

CITY of NOVI CITY COUNCIL

Agenda Item B
October 24, 2011

SUBJECT:

Approval of an agreement with Novi Investment Company, LLC for extension of Water Main within Phase II of the Tuscany Reserve Development at the option of and by the City of Novi with repayment by April 1, 2017 or prior to further construction on Phase II of the development, whichever comes first.

SUBMITTING DEPARTMENT: Community Development Department *cm*

CITY MANAGER APPROVAL: *[Signature]*

BACKGROUND INFORMATION:

The Tuscany Development residential development located on the north side of 8 Mile Road east of Garfield Road was planned for fifty eight (58) home sites: thirty one (31) lots in Phase I and an additional twenty seven (27) lots in Phase II. The initial permit for the project was issued May 25, 2005. The portion of the water main serving Phase I is complete, as is much of the development for Phase I, including roads, utilities and other site improvements. Work on Phase II of the project was limited to clearing of the path of the future roadway and utilities and construction of an emergency fire access road.

Because Phase I of the project is still incomplete and Phase II is not likely to progress within the foreseeable future, Completion Agreements for extension of the project approval have been prepared for consideration separately by City Council as would be the normal course for any development under the City's performance guarantee process. This separate item involves water main improvements within the development that would normally be the obligation of the developer (water main extension through the development) but that the City is seeking approval to complete as part of a public project in the area, with the intention of having the developer reimburse the City for the improvements over time.

The water main originally proposed for installation with Phase II of the project—which would normally be the obligation of the developer—actually provides the “loop” connection for the City's own planned Garfield Road Water Main Extension—a water main extension in the right-of-way of Garfield road that is a public project. The loop connection provides a second source of water in the event of interruption and provides additional flow to maintain pressures. This allows the Garfield Road extension to provide more reliable water service to nearby properties including Tuscany Reserve.

As proposed, the attached agreement would allow the City to construct the water main through Phase II of the Tuscany Reserve Development at the same time the Garfield Road Extension is installed. Because the developer would normally be responsible for the cost of the extension through Phase II, the agreement calls for the City to be repaid in full either before the start of any construction in Phase II of Tuscany Reserve, or at the latest, within 5

years of the date of the agreement. Repayment is to be secured with a first lien against the lots in Phase II.

The estimated cost of the Phase II portion of the water main installation is \$150,000. The funds would come from the City Water and Sewer Fund allowing immediate realization of the service improvements provided by the Garfield Road main extension. This arrangement also allows the developer's existing Financial Guarantee amounts to suffice for the remaining site development work specified in the Completion Agreements.

RECOMMENDED ACTION:

Approval of an agreement with Novi Investment Company, LLC for extension of Water Main within Phase II of the Tuscan Reserve Development at the option of and by the City of Novi with repayment by April 1, 2017 or prior to further construction on Phase II of the development, whichever comes first.

	1	2	Y	N
Mayor Landry				
Mayor Pro Tem Gatt				
Council Member Fischer				
Council Member Margolis				

	1	2	Y	N
Council Member Mutch				
Council Member Staudt				
Council Member Wrobel				



October 18, 2011

30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500
Fax: 248-851-2158
www.secretwardle.com

THOMAS R. SCHULTZ.
Direct: 248-539-2847
tschultz@secretwardle.com

Mayor Landry and City Council
City of Novi
45175 W. Ten Mile Road
Novi, MI 48375

Re: *Water Main Extension Through Phase II of Tuscany Reserve*
Our File No. 55142 NOV

Dear Mayor Landry and Councilmembers:

At the City's request, we prepared an Agreement for Extension of Water Main through private property to connect to a public water main to be placed on Garfield Road north of Eight Mile Road. The private property is part of the Tuscany Reserve development. The Tuscany RUD contemplated that the developer, Novi Investment Company, LLC, would extend the water line through the entire site, both Phase I and Phase II, to Garfield Road. The developer has finished the site improvements in Phase I, including the water main. Phase II, however, has not yet commenced.

The City wants the water main being placed in Garfield Road to have a loop connection to the Tuscany Reserve water main. The City administration has therefore negotiated the attached agreement under which the City would, as part of the Garfield Road water main project, extend the main through the Phase II property to connect to the existing Phase I water main.

The agreement contemplates a maximum five-year payback, with earlier payment if the developer begins any work that requires permits in Phase II. In other words, the City would not issue permits for any Phase II development until it has been made whole for the extension of the water main. The cost of the water main at this point through Phase II is contemplated to be about \$150,000.

