

Note: Supporting documents follow agenda.

CITY OF BILLINGS

CITY OF BILLINGS VISION STATEMENT:

**“THE MAGIC CITY – A VIBRANT, WELCOMING PLACE WHERE
PEOPLE FLOURISH AND BUSINESS THRIVES.”**

AGENDA

May 26, 2009

6:30 P.M.

CALL TO ORDER – Mayor Tussing

PLEDGE OF ALLEGIANCE – Mayor Tussing

INVOCATION – Councilmember Ronquillo

ROLL CALL

MINUTES – May 11, 2009

COURTESIES – Skyview High School Student Presentation

PROCLAMATIONS

ADMINISTRATOR REPORTS – Tina Volek

PUBLIC COMMENT on “NON-PUBLIC HEARING” Agenda Items: 1, 2(a), and 2(b) ONLY. Speaker sign-in required. (Comments offered here are limited to 1 minute per speaker. Please sign up on the clipboard located at the podium. Comment on items listed as public hearing items will be heard ONLY during the designated public hearing time for each respective item.)

(NOTE: For Items not on this agenda, public comment will be taken at the end of the agenda. Please sign up on the clipboard located at the back of the room.)

CONSENT AGENDA:

1. A. Bid Awards:

(1) **W.O. 08-23, West Wicks Lane Water, Sanitary Sewer, and Storm Drain Improvements.** (Opened 5/12/09). Recommend Knife River, \$324,240.

(2) **Well Pump Replacements, Wastewater Treatment Plant.** (Opened 5/12/09). Recommend Star Service, \$128,400.

(3) **Airport Terminal Building Roof Replacement.** (Opened 5/12/09). Recommend rejection of all bids and authorization to seek new bids.

(4) Taxiway "A" East Rehabilitation Project, funded by American Recovery and Reinvestment Act. (Opened 5/12/09). Recommend Riverside, \$947,432.55.

(5) AIP 035 – General Aviation Taxilane Rehabilitation. (Opened 5/26/09). Recommend delay of award to June 8, 2009.

B. Approval of members of the ad hoc committee to promote annexation east of the East End TIF District.

C. Approval of contract with Innoprise Software, Inc. for replacement of the existing Enterprise Software System, five year term, \$90,000 per year.

D. Approval of License and Service Agreement with Destiny Solutions, Inc. for agenda management software, \$19,950; annual maintenance fee second year forward, \$3,200.

E. Approval of Facility Use Agreement for Dehler Park between the Billings Mustangs and Montana State University-Billings.

F. Approval of Facility Use Agreement for Dehler Park between the Billings Mustangs and the American Legion.

G. Approval of 20-year combined Ground Lease with the Bureau of Land Management for a new fire station site and the existing tanker base/dispatch center at Billings Logan International Airport; May 1, 2009 – April 30, 2028; \$86,668.50 first year revenue; subsequent years adjusted according to the CPI-U.

H. Approval of two-year contract extension with EideBailly LLP for audit services for fiscal years 2009 and 2010, \$116,300.

I. Perpetual Right-of-Way Easement with Billings Clinic for construction of a sewer main along Shiloh Road between Howard Avenue and Broadwater Avenue for W.O. 07-16, Shiloh Road Corridor Water and Sewer System Improvements, at no financial impact to the City.

J. Approval of Quarterly Report for Pledged Collateral for First Interstate Bank Certificate of Deposit, US Bank Municipal Investor Accounts, US Bank Repurchase Account, and US Bank Certificates of Deposit.

K. Approval of Downtown Revolving Fund Loan to EB Ventures, LLC, to remodel Yellowstone Garage Building for restaurant space, not to exceed \$200,000.

L. Approval of Downtown Revolving Fund Loan extension of promissory notes of William and Marcia Honaker, secured by the Securities Building and the Securities Building Parking Lot, approximately \$300 additional interest income.

M. Approval of application and acceptance of Internet Crimes Against Children (ICAC) Continuation Grant, \$200,000.

N. Resolution of Intent to expand the Downtown Business Improvement District No. 0001 to include the new MET Transfer Center, and set a public hearing for June 22, 2009.

O. Resolution rescinding Resolution of Intent to Create No. 09-18813, Special Improvement Lighting Maintenance District 307, and cancelling the public hearing set for June 8, 2009.

P. Second/final reading ordinance expanding the boundaries of Ward IV to include recently annexed property in Annexation #09-02, a .74-acre property described as Lot 26, Block 19, Lillis Heights Subdivision, and located at 4739 Rimrock Road; MCS Properties, LLC, owner and petitioner.

Q. Preliminary Minor Plat of Lenhardt Square Subdivision, 1st Filing, a 33.8 acre tract described as Tract 1A of C/S 2063, Amended, located in Section 10, T1S, R25E; generally located north of King Avenue West, across from the Montana Sapphire Subdivision; **approval of two variance requests:** (1) allowing a 56 foot right-of-way dedication along 44th Street West and Monad Road adjacent to the subdivision; (2) allowing a total 8.5 foot right-of-way for boulevard and sidewalk along 44th Street West and Monad Road; and adoption of the Findings of Fact. M & K Blue One, LLC/Lenhardt Property, LLC, applicant; Sanderson Stewart, engineer. (Delayed from 4/27/09).

R. Preliminary Subsequent Minor Plat of Kuhlman Subdivision, Amended Lot 6, a .46-acre tract described as Lot 6, Section 22, T1N, R26E, generally located at 512 Josephine Drive; **approval of variance request** allowing a 30-foot street right-of-way for Kuhlman Drive; and adoption of the Findings of Fact. Troy Boucher, applicant, Blueline Engineering, LLC, engineer.

S. Final Plat of Flanagan Subdivision, Amended Lot 5.

T. Bills and Payroll

- (1) April 24, 2009
- (2) May 1, 2009
- (3) February 1, 2009-April 30, 2009, Municipal Court

(Action: approval or disapproval of Consent Agenda.)

REGULAR AGENDA:

2. **BENCH BOULEVARD PROJECT – 6TH AVENUE NORTH TO LAKE ELMO ROAD, PHASE 1; CM 1099 (32)**
 - (a) **MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF BILLINGS AND YELLOWSTONE COUNTY** regarding local funding match requirements; Yellowstone County - \$1,000,000 and road easement valued at \$175,000; City of Billings - \$526,185. Staff recommends approval. (**Action:** approval or disapproval of staff recommendation.)
 - (b) **AMENDMENT #1 TO THE GENERAL PROJECT DEVELOPMENT AND CONSTRUCTION AGREEMENT BETWEEN MONTANA DEPARTMENT OF TRANSPORTATION AND THE CITY OF BILLINGS**, amending the contract dated September 10, 2001, to split the project into two phases. Staff recommends approval. (**Action:** approval or disapproval of staff recommendation.)
3. **PUBLIC HEARINGS FOR AMENDMENTS TO THE COMMUNITY DEVELOPMENT BLOCK GRANT AND HOME INVESTMENT PARTNERSHIP PROGRAMS AND THE FY2008-2009 ANNUAL ACTION PLAN** to accept additional funding of \$190,430 from the American Recovery and Reinvestment Act. Staff recommends approval. (**Action:** approval or disapproval of staff recommendation.)
4. **PUBLIC HEARING AND RESOLUTION** ordering construction of the improvements identified in W.O. 08-30, Poly Drive Sidewalk Improvements – Billings, Federal Aid No. STPE 1099(61). Staff recommends approval. (**Action:** approval or disapproval of staff recommendation.)
5. **PUBLIC HEARING FOR SPECIAL REVIEW #876:** A special review to allow a drive-through window for a new coffee shop in an existing multi-tenant building in a Community Commercial zone adjacent to Residential 7000 and Residential 6000 zoning districts, on Lots 25-27, Block 5, Central Heights Subdivision, located at 2156 Central Avenue; Michael Stock, owner; Rob Veltkamp, agent. Zoning Commission recommends conditional approval. (**Action:** approval or disapproval of Zoning Commission recommendation.)
6. **PUBLIC HEARING FOR SPECIAL REVIEW #877:** A special review to allow a drive-through window for a Burger King restaurant in a new building in a Community Commercial zone adjacent to a Residential 7000 zoning district, on Lot 2, Sweet Subdivision, 2nd Filing (aka C/S 263 Tract 5), located at 2434 Grand Avenue, just west of the CVS Pharmacy under construction at 24th Street West and Grand Avenue; Montana CVS Pharmacy, owner; Food Service Concepts and Morrison-Maierle, agents. Zoning Commission recommends conditional approval. (**Action:** approval or disapproval of Zoning Commission recommendation.)

7. **PUBLIC HEARING FOR SITE DEVELOPMENT ORDINANCE VARIANCE #OP-09-01:** A request for a variance to allow access through the alley at a new Burger King restaurant on Lot 2, Sweet Subdivision, 2nd Filing, at 2434 Grand Avenue; Montana CVS Pharmacy, owner; Food Service Concepts and Morrison-Maierle, agents. Staff recommends approval subject to the condition that the alley be paved from the west edge of the Burger King site (Lot 2) all the way to 24th Street West. (**Action:** approval or disapproval of staff recommendation.)
8. **PUBLIC COMMENT on Non-Agenda Items -- Speaker sign-in required.**
(Restricted to ONLY items not on this printed agenda; comments limited to 3 minutes per speaker. Please sign up on the clipboard located at the back of the Council Chambers.)

Council Initiatives

ADJOURN

Additional information on any of these items is available in the City Clerk's Office.

Reasonable accommodations will be made to enable individuals with disabilities to attend this meeting. Please notify Cari Martin, City Clerk, at 657-8210.



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: W.O. 08-23 West Wicks Lane Water, Sanitary Sewer, and Storm Drain Improvement

DEPARTMENT: Public Works/Engineering

PRESENTED BY: David D. Mumford, PE, Public Works Director

PROBLEM/ISSUE STATEMENT: Bids were received and evaluated for Work Order 08-23, West Wicks Lane Water, Sanitary Sewer, and Storm Drain Improvement, on May 12, 2009. The project will provide water, sanitary sewer and storm drain improvements on Wicks Lane.

ALTERNATIVES ANALYZED:

1. Award the contract for W.O. 08-23 to Knife River in the amount of \$324,240; or
2. Reject all bids and do not award contract for W.O. 08-23

FINANCIAL IMPACT: We received seven bids for this project as follows:

<u>Contractor</u>	<u>Total Base Bid</u> (Schedules 1 & 2)	<u>Total Base Bid + Additive Alternates 1 & 2</u>
Engineer's Estimate	\$306,218.79	\$404,390.79
Knife River	\$247,884.00	\$324,240.00
Williams Civil Division	\$291,998.00	\$365,627.00
JEM Contracting	\$300,175.00	\$375,619.26
COP Construction	\$286,588.00	\$376,579.00
Castlerock Excavating	\$301,760.99	\$388,354.57
Western Municipal	\$337,479.70	\$409,745.20
Capstone Construction	\$335,611.23	\$415,418.99

A breakdown of the project funding sources available is listed below:

US Army Corps of Engineers Grant	\$231,075
Private Contributions	\$212,098
City Funds (water, sewer, storm drain)	\$75,474
Funding Available	\$518,647

RECOMMENDATION

Staff recommends that Council award the bid for W.O. 08-23 West Wicks Lane Water, Sanitary Sewer, and Storm Drain Improvement to Knife River in the amount of \$324,240, which includes the Additive #1 and Additive #2 for paving.

Approved By: **City Administrator** **City Attorney**



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Bid Award – Well Pump Replacements – Wastewater Plant

DEPARTMENT: Public Works Department

PRESENTED BY: David D. Mumford, P.E., Public Works Director

PROBLEM/ISSUE STATEMENT: Dewatering wells are located around the perimeter of the wastewater plant. Eleven of the pumps in these wells are in need of replacement to ensure continued dewatering of groundwater.

FINANCIAL IMPACT: Bids were publicly advertised for the replacement of these pumps on April 30 and May 7, 2009. Bids were opened on May 12, 2009. The replacement of these well pumps is part of the approved CIP and there is adequate funding in the wastewater plant budget for this expenditure. There was only one bid received. The bid result is:

Star Service, Inc.	\$128,400.00
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RECOMMENDATION

Staff recommends that Council award the bid for the Well Pump Replacement to Star Service, Inc. in the amount of \$128,400.00.

Approved By: **City Administrator** **City Attorney**



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Award of the Airport Terminal Building Roof Replacement Project

DEPARTMENT: Aviation and Transit

PRESENTED BY: Thomas H. Binford, A.A.E., Director of Aviation and Transit

PROBLEM/ISSUE STATEMENT: Included in the City's Capital Improvement Program is the Airport Terminal Building Roof Replacement project. As recommended in the Airport Terminal Roofing Survey completed in 2004, a number of identified roof areas will eventually be removed and replaced on the Terminal Building, encompassing 45,000 square feet that are regularly leaking or nearing the end of the roofing material's life cycle. Due to the anticipated high cost to replace all roof sections that were identified in the 2004 study, the first phase of the roof replacement was bid in 2007, and completed in early 2008. This year's project is the second phase of roof replacement, which will include 13,500 square feet of roof areas over the restaurant, kitchen, and Concourse A of the Terminal Building.

The new roofing system will be an Ethylene Propylene Diene Monomer (EPDM) roof membrane installed over a new tapered insulation roof system. This new system will have a higher insulation value than the old roof, and will reduce heating and cooling costs. Additionally, there will be fewer maintenance costs, as there will be significantly less water leakage into the Terminal once the new roofing is in place. The project has been advertised in the *Billings Times*, at the Billings Builders Exchange, and on the City's Web Site. On May 12, 2009, the Airport received the following bids for this project:

<u>CONTRACTOR</u>	<u>BID</u>
Commercial Roofing	\$173,500
Empire Roofing	\$160,460
Summit Roofing	\$280,000
ESTIMATE	\$200,000

Neither Commercial Roofing nor Empire Roofing included a signed acknowledgement of the Liquidated Damages form as required in the bid specifications, subsequently rendering their bids non-responsive. Staff has reviewed the bid from Summit Roofing and has determined that the per square foot cost of the work in their bid, for this type of project, is excessive when compared to previous costs paid on past roofing projects.

RECOMMENDATION

Staff recommends that the City Council reject all bids for the Airport Terminal Building Roof Replacement project and authorize staff to seek new bids for this work.

Approved By: City Administrator City Attorney



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Award of Taxiway "A" East Rehabilitation Project to be Funded with an American Recovery and Reinvestment Act (ARRA) Grant

DEPARTMENT: Aviation and Transit

PRESENTED BY: Tom Binford, A.A.E., Director of Aviation and Transit

PROBLEM/ISSUE STATEMENT: Billings Logan International Airport's approved "shovel ready" stimulus project is the Taxiway "A" East Rehabilitation project. While this project is being funded with American Recovery and Reinvestment Act (ARRA) funds, the Federal Aviation Administration (FAA) will administer the grant similar to the annual Airport Improvement Program (AIP) grants that the Airport receives.

The Taxiway "A" East Rehabilitation project was selected for the ARRA program because the asphalt surface on this portion of the Taxiway is 13 years old and has begun to break apart, creating foreign object debris (FOD) that, if ingested into a jet engine or aircraft propeller, can result in serious aircraft damage. This FAA eligible project will remove two inches of the existing surface and replace it with two inches of dense graded asphalt. Additionally, a second schedule of work to remove a hillside obstruction at the very east end of Taxiway "A" will also be included in the bid. The second schedule will only be awarded if construction prices continue to come in favorably and the designated ARRA funds are available to complete the work. The paving work will begin just east of the Terminal Building and continue east to the run up area. The obstruction removal, which will consist of excavating a hillside, will take place on the east side of the run up area. The bid prices and available funding will determine if both project schedules can be completed.

This project has been advertised in the *Billings Times* for two weeks, and was on the City's Web Site. On May 12, 2009, the Airport received the following bids for this project:

<u>CONTRACTOR</u>	<u>BID</u>
Riverside	\$947,432.55
Knife River	\$953,976.95
ESTIMATE	\$1,400,000

FINANCIAL IMPACT: The total cost of this project is \$947,432.55, and is funded 100% with an American Recovery and Reinvestment Act Grant.

RECOMMENDATION

Staff recommends that the Council approve the award of the ARRA funded Taxiway "A" East Rehabilitation project to the low bidder, Riverside, for the amount of \$947,432.55.

Approved By: **City Administrator** **City Attorney**



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Postponement of Award of Airport Improvement Program (AIP) Project for General Aviation Taxi Lane Rehabilitation

DEPARTMENT: Aviation and Transit

PRESENTED BY: Tom Binford, A.A.E., Director of Aviation and Transit

PROBLEM/ISSUE STATEMENT: One of the Airport's FY 2009 approved Capital Improvement Program projects is the General Aviation Taxi Lane Rehabilitation. This work will be funded at 95% with Federal Aviation Administration (FAA) Airport Improvement Program (AIP) grant funds, and 5% local capital funds. This project will resurface the taxi lanes in the Fixed Base Operator (FBO) area near Gates 14, 15, and 16, and at the west end General Aviation Hangar and Executive Hangar areas. The existing surfaces will be removed and re-graded to prevent water from ponding on the taxi lanes, and a new surface of dense graded asphalt will be installed.

Additionally, a second bid schedule was included for the repaving of the City owned ramp areas adjacent to the taxi lanes being resurfaced in the Executive Hangar area. This bid schedule was included to take advantage of the potentially favorable pricing that the Airport could receive for this work since the contractors will already be in this area to perform the taxi lane work. Also, staff believes that while oil prices are still down compared to the previous year's prices, it may be an opportune time to do the additional paving needed for these 20 plus year old ramps. While this second schedule of work is not part of this year's AIP grant program, it would be eligible for reimbursement in future years. Once bids have been analyzed, staff will provide Council a recommendation on this second schedule to pave the City owned ramps.

This project has been advertised in the *Billings Times* for two weeks, and was on the City's Web Site. On May 26, 2009, we will receive bids for this project, which is estimated to be around \$1,200,000.

RECOMMENDATION

In order to properly review and tabulate the bids received, staff recommends that the City Council postpone award of AIP Project for General Aviation Taxi Lane Rehabilitation for Billings Logan International Airport until the June 8, 2009, City Council meeting.

Approved By: **City Administrator** **City Attorney**

B

Approval of members of the ad hoc committee to promote annexation east of the East End TIF District. (To be added)



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Tuesday, May 26, 2009

TITLE: Approve Contract for Enterprise Software Systems
DEPARTMENT: Administration - ITD
PRESENTED BY: David Watterson, ITD Manager

PROBLEM/ISSUE STATEMENT: The City of Billings has utilized software from SunGard Public Sector (formally known as H.T.E.) since 1989. An organizational wide desire exists for improved access to information and to have enhanced browser-based user interfaces. An Enterprise Software Systems (ESS) Committee was formed in the fall of 2008 to determine if the City of Billings should remain with SunGard Public Sector or if it would be better served by migrating to another solution. After advertising an RFQ and reviewing the responses, the ESS Committee selected Innoprise as the only vendor qualified to meet the advertised needs. Innoprise conducted on-site demonstrations and members of the ESS Committee visited five (5) Innoprise customer sites in Colorado. The ESS Committee unanimously recommends proceeding with a conversion to the software solutions proposed by Innoprise Software, Inc.

FINANCIAL IMPACT: The City of Billings currently budgets for and pays SunGard Public Sector an annual software maintenance fee. This fee is subject to annual increase and has been assessed at \$ 90,022 for FY2010. The contract with Innoprise Software, Inc. is set at \$ 90,000/yr for five (5) years for a total of \$ 450,000.

RECOMMENDATION

Staff recommends that Council approve entering into a contract with Innoprise Software, Inc. at a cost of \$ 90,000/yr for 5 years to provide the City of Billings with a state-of-the-art Enterprise Software System.

Approved By: **City Administrator** **City Attorney**

ATTACHMENTS

- A: Innoprise Master Agreement
- B: Innoprise Licensing Agreement
- C: Innoprise Support Services Agreement

INTRODUCTION

The City of Billings has utilized software from SunGard Public Sector (formally known as H.T.E.) since 1989. An organizational wide desire exists for improved access to information and to have enhanced browser-based user interfaces. An Enterprise Software Systems (ESS) Committee was formed in the fall of 2008 to determine if the City of Billings should remain with SunGard Public Sector or if it would be better served by migrating to another solution. After advertising an RFQ and reviewing the responses, the ESS Committee selected Innoprise as the only vendor qualified to meet the advertised needs. Innoprise conducted on-site demonstrations and members of the ESS Committee visited five (5) Innoprise customer sites in Colorado. The ESS Committee unanimously recommends proceeding with a conversion to the software solutions proposed by Innoprise Software, Inc.

BACKGROUND

The City of Billings purchased its first H.T.E. application in the fall of 1989. Since that time, we have acquired an entire suite of integrated applications that serve the overall needs of mission critical areas such as Finance, Payroll, Utility Billing, Community Development, and on-line citizen access. Since H.T.E. was acquired by SunGard Data Systems in 2003, the company has been slow to adopt new technology. Although the environment has always been very reliable and stable, the applications noticeably lag behind the industry in ease of use and end-user productivity tools.

With the support of the Leadership Team, an Enterprise Software Systems (ESS) Committee was formed in the fall of 2008 and tasked with making a recommendation to the City Administrator as to whether the City of Billings should stay with SunGard Public Sector or migrate to another vendor's solution. The ESS Committee membership contains eighteen (18) key staff members representing every department throughout the organization. The committee developed, advertised, and evaluated the responses of a RFQ. Of the six (6) vendor responses, Innoprise was the only vendor selected as a finalist. Innoprise Software, Inc. is owned by Dennis Harward, former owner of H.T.E. Innoprise has an immense knowledge of our existing software applications and has valuable experience in converting other H.T.E. clients to their new Innoprise suite of products. Innoprise's offer not only provided the City of Billings with a state-of-the-art true browser-based suite of integrated applications, but Innoprise also offered to provide on-going support for our existing SunGard applications. In addition, Innoprise has already developed custom interfaces between our SunGard applications and the new Innoprise applications. These interfaces will greatly enhance business continuity throughout the conversion process. The on-going support and customized interfaces represent a competitive advantage over all other vendors. Innoprise provided three days of on-site demonstrations to members of the ESS Committee and other key staff members. In April, five members of the ESS Committee traveled to Colorado and visited the following customer sites: City/County of Broomfield, City of Littleton, City of Greenwood Village, City of Erie, and the City of Cheyenne, WY. In all cases, the customers were supportive of Innoprise, the products & services were meeting their needs, and indicated they would choose Innoprise again.

The ESS Committee unanimously recommended to the City Administrator to proceed with a conversion to Innoprise Software based on the following key points:

- The software solutions from Innoprise are true browser-based applications that greatly enhance end-user's access to information, provide great productivity tools, and are fully integrated.
- Innoprise can support our existing applications and provide custom interfaces throughout the conversion process.
- City staff from throughout the organization have been involved in the selection process and are fully supportive of the proposed changes.
- SunGard Public Sector is in the process of developing a Microsoft based solution to replace our existing applications. These solutions won't be available for months, possibly years and haven't been proven in the market. If we do nothing, we will eventually be pressured to change to their new product which may or may not meet our needs.
- Innoprise has made us an offer that doesn't increase the amount we are currently paying for annual maintenance to SunGard Public Sector.

RECOMMENDATION

Staff recommends that Council approve entering into a contract with Innoprise Software, Inc. at a cost of \$ 90,000/yr for 5 years to provide the City of Billings with a state-of-the-art Enterprise Software System.

ATTACHMENTS

- A: Innoprise Master Agreement
- B: Innoprise Licensing Agreement
- C: Innoprise Support Services Agreement

ATTACHMENT A

MASTER AGREEMENT

Date: _____

CUSTOMER NAME AND ADDRESS:

City of Billings (“Customer”)
210 N. 27th Street
Billings, MT 59101

THIS INNOPRISE SOFTWARE, INC. Master Agreement (the “Agreement”), is made and entered into this _____ day of _____, 2009, by and between INNOPRISE SOFTWARE, INC. (“INNOPRISE”) of 555 Eldorado Blvd., Suite 100, Broomfield, CO 80021-3470 and Customer.

INNOPRISE and Customer agree that all products and services to be provided by INNOPRISE to Customer hereunder shall be furnished only under the terms and conditions of this Agreement, its Schedule(s), and any License Agreement or Support Services Agreement entered into by the parties. INNOPRISE and Customer will execute a Schedule for all products and services to be provided to Customer by INNOPRISE hereunder.

INNOPRISE is a technology product and service firm specializing in providing certain technology software products and services that INNOPRISE has developed and owns.

Customer desires to purchase products or services from INNOPRISE.

INNOPRISE desires to supply Customer pursuant to the terms and conditions contained in this Agreement, the applicable Schedule, and any License Agreement or Support Services Agreement entered into by the parties.

INNOPRISE has represented to Customer that it has the capability to provide maintenance and support of all existing SunGard Public Sector software modules for the conversion period of five (5) years or until the service is no longer requested by the City of Billings, and that it has the capability to provide custom interfaces between the existing SunGard Public Sector applications and the new Innoprise Software applications and to support them until all new Innoprise Software modules are in production and there is no longer a need for the interfaces. This is the reason INNOPRISE was selected by the Customer to provide these services to Customer and if INNOPRISE had not made these representations it would not have been selected to provide Customer with these services. Therefore, nothing herein shall be construed by the parties to abrogate these essential representations by way of any limitations of its warranties it has heretofore made to Customer or on its liability to Customer, or on damages, whether such damages be direct, indirect, consequential or otherwise, which Customer may hereafter claim in any action against INNOPRISE for any breach of these representations and warranties.

NOW THEREFORE, in consideration of the mutual promises contained herein, it is agreed to as follows:

1. Definition of Terms. As used herein:

1.1 **“Project”** – the products and services provided by INNOPRISE for Customer.

- 1.2 **“Schedule(s)”** – an attachment(s) to this Agreement, which is a part of this Agreement for all purposes.
- 1.3 **“Innoprise Custom Software”** – Software developed by Innoprise specifically for Customer or Innoprise Core Software customized by Innoprise specifically for Customer.
- 1.4 **“Innoprise Core Software”** – Software developed or customized by Innoprise but not specifically for Customer.
- 1.5 **“Innoprise Software”** – Innoprise Custom Software and Innoprise Core Software in machine-readable form. Innoprise Software does not include the Source Code.
- 1.6 **“Third-Party Software”** – software in machine readable form provided by INNOPRISE to Customer that is not developed or customized by Innoprise. Third-Party Software does not include the Source Code.
- 1.7 **“Software”** – Innoprise Software and Thirty-Party Software.
- 1.8 **“Source Code”** – a copy of the computer programming code in human-readable form.
- 1.9 **“License Agreement”** – the non-exclusive License Agreement that the parties will execute for all Innoprise Software provided to Customer by INNOPRISE. The form of the License Agreement is attached as Exhibit A.
- 1.10 **“Support Services Agreement”** – the Support Services Agreement that the parties will execute for all Innoprise Software provided to Customer by INNOPRISE. The form of the Support Services Agreement is attached as Exhibit B.

2. **Term of Agreement.** This Agreement shall be effective upon execution by both parties and shall continue in force through completion of services described in Exhibit A hereto (Statement of Work) and the “Schedule(s)” unless earlier terminated in accordance with the terms set forth herein.
3. **Statement of Work.** INNOPRISE shall work with the City to perform the services outlined in Exhibit A. In performing these services, the INNOPRISE shall at all times comply with all federal, state and local statutes, rules and ordinances applicable to the performance of such services. In addition, these services and all duties incidental or necessary therefor, shall be performed diligently and completely and in accordance with professional standards of conduct and performance. A detailed Scope of Work will be written for each application with input from both the City and Innoprise.
4. **Compensation.** The amount of compensation Customer shall pay INNOPRISE for the products and services provided by INNOPRISE hereunder shall be provided in the Schedule(s). All compensation shall be payable by Customer upon receipt of an invoice from INNOPRISE. All amounts due and payable to INNOPRISE shall be exclusive of all applicable taxes based or measured thereon excluding taxes based on the income of INNOPRISE, and Customer shall be responsible for the payment of all such taxes to INNOPRISE or shall provide INNOPRISE with an appropriate certificate of exemption.
5. **Warranty.** Innoprise warrants that for a period of ninety (90) days after acceptance (30 day test period to determine whether the Licensed Program(s) functions operate together and whether the Licensed Program(s) meet the Customer’s specifications and/or requirements.) the Innoprise Licensed Program(s) listed in the Supplement(s) will perform in substantial compliance with the reference documentation supplied by Innoprise, provided the Licensed

Program(s) are used in the proper operating environment. Innoprise does not warrant that the functions contained in the Licensed Program(s) will meet the Customer's requirement or will operate in the combinations which may be selected for use by the Customer after the ninety (90) day period after the completion of the Licensed Program testing. Innoprise shall be responsible only for the Licensed Program(s) and products as originally supplied and accepted by Customer, and for changes made to the Licensed Program(s) by Innoprise's authorized representatives. Innoprise will not be responsible for the consequences of attempts at changes or modifications to the products and Licensed Program(s) made by the Customer or any other unauthorized party.

Innoprise warrants that it has the right to license the Innoprise Licensed Program(s) listed in the Supplement(s) and that the Innoprise Licensed Program(s) does not infringe any intellectual property of any third party. Innoprise agrees to indemnify Customer against expenses, including reasonable attorneys' fees, and liability arising from any claim of infringement related to Innoprise Licensed Program(s) provided Innoprise shall have the right to control the defense or settlement of any such claim. If the use of the Innoprise Licensed Program(s) by the Customer is enjoined by any infringement proceeding, Innoprise shall, if possible, obtain without unreasonable expense the right of License for the Customer to use the Innoprise Licensed Program(s) or if that is not possible, Innoprise shall refund to the Customer the license fee(s) paid under this Agreement for the particular Licensed Program(s) that is determined to be infringing.

INNOPRISE MAKES NO WARRANTIES, OTHER THAN AS STATED HEREIN, WITH RESPECT TO THE PARTICULAR LICENSED PROGRAM(S), EITHER EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE.

- 6. Limitation of Liability and Remedies.** To the extent permitted by law, and to the extent provided for under this Agreement, for claims related to bodily injury, death and damage to real property and tangible personal property, Innoprise shall indemnify and hold harmless the Customer from and against all direct damages and costs of any kind, including but not limited to reasonable attorney fees, arising out of or resulting from any negligent acts, or negligent omissions of Innoprise, regardless of whether such claims are caused in part by any party indemnified hereunder, but not to the extent that the Customer is legally liable for such damages and costs. In no event will Innoprise be liable for any consequential damages, including lost profits, savings or reprocurement costs, in any amount exceeding two times the total sums due to be paid by the Customer to Innoprise pursuant to this contract.

Except for Innoprise's obligations to indemnify the Customer under infringement actions, as noted in Section 4 of this Agreement, and claims for personal injury or damages to real or tangible personal property caused by Innoprise's negligence as noted above, Innoprise's liability for damages to the Customer for any cause whatsoever under this Agreement regardless of the form of action, is limited to two times the total amount of fees due to be paid by Customer under this Agreement for all of the Innoprise Licensed Programs(s) and services, including any fees associated with Innoprise project management and related out-of-pocket expenses.

In situations involving performance or nonperformance of Licensed Programs(s) furnished under this Agreement, the Customer's remedy is (1) the correction by Innoprise of Licensed Program defects, or (2) if, after repeated efforts, Innoprise is unable to make the Licensed Program(s) operate as warranted, the Customer shall be entitled to recover damages to the limits set forth in this section.

7. **Indemnification and Insurance.** INNOPRISE AGREES TO INDEMNIFY, DEFEND AND SAVE THE CITY, ITS OFFICERS, AGENTS AND EMPLOYEES HARMLESS FROM ANY AND ALL LOSSES, DAMAGE AND LIABILITY OCCASIONED BY, GROWING OUT OF, OR IN ANY WAY ARISING OR RESULTING FROM ANY INTENTIONAL OR NEGLIGENT ACT ON THE PART OF INNOPRISE OR INNOPRISE'S AGENTS OR EMPLOYEES. FOR THIS PURPOSE, INNOPRISE SHALL PROVIDE CITY WITH PROOF OF INNOPRISE'S INSURANCE ISSUED BY A RELIABLE COMPANY OR COMPANIES FOR PERSONAL INJURY AND PROPERTY DAMAGE, NAMING THE CITY AS A PRIMARY, NON-CONTRIBUTORY ADDITIONAL INSURED, IN AN AMOUNT NOT LESS THAN \$1.5 MILLION FOR EACH OCCURRENCE. THE INSURANCE MUST BE IN A FORM SUITABLE TO CITY.
8. **Confidentiality of Customer's Information.**
 - 8.1 INNOPRISE acknowledges that Customer regards as confidential and as a proprietary asset any information or materials that come to the attention of INNOPRISE by reason of (a) the presence of INNOPRISE's agents, employees, or representatives at Customer's site, or (b) INNOPRISE furnishing services to Customer in connection with this Agreement (such information, materials, and records collectively being referred to as "Customer's Confidential or Proprietary Information").
 - 8.2 INNOPRISE agrees to safeguard Customer's Confidential or Proprietary Information by holding it in strict confidence, disclosing it only to those employees, agents or contractors who have a need to know in order to provide services as agreed upon. In the event that a subpoena or other legal process that in any way concerns Customer's Confidential or Proprietary Information is served upon INNOPRISE, then INNOPRISE agrees to notify Customer in a reasonable manner following receipt of such subpoena or other legal process, and INNOPRISE will reasonably cooperate with Customer, as requested by Customer, to contest the subpoena or other legal process (provided that Customer agrees to pay any expense INNOPRISE incurs in so doing).
 - 8.3 INNOPRISE agrees to take all reasonable steps to prevent the disclosure, publication or dissemination of Customer's Confidential or Proprietary Information to any other person or entity, except where and to the extent specifically required by law.
 - 8.4 Notwithstanding anything herein to the contrary, Customer's Confidential or Proprietary Information shall not include: (a) information that comes into the public domain except as a result of a breach of this confidentiality provision; (b) information received by INNOPRISE from a third party not under any obligation of confidentiality with respect thereto; (c) information that is independently developed by Innoprise personnel that have not had access to Customer's Confidential or Proprietary Information; (d) information required to be disclosed under operation of law; or (e) information approved in advance in writing for disclosure by Customer.

9. Intellectual Property. All computer programs, including the Innoprise Software, related documentation, written procedures, copies of transcripts, Source Codes, and similar items are proprietary to and shall be considered trade secrets and confidential information remaining the property of INNOPRISE. Customer agrees that, other than those disclosures and records required to be made or maintained pursuant to Colorado Law, it will not disclose to any third party at any time (either during or after termination of this Agreement) any Innoprise trade secrets or any other Innoprise secrets or confidential information, learned by Customer in connection with this Agreement. All documentation shall be returned to INNOPRISE upon termination of this Agreement. All original input data items shall remain the property of Customer and will be returned pursuant to Customer's instructions, so long as Customer is not in breach of this Agreement. Customer shall retain or destroy all original input documentation and other documentation in accordance with its own procedures.

10. Termination.

- 9.1 Either party may terminate this Agreement or any Schedule(s) within the first thirty (30) days after execution by giving the other party not less than five (5) days prior written notice.
- 9.2 Either party may terminate this Agreement or any Schedule(s) at any time by giving the other party not less than sixty (60) days prior written notice.
- 9.3 In the Event of Default, as defined in Section 9 below, the non-defaulting party may terminate this Agreement or any Schedule(s).
- 9.4 In the event of termination for any reason, Customer will pay all amounts due and payable under this Agreement up to the effective date of termination, and Customer may retain any products or services delivered to Customer prior to the date of termination.

11. Events of Default.

- 10.1 Customer's failure to make payments as provided herein.
- 10.2 A party's failure to perform any material covenant, agreement, obligation, term or condition contained herein; provided, however, the party's failure to perform as provided in this Section 10.2 shall not be an Event of Default if the defaulting party cures such default within thirty (30) days of receipt of written notice of default from the non-defaulting party or if the default cannot be cured within thirty (30) days, if the defaulting party commences cure within thirty (30) days of receipt of written notice and proceeds to cure such default within a reasonable period of time.
- 10.3 A party ceases to do business as a going concern, makes an assignment for the benefit of creditors, admits in writing its inability to pay debts as they become due, files a petition in bankruptcy (except in connection with a reorganization under which the business of such party is continued and performance of all of its obligations under this Agreement shall continue) or appoints a receiver, acquiesces in the appointment of a receiver or trustee, or liquidator for it or any substantial part of its assets or properties.

12. Remedies on Default. In addition to the right of termination provided in Section 9.3 above, the non-defaulting party shall have all of the rights and remedies available in law and in equity.

13. Hold Harmless and Indemnification.

13.1 By INNOPRISE. INNOPRISE shall indemnify, defend and hold harmless Customer against any loss, damage or expense incurred by Customer as a result of claims, actions or proceedings brought by any third party arising out of INNOPRISE's performance of this Agreement including Customer's reasonable attorney's fees and any money damages or costs awarded in respect of any such claim(s) and any suit raising any such claim(s); provided, however, that (a) Customer shall have given INNOPRISE prompt written notice of any such claim, demand, suit or action; (b) Customer shall cooperate with said defense by complying with INNOPRISE's reasonable instructions and requests to Customer in connection with said defense; and (c) INNOPRISE shall have control of the defense of such claim, suit, demand, or action and the settlement or compromise thereof.

13.2 By Customer. Customer shall indemnify, defend and hold harmless INNOPRISE against any loss, damages or expense incurred by INNOPRISE as a result of claims, actions or proceedings brought by any third party arising out of Customer's performance of this Agreement including INNOPRISE's reasonable attorney's fees and any money damages or costs awarded in respect of any such claim(s) and any suit raising any such claim(s); provided, however, that (a) INNOPRISE shall have given Customer prompt written notice of any such claim, demand, suit or action; (b) INNOPRISE shall cooperate with said defense by complying with Customer's reasonable instructions and requests to INNOPRISE in connection with said defense; and (c) Customer shall have control of the defense of such claim, suit, demand, or action and the settlement or compromise thereof.

14. Notices. All notices and other communications under this Agreement must be in writing and shall be deemed to have been given if delivered personally, sent by facsimile (with confirmation), mailed by certified mail, or delivered by an overnight delivery service (with confirmation) to the parties at the following addresses or facsimile numbers (or at such other address or facsimile number as a party may designate by like notice to the other parties):

To Innoprise:

Innoprise Software, Inc.
Attention: Contract Administrator
555 Eldorado Blvd., Suite 100
Broomfield, CO 80021-3470
Facsimile No.: (303) 339-0413

To Customer:

City of Billings
Attention: Dave Watterson, IT Manager
210 N. 27th Street
Billings, MT 59101
Facsimile No.: (406) 657-3064

Any notice or other communication shall be deemed to be given (a) on the date of personal delivery, (b) at the expiration of the third (3rd) day after the date of receipt in the United States Mail, or (c) on the date of confirmed delivery by facsimile or overnight delivery service.

15. Governing Law/Dispute Resolution. This agreement shall be governed by, construed, and enforced under and in accordance with the Laws of the State of Montana. In the event of any litigation arising under or construing this Agreement, venue shall lie only in the District Court for the Thirteenth Judicial District, Yellowstone County, Montana. Prior to either party commencing any legal action under this Agreement, the parties agree to try in good faith, to settle any dispute amicably between them. If any dispute arises between the parties either relating to this Agreement or in any way arising out of this Agreement then the complaining party shall provide a notice of such dispute, in writing, to the other party. Such notice shall include both a specific description of the disputed issues and suggested action(s) to remedy such dispute. The Parties shall thereafter attempt, in good faith, to settle such dispute. If no resolution of the dispute is reached within forty-five (45) days of the notice of dispute, then either party may pursue any legal remedy it may have available including instituting suit in a court of competent jurisdiction.

16. Binding Nature and Assignment. This Agreement shall bind the parties and their successors and permitted assigns. Neither party may assign this Agreement without the prior written consent of the other party, except that the term "Assignment" shall not include any transfer by merger, acquisition, stock transfer or other consolidation with another entity. Notwithstanding the foregoing, Customer shall effect no assignment or transfer by merger, acquisition, stock transfer, sale of substantially all of the assets or consolidation to or with any entity engaged substantially in the business of providing software and/or related services that are similar to the software and services provided by INNOPRISE.

17. No Third Party Beneficiaries. This Agreement gives no rights or benefits to anyone other than INNOPRISE and Customer.

18. Force Majeure. Neither party shall be in default by reason of any failure in the performance of this Agreement (except failure to pay) if such failure arises out of causes beyond its reasonable control. Such causes may include, but are not limited to, acts of God, acts of the public enemy, acts of government in either its sovereign or contractual capacity, acts of the party whose performance is not sought to be excused, fires, flood, weather, epidemics, quarantine restrictions, strikes, freight embargoes, failure of transmission or power supply, mechanical difficulties with equipment which could not have been reasonably forecasted or provided for, or other causes beyond its sole control. The party so affected will resume performance as soon as practicable after the force majeure event terminates.

19. Entire Agreement. This Agreement and any Schedule(s), License Agreement, and Support Services Agreement contain the entire understanding of the parties with respect to its subject matter, and supersedes and extinguishes all prior oral and written communications between the parties relative to its subject matter. No amendment to, or change, waiver or discharge of any provision of this Agreement shall be valid unless in writing and signed by any authorized

representative of the party against which such amendment, change, waiver or discharge is sought to be enforced.

20. Signature Authority. Each party represents and warrants to the other that the signatory of that party is authorized to enter into this Agreement for and on behalf of that party.

21. Relationship of the Parties. The relationship of the parties established by this Agreement is solely that of independent contractors, and nothing contained in this Agreement shall be construed to (a) give any party the power to direct and control the day-to-day activities of the other; or (b) constitute such parties as partners, joint venturers, co-owners or otherwise as participants in a joint or common undertaking; or (c) make either party an agent of the other for any purpose whatsoever. Neither party nor its agents or employees is the representative of the other for any purpose, and neither has power or authority to act as agent, employee to represent, to act for, bind, or otherwise create or assume any obligation on behalf of the other.

22. Approvals and Similar Actions. Where agreement, approval, acceptance, consent or similar action by either party is required by any provision of this Agreement, such action shall not be unreasonably delayed or withheld, unless specifically permitted by this Agreement.

23. Publicity. Either party hereto may prepare press releases concerning the existence of this Agreement and may reference the other party and this Agreement in its advertising, sales promotions, trade shows, or other marketing material, subject to review, comment, revision and prior written approval of the other party which approval shall not be unreasonably delayed or withheld.

24. Severability. If any provision of this Agreement is held to be unenforceable, then both parties shall be relieved of all obligations arising under such provision, but only to the extent that such provision is unenforceable, and this Agreement shall be deemed amended by modifying such provision to the extent necessary to make it enforceable while preserving its intent or, if that is not possible, by substituting another provision that is enforceable and achieves the same objective and economic result. **IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT EACH PROVISION OF THIS AGREEMENT WHICH PROVIDES FOR A LIMITATION OF LIABILITY, DISCLAIMER OF WARRANTIES, INDEMNIFICATION OR EXCLUSION OF DAMAGES OR OTHER REMEDIES IS INTENDED TO BE ENFORCED AS SUCH. FURTHER, IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT IN THE EVENT ANY REMEDY UNDER THIS AGREEMENT IS DETERMINED TO HAVE FAILED OF ITS ESSENTIAL PURPOSE, ALL LIMITATIONS OF LIABILITY AND EXCLUSIONS OF DAMAGES OR OTHER REMEDIES SHALL REMAIN IN EFFECT.**

25. Waiver. No delay or omission by either party to exercise any right or power it has under this Agreement shall impair or be construed as a waiver of such right or power. A waiver by either party of any covenant or breach shall not be construed to be a waiver of any

succeeding breach or of any other covenant. All waivers must be in writing and signed by the party waiving its rights.

26. Attorneys' Fees. If any legal action or other proceeding is brought for the enforcement of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in that action or proceeding, in addition to any other relief to which it may be entitled.

27. Compliance with Laws. Each party shall comply with all governmental, including federal, state, and local laws, statutes, rules and regulations applicable to this Agreement.

