



CITY of NOVI CITY COUNCIL

**Agenda Item G
May 18, 2009**

SUBJECT: Approval of an Agreement for Completion and Maintenance of Improvements for Avalon Pointe Office Center (SP 03-51) a three-building (18 unit) general business condominium, in accordance with the requirements of Chapter 26.5

SUBMITTING DEPARTMENT: Community Development - Building *SON*

CITY MANAGER APPROVAL: *[Signature]*

BACKGROUND INFORMATION:

The City Council is being asked to consider approval of the Agreement for Completion and Maintenance Improvements for Avalon Pointe Office Center (SP-03-51), a three-building, 18 unit office general business condominium, pursuant to Chapter 26.5 of the City Code. Located on the south side of Eleven Mile Road, west of Meadowbrook (see aerial), two buildings of the development have been constructed and one of those is partially occupied. A portion of the second structure has been issued a TCO and may or may not be currently occupied.

Because more than two years has elapsed since the initial permit for development and the site improvements are not complete (per the requirements of the Ordinance), Meadow Pointe, LLC has requested an extension of time for completion. In addition to entering into the Completion Agreement, Chapter 26.5 requires that Meadow Pointe, LLC, must increase the amount of the performance guarantees to two times the estimated cost of completion in order to cover increases in costs of labor and materials which may occur over the time span prior to completion. Within Avalon Pointe, landscaping, and site work including a portion of the final course of paving remain incomplete. The City must also retain security for maintenance and close-out of soil erosion and sedimentation control measures, woodland protection fencing as well as security for any damage done to the City's right of way adjacent to the condominium. In this case, Meadow Pointe LLC will be responsible for posting an additional \$17,877.16 for a total of \$154,840.66.

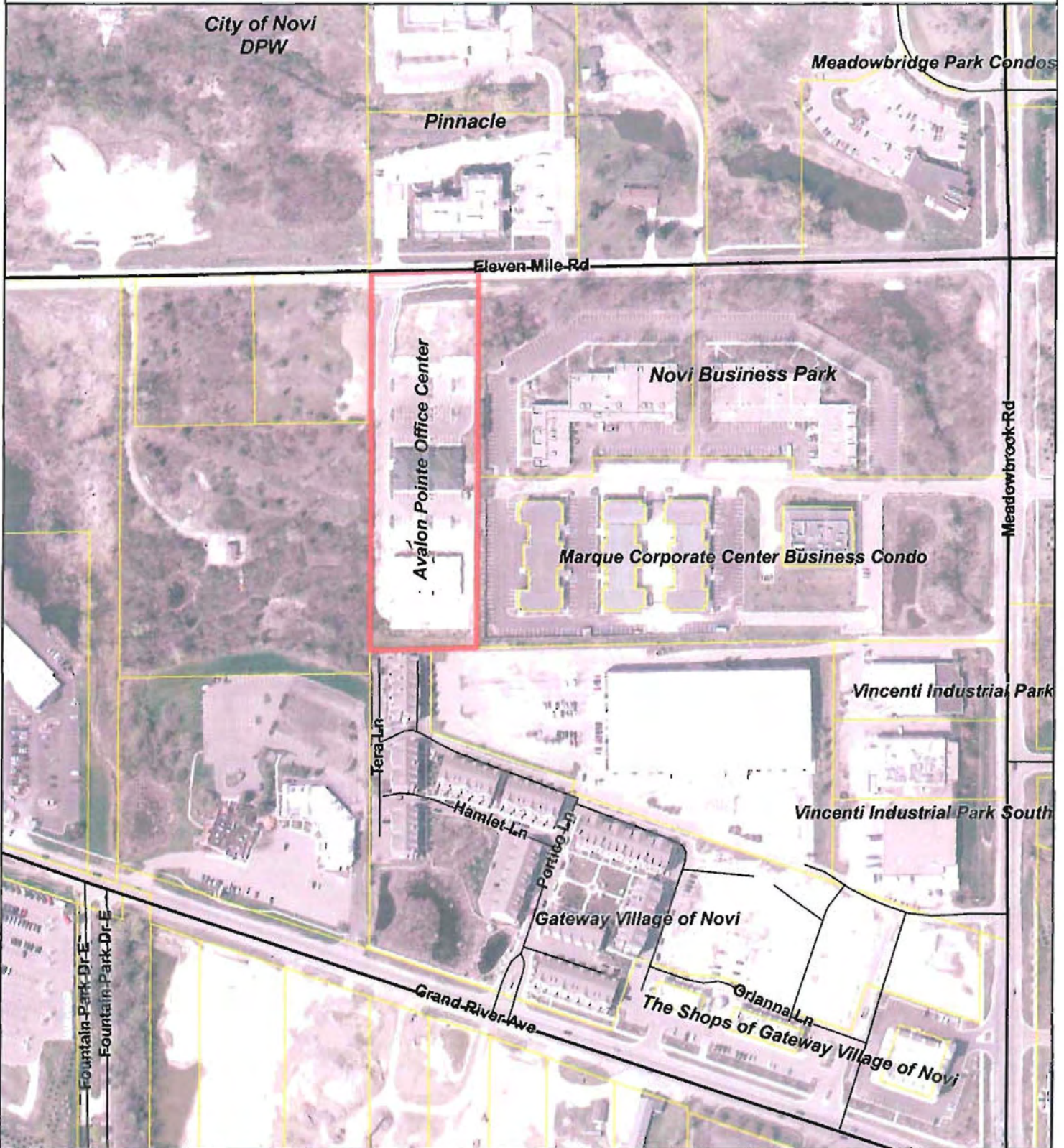
The Agreement requires that the developer complete installation of all remaining sitework (paving), landscaping (most of which is associated with yet to be constructed third building at front of site) and right of way restoration for the entire site prior to issuance of the final certificate of occupancy for the development in addition to continued installation and maintenance of soil erosion and woodland protection measures. Since the final large dollar items are generally associated with the completion of the third building, it expected they will be completed at such time this building is finished but no later than October 1, 2011 as required by the Agreement regardless of whether construction, sales and occupancy have been maintained or progressed.

