

**IMPROVEMENT AGREEMENT**  
(water main installation)

This Improvement Agreement (this "Agreement") is made and entered into as of March 7, 2021 by and between the City of Newport, an Oregon municipal corporation (the "City"), and Wyndhaven Ridge, LLC, an Oregon limited liability company, hereinafter referred to as "Developer."

**RECITALS:**

WHEREAS, Developer owns the real property at 1345, 1355, 1365, and 1375 NE Lakewood Drive, more specifically described in Exhibit A ("Property"), upon which they are constructing 66 multi-family apartment units; and

WHEREAS, this new development will require public water, sanitary sewer, street, and storm drainage services, and City has identified, and Developer is prepared to improve, those services that are required to support the apartment project; and

WHEREAS, in the course of reviewing Developer's plans to improve public services, City determined that it is necessary to replace and realign a portion of an existing 12-inch Asbestos-Cement (AC) water main located along NE Harney Street, between NE Lakewood Drive and NE 31<sup>st</sup> Street; and

WHEREAS, Developer is best positioned to perform the work since they need to replace sections of the 12-inch AC water main to resolve conflicts with a sanitary sewer main that they need to extend north to serve the 66 multi-family apartment units; and

WHEREAS, having Developer patch the sections of the 12-inch AC water main where there are conflicts with the sanitary sewer work is not an option, as such solution could compromise the integrity of the water distribution system; and

WHEREAS, City has determined, and Developer agrees, that the most efficient and effective approach is for the complete section of the water main between the above street intersections to be replaced and realigned concurrent with development of the Property, given that Developer will be working in the immediate area to improve other public services, with City reimbursing Developer for the cost of the construction above and beyond what is directly impacted by their project; and

WHEREAS, it is appropriate and necessary that Developer be reimbursed for the cost of the water main work because the need to replace the 12-inch AC water main is not attributed to the apartment project, and is being pursued instead out of a desire by the City to improve the functionality and longevity of the water system more generally; and

WHEREAS, since the 12-inch AC water main at issue provides domestic water to the 66 multi-family apartment units, it is necessary that the water main be replaced before the apartments are occupied; and

WHEREAS, the parties are entering into this Agreement to confirm certain matters relating to the replacement of the water main.

IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES above mentioned, for and in consideration of the mutual promises hereinafter stated, as follows:

1. Recitals. The Recitals to this Agreement set forth above are hereby incorporated herein as if fully set out, shall constitute contractual provisions and are not mere recitals.

2. Exhibits. The exhibits set forth below and attached to this Agreement are hereby incorporated herein by this reference.

- a. Exhibit A – Legal description of the real property subject to this Agreement.
- b. Exhibit B – Developer's cost estimate of the water main replacement.
- c. Exhibit C – Engineering drawing illustrating the nature and location of the water main improvements.

3. Identification of Required Improvements. Developer shall install and complete, or cause to be installed and completed, the Required Improvements. As used herein, the term "Required Improvements" shall mean and refer to the following:

- a. Replacement of approximately 1,000 lineal feet of 12-inch AC water line, including associated excavation, rock fill, pipe, fittings, concrete encasement and asphalt patching in a manner consistent with what is shown on Exhibit C.

4. Construction of Required Improvements. The Required Improvements shall be installed and completed and the plans and construction specifications related thereto shall be inspected and receive approval from the City Engineer prior to issuance of certificates of occupancy for the apartment building(s) on the Property. The City will accept the Required Improvements only if they have been inspected and accepted by the City Engineer. The City Engineer shall accept the Required Improvements if the work and materials are in accordance with the agreed upon plans and construction specifications.

5. License to Enter and Remain on Property. Developer hereby grants City and City's employees, engineers, consultants, agents, contractors, subcontractors and suppliers license to come onto and remain on the Property as necessary to make inspections of the Required Improvements.

6. Payment for Required Improvements. City agrees to reimburse Developer for actual costs incurred to construct Required Improvements, provided such costs do not exceed \$83,984, such amount being 125% of the estimated cost of the Required Improvements as set forth in Developer's cost estimate. Payment to Developer for actual costs shall be supported with contractor's invoice(s) and a signed statement from the Contractor confirming they have received payment. In the event Developer cannot obtain a bid from a licensed contractor to construct Required Improvements for a price at or below the 'not-to-exceed' amount, City agrees to work in good faith with Developer to either modify the scope of work such that Required Improvements can be completed at or below the 'not-to-exceed' amount or secure funds to cover the additional cost.

7. Ownership of Required Improvements. The Required Improvements shall be owned by City upon its acceptance of the same.

8. License to Use Permits, Specifications and Plans. If Required Improvements are not completed and accepted by the City within 24 months of this Agreement, Developer shall, upon request of the City, license to and provide City with all of Developer's applicable permits, plans and specifications and other documents necessary or useful in the completion of or related in any manner to the applicable Required Improvements.

9. No Third-Party Beneficiaries. City and Developer are the only parties to this Agreement and are the only parties entitled to enforce its terms. Nothing in this Agreement gives or provides any benefit or right, whether directly, indirectly, or otherwise, to third persons unless such third persons are individually identified by name in this Agreement and expressly described as intended beneficiaries of this Agreement.

10. Expiration. This Agreement shall expire at such time as Developer obtains a certificate of occupancy for its first apartment building or twenty-four (24) months from the date of this Agreement, whichever is sooner.

11. No Agency. It is agreed by and between the parties that Developer is not carrying out a function on behalf of City, and City does not have the right of direction or control of the manner in which Developer completes performance under this Agreement nor does City have a right to exercise any control over the activities of the Developer.

12. Liens. Developer shall pay as due all claims for work done on and for services rendered or material furnished to the Property and shall keep the Property free from liens.