INNOPRISE AGREES THAT ALL HIRING BY CONSULTANT OF PERSONS
PERFORMING THIS AGREEMENT WILL BE ON THE BASIS OF MERIT AND
QUALIFICATION AND WILL NOT DISCRIMINATE ON THE BASIS OF RACE,
COLOR, RELIGION, CREED, POLITICAL IDEAS, SEX, AGE, MARITAL STATUS,
PHYSICAL OR MENTAL DISABILITY, OR NATIONAL ORIGIN.

28. Survival of Provisions. Sections 4, 5, 6, 7, 8, 9.4, 11, 12, 14, 25 and 27 and all accrued and unpaid obligations arising hereunder shall survive the termination hereof.

Accepted by:

City of Billings

Innoprise Software, Inc.

Customer Name and Title

Dennis Harward, President & CEO

Date

Date

LEASE SCHEDULE NO. 1

Parties: Innoprise Software, Inc.

(“INNOPRISE”)

555 Eldorado Blvd.
Suite 100
Broomfield, CO 80021-3470

City of Billings
210 N. 27th Street
Billings, MT 59101

(“Customer”)

This Schedule is part of the **Master Agreement** between INNOPRISE and Customer dated the ____ day of _____, 2009.

NOW, THEREFORE, the parties agree as follows:

1. Software.

- 1.1 INNOPRISE will provide Customer with the following Software: Financials including: Accounting, Budgeting, Accounts Receivable, General Ledger, Purchasing/Inventory, Payroll/Personnel and Human Resources; CIS; Community Development Suite including: Planning & Zoning, Code Enforcements, Occupational Licenses, Building Permits and Citizen Access; Fleet Management; Work Orders; Property Tax and Centralized Cash Receipts.
- 1.2 Acceptance. Customer shall have ninety (90) days after delivery of any Innoprise Software to either accept or reject such Innoprise Software. Customer may only reject Innoprise Software if the Innoprise Software does not substantially conform to the Specifications. Any rejection of Innoprise Software by Customer must be in writing and must contain sufficient information to allow INNOPRISE to duplicate the problems. If Innoprise is unable to correct the errors, malfunctions, or defects in the Innoprise Software that cause the Innoprise Software to not substantially conform to the Specifications within ninety (90) days of the date Innoprise receives notice of rejection, Customer may return such defective Innoprise Software to Innoprise and Innoprise’s sole liability to Customer shall be to refund the License Fee attributable to the defective Innoprise Software. If Customer does not reject Innoprise Software within ninety (90) days from the date of delivery, the Innoprise Software shall be deemed to be accepted by Customer.

- 2. Services.** 90 ISU's (1 Implementation Service Unit equals 1 day) are included for each of the five years of this agreement. These ISU's can be used for data conversion, project management, training, implementation assistance and data interfaces required by the City to utilize SunGard (H.T.E.) as currently planned until the end of the five year period or no longer requested by the City. ISU's can be carried over from one year to the next within the five year period. ISU's can also be advanced if necessary to implement and convert certain applications within the five year period. Functional gaps between Innoprise Software and SunGard/THE software identified as required in the individual project Scope of Works do not count toward the 90 ISU's per year.
- 3. Specifications.** INNOPRISE will produce a process flowchart to determine the required functionality and processes of the Software and/or Services. After preparing such analysis, INNOPRISE shall prepare specifications for the Software and/or Services ("Specifications"). Customer shall have thirty (30) days after receipt of the Specifications to approve or disapprove the Specifications. If the Specifications are approved by Customer, they shall become the Specifications for the Software and/or Services. If the Specifications are not approved by Customer, INNOPRISE may either make the changes to the Specifications requested by Customer or terminate this Schedule.
- 4. Customer's Obligation.** Customer shall:
 - 4.1 Designate a primary and a secondary project manager, including telephone numbers and e-mail addresses, within ten (10) days following the execution of this Schedule.
 - 4.2 Perform all of its obligations hereunder in a time frame that permits INNOPRISE to meet the Delivery Schedule.
 - 4.3 Provide accurate information and the necessary resources required for INNOPRISE to meet the Delivery Schedule.
 - 4.4 Participate in all required reviews, testing, training, and perform all Customer testing as deemed necessary by Innoprise to ensure the compliance and adherence to all required functionality and processes as defined and documented throughout the Project.
 - 4.5 Provide all necessary infrastructures to operate the Software.
 - 4.6 Provide INNOPRISE access to Customer network, servers and infrastructure resources for remote technical assistance by INNOPRISE.
- 5. Warranty.** Innoprise warrants that for a period of ninety (90) days after acceptance (30 day test period to determine whether the Licensed Program(s) functions operate together and whether the Licensed Program(s) meet the Customer's specifications and/or requirements.) the Innoprise Licensed Program(s) listed in the Supplement(s) will perform in substantial compliance with the reference documentation supplied by Innoprise, provided the Licensed Program(s) are used in the proper operating environment. Innoprise does not warrant that the functions contained in the Licensed Program(s) will meet the Customer's requirement or will operate in the combinations which may be selected for use by the Customer after the ninety (90) day period after the completion of the Licensed Program testing. Innoprise shall be responsible only for the Licensed Program(s) and products as originally supplied and accepted by Customer, and for changes made to the Licensed Program(s) by Innoprise's authorized representatives. Innoprise will not be responsible for the consequences of attempts at changes

or modifications to the products and Licensed Program(s) made by the Customer or any other unauthorized party.

Innoprise warrants that it has the right to license the Innoprise Licensed Program(s) listed in the Supplement(s) and that the Innoprise Licensed Program(s) does not infringe any intellectual property of any third party. Innoprise agrees to indemnify Customer against expenses, including reasonable attorneys' fees, and liability arising from any claim of infringement related to Innoprise Licensed Program(s) provided Innoprise shall have the right to control the defense or settlement of any such claim. If the use of the Innoprise Licensed Program(s) by the Customer is enjoined by any infringement proceeding, Innoprise shall, if possible, obtain without unreasonable expense the right of License for the Customer to use the Innoprise Licensed Program(s) or if that is not possible, Innoprise shall refund to the Customer the license fee(s) paid under this Agreement for the particular Licensed Program(s) that is determined to be infringing.

Innoprise does not make any representations or warranties with the respect to intellectual property rights of any third party products. Any such representations or warranties are made solely by the Vendor of such products, and shall not be construed as a warranty with respect to infringement and the like by Innoprise.

INNOPRISE MAKES NO WARRANTIES, OTHER THAN AS STATED HEREIN, WITH RESPECT TO THE PARTICULAR LICENSED PROGRAM(S), EITHER EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE.

- 7. Limitation of Liability and Remedies.** To the extent permitted by law, and to the extent provided for under this Agreement, for claims related to bodily injury, death and damage to real property and tangible personal property, Innoprise shall indemnify and hold harmless the Customer from and against all direct damages and costs of any kind, including but not limited to reasonable attorney fees, arising out of or resulting from any willful negligent acts, or willful negligent omissions of Innoprise, regardless of whether such claims are caused in part by any party indemnified hereunder, but not to the extent that the Customer is legally liable for such damages and costs. In no event will Innoprise be liable for any consequential damages, including lost profits, savings or reprocurement costs, even if Innoprise has been advised of their possibility.

Except for Innoprise's obligations to indemnify the Customer under infringement actions, as noted in Section 4 of this Agreement, and claims for personal injury or damages to real or tangible personal property caused by Innoprise's negligence as noted above, Innoprise's liability for damages to the Customer for any cause whatsoever under this Agreement regardless of the form of action, is limited to the total amount of fees paid by Customer under this Agreement for the Innoprise Licensed Programs(s) and services, not including any fees associated with Innoprise project management and related out-of-pocket expenses.

In situations involving performance or nonperformance of Licensed Programs(s) furnished under this Agreement, the Customer's remedy is (1) the correction by Innoprise of Licensed Program defects, or (2) if, after repeated efforts, Innoprise is unable to make the Licensed Program(s) operate as warranted, the Customer shall be entitled to recover damages to the limits set forth in this

- 7. Compensation.** INNOPRISE shall be compensated for the work set forth on the Statement of Work which is attached hereto as Exhibit A and is incorporated herein by this reference.
- 8. Payment.** Customer shall pay \$90,000.00 each year for five years for the above Products and Services under the Support Services Agreement, which shall be full payment for Support Services July 1, 2009 thru June 30, 2014. In accordance with Montana law, payment of the \$90,000.00 annual support fee is subject to annual budget appropriation. Payment will be due to Innoprise on a net 30 schedule from the time the contract is signed and accepted by the City and Innoprise. Payments of such amounts to INNOPRISE shall be inclusive of all costs of whatsoever nature associated with INNOPRISE's efforts, including but not limited to salaries, benefits, expenses, overhead, administration, profits, and outside consulting fees.
- 9. Delivery Schedule.** After the Specifications are approved, the parties shall agree on a delivery schedule for the Software and Services. After agreement, the parties shall execute an amendment to this Schedule setting forth the agreed upon delivery schedule. If the parties are unable to agree on a delivery schedule, this Schedule shall be terminated upon notice by either party.
- 10. Travel Expenses.** INNOPRISE will be responsible for all travel expenses incurred by Innoprise employees during the 5 year term of this agreement.

City of Billings:

INNOPRISE:

Innoprise Software, Inc.

Customer Name and Title

Dennis Harward, President and CEO

Date

Date

The prices quoted in the contract will be honored thru June 30, 2009.

EXHIBIT A **STATEMENT OF WORK**

Maintenance & Support of Existing SunGard Public Sector Software Modules

Innoprise will provide maintenance and support of all existing SunGard Public Sector software modules for the conversion period of five (5) years or until the service is no longer requested by the City of Billings. This will include, but not be limited to, updates to financial application areas to address changes in tax law and to the payroll application area to address changes in payroll laws & regulations.

Application Interfaces

Innoprise will provide custom interfaces between the existing SunGard Public Sector applications and the new Innoprise Software applications. These interfaces are critical for maintaining business continuity, eliminating costly manual interfaces, and reducing error cause by manual input of interface data. All custom interfaces will be supported by Innoprise until all new Innoprise Software modules are in production and there is no longer a need for the interfaces.

Functionality

Innoprise shall provide and/or develop systems to include all functionality that currently exists in our SunGard Public Sector application modules as defined in the individual project Scope of Works.

Application Development & Required Features

The City of Billings desires to identify the following mission critical application areas, features, and functions within the Master Contract. This list is not inclusive of all of our needs and we fully expect that further details will be defined within the “Scope of Work” that will be defined for each application area.

- **Property Tax/Special Assessments/Loans**

Innoprise will provide the City of Billings with a Property Tax/Special Assessments/Loans system that, at a minimum, includes the following features:

- A property tax system which includes all functionality that we currently have available in our existing SunGard Public Sector Property Tax application including all existing custom programming.
- Building loans in the Special Assessments module and transferring them to Accounts Receivable. The loans are maintained in AR until tax time. Once a year, the current year amount due on these loans is transferred to tax to be billed.
- Several custom imports and exports of data.
- Interfaces with Cash Receipts, Land Management, Accounts Receivable, GMBA.

- **Planning and Engineering**

The Planning & Engineering system needs to include, at a minimum, the following features:

- Documents need to be attached to review steps and generated automatically during the review process. The end-user should not need to know what document is associated with the review; it should automatically appear for them.
- The system needs to allow for “master projects” and then allow multiple reviews be attached to them.
- **Fleet Management**
The new City of Billings Innoprise Fleet Management module will be created to provide, at a minimum, the same functionality that we currently have with SunGard Public Sector including:
 - Interface with Quatred for barcoding
 - Interface with GASBOY for automated fueling transactions
 - Interface with the General Ledger, Purchasing and Inventory, Work Orders, Fixed Assets
- **Airport Management**
An Airport Management application will be created and at a minimum will include:
 - Property management: to assist the airport in managing our rental, lease and concession related operations
 - Operational Database for airport's physical characteristics like details on the property, and operational statistics.
 - Project management – tracking for staffing, timing, expenditures, benchmark dates, grant required reports, etc. Resource planning capability – preliminary scheduling of short, intermediate and long-term projects to assist in grant and budget planning and development of the CIP/ERP.
 - Billing capability that ties into accounts receivables
 - Report generation capability for revenue & expense reports, budget reports, usage reports, project status reports, etc.
 - Would be interested in tying many of our processes into the workflow management application to assist with managing both repetitive and one-time tasks.
- **Registered Bond Application**
A Registered Bond application will be created that will:
 - Calculate principal and interest payments for bond redemptions
 - Create reports and notices for redemption for bond holders
 - Print checks for payments of principal and interest
 - Interface payment information to GMBA
 - Retain history of principal and interest payments
 - Amortization schedules for outstanding principal for all bonds
 - Report for called but unredeemed bonds
 - Ability to create 1099 files and print notices
 - Ability to change ownership on bonds and track history of changes

- **Bonded Contractor System**
 - The creation of an application that will keep track of contractors that are bonded through the City of Billings. This application will tie to the Business License and Building Permit applications.
- **Payroll**

The Payroll system needs to include, at a minimum, the following features:

 - Other pays are added with the account numbers
 - Exceptions for projecting budget fiscal year
- **GMBA (Innoprise Financial Application)**

The GMBA system needs to include, at a minimum, the following features:

 - Interest distribution by project with lookup tables and ability to change GL numbers.
 - Project link between project number and account number
 - Generate a project trial balances
 - Credit Card (P card) processing.
 - Create distributions for paying back loans and giving loans on the Fund Level and the Project Level. This process will:
 - Generate loans between funds
 - Generate loans for negative cash between projects and fund levels.
 - Pay back loans on project and fund level.
- **Accounts Receivable (Innoprise Financial Application)**

The Accounts Receivable system needs to include, at a minimum, the following features:

 - Lockbox interface for uploading batch payments. This is currently used heavily in our CIS/Utility Billing area.
 - Solid Waste's Waste Works program needs to interface into Accounts Receivable.
 - Accounts Receivable needs to have security by category so individual departments can do their own AR functions.

ATTACHMENT B

LICENSE AGREEMENT

THIS LICENSE AGREEMENT ("Agreement") is entered into this _____ day of _____, 2009, ("Effective Date") by and between **INNOPRISE SOFTWARE, INC** ("Licensor"), and the City of Billings, Montana. (Licensee").

AGREEMENT

INNOPRISE has represented to Customer that it has the capability to provide maintenance and support of all existing SunGard Public Sector software modules for the conversion period of five (5) years or until the service is no longer requested by the City of Billings, and that it has the capability to provide custom interfaces between the existing SunGard Public Sector applications and the new Innoprise Software applications and to support them until all new Innoprise Software modules are in production and there is no longer a need for the interfaces. This is the reason INNOPRISE was selected by the Customer to provide these services to Customer and if INNOPRISE had not made these representations it would not have been selected to provide Customer with these services. Therefore, nothing herein shall be construed by the parties to abrogate these essential representations by way of any limitations of its warranties it has heretofore made to Customer or on its liability to Customer, or on damages, whether such damages be direct, indirect, consequential or otherwise, which Customer may hereafter claim in any action against INNOPRISE for any breach of these representations and warranties.

1. DEFINITIONS. Unless otherwise defined herein, the following terms shall have the meanings set forth below:

1.1. "Innoprise Custom Software" – means Software developed by Licensor specifically for Licensee or Innoprise Core Software customized by Innoprise specifically for Licensee.

1.2 "Innoprise Core Software" means Software developed or customized by Licensor but not specifically for Licensee.

1.3 "Innoprise Software" - means the Innoprise Custom Software and Innoprise Core Software in machine readable form covered by this Agreement. The Innoprise Software covered by this Agreement will be listed on Schedule(s). Innoprise Software does not include the Source Code.

1.4. "Affiliate" - means with respect to either party, any entity which, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or common control with such party.

1.5. "Defect" - means a material failure of the Innoprise Software to substantially conform to the functional specifications set forth in the current published Documentation.

1.6. "Derivative Works" - means works of authorship based on one or more pre-existing works of Licensor, including Documentation, Innoprise Software, Enhancements, or Updates, in whatever form the work may be recast, transformed or adapted, including translations, ports and screen reformatting.

1.7. "Designated Location" - means the physical location identified in Schedule(s) A at which Licensee may use the Software.

1.8. "Designated Operating Environment" - means the computer hardware and software identified in the Documentation with which Licensee may use the Innoprise Software.

1.9. "Documentation" - means the written, electronic, or recorded work generally released by Licensor in connection with the Innoprise Software that describes the functions and features, of the Innoprise Software, including end user manuals.

1.10. "Enhancements" - means any software program, any part thereof, or any improvement or addition thereto, or any materials not included in the Innoprise Software at the time of execution of this License, or that are subsequently developed by Licensor, or on behalf of Licensor, which modify the Innoprise Software to provide a function or feature not originally offered or an improvement in function and which relate to the Innoprise Software.

1.11. "Executable Code" - means the compiled, interpreted machine readable program, code executed by a computer to perform the functions of the Software.

1.12. "License Fee" - means fees, if any, charged for the License.

1.13. "Licensed Materials" - means the Innoprise Software and Documentation covered by this Agreement.

1.14. "Permitted Users" - means those employees and agents of Licensee who have been authorized by Licensee to use the Licensed Materials.

1.15 "Third-Party Software" - means any third party software products provided to Licensee by Licensor, if any.

1.16 "Schedule(s)" – means an attachment(s) to this Agreement which is part of this Agreement for all purposes. Schedule(s) may be added or removed from time to time to add or delete Innoprise Software from the License Agreement.

1.17. "Source Code" – means a copy of the computer programming code in human, readable form.

1.18. "Software" – means the Innoprise Software and Third-Party Software.

1.19. "Updates" - means program logic changes made by Lessor to correct Defects in the Innoprise Software delivered hereunder.

2. LICENSE GRANT.

2.1. License to Innoprise Software. Except as otherwise provided herein, Lessor hereby grants to Licensee a perpetual, non-exclusive, non-transferable license to use a single incidence of the Innoprise Software and Documentation at the Designated Location for its internal use within a single operating environment and not for the processing of any data except Licensee's. Licensee may transfer Licensed Materials to back-up computer hardware to be used when the Designated Operating Environment is temporarily inoperable.

2.2. License to Third-Party Software. Any Third Party Software is licensed pursuant to a license agreement with the applicable third-party vendor.

2.3. Use and Prohibitions on Use. Licensee shall have the right to use the Innoprise Software and Documentation only as set forth in this Agreement or in the Documentation. Any other use of the Innoprise Software shall constitute an Event of Default under this Agreement. The right to use the Innoprise Software does not include use by Licensee's Affiliates. Unless otherwise agreed by the parties hereto in writing, Licensee shall not use the Innoprise Software in the operation of a service bureau or time sharing arrangement or provide same to a disaster recovery provider; nor shall Licensee assign, sublicense, sell or rent the Innoprise Software. Any rights not expressly granted herein are hereby expressly reserved to Lessor. Licensee will not create a derivative work of the Innoprise Software or reverse engineer, decompile, disassemble or otherwise attempt to reconstruct any Source Code or algorithms of the Innoprise Software or remove any product identification, copyright or other notices from the Innoprise Software or Documentation. Licensee shall not modify any Source Code.

2.4. Access. Access to the Licensed Materials shall be granted only to Permitted Users.

2.5. Single Point of Contact. Licensee shall designate a single point of contact to communicate with Lessor in all matters relating to this Agreement, including notifications of changes to Permitted Users at Designated Location(s) or the Designated Operating Environment. The identity of the contact may be changed upon written notice to Lessor.

2.6. Changes. No changes with regard to the Designated Locations or Permitted Users shall be made without the written consent of Lessor.

2.7. Copies. For each paid license of the Licensed Materials, Lessor shall deliver one (1) copy of the Innoprise Software, in Executable Code form, and one (1) copy of the accompanying Documentation to Licensee. Licensee shall make no copies of the Documentation and Innoprise Software except one (1) copy of the Innoprise Software may be made for backup or archival purposes. Any such copy shall be clearly marked as proprietary to Lessor and contain Lessor's proprietary notices.

2.8. Transfer. Licensee may transfer the Innoprise Software and Documentation to a different Designated Location within the United States upon written notice to Lessor. Upon transfer, the new physical location shall become Designated Location for the purposes of this Agreement. Notwithstanding the foregoing, Licensee understands and agrees that Third Party Software, if any, may not be transferred without the consent of the applicable third party vendors.

3. DELIVERY AND ENHANCEMENT OF SOFTWARE

3.1. Delivery. Lessor shall deliver or transmit the Software and Documentation to Licensee at the Designated Location.

3.2. Enhancements and Updates. Enhancements and Updates shall be provided to Licensee only as provided in the Support Services Agreement between Lessor and Licensee. If Lessor does provide Enhancements and Updates to Licensee pursuant to the Support Services Agreement, such Enhancements and Updates shall be subject to the terms of this License Agreement.

4. OWNERSHIP AND DISCLOSURE. All computer programs, including the Innoprise Software, Documentation, Derivative Works, Enhancements, Source Codes, and similar items are proprietary to and shall be considered trade secrets and confidential information remaining the property of Lessor. Licensee agrees that, other than those disclosures and records required to be made or maintained pursuant to Colorado law, it will not disclose to any third party at any time (either during or after the termination of this Agreement) any trade secrets or other secrets or proprietary or confidential information of Lessor.

5. PAYMENTS.

5.1. License Fees. In consideration of the license granted under this Agreement, Licensee shall pay a License Fee as determined pursuant to the Master Agreement between Lessor and Licensee dated _____. Unless otherwise provided in the applicable Schedule, License Fees charged hereunder shall be due and payable in advance of shipment of the Licensed Materials to Licensee. Amounts unpaid when due shall be subject to a late charge of one and one half percent (1.5%) per month or the maximum rate allowed by law, whichever is less.

5.2. Taxes. All amounts due and payable to Lessor shall be exclusive of all applicable taxes based or measured thereon excluding taxes based on the income of Lessor, and Licensee shall be responsible for the payment of all such taxes to Lessor or shall provide Lessor with an appropriate Certificate of Exemption.

6. TERMINATION.

6.1. Termination by Licensee. By giving not less than sixty (60) days' prior written notice, Licensee may terminate this Agreement or any Schedule(s) at any time.

6.2. Termination for Default. Subject to the right to cure in Section 6.3, by giving written notice, the non-defaulting party may terminate this Agreement or any Schedule(s) upon the occurrence of one or more of the following events, which shall constitute an Event of Default under this Agreement:

6.2.1. A party fails to perform any material covenant, agreement, obligation, term or condition contained herein;

6.2.2. A party attempts to assign, terminate or cancel this Agreement or any Schedule(s) contrary to the terms thereof;

6.2.3. Licensee fails to make payment as provided herein;

6.2.4. A party ceases to do business as a going concern, makes an assignment for the benefit of creditors, admits in writing its inability to pay debts as they become due, files a petition in bankruptcy (except in connection with a reorganization under which the business of such party is continued and performance of all its obligations under this Agreement shall continue) or appoints a receiver, acquiesces in the appointment of a receiver or trustee, or liquidator for it or any substantial party of its assets or properties.

6.3. Cure of Event of Default. Events of Default by a party shall not be cause for termination if the defaulting party cures such default within thirty (30) days of receipt of written notice of default from the non-defaulting party or if the default cannot be cured within thirty (30) days if the defaulting party commences cure within thirty (30) days of receipt of written notice and proceeds to cure such default within a reasonable period of time.

6.4. Rights Upon Default. Upon an uncured Event of Default, the non-defaulting party may, except as limited by this Agreement, seek all legal and equitable remedies to which it is entitled. The remedies set forth herein shall be deemed cumulative and not exclusive and may be exercised by the non-defaulting party, successively or concurrently, in addition to any other remedies available to it. Upon termination by Licenser for Licensee's default, any and all unpaid amounts under this Agreement shall become immediately due and payable.

6.5. Duties Upon Termination. Upon termination of this Agreement or any Schedule(s), each party shall return to the other any confidential information (including the Innoprise Software and Documentation) in its possession belonging to such other party except for any confidential information that is subject to a continuing License Agreement between Licensee and Licenser.

7. RELATIONSHIP OF THE PARTIES. The relationship of the parties

established by this Agreement is solely that of independent contractors, and nothing contained in this Agreement shall be construed to (a) give any party the power to direct and control the day-to-day activities of the other; or (b) constitute such parties as partners, joint venturers, co-owners or otherwise as participants in a joint or common undertaking; or (c) make either party an agent of the other for any purpose whatsoever. Neither party nor its agents or employees is the representative of the other for any purpose, and neither has power or authority to act as agent, employee to represent, to act for, bind, or otherwise create or assume any obligation on behalf of the other.

8. WARRANTY. Innoprise warrants that for a period of ninety (90) days after acceptance (30 day test period to determine whether the Licensed Program(s) functions operate together and whether the Licensed Program(s) meet the Customer's specifications and/or requirements.) the Innoprise Licensed Program(s) listed in the Supplement(s) will perform in substantial compliance with the reference documentation supplied by Innoprise, provided the Licensed Program(s) are used in the proper operating environment. Innoprise does not warrant that the functions contained in the Licensed Program(s) will meet the Customer's requirement or will operate in the combinations which may be selected for use by the Customer after the ninety (90) day period after the completion of the Licensed Program testing. Innoprise shall be responsible only for the Licensed Program(s) and products as originally supplied and accepted by Customer, and for changes made to the Licensed Program(s) by Innoprise's authorized representatives. Innoprise will not be responsible for the consequences of attempts at changes or modifications to the products and Licensed Program(s) made by the Customer or any other unauthorized party.

Innoprise warrants that it has the right to license the Innoprise Licensed Program(s) listed in the Supplement(s) and that the Innoprise Licensed Program(s) does not infringe any intellectual property of any third party. Innoprise agrees to indemnify Customer against expenses, including reasonable attorneys' fees, and liability arising from any claim of infringement related to Innoprise Licensed Program(s) provided Innoprise shall have the right to control the defense or settlement of any such claim. If the use of the Innoprise Licensed Program(s) by the Customer is enjoined by any infringement proceeding, Innoprise shall, if possible, obtain without unreasonable expense the right of license for the Customer to use the Innoprise Licensed Program(s) or if that is not possible, Innoprise shall refund to the Customer the license fee(s) paid under this Agreement for the particular Licensed Program(s) that is determined to be infringing.

Innoprise does not make any representations or warranties with the respect to intellectual property rights of any third party products. Any such representations or warranties are made solely by the Vendor of such products, and shall not be construed as a warranty with respect to infringement and the like by Innoprise.

INNOPRISE MAKES NO WARRANTIES, OTHER THAN AS STATED HEREIN, WITH RESPECT TO THE PARTICULAR LICENSED PROGRAM(S), EITHER EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE.

9. LIMITATION OF LIABILITY AND REMEDIES. To the extent permitted by law, and to the extent provided for under this Agreement, for claims related to bodily injury, death and damage to real property and tangible personal property, Innoprise shall indemnify and hold harmless the Customer from and against all direct damages and costs of any kind, including but not limited to reasonable attorney fees, arising out of or resulting from any negligent acts, or negligent omissions of Innoprise, regardless of whether such claims are caused in part by any party indemnified hereunder, but not to the extent that the Customer is legally liable for such damages and costs. In no event will Innoprise be liable for any consequential damages, including lost profits, savings or reprocurement costs, in any amount exceeding two times the total sums due to be paid by the Customer to Innoprise pursuant to this contract.

Except for Innoprise's obligations to indemnify the Customer under infringement actions, as noted in Section 4 of this Agreement, and claims for personal injury or damages to real or tangible personal property caused by Innoprise's negligence as noted above, Innoprise's liability for damages to the Customer for any cause whatsoever under this Agreement regardless of the form of action, is limited to two times the total amount of fees due to be paid by Customer under this Agreement for all of the Innoprise Licensed Programs(s) and services, including any fees associated with Innoprise project management and related out-of-pocket expenses.

In situations involving performance or nonperformance of Licensed Programs(s) furnished under this Agreement, the Customer's remedy is (1) the correction by Innoprise of Licensed Program defects, or (2) if, after repeated efforts, Innoprise is unable to make the Licensed Program(s) operate as warranted, the Customer shall be entitled to recover damages to the limits set forth in this section.

10. INDEMNIFICATION AND INSURANCE. INNOPRISE AGREES TO INDEMNIFY, DEFEND AND SAVE THE CITY, ITS OFFICERS, AGENTS AND EMPLOYEES HARMLESS FROM ANY AND ALL LOSSES, DAMAGE AND LIABILITY OCCASIONED BY, GROWING OUT OF, OR IN ANY WAY ARISING OR RESULTING FROM ANY INTENTIONAL OR NEGLIGENT ACT ON THE PART OF INNOPRISE OR INNOPRISE'S AGENTS OR EMPLOYEES. FOR THIS PURPOSE, INNOPRISE SHALL PROVIDE CITY WITH PROOF OF CONSULTANT'S INNOPRISE INSURANCE ISSUED BY A RELIABLE COMPANY OR COMPANIES FOR PERSONAL INJURY AND PROPERTY DAMAGE, NAMING THE CITY AS A PRIMARY, NON-CONTRIBUTORY ADDITIONAL INSURED, IN AN AMOUNT NOT LESS THAN \$1.5 MILLION FOR EACH OCCURRENCE. THE INSURANCE MUST BE IN A FORM SUITABLE TO CITY.

11. INDEMNIFICATION.

11.1. **By Licensor.** Licensor shall indemnify, defend and hold harmless Licensee against any loss, damage or expense incurred by Licensee as a result of claims, actions, or proceedings brought by any third party alleging infringement by the Innoprise Software, Documentation, Updates, and Enhancements of copyright, trademark, patent, or other proprietary rights, and against its reasonable attorneys' fees and any money damages or costs awarded in respect of any such claim(s) and any suit raising any such claim(s); provided, however, that (a) Licensee shall have given Licensor prompt written notice of any such claim, demand, suit or action; (b) Licensee shall cooperate with said defense by complying with Licensor's reasonable instructions and requests to Licensee in connection with said defense; and (c) Licensor shall have control of the defense of such claim, suit, demand, or action and the settlement or compromise thereof, however any settlement or compromise thereof in any matter relating in any way to an intellectual property right of Licensee must be consented to by both Licensor and Licensee. Further, Licensor shall have no liability for any infringement action or claim that is based upon or arising from the matters described in Section 10.2. If a temporary or permanent injunction is obtained against Licensee's use of the Innoprise Software as a result of the matters described in this section, Licensor shall, at its option and expense, either procure for Licensee the right to continue using the Innoprise Software or replace or modify the Innoprise Software or infringing portion thereof so that it no longer infringes the alleged proprietary right. Licensor shall indemnify Licensee for uses, damages or expenses incurred by Licensee as a result of claims, actions or proceedings brought by any third party based on code or design specifications provided to Licensor by Licensee.

11.2. **By Licensee.** Licensee shall indemnify, defend and hold harmless Licensor against any loss, damage or expense incurred by Licensor as a result of claims, actions, or proceedings brought by any third party arising from (a) Licensee's use of the Software other than with the Designated Operating Environment or in a manner not permitted by this Agreement, (b) Licensee's unauthorized use of the Software in conjunction with third party software not expressly approved by Licensor or (c) code or design specifications provided by Licensee to Licensor; provided, however, that (a) Licensor shall have given Licensee prompt written notice of any such claim, demand, suit or action; (b) Licensor shall cooperate with said defense by complying with Licensee's reasonable instructions and requests to Licensee in connection with said defense; and (c) Licensee shall have control of the defense of such claim, suit, demand, or action and the settlement or compromise thereof, however any settlement or compromise thereof in any matter relating in any way to an intellectual property right of Licensor must be consented to by both Licensor and Licensee. Licensee will indemnify Licensor against its reasonable attorneys' fees and any money damages or costs awarded in respect of any such claim(s) and any suit raising any such claim(s).

12. GOVERNING LAW. This agreement shall be governed by, construed, and enforced under and in accordance with the Laws of the State of Montana. In the event of any litigation arising under or construing this Agreement, venue shall lie only in the District Court of the Thirteenth Judicial District, Yellowstone County, Montana. Prior to either party commencing any legal action under this Agreement, the parties agree to try in good faith, to settle any dispute amicably between them. If any dispute arises between the parties either relating to this Agreement or in any way arising out of this Agreement then the complaining party shall provide a notice of such dispute, in writing, to the other party. Such notice shall include both a specific description of the disputed issues and suggested action(s) to remedy such dispute. The Parties shall thereafter attempt, in good faith, to settle such dispute. If no resolution of the dispute is reached within forty-five (45) days of the notice of dispute, then either party may pursue any legal remedy it may have available including instituting suit in a court of competent jurisdiction.

13. MISCELLANEOUS.

13.1. **Binding Nature and Assignment.** This Agreement shall bind the parties and their successors and permitted assigns. Licensee may not assign this Agreement without the prior written consent of Licensor, except that the term "assignment" shall not include any transfer by merger, acquisition, stock transfer or other consolidation with another entity. Notwithstanding the foregoing, Licensee shall effect no assignment or transfer by merger, acquisition, stock transfer, sale of substantially all assets or consolidation to or with any entity engaged substantially in the business of providing software and/or related services that are similar to the services provided by Licensor. Any other assignment attempted by Licensee without the written consent of the Licensor shall be void.

13.2 **Notices.** All notices and other communications under this Agreement must be in writing and shall be deemed to have been given if delivered personally, sent by facsimile (with confirmation), mailed by certified mail, or delivered by an overnight delivery service (with confirmation) to the parties at the following addresses or facsimile numbers (or at such other address or facsimile number as a party may designate by like notice to the other parties):

To Licensor:

Innoprise Software, Inc.

Attention: Contract Administrator

555 Eldorado Blvd., Suite 100
Broomfield, CO 80021-3470
Facsimile No.: (303) 339-0413

To Licensee:

City of Billings
Attention: Dave Watterson, IT Manager
210 N. 27th Street
Billings, MT 59101
Facsimile No.: (406) 657-3064

Any notice or other communication shall be deemed to be given (a) on the date of personal delivery, (b) at the expiration of the third (3rd) day after the date of receipt in the United States Mail, or (c) on the date of confirmed delivery by facsimile or overnight delivery service.

13.3. Counterparts. This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one single agreement between the parties.

13.4. Headings. The section headings are for reference and convenience only and shall not be considered in the interpretation of this Agreement.

13.5. Approvals and Similar Actions. Where agreement, approval, acceptance, consent or similar action by either party is required by any provision of this Agreement, such action shall not be unreasonably delayed or withheld, unless specifically permitted by this Agreement.

13.6. Publicity. Either party hereto may prepare press releases concerning the existence of this Agreement and may reference the other party and this Agreement in its advertising, sales promotions, trade shows, or other marketing material, subject to review, comment, revision and prior written approval of the other party which approval shall not be unreasonably delayed or withheld.

13.7. Force Majeure. Neither party shall be in default by reason of any failure in the performance of this Agreement (except failure to pay) if such failure arises out of causes beyond its reasonable control. Such causes may include, but are not limited to, acts of God, acts of the public enemy, acts of government in either its sovereign or contractual capacity, acts of the party whose performance is not sought to be excused, fires, flood, weather, epidemics, quarantine restrictions, strikes, freight embargoes, failure of transmission or power supply, mechanical difficulties with equipment which could not have been reasonably forecasted or provided for, or other causes beyond its sole control. The party so affected will resume performance as soon as practicable after the force majeure event terminates.

13.8. Severability. If any provision of this Agreement is held to be unenforceable, then both parties shall be relieved of all obligations arising under such provision, but only to the extent that such provision is unenforceable, and this Agreement shall be deemed amended by modifying such provision to the extent necessary to make it enforceable while preserving its intent or, if that is not possible, by substituting another provision that is enforceable and achieves the same objective and economic result. IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT EACH PROVISION OF THIS AGREEMENT WHICH PROVIDES FOR A LIMITATION OF LIABILITY, DISCLAIMER OF WARRANTIES, INDEMNIFICATION OR EXCLUSION OF DAMAGES OR OTHER REMEDIES IS INTENDED TO BE ENFORCED AS SUCH. FURTHER, IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT IN THE EVENT ANY REMEDY UNDER THIS AGREEMENT IS DETERMINED TO HAVE FAILED OF ITS ESSENTIAL PURPOSE, ALL LIMITATIONS OF LIABILITY AND EXCLUSIONS OF DAMAGES OR OTHER REMEDIES SHALL REMAIN IN EFFECT.

13.9. Waiver. No delay or omission by either party to exercise any right or power it has under this Agreement shall impair or be construed as a waiver of such right or power. A waiver by either party of any covenant or breach shall not be construed to be a waiver of any succeeding breach or of any other covenant. All waivers must be in writing and signed by the party waiving its rights.

13.10. Attorneys' Fees. If any legal action or other proceeding is brought for the enforcement of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in that action or proceeding, in addition to any other relief to which it may be entitled.

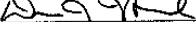
13.11. No Third Party Beneficiaries. The parties agree that this Agreement is for the benefit of the parties hereto and is not intended to confer any legal rights or benefits on any third party and that there are no third party beneficiaries to this Agreement or any part or specific provision of this Agreement.

13.12. Compliance with Laws. Each party shall comply with all governmental, including federal, state, and local laws, statutes, rules and regulations applicable to this Agreement. INNOPRISE AGREES THAT ALL HIRING BY CONSULTANT OF PERSONS PERFORMING THIS AGREEMENT WILL BE ON THE BASIS OF MERIT AND QUALIFICATION AND WILL NOT DISCRIMINATE ON THE BASIS OF RACE, COLOR, RELIGION, CREED, POLITICAL IDEAS, SEX, AGE, MARITAL STATUS, PHYSICAL OR MENTAL DISABILITY, OR NATIONAL ORIGIN.

13.13. Entire Agreement. This Agreement contains the entire understanding of the parties with respect to the Licensee's use of the Software, and supersedes and extinguishes all prior oral and written communications between the parties relative to its subject matter. No amendment to, or change, waiver or discharge of any provision of this Agreement shall be valid unless in writing and signed by any authorized representative of the party against which such amendment, change, waiver or discharge is sought to be enforced.

13.14. Survival of Sections. Sections 4, 6.4, 6.5, 8, 9, 10, 11, 12, 13.10, and 13.14 and all accrued and unpaid obligations arising hereunder shall survive the termination hereof.

ACKNOWLEDGED AND AGREED TO, as of the day and year first written above.

LICENSOR **Innoprise Software, Inc.**
By: 
Printed Name: Dennis J. Harward
Title: President and CEO
Date: March 12, 2009

LICENSEE **City of Billings**
By:
Printed Name:
Title:
Date:

ATTACHMENT C

SUPPORT SERVICES AGREEMENT

THIS SUPPORT SERVICES AGREEMENT ("Agreement") is entered into this _____ day of _____, 2009, ("Effective Date") by and between **INNOPRIZE SOFTWARE, INC.** ("Licensor"), and City of Billings ("Licensee").

RECITALS

WHEREAS, Licensor has granted a license to Licensee to use certain computer software programs pursuant to the License Agreement, as defined below; and

WHEREAS, Licensee desires that Licensor provide support services to Licensee for the Licensed Materials (defined below), and Licensor desires to provide the support services.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and in further consideration of the covenants and representations contained herein, the parties agree as follows:

AGREEMENT

1. DEFINITIONS. The definitions in the License Agreement are incorporated herein. Unless otherwise defined herein or in the License Agreement, the following terms shall have the meanings set forth below:

- 1.1. "Current Release" – means the latest version of the Innoprise Software offered by Licensor for general commercial distribution, including all Updates to it.
- 1.2. "License Agreement" - means the License Agreement between Licensor and Licensee executed contemporaneously herewith.
- 1.3. "License Effective Date" - means the Effective Date as defined in the License Agreement.
- 1.4. "Schedule(s)" – means an attachment to this Agreement which is a part of this Agreement for all purposes. Schedules may be added and removed from time to time to add or delete Innoprise Software from the Support Services Agreement.
- 1.5. "Services" - means the support services that Licensor agrees to provide under this Agreement.
- 1.6. "Telephone or Email Support Call" - means a telephone call or email by Licensee to Licensor for the purpose of obtaining Services under this Agreement.

2. STANDARD SUPPORT SERVICES.

Licensor shall provide the Services specified in the following sections of this Agreement, the Statement of Work which is attached as Exhibit A to the Master Agreement executed between the parties on the same day as this Support Services Agreement, and any Services set forth in the Schedule(s) for Innoprise Software listed on the Schedule(s). All services will be planned annually with Licensee and the Schedule(s) will be amended reflecting any changes. The Services will include the Licensing of Innoprise Software products for Financials (Accounting, Budgeting, Accounts Receivable, General Ledger, Purchasing/Inventory, Payroll/Personnel and Human Resources), CIS, Community Development (Planning & Zoning, Code Enforcements, Occupational Licenses, Building Permits and Citizen Access), Fleet Management, Work Orders, Property Tax and Centralized Cash Receipts. The City may implement these products at any time during the five year period. Following payment of the full \$450,000.00, the City will own the software licenses for the Innoprise Software product suites listed above.

2.1. Error Reporting. Licensee shall report any Defects to Licensor by telephone or e-mail.

2.2. Enhancements. Customization of Enhancements requested by Licensee or customization of Enhancements required to adapt or conform Enhancements to Innoprise Software shall occur under the Schedule(s) and planned annually with Licensee.

2.3. Telephone and e-mail Support. Licensor shall provide telephone and e-mail assistance to Licensee with respect to use of the Innoprise Software and to resolve Defects at telephone numbers designated by Licensor from time-to-time. Support will be available from 9 a.m. to 8 p.m. EST, Monday through Friday, excluding U.S. holidays.

2.4. Severity Levels and Response Times. Licensor shall use reasonable efforts to address the Severity Levels set forth below in the time periods described below:

2.5. Error Severity Levels.

Severity 1: Destroys data or software or causes the application or system to be unavailable for use in a "live" production environment.

Severity 2: Prevents the use of one or more functions or causes the product not to perform as required.

Severity 3: Impedes, but does not prevent, the use of one or more essential functions. May cause the product not to perform in accordance with the product design or specifications.

Severity 4: Impedes the use of non-essential functions or is a cosmetic-related problem.

2.6. Response Time Goals:

Severity 1: Fix or work-arounds available in 24 hours or daily updates until resolution. Resolution usually in the form of patch for system critical errors or the next Update.

Severity 2: Fix or work-arounds available in 48 hours or as soon as is reasonably possible but no later than next regular Update or as patch in extreme cases.

Severity 3: Response available in 1 week. Fix available in next or future Update as appropriate.

Severity 4: Fix in the future Update or Enhancement if required.

3. LIMITATION ON STANDARD SUPPORT SERVICES.

3.1. Licensee Defects. If Licensee notifies Licensor of a problem and Licensor determines that the problem is due to Licensee's incorrect or improper use of the Innoprise Software (as opposed to a Defect in the Innoprise Software), Licensor shall have no obligation to take any action to correct the problem. At Licensee's request and at Licensor's sole discretion, Licensor will make a "best effort" attempt to correct the problem, and Licensee shall pay Licensor the then current time and materials rate for all services provided and all expenses of Licensor associated with performance of those services, whether or not the problem is corrected.

3.2. Current Version. Licensor's obligations under the Agreement shall apply only to the Current Release. However, Licensor shall support the immediately prior release ("Prior Release") for three (3) months following release of the Current Release. During this period, Licensor's sole obligation with respect to the Prior Release shall be to ensure that the Prior Release continues to function in the manner in which it functioned on the date that Licensor made available the Current Release.

3.3. Third Party Software. Maintenance and Support does not cover Third Party Software, nor does it cover Innoprise Software modified by Licensee or Innoprise Software used in any manner in violation of the License Agreement.

3.4. Data. Licensor shall have no responsibility for loss of or damage to Licensee's data. Licensee shall take all necessary steps to backup its data.

4. ADDITIONAL SUPPORT.

Additional support services including on-site support which may be requested by Licensee or necessary to maintain the Innoprise Software or Third Party Software and which is agreed to by Licensor shall be provided under a separate Services Agreement at Licensor's then current rates plus expenses.

5 OBLIGATIONS OF LICENSEE.

5.1. First Level Support/Single Point of Contact. All communications relating to the Services hereunder shall be supervised, coordinated, and undertaken by no more than one (1) designated contact person per Licensee work-shift who shall act as a single point of contact between Licensee and Licensor. All problems must be researched by said contact person before contacting Licensor.

5.2. Modem, ISDN, or Internet Connection. Licensee shall allow and enable Licensor to perform support services via internet, modem or ISDN connection using commercially available remote control software agreed to by the parties. Licensee agrees to obtain a copy of such software, provide an operational connection, and provide such assistance as reasonably necessary to facilitate such support. Licensee shall be solely responsible for instituting and maintaining security safeguards to protect Licensee's systems and data.