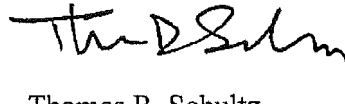
The payment would be secured by a lien on the Phase II property. If the agreement is approved by City Council, the City would seek subordination of any existing liens or mortgages that the developer has granted to others across the Phase II property, so that the City's lien would have priority.

Mayor Landry and City Council
October 18, 2011
Page 2

At this point, there appears to be no legal impediment to the City entering into this agreement as proposed. The public benefit to the City is the loop connection. The City retains complete control on the construction process, and the first lien on the Phase II property seems the best available security under the circumstances.

If you have any questions, please do not hesitate to call.

Very truly yours,



Thomas R. Schultz

TRS/jec

cc: Clay Pearson, City Manager
Victor Cardenas, Assistant City Manager
Maryanne Cornelius, City Clerk
Rob Hayes, City Engineer
Charles Boulard, Community Development Director

1738078

STATE OF MICHIGAN
COUNTY OF OAKLAND
CITY OF NOVI

AGREEMENT FOR EXTENSION OF WATER MAIN
(TUSCANY RESERVE—PHASE II)

This Agreement, dated _____, 2011 by and between the City of Novi, a Michigan municipal corporation, whose address is 45175 W. Ten Mile Road, Novi, Michigan 48375 (“City”), and Novi Investment Company, LLC, a Michigan limited liability company, whose address is 47765 Bellagio Drive, Northville, Michigan 48167 (“Developer”).

RECITATIONS:

1. Developer is the owner and developer of land in the City of Novi, Oakland County, Michigan, described in the attached Exhibit A (the “Property”). The Property has been approved for development as a 77.37 acre single-family Residential Unit Development (RUD), known as Tuscany Reserve, under Section 2404 of the City of Novi Zoning Ordinance.
2. The Tuscany Reserve RUD as approved contains fifty-eight (58) single-family home sites/units to be established as part of a site condominium development (“Development”).
3. Phase I of the Development includes 31 residential units and corresponding improvements. Phase II of the Development includes 27 residential units and corresponding improvements.
4. Phase I of the Development has been substantially commenced by the Developer and contains various site improvements, utilities, and homes, but is not complete. The initial permit for the Development was issued on May 25, 2005.
5. Phase II of the Development has not been substantially commenced at this point. There are minimal site improvements—specifically minor clearing and the construction of an emergency fire access road. No units or lots within the development have been

transferred to a third party. However, there is a lien in the approximate amount of \$700,000 on the remaining Phase I units.

6. The RUD plan for Phase II of the Development contemplates the construction, at the Developer's expense, of a water main in the through Phase II of the Development as shown on the attached Exhibit B (the "Phase II Water Main").
7. The Phase II Water Main has been designed by the Developer, and the approved engineering plans for the water main are attached as Exhibit C in reduced form, and are on file with the City of Novi Community Development Department.
8. At this point, the Developer does not intend to start Phase II of the Development within the foreseeable future, due to market constraints and other factors affecting its ability to market and sell units within the Development.
9. The City is planning an extension of the public water supply system, in Fiscal Year 2012/2013, consisting of a water main along Garfield Road in the area of the Tuscany Reserve development, and more particularly between Nine Mile Road and Tuscany Reserve, as shown on Exhibit B (the "Garfield Road Water Main Extension"). The purpose of the Garfield Road Water Main Extension is to provide more reliable water service to properties within Section 32 of the City, including Tuscany Reserve.
10. In order for the City extension to accomplish that purpose, however, the Phase II Water Main must be completed, so that the connection will function as a "loop" in the area. The Developer's assertion that it is currently unable to extend the water main through Phase II presents an issue with regard to completion of the planned loop and the purpose and usefulness of a public extension of the water main along Garfield Road by the City.
11. The City and Developer estimate that the cost of the extension of the water main through its current termination point in Phase I of the Development, through Phase II, to the area of Garfield Road where the City's project would commence at approximately \$150,000. The City has determined that there is a public purpose and public benefit to be served by the City undertaking the extension of the water main in Tuscany Reserve from its current terminus to Garfield Road as part of the construction of the City's Garfield Road water main extension project. In the event that the Garfield Road Water Main Extension Project goes forward, the City is willing to undertake the Phase II Water Main Extension concurrently with the Garfield Road Water Main Extension provided that the Developer will pay for the Phase II Water Main Extension—which remains under the RUD its obligation and not the City's—in an appropriate fashion. Developer is willing to grant the necessary easements and approvals to enter on its property to the City, and is willing to commit to payment as required by the City, in order to satisfy its obligations under the RUD and various City ordinance provisions.
12. The parties wish to establish the terms and conditions upon which the City would undertake the Phase II Water Main Extension of the water main through the Tuscany

Reserve Phase II property to Garfield Road, and the terms and conditions under which Developer would pay for such improvements.

