by the City of a certificate of final completion for the Improvements and acceptance of the Improvements by _____; provided however, that if the City or _____ incurs any costs in connection with the completion of the Improvements, the Holdback shall be used first to reimburse the City or _____ for any out-of-pocket costs and second to pay the Contractor.

2. **Easements.** Within six months of execution of this Agreement, the City shall acquire and convey to Developer any and all permanent and temporary easements reasonably required for construction of the Improvements (the "Easements"). In the event that the City fails to obtain the Easements within said period, either the Developer or the City may terminate this Agreement by providing written notice thereof to the other party, and thereafter, neither party shall have any further obligation hereunder. Any modification to the Contract or Plans involving the relocation or enlargement of an Easement must be approved in writing by the City and the property owner whose property is affected by the relocation or enlargement. Simultaneously

with Developer's submission of its Plans for City approval, the Developer shall dedicate the Easements and the Improvements to _____.

3. **Agreement for Payment of the Cost of Improvements.** The City agrees to advance any and all costs for the construction of the Improvements excluding Developer's Share which shall be advanced by Developer pro rata with the City's contribution. The term "Share" is \$_____.

(a) The payment shall be made as follows:

(i) Contemporaneously with execution of the Agreement, the Developer shall enter into an escrow agreement with Commonwealth Land Title Insurance Company ("Escrow Agent") and the City, the form of said agreement being attached hereto as **Exhibit C**.

(ii) The City shall make progress payments to the Escrow Agent in satisfaction of the City's obligation to finance the costs of the Improvements for the Owners; provided that the Engineer provides the Escrow Agent and the City with (1) a certificate of payment not less than thirty (30) days prior to the date for the City's performance; and (2) partial unconditional lien waivers for all work performed by the Contractor and all subcontractors, suppliers, material-men and/or service providers through the applicable funding date. During such thirty (30) day period, the City shall have the right to inspect the Contractor's work, and in the event that the City determines, in its reasonable discretion, that the work was not performed in accordance with the Plans, the City shall notify the Developer that the City is not accepting the work. The City shall not unreasonably withhold or delay its acceptance of the Contractor's work. The City shall have no obligation to pay the Escrow Agent for work not performed in accordance with the Plans as approved by the City. If, however, the City determines that the work has been performed in accordance with the Contract and that all partial unconditional lien waivers for the work performed through the funding date have been obtained, then the City shall immediately deposit the amount of the progress payment due under the Contract with the Escrow Agent.

(iii) Simultaneously with the City's deposit of its first progress payment with the Escrow Agents as provided above, Developer shall deposit its Share with Escrow Agent.

(b) Notwithstanding anything herein to the contrary, City's obligation shall be limited to _____ exclusive of any change orders initiated by the City or _____, which shall become part of the City's obligation.

4. **Performance Bond.** Developer shall obtain a performance bond in the amount of 100% of the Project Costs in form as is reasonably acceptable to the City, the cost of which shall

become part of the cost of the Improvements and shall be paid in accordance with Section 3 above.

5. **Indemnification.** Developer shall indemnify, hold harmless and defend the City and the Owners (the “Indemnitees”) and such other persons who are in privity of estate with Indemnitees, or to who the Indemnitees are legally responsible, from and against any and all claims, actions, suits, cross-claims, counterclaims, third party actions, damages, liabilities, attorney’s fees and expenses in connection with loss of life, personal injury, bodily injury or damage to property arising from or out of the negligent or willful misconduct of Developer or any agents or employees of Developer in connection with the construction of the Improvements. In case the Indemnitees or such other persons who are in privity of estate with Indemnitees or to whom Indemnitees are legally responsible, shall be made a party to any action or proceeding commenced by or against Indemnitees for any reason for which Developer is indemnifying Indemnitees hereunder, then Developer agrees to protect and hold such parties harmless and to pay all costs, expenses and reasonable attorneys’ fees incurred or paid by such parties in connection with such action or proceeding.

6. **Remedies.** In the event of either party’s breach of this Agreement (the “Defaulting Party”), and subject to 30 days prior written notice to the Defaulting Party during which the Defaulting Party shall have the right to cure such breach, the non-defaulting party shall have all remedies available at law or in equity, including, without limitation, receipt or retention of the proceeds of the performance bond and the Holdback. In the event of any action brought for the breach hereof by either party, the prevailing party shall be entitled to recover its reasonable attorneys’ fees and expenses.