5.3. Training. In consideration of performance of the Services by Licensor, Licensee agrees to purchase the training Services described on the Schedule(s) at the price set forth therein.

5.4. Additional Training. In the event that following the first three months of the first year of this Agreement, Licensee's Telephone or Email Support Calls exceed an average of three hours each week during any calendar quarter, Licensee and Licensor shall attempt to determine the reason for the excess calls or emails. If Licensor, in its sole discretion, determines that the excess Telephone or Email Support Calls are a result of inadequate training by Licensee, then Licensee shall correct the inadequacy by providing additional training to its Permitted Users by Licensor at Licensor's then current rates plus expenses.

5.5. Enhancements. Licensee acknowledges and agrees that Enhancements provided by Licensor pursuant to this Agreement may, in Licensor's sole discretion, require additional training of Licensee's trainers and Permitted Users. In consideration of Licensor's continued support of Enhancements in accordance with the terms of this Agreement, Licensee agrees to purchase appropriate training with respect to Enhancements at Licensor's then current rates plus expenses.

6 SUPPORT SERVICES FEES.

6.1. Fees. In consideration of the Services provided under this Agreement, Licensee agrees to pay a Support Service Fee as shown on the Schedule(s). Licensor may change the Support Service Fee for the next calendar year of support and will give Licensee not less than sixty (60) days written notice of the new fee schedule. Immediate "Maintenance" fees may change only if the Licensee adds additional modules. Otherwise, support fees are to be valid for one year from the "Go Live" date. If a module is added after the "Go Live" date, it will be under the overall support calendar date so there is only ONE calendar date to consider.

6.2. Manner of Payment. Support Service Fees for the Innoprise Software that are paid as a flat fee are due and payable within thirty (30) days of the Effective Date and on the next anniversary of the Effective Date each year thereafter. All other service fees and expenses shall be invoiced monthly and are due and payable by Licensee within thirty (30) days of the date of invoice.

6.3. Non-payment. Notwithstanding anything contained herein to the contrary, Licensor reserves the right to refuse to provide Services when charges to Licensee remain unpaid after thirty (30) days from the due date. Licensor agrees to reinstate Services promptly upon payment of all past due charges. Invoices remaining unpaid following the due date shall be subject to interest at the rate of one and one half percent (1.5%) per month or the maximum rate allowed by law, whichever is less.

6.4. Taxes. All amounts due and payable to Licensor shall be exclusive of all applicable taxes based or measured thereon excluding taxes based on the income of Licensor, and Licensee shall be responsible for the payment of all such taxes to Licensor or shall provide Licensor with an appropriate Certificate of Exemption..

7. TERM, TERMINATION, AND DEFAULT.

7.1. Term. This Agreement shall commence on the Effective Date and shall continue until terminated pursuant to this section.

7.2. Termination without Cause. Licensor or Licensee may terminate this Agreement or any Schedule(s) for any reason or no reason by giving sixty (60) days' prior written notice to the other party. Licensee acknowledges and agrees that Licensor has undertaken significant commitment of personnel in the execution of its responsibilities under this Agreement. Therefore, Licensee agrees that upon termination by Licensee pursuant to this section, Licensor shall retain all Support Service Fees paid by Licensee that are applicable to the Schedule(s) being terminated or all of the Support Service Fees if the Agreement is terminated. If Licensor terminates without cause, 100% of any and all unused prepaid maintenance or service fees will be returned to Licensee.

7.3. Termination of License Agreement. If the License Agreement is terminated for any reason as to all of the Innoprise Software, this Agreement shall terminate. If the License Agreement is terminated for any reason as to a portion of the Innoprise Software, then this Agreement shall remain in effect for the remaining Innoprise Software. This Agreement shall terminate with respect to all Innoprise Software that is based upon or derived from Innoprise Software as to which this Agreement is terminated.

7.4. Termination for Default. Subject to the right to cure in Section 7.5, by giving written notice, the non-defaulting party may terminate this Agreement or any Schedule(s) upon the occurrence of one or more of the following events which shall constitute an Event of Default:

7.4.1. Any material representation by a party is discovered to be materially misleading or inaccurate, or a party fails to perform any material covenant, agreement, obligation, term or condition contained herein

7.4.2. A party attempts to assign, terminate or cancel this Agreement contrary to the terms thereof;

7.4.3. Licensee fails to make payment as provided herein;

7.4.4. A party breaches its obligations under the License Agreement.

7.4.5. A party ceases to do business as a going concern, makes an assignment for the benefit of creditors, admits in writing its inability to pay debts as they become due, files a petition in bankruptcy (except in connection with a reorganization under which the business of such party is continued and performance of all its obligations under this Agreement shall continue) or appoints a receiver, acquiesces in the appointment of a receiver or trustee, or liquidator for it or any substantial party of its assets or properties.

7.5. Cure of Event of Default. Except for Licensee's failure to make a payment as provided in Section 7.4.3, Events of Default by a party shall not be cause for termination if the defaulting party cures such default within thirty (30) days of receipt of written notice of default from the non-defaulting party or if the default cannot be cured within thirty (30) days if the defaulting party commences cure within thirty (30) days of receipt of written notice and proceeds to cure such default within a reasonable period of time. Licensee shall not have any right to cure Licensee's failure to make a payment when due.

7.6. Rights Upon Default. Upon an uncured Event of Default, the non-breaching party may, except as limited by this Agreement, seek all legal and equitable remedies to which it is entitled. The remedies set forth herein shall be deemed cumulative and not exclusive and may be exercised by the non-breaching party, successively or concurrently, in addition to any other remedies available to it. Upon termination by Licensor for Licensee's default, all amounts under this Agreement shall become immediately due and payable. If the Agreement is terminated because of the default of Licensor, Licensor shall refund any prepaid Support Service Fee.

8. LIMITATION OF LIABILITY AND REMEDIES. To the extent permitted by law, and to the extent provided for under this Agreement, for claims related to bodily injury, death and damage to real property and tangible personal property, Innoprise shall indemnify and hold harmless the Customer from and against all direct damages and costs of any kind, including but not limited to reasonable attorney fees, arising out of or resulting from any negligent acts, or negligent omissions of Innoprise, regardless of whether such claims are caused in part by any party indemnified hereunder, but not to the extent that the Customer is legally liable for such damages and costs. In no event will Innoprise be liable for any consequential damages, including lost profits, savings or reprocurement costs, in any amount exceeding two times the total sums due to be paid by the Customer to Innoprise pursuant to this contract.

Except for Innoprise's obligations to indemnify the Customer under infringement actions, as noted in Section 4 of this Agreement, and claims for personal injury or damages to real or tangible personal property caused by Innoprise's negligence as noted above, Innoprise's liability for damages to the Customer for any cause whatsoever under this Agreement regardless of the form of action, is limited to two times the total amount of fees due to be paid by Customer under this Agreement for all of the Innoprise Licensed Programs(s) and services, including any fees associated with Innoprise project management and related out-of-pocket expenses.

In situations involving performance or nonperformance of Licensed Programs(s) furnished under this Agreement, the Customer's remedy is (1) the correction by Innoprise of Licensed Program defects, or (2) if, after repeated efforts, Innoprise is unable to make the Licensed Program(s) operate as warranted, the Customer shall be entitled to recover damages to the limits set forth in this section.

9. INDEMNIFICATION INSURANCE. INNOPRIZE AGREES TO INDEMNIFY, DEFEND AND SAVE THE CITY, ITS OFFICERS, AGENTS AND EMPLOYEES HARMLESS FROM ANY AND ALL LOSSES, DAMAGE AND LIABILITY OCCASIONED BY, GROWING OUT OF, OR IN ANY WAY ARISING OR RESULTING FROM ANY INTENTIONAL OR NEGLIGENT ACT ON THE PART OF INNOPRIZE OR INNOPRIZE'S AGENTS OR EMPLOYEES. FOR THIS PURPOSE, INNOPRIZE SHALL PROVIDE CITY WITH PROOF OF CONSULTANT'S INNOPRIZE INSURANCE ISSUED BY A RELIABLE COMPANY OR COMPANIES FOR PERSONAL INJURY AND PROPERTY DAMAGE, NAMING THE CITY AS A PRIMARY, NON-CONTRIBUTORY ADDITIONAL INSURED, IN AN AMOUNT NOT LESS THAN \$1.5 MILLION FOR EACH OCCURRENCE. THE INSURANCE MUST BE IN A FORM SUITABLE TO CITY.

10. GOVERNING LAW. This agreement shall be governed by, construed, and enforced under and in accordance with the Laws of the State of Montana. In the event of any litigation arising under or construing this Agreement, venue shall lie only in the Thirteenth Judicial District Court for Yellowstone County, Montana. Prior to either party commencing any legal action under this Agreement, the parties agree to try in good faith, to settle any dispute amicably between them. If any dispute arises between the parties either relating to this Agreement or in any way arising out of this Agreement then the complaining party shall provide a notice of such dispute, in writing, to the other party. Such notice shall include both a specific description of the disputed issues and suggested action(s) to remedy such dispute. The Parties shall thereafter attempt, in good faith, to settle such dispute. If no resolution of the dispute is reached within forty-five (45) days of the notice of dispute, then either party may pursue any legal remedy it may have available including instituting suit in a court of competent jurisdiction..

11. SUBCONTRACTING.

Licensor reserves the right to subcontract all or part of the Services, but Licensor shall remain responsible for performance of such Services by its subcontractors.

12. RELATIONSHIP OF THE PARTIES.

The relationship of the parties established by this Agreement is solely that of independent contractors, and nothing contained in this Agreement shall be construed to (a) give any party the power to direct and control the day-to-day activities of the other; or (b) constitute such parties as partners, joint venturers, co-owners or otherwise as participants in a joint or common undertaking; or (c) make either party an agent of the other for any purpose whatsoever. Neither party nor its agents and employees is the representative of the other for any purpose, and neither has power or authority to act as agent, employee to represent, to act for, bind, or otherwise create or assume any obligation on behalf of the other.

13. MISCELLANEOUS.

13.1. **Binding Nature and Assignment.** This Agreement shall bind the parties and their successors and permitted assigns. Licensee may not assign this Agreement without the prior written consent of Licensor.

13.2. **Notices.** All notices and other communications under this Agreement must be in writing and shall be deemed to have been given if delivered personally, sent by facsimile (with confirmation), mailed by certified mail, or delivered by an overnight delivery service (with confirmation) to the parties at the following addresses or facsimile numbers (or at such other address or facsimile number as a party may designate by like notice to the other parties):

To Licensor:

Innoprise Software, Inc.
Attention: Contract Administrator
555 Eldorado Blvd, Suite 100
Broomfield, CO 80021-3470
Facsimile No.: (303) 339-0413

To Licensee:

City of Billings
Attention: Dave Watterson, IT Manager
210 N. 27th Street
Billings, MT 59101
Facsimile No.: (406) 657-3064

Any notice or other communication shall be deemed to be given (a) on the date of personal delivery, (b) at the expiration of the third (3rd) day after the date of receipt in the United States Mail, or (c) on the date of confirmed delivery by facsimile or overnight delivery service.

13.3. Counterparts. This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one single agreement between the parties.

13.4. Headings. The section headings are for reference and convenience only and shall not be considered in the interpretation of this Agreement.

13.5. Approvals and Similar Actions. Where agreement, approval, acceptance, consent or similar action by either party is required by any provision of this Agreement, such action shall not be unreasonably delayed or withheld, unless specifically permitted by this Agreement.

13.6. Force Majeure. Neither party shall be in default by reason of any failure in the performance of this Agreement (except failure to pay) if such failure arises out of causes beyond its reasonable control. Such causes may include, but are not limited to, acts of God, acts of the public enemy, acts of government in either its sovereign or contractual capacity, acts of the party whose performance is not sought to be excused, fires, flood, weather, epidemics, quarantine restrictions, strikes, freight embargoes, failure of transmission or power supply, mechanical difficulties with equipment which could not have been reasonably forecasted or provided for, or other causes beyond its sole control. The party so affected will resume performance as soon as practicable after the force majeure event terminates.

13.7. Severability. If any provision of this Agreement is held to be unenforceable, then both parties shall be relieved of all obligations arising under such provision, but only to the extent that such provision is unenforceable, and this Agreement shall be deemed amended by modifying such provision to the extent necessary to make it enforceable while preserving its intent or, if that is not possible, by substituting another provision that is enforceable and achieves the same objective and economic result. IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT EACH PROVISION OF THIS AGREEMENT WHICH PROVIDES FOR A LIMITATION OF LIABILITY, DISCLAIMER OF WARRANTIES, INDEMNIFICATION OR EXCLUSION OF DAMAGES OR OTHER REMEDIES IS INTENDED TO BE ENFORCED AS SUCH.

13.8. Waiver. No delay or omission by either party to exercise any right or power it has under this Agreement shall impair or be construed as a waiver of such right or power. A waiver by either party of any covenant or breach shall not be construed to be a waiver of any succeeding breach or of any other covenant. All waivers must be in writing and signed by the party waiving its rights.

13.9. Attorneys' Fees. If any legal action or other proceeding is brought for the enforcement of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in that action or proceeding, in addition to any other relief to which it may be entitled.

13.10. No Third Party Beneficiaries. The parties agree that this Agreement is for the benefit of the parties hereto and is not intended to confer any legal rights or benefits on any third party and that there are no third party beneficiaries to this Agreement or any part or specific provision of this Agreement.

13.11. Entire Agreement. This Agreement, including all of its attachments, each of which is incorporated into this Agreement, is the entire agreement between the parties with respect to its subject matter, and there are no other representations, understandings or agreements between the parties relative to such subject matter. No amendment to, or change, waiver or discharge of any provision of this Agreement shall be valid unless in writing and signed by any authorized representative of the party against which such amendment, change, waiver or discharge is sought to be enforced.

13.12. Publicity. Licensor may prepare press releases concerning the existence of this Agreement and may reference Licensee and this Agreement in its advertising, sales promotions, trade shows, or other marketing material subject to approval by Licensee which approval shall not be unreasonably delayed or withheld.

13.13. Compliance with Laws. Each party shall comply with all governmental, including federal, state, and local laws, statutes, rules and regulations applicable to this Agreement and in the conduct of its business. INNOPRIZE AGREES THAT ALL HIRING BY CONSULTANT OF PERSONS PERFORMING THIS AGREEMENT WILL BE ON THE BASIS OF MERIT AND QUALIFICATION AND WILL NOT DISCRIMINATE ON THE BASIS OF RACE, COLOR, RELIGION, CREED, POLITICAL IDEAS, SEX, AGE, MARITAL STATUS, PHYSICAL OR MENTAL DISABILITY, OR NATIONAL ORIGIN.

13.14. Non-disclosure. Each party hereby agrees that it will not disclose the terms of this Agreement to any third party without the express written consent of the other party, other than those disclosures and records required to be made or maintained pursuant to Colorado law.

13.15. Survival of Provisions. Provisions 7.6, 8, 9, 12.9 and 12.15 and all accrued and unpaid obligations arising hereunder shall survive the termination hereof.

IN WITNESS WHEREOF, Licensor and Licensee have each caused this Agreement to be signed and delivered by its duly authorized representative, effective as of the date first stated above.

LICENSEE **City of Billings**

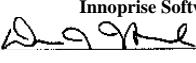
By:

Printed Name:

Title:

Date: _____

LICENSOR **Innoprise Software, Inc.**

By: 

Printed Name: Dennis J. Harward

Title: President and CEO

Date: March 12, 2009

SCHEDULE "A"

This attachment is to the INNOPRISE Support Services Agreement dated of even date herewith, between Innoprise Software, Inc. and City of Billings. Unless otherwise stated below, all terms and conditions as stated in the License and Master Agreement shall remain in effect.

Software:

The following Innoprise Software is subject to this Schedule:

Financial Suite including: Accounting, Budgeting, Accounts Receivable, General Ledger, Purchasing/Inventory, Payroll/Personnel and Human Resources
CIS
Community Development Suite including: Planning and Zoning, Code Enforcements, Occupational Licenses, Building Permits And Citizen Access
Fleet Management Suite including: Fleet Management and Work Orders
Property Tax
Centralized Cash Receipts

90 ISU's are included in each of the five years of this agreement (1 Implementation Service Unit equals 1 day)

Support Service Fee:

Cost of Services

The following Services will be provided for a flat fee for each year of this five year agreement:

90 ISU's each year to be used as directed by the City

\$ 90,000.00

- Help Desk
- Software Enhancements

*After Year Five, the annual maintenance will be invoiced with no more than a 5% increase per year, based on the rate of \$90,000.00.

Additional Implementation Service Units (Each Unit = 1 day) are available at the following rates:

<u># of ISU's</u>	<u>Price per Unit</u>
1 - 20	\$ 1,320.00
21 - 40	\$ 1,240.00
41 - 60	\$ 1,160.00
61 - 80	\$ 1,080.00
81 - 100	\$ 1,000.00
101 +	\$ 900.00

Service Definitions:

- Help Desk – means application software support for issues and questions related to the utilization of the Innoprise Software licensed by Licensee.
- Software Enhancements – means any Enhancements licensed by Licensee.
- Training – means any training activity requested by Licensee for training on any Innoprise Software application component licensed by Licensee.
- Technical Services – means any technical service activity requested by Licensee for hardware, operating systems, and network issues.
- Technology Consulting - means any consulting activity requested by Licensee for technology planning, analyses, and software utilization.

LICENSEE City of Billings

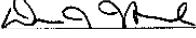
By:

Printed Name:

Title:

Date: _____

LICENSOR Innoprise Software, Inc.

By: 

Printed Name: Dennis J. Harward

Title: President and CEO

Date: March 12, 2009



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Tuesday, May 26, 2009

TITLE: Approval of License and Service Agreement with Destiny Software, Inc. for AgendaQuick Software and Minutes Module

DEPARTMENT: Administration

PRESENTED BY: Tina Volek, City Administrator
Cari Martin, City Clerk

PROBLEM/ISSUE STATEMENT: Creation of City Council agendas and agenda packets currently involves an extensive manual process. City departments submit two sets of paper copies of agenda items to the City Clerk, who manually prepares the agenda, the agenda packets, and the electronic packet for the City's website. The process involves many hours of preparing, finalizing, and photocopying the agenda and agenda packets, as well as approximately \$6,000 a year in photocopy expense. AgendaQuick Software will facilitate the creation of staff reports using an automated routing and approval process, saving time and eliminating the need for paper copies; streamline creation of the agenda and the minutes transcription process; and automatically create the electronic packet for the City's website. A Request for Proposals was advertised, and ten proposals were received. A selection committee comprised of Cari Martin, City Clerk; Liz Kampa, Purchasing Agent; Councilmember Denis Pitman; and Deb Schmitt, Network Administrator, reviewed the proposals and unanimously selected Destiny Software, Inc. If the agreement is approved, the installation and training process will tentatively begin the end of May, with full staff utilization of the software by the end of August.

FINANCIAL IMPACT: City Council previously approved \$40,000 in the FY09 City Clerk's budget specifically for agenda management software.

RECOMMENDATION

Staff recommends that Council approve the agreement with Destiny Software, Inc. in the amount of \$19,950, with an annual support and maintenance fee the second year forward in the amount of \$3,200.

Approved By: **City Administrator** **City Attorney**

ATTACHMENT:

A. Software License and Service Agreement

Software License & Service Agreement

Effective Date: May 26, 2009

THIS AGREEMENT between **Destiny Software Inc.** ("Licensor"), of 19724 166th Ave NE, Woodinville, Washington 98072, mailing address: PO Box 827, Woodinville, WA 98072 and **The City of Billings, Montana** ("Licensee"), of 210 N. 27th St. Billings, MT 59101

WHEREAS:

- (A) This Agreement is a license and service agreement and not an agreement for the sale of software.
- (B) This Agreement gives Licensee limited rights to use the Software and Related Materials described below and imposes upon Licensee certain obligations to protect the Software and Related Materials from unauthorized use, reproduction, distribution or publication.
- (C) This Agreement imposes upon Licensor certain obligations to provide customer service in regard to the ongoing maintenance of Software and Related Materials described below.

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

1. **Definitions.** In this Agreement the following words and phrases shall have the following respective meanings, unless the context otherwise requires:
 - (a) **"Confidential Information"** means proprietary material or information belonging to Licensor, or to any third party to which Licensor owes a duty to maintain confidentiality, directly or indirectly placed by Licensor, or by third parties to which Licensor is related, into the possession of Licensee which material or information is not generally available to or used by others (except other persons whom Licensor has granted licenses of the Software and Related Materials or part thereof) or the utility or value of which is not generally known or recognized as standard practice, whether or not the underlying details are in the public domain, and includes, without limitation, all business information, computer software and computer technology, whether patentable or not, which is acquired by or on behalf of Licensee from time to time and which, owing to the relationship between Licensor and Licensee, may become known to Licensee.
 - (b) **"Copyrights"** shall refer to those copyrights or copyright registrations for the Software or the Software and Related Materials and shall include future copyrights belonging to Licensor or any third party related to Licensor for improvements and modifications thereof and applications by Licensor for registration of copyrights for improvements and modifications thereof;
 - (c) **"Enhancements"** means changes and/or improvements to the Software, whether arising out of the particular Software configuration for the specific use of Licensee or otherwise;
 - (d) **"Errors"** means, with regard to the Software, incorrect source code or object code or anything not in agreement with published Specifications or requested modifications;
 - (e) **"Know-How"** includes all technology, source code, object code, local area network manager code, technical information, procedures, processes, trade secrets, methods, practices, techniques, information, logic/flow charts, sketches, drawings, Specifications, application and modification manuals and data relating to the design, manufacture, production, inspection, and testing of the Software, which are from time to time in Licensor's possession;
 - (f) **"Manuals"** means the programmer's manuals, the technical manuals and the user manuals and other similar documentation;

- (g) "**Modifications**" means Enhancements and/or correction of Errors, and Modifications shall be deemed to have been accepted by Licensee upon the lapse of sixty (60) days following successful installation of any Modifications unless Licensee notifies Licensor in writing prior to the lapse of such period that the Modifications in question do not conform to Specifications;
- (h) "**Related Materials**" means all of the printed materials, user documentation, training documentation and confidential activation code for the Software supplied by Licensor to Licensee, and includes the Manuals;
- (i) "**Service**", which means consulting time, providing technical information and or assistance in the ongoing maintenance of the Software;
- (j) "**Software**", which includes the Know-How and, unless otherwise hereinafter set out to the contrary, any Modifications, is described on Schedule "A" herein and includes all actual copies of all or any portion of the computer programs delivered by Licensor to Licensee, inclusive of backups, updates and merged copies either permitted by this Agreement or supplied subsequently by Licensor or any party related to Licensor; and
- (k) "**Specifications**" means the functional performance parameters of the Software.

2. **Grant of License and Reservation of Ownership.** Licensor hereby grants to Licensee a personal, non-exclusive, non-transferable license to use the Software and Related Materials at the site referred to in **Schedule "A"** hereto and otherwise pursuant to the terms of this Agreement. Licensee agrees to use its best efforts to protect the Software and Related Materials from unauthorized use, reproduction, distribution or publication.

3. **License & Service Fee.** In consideration for the granting of the license of the Software and Related Materials to Licensee, and for the providing by Licensor of service, as defined in **Schedule "B"**, Licensee hereby agrees to pay to Licensor a license & service fee, as defined in **Schedule "B"**. Licensee shall also pay to Licensor all sales, excise and other taxes thereon and upon any other amounts payable by Licensee to Licensor pursuant to this Agreement.

4. **Copyrights.**

- (a) The Software and Related Materials are owned by Licensor and are protected by U.S. copyright laws and applicable international treaties and/or conventions. Without limiting the prohibition on assignment contained elsewhere in this Agreement, Licensee acknowledges that its rights to use the Software and Related Materials are personal to Licensee. Licensee therefore covenants not to permit the use of the Software and Related Materials by unauthorized persons and to use its best efforts to prevent the exportation of the Software and Related Materials or any portion thereof into any country which does not have copyright laws that will protect Licensor's Copyrights.
- (b) Licensor, at its own expense, will defend and indemnify Licensee from all claims that the Software and Related Materials infringe a United States of America copyright, provided that Licensee gives Licensor prompt written notice of such claims and permit Licensor to defend or settle the claims and provides Licensor with all reasonable co-operation and further provided that Licensor shall not be required to defend and indemnify Licensee from infringement claims resulting from Modifications by Licensee.
- (c) As to any Software and Related Materials which are or in the opinion of Licensor may become subject to a claim of infringement, Licensor, at its option, will obtain the right for Licensee to continue using the Software and Related Materials or replace or modify the Software and Related Materials so as to make it non-infringing. If none of the aforementioned alternatives are available on commercially reasonable terms, then Licensee agrees to return the Software and Related Materials to Licensor upon Licensor's written request and Licensor shall, upon return, refund to

Licensee all license fees paid by Licensee to Licensor, and Licensor shall have no other or further liability to Licensee. Licensee acknowledges that the remedies set out in paragraph 11 hereof constitute the sole and exclusive remedy of Licensee for copyright infringement.

5. **Permitted Uses of the Software and Related Materials.** As each configuration of central processing units and/or networked systems may be unique, Licensee agrees to conform Licensee's use of the Software to the particular Software configuration licensed by Licensor to Licensee. Said configuration is incorporated into this license agreement by reference, inclusive of Modifications created or approved by Licensor. Licensee may make one (1) copy of the Software for archival purposes only, unless Licensor agrees otherwise in writing.

6. **Uses Not Permitted.** Licensee covenants and agrees that it will not:

- (a) whether in whole or in part, sell, rent, lease, sublease, license, sublicense, lend, time-share, transfer, assign or provide the use of or access to the Software and Related Materials, or any portion thereof, to unlicensed persons;
- (b) assign, mortgage, charge or otherwise encumber either the Software and Related Materials or its rights under this Agreement;
- (c) reverse engineer, decompile or disassemble the Software;
- (d) alter, modify or create any derivative works of the Software and Related Materials or any portion thereof, except as needed for Licensee's own use of Software;
- (e) except as permitted elsewhere in this Agreement, make additional copies of the Software and Related Materials or any portion thereof;
- (f) obscure or remove any copyright or trademark notices.

7. **Assignment.** Without limiting anything contained elsewhere in this Agreement, Licensee shall not assign this Agreement or any rights herein without the prior written consent of Licensor, which consent may be arbitrarily withheld. Any purported assignment without Licensor's consent shall be deemed to be null and void.

8. **Term.** The license granted by this Agreement shall commence on the date of this Agreement and shall continue for a period of one year thereafter. This Agreement shall be automatically terminated at the end of the one year period unless Licensee requests renewal, in writing, prior to the end of the period. Notwithstanding the foregoing, this Agreement will terminate automatically without notice if Licensee fails to comply with any provision of this Agreement. The parties agree that all provisions set out in this Agreement for the protection of Licensor and its Copyrights shall remain in force notwithstanding termination of this Agreement.

9. **Updates.** Provided that Licensee is in compliance with the terms and conditions of this Agreement, Licensor agrees to make available to Licensee all updates, improvements and enhancements for the Software. Nothing herein shall be construed or interpreted as requiring Licensor to develop any such updates, improvements or enhancements.

10. **Limited Warranty.**

- (a) Licensor warrants that the Software, as defined in **Schedule "A" and, any additional Software, as defined in future revisions to Schedule "A"**, without Modifications, will substantially

conform to the Related Materials for a period of one (1) year from the date of receipt by Licensee. Licensor warrants that the media upon which the Software is provided and the Related Materials will be free from defects in materials and workmanship under normal use and service for a period of ninety (90) days from the date of receipt by Licensee.

(b) **LICENSOR DISCLAIMS ALL OTHER WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE SOFTWARE AND RELATED MATERIALS. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES OR THE LIMITATION OR EXCLUSION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES SO THE FOREGOING EXCLUSIONS MAY NOT APPLY TO COMPANY. COMPANY MAY HAVE OTHER RIGHTS WHICH VARY FROM JURISDICTION TO JURISDICTION.**

(c) During the warranty period, Licensor's entire liability and Licensee's exclusive remedy shall, at Licensor's option, be one of the following:

- (i) Licensor may attempt to correct or work around Errors;
- (ii) Licensor may replace the Software and Related Materials;

(d) Licensor shall not be liable for damages, direct or indirect, special, incidental, consequential, punitive or exemplary, related to Licensee's use of the Software and Related Materials, even if Licensor is advised of the possibility of such damage.

11. **Confidentiality.** All Confidential Information, including the Know-How, shall be treated as confidential by Licensee and shall be used solely to enable Licensee to use the Software in accordance with this Agreement. Nothing contained herein shall prevent Licensee from making disclosure of any of the Confidential Information to any employee of Licensee for the sole purpose of utilizing the Software and Related Materials in accordance with this Agreement, provided that Licensee shall obtain from each employee to whom such disclosure is made a covenant of non-disclosure.

12. **No Implied Waiver.** No failure or delay by Licensor in enforcing any right or remedy in this Agreement shall be construed as a waiver of any future exercise of such right or remedy by Licensor.

13. **Conflict of Documents.** Any conflict between the terms of this Agreement and any purchase order or other document in relation to the license granted hereby shall be resolved in favor of the terms of this Agreement.

14. **Equitable Relief.** Licensee acknowledges that any breach by it of any of the terms of this Agreement is likely to result in irreparable harm or damage to Licensor and that, in the event of such breach, in addition to any and all remedies at law, Licensor shall have the right to obtain an injunction, specific performance or other equitable relief to prevent the continuous violation of the terms of this Agreement.

15. **Governing Law.** This Agreement shall be construed in accordance with the laws of the State of Montana.

16. **Forum.** This agreement, including its payment obligation, is performable in Yellowstone County, MT and venue for all actions in connection with this Agreement shall lie exclusively in Yellowstone County, MT.

17. **Entire Agreement.** This Agreement constitutes the sole and entire agreement between the parties, and

supersedes any previous agreements, understandings and arrangements between the parties relating to the Software and Related Materials. Any amendments hereto are enforceable only if in writing and signed by each of the parties.

18. **Severability** If any portion of this Agreement is deemed by any court of competent jurisdiction to be illegal or unenforceable, then the remaining provisions of this Agreement shall remain in full force and effect notwithstanding.
19. **Execution.** This Agreement has been executed by an authorized signatory duly entitled to bind the party on behalf of which he or she has executed this Agreement.

IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the date first above written.

The City of Billings, Montana

Per:

Name:
Title:

Destiny Software Inc.

Per:

Name: Dean Dickinson
Title: Vice President

Schedule "A"
Effective: May 4, 2009

Description of Software & Services	AgendaQuick – Web-based agenda software system	
Software Contract Price	AgendaQuick™ System Software	\$17,550
Training and Travel	1 2-day onsite training for AgendaQuick	\$ 2,400
	(Each additional training session \$ 1,500)	
Total Price		\$ 19,950
Licensee Site:	The City of Billings, Montana	

Schedule "B"
Software License, Maintenance & Service Fee Schedule
Effective: May 4, 2009

Description of Services	<ul style="list-style-type: none">• Customer Training and Program Documentation for AgendaQuick• Customer Support for Purchased Software Listed in Schedule "A"• Free Updates, if applicable, to Purchased Software Listed in Schedule "A"
Term of Agreement	May 26, 2009 to May 25, 2010
Annual Service & Maintenance Fee	AgendaQuick \$3,200

AGENDA ITEM:

E



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Approval of Facility/Use Agreement Form for Dehler Park Between the Billings Mustangs and Montana State University - Billings

DEPARTMENT: Parks, Recreation and Public Lands

PRESENTED BY: Michael Whitaker, Parks, Recreation and Public Lands Director

PROBLEM/ISSUE STATEMENT: The current agreement with the Billings Pioneer Baseball Club requires the City to approve all of the Ballclub's standard forms of sublease, use agreements, contract and subcontract forms applicable to users of the facility for baseball and baseball-related events shall be subject to prior recommended approval by the City Parks and Recreation Advisory Board and final approval by the Mayor and Council..

The Parks, Recreation and Cemetery Board Recommended that the Billings Mustangs facility/use agreements as presented to the board be sent to City Council with the user rate fees for MSU-Billings and Legion be set at last years rate of \$350 for a doubleheader - \$250 single game and that City of Billings make a request for the Mustangs to better track costs during the 2009 games and prepare a report.

The facility/use agreement form was reviewed at the April 20th City Council work session.

ALTERNATIVES ANALYZED:

- Approve the Facility/Use Agreement Form;
- Do not approve the Facility/Use Agreement Form.

FINANCIAL IMPACT: There is no financial impact to the City.

RECOMMENDATION

Staff recommends that City Council approve the proposed facility/use agreement form.

Approved By: **City Administrator** _____ **City Attorney** _____

ATTACHMENTS:

A: Dehler Park Facility Use Agreement

B: Mustangs' Rate Calculations

DEHLER PARK FACILITY USE AGREEMENT

This agreement, by and between the Billings Pioneer Baseball Club, a Montana Corporation, d/b/a Billings Mustangs, and MSU-Billings intercollegiate baseball, hereinafter designated as "MSUB", hereinafter collectively referred to as "the parties", states:

Section 1. Effective Date and Term.

1.1 Effective Date. This Agreement is effective upon the date it is executed by the parties, or March 1, 2009, whichever occurs first.

1.2 Initial Period. This Agreement will expire May 31, 2009.

Section 2. Responsibilities and Use of the Facility.

2.1 Management of Facility. Billings Mustangs shall exclusively manage all daily maintenance and improvement issues relative to the facility, including ordering / receiving of materials and payment of all labor (field maintenance, cleaning), labor costs and materials needed in the operation of the facility for each and every MSUB varsity baseball event.

2.2 Event Defined. MSUB shall be permitted full use and full access to the facility and related baseball equipment (batting tunnel, protective screens, etc.) for varsity games only, provided that a maximum of two (2) consecutive varsity games per calendar day will be played.

2.3 Event Personnel. Billings Mustangs shall hire, train, schedule, supervise and compensate all full and part time field maintenance employees and cleaners at Dehler Park. MSUB is responsible for securing and compensating all event staff, security and support personnel (ticketing associates, ushers, scorer, etc.).

2.4 Ultimate Authority. Prior to the start of each game, the Director of Field Maintenance is provided with ultimate authority in determining whether the grounds are suitable for play. The decision as whether to start the game is that of the Director of Field Maintenance, and must / will be respected by all parties involved. Once the game has started, the decision to continue, as set forth by the official rules of baseball, is solely that of the umpire in charge.

Section 3. Playing Surface and Cleaning.

3.1 Playing Surface and Grounds. Billings Mustangs shall have the exclusive responsibility to maintain, repair and prepare the baseball surface for all MSUB events.

3.2 Cleaning of the Facility. Billings Mustangs shall have the exclusive responsibility to clean all areas within the facility (seating, entrances, restrooms, etc.) for all events hosted by MSUB as necessary, with the exception of both the home team and visiting team dugouts. MSUB agrees to thoroughly clean both dugouts immediately following the conclusion of each and every event.

3.3 Restrooms. Billings Mustangs shall have the exclusive responsibility to stock and supply the restrooms on the third base side (west side of property) only during all MSUB events and that cleaning will be performed as needed.

3.4 Assistance with Field Preparation. MSUB agrees to provide personnel (players, support staff) to aid in field preparation and maintenance as requested by the Director of Field Maintenance.

3.5 Batting Practice. Batting practice and infield practice shall be permitted only under favorable playing surface conditions. The decision as to whether pregame practice will be permitted is exclusively that of the Director of Field Maintenance.

Batting mats and practice screens are provided for both the preservation of the field and the safety of the players. It is the responsibility of MSUB to assist with the set up and tear down of the batting practice equipment.

Section 4. Miscellaneous.

4.1 Indemnification. MSUB shall indemnify and have the duty to defend the City of Billings and Billings Mustangs and hold both harmless from and against all claims, liabilities, damages, losses and expenses arising out of or resulting from the negligent acts or omissions of anyone they employ directly or indirectly, including sub-contractors, agents and volunteers.

4.2 Insurance. MSUB shall be required to carry insurance as set forth below by the City of Billings. Prior to the start of the use of the facility, MSUB shall provide Billings Mustangs a Certificate of Insurance naming Billings Pioneer Baseball Club as a primary, non-contributory insured in all categories of insurance.

"The Ballclub and each other organization using the facility shall annually renew and carry liability and property, fire and casualty insurance, including liquor liability insurance (when alcohol will be sold/consumed) as approved by the Billings City Attorney covering the Ballclub and other users. The Ballclub and other all other seasonal and single event users shall obtain a Commercial General Liability insurance policy in an amount as set forth below, and under the terms and conditions as approved by the Billings City Administrator or Billings City Attorney. The Ballclub and other seasonal and single event users shall also obtain a separate liquor liability insurance policy in the amount of One Million and no/100 Dollars (\$1,000,000) per Occurrence when any alcoholic beverages are sold or consumed during any event. The required insurance will be equivalent to the minimum amount of Seven Hundred and Fifty Thousand and no/100 Dollars (\$750,000) per claim, and a minimum of One Million Five Hundred Thousand and no/100 Dollars (\$1,500,000) per occurrence (MCA Section 2-9-108(1)(2007)) and shall be in effect for the entire baseball use season including practice and scheduled games for the term of this agreement. Prior to the start of the use of the facility each year, the Ballclub and all other permitted users shall provide the City a Certificate of Insurance made out to the City of Billings and naming the City of Billings as a primary, non-contributory insured in all categories of insurance. The City reserves the right to require reasonable increases in insurance coverage or changes in types of coverage as the circumstances or insurance industry practices may require. The City shall be notified by Ballclub or its insurer in writing thirty (30) days prior to any cancellation or nonrenewal of the policy. The notice of cancellation must be sent to the City."

4.3 Announcement. MSUB agrees to make the following public address announcement prior to each event that takes place at the facility.

"Ladies and gentlemen:

Welcome to Dehler Park, owned by the City of Billings. For your safety, the Yellowjackets and the City of Billings ask that you take a moment to familiarize yourself with the nearest passageways and exits to be used in case of fire or other emergencies.

These exits are located at (description of exits).

Also, we would like to remind you that Dehler Park is a SMOKE-FREE facility by order of the Billings City Council.

Thank you for your cooperation."

4.4 Stadium Security. MSUB shall provide and compensate a minimum of one (1) qualified, uniformed security officer at each event.

Section 5. Rent.

5.1 Rental Payment. MSUB shall remit to Billings Mustangs the sum of **\$450.00 per day** as compensation for use of the Facility when two (2) varsity baseball games are scheduled and played, and **\$300.00 per day** when one (1) varsity baseball game is scheduled and played.

Billings Mustangs shall prepare and provide MSUB with an invoice for the total amount due immediately following the final event of the 2009 season.

This Agreement may not be altered without the expressed written consent of the aforementioned parties.

BY: _____

DATE: _____

Gary Roller, General Manager
Billings Mustangs Baseball Club

BY: _____

DATE: _____

Gary Gray, Director Intercollegiate Athletics
MSU-Billings

March 25, 2009

Mike Whitaker
City of Billings Parks, Recreation and Public Lands
390 North 23rd Street
Billings, MT 59101

Dear Mike,

Thank you for your recent inquiry regarding our Use Agreement rate.

Following is an itemized list of expenses incurred during a standard baseball doubleheader (DH) played on a single calendar day. This is the method by which our use rates are calculated. Rates are adjusted accordingly for single game and tournament use. The figures for utilities are projections based on actual costs (see below) from the 2008 season.

Playing Field Labor (minimum 18 hours @ \$15/hour)	\$ 270
Cleaning Labor (minimum 5 hours @ \$15/hour)	\$ 75
Electricity	\$ 75
Water	\$ 22
Gas	\$ 8
Paper Products	\$ 80
Playing Field Supplies	\$ 10
Playing Field Materials	\$ 50
Equipment Use	?
TOTAL	\$ 590 +

7/1/2008 – 10/15/2008	High / day	Low / day	Avg / day	50% Avg
Electricity	\$211.75	\$89.40	\$150.58	\$75.29
Water	\$67.36	\$19.96	\$43.66	\$21.83
Gas	\$23.69	\$10.25	\$16.97	\$8.49

As noted by a (?) in the category of equipment use, we cannot quantify or even estimate as to the monetary value for the use of the field equipment (mowers, utility vehicles, batting cage, protective screens, tarps, etc.) that is exclusively the property of the Billings Mustangs. The Mustangs have purchased and will continue to purchase equipment without contribution from any other user group. However, these individual pieces of equipment are not luxury items, but both imperative and necessary to the playing of the game of baseball and therefore do in fact benefit other user groups of the Facility.

Additionally, we do not factor into the use rate any improvement or maintenance projects to the playing surface or adjoining grounds. For example, the Mustangs aerate and sand top dress the playing surface a minimum of twice per year but do not ask for or receive compensation from any other baseball user group, although the result of the aeration unquestionably improves the field conditions and therefore does directly affect user groups other than just the Mustangs. In October of '08, the total cost, excluding labor, to aerate and top dress the playing surface was \$ 1,850.00.

As I think you'll agree, the rates as outlined in the Use Agreement are not merely reasonable, but low.

Sincerely,

Gary Roller
Billings Mustangs Professional Baseball



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Approval of Facility/Use Agreement Form for Dehler Park Between the Billings Mustangs and Billings American Legion Baseball

DEPARTMENT: Parks, Recreation and Public Lands

PRESENTED BY: Michael Whitaker, Parks, Recreation and Public Lands Director

PROBLEM/ISSUE STATEMENT: The current agreement with the Billings Pioneer Baseball Club requires the City to approve all of the Ballclub's standard forms of sublease, use agreements, contract and subcontract forms applicable to users of the facility for baseball and baseball-related events shall be subject to prior recommended approval by the City Parks and Recreation Advisory Board and final approval by the Mayor and Council..

The Parks, Recreation and Cemetery Board Recommended that the Billings Mustangs facility/use agreements as presented to the board be sent to City Council with the user rate fees for MSU-Billings and Legion be set at last years rate of \$350 for a doubleheader - \$250 single game and that City of Billings make a request for the Mustangs to better track costs during the 2009 games and prepare a report.

The facility/use agreement form was reviewed at the April 20th City Council work session.

ALTERNATIVES ANALYZED:

- Approve the Facility/Use Agreement Form;
- Do not approve the Facility/Use Agreement Form.

FINANCIAL IMPACT: There is no financial impact to the City.

RECOMMENDATION

Staff recommends that City Council approve the proposed facility/use agreement form.

Approved By: **City Administrator** _____ **City Attorney** _____

ATTACHMENTS:

A: Dehler Park Facility Use Agreement

B: Mustangs' Rate Calculations

DEHLER PARK FACILITY USE AGREEMENT

This agreement, by and between the Billings Pioneer Baseball Club, a Montana Corporation, d/b/a Billings Mustangs, and Billings American Legion Baseball, hereinafter designated as "BALB", hereinafter collectively referred to as "the parties", states:

Section 1. Effective Date and Term.

1.1 Effective Date. This Agreement is effective upon the date it is executed by the parties, or April 1, 2009, whichever occurs first.

1.2 Initial Period. This Agreement will expire August 31, 2009.

Section 2. Responsibilities and Use of the Facility.

2.1 Management of Facility. Billings Mustangs shall exclusively schedule, operate and administer all daily maintenance and improvement issues relative to the facility, including ordering / receiving of all materials / supplies and payment of all labor (field maintenance, cleaning, concessions), labor costs and materials needed in the operation of the facility for each and every BALB event.

2.2 Event Defined. BALB shall be permitted full use and full access to the Facility and related baseball equipment (batting tunnel, protective screens, etc.) for varsity games (AA) only, provided that a maximum of three (3) games be scheduled and played consecutively on non-tournament days and a maximum of four (4) games be scheduled and played consecutively on tournament days. No games, tournament or non-tournament, shall be scheduled to begin before 11:00 am.

BALB shall be permitted full use of the Facility for one (1) additional sub-varsity (A) game for each the Cardinals and Blue Jays, should BALB so choose.

2.3 Event Personnel. Billings Mustangs shall hire, train, schedule, supervise and compensate all full and part time field maintenance employees, cleaning personnel and concessions employees at Dehler Park. BALB is responsible for securing and compensating all other event staff, including security and support personnel (ticketing associates, ushers, scorer, etc.).