NOW, THEREFORE, in consideration of the foregoing, the parties agree as follows:

- A. At least 30 days before commencement of construction, the Developer agrees to provide any easements for construction, operation, maintenance and repair of the Phase II Water Main Extension, in a location consistent with the plans set forth and attached as Exhibit C, that have not yet been provided to the City. The form of the easements shall be subject to approval by the City Attorney's office and acceptance by the City Council, and shall be substantially in the form set forth as Exhibit D. The consideration for any easements provided hereunder shall be reflected as One (\$1.00) Dollar. Upon completion of the Phase II Water Main Extension, Developer shall provide the remaining documentation, if any, necessary to complete conveyance of the Phase II Water Main Extension to the City for operation, maintenance and repair as part of the City's public water supply system.

- B. As part of its Garfield Road Water Main Extension Project, the City will construct the Phase II Water Main, including reasonable restoration, substantially in conformance with the plans set forth in Exhibit C. the water main shall extend from where it ends at its current terminus in Phase I, through Phase II of Tuscan Reserve, terminating at Garfield Road, and shall include a connection to the existing water main in Maybury Park. The City shall bid the Phase II Water Main Extension as a part of its public bid process for the Garfield Road Water Main Extension Project. The City shall retain all rights to determine the contractor for the project and shall follow its normal procedures for bidding, awarding, and documenting any and all agreements for the construction as a typical City of Novi public improvement contract. Developer shall have no authority, rights, or obligations with respect to the advertisement, awarding, or execution of the contract or contracts for the extension. If the Garfield Road Water Main Extension Project does not move forward or is not completed by the City for any reason, the City shall have no liability to the Developer, or its successors or assigns for failure to construct either the Garfield Road Water Main Extension or the Phase II Water Main Extension. The Developer hereby acknowledges that Developer has not relied upon the City's representations with respect to the installation of either the Garfield Road Water Main or the Phase II Water Main to its detriment in constructing or failing to construct the Development or any portion of the Development, or with respect to the reliability of its water system

- C. The parties' best current estimate for the cost of construction of the Phase II Water Main Extension is approximately \$150,000. At the completion of the Garfield Road Water Main Extension Project (i.e., upon final payment to the contractor as approved by the City Council), the City will provide Developer with a breakdown of the actual cost of the Phase II Water Main Extension. The breakdown shall be in the form of an invoice, and shall, to the extent possible, reflect the actual cost of the improvement attributable to the Phase II Water Main Extension construction. The Developer shall not be assessed any

costs or charges in connection with the Garfield Road Water Main Extension portion of the project.

- D. The parties acknowledge that the City is constructing the water main through Phase II of the Development because the Developer does not currently have sufficient funds to complete the extension. The Developer has further represented that it does not have sufficient funds to immediately pay the City for the improvement. It is therefore the parties' intention that the City will be paid back at the time of the development of Phase II.; provided, however, that the Developer can at any time before developing Phase II pay the amount owed to the City, and must pay the City back by April 1, 2017 at the latest.
- E. The terms and conditions of repayment, and the process under which the City will be repaid, are as follows:

- (1) **Lien on all Phase II Properties.** The City shall have a lien on the entire area of Phase II of the Development, including but not limited to the 27 residential units and corresponding improvements, in the amount of the actual construction costs of the water main improvement, as determined by the City and provided to the Developer as set forth in Paragraph C above. This Agreement shall be recorded against such properties, and the lien shall be a first lien on the property. The Developer shall secure, in a form acceptable to the City, a release or subordination of any liens or mortgages on the Phase II property.
- (2) **Prohibition on construction in Phase II until full payment.** To secure repayment as set forth herein, Developer agrees that no improvements in Phase II shall be commenced unless and until the City has been paid in full for the Phase II Water Main Extension, and no further development approvals will be granted. Developer agrees that the City will not hold any pre-construction meetings as required under the City ordinances until the full amount due under Paragraph C above has been paid to the City. The City will not issue any and all permits or grant any and all approvals for improvements in Phase II, including, but not limited to, site plan approval, site improvement permits, land improvement permits, soil erosion permits, building permits, or any similar permits or approvals. It is the express intent of the parties that the City will be made whole for its satisfaction of the Developer's obligation to provide the Phase II Water Main Extension before the Developer can take advantage of improvements with regard to development of Phase II
- (3) **Full payment date.** Notwithstanding any other provision of this agreement, Developer agrees that it will pay the City the full amount due hereunder by April 1, 2017. If the Developer fails to pay the amount due by such date, it shall be in default of this Agreement, and the City may proceed to collect the amount due in any legally permissible way, including: (a) foreclosure of the lien(s) as provided at law or in equity; (b) placing the unpaid amounts on the delinquent tax roll of the City as to the Property to be collected as and deemed to be delinquent real property taxes according to the laws made and provided for the collection of