13. Waivers. No covenant, term or condition of this Agreement shall be deemed to have been waived by any Party, unless such waiver is in writing signed by the Party charged with such waiver. Any waiver of any provision of this Agreement, or any right or remedy, given on any one or more occasions shall not be deemed a waiver with respect to any other occasion.

14. Entire Agreement/Modifications. This Agreement constitutes the entire agreement between and among the Parties with respect to the subject matter herein contained and all prior negotiations, discussions, writings and agreements between the Parties with respect to the subject matter herein contained are superseded and of no further force and effect. This Agreement cannot be amended or modified without a writing signed by all of the Parties hereto.

15. Severability. The unenforceability or invalidity of any provisions hereof shall not render any other provision herein contained unenforceable or invalid.

16. Oregon Law; Attorneys' Fees. This Agreement shall be interpreted, construed and enforced in accordance with the law of the State of Oregon, without regard to conflict of law principles. If any suit, action or proceeding (including under the U.S. Bankruptcy Code) is brought to declare, interpret, or enforce any rights under this Agreement, or for the breach of any warranty, representation, covenant, term or condition hereof, the prevailing party in such suit, action or proceeding, including at arbitration, at trial, on appeal to an appellate court arising therefrom, or on any petition for review, shall be entitled to recover reasonable attorneys' fees in addition to costs and disbursements.

17. Covenants Running with the Land. It is the intention of the parties that the obligations set forth in this Agreement are also covenants necessary for the development of Property and as such shall run with the Property and shall be binding upon the heirs, executors, assigns, administrators, and successors of the parties hereto, and shall be construed to be a benefit and burden upon the Property.

18. Further Assurances. Each party shall execute and deliver any and all additional papers, documents and other assurances, and shall do any and all acts and things reasonably necessary in connection with the performance of its obligations hereunder in good faith, to carry out the intent of the parties hereto.

19. Indemnification. Developer shall be responsible for any and all injury to any and all persons or property caused directly or indirectly by reason of any and all activities of Developer under this Agreement and the failure of developer to comply with this Agreement; and further agrees to defend, indemnify and save harmless City, its officers, agents and employees from and against all claims, suits, actions, damages, costs, losses and expenses in any manner resulting from, arising out of, or connected with any such injury or noncompliance. Notwithstanding the foregoing, Developer shall have no liability for, and no obligation to indemnify the City for, any liability, loss, injury or damage to the extent the same arises out of the actions or inactions of the City.

20. Counterparts. This Agreement may be executed in several counterparts, all of which when taken together shall constitute one Agreement binding on all parties, notwithstanding that all parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.

21. Notice. Except as otherwise expressly provided in this Agreement, any communications between the parties hereto or notices to be given hereunder shall be given in writing to Developer or City at the addresses set forth below or to such other addresses or numbers as either party may hereafter indicate in writing. Delivery may be by personal delivery, facsimile, or mailing the same, postage prepaid. Communication or notice by personal delivery shall be deemed delivered when actually given to the designated person or representative. Any communication or notice sent by facsimile shall be deemed delivered when the transmitting machine generates receipt of the transmission. To be effective against City, such facsimile transmission shall be confirmed by telephone notice to City Recorder. Any communication or notice mailed shall be deemed delivered three (3) days after mailing. Any notice under this Agreement shall be mailed by first class postage or delivered as follows:

To Developer:

Wyndhaven Ridge, LLC  
Attn: Todd Woodley, Agent  
42242 Salmon Creek Road  
Baker City, Oregon 97814

To City:

City of Newport  
Attn: City Engineer  
169 SW Coast Highway  
Newport, Oregon 97365

22. Captions. The captions contained in this Agreement were inserted for the convenience of reference only. Captions do not, in any manner, define, limit, or describe the provisions of this Agreement or the intentions of the parties.

Executed as of this 4<sup>th</sup> day of March 2021.

City:

CITY OF NEWPORT

By: Margaret M. Hawker  
Name: MARGARET M. HAWKER  
Title: Acting City MANAGER

Developer:

WYNDHAVEN RIDGE, LLC

By: Todd Woodley  
Name: TODD WOODLEY  
Title: MANAGER

Approved as to Form:

David W. Allen  
City Attorney

**EXHIBIT A**

**(Legal Description of Real Property Subject to this Agreement)**

**PARCEL 1 OF PARTITION PLAT 2019-11 RECORDED IN THE LINCOLN COUNTY PLAT RECORDS, TOGETHER WITH VACATED RIGHT-OF-WAY THAT ACCRUED TO SAID PARCEL FOLLOWING THE ADOPTION OF CITY OF NEWPORT ORDINANCE NO. 2162.**



# EXHIBIT B

## (Developer's Cost Estimate of Water Main Replacement)

Runions Construction LLC

521 NE Newport Heights Drive  
Newport, OR 97365

### Estimate

Date	Estimate #
2/17/2021	1

Name / Address
Wyndhaven Ridge Apartments Todd Woodley 42242 Salmon Creek Rd. Baker City, OR 97814

			Project
Description	Qty	Cost	Total
Pipe and fittings	1	25,254.41	25,254.41T
Cost of Rock Delivered to jobsite/Per Load	1	5,800.00	5,800.00
Saw cut asphalt	1	1,500.00	1,500.00T
Excavation,trucks,loader,pipe layer,top guy,flagger		19,320.00	19,320.00T
Water line		2,000.00	2,000.00T
Concrete, CDF		6,970.00	6,970.00
Asphalt patching		6,125.00	6,125.00T
Corporate Activity Tax		0.40%	216.80
		<b>Total</b>	<b>\$67,186.21</b>

Customer Signature \_\_\_\_\_

(Engineer's Drawing of the Nature and Extent of the Water Line Improvements)