2.4 Ultimate Authority. Prior to the start of each game, the Director of Field Maintenance is provided with ultimate authority in determining whether the grounds are suitable for play. The decision as whether to start the game is that of the Director of Field Maintenance, and must / will be respected by all parties involved. Once the game has started, the decision to continue, as set forth by the official rules of baseball, is solely that of the umpire in charge.

Section 3. Playing Surface and Cleaning.

3.1 Playing Surface and Grounds. Billings Mustangs shall have the exclusive responsibility to prepare, maintain, and repair the baseball surface for all BALB events.

3.2 Cleaning of the Facility. Billings Mustangs shall have the exclusive responsibility to clean all areas within the facility (seating, entrances, restrooms, etc.) for all events hosted by BALB as needed, with the exception of both the Billings Scarlets and Billings Royals locker rooms and dugouts. BALB agrees to clean and maintain both locker rooms as needed in a manner consistent with standards as set forth by the City / County Health Department. BALB also agrees to thoroughly clean both dugouts, home and visitor, immediately following the conclusion of each and every BALB event held at the Facility.

3.3 Remedies. In the event BALB does not satisfactorily perform its cleaning, upkeep and maintenance obligations under this Agreement, Billings Mustangs reserves the right to hire a third-party to perform such obligations and charge the cost of such cleaning, upkeep or maintenance to BALB.

3.4 Restrooms. Billings Mustangs shall have the exclusive responsibility to stock and supply the public restrooms within the Facility, as well as the locker room restrooms, during all BALB events and that cleaning will be performed as needed.

3.5 Batting Practice. Batting practice and infield practice shall be permitted only under favorable playing surface conditions. The decision as to whether pregame practice will be permitted is exclusively that of the Director of Field Maintenance.

Batting mats and practice screens are provided for both the preservation of the field and the safety of the players. BALB agrees to assist with the set up and tear down of the batting practice equipment.

Section 4. Concessions.

4.1 Authority. Billings Mustangs shall own, operate and administer exclusively all food and beverage (alcohol concessions excluded) concessions at each and every BALB event.

4.2 Menus and Pricing. Billings Mustangs shall have the exclusive right and authority to determine menus and set reasonable prices for individual food / beverage concessions items.

4.3 Reconciliation. Billings Mustangs shall pay 30% of GROSS receipts to BALB. Concessions sales shall be reconciled monthly with payment due in full on or before the 10th day of each succeeding month for the months of May, June and July.

Section 5. Miscellaneous.

5.1 Announcement. BALB agrees to make the following public address announcement prior to each event that takes place at the facility.

"Ladies and gentlemen:

Welcome to Dehler Park, owned by the City of Billings. For your safety, the Billings American Legion Baseball program and the City of Billings ask that you take a moment to familiarize yourself with the nearest passageways and exits to be used in case of fire or other emergencies.

These exits are located at (description of exits).

Also, we would like to remind you that Dehler Park is a SMOKE-FREE facility by order of the Billings City Council.

Thank you for your cooperation."

5.2 Indemnification. BALB shall indemnify and have the duty to defend the City of Billings and Billings Mustangs and hold both harmless from and against all claims, liabilities, damages, losses and expenses arising out of or resulting from the negligent acts or omissions of anyone they employ directly or indirectly, including sub-contractors, agents and volunteers.

5.3 Insurance. BALB shall be required to carry insurance as set forth below by the City of Billings. Prior to the start of the use of the facility, BALB shall provide Billings Mustangs a Certificate of Insurance naming Billings Pioneer Baseball Club as a primary, non-contributory insured in all categories of insurance.

"The Ballclub and each other organization using the facility shall annually renew and carry liability and property, fire and casualty insurance, including liquor liability insurance (when alcohol will be sold/consumed) as approved by the Billings City Attorney covering the Ballclub and other users. The Ballclub and other all other seasonal and single event users shall obtain a Commercial General Liability insurance policy in an amount as set forth below, and under the terms and conditions as approved by the Billings City Administrator or Billings City Attorney. The Ballclub and other seasonal and single event users shall also obtain a separate liquor liability insurance policy in the amount of One Million and no/100 Dollars (\$1,000,000) per Occurrence when any alcoholic beverages are sold or consumed during any event. The required insurance will be equivalent to the minimum amount of Seven Hundred and Fifty Thousand and no/100 Dollars (\$750,000) per claim, and a minimum of One Million Five Hundred Thousand and no/100 (\$1,500,000) per occurrence (MCA Section 2-9-108(1)(2007)) and shall be in effect for the entire baseball use season including practice and scheduled games for the term of this agreement. Prior to the start of the use of the facility each year, the Ballclub and all other permitted users shall provide the City a Certificate of Insurance made out to the City of Billings and naming the City of Billings as a primary, non-contributory insured in all categories of insurance. The City reserves the right to require reasonable increases in insurance coverage or changes in types of coverage as the circumstances or insurance industry practices may require. The City shall be notified by Ballclub or its insurer in writing thirty (30) days prior to any cancellation or nonrenewal of the policy. The notice of cancellation must be sent to the City."

5.4 Stadium Security. BALB shall provide and compensate a minimum of one (1) qualified, uniformed security officer at each and every BALB game.

Section 6. Rent.

6.1 Rental Payment. BALB shall remit to Billings Mustangs the sum of \$300.00 per day as compensation for use of the Facility when one (1) baseball game is scheduled / played in a single calendar day, \$450.00 per day when two (2) baseball games (DH) are scheduled / played in a single calendar day, and \$800.00 per day when three (3) or more baseball games are scheduled / played in a single calendar day.

Billings Mustangs shall prepare and provide BALB with an invoice at the end of the months May, June and July for the total amount due as per the number of games / events executed. Payment in full is due no later than the 10th day of each succeeding month.

This Agreement may not be altered without the expressed written consent of the aforementioned parties.

BY: _____

BY: _____

DATE: _____

DATE: _____

Gary Roller, General Manager
Billings Mustangs Baseball Club

Jeff Ballard, Executive Director
Billings American Legion Baseball

March 25, 2009

Mike Whitaker
City of Billings Parks, Recreation and Public Lands
390 North 23rd Street
Billings, MT 59101

Dear Mike,

Thank you for your recent inquiry regarding our Use Agreement rate.

Following is an itemized list of expenses incurred during a standard baseball doubleheader (DH) played on a single calendar day. This is the method by which our use rates are calculated. Rates are adjusted accordingly for single game and tournament use. The figures for utilities are projections based on actual costs (see below) from the 2008 season.

Playing Field Labor (minimum 18 hours @ \$15/hour)	\$ 270
Cleaning Labor (minimum 5 hours @ \$15/hour)	\$ 75
Electricity	\$ 75
Water	\$ 22
Gas	\$ 8
Paper Products	\$ 80
Playing Field Supplies	\$ 10
Playing Field Materials	\$ 50
Equipment Use	?
TOTAL	\$ 590 +

7/1/2008 – 10/15/2008	High / day	Low / day	Avg / day	50% Avg
Electricity	\$211.75	\$89.40	\$150.58	\$75.29
Water	\$67.36	\$19.96	\$43.66	\$21.83
Gas	\$23.69	\$10.25	\$16.97	\$8.49

As noted by a (?) in the category of equipment use, we cannot quantify or even estimate as to the monetary value for the use of the field equipment (mowers, utility vehicles, batting cage, protective screens, tarps, etc.) that is exclusively the property of the Billings Mustangs. The Mustangs have purchased and will continue to purchase equipment without contribution from any other user group. However, these individual pieces of equipment are not luxury items, but both imperative and necessary to the playing of the game of baseball and therefore do in fact benefit other user groups of the Facility.

Additionally, we do not factor into the use rate any improvement or maintenance projects to the playing surface or adjoining grounds. For example, the Mustangs aerate and sand top dress the playing surface a minimum of twice per year but do not ask for or receive compensation from any other baseball user group, although the result of the aeration unquestionably improves the field conditions and therefore does directly affect user groups other than just the Mustangs. In October of '08, the total cost, excluding labor, to aerate and top dress the playing surface was \$ 1,850.00.

As I think you'll agree, the rates as outlined in the Use Agreement are not merely reasonable, but low.

Sincerely,

Gary Roller
Billings Mustangs Professional Baseball



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Tuesday, May 26, 2009

TITLE: Ground Lease with Bureau of Land Management, Combining the Existing Tanker Base Leasehold with Additional Land for Development of a New Wildlands Fire Station

DEPARTMENT: Aviation and Transit

PRESENTED BY: Thomas H. Binford, A.A.E., Director of Aviation and Transit

PROBLEM/ISSUE STATEMENT: The Bureau of Land Management (BLM) has conducted regional fire fighting operations from Billings Logan International Airport for many years. In 1998, the Council approved a twenty-year ground lease with the BLM to construct a regional fire retardant air tanker base and dispatch center. The tanker base substantially improved the ability to load fire fighting air tankers with fire retardant to combat wild fires throughout this region during the annual wild fire season. The BLM wishes to construct a new wildlands fire station at the Airport to supplement its seasonal wildlands fire fighting operations. The proposed facility will be located on a 1.40 acre parcel at 1297 Rimtop Drive, adjacent to the 6.556 acre tanker base/dispatch center parcel, and will include a 5,600 square foot building that will house wildlands fire fighting vehicles and equipment, as well as provide additional office space. The BLM wishes to combine the existing tanker base/dispatch center leasehold with the additional parcel for the new wildlands fire station. Combining the parcels onto one lease will extend the current lease term on the tanker base/dispatch center parcel by an additional ten (10) years. Staff has negotiated a consolidated twenty-year Ground Lease with the BLM for 7.956 acres (346,674 square feet) for the new fire station site and the existing tanker base/dispatch center parcel. The Lease will commence on May 1, 2009, and terminate on April 30, 2028. Construction is slated to begin as early as June 2009.

FINANCIAL IMPACT: This Lease will generate \$86,668.50 in the first year and will be adjusted annually for inflation by the Consumer Price Index.

RECOMMENDATION

Staff recommends that Council approve a twenty-year combined Ground Lease between the BLM and the City of Billings for the BLM's existing tanker base/dispatch center and site of the BLM's new fire station at Billings Logan International Airport.

Approved By: **City Administrator** **City Attorney**



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Audit Services

DEPARTMENT: Administration – Finance Division

PRESENTED BY: Patrick M. Weber, Financial Services Manager

PROBLEM/ISSUE STATEMENT: The Finance division prepared an RFP for annual audit services required by State law in 2006. EideBailly was awarded the contract for three years with an option to extend the contract for two years with council approval. The contract for the three years of audit services has expired and the extension of the contract for two additional years can occur.

Firm	2009	2010	Total
EideBailly	\$57,300	\$59,000	\$116,300

FINANCIAL IMPACT: Audit services are budgeted in the Finance annual budget. There is \$58,700 in the proposed FY 10 budget for fiscal year 2009 audit. This amount was estimated since a contract with EideBailly had not been received yet.

RECOMMENDATION

Staff recommends that City Council approve the two year contract extension with EideBailly for audit services for fiscal years 2009 and 2010.

Approved By: **City Administrator** **City Attorney**

ATTACHMENT

A – Contract

DEPARTMENT OF ADMINISTRATION
LOCAL GOVERNMENT SERVICES BUREAU
STANDARD AUDIT CONTRACT

THIS CONTRACT is made this 29th day of April, 2009, by and between

Eide Bailly LLP

(Certified or Licensed Public Accountant)

hereinafter referred to as the "Contractor",
City of Billings

(Governmental Entity)

hereinafter referred to as the "Entity", and the **Montana Department of Administration, Local Government Services Bureau**, hereinafter referred to as the "State", acting under the authority of Title 2, Chapter 7, Part 5, of the Montana Code Annotated. It is hereby agreed that:

1. **This contract is not effective with respect to any party until it is approved and signed by the State, as required by Section 2-7-506(3), MCA. The Contractor may not begin any audit work until the State gives this approval.** If the Contractor begins work before the State has approved the contract and the State subsequently does not approve the contract, the Contractor is not entitled to receive any compensation for the work performed.
2. The audit period or periods covered by this contract begins July 1, 2008 and ends June 30, 2010.

- a. In consideration of the faithful performance of this contract, the Entity will pay the Contractor for the audit work on the basis of time and necessary out-of-pocket expenses, which will not exceed:

\$ 57,300 for initial (or sole) audit covering 07 /01 /08 to 06 /30 /09.
\$ 59,000 for subsequent audit covering 07 /01 /09 to 06 /30 /10.
\$ NA for subsequent audit covering / / to / /.

The fees are set out in detail in Appendices A, B & C, as applicable, which are attached hereto and by this reference made a part hereof.

- b. Where the cost of any subsequent audit is not agreed upon at the time this contract is executed, the cost will be negotiated by the Contractor and the Entity. The results of this negotiation will be set forth in the Appendices and made a part of this contract. The Contractor will provide the State and the Entity with a copy of the appropriate Appendices.
 - c. The total cost of the Contract Audit does not include the cost of additional work that may be required in the event the Contractor discovers a defalcation or material irregularity. Any change in the scope of the audit services to be provided under this contract requires a contract amendment.

2. continued:

- d. The Contractor may submit interim bills to the Entity each month, based upon the estimated percentage of completion of the contract. The Entity may retain 10 percent of each of these estimates until the Contractor has delivered the final audit report, at which time the Entity will release the amount retained.
3. The Contractor will conduct a financial statement audit of the Entity:
 - a. The audit will be made in accordance with generally accepted auditing standards adopted by the American Institute of Certified Public Accountants and the standards applicable to financial audits contained in Government Auditing Standards, issued by the Comptroller General of the United States. The objective of the audit is the expression of an opinion by the Contractor on the financial statements of the Entity. The Contractor will obtain reasonable rather than absolute assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud. Accordingly, a material misstatement may remain undetected. Also, the audit will not be designed to detect error or fraud that is immaterial to the financial statements. If, for any reason, the Contractor is unable to complete the audit or is unable to form or has not formed an opinion, the Contractor may decline to express an opinion or decline to issue a report as a result of the engagement.
 - b. The audit will include tests of internal control over financial reporting, but will not be designed to provide an opinion on internal control or to identify reportable conditions (or significant deficiencies, depending on the terminology appropriate to the professional standards in effect for the year(s) being audited). The Contractor, however, will be responsible for making the Entity aware, in writing, of any reportable conditions (or significant deficiencies) that come to the Contractor's attention.
 - c. The audit will include tests of compliance and other matters as required by Government Auditing Standards, but will not be designed to provide an opinion on such compliance.
 - (1) The audit will include tests to determine whether the Entity has complied with all appropriate statutes and regulations, as required by Section 2-7-502, MCA.
 - (2) The audit will include tests to determine whether the Entity has complied with the provisions of each of its revenue bond ordinances and indenture agreements.
 - (3) If the audit is of a county, city or town, it will include tests to determine whether money is or has been retained in a local charge for services fund contrary to the requirements of Section 17-2-301 through 17-2-303, MCA, as required by Section 17-2-302, MCA. **The Contractor will report any findings of noncompliance with the provisions of these statutes, regardless of materiality.**
 - (4) If the audit is of a county or consolidated city/county government, the audit will include tests for compliance with state laws relating to receipts and disbursements of agency funds maintained by the Entity, as required by Section 2-7-505, MCA.
 - d. When applicable, the audit will meet all requirements of the Federal Single Audit Act of 1984, as amended by the Single Audit Act Amendments of 1996 and OMB Circular A-133.

3. continued:

- e. The audit scope with regard to federal financial assistance for each fiscal year covered by this audit contract will be as specified in Appendices A, B and C, which are attached to this contract and by this reference made a part of this contract.
- f. For purposes of determining the scope of the audit, the Entity will be considered to be the financial reporting entity as defined by the Governmental Accounting Standards Board.
- g. The audit of any school district will also include:
 - (1) Tests to verify the accuracy of the school district's enrollment for the fiscal year or years being audited as reported to the Office of Public Instruction in the Fall and Spring enrollment reports.
 - (2) When applicable, an audit of the extracurricular funds for pupil functions.
- h. If the Entity is a school district or associated cooperative, the Contractor will contact the State Office of Public Instruction and the county superintendent of schools prior to or during the audit of the Entity. These contacts will be made to determine whether those offices are aware of potential financial or legal compliance problems relating to the Entity that could affect the scope of the audit.
- i. The Contractor will immediately notify the Entity and the State in writing of any material irregularities it discovers. If the Entity is a school district or special education cooperative, the Contractor will also notify the Office of Public Instruction.
- j. The Contractor will provide the Entity with a copy of its most recent external peer review report and any letter of comment, and any subsequent peer review reports and letters of comment received during the period of the contract.

4. The Entity will be responsible for:

- a. Its basic financial statements, including note disclosures;
- b. Establishing and maintaining effective internal control over financial reporting;
- c. Identifying and ensuring that it complies with the laws and regulations applicable to its activities;
- d. Making all financial records and related information available to the Contractor;
- e. The schedule of expenditures of federal awards required for audits conducted under OMB Circular A-133;
- f. Adjusting the financial statements to correct material misstatements; and
- g. Providing the Contractor, at the conclusion of the audit engagement, with a letter that confirms certain representations made during the audit, including an affirmation that the effects of any uncorrected misstatements aggregated by the auditor during the current engagement and pertaining to the latest period presented are immaterial, both individually and in the aggregate, to the financial statements taken as a whole.

- 5. The Entity will prepare its annual financial report or a trial balance of accounts no later than the dates specified in Appendices A, B and C. If the Entity is unable to prepare its annual financial report or trial balance by the date specified in the Appendices, the Entity will notify the Contractor and the State in writing.
- 6. The Contractor will begin the field audit work, and will deliver the audit report to the Entity and the State, in accordance with the schedule established in Appendices A, B and C. If the Contractor cannot deliver the audit report to the Entity and the State on the date specified in the Appendices, the Contractor will notify the Entity and the State in writing of that fact, and the reason(s) thereof. The Contractor will then request in writing an extension from the State. The State's approval or denial of this request will also be in writing.
- 7. Pursuant to Section 2-7-503(3)(a), MCA, all audits must be completed and the reports issued within one year from the close of the last fiscal year covered by the audit. If the audit is conducted in accordance with the provisions of OMB Circular A-133, the Contractor will also complete the audit and issue the audit report within the time period required by that Circular, unless a longer period has been agreed to in advance by the federal cognizant or oversight agency for audit.
- 8. The final audit report must contain basic financial statements and required supplementary information in accordance with financial reporting standards in effect for the year or years being audited, as established by the Governmental Accounting Standards Board. In addition, other supplementary information required by provisions within this contract and by OMB Circular A-133 must also be included, if applicable.
 - a. The final audit report must also contain any other financial statements and supporting schedules and information as agreed upon by the Entity and Contractor.
 - b. The financial statements presented should be in accordance with the financial reporting standards in effect for the year or years being audited, as described above. If the accounting records or other circumstances will not permit financial statements to comply with these requirements, the Contractor will notify the State of those conditions and describe the financial statements that will be presented. This notification will be in writing. The applicable auditor's reports will also be modified as required.
 - c. If the audit is of a school district with separate elementary and high school district general funds, the general funds will be combined as a single major fund. All other funds will be separately considered for major fund criteria.
 - d. If the audit is a biennial audit covering two years, the Contractor will present complete financial statements as specified above for each year covered by the audit. The two years must, however, be presented under one audit report cover, and opined upon in one Independent Auditor's Report.
- 9. All audit reports will contain the following auditor's reports, which must comply with applicable professional standards in effect for the fiscal year or years being audited:
 - a. An independent auditor's report on the financial statements of the Entity.
 - b. A report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with Government Auditing Standards. If applicable, this report should include information about fraud, illegal acts, significant violations of provisions of contracts or grant agreements, and significant abuse, or indications of these acts.

9. continued:

- c. A report disclosing any lack of compliance with State statutes, rules, regulations, or ordinances that would not have a material effect on the financial statements. This report must be referred to in the report required in 9.b. above. This report may be combined with other reports if appropriate, or the findings may be included in a management letter. If included in a management letter, that letter must be included as a part of, or accompanying, the audit report.
- d. A report on supplemental schedules or information, including the supplemental schedule of school district enrollment required by paragraph 11.a. and the supplemental schedule of school district extracurricular fund financial activities required by paragraph 11.b., if any such schedules or information are presented in the audit report. This report may be given in a supplemental information paragraph of the auditor's report on the financial statements 9.a. above, or in a separate report.
- e. A report disclosing the action taken by the Entity to correct any deficiencies or implement any recommendations contained in the prior audit report. This report must be in a format that specifically identifies, by title or summary, each deficiency or recommendation contained in the prior audit report and the action taken by the Entity on each such deficiency or recommendation.
- f. If the Contractor includes audit findings in the reports referenced in 9.b. and 9.c. above or in a management letter, the views of entity officials and their planned corrective actions should also be included, as required by Government Auditing Standards, if they are available at the time the Contractor files copies of the audit report with the State. If the views and planned corrective actions are not available at that time, the Contractor should so indicate in the reports.

10. All audit reports for single audits done in accordance with OMB Circular A-133 must also contain the following:

- a. A schedule of expenditures of federal awards.
 - (1) As required by OMB Circular A-133, the schedule must:
 - (a) List individual federal programs by federal agency. For federal programs included in a cluster of programs, list individual federal programs within a cluster of programs.
 - (b) For federal awards received as a subrecipient, include the name of the pass-through entity and identifying number assigned by the pass-through entity.
 - (c) Provide total federal awards expended for each individual federal program and the CFDA number or other identifying number when the CFDA information is not available.
 - (d) Include notes that describe the significant accounting policies used in preparing the schedule.
 - (e) To the extent practical, pass-through entities should identify in the schedule the total amount provided to subrecipients from each federal program.

10. continued:

- (f) Include, in either the schedule or a note to the schedule, the value of the federal awards expended in the form of non-cash assistance, the amount of insurance in effect during the year, and loans or loan guarantees outstanding at year end. While not required, it is preferable to present this information in the schedule.
- (2) In addition, to provide information requested by State pass-through agencies for use in monitoring subrecipients, the schedule must contain:
 - (a) The program or award amount;
 - (b) The cash balance or fund balance of the program at the beginning of the audit period;
 - (c) Federal receipts or revenues for the program for the audit period;
 - (d) Other receipts or revenues for the program such as program income, matching funds, or other receipts/ revenues for the audit period;
 - (e) Non-federal expenditures associated with the program, if determinable; and
 - (f) The cash balance or fund balance of the program at the end of the audit period.
- b. A report on the schedule of expenditures of federal awards. This report may be combined with other reports as provided by OMB Circular A-133 and professional standards. This report must comply with applicable professional standards in effect for the fiscal year or years being audited.
- c. A report on compliance with requirements applicable to each major program and on internal control over compliance in accordance with OMB Circular A-133. Where applicable, this report should refer to the separate schedule of findings and questioned costs described in paragraph 10.d. of the contract. This report must comply with applicable professional standards in effect for the fiscal year or years being audited.
- d. A schedule of findings and questioned costs which must include the information required by OMB Circular A-133.
- e. The corrective action plan required by OMB Circular A-133, if that plan is available at the time the Contractor files copies of the audit report with the State. This corrective action plan may be combined with the Entity's planned corrective actions related to findings reported in accordance with Government Auditing Standards, as provided in paragraph 9.f., above.

11. School district audit reports must also include the following as supplemental information/schedules:

- a. A schedule of the district's enrollment as reported to the Office of Public Instruction for the fiscal year or years being audited. The schedule will contain the enrollment both as reported in the Fall and Spring enrollment reports and as documented by the school district's enrollment records.
- b. A detailed schedule of extracurricular fund financial activities

12. The final audit report must contain any material findings relative to economy, efficiency or effectiveness in operations that are noted by the Contractor during the audit, along with the Contractor's recommendations for improvement. The report must also contain any other recommendations or comments for improvement that the Contractor deems pertinent.
13. The Contractor must render a single, written report for the Entity audited. **The report must include, or be accompanied by, all written reports and letters discussing findings and recommendations from the Contractor to the Entity, including but not limited to the reports and schedules referred to in paragraphs 9 and 10 above as well as any management letters.**
14. Before submitting the final audit report, the Contractor will hold an exit review conference in which the audit results are discussed with those charged with governance and appropriate Entity officials and employees. **The Contractor must ensure that all members of the governing body and key members of management are notified of this exit conference.** The Contractor further agrees that prior to submitting the final report, it will not discuss the audit findings with anyone other than the Entity or the State. However, once the Contractor delivers the final audit report the report is deemed to be a public record.
15. The Contractor and Entity will file copies of the audit report as specified below.
 - a. The Contractor will provide the Entity with the number of copies of the audit report specified in Appendices A, B and C and the cost of those copies is included in the total price for the engagement as set out in paragraph 2.a., above, and in the Appendices. The Contractor will submit one of these copies to the attorney for the Entity.
 - b. Upon request by the Entity, the Contractor will provide additional copies of the audit report at a price per copy agreed upon by the Entity and Contractor.
 - c. The Contractor will provide the State with four copies of each audit report at no charge. **These copies will be sent to the State at the same time the Contractor delivers the final audit report to the Entity, and will include any management letters.** A letter of transmittal will accompany the State's copies which will advise the State as to the date of the exit conference, the date the final report was delivered to the Entity, the date of the audit report, the actual number of hours spent by the Contractor in the conduct of the audit, the total audit fees billed the Entity, whether the audit was conducted in accordance with the provisions of OMB Circular A-133, and whether there were any findings or opinion qualifications in the audit report, and if so whether the entity's corrective action plan or response was included as part of or submitted with the audit report.
 - d. If the Entity is a school district or associated cooperative, the Contractor will provide copies of the audit report to the Office of Public Instruction, the county superintendent of schools, and the county attorney.
 - e. If the Entity is a city or town fire department relief association disability and pension fund, the Contractor will provide one copy of the audit report to the city or town clerk.
 - f. If the audit is a single audit conducted in accordance with the provisions of OMB Circular A-133, the Entity will provide copies of the reporting package defined in OMB Circular A-133 and the data collection form to the federal clearinghouse designated by OMB. In addition, the Entity will provide either a copy of the reporting package, or the alternative written notification as described by OMB Circular A-133 to all federal, state and other granting and pass-through agencies as required by Circular A-133.

16. If not included in the audit report as provided in paragraphs 9.f. and 10.e., within 30 days after receiving the audit report the Entity will notify the State in writing as to what action it plans to take to correct any deficiencies or implement any recommendations identified or contained in the audit report, as required by Section 2-7-515, MCA, and ARM 2.4.409. **This notification will also address any findings and recommendations contained in management letters, which are considered a part of the audit report as prescribed in paragraph 13.** If the audit is a single audit conducted in accordance with OMB Circular A-133, this corrective action plan will also meet the requirements of Circular A-133 and contain all information required by that Circular.
17. If requested by the State, the attorney for the Entity will report to the State on the actions taken or the proceedings instituted or to be instituted relating to violations of law and nonperformance of duty as required by Section 2-7-515(4), MCA. The attorney will report to the State within 30 days after receiving the request.
18. The Contractor certifies that, as required by generally accepted government auditing standards, it and its principals and employees are independent in all matters with respect to this engagement. The Contractor will neither arrange for, nor accept, non-auditing work with the Entity which could in any way impair the Contractor's independence in violation of professional standards. If required by the State, the Contractor must document that independence has been maintained in both fact and appearance as required by professional auditing standards.
19. The Contractor will be the prime contractor and shall be responsible, in total, for all work of any subcontractors. The Contractor will obtain the **written approval of the Entity and the State prior to engaging correspondent Contractors, consultants, or subcontractors to provide services in connection with this audit.** **Any Contractors subcontracted to perform audit work must be on the Roster of Independent Auditors authorized to conduct audits of Montana local governments that is maintained by the Local Government Services Bureau.** The Contractor shall be responsible to the Entity and the State for the acts and omissions of all correspondent Contractors, consultants, subcontractors, or agents and of persons directly or indirectly employed by such correspondent Contractors, consultants, subcontractors or agents, and for the acts and omissions of persons employed directly by the Contractor. Further, nothing contained within this Contract shall create any contractual relationship between any correspondent Contractor, consultant, or subcontractor and the State.
20. The State may participate in all entrance and exit conferences between the Entity and Contractor, as well as all major conferences dealing with audit exceptions and recommendations regarding accounting or operating procedures, management policies, or internal control changes.
21. The Contractor will give the State and, when required by law, the Montana Legislative Audit Division, access to the Contractor's audit programs, supporting working papers, time records, and all other documents relating to the audit. Access to these documents will be provided at the State's offices in Helena, Montana. Access to working papers includes the right of the State to obtain copies of working papers, as is reasonable and necessary. The Contractor also agrees to make the audit programs and supporting working papers available to the State for use by the State or other public accounting firms as directed by the State in future audits of the Entity. The contractor also agrees to make the audit programs and supporting working papers available to the cognizant or oversight agency for audit or its designee, federal agencies providing direct or indirect funding, or the U.S. General Accounting Office, if requested. Access to working papers includes the right of federal agencies to obtain copies of working papers, as is reasonable and necessary. The Contractor will retain the audit report, audit programs, and audit working papers for a minimum of four years from the date of the audit report, unless the State notifies the Contractor to extend the retention period. If professional standards or other

21. continued:

applicable laws, rules, or regulations require a longer retention period, the auditor will retain the above materials for that specified period.

22. As provided by Section 2-7-522, MCA, the State may review the audit report submitted by the Contractor. If the State determines that reporting requirements have not been met, it will notify the Entity and the Contractor of the significant issues of noncompliance. The Contractor must correct the identified deficiencies within 60 days of notification.
23. The Entity and the State recognize that the Contractor is an independent public accountant, and neither the Entity nor the State will request or require the Contractor to surrender its "independence," as this term is professionally understood and used concerning public accountants. It is understood by the parties to this contract that the Contractor is an independent contractor and that neither its principals nor its employees are employees of the State or Entity for purposes of tax, retirement system, or social security (FICA) withholding.
24. The Contractor certifies that it carries Workers' Compensation for its employees and that it has either elected Workers' Compensation or has an approved Independent Contractor's Exemption covering the Contractor while performing work under this contract. (Montana Code Annotated, Title 39, Chapter 71) Neither the Contractor nor its employees are employees of the State for the purposes of this paragraph.
25. The Contractor agrees to protect, defend, and save the State, its elected and appointed officials, agents, and employees, while acting within the scope of their duties as such, harmless from and against all claims, demands, and causes of action of any kind or character, including the cost of defense thereof, arising in favor of the Contractor's employees or third parties on account of bodily or personal injuries, death, or damage to property arising out of services performed or omissions of services or in any way resulting from the acts or omission of the Contractor and/or its agents, employees, representatives, assigns, subcontractors, except the sole negligence of the State, under this agreement.
26. The Contractor must, in performance of work under this contract, fully comply with all applicable federal, state, or local laws, rules and regulations, including the Montana Human Rights Act, the Civil Rights Act of 1964, the Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. Any subletting or subcontracting by the Contractor subjects subcontractors to the same provisions. In accordance with Section 49-3-207, MCA, the Contractor agrees that the hiring of persons to perform the contract will be made on the basis of merit and qualifications and there will be no discrimination based upon race, color, religion, creed, political ideas, sex, age marital status, physical or mental disability, or national origin by the persons performing the Contract.
27. The Entity will provide the Contractor with reasonable space in which to conduct the audit, and respond promptly to requests for information as well as for all necessary books and records. Support for clerical, equipment, and photocopying or reproduction services shall be agreed upon by the Entity and the Contractor as specified in Appendices A, B and C.
28. Prior to the commencement of the audit, either the Contractor or the Entity, with the consent of the State, or the State, may cancel this contract by providing written notice to the other parties. The contract may be canceled under this paragraph for cause. Cause includes, but is not limited to, failure of any party to comply with the terms of this contract or with any Administrative Rule adopted by the State under the authority of Title 2, Chapter 7, Part 5, of the Montana Code Annotated.

28. continued:

In addition, if both the Contractor and the Entity mutually agree to cancel this contract prior to the commencement of the audit, regardless of whether there is cause, the State will consent to cancellation of the contract upon written notification by the Contractor and the Entity of their agreement to cancel this contract.

The State, however, will not consent to the cancellation of an audit contract for the sole purpose of allowing the Contractor and Entity to then enter into a new contract that extends the number of fiscal years to be audited by the Contractor. Unless there are extenuating circumstances, the existing audit contract must be completed first. This provision does not prohibit the cancellation of a contract for the purpose of replacing an annual audit with a biennial audit.

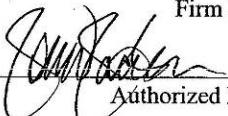
29. After the audit has commenced, but before the audit report has been issued, either the Contractor or the Entity, with the consent of the State, or the State, may cancel this contract for failure of any party to comply with the terms of this contract or with any Administrative Rule adopted by the State under the authority of Title 2, Chapter 7, Part 5, of the Montana Code Annotated, or for other cause. If the contract is canceled due to the failure of the Contractor to comply, the Contractor is not entitled to the audit fee set out in this contract. If the contract is canceled due to the failure of the Entity to comply, the Entity will pay the Contractor a pro rata portion of the audit fee set out in this contract, based on the percentage of work completed at the time of cancellation. In addition, if both the Contractor and the Entity mutually agree to cancel this contract without establishing cause on the part of either party, the State will consent to cancellation of the contract upon written notification by the Contractor and the Entity of their agreement to cancel this contract.
30. The Contractor shall not assign, transfer or subcontract any portion of the contract without the express written consent of the Entity and the State.
31. By signing this contract, the Contractor certifies that it is in compliance with the continuing professional education requirements and the external quality control review requirements as set out in Government Auditing Standards, as established by the Comptroller General of the United States. The State may require the Contractor to provide evidence that it has met the above requirements.
32. If the audit is required to meet the requirements of the Single Audit Act of 1984 as amended by the Single Audit Act Amendments of 1996 and OMB Circular A-133, the Contractor certifies that neither it nor any of its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from performing audits by any Federal department or agency.
33. This Contract is governed by the laws of Montana. The parties agree that any litigation concerning this Contract in which the State is named as a party must be brought in the First Judicial District in and for the County of Lewis and Clark, State of Montana, and each party shall pay its own costs and attorney fees. The parties also agree that any litigation concerning this Contract in which the State is not named as a party must be brought in the Judicial District in and for the County in which the Entity is located, and each party shall pay its own costs and attorney fees.
34. This contract and the attached Appendices contain the entire understanding and agreement of the parties. No modification or amendment of this contract is valid unless it is reduced to writing, signed by the parties, and made a part of this contract.

IN WITNESS WHEREOF, Contractor, Entity, and State have executed this Standard Audit Contract on the date first above written:

Certified or Licensed Public Accountant

Eide Bailly LLP

Firm Name

By: 

Date: 4/29/2009

Authorized Representative

Governmental Entity

City of Billings

Entity Name

By: _____

Date: _____

Authorized Representative

**Montana Department of Administration,
Local Government Services Bureau**

By: _____

Date: _____

Approved By

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APPENDIX A

Initial or Sole Audit Under This Contract

GOVERNMENTAL ENTITY (ENTITY): City of Billings

Telephone: (406) 657-8209 Address: 210 North 27th Street
(Street Address or P.O. Box)

Billings 59101, MT 59101
(City/Town) (Zip Code)

Contact Person(s):

Pat Weber

**PUBLIC ACCOUNTANT/ACCOUNTING
FIRM (CONTRACTOR):** Eide Bailly LLP

Address: P.O. Box 7112
(Street Address or P.O. Box)

Telephone: (406) 896-2400 Billings 59103-7112
(City/Town) (Zip Code)

Contact Person(s):

John W. Jacobsen or Barb Aasen

1. Audit Period and Dates of Engagement:

A. This audit will cover the fiscal year ending
June 30, 2009
(Month & Day) (Year)

B. Date to commence audit work: October 19, 2009

C. Date to submit final audit report
to Entity and State: December 31, 2009

2. Time and Price for Engagement:

FY(s) Ending June 30, 2009
(Month & Day)(Year)

A. Estimated total hours - 700

B. Price for audit personnel \$ 57,300

Price for Travel 0

Price for typing, clerical
and report preparation included above

Total price for this
engagement \$ 57,300

3. The reporting entity contains the following discretely presented component units: None

4. Date Annual Financial Report or a trial balance will be available: October 12, 2009

5. Number of copies of audit report Contractor will provide to Entity:
130-150

6. The Entity will provide clerical, equipment, and photocopying or reproduction services to the Contractor as follows:
As needed by Contractor

7. The audit scope with regard to federal financial assistance received by the Entity for the above fiscal year(s) will be as indicated below:

The audit will be a single audit conducted in accordance with the provisions of OMB Circular A-133 because the Entity expended a total amount of federal awards **equal to or in excess of \$500,000** during the fiscal year(s), or such other dollar amount as may be established by OMB that is effective for the fiscal year(s) being audited.
OR

The audit will not be a single audit conducted in accordance with the provisions of OMB Circular A-133, and will not include audit coverage of any federal financial assistance in accordance with requirements of that Circular, because the Entity expended a total amount of federal awards of **less than \$500,000** during the fiscal year(s), or such other dollar amount as may be established by OMB that is effective for the fiscal year(s) being audited.

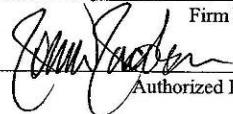
IN WITNESS WHEREOF:

Certified or Licensed Public Accountant

Eide Bailly LLP

Firm Name

By:



Date: 4/29/2009

Authorized Representative

Governmental Entity

City of Billings

Entity Name

By:

Authorized Representative

Date: _____

**Montana Department of Administration,
Local Government Services Bureau**

By:

Approved By

Date: _____

5. Number of copies of audit report Contractor will provide to Entity:
130-150

6. The Entity will provide clerical, equipment, and photocopying or reproduction services to the Contractor as follows:
As needed by Contractor

7. The audit scope with regard to federal financial assistance received by the Entity for the above fiscal year(s) will be as indicated below:

The audit will be a single audit conducted in accordance with the provisions of OMB Circular A-133 because the Entity expended a total amount of federal awards **equal to or in excess of \$500,000** during the fiscal year(s), or such other dollar amount as may be established by OMB that is effective for the fiscal year(s) being audited.
OR

The audit will not be a single audit conducted in accordance with the provisions of OMB Circular A-133, and will not include audit coverage of any federal financial assistance in accordance with requirements of that Circular, because the Entity expended a total amount of federal awards of **less than \$500,000** during the fiscal year(s), or such other dollar amount as may be established by OMB that is effective for the fiscal year(s) being audited.

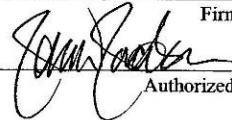
IN WITNESS WHEREOF:

Certified or Licensed Public Accountant

Eide Bailly LLP

Firm Name

By:



Date: 4/29/2009

Authorized Representative

Governmental Entity

City of Billings

Entity Name

By:

Authorized Representative

Date: _____

**Montana Department of Administration,
Local Government Services Bureau**

By:

Approved By

Date: _____

AGENDA ITEM:



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: WO 07-16; Shiloh Road Corridor Water and Sewer System Improvements
Billings Clinic Property Sanitary Sewer Easement

DEPARTMENT: Public Works

PRESENTED BY: David D. Mumford, P.E., Director

PROBLEM/ISSUE STATEMENT: On August 25, 2008 City Council awarded the Shiloh Road Corridor Water and Sewer System Improvements Project to COP Construction LLC. Work in one of the project segments includes construction of a sewer main on the west side of the Shiloh Drain along the eastern edge of Billings Clinic property, between Howard Avenue and Broadwater Avenue. A Perpetual Right-of-Way Easement is needed by the City from Billings Clinic in order for the City to have the ongoing right to construct, repair, replace, maintain and operate the public sewer main to be located within the easement.

ALTERNATIVES ANALYZED: It was determined during project design that it was in the City's best interest to construct the sewer main in the described location and seek an easement from Billings Clinic. Wastewater generated in this area is best routed south to the trunk main in Central Avenue. It was determined to be least costly to the City now and under future maintenance considerations to route the sewer main directly south along the Shiloh Drain rather than through the proposed future Clinic development or other alternate route.

FINANCIAL IMPACT: Billings Clinic has signed a Perpetual Right-of-Way Easement with no financial commitment from the City necessary.

RECOMMENDATION

Staff recommends that Council approve the attached Perpetual Right-of-Way Easement and authorize the Mayor to execute the document.

Approved By: **City Administrator** **City Attorney**

ATTACHMENT

A. Perpetual Right-of-Way Easement (6 pages)

Return to:
Engineering, Inc.
1300 North Transtech Way
Billings, MT 59102

PERPETUAL RIGHT-OF-WAY EASEMENT

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, on this _____ day of _____, 20____, the undersigned, **BILLING CLINIC**, formerly known as, **DEACONESS BILLINGS CLINIC**, a Montana nonprofit corporation, P.O. Box 37000, Billings, Montana 59107, hereinafter called "Grantors," hereby grant and convey unto the **CITY OF BILLINGS**, a municipal corporation and political subdivision of the State of Montana, P.O. Box 1178, Billings, Montana 59101, hereinafter called "Grantee," a perpetual easement and right-of-way over, across, under, and through the following described tract of real property in Yellowstone County, Montana:

That portion within N1/2SE1/4 of Section 3, T. 1 S., R. 25 E., P.M.M., as shown and described on the attached Exhibits A & B as "RIGHT-OF-WAY EASEMENT".

This perpetual easement to Grantee is for the purpose of constructing, reconstructing, maintaining, operating, servicing, repairing, and replacing sanitary sewers and/or water lines over, across, under, and through the said real property, together with the right of free ingress and egress at all times for the purpose of constructing, reconstructing, maintaining, operating, servicing, repairing, and replacing said sanitary sewers and/or water lines and appurtenances, and adding additional sanitary sewer and/or water lines.

Grantors shall continue to have the right to use and enjoy the above-described property, except as to the rights herein granted, subject to the following restrictions:

1. Grantors and their successors agree not to construct, nor cause to be constructed within the easement right-of-way, any type of building or structure such as, but not limited to, houses, garages, sheds, kennels, fences, or any other fixed objects of any kind, shape or form, except as may be licensed by Grantee.
2. Grantors agree that all landscaping and landscaping facilities installed by the Grantors within the easement right-of-way, such as irrigation, berms, trees, bushes, shrubs, hedges, grass, or any other facilities or plantings of a similar nature, shall be approved by Grantee prior to installation of such facilities, and shall be operated and maintained by Grantors. It is also agreed that no trees and/or shrubs will be planted with 10 feet of a proposed or existing City water or sewer main. Grantee agrees that replacement of any landscaping facilities within the easement right-of-way due to any construction, replacement, repair, or service work to the sanitary sewer and/or water lines by the City of Billings shall be the responsibility of the Grantee.
3. Grantors agree that authorized representatives of the City of Billings can freely travel within the easement right-of-way with their equipment in the performance of their duties at any time, day or night, regardless of outside weather conditions.

4. Grantors agree to obtain the permission of the Public Works Department or Grantee prior to placing or removing any fill dirt within the easement right-of-way and, in addition, in the event such permission is granted, the Grantors agree to perform any work necessary to modify the existing sanitary sewers and/or water lines and appurtenances, which work may be required prior to placing or removing any fill dirt within the easement right-of-way and all such work shall be done at the Grantor's expense and without expense to the City.
5. Grantee agrees that surface restoration due to construction, replacement, repair, or service work to the sanitary sewer and/or water lines by the City of Billings, shall be the responsibility of the Grantee.
6. HOLD HARMLESS AGREEMENT
 - a. Grantee will forever waive and hold Grantors harmless for, and defend Grantors against, any claims, losses, causes of action, and suits which arise from Grantee's, its agents', employees' or invitees' acts or omissions, including but not limited to the use of the easement herein granted and will indemnify Grantor for any losses suffered due to any such claims, losses, causes of action or suits.
 - b. Grantors agree that the owners of the above-described real property shall reimburse the City of Billings for any and all damage claims paid by the City for damages of any type or nature to any and all persons and entities in the event such damage results from or was caused to happen by such owner's failure to comply with any portion of the rights, restrictions, obligations, or responsibilities contained in this Agreement.
 - c. Grantors agree that the owner or owners of the above-described property shall at all times fully relieve and save harmless the City of Billings and its authorized representatives for any and all damages of property that may be caused within said real property due to possible failure of the public water and sanitary sewer mains within said easement.
7. The Restrictions, Covenants, and Hold Harmless Agreements herein contained shall attach to and run with the land and shall bind the parties hereto and all persons claiming thereunder.