delinquent real property taxes; or; (c) initiation of an action at law or in equity against the Developer; or any other action permissible at law or equity. Developer further agrees that any cost or expenses incurred by the City in the collection of any amounts due under this Agreement, including actual attorneys' fees, shall be paid by and shall be the obligation of the Developer.

- F. This Agreement shall run with the land constituting the property described on Exhibit A and shall be binding upon and inure to the benefit of the City and Developer and to their respective heirs, successors, assigns, and transferees.
- G. Developer hereby warrants that it is the owner of the Property described on attached Exhibit A, and that is, and Developer have the full authority to execute this Agreement.
- H. A delay in enforcement of any provision of this Agreement shall not be construed as a waiver or estoppel of the City's right to eventually enforce, or take action to enforce, the terms of this Agreement.
- I. Each covenant, requirement, obligation, and provision contained herein shall be considered to be an independent and separate covenant and agreement, and, in the event one or more of the covenants, requirements, obligations, or provisions shall for any reason be held to be invalid or unenforceable by the court of competent jurisdiction, all remaining covenants, requirements, obligations and provisions shall nevertheless remain in full force and effect.
- J. Developer and City agree that this Agreement and its terms, conditions, and requirements are lawful and consistent with the intent and provisions of local ordinances, state and federal law, and the Constitutions of Michigan and the United States of America. Developer agreed to complete the water main improvements at its cost and expense, as specified in the RUD, and acknowledges that it has authorized the City to do so in its place and stead. Developer agrees that the terms and conditions under which the City has agreed to do so, as set forth in this Agreement, are intended to protect the public health, safety, and welfare and provide material advantages and development options for the Developer, all of which improvements and obligations Developer and the City agreed were roughly proportional to the burden imposed and necessary in order to ensure that public services and facilities necessary for or affected by the Development will be capable of accommodating the development on the Property, and to achieve other reasonable and legitimate objectives of the City and Developer, as authorized under applicable City ordinances and the Home Rule City Act, MCL 117.1, et seq.

Furthermore, Developer fully accepts and agrees to the final terms, conditions, requirements, and obligations of this Agreement, and Developer shall not be permitted in the future to claim that the effect of this Agreement results in an unreasonable limitation upon use of all or any portion of the Property, or claim that enforcement of this Agreement causes an inverse condemnation or taking of all or any portion of such property. It is further agreed and acknowledged that the terms, conditions, obligations, and requirements of this Agreement are clearly and substantially related to the burdens to

be created by the development of the Property, and are, without exception, clearly and substantially related to the City's legitimate interests in protecting the public health, safety, and general welfare.

- K. This Agreement shall be interpreted and construed in accordance with Michigan law, and shall be subject to enforcement only in Michigan courts.
- L. As used in this Agreement, the term "Developer" shall mean and include the undersigned party designated herein as developer and owner of the Property, as well as all future and successor persons and entities that become owners and developers of all or any portion of the Development property in the future until such time as all phases of the Development have been completed and approved.
- M. Any headings contained herein are for the convenience of the parties and are not to be used in construing or interpreting this Agreement.
- N. This Agreement is deemed effective as of the date first written above.

"DEVELOPER"

NOVI INVESTMENT COMPANY, LLC,
a Michigan limited liability company

By: MEG Development, LLC
A Michigan limited liability company
Its: Authorized Manager

By: _____
Mark F. Guidobono
Its: Authorized Member

STATE OF MICHIGAN)
)ss
COUNTY OF OAKLAND)

The foregoing instrument was acknowledged before me this ____ day of _____, 2011, by _____, as the _____ of _____.

Notary Public
Oakland County, Michigan
Acting in Oakland County, Michigan
My Commission Expires: _____

“CITY”

CITY OF NOVI,
a Michigan municipal corporation

By: _____

Its: Mayor

By: _____

Its: Clerk

STATE OF MICHIGAN)
)ss
COUNTY OF OAKLAND)

The foregoing instrument was acknowledged before me this ____ day of _____, 2011, by _____, Mayor and _____, Clerk of the City of Novi.

Notary Public
Oakland County, Michigan
Acting in Oakland County, Michigan
My Commission Expires: _____