7. **Miscellaneous**

- (a) If any party commences an action against another party in connection with the matters contained herein, the party or parties who substantially prevail (“the Prevailing Party or Parties”) shall be entitled to recover from the losing party or parties the costs which the Prevailing Party or Parties incurred in connection with such suit including reasonable attorney fees and reasonable expert witness fees.
- (b) Neither the City nor the Developer nor any successor in interest shall be considered in breach or default of their respective obligations under this Agreement, and times for performance of obligations hereunder shall be extended, in the event of any delay caused by force majeure, including, without limitation, damage or destruction by fire or casualty; condemnation; strike; lockout; civil disorder; war; restrictive government regulations; issuance of any permits and/or legal authorization by the governmental entity necessary for the Developer to proceed with construction of the Improvements or any portion thereof; shortage or delay in shipment of material or fuel; acts of God; unusually adverse weather or wet soil conditions; adverse conditions affecting the Improvements in the Project Area; or other like causes beyond the parties’ reasonable control, including but not limited to, any litigation, court order or judgment resulting from any litigation affecting the validity of this Agreement; provided that such event of force majeure shall not authorize a delay hereunder of more than 120 days in any one calendar

year without the approval of the City, which approval shall not be unreasonably withheld or delayed, and any days in one calendar year shall not be carried over to increase the number of days of permitted delay in any subsequent calendar year. A party seeking to extend the time for performance of obligations pursuant to this Section shall notify the other party within thirty (30) days of the event of delay caused by force majeure.

- (c) This Agreement does not create a joint venture or partnership, and it does not authorize any party to act as an agent for any other party. This Agreement merely establishes a method, terms and conditions for constructing the Improvements and financing to the Project Costs.
- (d) This Agreement shall be construed in accordance with the laws of the State of Missouri.
- (e) The provisions of this Agreement are severable, and if any clause or provision shall be held invalid, illegal or unenforceable in whole or in part in any jurisdiction, then such invalidity or un-enforceability shall not in any manner affect such clause or provision in any other jurisdiction or any other clause or provision of this Agreement in any jurisdiction.
- (f) This Agreement may be executed in counterparts.
- (g) This Agreement (including all attached Exhibits) contains the entire understanding and agreement of the parties with respect to this agreement and may not be amended, modified, altered or varied except by an agreement in writing signed by all of the parties. All prior and contemporaneous agreements, understandings, negotiations, discussions, representations, warranties, commitments, offers and contracts, whether oral or written, are superseded by this Agreement.
- (h) All notices and requests desired, permitted and/or required to be given hereunder shall be in writing and shall be deemed effective (1) on the date delivered, if hand delivered; (2) on the date of receipt, if mailed by registered or certified U.S. Mail, return receipt requested, with adequate postage affixed; (3) on the date when delivered, if sent charges pre-paid, by a reputable commercial overnight delivery service or U.S. Express Mail as evidenced by service receipt or by Express Mail post mark; or (4) on the date when sent, if sent via facsimile, as evidenced by a written facsimile verification maintained by the sender of said facsimile. All notices shall be addressed to the Developers identified in this Agreement and/or to anyone else a Developer may subsequently designate in writing in the manner hereinabove set forth.

[remainder of page intentionally left blank; signature page follows]

IN WITNESS WHEREOF, the City and Developer have hereunto set their hands acknowledging their Agreement as set forth above:

CITY OF CHESTERFIELD, MISSOURI

By: _____

Name: _____

Title: _____

Date: _____

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS) SS

On this _____ day of _____, 200__, before me, a Notary Public, personally appeared _____, known to me to be the duly appointed and authorized representative and agent of CITY OF CHESTERFIELD, MISSOURI, who executed the foregoing Forward Financing Agreement, and acknowledged that he and/or she executed the same upon behalf of CITY OF CHESTERFIELD, MISSOURI, as his and/or her free and voluntary act and deed.

Notary Public

My Commission expires:

[Title of Developer]

By: _____

Name: _____

Title: _____

Date: _____

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS) SS

On this _____ day of _____, 200__, before me, a Notary Public, personally appeared _____, known to me to be the duly appointed and authorized representative and agent of _____, who executed the foregoing Forward Financing Agreement, and acknowledged that he and/or she executed the same upon behalf of _____, as his and/or her free and voluntary act and deed.

Notary Public

My Commission expires:

EXHIBIT A
LEGAL DESCRIPTION

EXHIBIT B
DESCRIPTION OF DEVELOPER'S PROPOSED IMPROVEMENTS

EXHIBIT C
ESCROW AGREEMENT