Grantors warrant and covenant that there are no liens or other encumbrance on the described tract or tracts with exception of the drainage ditch, storm drain and multi-use path easements as shown on Exhibit A.

"GRANTORS"

BILLINGS CLINIC
formerly known as,
BILLINGS DEACONESS CLINIC

By:

Mitchell Goplen
Its: *Ex. Director Facility Services*

STATE OF MONTANA)
: ss
County of Yellowstone)

On this 31 day of MARCH, 2009, before me, a Notary Public in and for the State of Montana, personally appeared Mitchell Goplen, known to me to be the person who signed the foregoing instrument as the Executive Director Facility Services of BILLINGS CLINIC, formerly known as, DEACONESS BILLINGS CLINIC, and who acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year hereinabove written.



Jessica Ott
Notary Public in and for the State of Montana
Printed name: JESSICA OTT
Residing at: Billings, Montana
My commission expires: July 31, 2010

“CITY”

**CITY OF BILLINGS
MONTANA**

By: _____
Mayor

Attest: _____
City Clerk

STATE OF MONTANA)
County of Yellowstone)

On this _____ day of _____, 20____, before me, a Notary Public for the State of Montana, personally appeared _____ and _____, known to me to be the Mayor and City Clerk, respectively, of the City of Billings, Montana, whose names are subscribed to the foregoing instrument in such capacity and acknowledged to me that they executed the same on behalf of the City of Billings, Montana. Witness my hand and seal the day and year herein above written.

Notary Public for the State of Montana
Printed name: _____
Residing at: _____
My commission expires: _____

Exhibit A

Right-of-Way Easement

A tract of land situated in the SE1/4 of Section 3, T. 1 S., R. 25 E., P.M.M., Yellowstone County, Montana, being more particularly described as follows, to-wit:

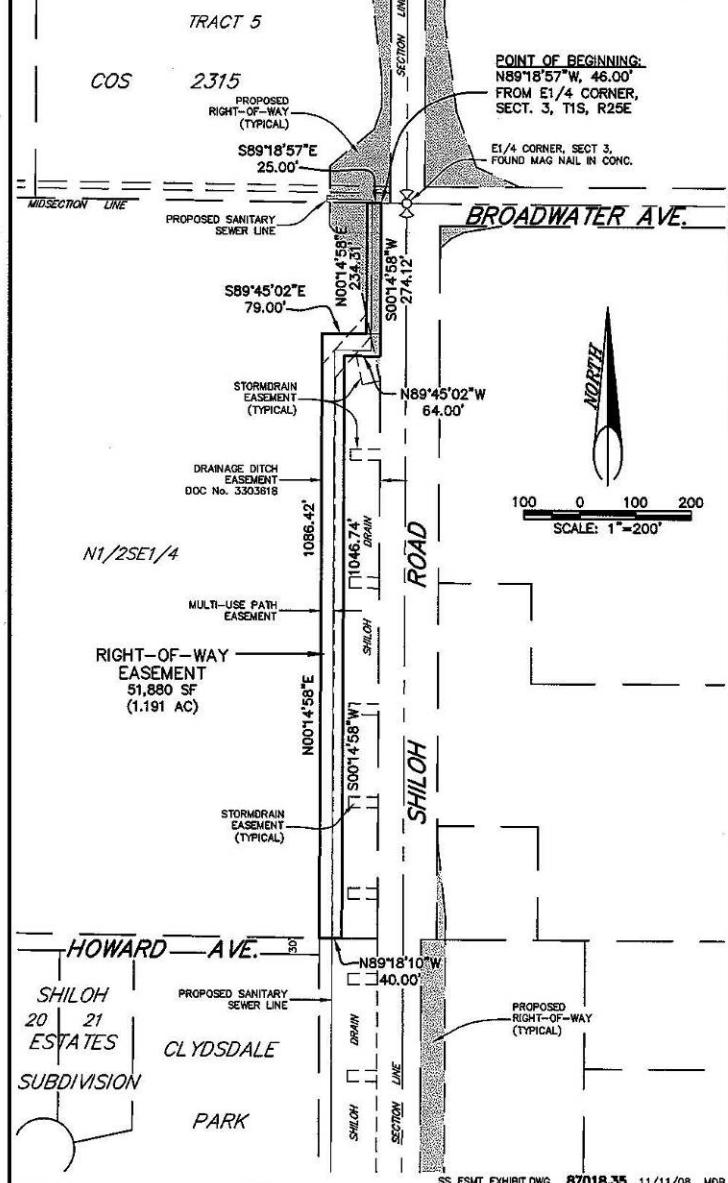
Beginning at a point which bears N 89°18'57" W a distance of 46.00 feet from the E1/4 Corner of Section 3, T. 1 S., R. 25 E., P.M.M.; thence, from said Point of Beginning, along west right-of-way line of Shiloh Road, S 00°14'58" W a distance of 274.12 feet; thence, leaving said right-of-way line, N 89°45'02" W a distance of 64.00 feet; thence along a line running parallel to and 64.00 feet west of said right-of-way line, SN 00°14'58" W a distance of 1046.74 feet; thence, N 89°18'10" W a distance of 40.00 feet; thence along a line running parallel to and 104.00 feet west of said right-of-way line, N 00°14'58" E a distance of 186.42 feet; thence, S 89°45'02" W a distance of 79.00 feet; thence along a line running parallel to and 25.00 feet west of said right-of-way line, N 89°14'58" E a distance of 234.31 feet to a point on the east-west midsection line of said Section 3; thence along said midsection line, S 89°18'57" E a distance of 25.00 feet to said Point of Beginning; said described easement having an area of 51,880 square feet (1.191 AC) and being as shown on attached Exhibit "B".

EXHIBIT B

RIGHT-OF-WAY EASEMENT
WITHIN N1/2SE1/4 OF SECTION 3, T1S, R25E, P.M.M.
YELLOWSTONE COUNTY, MONTANA

PREPARED FOR : DEACONESS BILLINGS CLINIC
PREPARED BY : ENGINEERING, INC.

NOVEMBER, 2008
BILLINGS, MONTANA





CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Tuesday, May 26, 2009

TITLE: Quarterly Report for Pledged Collateral for First Interstate Bank Certificate of Deposit, US Bank Municipal Investor Accounts, US Bank Repurchase Account, and US Bank Certificates of Deposit

DEPARTMENT: Administration-Finance Division

PRESENTED BY: Patrick M. Weber, Financial Services Manager

PROBLEM/ISSUE STATEMENT: Deposit type securities (i.e., certificates of deposit) shall be collateralized according to Montana Code Annotated Section 7-6-207.

On March 31, 2009, the City had a certificate of deposit at First Interstate Bank for \$1,500,000; also \$13,133,169.26 invested in the U.S. Bank Municipal Investor Accounts; and \$5,998,468.27 in the US Bank Repurchase Account. The City has \$3,500,000 in two certificates of deposit at US Bank, Billings.

Because First Interstate Bank and US Bank's net worth ratios to total assets ratio are over 6%, the City is required to have a minimum of 50% of the deposits covered by pledged securities. First Interstate Bank has collateralized the City's deposits with 100% in pledged securities. US Bank has collateralized the City's Municipal Investor Account and two certificates of deposit with 128% in pledged securities. The Repurchase Account is collateralized with 102% in pledged securities.

RECOMMENDATION

Staff recommends that Council approve securities pledged by First Interstate Bank and US Bank as collateral for their respective certificates of deposit, MIA, and repurchase account.

Approved By: **City Administrator** **City Attorney**



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Downtown Revolving Loan Fund Recommendations for EB Ventures, LLC

DEPARTMENT: Administration – Finance Division

PRESENTED BY: Patrick M Weber, Financial Services Manager

PROBLEM/ISSUE STATEMENT: The Downtown Revolving Loan Committee met on May 6, 2009, and approved loans to EB Ventures, LLC.

EB Ventures, LLC is requesting a loan from the Downtown Revolving Loan Fund for the purpose of remodeling the ground level floor of Yellowstone Garage Building for restaurant space located at 2303 Montana Avenue. DB Squared, LLC is in the process of purchasing the entire building and EB Ventures, LLC will occupy the ground level as a tenant with an Italian restaurant chain. The total restaurant project costs will be approximately \$725,000, of which the Downtown Revolving Loan Fund will loan no more than \$200,000 while requiring equity by the partnership of at least 20% of total costs. The Downtown Revolving Loan will be subordinate to a bank loan of approximately \$325,000.

FINANCIAL IMPACT: Subsequent to approval of this loan, the loan fund will have a balance available of approximately \$2,275,000. (\$3,200,000 approved and \$925,000 outstanding)

RECOMMENDATION

The Downtown Revolving Loan Committee recommends that council approve the loan to EB Ventures, LLC for no more than \$200,000 while requiring equity of at least 20% of total costs.

Approved By: **City Administrator** **City Attorney**

ATTACHMENT

A-Loan Description

Attachment A

Revolving Loan Fund Loan

Tuesday, May 26, 2009

The EB Ventures, LLC, loan terms are as follows:

Loan	Not to exceed \$200,000.
Interest Rate	5% Adjusted annually.
Term	Amortized over seven years with a balloon payment at maturity.
Payments	Minimum Payments calculated at a rate of 5% over a seven year term.
Collateral	Second mortgage on the real property and personal guarantees of LLC members Matt Brosovich and other partners.
Disbursement	The City will disburse funds after it receives documentation supporting the actual project costs.

This loan is for the purpose of remodeling ground level space in the Yellowstone Garage Building.



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Tuesday, May 26, 2009

TITLE: Downtown Revolving Loan Fund Recommendations for Securities Building Notes Receivable

DEPARTMENT: Administration – Finance Division

PRESENTED BY: Patrick M Weber, Financial Services Manager

PROBLEM/ISSUE STATEMENT: The Downtown Revolving Loan Committee approved an extension of two notes due from William and Marcia Honaker secured by the Securities Building and the Securities Building Parking Lot.

William and Marcia Honaker have requested an extension to repay the notes by changing the due dates from May 1, 2013, to April 1, 2015. In order to repay these loans by the new due date, the payment amounts will increase from \$3,582 per month with a balloon payment due at May 1, 2013, to \$4,305.59 per month with no balloon payment due at April 1, 2015.

The current balance of the loans from the City's Downtown Revolving Loan Fund is \$296,709.24. Both notes are current.

FINANCIAL IMPACT: Using the loans' current interest, the City will earn approximately \$300 in additional interest due to the change in terms.

RECOMMENDATION

The Downtown Revolving Loan Committee recommends that council approve the extension notes for the promissory notes of William and Marcia Honaker.

Approved By: **City Administrator** **City Attorney**



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Tuesday, May 26, 2009

TITLE: Submittal of Application and Acceptance of Internet Crimes Against Children (ICAC) Continuation Grant in the amount of \$200,000

DEPARTMENT: Billings Police Department

PRESENTED BY: Rich St. John, Chief of Police

PROBLEM/ISSUE STATEMENT: The City has just been notified that we have been awarded an ICAC operational continuation grant in the amount of \$200,000. This grant is for a twelve (12) month period (June 1, 2009, through May 31, 2010) and will provide monies for overtime for the Montana affiliate task force officers, training, equipment, supplies, and a vehicle lease for the Montana ICAC Task Force Coordinator. The application must be completed, on line, by June 8, 2009. City Council is being asked to approve the submittal of the continuation grant application and acceptance of the grant award in the amount of \$200,000, and when the award documents are received, authorize the Mayor to sign.

FINANCIAL IMPACT: There will be City dollars spent, but these expenditures will be reimbursed on a quarterly drawdown basis. No City match is required.

RECOMMENDATION

Staff recommends that City Council approve the submittal of the continuation grant application and acceptance of the grant award in the amount of \$200,000, and when the award documents are received, authorize the Mayor to sign.

Approved By: **City Administrator** _____ **City Attorney** _____



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Tuesday, May 26, 2009

TITLE: Resolution of Intent to Expand the Billings Downtown Business Improvement District No. 0001

DEPARTMENT: Administration

PRESENTED BY: Bruce McCandless, Asst. City Administrator

PROBLEM/ISSUE STATEMENT: The property comprising the City's new downtown MET Transfer Center borders the downtown Business Improvement District (BID). MET would like to join the BID and have it maintain the property's perimeter. State law requires that a BID boundary change must go through the same process as when it is created; 1) resolution of intent to create or expand a district; 2) notice of public hearing and mailed notice to affected property owners; 3) public hearing; and 4) resolution to create or expand the district. The Council will decide whether to adopt the resolution of intent to expand the district and set a public hearing for June 22, 2009.

ALTERNATIVES ANALYZED: The Council may approve or disapprove the resolution.

FINANCIAL IMPACT: The BID's current assessment rate is 4.95¢ / sq. ft. of lot area and .0702¢ / \$100 of taxable market value. The MET Transfer Center's estimated assessment is \$2,645.25 per year.

RECOMMENDATION

Staff recommends that Council approve the Resolution of Intent to expand the Downtown Business Improvement District No. 0001.

Approved By: **City Administrator** **City Attorney**

ATTACHMENTS

- A: Resolution of Intent
- B: MET Transfer Center petition

ATTACHEMENT A

Resolution No. 09- _____

A RESOLUTION DECLARING IT TO BE THE INTENTION OF THE CITY COUNCIL TO EXPAND THE DOWNTOWN BUSINESS IMPROVEMENT DISTRICT NO. 0001 FOR THE PURPOSE OF MAINTAINING THE COMMON AREA IMPROVEMENTS AND OTHER PORTIONS OF IMPROVEMENTS MADE IN DOWNTOWN, CITY OF BILLINGS, MONTANA

BE IT RESOLVED by the City Council of the City of Billings (the "City"), Montana, as follows:

Section 1. Downtown Business Improvement District (B.I.D.) No. 0001; Intention To Expand Business Improvement District. The B.I.D. maintains certain special improvements to benefit certain property located in the City of Billings, Montana. The purpose of this B.I.D. is to provide funding for the purposes and powers that will serve a public use; will promote the health, safety, prosperity, security, and general welfare of the inhabitants thereof and of the people of this state; and will be of special benefit to the property within the boundaries of any district created pursuant to the provisions of Montana Code annotated, Title 7, Chapter 12, Part 11, as amended.

Section 2. Boundaries of District. The limits and boundaries of the present District, the limits and boundaries of the District following expansion and a written description of the proposed expansion property are depicted on attached "Exhibit A" (which is hereby incorporated herein and made a part hereof). These boundaries are designated and confirmed as the boundaries of the District.

Section 3. Benefited Property. The District and territory included within the limits and boundaries described in Section 2 and as shown on Exhibit "A" are hereby declared to be the Business Improvement District and the territory which will benefit and be benefited by and will be assessed for a portion of the costs of the maintenance as described in Section 1.

Section 4. General Character of the Maintenance to be Performed. The general character of the maintenance includes public sidewalk sweeping, security, public sidewalk snow removal and graffiti removal and abatement and maintaining other sidewalk furniture, equipment and improvements installed in the public areas NOT including city streets, private property or alleyways.

Section 5. Assessment Methods; Property to Be Assessed. All properties within the District are to be assessed for a portion of the costs of maintaining the sidewalk Public Area Improvements in Business Improvement District, as specified herein. The costs of maintaining

the Improvements shall be assessed against the property in the District benefiting from the improvements.

Section 6. Assessable Area. All properties in the District will be assessed for their proportionate share of the costs of maintaining the activities of the Business Improvement District. Public Area Improvements as prescribed in Section 7-12-1133 subsection (e), M.C.A. **The assessments to fund the work plan for the current fiscal are to be a total amount derived by adding: \$0.0495 for each square foot of lot as prescribed in Section 7-12-1133, subsection (b); AND \$0.00702 per dollar of taxable value as prescribed in Section 7-12-1133, subsection (c); AND \$0.022 per square foot of the building above the first floor as prescribed in Section 7-12-1133, subsection (d), M.C.A.**

Section 7. Payment of Assessments. The assessments for the costs of maintaining the services provided by the Business Improvement District shall be payable, as prescribed in Section 7-12-1133 subsection (e), M.C.A.

Section 8. Public Hearing; Protests. At any time within fifteen (15) days from and after the date of the first publication of the notice of the passage and approval of this resolution, the owner of real property within the proposed District expansion subject to assessment and taxation for the cost and expense of maintaining the Business Improvement District may make and file with the City Clerk until 5:00 p.m., M.T., on the expiration date of said 15-day period, written protest against the proposed Business Improvement District expansion, and this Council will at its next regular meeting after the expiration of the fifteen (15) days in which such protests in writing can be made and filed, proceed to hear all such protests so made and filed; which said regular meeting will be held on Monday, June 22, 2009 at 6:30 p.m., in the Council Chambers, located on the Second Floor of the City Hall at 220 North 27th Street, in Billings, Montana.

Section 9. Notice of Passage of Resolution of Intention. The City Clerk is hereby authorized and directed to publish or cause to be published a copy of a Notice of the passage of this Resolution in the Billings Times, a newspaper of general circulation in the County on Thursday, June 4, and Thursday, June 11, 2009, in the form and manner prescribed by law, and to mail or cause to be mailed a copy of said Notice to every person, firm, corporation, or the agent of such person, firm, or corporation having real property within the proposed district expansion listed in his or her name upon the last completed assessment roll for State, County, and school district taxes, at his last-known address, on or before the same day such notice is first published.

PASSED AND ADOPTED by the City Council of the City of Billings, Montana, this 26th day of May, 2009.

THE CITY OF BILLINGS:

BY: _____

Ron Tussing, MAYOR

ATTEST:

BY: _____

Cari Martin, CITY CLERK

EXHIBIT A

Map of proposed Business Improvement District Expansion - 2009-05-04

The area is defined as:

Starting at a point of intersection between the centerlines of 2nd Ave. North and the alley between N. 25th St. and N. 26th St. and proceeding east along the centerline of 2nd Ave. North to a point of intersection between the centerlines of 2nd Ave. North and North 25th Street, proceeding north along the centerline of N. 25th St. to the intersection of the centerlines of 3rd Ave. North and North 25th Street, proceeding west along the centerline of 3rd Ave. North to the intersection of the centerlines of the alley between North 25th Street and North 26th Street and 3rd Ave. North and proceeding south along the centerline of the alley to the starting point. Thus when joined to the boundary of the current B.I.D. will expand the BID in a contiguous manner.



ATTACHMENT B

PETITION TO AMEND THE BOUNDARIES OF BUSINESS IMPROVEMENT
DISTRICT 001 IN DOWNTOWN BILLINGS

In accordance with Title 7, Chapter 12, Part 11. *Business Improvement Districts*, of the Montana Code Annotated 2003, the undersigned hereby petition the *Governing Body* of the City of Billings for approval of Resolution of Intent to expand the boundaries of Business Improvement District 001. When no protests have been delivered to the governing body within 15 days after the date of the first publication of the notice of the passing of the resolution of intention, when a protest shall have been found by the governing body to be insufficient or has been overruled, or when a protest against the extent of the proposed district or proposed expansion of a district has been heard and denied, the governing body has jurisdiction to order the creation or expansion of the district and shall pass a resolution creating or expanding the district in accordance with the resolution of intention.



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Tuesday, May 26, 2009

TITLE: Resolution Rescinding Resolution of Intent to Create No. 09-18813, Special Improvement Lighting Maintenance District 307 for Shiloh Road from Rimrock Road to Pierce Parkway, and canceling public hearing date for creation of the district set for the June 8th Council Meeting

DEPARTMENT: Public Works Department

PRESENTED BY: David D. Mumford, P.E., Public Works Director

PROBLEM/ISSUE STATEMENT: At the May 11, 2009, council meeting, City Council passed the Resolution of Intent to Create SILMD 307 (Resolution No. 09-18813) and set a public hearing for creation of the district at the June 8, 2009, council meeting. After passage of Resolution No. 09-18813, staff was made aware that ownership of multiple properties abutting the Shiloh Drain had changed, due to MDT purchasing right-of-way along Shiloh Road, and as such, Resolution No. 09-18813 and all exhibits of the Resolution need to be revised. At the direction of the city attorney, staff is asking for approval of the resolution rescinding Resolution No. 09-18813 and canceling the June 8, 2009, public hearing.

ALTERNATIVES ANALYZED:

1. Pass this resolution rescinding Resolution No. 09-18813; or
2. Do not pass this resolution and continue with the creation of the district that will need to be repealed and recreated at a later time.

FINANCIAL IMPACT: There is no financial impact with repealing Resolution No. 09-18813 and canceling the public hearing.

RECOMMENDATION

Staff recommends that Council approve the resolution rescinding Resolution No. 09-18813, and canceling the June 8, 2009, public hearing.

Approved By: **City Administrator** **City Attorney**

ATTACHMENT:

- A. Resolution

RESOLUTION NO. 09-_____

RESOLUTION RESCINDING RESOLUTION OF INTENT TO CREATE NO. 09-18813, SPECIAL IMPROVEMENT LIGHTING MAINTENANCE DISTRICT 307 FOR SHILOH ROAD FROM RIMROCK ROAD TO PIERCE PARKWAY, AND CANCELING PUBLIC HEARING DATE FOR CREATION OF THE DISTRICT SET FOR THE JUNE 8TH COUNCIL MEETING.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BILLINGS, MONTANA:

SECTION 1:

That it is the intention to rescind Resolution 09-18813 for SILMD 307; which was approved by Council on May 11, 2009. Changes have occurred within the District that make it necessary and desirable to rescind Resolution 09-18813. The public hearing planned for June 8, 2009 must be cancelled.

PASSED by the City Council and APPROVED this 26th day of May 2009.

CITY OF BILLINGS

By _____
Ron Tussing, Mayor

ATTEST:

By _____
Cari Martin, City Clerk



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Second Reading of an Ordinance Expanding Ward IV: Annexation #09-02

DEPARTMENT: Planning and Community Services Department

PRESENTED BY: Juliet Spalding, AICP, Planner II

PROBLEM/ISSUE STATEMENT: On April 27, 2009, the City Council approved the annexation of a property legally described as Lot 26, Block 19, Lillis Heights Subdivision (see Attachment A). The request for annexation was submitted by MCS Properties, LLC, the owner of the property. Upon annexation, the property must be added to one of the City's election wards. The first reading and public hearing on the ordinance to add the property to Ward IV will be conducted at the Council's May 11, 2009, meeting. The second reading of the ordinance will be conducted at this meeting.

FINANCIAL IMPACT: There are no direct financial impacts if this ordinance is approved.

RECOMMENDATION

Staff recommends that the City Council approve the second reading of this ordinance that adds property to City Ward IV.

Approved by: City Administrator _____ City Attorney _____

ATTACHMENT

A. Ward Ordinance and Exhibit A

ORDINANCE NO. 09-_____

AN ORDINANCE OF THE CITY OF BILLINGS, AMENDING BILLINGS MUNICIPAL CODE, CHAPTER 11, ELECTIONS, IN PARTICULAR, SECTION 11-102(c), WARD BOUNDARIES; AND CHANGING THE WARD BOUNDARIES ESTABLISHED THEREIN BY ADDING CERTAIN NEWLY ANNEXED REAL PROPERTY TO WARD IV PROVIDING FOR CERTIFICATION AND REPEALING OF ALL ORDINANCES AND RESOLUTIONS INCONSISTENT THEREWITH.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BILLINGS, MONTANA:

1. **AMENDMENT.** Pursuant to Billings Municipal Code, Section 11-102(c) and the State Law, Billings Municipal Code, Section 11-102(c) Ward Boundaries is hereby amended by adding to the following designated Ward the following described real property:

Tracts of land situated in the SE1/4 of Section 29, T.1N., R.25E., P.M.M., and the NE1/4 of Section 32, T.1N., R.25E., P.M.M., Yellowstone County, Montana, more particularly described as:

Lot 26, Block 19, Lillis Heights Subdivision, Recorded February 19, 1957, under Document No. 578193, Records of Yellowstone County; including all adjacent right-of-way of Rim Point Drive and Rimrock Road.

Containing 0.740 gross acres and 0.255 net acres.
(# 09-02) See Exhibit "A" Attached

2. **CERTIFICATION.** Pursuant to M.C.A. Section 13-3-103, the above change and alteration is hereby certified to the election administrator by the City Council, and the City Administrator or his designee is hereby directed to certify the changes and alterations and to deliver a map showing the boundaries of the ward, the streets, avenues and alleys by name and the ward by number, to the election administrator not more than ten (10) days after the effective date of this ordinance.
3. **REPEALER.** All other ordinances, sections of the Billings Municipal Code and ordinances inconsistent herewith are hereby repealed.

PASSED by the City Council on the first reading this 11th day of May, 2009.

PASSED by the City Council on the second reading this 26th day of May, 2009.

THE CITY OF BILLINGS:

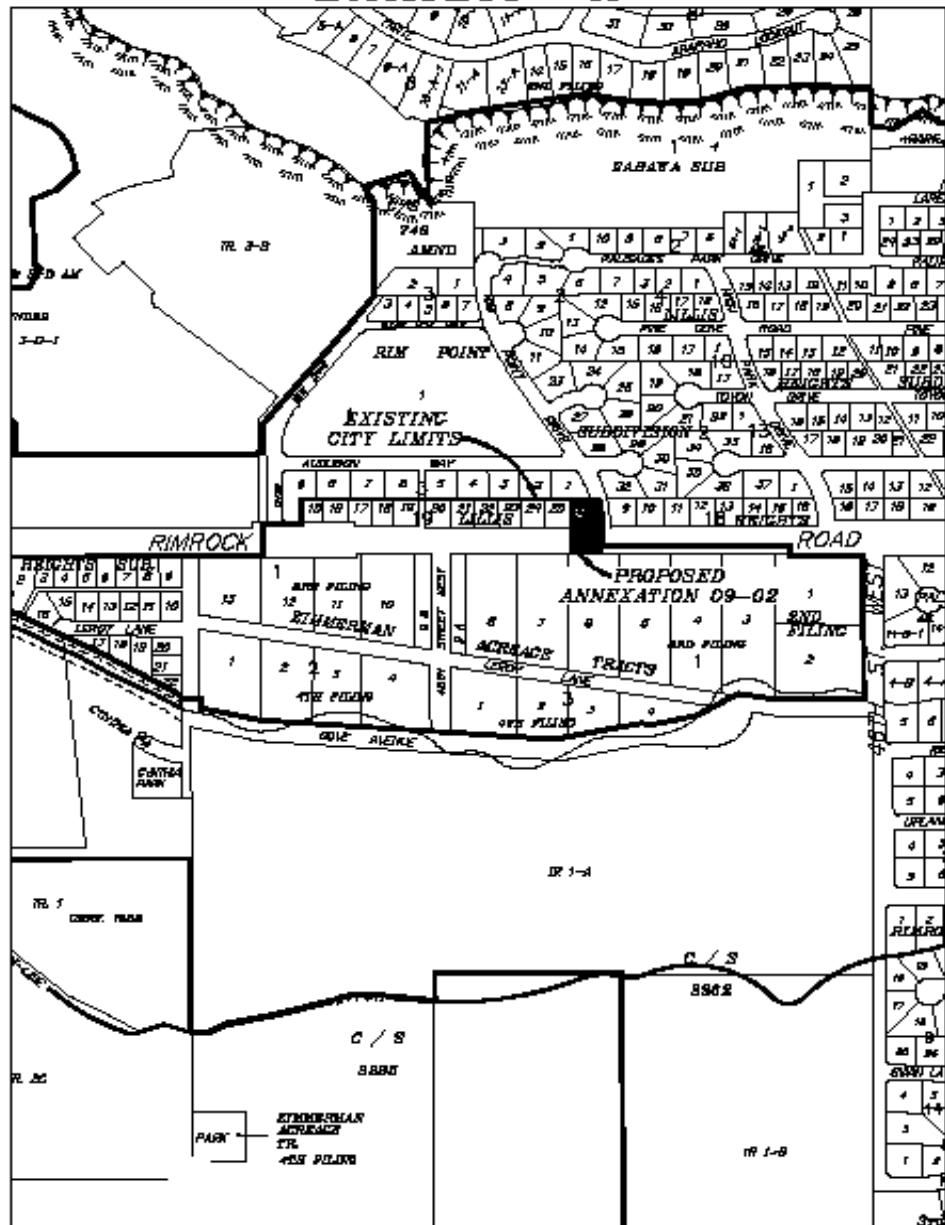
Ron Tussing, MAYOR

ATTEST:

BY: _____
Cari Martin, CITY CLERK

(AN 09-02)

EXHIBIT "A"





**CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, May 26, 2009**

TITLE: Preliminary Minor Plat of Lenhardt Square Subdivision, First Filing, Return Item from April 27 Meeting

DEPARTMENT: Planning and Community Services

PRESENTED BY: Wyeth Friday, AICP, Planning Division Manager

PROBLEM/ISSUE STATEMENT: On April 27, the City Council delayed taking action and approved a request for an extension on the preliminary plat review period for the Lenhardt Square Subdivision, First Filing, until the City Council Meeting on May 26. The delay was requested by the owners and applicant to further discuss several of the proposed conditions of approval with City staff and possibly change those conditions. Some amendments have been made to the conditions and have been approved by City staff in coordination with the applicant, owners and the agent. The City Council is expected to review the preliminary plat, and approve, conditionally approve, or deny the proposed subdivision at the May 26, 2009, meeting.

On March 16, 2009, the subdivider, M & K Blue One, LLC, applied for preliminary minor plat approval for Lenhardt Square Subdivision, First Filing. The proposed subdivision creates five lots from a 33.8-acre tract of land. The subject property is located north of King Avenue West, across from the Montana Sapphire Subdivision. The property was annexed into the City in 2008 and Planned Unit Development (PUD) zoning was approved for the property at the same time. The five lots will be developed in phases as multi-family residential uses.

ALTERNATIVES ANALYZED: State and City subdivision regulations require that preliminary plats be reviewed using specific criteria, as stated within this report. The City may not unreasonably restrict a subdivider's ability to develop land if the subdivider provides evidence that any identified adverse effects can be mitigated.

FINANCIAL IMPACT: Should the City Council approve this preliminary plat, the subject property may develop, resulting in additional tax revenues for the City.

RECOMMENDATION

Planning staff recommends conditional approval of the preliminary plat of Lenhardt Square Subdivision, First Filing, approval of two variance requests, and adoption of the Findings of Fact as presented in the staff report to the City Council.

Approved by: City Administrator _____ City Attorney _____

ATTACHMENTS

- A. Preliminary Plat
- B. Variance Requests
- C. Findings of Fact
- D. Mayor's Approval Letter

INTRODUCTION

On April 27, the City Council delayed taking action and approved a request for an extension on the preliminary plat review period for the Lenhardt Square Subdivision, First Filing, until the City Council Meeting on May 26. The delay was requested by the owners and applicant to further discuss several of the proposed conditions of approval with City staff and possibly change those conditions. Some amendments have been made to the conditions and have been approved by City staff in coordination with the applicant, owners and the agent. On March 16, 2009, the subdivider, M & K Blue One, LLC, applied for preliminary minor plat approval for Lenhardt Square Subdivision, First Filing. The proposed subdivision creates five lots from a 33.8-acre tract of land. The subject property is located north of King Avenue West, across from the Montana Sapphire Subdivision.

PROCEDURAL HISTORY

- A pre-application meeting was held on January 8, 2009, to discuss the proposal.
- The preliminary plat application was submitted to the Planning Division on March 16, 2009.
- The City Council considered a request by the applicant to delay action on the preliminary plat on April 27, 2009, and voted to delay action until its meeting on May 26, 2009.
- The City Council is expected to take action to approve, conditionally approve, or deny the preliminary plat at its meeting on May 26.

BACKGROUND

The proposed subdivision will create five lots ranging in size from 3.1 to 7.2 acres in size. The applicants intend to develop the lots in phases with multi-family housing. The property is bordered on the north by agricultural uses, on the west by agricultural and large lot residential uses, on the east by vacant land planned for medical, commercial, and residential uses, and on the south by King Avenue West and existing commercial and planned multi-family residential uses.

General location: North of King Avenue West across from the Montana Sapphire Subdivision.

Legal Description: Tract 1A, of Certificate of Survey 2063, Amended located in Section 10, T1S, R25E

Subdivider/Owner: M & K Blue One, LLC/Lenhardt Property, LP

Engineer and Surveyor: Sanderson Stewart

Existing Zoning: PUD – Multi-family

Existing land use: Agricultural

Proposed land use: Multi-family residential

Gross area: 33.82 acres

Proposed number of lots:	5
Lot sizes:	Max: 7.288 acres Min.: 3.165 acres
Parkland requirements:	1.12 acres of private parkland is proposed

ALTERNATIVES ANALYSIS

One of the purposes of the City's subdivision review process is to identify potentially negative effects of property subdivision. When negative effects are identified it is the subdivider's responsibility to mitigate those effects. Various City departments reviewed this application and provided input on effects and mitigation. The Planning Division staff develops and recommends conditions of approval that are based on departmental comments. The Findings of Fact, which are presented as an attachment, discuss the potential negative impacts of the subdivision and the following conditions of approval are recommended as measures to further mitigate any impacts.

RECOMMENDED CONDITIONS OF APPROVAL

Pursuant to Section 76-3-608(4), MCA, the following conditions are recommended to reasonably minimize potential adverse impacts identified within the Findings of Fact:

1. Utility easements shall be shown on the face of the final plat as requested by Montana-Dakota Utilities (MDU) and NorthWestern Energy (NWE) (*Required by 23-410.A., BMCC*).
2. In order to mitigate impacts on local services, mail delivery to the proposed subdivision shall be accomplished using centralized mailboxes. Location(s) and design of proposed centralized mailbox unit(s) and any required pull-out(s) shall be approved in writing by the United States Postal Service (USPS) prior to final plat approval (*Required by 23-406.A.17, BMCC*).
3. To mitigate the impacts to public health and safety, prior to final plat approval, the street named Saratov on the preliminary plat must be renamed 44th Street West from King Avenue West all the way north to the curve where 44th Street West turns east to become Monad Road at the northwest corner of Lot 1 (*Required by the City Engineering Division, City Fire Department, and as per Section 23-406 (8), BMCC*).
4. To mitigate the impacts to local services, prior to final plat approval, language in Section VI of the SIA on Page 7 shall be removed based on changes in the City's fee structure for water and sewer lines. The following language should be removed from the SIA: "It is acknowledged that the properties subject to the Subdivision Improvement Agreement shall be subject to the appropriate water and waste water local and interior construction fees in effect at the time payment. Fees shall be paid for the lots in each phase as applied for in the extension application and as per the preceding paragraph above" (*Required by the City Public Works Department*).

5. To mitigate impacts to local services, prior to final approval, the Monad Road right-of-way in the Lenhardt Square Subdivision must either line up with the right-of-way in Monad Road in the Village Subdivision to the east where the two section of the road connect or be terminated at the proposed 44th Street West-Monad Road intersection. If terminated at the proposed 44th Street West-Monad Road intersection, the right-of-way connection to the Village Subdivision must be platted when Lot 1A develops. The Monad Road right-of-way may be reduced in the Lenhardt Square Subdivision to the 56-ft right-of-way and a 39-ft road width as requested by variance, but the right-of-way width must be the same where the two subdivisions meet and any reduction in right-of-way must occur on the Lenhardt Square property (*Required by the City Engineering Division*).
6. In order to mitigate impacts on local services, prior to final plat approval, the subdivider shall provide written documentation from the Montana Department of Transportation (MDT) that he has met any infrastructure improvement requirements for King Avenue West identified by MDT.
7. In order to mitigate impacts on local services, prior to final plat approval, the last sentences in Section III.A.2 and Section III. B of the SIA must both be changed to read “The design of the 10-foot wide bike trail is subject to the approval of the Public Works Department-Engineering Division prior to construction at the time of site development” (*Required by the City Engineering Division*).
8. In order to mitigate impacts on local services, prior to final plat approval, language must be added to Section III. C of the SIA stating that one or more street lights, as approved by the City, are required near the median curb if any median curb is installed on 44th Street West. Language also should be included in this section stating when and by whom the street light or street lights will be installed, and that a street light maintenance district must be approved by the City prior to installation of any streetlights (*Required by the City Engineering Division*).
9. In order to mitigate impacts on local services and because King Avenue is a state highway, all necessary intersection improvements to the King Avenue West/44th Street West intersection, including cost participation in any future intersection improvements, shall be determined by the Montana Department of Transportation pursuant to state law and through negotiations with the affected landowners. The City shall be provided with a copy of any memorandum of understanding (MOU) or other agreement entered into by the MDOT and affected landowners. The MDOT’s rights and responsibilities under any such MOU or other agreement shall be assignable by MDOT to the City of Billings in the event jurisdiction over King Avenue West is transferred to the City of Billings (*Required by the City Engineering Division*).
10. To mitigate impacts to local services and public health and safety, prior to final approval, language shall be added to Section III of the SIA stating that if the house addressed as 4345 King Avenue West that is located west of Block 1, Lot 5 is still in the right-of-way of 44th Street West, it shall be removed from the right-of-way. If the

common boundary with Tract 4A is changed prior to final plat approval and the house is located outside of the right-of-way, the house may remain in place (*Required by the City Engineering Division*).

11. To mitigate impacts to local services, the final plat shall show right-of-way dedication on King Avenue of at least sixty-five feet (65') measured from the centerline. Any additional right-of-way required for future intersection improvements at the King Avenue-44th Street West intersection shall be in accordance with the memorandum of understanding or other agreement reached with the Montana Department of Transportation (*Required by the City Engineering Division*).
12. To mitigate impacts to local services and to align with the requirements of the Lenhardt Square PUD Agreement and the Lenhardt Square Master Site Plan Agreement, prior to final plat approval, a Homeowners' or Master Association shall be established to provide for maintenance of the park land easements provided with this subdivision. Language also shall be added to Section VII. of the SIA stating that a Master Association will be responsible for the development and maintenance of the linear park easements throughout the subdivision (*Required by the Lenhardt Square PUD Agreement, Lenhardt Square Master Plan Agreement and the City Parks, Recreation and Public Lands Department*).
13. To bring the SIA into alignment with the two variance requests submitted for consideration and to avoid future confusion, Section I of the SIA should be revised to reflect two variance requests by combining Part A and B into one variance request and combining Part C and D into one variance request.
14. Minor changes may be made in the SIA and final documents, as requested by the Planning, Legal or Public Works Departments to clarify the documents and bring them into the standard acceptable format.
15. The final plat shall comply with all requirements of the City of Billings Subdivision Regulations, rules, regulations, policies, and resolutions of the City of Billings, and the laws and Administrative Rules of the State of Montana.

VARIANCES REQUESTED

Two variances have been requested from the City Subdivision Regulations for this subdivision:

1. A variance from Section 23-406 (B) (6) to allow a 56-foot right-of-way dedication along 44th Street West and Monad Road adjacent to the subdivision where a 74-foot right-of-way is required for roads classified as collectors. The paved street width for Monad and 44th Street West will be 39-feet and may be accommodated in a 56-foot right-of-way. This variance is supported by City Engineering staff since the additional park land easements adjacent to the right-of-way will provide enough room for boulevard with a bike trail on one side and boulevard sidewalks on the other. However, Condition #5 does specify that the Monad Road right-of-way in the Lenhardt Square Subdivision must match the Monad Road right-of-way width in the Village Subdivision to the east where the two sections of road connect. Monad right-

of-way may be reduced in the Lenhardt Square Subdivision to the 56 foot right-of-way and 39-foot road width requested in this variance, but the reduction in right-of-way width must occur on the Lenhardt Square Subdivision property.

2. A variance from Section 23-406 (B) (13) to allow a total 8.5-foot width of right-of-way for boulevard and sidewalk along the 44th Street West and Monad Road. Since a 10-foot-wide park and bikeway easement is being provided adjacent to the City road right-of-way, this provides additional area for the boulevard and bike trail along the road. The design is going to be for the bike trail to meander along the roadway so the trail will go in and out of right-of-way and the park easement. This design and area is acceptable to the City Engineering Division and Planning Division and the variance is supported by staff. Additional information regarding the variances is provided in Attachment B.

STAKEHOLDERS

A public hearing is not required for minor subdivisions. However, any interested party may review the proposal and make comments. The Planning Division has received no public input on this proposal at the time this staff report was completed.

CONSISTENCY WITH ADOPTED POLICIES OR PLANS

Consistency with the Growth Policy, West Billings Plan, the Transportation Plan and the Heritage Trail Plan is discussed within the Findings of Fact.

RECOMMENDATION

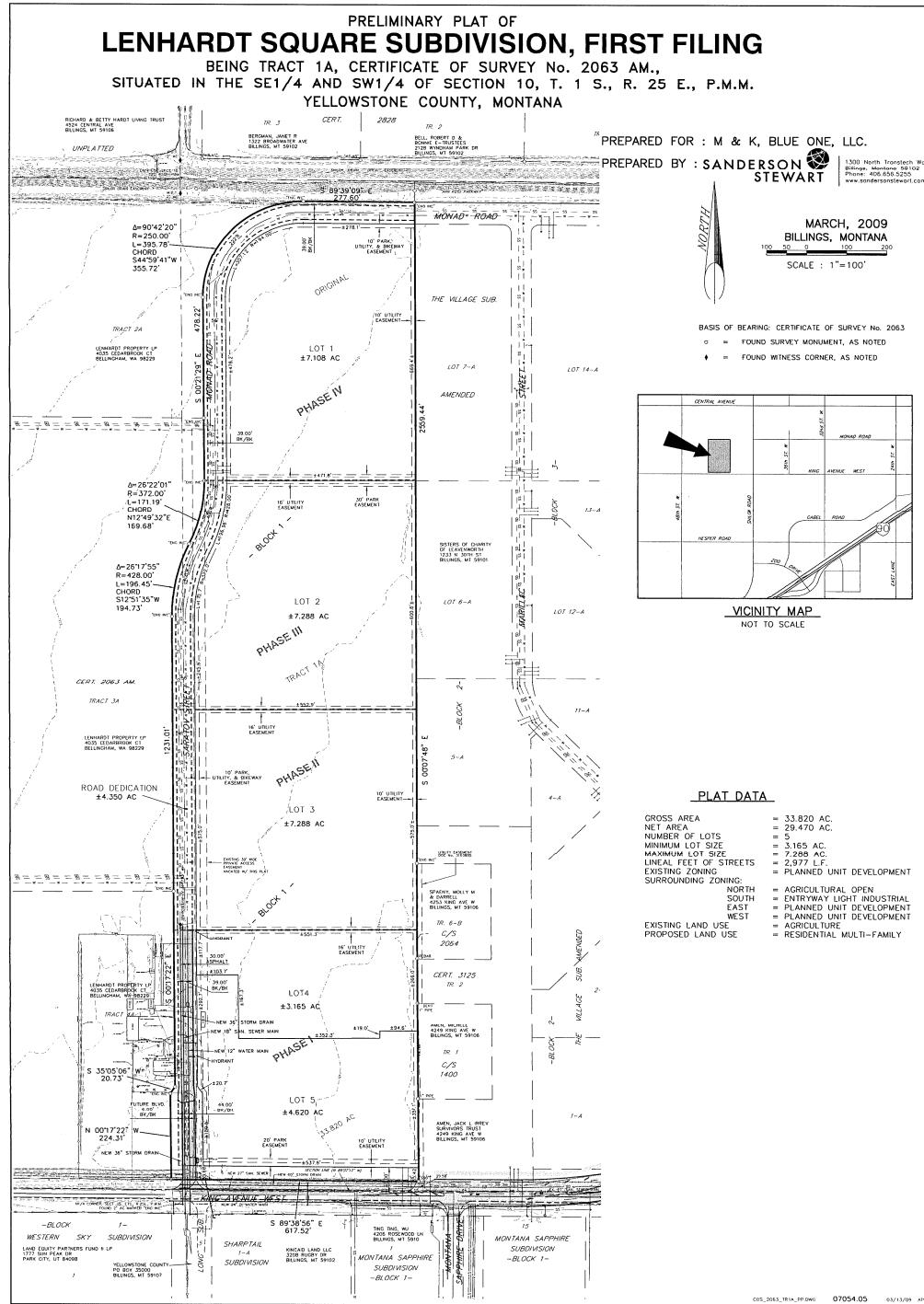
Planning staff recommends conditional approval of the preliminary plat of Lenhardt Square Subdivision, First Filing, approval of two variance requests, and adoption of the Findings of Fact as presented in the staff report to the City Council.

ATTACHMENTS

- A. Preliminary Plat
- B. Variance Requests
- C. Findings of Fact
- D. Mayor's Approval Letter

ATTACHMENT A

Preliminary Plat of Lenhardt Square Subdivision, First Filing



ATTACHMENT B

Variance Requests

FINDINGS OF FACT:

Variance Request: 23-406(B) to allow 56-foot right-of-way dedication along Saratov Street adjacent to the property to its intersection with Monad Road in lieu of the required 74-foot right-of-way requirement

Variance Request: 23-406B(6) to allow a 8.5-foot total boulevard width/sidewalk dedication along Saratov Street adjacent to the property to its intersection with Monad Road in lieu of the required 10-foot requirement.

1. The granting of the variance will not be detrimental to the public health, safety, or general welfare or injurious to other adjoining properties.

The variance would not be detrimental to the public health, safety, or general welfare of the public or be injurious to other properties. It has been determined that a 39-ft wide roadway surface (measured from back of curb to back of curb) would be constructed and would have the capacity to accommodate the anticipated traffic volumes. With the required 10-ft wide parks on either side of the right-of-way, it would create 27.5-ft of open space on either side of the street if the 74-ft right-of-way requirement were enforced. The intent of the development was to provide approximately 20-ft of open space on either side of the street as indicated in the master plan document for the property.

By creating less open space along the street, speeding should be kept to a minimum. In addition, the creation of the 56-ft right-of-way would in fact help adjoining properties by creating more developable area.

2. Because of the particular physical surroundings, shape, or topographical conditions of the specific property involved, an undue hardship to the owner would result if the strict letter of the regulations was enforced.

By enforcing the 74-ft right-of-way requirement on Saratov Street, the developable area of the property would be significantly impacted. Because Saratov Street is forced to be located on the mid-section line at approximately 44th Street West, enforcing a 74-ft right-of-way would limit the developable area for this property and densities agreed upon during the zoning process would likely be unattainable.

3. The variance will not result in an increase in taxpayer burden

By allowing a 56-ft right-of-way, the City of Billings would actually be creating more developable area within the Lenhardt Square Subdivision, First Filing, thus creating a higher tax base for the City of Billings.

4. The variance will not in any manner place the subdivision in nonconformance with any adopted zoning regulations or Growth Policy.

Allowing a 56-ft right-of-way would not place the subdivision in nonconformance with the adopted City of Billings Zoning regulations. In addition, this variance would still

allow the subdivision to be in compliance with the Growth Policy and the West Billings Plan.

5. **The subdivider must prove that the alternative design is equally effective and the objectives of the improvements are satisfied.**

A 56-ft right-of-way would still accommodate a 39-ft street (measured from back of curb to back of curb). This street width would be adequate to meet the projected traffic demands for Saratov Road. In addition, this right-of-way, along with required setbacks in the Lenhardt Square master plan would create 20-ft wide boulevard/open space areas, which was the intent of the provisions within the master plan document. The 18.5-ft wide area (including the right-of-way and the 10-ft park strip) would be sufficient to place the 10-ft wide bike path in and the street would still be wide enough to handle any projected traffic volumes.

FINDINGS OF FACT:

Variance Request: 23-406(B) to allow 56-foot right-of-way dedication along Monad Road adjacent to the property to its intersection with Saratov Street in lieu of the required 74-foot right-of-way requirement

Variance Request: 23-406B(6) to allow a 8.5-foot total boulevard width/sidewalk dedication along Monad Road adjacent to the property to its intersection with Saratov Street in lieu of the required 10-foot requirement.

1. The granting of the variance will not be detrimental to the public health, safety, or general welfare or injurious to other adjoining properties.

The variance would not be detrimental to the public health, safety, or general welfare of the public or be injurious to other properties. It has been determined that a 39-ft wide roadway surface (measured from back of curb to back of curb) would be constructed and would have the capacity to accommodate the anticipated traffic volumes. With the required 10-ft wide parks on either side of the right-of-way, it would create 27.5-ft of open space on either side of the street if the 74-ft right-of-way requirement were enforced. The intent of the development was to provide approximately 20-ft of open space on either side of the street as indicated in the master plan document for the property.

By creating less open space along the street, speeding should be kept to a minimum. In addition, the creation of the 56-ft right-of-way would in fact help adjoining properties by creating more developable area.

2. Because of the particular physical surroundings, shape, or topographical conditions of the specific property involved, an undue hardship to the owner would result if the strict letter of the regulations was enforced.

By enforcing the 74-ft right-of-way requirement on Monad Road, the developable area of the property would be significantly impacted. Because Saratov Street is forced to be located on the mid-section line at approximately 44th Street West and Monad Road is an extension of that street, enforcing a 74-ft right-of-way would limit the developable area for this property and densities agreed upon during the zoning process would likely be unattainable.

3. The variance will not result in an increase in taxpayer burden

By allowing a 56-ft right-of-way, the City of Billings would actually be creating more developable area within the Lenhardt Square Subdivision, First Filing, thus creating a higher tax base for the City of Billings.

4. The variance will not in any manner place the subdivision in nonconformance with any adopted zoning regulations or Growth Policy.

Allowing a 56-ft right-of-way would not place the subdivision in nonconformance with the adopted City of Billings Zoning regulations. In addition, this variance would still

allow the subdivision to be in compliance with the Growth Policy and the West Billings Plan.

5. The subdivider must prove that the alternative design is equally effective and the objectives of the improvements are satisfied.

A 56-ft right-of-way would still accommodate a 39-ft street (measured from back of curb to back of curb). This street width would be adequate to meet the projected traffic demands for Monad Road. In addition, this right-of-way, along with required setbacks in the Lenhardt Square master plan would create 20-ft wide boulevard/open space areas, which was the intent of the provisions within the master plan document. The 18.5-ft wide area (including the right-of-way and the 10-ft park strip) would be sufficient to place the 10-ft wide bike path in and the street would still be wide enough to handle any projected traffic volumes.

ATTACHMENT C
Findings of Fact

The Planning staff is forwarding the recommended Findings of Fact for Lenhardt Square Subdivision, First Filing, for review and approval by the City Council. These findings are based on the preliminary plat application and supplemental documents and address the review criteria required by the Montana Subdivision and Platting Act (76-3-608, MCA) and the City of Billings Subdivision Regulations (23-303(H)(2), BMCC).

A. What are the effects on agriculture, local services, the natural environment, wildlife and wildlife habitat and public health, safety and welfare? [MCA 76-3-608 (3) (a) and BMCC 23-304 (c) (1)]

1. Effect on agriculture and agricultural water user facilities

The subject property is part of a larger 114-acre property that was annexed into the City in 2008 and rezoned for Planned Unit Development (PUD) zoning at that time. The property has remained as agricultural land since the annexation and zone change and is now beginning to be prepared for development. There is agricultural and large-lot residential property to the north and west of the subject property. The subject property has been irrigated and farmed for many years. The proposed development will take 33-acres out of agricultural production with the remainder of the 114 acres being taken out of agricultural production as it develops in the future. The property owners plan to maintain the irrigation ditches and infrastructure on the non-developed portions of the property and changes to irrigation on this property are not expected to affect other agricultural water user facilities in the area.

2. Effect on local services

- a. **Utilities – Water:** Water services will be provided by the City of Billings. The subdivider will extend water mains from a 24-inch water main to be installed in King Avenue West along the frontage of the subdivision. Language in Section VI (A) of the Subdivision Improvement Agreement (SIA) also specifies water service limitations for the subdivision based on available water supply that the City can deliver at this time. Additional domestic water availability to the subdivision is based on two planned future City reservoir storage projects and on the City's determination of when additional capacity may be supplied.

Sewer: Sanitary sewer service can be provided by the City of Billings by installation of a 27-inch sewer main in King Avenue West. The subdivider will extend sewer mains from the King Avenue West main line at the time of lot development.

Language in Section VI of the SIA on Page 7 needs to be removed based on changes in the City's fee structure for water and sewer lines (**See Condition #4**). The following language should be removed: "It is acknowledged that the properties subject to the Subdivision Improvement Agreement shall be subject to the appropriate water and waste water local and interior construction fees in effect at the time payment. Fees shall be paid for the lots in each phase as applied for in the extension application and as per the preceding paragraph above."

MDU will provide gas services and NWE will provide electric services to the subdivision in the future. Utility easements shall be provided along lot boundaries as requested by the utility providers and shall be shown on the face of the final plat (**See Condition #1**).

Street Lights: Section III. C of the SIA states that streetlights will not be required at this time. However, a median is proposed at the south end of 44th Street West near the intersection of King Avenue West. The City requires streetlights to be installed when median curb is installed. Prior to final plat approval, language must be added to Section III.C of the SIA stating that streetlights are required if any median curb is installed on 44th Street West. Language also should be included in this section stating when and by whom the streetlights will be installed, and that a Street Light Maintenance District must be approved by the City prior to the installation of streetlights (**See Condition #8**).

- b. **Storm water** – Storm water drainage will be collected via new storm water lines in the subdivision that will connect to a new 66-inch storm drain to be installed in King Avenue West along the frontage of the subdivision. All improvements shall satisfy the criteria set forth by the *City of Billings Stormwater Management Manual* and will be subject to review and approval by the City Engineering Department.
- c. **Solid waste** – The City of Billings will provide solid waste collection and disposal. The City's landfill has adequate capacity for this waste.
- d. **Streets** – The subdivision will be served by internal public and private residential streets and by Monad Road and 44th Street West (Saratov) connecting to King Avenue West. As per the City Subdivision Regulations, sixty-five feet of right-of-way is being dedicated for King Avenue West, a principal arterial along the southern boundary of the subdivision (**See Condition #11**). However, King Avenue West is under the jurisdiction of the Montana Department of Transportation in this area. Improvements to King Avenue West will be required and approved by the Montana Department of Transportation (**See Condition #6 and Condition #11**).

Saratov Street on the preliminary plat aligns with 44th Street West to the south of King Avenue West. As per Section 23-406 (8) of the City Subdivision Regulations pertaining to consistency of street names and to mitigate impacts to public health and safety, Saratov Street on the preliminary plat must be renamed 44th Street West on the final plat (**See Condition #2**).

Access to the subdivision will be off of King Avenue West via 44th Street West and Monad Road. When the property to the east of this subdivision developments, access to Shiloh Road will be available via Monad Road at the northeastern corner of Lot 1 of the subdivision. Access to the individual lots has been specified in the SIA as follows: Two accesses for Lot, Block 1 to Monad Road; two accesses each for Lot 2 and Lot 3, Block 1, from 44th Street West; and one access each for Lot 4 and Lot 5, Block 1 onto 44th Street West. Internal connectivity shall be reviewed and provided between lots as they develop. All access designs and locations on public rights-of-way shall be reviewed and approved by the City Engineering Division.

Right-of-way for 44th Street West and Monad Road is being dedicated along the western portion of the subdivision and right-of-way for Monad Road also is being dedicated along the northern portion of the subdivision. Monad Road and 44th Street West are classified as collector streets. The standard right-of-way dedication for collector streets is 74 feet. Driving surface widths for collector streets range from 53 feet from back-of-curb to back-of-curb to 39 feet from back-of-curb to back-of-curb. In this situation, a 39-foot paved road section is being proposed.

The subdivider is requesting a variance from the required collector right-of-way dedication of 74 feet for this subdivision. The subdivider is applying for a variance to provide a 56-foot right-of-way width for Monad Road and 44th Street West with 39 feet of back-of-curb to back-of-curb paving. Since a 10-foot-wide park and bike trail easement is being proposed adjacent to Monad Road and 44th Street West along the subdivision property in addition to the road right-of-way, and since this easement will provide additional space for sidewalk on the west side of the roads in the future and bike path improvements along the east side of the roads when this subdivision is developed, the City Engineering Division is supportive of the right-of-way variance except where Monad Road intersects the property to the east. The width of Monad Road in the Lenhardt Square Subdivision must match the width of Monad Road in the Village Subdivision to the east. Monad may “neck down” in Lenhardt Square Subdivision to the 56 foot right-of-way and 39-foot road width as per the variance request but it must occur on the Lenhardt Square Subdivision property. The right-of-way for Monad Road on the Lenhardt Square property also must connect and align with the right-of-way for Monad Road in the Village Subdivision to the east (**See Condition #5**).

It is likely that additional improvements may be installed in the future at the intersection of King Avenue West and 44th Street West, according to the City Engineering Division and the Montana Department of Transportation. To plan for this possibility, City Engineering Division is requiring that the City be informed of any memorandums of understanding (MOU) between MDT and affected landowners, and that any MOU executed be assignable by MDT to the City of Billings in the event the jurisdiction of King Avenue West is transferred to the City of Billings in the future (**See Condition #9**).

The house located west of the proposed Lot 5, Block 1, of the subdivision will be encroaching into the right-of-way of 44th Street West according to the road design planned for the subdivision. The house is going to be too close to roadway to be safe. City Engineering has specified that language shall be added to Section III of the SIA stating that prior to construction of 44th Street West, the house addressed as 4345 King Avenue West and located west of Lot 5, Block 1, shall be removed from the right-of-way. If the lot line for Lot 4 or 5 of the proposed subdivision is changed prior to final plat approval and the house is located outside of the right-of-way, then the house may remain in place (**See Condition #10**).

Park and Bike Trail Easements: The subdivision is providing a 10-foot wide park and trail easement along the subdivision adjacent to 44th Street West and Monad Road. The subdivider also is providing a 20-foot wide park easement along King Avenue West and a

30-foot wide park easement along the property line between Lots 1 and 2. These park easements are private and will be maintained by a Master Association (**See Condition #12**). The bike trail along Monad Road and 44th Street West will meander along and through the road right-of-way and park easement and maintain the proper 5-foot boulevard width along the streets. However, the total area of the five-foot boulevard and the 10-foot bike trail width will not be entirely in the road right-of-way. =

The subdivider is asking for a variance from the street development requirements to place a portion of the bike trail and boulevard area in the park and bike trail easement and outside of the road right-of-way along Monad Road and 44th Street West. Since the park and bike trail easement allows access by the public and the City to use the trail and service it if needed (See Declaration of Easement for Sidewalk and Bikeway), the City is supportive of the variance to allow portions of the bike trail and boulevard to be outside of the street right-of-way. The 10-foot wide bike trail will be constructed at the time of development of the adjacent lots in the Lenhardt Square Subdivision, First Filing.

A 10-foot wide bike trail also will be constructed within a 20-foot wide park easement adjacent to King Avenue West along the southern edge of the subdivision. This will be constructed at the time of development of Lot 5, Block 1 of the Lenhardt Square Subdivision, First Filing.

- e. **Emergency services** – The Billings Police and Fire Departments will respond to emergencies within the proposed subdivision. Two fire stations are about equidistant to the subdivision. One is located at 604 South 24th Street West (Station #5) and one is located at 1501 54th Street West (Station #7). The subdivision is located within the ambulance service area of American Medical Response (AMR).
- f. **Schools** –School District #2 provides educational services from elementary through high school students. Big Sky Elementary School, Riverside Middle School and West High School are expected to serve the children in this subdivision. Responses from these schools were not received at the time this report was written.
- g. **Parks and Recreation** – Specific parkland requirements for this subdivision were specified during the drafting and approval of the PUD Agreement recorded for this property in 2008. Section 76-3-621 of the Montana Subdivision and Platting Act and Section 23-1009 (A) of the City Subdivision Regulations address park dedication requirements for PUDs. According to the approved master plan adopted with the Lenhardt Square PUD, 1.12 acres of parkland is required for the Lenhardt Square Subdivision, First Filing. The subdivider is proposing to provide 1.2 acres for the subdivision. The parkland is provided as linear parks and trail corridors along King Avenue West, 44th Street West, Monad Road, and along the property line between Lot 1 and Lot 2 of the subdivision. The parkland will all be owned and maintained by either the subdivider or a Master Association to be established for this subdivision and for the balance of the Lenhardt Square PUD. As a condition of approval for the subdivision, language must be added to Section VII of the SIA specifying that either the subdivider, future owners of the property or a Master Association shall maintain the park areas and

not the City. If a Master Association is designated, documentation that the Master Association has been created must be provided prior to final plat approval. (**Condition #12**).

h. **Mail Delivery** - The United States Postal Service (USPS) will provide postal service to the subdivision. Upon review of the proposal, USPS has requested that centralized mailboxes are installed to facilitate mail delivery. It is recommended as a condition of approval that the location and design of proposed centralized mailbox units and any required pull-outs shall be approved by the USPS prior to final plat approval (**See Condition 2**).

3. Effect on the natural environment

The subject property is on the western edge of the City of Billings. The property has been used for agricultural purposes for many years before it was planned for residential and commercial development. Creation of these lots and subsequent development of residential units on the property should have minimal effects on the natural environment.

4. Effect on wildlife and wildlife habitat

There are no known endangered or threatened species on the property. There is a note in the Conditions that Run with the Land section of the SIA that warns future lot owners of the possible presence of wildlife in the area. This subdivision should have a minimal effect on wildlife and wildlife habitat, as it is on the edge of an urbanized area and has been used for agricultural operations for many years.

5. Effect on the public health, safety and welfare

The subdivision is located in an area with no known natural hazards. The soil in the area is Kyle series with characteristics of low bearing capacity, low shear strength, high shrink-swell potential and slow permeability. Language has been added to the Conditions that Run with the Land section of the SIA to inform future property owners that a geotechnical analysis was completed for the subdivision and additional geotechnical work may be needed for design and construction of buildings.

B. Was an Environmental Assessment required? [(MCA 76-3-603 and BMCC 23-304 (c) (1)]

The proposed subdivision is exempt from the requirement for an Environmental Assessment pursuant to Section 76-3-210, MCA and Section 23-902 (C), BMCC.

C. Does the subdivision conform to the Yellowstone County-City of Billings 2008 Growth Policy, the Urban Area 2005 Transportation Plan Update and the Heritage Trail Plan? [BMCC 23-304 (c) (3)]

1. Yellowstone County-City of Billings 2008 Growth Policy

The proposed subdivision is consistent with the following goals of the Growth Policy:

- a. Goal: More housing and business choices within each neighborhood (p. 6).

As this subdivision is built out, it will provide more housing choices in this area of Billings. Future development of the Lenhardt Square PUD also will provide a mix of housing choices and business options in this area of Billings.

- b. Goal: Additional bicycle facilities throughout the City and County (P. 12).

This subdivision provides linear parks and trails in the parks to provide for bicycle and pedestrian facilities through this subdivision and connecting to other facilities in the future in this area of Billings.

- c. Goal: A multi-purpose trail network integrated into the community infrastructure that emphasizes safety, environmental preservation, resource conservation and cost effectiveness. (p. 10).

The trail and pedestrian facilities proposed for this subdivision and the surrounding development will help connect people via non-motorized means to many places to shop, work and live in this area of Billings. Since the parks and trails in this development will be maintained by private means, the cost to the community is less while the benefits are realized.

- d. Goal: Contiguous development focused in and around existing population centers separated by open space (p. 6).

This subdivision is on the edge of the City of Billings and is contiguous to property that also is planned to be developed at urban densities soon.

The proposed subdivision is inconsistent with the following goals of the Growth Policy:

- a. Goal: New developments that are sensitive to and compatible with the character of adjacent City neighborhoods and County townsites (p. 6).

Currently, this subdivision is surrounded by agricultural uses on three sides. One side will be developed at urban densities soon. The west and east areas adjacent to this property are expected to be in agricultural production/uses for some time. Having a high-density urban-style development adjacent to agricultural operations is not compatible at this time.

- b. Protection of groundwater, surface water, riparian areas, air quality, and productive agricultural land (p. 9).

The property proposed to be developed is part of a 114 acre site that has been used for agricultural production for many years. The property is irrigated and the soil is of high quality for agricultural production. Development of this subdivision will take 33 acres of the total 114 acres out of agricultural production.

2. 2001 West Billings Plan

The plan to develop the property at urban densities is in line with the managed growth theme of the West Billings Plan. However, the Plan also encourages compact and infill development to conserve land and natural resources (Theme 1, Planned Growth, Page 15). The development proposed for this property is compact but the property is on the fringe of the urban area and is not infill.

The subject property is located in an area that the West Billings Plan identifies as a place for residential development, with a commercial center identified to the east at the intersection of Shiloh Road and King Avenue West. The proposal for development of the property would

include both residential and commercial uses in a mixed use environment (Theme 3, Achieving a Distinctive Community Character, Page 38).

3. Urban Area 2005 Transportation Plan Update

The proposed subdivision adheres to the goals and objectives of the 2005 Transportation Plan Update and preserves the street network and street hierarchy specified within the plan.

4. Heritage Trail Plan

The proposed subdivision lies within the jurisdiction of the Heritage Trail Plan. The Lenhardt Square Subdivision, First Filing, and the Lenhardt Square PUD Agreement specify that linear parks and trails will be provided throughout this subdivision and the entire PUD. This subdivision is providing a 10-foot bike trail along King Avenue West, 44th Street West and Monad Road. An additional 30-foot-wide park corridor also will be located along the property line between Lot 1 and Lot 2 of this subdivision and will provide for pedestrian and bicycle access to the east. The trail network in this subdivision is designed to connect to the trail to be built along Shiloh Road and from there into the rest of the Heritage trail system.

D. Does the subdivision conform to the Montana Subdivision and Platting Act and to local subdivision regulations? [MCA 76-3-608 (3) (b) and BMCC 23-304 (c) (4)]

The proposed subdivision satisfies the requirements of the Montana Subdivision and Platting Act and conforms to the design standards specified in the local subdivision regulations. The subdivider and the local government have complied with the subdivision review and approval procedures set forth in the local and state subdivision regulations.

E. Does the subdivision conform to sanitary requirements? [BMCC 23-304 (c) (5)]

The subdivision will utilize the City's sanitary sewer and water systems, and the City's solid waste collection and disposal services. All services are approved and regulated by state and federal authorities.

F. Does the proposed subdivision conform to all requirements of the zoning in effect? [BMCC 23-304 (c) (6)]

The subject property is located within Lenhardt Square PUD approved by the City in 2008 and shall comply with the standards set forth in the Lenhardt Square PUD Agreement.

G. Does the proposed plat provide easements for the location and installation of any utilities? [MCA 76-3-608 (3) (c) and BMCC 23-304 9 (c) (7)]

The subdivider shall provide utility easements as requested by MDU (See Condition #1).

H. Does the proposed plat provide legal and physical access to each parcel within the subdivision and notation of that access on the plat? [MCA 76-3-608 (3) (d) and BMCC 23-304 9 (c) (8)]

Legal and physical access is provided to the proposed lots from 44th Street West, Monad Road which will connect to King Avenue West.

CONCLUSIONS OF FINDING OF FACT

- The preliminary plat of Lenhardt Square Subdivision, First Filing does not create any adverse impacts that warrant denial of the subdivision.
- The proposed subdivision conforms to several goals and policies of the 2008 Growth Policy and is inconsistent with several goals. The proposed subdivision does not conflict with the Billings Urban Area Transportation Plan or the Heritage Trail Plan.
- The proposed subdivision complies with state and local subdivision regulations, local zoning, and sanitary requirements and provides legal and physical access to each lot.
- Any potential negative or adverse impacts will be mitigated with the proposed conditions of approval.

Approved by the Billings City Council, May 26, 2009.

Ron Tussing, Mayor

Mayor's Approval Letter

May 27, 2009

M & K Blue One, LLC
PO Box 3494
Billings, MT 59103

Dear Applicant:

On May 26, 2009, the Billings City Council conditionally approved the preliminary plat of Lenhardt Square Subdivision, First Filing and two variance requests. The conditions of approval are as follows:

1. Utility easements shall be shown on the face of the final plat as requested by Montana-Dakota Utilities (MDU) and NorthWestern Energy (NWE) (*Required by 23-410.A., BMCC*).
2. In order to mitigate impacts on local services, mail delivery to the proposed subdivision shall be accomplished using centralized mailboxes. Location(s) and design of proposed centralized mailbox unit(s) and any required pull-out(s) shall be approved in writing by the United States Postal Service (USPS) prior to final plat approval (*Required by 23-406.A.17, BMCC*).
3. To mitigate the impacts to public health and safety, prior to final plat approval, the street named Saratov on the preliminary plat must be renamed 44th Street West from King Avenue West all the way north to the curve where 44th Street West turns east to become Monad Road at the northwest corner of Lot 1 (*Required by the City Engineering Division, City Fire Department, and as per Section 23-406 (8), BMCC*).
4. To mitigate the impacts to local services, prior to final plat approval, language in Section VI of the SIA on Page 7 shall be removed based on changes in the City's fee structure for water and sewer lines. The following language should be removed from the SIA: "It is acknowledged that the properties subject to the Subdivision Improvement Agreement shall be subject to the appropriate water and waste water local and interior construction fees in effect at the time payment. Fees shall be paid for the lots in each phase as applied for in the extension application and as per the preceding paragraph above" (*Required by the City Public Works Department*).
5. To mitigate impacts to local services, prior to final approval, the Monad Road right-of-way in the Lenhardt Square Subdivision must either line up with the right-of-way in Monad Road in the Village Subdivision to the east where the two section of the road connect or be terminated at the proposed 44th Street West-Monad Road intersection. If terminated at the proposed 44th Street West-Monad Road intersection, the right-of-way connection to the Village Subdivision must be platted when Lot 1A develops. The Monad Road right-of-way may be reduced in the Lenhardt Square Subdivision to the 56-

ft right-of-way and a 39-ft road width as requested by variance, but the right-of-way width must be the same where the two subdivisions meet and any reduction in right-of-way must occur on the Lenhardt Square property (*Required by the City Engineering Division*).

6. In order to mitigate impacts on local services, prior to final plat approval, the subdivider shall provide written documentation from the Montana Department of Transportation (MDT) that he has met any infrastructure improvement requirements for King Avenue West identified by MDT.
7. In order to mitigate impacts on local services, prior to final plat approval, the last sentences in Section III.A.2 and Section III. B of the SIA must both be changed to read “The design of the 10-foot wide bike trail is subject to the approval of the Public Works Department-Engineering Division prior to construction at the time of site development” (*Required by the City Engineering Division*).
8. In order to mitigate impacts on local services, prior to final plat approval, language must be added to Section III. C of the SIA stating that one or more street lights, as approved by the City, are required near the median curb if any median curb is installed on 44th Street West. Language also should be included in this section stating when and by whom the street light or street lights will be installed, and that a street light maintenance district must be approved by the City prior to installation of any streetlights (*Required by the City Engineering Division*).
9. In order to mitigate impacts on local services and because King Avenue is a state highway, all necessary intersection improvements to the King Avenue West/44th Street West intersection, including cost participation in any future intersection improvements, shall be determined by the Montana Department of Transportation pursuant to state law and through negotiations with the affected landowners. The City shall be provided with a copy of any memorandum of understanding (MOU) or other agreement entered into by the MDOT and affected landowners. The MDOT’s rights and responsibilities under any such MOU or other agreement shall be assignable by MDOT to the City of Billings in the event jurisdiction over King Avenue West is transferred to the City of Billings (*Required by the City Engineering Division*).
10. To mitigate impacts to local services and public health and safety, prior to final approval, language shall be added to Section III of the SIA stating that if the house addressed as 4345 King Avenue West that is located west of Block 1, Lot 5 is still in the right-of-way of 44th Street West, it shall be removed from the right-of-way. If the common boundary with Tract 4A is changed prior to final plat approval and the house is located outside of the right-of-way, the house may remain in place (*Required by the City Engineering Division*).
11. To mitigate impacts to local services, the final plat shall show right-of-way dedication on King Avenue of at least sixty-five feet (65') measured from the centerline. Any additional right-of-way required for future intersection improvements at the King

Avenue-44th Street West intersection shall be in accordance with the memorandum of understanding or other agreement reached with the Montana Department of Transportation (*Required by the City Engineering Division*).

12. To mitigate impacts to local services and to align with the requirements of the Lenhardt Square PUD Agreement and the Lenhardt Square Master Site Plan Agreement, prior to final plat approval, a Homeowners' or Master Association shall be established to provide for maintenance of the park land easements provided with this subdivision. Language also shall be added to Section VII. of the SIA stating that a Master Association will be responsible for the development and maintenance of the linear park easements throughout the subdivision (*Required by the Lenhardt Square PUD Agreement, Lenhardt Square Master Plan Agreement and the City Parks, Recreation and Public Lands Department*).
13. To bring the SIA into alignment with the two variance requests submitted for consideration and to avoid future confusion, Section I of the SIA should be revised to reflect two variance requests by combining Part A and B into one variance request and combining Part C and D into one variance request.
14. Minor changes may be made in the SIA and final documents, as requested by the Planning, Legal or Public Works Departments to clarify the documents and bring them into the standard acceptable format.
15. The final plat shall comply with all requirements of the City of Billings Subdivision Regulations, rules, regulations, policies, and resolutions of the City of Billings, and the laws and Administrative Rules of the State of Montana.

Variances Approved:

1. A variance from Section 23-406 (B) (6) to allow a 56-foot right-of-way dedication along 44th Street West and Monad Road adjacent to the subdivision where a 74-foot right-of-way is required for roads classified as collectors. Note: The width of Monad Road where it enters the Village Subdivision to the east of Lot 1, Block 1 of the Lenhardt Square Subdivision, First Filing, must match the Monad Road width in the Village Subdivision.
2. A variance from 23-406 (B) (13) to allow a total 8.5-foot width of right-of-way for boulevard and sidewalk along 44th Street West and Monad Road.

Should you have questions please contact Wyeth Friday with the Planning Division at 247-8660 or by email at fridayw@ci.billings.mt.us.

Sincerely,

Ron Tussing, Mayor

Pc: Will Ralph, PE, Sanderson Stewart
Lenhardt Property, LP



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, May 26, 2009

TITLE: Preliminary Subsequent Minor Plat of Kuhlman Subdivision, Amended Lot 6

DEPARTMENT: Planning and Community Services

PRESENTED BY: Juliet Spalding, AICP, Planner II

PROBLEM/ISSUE STATEMENT: On April 15, 2009, subdivider, Troy Boucher, applied for preliminary subsequent minor plat approval for Kuhlman Subdivision, Amended Lot 6. The proposed subdivision creates two lots from a 0.46-acre tract of land. The subject property is located between Josephine Drive and Kuhlman Drive on the west side of Main Street in the Heights, a few blocks north of the Hilltop Road intersection. The property currently has one single-family home on its south side, but is zoned Highway Commercial (HC) and is surrounded by a variety of uses. A variance from the City Subdivision Regulations is being requested to waive the right-of-way dedication requirement for Kuhlman Drive. The City Council will review the preliminary plat, and approve, conditionally approve, or deny the proposed subdivision and variance request at the May 26, 2009, meeting. The representing agent is Blueline Engineering, LLC.

ALTERNATIVES ANALYZED: State and City subdivision regulations require that preliminary plats be reviewed using specific criteria, as stated within this report. The City may not unreasonably restrict a subdivider's ability to develop land if the subdivider provides evidence that any identified adverse effects can be mitigated.

FINANCIAL IMPACT: Should the City Council approve the preliminary plat, the subject property may further develop, resulting in additional tax revenues for the City.

RECOMMENDATION

Planning staff recommends approval of the variance request from Section 23-406.B.6 of the City Subdivision Regulations, conditional approval of the preliminary plat of Kuhlman Subdivision, Amended Lot 6, and adoption of the Findings of Fact as presented in the staff report to the City Council.

Approved by: **City Administrator** _____ **City Attorney** _____

ATTACHMENTS

- E. Photos of the subject property
- F. Preliminary Plat
- G. Findings of Fact
- H. Mayor's Approval Letter
- I. Variance Request Documents

INTRODUCTION

On April 15, 2009, subdivider, Troy Boucher, applied for preliminary subsequent minor plat approval for Kuhlman Subdivision, Amended Lot 6. The proposed subdivision creates 2 lots from a 0.46-acre tract of land. The subject property is located between Josephine Drive and Kuhlman Drive on the west side of Main Street in the Heights, a few blocks north of the Hilltop Road intersection. The property currently has one single-family home on its south side, but is zoned Highway Commercial (HC) and is surrounded by a variety of uses. The representing agent is Blueline Engineering, LLC.

PROCEDURAL HISTORY

- A pre-application meeting was held on February 12, 2009, to discuss the proposal.
- The preliminary plat application was submitted to the Planning Division on April 15, 2009.
- The City Council will consider the preliminary plat on May 26, 2009.

BACKGROUND

General location: 512 Josephine Drive, in the Heights

Legal Description: Lot 6 of Kuhlman Subdivision, in Section 22, T1N, R26E

Subdivider: Troy Boucher

Owner: Lesley and Louvina Boucher

Engineer and Surveyor: Blueline Engineering, LLC

Existing Zoning: HC

Existing land use: One single-family residence

Proposed land use: residential/commercial

Gross area: 19,990 square feet

Proposed number of lots: 2

Lot sizes: 9,995 square feet

Parkland requirements: Parkland is not required for subdivisions creating only one additional lot.

ALTERNATIVES ANALYSIS

One of the purposes of the City's subdivision review process is to identify potentially negative effects of property subdivision. When negative effects are identified it is the subdivider's responsibility to mitigate those effects. Various City departments reviewed this application and provided input on effects and mitigation. The Planning Division staff develops and recommends conditions of approval that are based on departmental comments. The Findings of Fact, which are presented as an attachment, discuss the potential negative impacts of the subdivision and the following conditions of approval are recommended as measures to further mitigate any impacts.

RECOMMENDED CONDITIONS OF APPROVAL

Pursuant to Section 76-3-608(4), MCA, the following conditions are recommended to reasonably minimize potential adverse impacts identified within the Findings of Fact:

16. To ensure the provision of easements, a 5-foot wide sidewalk, street light and fire hydrant easement shall be shown on the final plat adjacent to the Kuhlman Drive right-of-way. Additionally, the subdivider shall work with the City Engineering Division and the private utility companies to determine suitable locations for other utility easements (*Required by 23-410, BMCC, and in exchange for right-of-way variance*).
17. In order to mitigate impacts on local services, Section III.A. of the Subdivision Improvements Agreement (SIA) shall be rewritten as follows:

“This subdivision is bordered on the north by Kuhlman Drive and on the south by Josephine Drive. Kuhlman Drive has a 30-foot wide right-of-way and due to the dead-end nature of this street, the subdivider has requested a variance from the requirement to dedicate an additional 26 feet of right-of-way. Josephine Drive exists within a 60-foot wide right-of-way, so no additional dedication is required. Future street improvements, including street widening, curb, gutter and sidewalks, may be done as part of a larger Special Improvement District (SID) project and a waiver of right to protest the creation of future SIDs is being filed with this plat.” (*Required by Planning and Engineering Divisions*)

18. Minor changes may be made in the SIA and final documents, as requested by the Planning, Legal or Public Works Departments to clarify the documents and bring them into the standard acceptable format.
19. The final plat shall comply with all requirements of the City of Billings Subdivision Regulations, rules, regulations, policies, and resolutions of the City of Billings, and the laws and Administrative Rules of the State of Montana.

VARIANCES REQUESTED

A variance from Section 23-406.B.6, BMCC to allow for a 30-foot wide street right-of-way for Kuhlman Drive, in lieu of a 56-foot wide dedication. City staff recommends approval of this variance; further discussion on this request and recommendation can be found in Attachments C and E.

STAKEHOLDERS

A public hearing is not required for minor subdivisions. However, any interested party may review the proposal and make comments. The Planning Division has received no public input on this proposal at the time this staff report was completed.

CONSISTENCY WITH ADOPTED POLICIES OR PLANS

Consistency with the Growth Policy, the Transportation Plan and Heritage Trail Plan is discussed within the Findings of Fact.

RECOMMENDATION

Planning staff recommends approval of the variance request from Section 23-406.B.6 of the City Subdivision Regulations, conditional approval of the preliminary plat of Kuhlman Subdivision, Amended Lot 6, and adoption of the Findings of Fact as presented in the staff report to the City Council.

ATTACHMENTS

- A. Photos of the subject property
- B. Preliminary Plat
- C. Findings of Fact
- D. Mayor's Approval Letter
- E. Variance Request Documents

ATTACHMENT A



Figure 1: Looking north from Josephine Drive at existing dwelling on property.



Figure 2: Looking south east from Kuhlman Drive at proposed Lot 6A.



Figure 3: Looking east up Kuhlman Drive. Subject property on right near garbage can.

ATTACHMENT B

Preliminary Plat of Kuhlman Subdivision, Amended Lot 6

ATTACHMENT C
Findings of Fact

The Planning staff is forwarding the recommended Findings of Fact for Kuhlman Subdivision, Amended Lot 6 for review and approval by the City Council. These findings are based on the preliminary plat application and supplemental documents and address the review criteria required by the Montana Subdivision and Platting Act (76-3-608, MCA) and the City of Billings Subdivision Regulations (23-303(H)(2), BMCC).

A. What are the effects on agriculture, local services, the natural environment, wildlife and wildlife habitat and public health, safety and welfare? [MCA 76-3-608 (3) (a) and BMCC 23-304 (c) (1)]

1. Effect on agriculture and agricultural water user facilities

The subject property is located in the City limits and is surrounded by urban density development. The proposed future use will not displace any existing agricultural activity, and therefore should have a minimal effect on the agricultural industry. Additionally, there are no irrigation canals or facilities on the property, therefore the subdivision will not have an effect on agricultural water user facilities.

2. Effect on local services

- i. **Utilities** – Water services can be provided by the County Water District of the Billings Heights by connecting to the existing mains found within the adjacent public rights-of-way. Sanitary sewer services can be provided by the City of Billings by connecting to the existing mains found within the adjacent public rights of way.

MDU will provide gas services, and NWE will provide electric services to the subdivision in the future. Utility easements shall be provided along lot boundaries as requested by the utility providers and shall be shown on the face of the final plat (**Condition #1**).

- j. **Storm water** – Storm water is proposed to be absorbed on site and in the borrow ditches as it is currently handled. In the future, if curb, gutter, and storm water improvements are installed, the property owners will participate in a Special Improvement District to help fund those improvements. All improvements shall satisfy the criteria set forth by the *City of Billings Stormwater Management Manual* and will be subject to review and approval by the Engineering Department.
- k. **Solid waste** – The City of Billings will provide solid waste collection and disposal. The City's landfill has adequate capacity for this waste.
- l. **Streets** – Josephine Drive fronts the subject property on the south and provides access to the existing home on Lot 6B. Josephine Drive is a paved street within a 60-foot wide right-of-way. Kuhlman Drive fronts the property on the north, and provides access to Lot 6A. A 30-foot wide street right-of-way is presently dedicated place for Kuhlman Drive, and since this subdivision only affects a short portion of it (approximately 70 feet) and

ends in a dead-end to the east, the subdividers have requested a variance from the current right-of-way dedication requirements of 56 feet. Staff is supportive of this variance request in this existing situation if a 5-foot wide easement is provided adjacent to the street for future street lights, hydrants and drive approaches (**Condition #1**). Additional information on the variance request can be found in Attachment E.

Street improvements to both Josephine and Kuhlman Drive, including street widening, curb, gutter, and sidewalk have been proposed to be delayed until such time as a neighborhood Special Improvement District (SID) is created to improve the entire street. A waiver of right to protest the creation of future SIDs will be recorded with the final plat documents and a notice in the Conditions that Run with the Land section of the SIA will inform future landowners of this possible future commitment. Clarification on the streets and future improvements is recommended within the SIA (**Condition #2**).

- m. **Emergency services** – The Billings Police and Fire Departments will respond to emergencies within the proposed subdivision. The nearest fire station is located at 1601 St. Andrews (Fire Station #6). The subdivision is located within the ambulance service area of American Medical Response (AMR).
- n. **Schools** –School District #2 provides educational services to elementary through high school students. No comments were received from the schools at the time this report was compiled.
- o. **Parks and Recreation** –There are no parkland dedication requirements for minor subdivisions creating only one additional lot.
- p. **Mail Delivery** - The United States Postal Service provides postal service to the subdivision. Individual mail boxes will serve the two new lots.

3. Effect on the natural environment

The subject property is entirely surrounded by urban density development. Creation of these lots and subsequent development of additional units on the vacant property should have minimal effects on the natural environment.

4. Effect on wildlife and wildlife habitat

There are no known endangered or threatened species on the property. This subdivision should have a minimal effect on wildlife and wildlife habitat, as it is in the middle of an urbanized area.

5. Effect on the public health, safety and welfare

The subdivision is located in an area with no known natural hazards.

B. Was an Environmental Assessment required? [(MCA 76-3-603 and BMCC 23-304 (c) (1)]

The proposed subdivision is exempt from the requirement for an Environmental Assessment pursuant to Section 76-3-210, MCA.

C. Does the subdivision conform to the Yellowstone County-City of Billings 2008 Growth Policy, the Urban Area 2005 Transportation Plan Update and the Heritage Trail Plan? [BMCC 23-304 (c) (3)]

1. Yellowstone County-City of Billings 2008 Growth Policy

The proposed subdivision is consistent with the following goals of the Growth Policy:

- e. Goal: More housing and business choices within each neighborhood (p. 6).
- b. Goal: New developments that are sensitive to and compatible with the character of adjacent City neighborhoods and County townsites (p. 6).
- c. Goal: Contiguous development focused in and around existing population centers separated by open space (p. 6).

2. Urban Area 2005 Transportation Plan Update

The proposed subdivision adheres to the goals and objectives of the 2005 Transportation Plan Update and preserves the street network and street hierarchy specified in the plan.

3. Heritage Trail Plan

The proposed subdivision lies within the jurisdiction of the Heritage Trail Plan. No trail corridors are identified on the plan within or adjacent to this subdivision.

D. Does the subdivision conform to the Montana Subdivision and Platting Act and to local subdivision regulations? [MCA 76-3-608 (3) (b) and BMCC 23-304 (c) (4)]

The proposed subdivision satisfies the requirements of the Montana Subdivision and Platting Act and conforms to the design standards specified in the local subdivision regulations. The subdivider and the local government have complied with the subdivision review and approval procedures set forth in the local and state subdivision regulations.

E. Does the subdivision conform to sanitary requirements? [BMCC 23-304 (c) (5)]

The subdivision will make use of the Heights Water District water services, the City of Billings' sanitary sewer, and stormwater sewer systems, and the City's solid waste collection and disposal services. All services are approved and regulated by state and federal authorities.

F. Does the proposed subdivision conform to all requirements of the zoning in effect? [BMCC 23-304 (c) (6)]

The subject property is located in the HC zoning district. The proposed lots and any future development of the land shall comply with the standards set forth in Section 27-308, BMCC.

G. Does the proposed plat provide easements for the location and installation of any utilities? [MCA 76-3-608 (3) (c) and BMCC 23-304 9 (c) (7)]

The subdivider shall provide a 5-foot wide easement along the frontage of Kuhlman Drive for potential future sidewalk, street lights and fire hydrants, as well as any utility easements requested by MDU and NWE (**Condition #1**).

H. Does the proposed plat provide legal and physical access to each parcel within the subdivision and notation of that access on the plat? [MCA 76-3-608 (3) (d) and BMCC 23-304 9 (c) (8)]

Legal and physical access is provided to the proposed lots from Josephine Drive and Kuhlman Drive.

CONCLUSIONS OF FINDING OF FACT

- The preliminary plat of Kuhlman Subdivision, Amended Lot 6, does not create any adverse impacts that warrant denial of the subdivision.
- The proposed subdivision conforms to several goals and policies of the 2008 Growth Policy and does not conflict with the Transportation or Heritage Trail Plans.
- The proposed subdivision complies with state and local subdivision regulations, local zoning, and sanitary requirements and provides legal and physical access to each lot.
- Any potential negative or adverse impacts will be mitigated with the proposed conditions of approval.

Approved by the Billings City Council, May 26, 2009.

Ron Tussing, Mayor

ATTACHMENT D
Mayor's Approval Letter

May 27, 2009

Lesley A. and Louvina K. Boucher
c/o Troy Boucher
521 Josephine Drive
Billings, MT 59105

Dear Applicants:

On May 26, 2009, the Billings City Council conditionally approved the preliminary plat of Kuhlman Subdivision, Amended Lot 6. The conditions of approval are as follows:

1. To ensure the provision of easements, a 5-foot wide sidewalk, street light and fire hydrant easement shall be shown on the final plat adjacent to the Kuhlman Drive right-of-way. Additionally, the subdivider shall work with the City Engineering Division and the private utility companies to determine suitable locations for other utility easements.
2. In order to mitigate impacts on local services, Section III.A. of the Subdivision Improvements Agreement (SIA) shall be rewritten as follows:

“This subdivision is bordered on the north by Kuhlman Drive and on the south by Josephine Drive. Kuhlman Drive has a 30-foot wide right-of-way and due to the dead-end nature of this street, the subdivider has requested a variance from the requirement to dedicate an additional 26 feet of right-of-way. Josephine Drive exists within a 60-foot wide right-of-way, so no additional dedication is required.

Future street improvements, including street widening, curb, gutter and sidewalks, may be done as part of a larger Special Improvement District (SID) project and a waiver of right to protest the creation of future SIDs is being filed with this plat.”

3. Minor changes may be made in the SIA and final documents, as requested by the Planning, Legal or Public Works Departments to clarify the documents and bring them into the standard acceptable format.
4. The final plat shall comply with all requirements of the City of Billings Subdivision Regulations, rules, regulations, policies, and resolutions of the City of Billings, and the laws and Administrative Rules of the State of Montana.

The City Council also approved your variance request from Sections 23-406.B.6, BMCC to waive the requirement for a 26-foot right-of-way dedication for Kuhlman Lane.

Should you have questions please contact Juliet Spalding with the Planning Department at 247-8684 or by email at spaldingj@ci.billings.mt.us.

Sincerely,

Ron Tussing, Mayor

Pc: Marshall Phil, Blueline Engineering, LLC
Tom Kelly, North Star Land Services

ATTACHMENT E
Variance Request

RECEIVED

MAY 04 2009

PLANNING & COMMUNITY
SERVICES DEPARTMENT



2110 Overland Avenue, Suite 119B
Billings, MT 59102
Work: 406-294-2294
Fax: 406-294-2295

Juliet Spalding
Subdivision Coordinator
City of Billings Planning & Community Services
510 North Broadway – 4th Floor
Billings MT 59101

April 4, 2009

Re: Amended Lot 6, Kuhlman Subdivision Variance Request

Juliet:

This variance request pertains to leaving the existing right-of-way at 30 feet versus widening it to 56 feet according to the subdivision regulations.

Leaving the right-of-way at 30 feet will not have a negative effect on emergency services. The current street as is does not cause any constrictions.

The owner of this property will suffer a hardship due to the loss of property which will result in the lack of adequate parking and storm water storage areas at the time of development.

There will not be an increase in taxpayer burden as there will be no additional road areas created for on going maintenance costs.

The variance will not place the subdivision in nonconformance with the adopted Zoning Regulations or Growth Policy. All Zoning and Growth Policy regulations are met.

The City Engineering Department stated that they are not requesting the additional right-of-way as it is not needed to complete a street widening in the future. A 5-foot wide sidewalk easement shall be provided for future improvements.

If you would like any additional information or have any questions please feel free to contact me at any time.

Sincerely

A handwritten signature in black ink, appearing to read "Richard C Schneider".

Richard C Schneider

AGENDA ITEM:

S



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Final Plat of Flanagan Subdivision, Amended Lot 5

DEPARTMENT: Planning and Community Services

PRESENTED BY: Juliet Spalding, AICP, Planner II

PROBLEM/ISSUE STATEMENT: The final plat for Flanagan Subdivision, Amended Lot 5, is being presented to Council for approval. On March 23, 2009, the City Council conditionally approved 3 lots on approximately 4.55 acres for commercial use. The subject property is located on the southeast corner of Central Avenue and Moore Lane. The property is zoned Community Commercial. The owner is 1030 Central, LLC. The representing agent is Sanderson Stewart. Upon City Council approval, these documents are appropriate as to form for filing with the Clerk and Recorder.

FINANCIAL IMPACT: Should the City Council approve the final plat, the subject property may further develop, resulting in additional tax revenues for the City.

RECOMMENDATION

Staff recommends that the City Council approve the final plat of Flanagan Subdivision, Amended Lot 5.

Approved By: **City Administrator** **City Attorney**

ATTACHMENT

A: Plat

ATTACHMENT A

T1

AGENDA ITEM:



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Payment of Claims

DEPARTMENT: Administration – Finance Division

PRESENTED BY: Patrick M. Weber, Financial Services Manager

PROBLEM/ISSUE STATEMENT: Claims in the amount of \$829,844.55 audited and are presented for your approval for payment. A complete listing of the claims dated April 24, 2009 in the Finance Department.

RECOMMENDATION

Staff recommends that Council approve Payment of Claims.

Approved By: **City Administrator** **City Attorney**

T2

AGENDA ITEM:



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Payment of Claims

DEPARTMENT: Administration – Finance Division

PRESENTED BY: Patrick M. Weber, Financial Services Manager

PROBLEM/ISSUE STATEMENT: Claims in the amount of \$916,355.53 audited and are presented for your approval for payment. A complete listing of the claims dated May 01, 2009 in the Finance Department.

RECOMMENDATION

Staff recommends that Council approve Payment of Claims.

Approved By: **City Administrator** **City Attorney**



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
May 26, 2009

SUBJECT: Payment of Claims

DEPARTMENT: Municipal Court

PRESENTED BY: Melinda Balter, Municipal Court Administrator

PROBLEM/ISSUE STATEMENT: Claims in the amount of \$542,484.58 have been audited and are presented for your approval for payment. A complete listing of the claims dated February 1, 2009, to April 30, 2009, is on file in the Municipal Court. Claims include payments to individual victims and businesses for restitution, disbursement of surcharges and revenues and return of bonds posted to ensure court appearance.

RECOMMENDATION

Staff recommends that Council approve Payment of Claims.

Approved By: City Administrator City Attorney



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Memorandum of Understanding Between the City of Billings and Yellowstone County for Yellowstone County to Provide a Portion of the Local Funding Match for the Bench Blvd. Project – 6th Ave. N. to Lake Elmo Road, Phase 1; CM 1099 (32)

DEPARTMENT: Public Works Department

PRESENTED BY: David D. Mumford, P.E., Public Works Director

PROBLEM/ISSUE STATEMENT: The City of Billings and the Montana Department of Transportation entered into a General Project Development and Construction Agreement dated September 10, 2001 for the Bench Blvd. connection project. An amendment for this agreement is scheduled for Council action on May 26, 2009. Phase 1 for the project includes a new road and sidewalks from 6th Ave. N. and Main Street to Lake Elmo Drive and also includes improvements to the at grade intersection at 6th Ave. N. and Main Street, a bridge over Alkali Creek, and improvements to the intersection of Lake Elmo Drive and Bench Blvd. This project will include State and Federal funding and will also require a local funding match. Yellowstone County has agreed to provide funding for a portion of this local match and to donate the easement for the road and appurtenances which will also apply to the local funding match.

ALTERNATIVES ANALYZED:

- Approve the Memorandum of Understanding between the City of Billings and Yellowstone County for Yellowstone County to provide a portion of the local funding match requirement for the Bench Blvd. project CM 1099 (32) – 6th Ave. N. to Lake Elmo Road.
- Do not approve this agreement.

FINANCIAL IMPACT: The project costs for phase 1 are estimated as:

Total State and Federal Cost	\$11,173,642
Local Match	
County Easement for the Road (est. value)	\$ 175,000
County Contribution to local match	\$1,000,000
City Of Billings contribution to local match	<u>\$ 526,185</u>
Total Local Match Required	<u>\$ 1,701,185</u>

Total Project Cost	\$12,874,827
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RECOMMENDATION

Staff recommends that Council approve the Memorandum of Understanding between the City Of Billings and Yellowstone County for Yellowstone County to provide a portion of the local funding match requirement for the Bench Blvd. project CM 1099 (32) – 6th Ave. N. to Lake Elmo Road.

Approved By: **City Administrator** _____ **City Attorney** _____

ATTACHMENT

- A. Memorandum of Understanding Between the City Of Billings and Yellowstone County for Yellowstone County to Provide a Portion of the Local Funding Match for the Bench Blvd. Project – 6th Ave. N. to Lake Elmo Road; CM 1099 (32)

MEMORANDUM OF UNDERSTANDING (MOU)
6th Avenue North to Bench Boulevard (Bench Connector Project)
Yellowstone County

This **AGREEMENT**, made and entered into this _____ day of _____, 2009, by and between **YELLOWSTONE COUNTY**, its agents, and Board of County Commissioners, hereinafter referred to as "**COUNTY**", and the **CITY OF BILLINGS**, hereinafter referred to as "**CITY**" to make road and bridge improvements in the area referred to as 6th Avenue North to Bench Boulevard, based on the commonly known proposed scope of work as of March 17, 2007, as follows:

Scope of Work

The proposed scope of work for this project is to:

- Completely reconstruct the existing parking lot access road adjacent to the Metra parking facilities, from its intersection with Main Street easterly to its intersection with Airport Road as an urban minor arterial. The reconstructed roadway will also be extended across a new structure to Bench Boulevard east of Alkali Creek to make a through connection of Bench Boulevard from 6th Avenue North to Lincoln Street; and
- Widen Main Street to the northeast, and modify the existing raised median as necessary, north from 4th Avenue North through the horizontal curve on Main Street northeast of 6th Avenue North to accommodate a new triple left-turn movement from eastbound 4th Avenue North to northbound Main Street.

WHEREAS, **COUNTY** desires to assist **CITY** in expediting the construction of roadway improvements under the current responsibility of the **CITY**, and

WHEREAS, **CITY** commits to expedite the project to deliver an "Award of Bid" for the construction of roadway improvements before the end of calendar year 2010 (target date), and

WHEREAS, the construction of roadway improvements will benefit both **COUNTY** and **CITY** residents, and the traveling public, in the area, and

WHEREAS, **CITY** will engage an engineer to design and **CITY** will provide project management for the roadway improvements up to the project milestone of "Bid of Construction" and "Award of Bid" meeting Federal, Montana Department of Transportation (MDT), and City of Billings standards, at which time Montana Department of Transportation (MDT) will take full project control to completion of construction of roadway improvements. **COUNTY** will participate in design of any intersection improvements contained on the easement donated by the **COUNTY** for this project, and

WHEREAS, **COUNTY** represents to **CITY** that **COUNTY** will contribute \$1,000,000.00 in funding, exclusive of any land easements contributed to this project, towards the local match required for the actual construction of the bridge and roadway improvements. **COUNTY** will

remit said funding contribution under an Escrow Agreement to **CITY** (or MDT) that will be created by **CITY**, and in accordance with the local match payment timelines required by MDT, and

WHEREAS, COUNTY represents to **CITY** that **COUNTY** will contribute the value of any perpetual easement on land it owns, needed for the roadway improvements, towards the local match required for the project.

THEREFORE BE IT AGREED by **COUNTY** and **CITY** to provide for these improvements meeting Federal, Montana Department of Transportation (MDT), and City of Billings standards and regulations.

TERMINATION OF AGREEMENT: This offer (both financial contribution and perpetual easement of land) from **COUNTY** will sunset on July 1, 2009 should **CITY** not have approved agreements in place with MDT and **CITY'S** Bench Connector project consulting engineer.

YELLOWSTONE COUNTY, MONTANA - BOARD OF COUNTY COMMISSIONERS

By _____ Witness: _____
Bill Kennedy Tony Nave, Clerk and Recorder
Chair, Board of County Commissioners

By _____
John Ostlund
Member, Board of County Commissioners

By _____
James E. Reno
Member, Board of County Commissioners

CITY OF BILLINGS, MONTANA

By _____ (SEAL & ATTEST)
Ron Tussing, Mayor – City of Billings City Clerk

APPROVED AS TO FORM:

City Attorney



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Amendment Number One to the Existing Contract for Bench Blvd. Between the Montana Department of Transportation and the City Of Billings; CM 1099 (32) – 6th Ave. N. to Lake Elmo Road, Phase 1

DEPARTMENT: Public Works Department

PRESENTED BY: David D. Mumford, P.E., Public Works Director

PROBLEM/ISSUE STATEMENT: The City of Billings and the Montana Department of Transportation entered into a General Project Development and Construction Agreement dated September 10, 2001 for the Bench Blvd. connection project. This amendment will split the project into two phases. Phase 1 includes a new road and sidewalks from 6th Ave. N. and Main Street to Lake Elmo Drive and also includes improvements to the at grade intersection at 6th Ave. N. and Main Street, a bridge over Alkali Creek, and improvements to the intersection of Lake Elmo Drive and Bench Blvd. Phase 2 will construct a grade separated intersection at 6th Ave. N and Main Street that will be designed and constructed when state and federal funding is available. This amendment updates the project costs and the resulting State and Federal cost share and the local matching share of the costs. The amendment also adds State indirect costs (IDC) to all phases of the project except for design. The target date to award a contract for construction is by the end of calendar year 2010.

ALTERNATIVES ANALYZED:

- Approve amendment number one to the existing contract for the Bench Blvd. project between the Montana Department of Transportation and the City Of Billings; CM 1099 (32) – 6th Ave. N. to Lake Elmo Road.
- Do not approve this agreement.

FINANCIAL IMPACT: The project costs for phase 1 are estimated as:

Total State and Federal Cost	\$11,065,251
Local Match	
County Easement for the Road (est. value)	\$ 175,000
County Contribution to local match	\$1,000,000
City Of Billings contribution to local match	<u>\$ 526,185</u>

Total Local Match Required	<u>\$ 1,701,185</u>
Total Project Cost	\$12,874,827

VH/3-30-09

Page 1 of 2

In order for the Bench project to proceed, the City Of Billings must contribute to the local match as shown above. The net result of providing this local match is that the following previously approved projects must be delayed:

<u>Project</u>	<u>Funding to be Moved to Bench</u>	<u>Notes</u>
Poly Drive & Zimmerman Signal	\$300,000	delay from FY10 to future date to be determined
Rimrock Road Reconstruction Shiloh to Stanford	\$226,185	This project is scheduled for construction in FY11. Construction costs will be refined once the design is completed. The total CIP cost is \$2,600,000.

RECOMMENDATION

Staff recommends that Council approve amendment number one to the existing contract for Bench Blvd. between the Montana Department of Transportation and the City Of Billings; CM 1099 (32) – 6th Ave. N. to Lake Elmo Road, phase 1.

Approved By: **City Administrator** _____ **City Attorney** _____

ATTACHMENT

A. Amendment Number One to CM 1099 (32) – 6th Ave. N. to Bench Blvd. Between the Montana Department of Transportation and the City Of Billings

AMENDMENT NUMBER ONE to
CM 1099 (32) – 6th AVE N TO BENCH BLVD-BLGS (UPN 4553)

BETWEEN

THE MONTANA DEPARTMENT OF TRANSPORTATION

AND

THE CITY OF BILLINGS

The undersigned parties, the City of Billings (Local Agency) and the Montana Department of Transportation (State), hereby agree and acknowledge that the 6th AVE N TO BENCH BLVD-BLGS General Project Development and Construction Agreement, entered into September 10, 2001 is amended as follows:

1) Fourth WHEREAS, Page 1 of the original agreement, is replaced with the following:

WHEREAS, the project is eligible for up to \$1,609,000 total Federal and local matching funds under the Montana Air & Congestion Initiative (MACI) - Guaranteed program. This project is also eligible for up to \$17,000,000 Federal funds of Transportation Improvements-Section 1934 funds less any congressionally approved adjustments, indirect costs, and Bench Blvd-North project development and construction costs. The required match participation will be 13.42% for use of the federal funds. This is the total Federal funding available for this project unless additional funds are allocated through the local planning process in accordance with Federal regulations. The applicable federal-aid participation rate for this project is 86.58% for all eligible phases; and,

2) An additional WHEREAS, is inserted after the ninth WHEREAS, page 2 of the original agreement to state as follows:

WHEREAS, the State acknowledges that the City and Yellowstone County have committed through a May 26, 2009 Interlocal Agreement that the County will provide funds and easements toward the non-Federal local match (13.42%) for the City's 6th AVE N TO BENCH BLVD-BLGS project. Yellowstone County has committed \$1,000,000 and the right-of-way easement towards this local match. **Reference** to Attachment (Exhibit "C")

3) Item D. PROJECT FUNDING, and all sections contained under Item D., Page 3 and 4 of the original agreement are replaced with the following:

The Local Agency understands the off-system project is contingent on an acceptable and comprehensive funding plan. The project is split into two phases with an estimated total cost of \$28,280,568. As described in the January 14, 2008 Environmental Document, Phase One would construct, with the exception of the grade separation under Main Street, essentially the final foot print of the portion of the project located east of Main Street including the Alkali Creek bridge

structure. The estimated total project cost for Phase One is \$12,874,827, including an estimated local match of \$1,701,184. The project is eligible for up to \$1,609,000 total Federal and local matching funds under the Montana Air & Congestion Initiative (MACI) - Guaranteed program. In addition, \$17,000,000 in Transportation Improvements-Section 1934 funds have been made available to both this project and the MT 1036(1) Bench Boulevard – Billings project (UPN 6041). Approximately \$2,000,000 of the Transportation Improvements-Section 1934 funds will be reserved for the completion of the Preliminary Engineering and Environmental phases for the MT 1036(1) Bench Boulevard – Billings project. These funds will be allocated to each project through the local planning process in accordance with federal regulations. It is understood that the federal share in the total cost of the project will not exceed 86.58% of the low bid, less any congressionally-approved adjustments, indirect costs, or project development costs. The Local Agency will be responsible for the 13.42% non-Federal match. All costs in excess of the maximum Federal participation will be financed by the Local Agency unless additional funds are allocated through the local planning process in accordance with Federal regulations.

MDT will work with the City and MPO through the local planning process to advance the MPO's request to initiate a functional classification review and possible system action when Phase One of the project has been completed. Phase Two (underpass structure at 6th/Main and Bench and appurtenances) will advance when funding is identified through the metropolitan planning process.

Any necessary required match to federal funds will be provided in accordance with State and federal program requirements. In addition, the Local Agency will be responsible for 100% of non-federal aid eligible costs. The State will bill the local Agency for non-federal-aid eligible costs.

4) Item F. Parts 1 and 3, **RIGHT OF WAY ACQUISITION**, add the following sentence to each section:

The right-of-way will be in the form of an easement.

5) Item H., **BIDS AND CONTRACT ADMINISTRATION**, and all sections contained under Item H., Page 7 of the original agreement, are replaced with the following:

The Local Agency will be billed in advance for its portion of the estimated required match (13.42%) of the total estimated construction costs, construction engineering costs, indirect costs, and Local Agency-applicable costs of the project no more than sixty (60) days before bid opening. Although the anticipated expenses will have been discussed with Local Agency representatives before that time, the State will provide a detailed breakdown of all estimated project costs with the billing. The billed amount includes the applicable required pro-rata match for Preliminary Engineering (PE) associated with the project design. PE will not be charged indirect cost.

The Local Agency will submit payment to the State within thirty (30) days of billing, or an escrow (payment plan) may be created within thirty (30) days. Should the escrow option be chosen, the

Local Agency will enter into an additional agreement with MDT spelling out the terms and conditions of the escrow account. The State will not proceed further with the project's development if payment is not made within that time. If the federal government requires a reimbursement or return of any federal funds because a project doesn't advance due to the Local Agency's failure to make any scheduled payment, the Local Agency agrees that it will reimburse the State for those federal funds within thirty (30) days of billing.

If, after initial payment is made, bid opening or contract award by the State is delayed or postponed by 30 days or more, or canceled for any reason, the State agrees to refund within 30-days the Local Agency's initial payment upon the Local Agency's request. If the lowest acceptable bid exceeds the State's estimate by more than 10%, the Local Agency and State will confer and decide whether or not the project will be awarded, since the Local Agency is also responsible for the cost increase. If the Local Agency does not concur, the project will not be awarded. If the Local Agency does concur, the project will be awarded and the Local Agency will be billed for the amount exceeding the initial payment. The Local Agency will pay that amount within thirty (30) days of the billing. If the Local Agency's share of the cost of the awarded project exceeds the amount paid by the Local Agency, the Local Agency may determine if other eligible federal funds are available and reach an agreement with the State to allocate those funds to pay the excess. If other federal funds are not available, the Local Agency will pay the excess as stated above.

The contact for billing, accounting and change order questions for the Local Agency shall be:

Debi Meling, P.E. City Engineer
City of Billings
510 North Broadway, 4th floor
Billings, MT

The parties understand that it is possible that the estimate may be exceeded once construction is begun, and any change orders, increases, or unforeseen expenses applicable to the Local Agency's portion of the project will be borne by the Local Agency. The State will inform the Local Agency, and as early as possible, of anything that appears will result in a cost increase, and will discuss the need for any possible change order with the Local Agency. But it is agreed that the Local Agency does not have the ability to veto or delay, or refuse to pay for, any change orders deemed necessary by the State.

The Local Agency's portion of the cost of any change order will be billed as early as it can be readily determined, and will be due and payable by the Local Agency within thirty (30) days of the statement.

Within six (6) months after the project has been finally accepted with the final costs submitted, the State will submit a final statement to the Local agency. The final statement will provide details of any expenses that may be identified as "miscellaneous". The final statement will include a refund of unspent portions of the Local Agency's initial payment, payable to the Local Agency in an amount equaling the difference between that payment and the Local Agency's share of the final

costs. If the final statement exceeds the Local Agency's payments thus far, the Local Agency will remit to the State within thirty (30) days of the final statement the difference between Local Agency's share of final costs and Local Agency's earlier payment. If payment is not made within that thirty (30) day period, interest on the unpaid amount will accrue at the rate of 10% per year, and continue to accrue until paid in full. If the Local Agency is billed for additional funds, MDT will not participate in any future funding agreements with the Local Agency until full payment, including interest, is received from the Local Agency.

Payments to this project will be coordinated through MDT's Administration Division (to be directed to the State's Accounts Receivable Collections Technician and Accounting Systems Operations Supervisor). Payments to this project will be provided to the above State staff in the form of a check to be credited to this project.

Section 17-1-106, MCA, requires any state agency, including MDT that receives non-general funds to identify and recover its indirect costs. These costs are in addition to direct project costs. The MDT's indirect cost rate is determined annually as a percentage of the project's direct costs to cover the project's share of MDT's indirect costs as defined by OMB Circular A-87. MDT's current indirect cost rate is 14.06 % for fiscal year 2009 (July 1, 2008 to June 30, 2009).

For this project, indirect costs will be charged to the federal funding and the required local match. MDT will bill the Local Agency the indirect costs applicable to the local match. [Note: If this project extends across more than one fiscal year, more than one annual rate will be involved, as the rates may change during the life of the project.]

Preliminary Engineering (PE) costs charged against this project will not be subject to indirect costs due to the PE phase already being open and active. Indirect costs will be charged on the remaining phases.

- 6) Attachment B (NON-DISCRIMINATION NOTICE) is replaced by the following:

NON-DISCRIMINATION NOTICE

During the performance of this Agreement, the Local Agency (hereafter in this Section "the Party"), for itself, its assignees and successors in interest, agrees as follows:

A) COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 FOR FEDERAL-AID CONTRACTS

- (1) **Compliance with Regulations:** The Party shall comply with all Regulations relative to nondiscrimination in Federally-assisted programs of the Department of Transportation, 49 Code of Federal Regulations (CFR) Part 21, as they may be amended (hereafter referred to as the Regulations), which are incorporated by reference and made a part of this Agreement, even if only state funding is here involved.

(2) Nondiscrimination: The Party, with regard to the work performed by it during the Agreement, shall not discriminate on the grounds of sex, race, color, or national origin in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The Party shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR Sec. 21.5.

(3) Solicitations for Subcontracts, Including Procurement of Materials and Equipment: In all solicitations, whether by competitive bidding or negotiation by the Party for work to be performed under a subcontract, including procurement of materials or leases of equipment, any potential subcontractor or supplier shall be notified by the Party of the Party's obligations under this Agreement and the Regulations relative to nondiscrimination.

(4) Information and Reports: The Party will provide all reports and information required by the Regulations, or directives issued pursuant thereto, and permit access to its books, records, accounts, other sources of information and its facilities as may be determined by State or the Federal Highway Administration (FHWA) to be pertinent to ascertain compliance with Regulations or directives. Where any information required of the Party is in the exclusive possession of another who fails or refuses to furnish this information, the Party shall so certify to the Department or the FHWA as requested, setting forth what efforts it has made to obtain the information.

(5) Sanctions for Noncompliance: In the event of the Party's noncompliance with the nondiscrimination provisions of this Agreement, State may impose sanctions as it or the FHWA determines appropriate, including, but not limited to,

- (a) Withholding payments to the Party under the Agreement until the Party complies, and/or
- (b) Cancellation, termination or suspension of the Agreement, in whole or in part.

(6) Incorporation of Provisions: The Party will include the provisions of paragraphs (1) through (6) in every subcontract, including procurement of materials and leases of equipment, unless exempt by the Regulations or directives issued pursuant thereto. The Party will take such action with respect to any subcontract or procurement as the State or the FHWA may direct to enforce such provisions including sanctions for noncompliance: Provided, however, that in the event the Party is sued or is threatened with litigation by a subcontractor or supplier as a result of such direction, the Party may request the State to enter into the litigation to protect the interests of the State, and, in addition, the Party or the State may request the United States to enter into such litigation to protect the interests of the United States.

B) COMPLIANCE WITH THE MONTANA GOVERNMENTAL CODE OF FAIR PRACTICES, SEC. 49-3-207, MCA

In accordance with Section 49-3-207, MCA, the Party agrees that for this Agreement all hiring will be made on the basis of merit and qualifications and that there will be no discrimination on

the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing the Agreement.

C) COMPLIANCE WITH AMERICANS WITH DISABILITIES ACT (ADA)

- (1) The Party will comply with all regulations relative to implementation of the AMERICANS WITH DISABILITIES ACT.
- (2) The Party will incorporate or communicate the intent of the following statement in all publications, announcements, video recordings, course offerings or other program outputs: **"The Party will provide reasonable accommodations for any known disability that may interfere with a person in participating in any service, program or activity offered by the Party. In the case of documents, recordings or verbal presentations, alternative accessible formats will be provided. For further information call the Party."**
- (3) All video recordings produced and created under contract and/or agreement will be closed-captioned.

D) COMPLIANCE WITH PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS, 49 CFR PART 26

Each Agreement the Department signs with a Party (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

The Party, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Party shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the Party to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate

The agreement between the Local Agency and State executed September 10, 2001, as amended herein, constitutes the entire agreement between the parties and no statement, promises or inducements made by either party, or agents of either party, which are not contained in the written agreement is binding or valid. This amendment is necessary to reflect the increased level of funding and method of payment in the memorandum of understanding between the State and Local Agency. All other terms, conditions, requirements, and specifications remain as stated in the original agreement.

IN WITNESS WHEREOF, the Director of Transportation's authorized representative has hereunto signed on behalf of the State and the City Manager, on behalf of the Local Agency, has signed and affixed hereto the seal of the Local Agency.

STATE OF MONTANA, DEPARTMENT OF TRANSPORTATION

BY _____, 20_____
Loran Frazier, P.E.
Chief Engineer, Engineering Division

CITY OF BILLINGS

ATTEST Local Agency Official

City Clerk By _____

City Mayor

_____, 20_____

APPROVED FOR LEGAL CONTENT

MDT Legal Counsel By: _____

Billings – City Attorney



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Substantial Amendment to the FY2008-2009 Consolidated Plan for Community Development Block Grant (CDBG) and the HOME Investment Partnership Program (HOME) to include CDBG Stimulus Funding Allocation

DEPARTMENT: Planning and Community Services Department

PRESENTED BY: Brenda Beckett, Community Development Manager

PROBLEM/ISSUE STATEMENT: The U.S. Department of Housing and Urban Development (HUD) is awarding an additional \$190,430 in CDBG funding as part of an economic stimulus package to the City of Billings for FY2008-2009, referred to as "CDBG-R" funding. The additional funding has been made available through the American Recovery and Reinvestment Act of 2009 (ARRA). CDBG-R can be used to either promote energy-efficiency and conservation through rehabilitation or retrofit or for infrastructure that provides basic services to residents. The City must give priority to projects that can commit funding via contract within 120 days. The City's Consolidated Plan amendment must be submitted to HUD no later than June 5, 2009. The substantial amendment to the FY2008-2009 Consolidated Plan requires both a public hearing and action to accept and utilize CDBG-R as proposed.

Staff recommends creating a new program to provide funding specifically for energy-efficiency and conservation upgrades in addition to providing funding for down payment and closing costs. Assistance levels for the City's First Time Homebuyer program vary from \$10,000 to \$15,000 according to household income. With an additional investment of up to \$15,000 for energy-efficiency upgrades, the City can assist 7 low-income households to achieve homeownership with cost containment for utilities for years to come. The First Time Homebuyer program runs out of funding within a few months of availability and there are currently over 60 approved applicants on the waiting list.

ALTERNATIVES ANALYZED: 1) Hold a public hearing, amend the FY2008-2009 Annual Action Plan to include CDBG-R funds and approve the use of funding as proposed; 2) Do not hold a public hearing, do not amend the FY2008-2009 Annual Action Plan to include CDBG-R funding and do not approve the use of funding as proposed.

FINANCIAL IMPACT: No match is required for this program. Administration funding is limited in this allocation and will be directed to program costs such as inspections and lead-based paint costs. Staff recommends utilizing current staff expertise and procedures to initiate the program to ensure contracts are implemented and expenditures are made within the timelines required by HUD.

RECOMMENDATION

Staff recommends that the City Council hold a public hearing on May 26, 2009 to gather public input on the proposed use of CDBG-R funding, and substantially amend the FY2008-2009 Annual Action Plan to include CDBG-R funding and approve the use of funding as proposed.

Approved By: **City Administrator** **City Attorney**

ATTACHMENTS

A. Drafted Substantial Amendment to the FY2008-2009 Consolidated Plan (13 pages)

INTRODUCTION

The City of Billings is required by the HUD to prepare a Consolidated Plan to address the use of federal funding through the CDBG and HOME programs. Focused on CDBG and HOME activities, the Consolidated Plan combines the planning and application requirements for the CDBG and HOME Programs. Consolidation of the submission requirements for the CDBG and HOME Programs allows program planning and citizen participation to take place in a comprehensive context covering both programs.

This Substantial Amendment to the City of Billings Annual Action Plan for FY2008-2009 documents how the City plans to utilize CDBG-R funds provided under the American Recovery and Reinvestment Act of 2009. The geographic area covered in the Action Plan and amendment is the City of Billings municipal boundaries. CDBG-R provides an additional \$190,430 in CDBG funds to the City of Billings for economic stimulus activities and general categories for funding include housing, job creation, economic development and infrastructure.

PROCEDURAL HISTORY

- *March 16, 2009* - The City received an award notice from HUD regarding an additional \$190,430 in CDBG funding for FY2008-2009. Guidance on permitted uses of funding was not included in the award notice.
- *April 7, 2009* - Community Development Board met to make preliminary recommendations on CDBG and HOME funding, including preliminary recommendations for CDBG-R funding to be used for the First Time Homebuyer program.
- *May 5, 2009* - Community Development Board reviewed preliminary recommendations for funding allocations and approved the recommendations.
- *May 6, 2009* - The City received regulatory information on the permitted uses for CDBG-R funding.
- *May 14 and May 21, 2009* - Public Notices are published for the public hearing, public comment period and action on the substantial amendment for CDBG-R funding.
- *May 15 through May 26, 2009* - Public comment period for the substantial amendment to the Consolidated Plan for CDBG-R funding.
- *May 22, 2009* - Community Development Board met to review and approve staff recommendations for funding.
- *May 26, 2009* - Public hearing held and action taken on the FY2008-2009 substantial amendment to the Consolidated Plan to include CDBG-R funding.

BACKGROUND

The City of Billings has been receiving CDBG funds since the mid-1970s and HOME funds since the early 1990s. These funds are provided by the federal government and are primarily targeted in Billings to address the affordable housing and neighborhood revitalization needs of the community. The FY2008-2009 budget represents the fourth year Action Plan to implement the City's five-year Consolidated Plan. The Consolidated Plan identifies strategies for the use of housing and community development resources in the community. CDBG-R funding requires a substantial amendment to the current FY2008-2009 Annual Action Plan in order to implement CDBG-R activities.

ALTERNATIVES ANALYZED

1) Hold a public hearing, amend the FY2008-2009 Annual Action Plan to include CDBG-R funds and approve the use of funding as proposed; 2) Do not hold a public hearing, do not amend the FY2008-2009 Annual Action Plan to include CDBG-R funding and do not approve the use of funding as proposed.

STAKEHOLDERS

Stakeholders for the CDBG and HOME programs include:

1. Neighborhood Task Forces – The task forces communicate neighborhood needs and solutions to those needs utilizing both CDBG and HOME resources.
2. The Community Development Board, as an advisory body to the City Council, provides detailed oversight to both the CDBG and HOME programs throughout the year.
3. Low income households that may benefit from implementation of the new program.

CONSISTENCY WITH ADOPTED POLICIES OR PLANS

The program proposed for consideration is consistent with the goals and objectives of the adopted FY2005-2009 Consolidated Plan for the use of CDBG & HOME resources in Billings. Five primary strategies are proposed in the FY2005-FY2009 Consolidated Plan to meet the diverse needs of Billings' lower-income households. These needs have been primarily identified through the 2005 Billings Housing Needs Assessment completed for the City of Billings by Montana State University-Billings Center for Applied Economic Research. This needs assessment was undertaken utilizing focus groups, individual interviews, a community survey, and an examination of census and housing market data.

The work and input from neighborhood groups and community partners resulted in the identification of the following four characteristics of the community that the City of Billings will attempt to address with housing and community development activities: (1) Increasing housing cost compared to income and its effect on low income renters and homeowners in achieving safe, decent & affordable housing; (2) An aging population and the associated increase in the percentage of the population with disabilities; (3) A slight decrease in the price of rental housing and short term concern over the number of multi-family units scheduled to be constructed; and

(4) The age and condition of the community's affordable housing stock, particularly in the older neighborhoods surrounding the City's Central Business District.

RECOMMENDATION

Staff recommends that the City Council hold a public hearing on May 26, 2009 to gather public input on the proposed use of CDBG-R funding, and substantially amend the FY2008-2009 Annual Action Plan to include CDBG-R funding and approve the use of funding as proposed.

Approved By: **City Administrator** **City Attorney**

ATTACHMENTS

A. Drafted Substantial Amendment to the FY2008-2009 Consolidated Plan (13 pages)
(Copy in City Clerk's Office)



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: W.O. 08-30 Poly Drive Sidewalk Improvements - Billings, Federal Aid No. STPE 1099(61)

DEPARTMENT: Public Works - Engineering

PRESENTED BY: David D. Mumford, P.E., Public Works Director

PROBLEM/ISSUE STATEMENT: The Poly Drive Sidewalks project was approved through the local CTEP selection process and approved by MDT. Council approved the CTEP Project Specific Agreement (PSA) for this project on April 14, 2008. This project will construct sidewalks and associated public improvements along Poly Drive between Westfield Drive and Shiloh Road. The proposed sidewalk assessments follow the SID Policy adopted by Council in 2004, as the missing public improvements will be assessed to adjoining property owners. On April 27, 2009, Council passed a Resolution of Intent for this project and established a Public Hearing date of May 26, 2009. After conducting the Public Hearing, in order to proceed with construction of the project, Council has the option to pass a resolution ordering construction of the improvements.

FINANCIAL IMPACT: Sidewalk assessments for this project are an integral part of the entire project's budget that has already been authorized in the City's Capital Improvement Plan (CIP). The approved funding information for this project is as follows:

CTEP Grant	\$ 74,080
Property Assessments	\$ 5,000
Gas Tax	\$ 25,000
Total	\$104,080

RECOMMENDATION

Staff recommends that, after holding a public hearing, Council pass a resolution ordering construction of the improvements identified in Work Order 08-30 Poly Drive Sidewalk Improvements - Billings, Federal Aid No. STPE 1099(61).

Approved By: City Administrator City Attorney

ATTACHMENTA. Resolution Ordering Improvements

RESOLUTION NO. 09 -

A RESOLUTION RELATING TO W.O. 08-30 – POLY DRIVE SIDEWALK IMPROVEMENTS -BILLINGS, FEDERAL AID NO. STPE 1099(61); ORDERING THE PROGRAM FOR THE PURPOSE OF UNDERTAKING CERTAIN LOCAL IMPROVEMENTS AND FINANCING THE COSTS THEREOF AND INCIDENTAL THERETO THROUGH THE ISSUANCE OF SIDEWALK, CURB AND GUTTER IMPROVEMENT BONDS SECURED BY THE CITY'S SPECIAL IMPROVEMENT DISTRICT REVOLVING FUND AND ESTABLISHING COMPLIANCE WITH REIMBURSEMENT BOND REGULATIONS UNDER THE INTERNAL REVENUE CODE.

BE IT RESOLVED by the City Council of the City of Billings (the “City”), Montana, as follows:

Section 1. Passage of Resolution of Intention. This Council, on April 27, 2009, adopted Resolution No. 09-18807 (the “Resolution of Intention”), pursuant to which this Council declared its intention to order in certain sidewalks, curb, gutter and street improvements, designated as W.O. 08-30 (the “Project”) of the City, under Montana Code Annotated, Title 7, Chapter 14, Part 41, as amended, for the purpose of financing the costs of certain local improvements described generally therein (the “Improvements”) and paying costs incidental thereto, including costs associated with the sale and the security of sidewalk, curb and sidewalk, curb and gutter improvement bonds drawn on the Project (the “Bonds”), the creation and administration of the Project, and the funding of a deposit to the City’s Special Improvement District Revolving Fund (the “Revolving Fund”).

Section 2. Notice and Public Hearing. Notice of passage of the Resolution of Intention was duly published and mailed in all respects in accordance with law, and on May 26, 2009, this Council conducted a public hearing on the ordering in of the Project and the making of the Improvements.

Section 3. Order. It is hereby ordered that the following improvements shall be constructed, reconstructed, repaired, or replaced:

See Exhibit “A” attached hereto.

Section 4. Affected Properties. All properties which will be required to pay any portion of the costs of the improvements identified herein are identified in Exhibit “B” attached hereto.

Section 5. Reimbursement Expenditures.

5.01. Regulations. The United States Department of Treasury has promulgated final regulations governing the use of proceeds of tax-exempt bonds, all or a portion of which are to be used to reimburse the City for project expenditures paid by the City prior to the date of issuance of such bonds. Those regulations (Treasury Regulations, Section 1.150-2) (the “Regulations”) require that the City adopt a statement of official intent to reimburse an original expenditure not later than 60 days after payment of the original expenditure. The Regulations also generally require that the bonds be issued and the reimbursement allocation made from the proceeds of the bonds within 18 months (or three years, if the reimbursement bond issue qualifies for the “small issuer” exception from the arbitrage rebate requirement) after the later of (i) the date the expenditure is paid or (ii) the date the project is placed in service or abandoned, but (unless the issue qualifies for the “small issuer” exception from the arbitrage rebate requirement) in no event more than three years after the date the expenditure is paid. The Regulations generally permit reimbursement of capital expenditures and costs of issuance of the bonds.

5.02. Prior Expenditures. Other than (i) expenditures to be paid or reimbursed from sources other than the Bonds, (ii) expenditures permitted to be reimbursed under the transitional provisions contained in Section 1.150-2(j) (2) of the Regulations, (iii) expenditures constituting preliminary expenditures within the meaning of Section 1.150-2(f)(2) of the Regulations, or (iv) expenditures in a “de minimus” amount (as defined in Section 1.150-2(f)(1) of the Regulations), no expenditures for the Improvements have been paid by the City before the date 60 days before the date of adoption of this resolution.

5.03. Declaration of Intent. The City reasonably expects to reimburse the expenditures made for costs of the Improvements out of the proceeds of Bonds in an estimated maximum aggregate principal amount of \$5,000 after the date of payment of all or a portion of the costs of the Improvements. All reimbursed expenditures shall be capital expenditures, a cost of issuance of the Bonds or other expenditures eligible for reimbursement under Section 1.150-2(d)(3) of the Regulations.

5.04. Budgetary Matters. As of the date hereof, there are no City funds reserved, allocated on a long-term basis or otherwise set aside (or reasonably expected to be reserved, allocated on a long-term basis or otherwise set aside) to provide permanent financing for the expenditures related to the Improvements, other than pursuant to the issuance of the Bonds. The statement of intent contained in this resolution, therefore, is determined to be consistent with the city’s budgetary and financial circumstances as they exist or are reasonably foreseeable on the date hereof.

5.05. Reimbursement Allocations. The City’s financial officer shall be responsible for making the “reimbursement allocations” described in the Regulations, being generally the transfer of the appropriate amount of proceeds of the bonds to reimburse the source of temporary financing used by the City to make prior payment of the costs of the Improvements. Each allocation shall be

evidenced by an entry on the official books and records of the City maintained for the Bonds or the Improvements and shall specifically identify the actual original expenditure being reimbursed.

Section 6. Property Owner Option to Construct Improvements. Notice of passage of this Resolution shall be mailed to all affected property owners and said owners shall have thirty (30) days from the date of said Notice in which to install the ordered improvements at their cost and expense. In the event the owners do not take said action within the said thirty (30) day period, the City will install the improvements and will assess the costs thereof, all costs of administration and engineering and all bond issuance costs against the real property.

PASSED AND ADOPTED by the City Council of the City of Billings, Montana, this 26th day of May 2009.

THE CITY OF BILLINGS:

BY _____
Ron Tussing, MAYOR

ATTEST:

BY _____
Cari Martin, CITY CLERK

Exhibit “A”
Location of Work
WO 08-30 Poly Drive Sidewalk Improvements

Construction of sidewalk along the south side of Poly Drive from Westfield Drive to 41st Street West and along the north side of Poly Drive from 41st Street West to Shiloh Road

Properties being assessed

Sidewalk, curb & Gutter, Drive Aprons: 4106 Poly Drive * 4015 Poly Drive *

WO 08-30 Poly Drive Sidewalk Improvements - Billings STPE 1099(61)
Exhibit B

Tax Code	SID #	SID Pay-off	Delinquent	WO 08-30 Assessment	SID Pay-off + Delinquent + WO 08-02-Assessment	Estimated Market Value
C02233				\$ 1,612.91	\$ 1,612.91	\$ 99,264.00
D04718				\$ 3,387.00	\$ 3,387.00	\$ 82,962.00
		Average		\$ 2,499.96	\$ 2,499.96	\$ 91,113.00
		Median		\$ 2,499.96	\$ 2,499.96	\$ 91,113.00
		Low		\$ 1,612.91	\$ 1,612.91	\$ 82,962.00
		High		\$ 3,387.00	\$ 3,387.00	\$ 99,264.00
		Total		\$ 4,999.91	\$ 4,999.91	\$ 182,226.00



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Tuesday, May 26, 2009

TITLE: Public Hearing for Special Review #876 – 2156 Central Avenue
DEPARTMENT: Planning and Community Services
PRESENTED BY: Nicole M. Cromwell, AICP, Zoning Coordinator, Planner II

PROBLEM/ISSUE STATEMENT: This is a request for a special review to allow a drive-through window for a new coffee shop in a new multi-tenant building in a Community Commercial (CC) zone adjacent to Residential 7,000 (R-70) and Residential 6,000 (R-60) zoning districts, on Lots 25-27, Block 5, Central Heights Subdivision. The property is addressed as 2156 Central Avenue and currently is the site of the Budget Framer, a drop-in day care facility and Extreme Hobbies. The property is located on the south east corner of the intersection of Central Avenue and Santa Fe Drive. The property owner is Michael Stock. The Zoning Commission held a public hearing on this request on May 5, 2009, and is forwarding a recommendation of conditional approval to the City Council on a 3-0 vote.

ALTERNATIVES ANALYZED: Before taking any action on an application for a Special Review use, the City Council shall first consider the findings and recommendations of the City Zoning Commission. In no case shall the City Council approve a special review use other than the one advertised. The Council shall take one of the following actions:

- Approve the application;
- Conditionally approve the application;
- Deny the application;
- Allow withdrawal of the application; or
- Delay the application for a period not to exceed thirty (30) days.

FINANCIAL IMPACT: The special review should have no impact on the City's tax base.

RECOMMENDATION

The Zoning Commission is forwarding a recommendation of conditional approval of Special Review #876 on a 3-0 vote.

Approved By: _____ **City Administrator** _____ **City Attorney** _____

ATTACHMENTS

- A. Zoning Map
- B. Site Photographs
- C. Site Plan

INTRODUCTION

This is a request for a special review to allow a drive through service adjacent to and across an alley from residential zoning districts. The proposed use is for a new coffee shop in a new multi-tenant building to be located at 2156 Central Avenue. Two current buildings will be demolished and a new building constructed. The drive through lane is proposed off Santa Fe Drive, south of the proposed new building with an exit on to Central Avenue. Central Avenue is a principal arterial street and Santa Fe Drive is local residential street.

PROCEDURAL HISTORY

- A special review application to allow a drive through adjacent to residential zoning was received on April 6, 2009.
- The City Zoning Commission held a public hearing on May 5, 2009, and is forwarding a recommendation of conditional approval on a 3-0 vote.
- The City Council will conduct a public hearing and consider this application on May 26, 2009.

BACKGROUND

The applicant proposes to construct a new multi-tenant building with one tenant as a coffee shop on the east end of the new building. The remaining tenant spaces are shown as office space. (See Attachment C) The applicant intends to fully re-develop the property including new landscaping and pavement. The applicant has submitted a Traffic Accessibility Study (TAS) to the City Traffic Engineer for review and an approval. The Engineering Division has noted the parking plan is at a maximum given the designated uses of the proposed building. Any use other than office uses in the remaining tenant spaces, may require additional parking spaces that are not available on the proposed site plan.

This property is adjacent to a residential neighborhood, an assisted living facility, near West High School, as well as high traffic retail to the west. Central Avenue is classified as an arterial street and is designed to carry high volumes of traffic through this area of the City. The 2008 traffic count for Central Avenue at this location is approximately 15,000 vehicle trips per day. The TAS indicates expected vehicle trips to this new business during the peak hour in the afternoon will be approximately 65 trips. The TAS also indicates a full access drive on Santa Fe Drive and an exit only drive on Central Avenue. The exit only drive on Central will prevent traffic on Central from queuing and causing traffic conflicts near this traffic-light controlled intersection.

Before a recommendation of approval or conditional approval can be made, each special review request must demonstrate conformance with three primary criteria; 1) the application complies with all parts of the Unified Zoning Regulations, 2) the application is consistent with the objectives and purposes of the Unified Zoning Regulations and the 2003 Growth Policy, and 3) the application is compatible with surrounding land uses and is otherwise screened and separated from adjacent land to minimize adverse impacts. This application conforms to the first criteria in so far that it is within the CC zoning district where a drive through service adjacent to a residential zone may be allowed by special review approval.

The application also conforms to the second and third criteria. The zoning regulations adopted by

the City Council have designated several zoning districts where drive through services may be allowed. The CC zone is intended to *“accommodate community retail, service and office facilities offering a greater variety than would normally be found in a neighborhood or convenience retail development. Facilities within the classification will generally serve the community, and is commensurate with the purchasing power and needs of the present and potential population within the trade area.”*

The proposed use is in a zoning district that allows this use with a special review. The City Council has granted 6 previous requests for drive through services within a few blocks of this location. The proposal is consistent with goals of the 2003 Growth Policy as updated, specifically the goal of encouraging uses that are compatible with the character of the adjacent land use patterns. This site has frontage on an arterial street (Central Avenue) that currently supports 15,000 vehicle trips per day. Several drive through services exist in the neighborhood. The redevelopment of this site will add value to the property and enhance the residential area by providing new screening and landscaping. The Planning Division recommended conditional approval to the Zoning Commission.

ALTERNATIVES ANALYSIS

Section 27-1503(D) specifies that all Special Reviews shall comply with the following three (3) criteria:

1. Complies with all requirements of this Article (27-1500).
This application does comply with the requirements of the zoning regulations.
2. Is consistent with the objectives and purposes of Chapter 27 BMCC and the Growth Policy.
This application is consistent with the purposes of Chapter 27- Unified Zoning Regulations and the 2003 Growth Policy. The application is appropriate in this particular district based on all the circumstances of the location. The application does encourage predictable land use decisions that are consistent with the neighborhood character and land use patterns. The application does encourage new developments that are sensitive to and compatible with the character of the adjacent neighborhood.
3. Is compatible with surrounding land uses or is otherwise screened and separated from adjacent land in such a way as to minimize adverse effects.
The proposed location for the drive through service is appropriate and conditions of approval are recommended to mitigate any potential adverse impacts to the neighborhood.

Further, the City Council shall consider and may impose modifications or conditions concerning, but not limited to the following:

1. Street and road capacity;
2. Ingress and egress to adjoining streets;
3. Off-street parking;
4. Fencing, screening and landscaping;
5. Building bulk and location;
6. Usable open space;

7. Signs and lighting; and/or
8. Noise, vibration, air pollution and similar environmental influences.

Based on the above criteria, the Zoning Commission is forwarding a recommendation of conditional approval of Special Review #876 on a 3-0 vote.

CONDITIONS OF APPROVAL

1. The special review approval for a drive through window shall be limited to Lots 25-27, Block 5, Central Heights Subdivision as shown on the site plans submitted with this application.
2. Any new lighting within the parking lot or drive through areas shall have full cut-off shields so light is directed to the ground and not onto adjacent property. Lighting standards are limited to 18 feet in height from finished grade.
3. The drive through location shall be constructed as shown on the submitted site plan.
4. The landscaping and parking shall be installed as shown on the submitted site plan, including a sight-obscuring dumpster enclosure on all sides.
5. The applicant is required to install and continuously maintain the 6-foot sight-obscuring fencing that runs along the south and east property boundaries. The fencing shall comply with the clear vision area at the intersection of the alley and Santa Fe Drive and the drive exit on Central Avenue.
6. There shall be no outdoor public address system or outside announcement system of any kind. The drive through may have an outdoor private address system as standard for all drive through services.
7. Demolition of the existing structure on the property will provide for site security, debris and trash containment, dust control during and after structure demolition, and no demolition work shall occur prior to 8 am or after 8 pm daily. A demolition permit from the Building Division is required.
8. The proposed development shall comply with all other limitations of Section 27-613 of the Unified Zoning Regulations concerning special review uses, all landscaping requirements specified on Section 27-1101, and all other City regulations that apply.

****NOTE**** Approval of this Special Review does not constitute approval of a building permit, sign permit or fence permit. Compliance with all applicable local codes will be reviewed at the building permit level. This application is for a Special Review as noted above and no other request is being considered with this application. The Planning Division points out that the use and development of the property must be in accordance with the submitted site plan.

STAKEHOLDERS

A public hearing before the City Zoning Commission was held on May 5, 2009. Staff forwarded a recommendation of conditional approval. Rob Veltkamp, an agent for Michael Stock, appeared before the Zoning Commission and explained the proposed development. No other persons testified in favor or in opposition to the application.

The Zoning Commission considered the testimony and the staff recommendation of conditional approval. The Zoning Commission moved to recommend conditional approval of the special review request and voted 3-0 to forward this recommendation to the City Council.

CONSISTENCY WITH ADOPTED PLANS AND POLICIES

Consistency with plans and policies is discussed in the Alternatives Analysis section above.

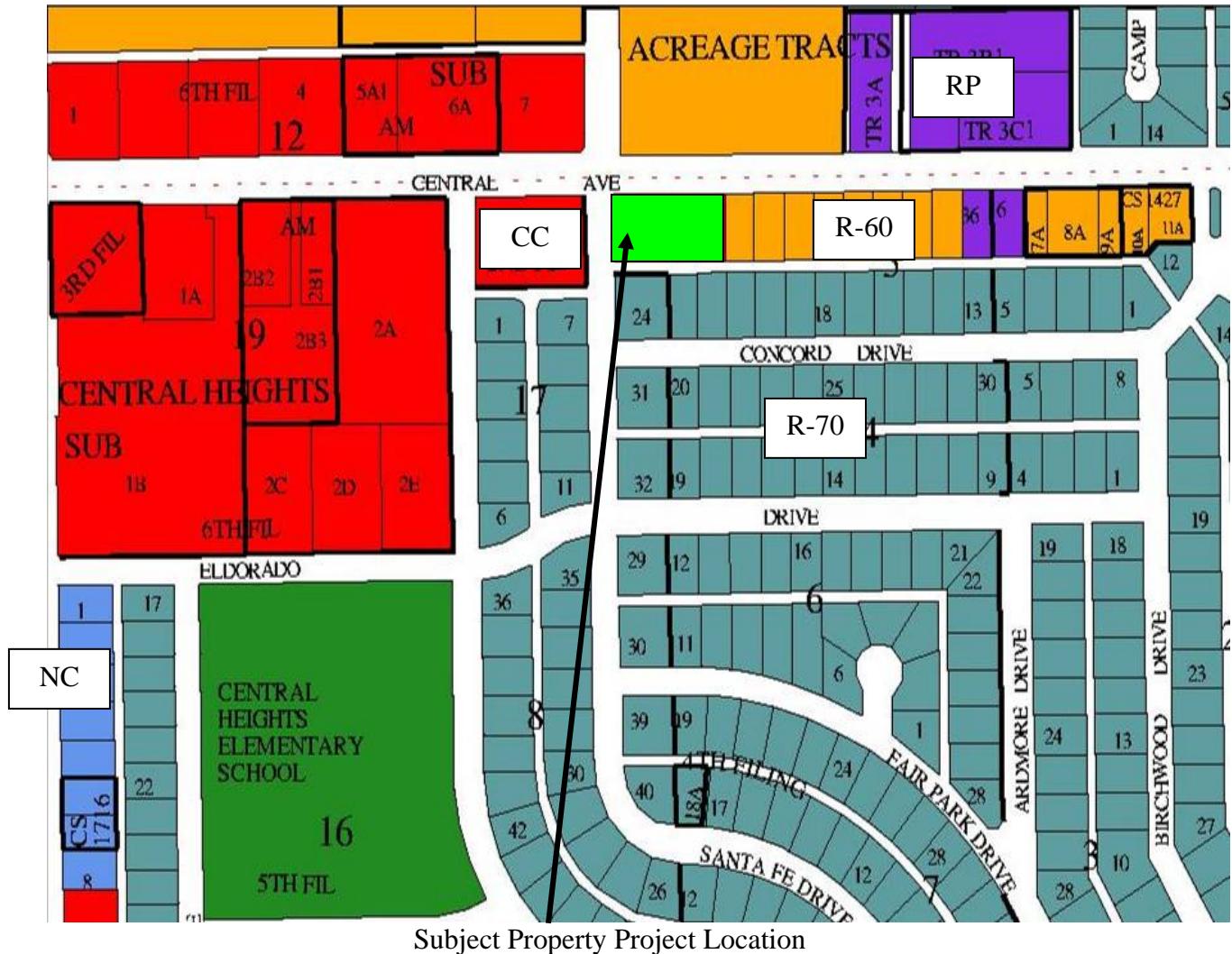
RECOMMENDATION

The Zoning Commission is forwarding a recommendation of conditional approval of Special Review #876 on a 3-0 vote.

ATTACHMENTS

- A. Zoning Map
- B. Site Photographs
- C. Site Plan

ATTACHMENT A
Zoning Map – Special Review #876



ATTACHMENT B
Site photos –Special Review #876



Subject Property

ATTACHMENT B, continued
Site photos –Special Review #876

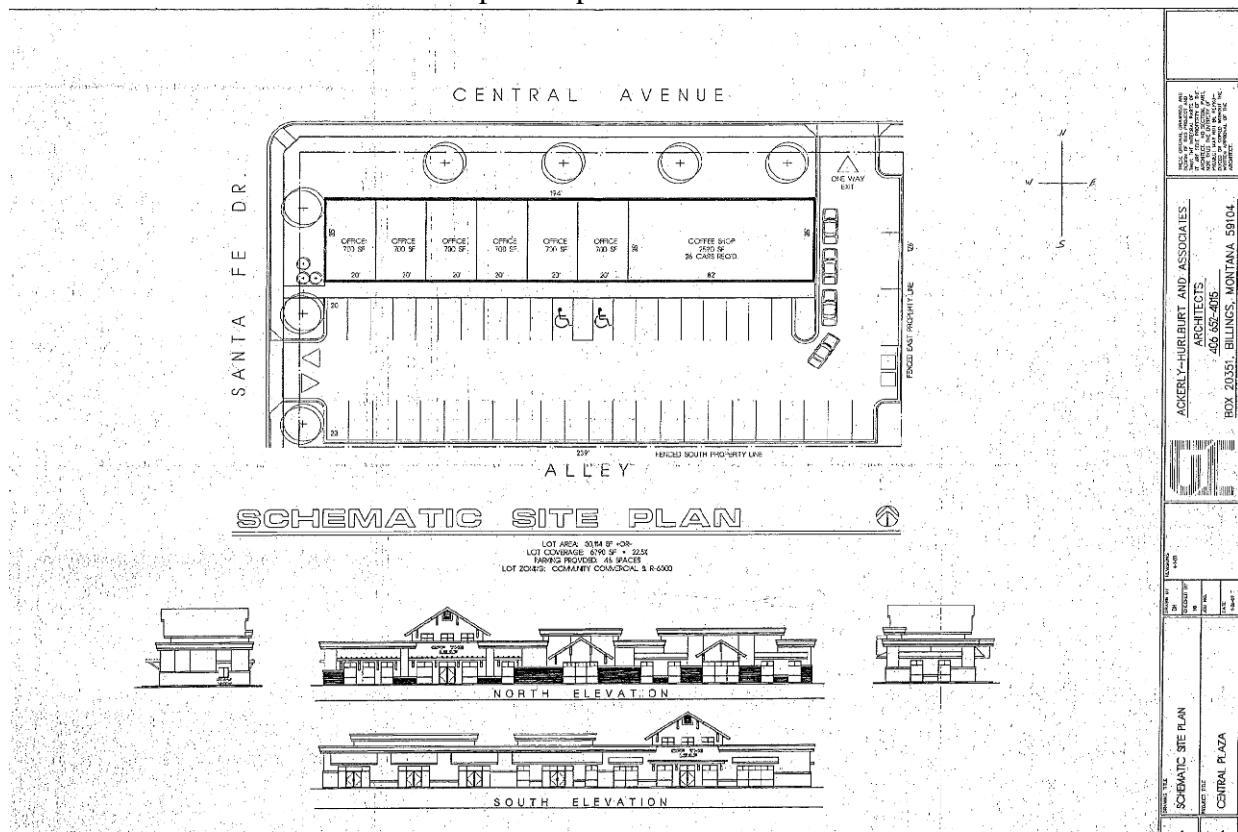


View south west across property



View east along alley

ATTACHMENT C
Site plan –Special Review #876



ATTACHMENT C, continued
Site plan –Special Review #876

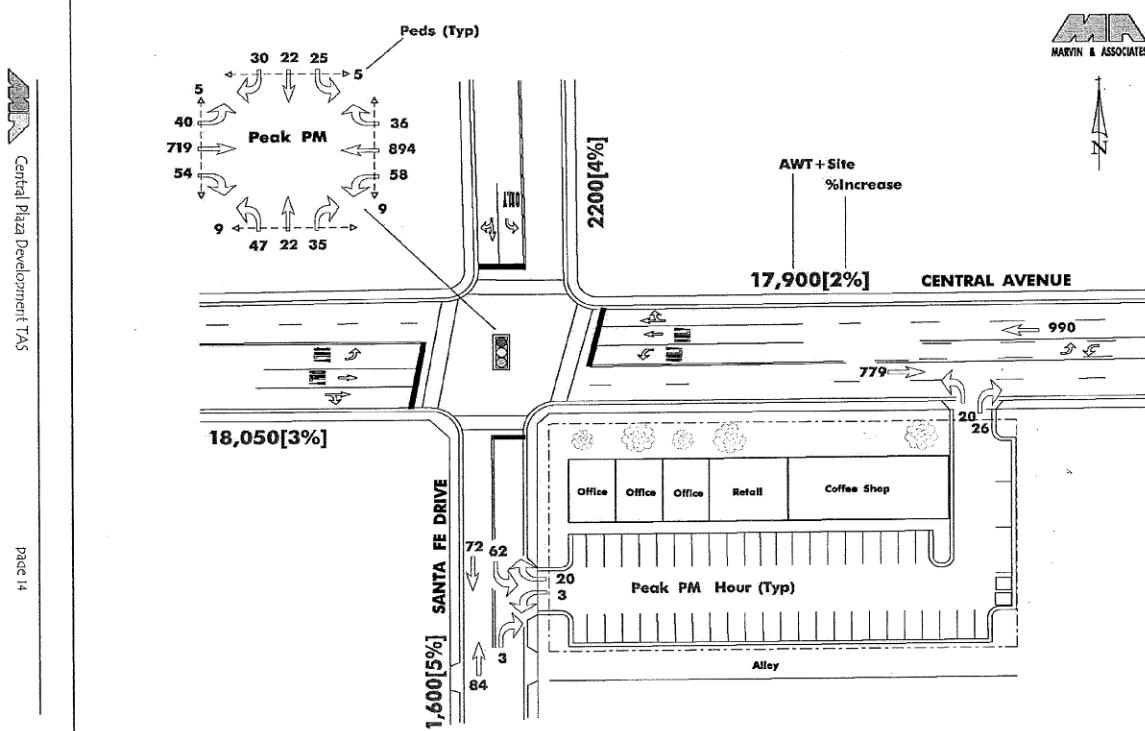


Figure 5. Existing Plus Site Generated Traffic Volumes



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Tuesday, May 26, 2009

TITLE: Public Hearing for Special Review #877 – 2434 Grand Avenue
DEPARTMENT: Planning and Community Services
PRESENTED BY: Nicole M. Cromwell, AICP, Zoning Coordinator, Planner II

PROBLEM/ISSUE STATEMENT: This is a request for a special review to allow a drive-through window for a new Burger King restaurant in a new building in a Community Commercial (CC) zone adjacent to Residential 7,000 (R-70) zoning district, on Lot 2, Sweet Subdivision, 2nd Filing (aka C/S 263 Tract 5). The property is addressed as 2434 Grand Avenue and is just west of the new CVS Pharmacy under construction at the intersection of 24th St West and Grand Avenue. The property owner is Montana CVS Pharmacy and the agents are Food Service Concepts and Morrison-Maierle. The Zoning Commission held a public hearing on this request on May 5, 2009, and is forwarding a recommendation of conditional approval to the City Council on a 3-0 vote.

ALTERNATIVES ANALYZED: Before taking any action on an application for a Special Review use, the City Council shall first consider the findings and recommendations of the City Zoning Commission. In no case shall the City Council approve a special review use other than the one advertised. The Council shall take one of the following actions:

- Approve the application;
- Conditionally approve the application;
- Deny the application;
- Allow withdrawal of the application; or
- Delay the application for a period not to exceed thirty (30) days.

FINANCIAL IMPACT: The special review should have no impact on the City's tax base.

RECOMMENDATION

The Zoning Commission is forwarding a recommendation of conditional approval of Special Review #877 on a 3-0 vote.

Approved By: City Administrator City Attorney

ATTACHMENTS

- D. Zoning Map
- E. Site Photographs
- F. Site Plan

INTRODUCTION

This is a request for a special review to allow a drive-through window for a new Burger King restaurant directly west of the new CVS Pharmacy at 24th Street West and Grand Avenue. The property is currently vacant. The drive through lane enters from Grand Avenue and continues around the east side of the proposed restaurant. Customer access is proposed to and from the alley to the south and will require a Site Development Variance from the City Council in addition to this special review. CVS Pharmacy to the east also has alley access but the property adjoining the CVS property is zoned CC so no variance or special review was required. The Burger King property is across an alley from R-70 zoning and requires a special review approval. Grand Avenue and 24th St West are principal arterial streets that carry a combined traffic volume of 40,000 vehicle trips per day.

PROCEDURAL HISTORY

- A special review application to allow a drive through adjacent to residential zoning was received on April 6, 2009.
- The City Zoning Commission held a public hearing on May 5, 2009, and is forwarding a recommendation of conditional approval on a 3-0 vote.
- The City Council will conduct a public hearing and consider this application on May 26, 2009.

BACKGROUND

The applicant proposes to construct a restaurant and a retail building on the 39,478 square foot parcel. This lot will be interconnected with the new CVS lot to the east but will have its own drive approach off Grand Avenue. (See Attachment C) The applicant needs to submit a Traffic Impact Study (TIS) to the City Traffic Engineer for review and approval. The TIS will review access to and from the site as well as potential impacts to the surrounding properties and intersections. The TIS was not available at the time of the Zoning Commission hearing but should be submitted to the City Traffic Engineer prior to the City Council hearing. The applicant will need to provide paving on the alley if customer access is allowed. In addition, the applicant will need to adjust the orientation of the proposed dumpster to ensure adequate access for pickup.

This property is adjacent to a residential neighborhood to the south and close to a 5-6 lane traffic controlled intersection. There is sufficient capacity on Grand Avenue and 24th St West to handle any new traffic generated, however a Traffic Accessibility Study (TAS) or TIS is required to make sure any mitigation is done to adequately control the new traffic. The city is currently considering the construction of a right-turn lane for the turn south from Grand Avenue to 24th Street West. This property and the CVS property to the east have given the required right of way to complete this project. It is not yet on the City's Capital Improvement Plan (CIP). Vehicles headed east bound or south bound in the right lane of Grand Avenue currently stack up to and beyond the BBWA canal crossing on Grand Avenue during morning and afternoon peak hour traffic. Access to and from the Burger King site and the CVS Pharmacy site from Grand Avenue during these peak hours will be seriously restricted due to vehicle stacking in the right lane. The TIS should clarify how these impacts will or should be mitigated.

This applicant will need to provide a sight-obscuring fence along the alley except where the customer access is provided, including any clear vision areas required. The location of the alley access may be adjusted during the TIS review process. The proposed landscaping meets the requirements but may need to be adjusted dependent on results of the TIS review process and possible construction of the right-turn lane on Grand Avenue.

Before a recommendation of approval or conditional approval can be made, each special review request must demonstrate conformance with three primary criteria; 1) the application complies with all parts of the Unified Zoning Regulations, 2) the application is consistent with the objectives and purposes of the Unified Zoning Regulations and the 2003 Growth Policy, and 3) the application is compatible with surrounding land uses and is otherwise screened and separated from adjacent land to minimize adverse impacts. This application conforms to the first criteria in so far that it is within the CC zoning district where a drive through service adjacent to a residential zone may be allowed by special review approval.

The application also conforms to the second and third criteria. The zoning regulations adopted by the City Council have designated several zoning districts where drive through services may be allowed. The CC zone is intended to *“accommodate community retail, service and office facilities offering a greater variety than would normally be found in a neighborhood or convenience retail development. Facilities within the classification will generally serve the community, and is commensurate with the purchasing power and needs of the present and potential population within the trade area.”*

The proposed use is in a zoning district that allows this use with a special review. The City Council has granted 7 of 8 previous requests for drive through services within a few blocks of this location. One request was denied in 1992 for the former Kentucky Fried Chicken location at 2240 Grand Avenue. The denial was primarily based on a disagreement between the applicant and the adjacent property owner over access agreements and easements. The Burger King proposal is consistent with goals of the 2003 Growth Policy as updated, specifically the goal of encouraging uses that are compatible with the character of the adjacent land use patterns. The Planning Division recommended conditional approval to the Zoning Commission.

ALTERNATIVES ANALYSIS

Section 27-1503(D) specifies that all Special Reviews shall comply with the following three (3) criteria:

4. Complies with all requirements of this Article (27-1500).

This application does comply with the requirements of the zoning regulations.

5. Is consistent with the objectives and purposes of Chapter 27 BMCC and the Growth Policy.

This application is consistent with the purposes of Chapter 27- Unified Zoning Regulations and the 2003 Growth Policy. The application is appropriate in this particular district based on all the circumstances of the location. The application does encourage predictable land use decisions that are consistent with the neighborhood

character and land use patterns. The application does encourage new developments that are sensitive to and compatible with the character of the adjacent neighborhood.

6. Is compatible with surrounding land uses or is otherwise screened and separated from adjacent land in such a way as to minimize adverse effects.

The proposed location for the drive through service is appropriate and conditions of approval are recommended to mitigate any potential adverse impacts to the neighborhood.

Further, the City Council shall consider and may impose modifications or conditions concerning, but not limited to the following:

9. Street and road capacity;
10. Ingress and egress to adjoining streets;
11. Off-street parking;
12. Fencing, screening and landscaping;
13. Building bulk and location;
14. Usable open space;
15. Signs and lighting; and/or
16. Noise, vibration, air pollution and similar environmental influences.

Based on the above criteria, the Zoning Commission is forwarding a recommendation of conditional approval of Special Review #877 on a 3-0 vote.

CONDITIONS OF APPROVAL

9. The special review approval for a drive through window shall be limited to Lot 2, Sweet Subdivision, 2nd Filing as shown on the site plans submitted with this application.
10. Any new lighting within the parking lot or drive through areas shall have full cut-off shields so light is directed to the ground and not onto adjacent property. Lighting standards are limited to 18 feet in height from finished grade.
11. The drive through location shall be constructed as shown on the submitted site plan.
12. The applicant is required to install and continuously maintain a 6-foot sight-obscuring fencing that runs along the south property boundary except where the customer access is allowed to and from the alley including any clear vision areas.
13. The landscaping and parking shall be installed as shown on the submitted site plan, including a sight-obscuring dumpster enclosure on all sides. The orientation of the dumpster enclosure will be adjusted according to specifications from the Solid Waste Division. The landscaping and parking may be adjusted based on a TAS submitted and approved by the Engineering Division.
14. There shall be no outdoor public address system or outside announcement system of any kind. The drive through may have an outdoor private address system as standard for all drive through services.
15. The proposed development shall comply with all other limitations of Section 27-613 of the Unified Zoning Regulations concerning special review uses, all landscaping requirements specified on Section 27-1101, and all other City regulations that apply.

16. Alley egress will include traffic mitigation. Traffic mitigation may include but is not limited to a speed bump, a speed table and appropriate signage to discourage pass through traffic and to note the dead end of the alley to the west.

****NOTE**** Approval of this Special Review does not constitute approval of a building permit, sign permit or fence permit. Compliance with all applicable local codes will be reviewed at the building permit level. This application is for a Special Review as noted above and no other request is being considered with this application. The Planning Division points out that the use and development of the property must be in accordance with the submitted site plan.

STAKEHOLDERS

A public hearing before the City Zoning Commission was held on May 5, 2009. Staff forwarded a recommendation of conditional approval. Kevin Jacobsen of Morrison-Maierle, the agent for the applicant, appeared before the Zoning Commission and explained the proposed development. Three surrounding property owners spoke in opposition to the application. The primary concerns of these owners were traffic, noise, smell and hours of operation.

Michelle and Michael McMahon of 2511 Arnold Lane spoke in opposition to the application. They were concerned about the potential to allow cut through traffic from Grand Avenue through the Burger King site to the alley. This has happened in the past especially when traffic is stacked at the intersection waiting to turn south on 24th Street West. Mr. & Mrs. McMahon stated that cut through traffic will happen unless Burger King takes steps to control the traffic exiting through the alley. They stated the traffic in the alley will be far greater than previous experience. They were concerned that people might turn right (west) into the alley and get stuck at the dead end at the BBWA canal. There is limited area for people to turn around at the dead end. This portion of the alley will remain unpaved. Mrs. McMahon asked the developer to install more mature trees and landscaping to help buffer the noise and light to their adjacent residence. They were concerned that teenagers would behave inappropriately at the location causing noise at their residence. Mr. & Mrs. McMahon stated many children use the alley to ride bikes and all the new traffic would cause a hazard to these riders. Mr. McMahon stated he would support the proposal if there was no vehicle access to the alley.

Sara Gardipee of 2420 Avenue B spoke in opposition to the application. She stated she lives north of the Western Security Bank and is used to traffic noise but most businesses in the area closed by 8:00 pm and the noise lessens. She was concerned that Burger King would be open until 2 am on weekends and does not fit in with the other businesses in the area. She was also concerned about being downwind of the charbroiling smell and smoke from the Burger King. She stated she already puts up with exhaust from the heavy traffic in the area and this would be too much especially until late in the evening.

Kevin Jacobsen provided rebuttal testimony. Mr. Jacobsen stated the fence along the alley would not be along the property line but would be setback a few feet and trees and landscaping would be installed both inside and outside the fence to soften the appearance from the residences south of the alley. He stated they would try to address cut through traffic with signage and possibly a

temporary speed bump. The mitigation would depend on the results from the TIS under development. Mr. Jacobsen stated the alley is an easement on the north that will be a full dedicated alley right of way of 20 feet in width. Burger King and CVS will be paving the alley to eliminate dust and damage from regular traffic. Mr. Jacobsen stated he could not address the concern about cooking smells or noise from late business hours. He will ask a representative from Food Service Concepts to address these concerns prior to the City Council hearing.

Commission member Michael Larson asked Mr. Jacobsen to specifically discourage traffic from turning left (west) in the alley with signage at the access point to the alley. Mr. Larson stated he was reluctant to be specific on mitigation for potential cut through traffic since the TIS is still in development and he is not an engineer or site designer. Commission Chairman Leonard Dailey, Jr. asked Mr. Jacobsen whether the TIS would include an analysis of the alley traffic impacts. Mr. Jacobsen stated the report would address all of the surrounding area including the alley. Chairman Dailey asked whether the TIS would be available before the City Council meeting and Mr. Jacobsen stated the report should be finished by May 15th.

The Zoning Commission considered the testimony and the staff recommendation of conditional approval. The Zoning Commission determined that an 8th condition of approval should be added to address the surrounding property owner concerns. The Zoning Commission moved to recommend conditional approval of the special review request and voted 3-0 to forward this recommendation to the City Council.

CONSISTENCY WITH ADOPTED PLANS AND POLICIES

Consistency with plans and policies is discussed in the Alternatives Analysis section above.

RECOMMENDATION

The Zoning Commission is forwarding a recommendation of conditional approval of Special Review #877 on a 3-0 vote.

ATTACHMENTS

- D. Zoning Map
- E. Site Photographs
- F. Site Plan

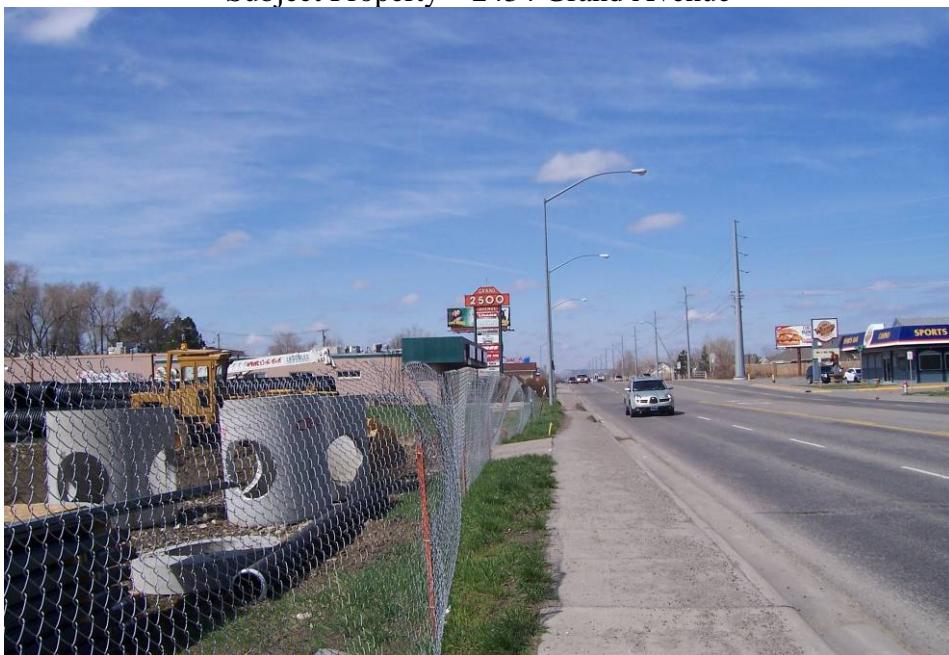
ATTACHMENT A
Zoning Map – Special Review #877



ATTACHMENT B
Site photos –Special Review #877



Subject Property – 2434 Grand Avenue



View west along Grand Avenue

ATTACHMENT B, continued
Site photos –Special Review #877



View east along Grand Avenue



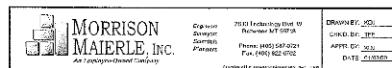
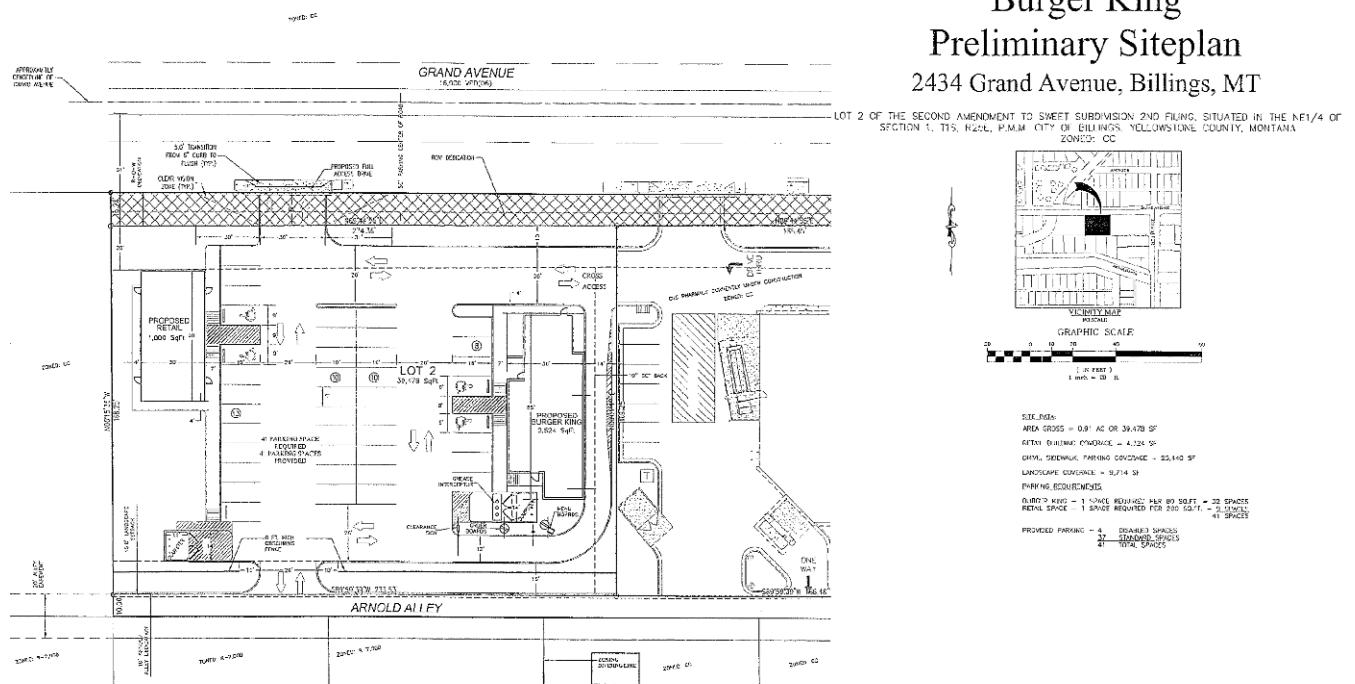
View south across subject property to residences on Arnold Lane

ATTACHMENT C

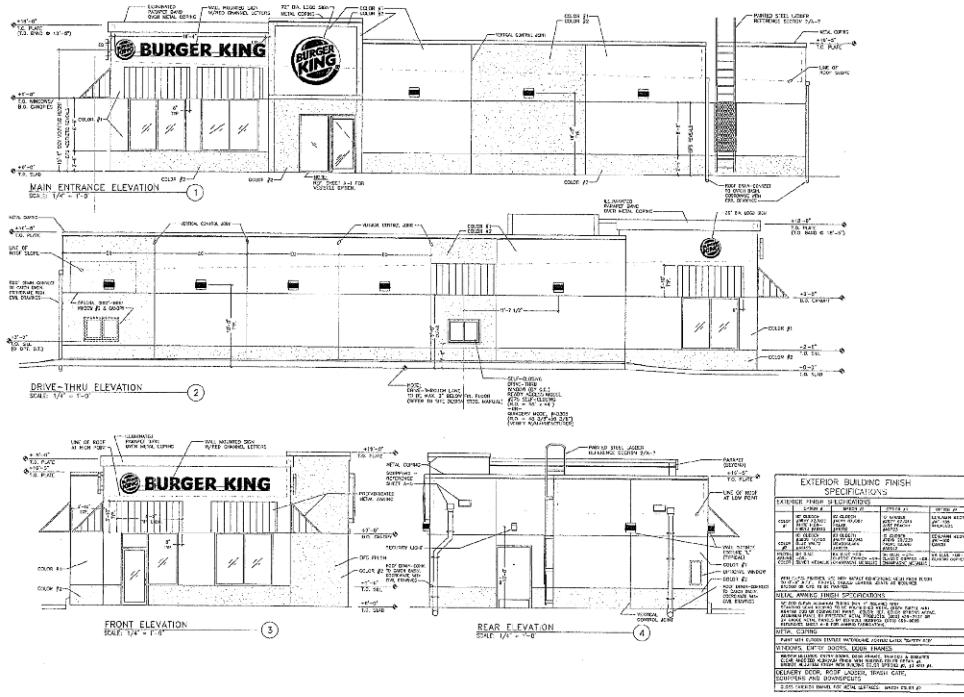
Site plan –Special Review #877

Burger King Preliminary Siteplan Grand Avenue, Billings, MT

2434 Grand Avenue, Billings, MT



ATTACHMENT C, continued



BURGER KING
2434 GRAND AVENUE
BILLINGS, MT.

EXTERIOR
ELEVATIONS

-2

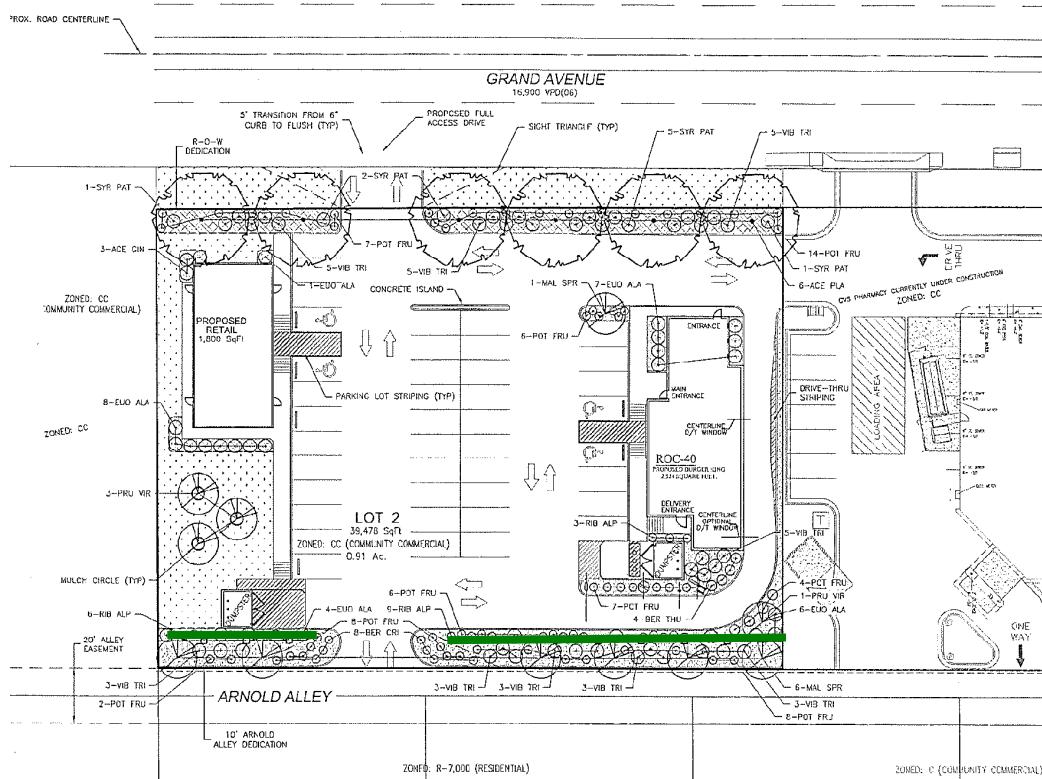
ATTACHMENT C, continued

Burger King
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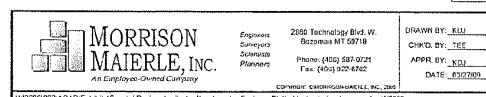
Preliminaries

Landscaping and Planting

2434 Grand Avenue, Bi



= Fence



BURGER KING
2434 GRAND AVENUE

**PRELIMINARY LANDSCAPING AND PLANTING
SPECIAL REVIEW APPLICATION**



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Tuesday, May 26, 2009

TITLE: Public Hearing & Site Development Ordinance Variance # OP – 09 - 01
DEPARTMENT: Public Works/Engineering
PRESENTED BY: Dave Mumford, P.E., Public Works Director

PROBLEM/ISSUE STATEMENT: Burger King is proposing to build a new fast food restaurant at 2434 Grand Avenue on Lot 2 of the Second Amendment to Sweet Subdivision, 2nd Filing. The site is on the south side of Grand Avenue, approximately 350 feet west of 24th Street West. They are seeking a variance from the Site Development Ordinance, Section 6-1203(r), which reads as follows:

Limited access through the alley. Customer access via an alley to any commercial use on a lot which is adjacent to an alley which abuts an "R" zone shall not be permitted over that alley.

ALTERNATIVES ANALYZED:

1. Approve the variance allowing a customer access through the alley.
2. Do not approve the variance allowing a customer access through the alley.

FINANCIAL IMPACT: There is no direct financial impact to the City associated with this variance.

RECOMMENDATION

Staff recommends that Council approve the variance allowing access through the alley, subject to the condition that the alley be paved from the west edge of the Burger King site (Lot 2) all the way to 24th Street West.

Approved By: **City Administrator** **City Attorney**

ATTACHMENTS

- A. Proposed Site Plan

INTRODUCTION

Burger King is proposing to build a new fast food restaurant at 2434 Grand Avenue on Lot 2 of the Second Amendment to Sweet Subdivision, 2nd Filing. The site is on the south side of Grand Avenue, approximately 350 feet west of 24th Street West. They are seeking a variance from the Site Development Ordinance, Section 6-1203(r), which prohibits customer access to alleys from commercial sites that abut a residential zone.

PROCEDURAL HISTORY

This variance request was advertised in the Billings Times on May 7 and May 14, 2009. City Code requires the Council to conduct a public hearing as part of their consideration of the variance request.

The City Council is also scheduled to act on a Special Review request for a drive up window on this same site at the May 26 meeting.

BACKGROUND

The applicant has requested this variance to allow customer access through the alley. It is anticipated that some delivery and service vehicles may use the alley access as it will allow them better access. The site will have one driveway directly accessing Grand Avenue and will also share an additional driveway on Grand with the adjacent CVS Pharmacy development. The drive thru exit will direct people toward Grand. Most of the traffic accessing the site will come and go from Grand.

The City has consistently required developments to pave the alley when it is being used for customer access. The adjacent CVS Pharmacy will also use a portion of the alley for access to and from 24th Street West, although the properties across the alley from CVS are commercial. CVS is required to pave the alley adjacent to their site, so Burger King really only has to pave the alley adjacent to their property. The recommended condition requiring alley paving all the way to 24th Street West is only imposed so that if due to some unforeseen circumstance CVS decided not to provide access to the alley, we would not be left with a gravel alley between Burger King and 24th.

ALTERNATIVES ANALYSIS

Approval of the variance request: If the variance request is approved access between the Burger King parking lot and the alley will be provided. The alley will be paved from Burger King all the way to 24th Street West at the expense of the Burger King and CVS developments. There will be no direct costs to the City or property owners on the south side of the alley for the alley paving. Long term costs to the City are indeterminate. A paved alley will save the costs of periodically blading and maintaining a gravel alley. A paved alley results in higher surface restoration costs whenever it is excavated to repair or replace underground utilities (sanitary sewer, natural gas, etc.).

Denial of the variance request: If the variance request is denied Burger King will have to close off all access to the alley from their site. The alley would not be paved. Access by customers and the service and delivery vehicles may be slightly more difficult.

RECOMMENDATION

Staff recommends that Council approve the variance allowing access thru the alley, subject to the condition that the alley will be paved from the west edge of the Burger King site (Lot 2) all the way to 24th Street West.

ATTACHMENTS

- A. Proposed Site Plan

**Burger King
Preliminary
Landscaping and Planting Plan
2434 Grand Avenue, Billings, MT**