RECOMMENDED ACTION: Approval of an Agreement for Completion and Maintenance of Improvements for Avalon Pointe (SP 03-51) a three-building (18 unit) general business condominium, in accordance with the requirements of Chapter 26.5

	1	2	Y	N
Mayor Landry				
Mayor Pro Tem Gatt				
Council Member Burke				
Council Member Crawford				

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

Avalon Pointe Office Center Location Map



CITY OF NOVI
 PLANNING DIVISION
 45175 W. TEN MILE ROAD
 NOVI, MI 48375-3024
 (248) 347-0475
 MARK SPENCER, AICP, PLANNER
 CREATED: 10/16/08



MAP INTERPRETATION NOTICE
 Map information depicted is not intended to replace or substitute for any official or primary source. This map was intended to meet National Map Accuracy Standards and use the most recent, accurate sources available to the people of the City of Novi. Boundary measurements and area calculations are approximate and should not be construed as survey measurements performed by a licensed Michigan Surveyor as defined in Michigan Public Act 132 of 1970 as amended. Please contact the City GIS Manager to confirm source and accuracy information related to this map.

April 23, 2009

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www.secretwardle.com

Elizabeth M. Kudla
Direct: 248-539-2846
bkudla@secretwardle.com

Steve Rumble, Community Development Director
City of Novi
45175 West Ten Mile Road
Novi, MI 48375-3024

**Re: Avalon Pointe - Agreement for Completion and Maintenance
of Improvements Pursuant to Chapter 26.5 of City Code
Our File No. 660085. NOVI**

Dear Mr. Rumble:

We have prepared a proposed Agreement for Completion and Maintenance of Improvements (the "Completion Agreement") for the Avalon Pointe Condominium pursuant to the provision of Chapter 26.5 of the City of Novi Code of Ordinances.

Avalon Pointe is a three-building (18-unit) general business condominium in the I-1 District. Currently, two buildings within the condominium have been completed. One building and associated site improvements, including the final course of pavement, remain to be constructed.

Because more than two years has elapsed since the issuance of the initial permit for the development and the developer is not ready to construct the third building and the remaining site improvements, the developer has requested an extension of time for completion. In addition to entering into the Completion Agreement, Chapter 26.5 requires that the developer increase the amount of performance guarantees to two-times the estimated cost of completion in order to cover increases in costs of labor and materials which may occur over the time span prior to completion. In this case, the total performance guarantee that must be maintained is \$154,840.66.

Section 3 of the Completion Agreement contains specifics detailing which site improvements are outstanding and the costs relating to completion of those improvements. The figures are provided by the City consultant or department responsible for inspecting each particular improvement. The 200% multiplier provided for by Section 26.5-5 of the Code of Ordinances is included in the calculation of the total amount of security required as detailed in this Section of the Agreement.

Steve Rumples, Community Development Director
April 23, 2009
Page 2

Within Avalon Pointe, site landscaping, and incomplete site work, consisting of the final course of paving are the primary improvements that remain incomplete. The City must also retain security for soil erosion and sedimentation control, woodland fence, and any damage done to the City's right-of-way adjacent to the condominium.

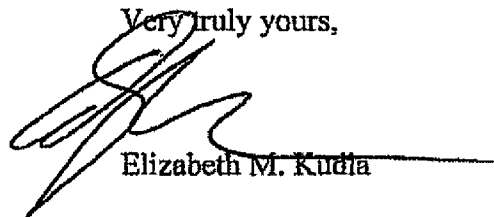
Section 4 of the Completion Agreement sets forth the time schedule in which the Developer must complete the improvements. For the remaining site improvements, the schedule provides for completion by October 1, 2011, regardless of the whether the project has been progressing. The City's staff and consultants agreed on the dates as being reasonable with respect to each particular site improvement based on the current rate that units within the condominium are being developed.

Section 5 permits the City to enter onto the property and use the performance guarantee to complete the site improvements in the event that the Developer has not complied with the time schedule set forth in Section 4.

We have provided you with a working draft of the completion agreement that may require modification based on City Council's consideration of the content. If you have any questions regarding this document, please let me know.

Should you have any questions or concerns with regard to this matter, please feel free to contact us.

Very truly yours,



Elizabeth M. Kudia

EMK

Enclosures

- C: Maryanne Cornelius, City Clerk (w/Enclosures)
- Clay Pearson, City Manager (w/Enclosures)
- Charles Boulard, Building Official (w/Enclosures)
- Marina Neumaier, Assistant Finance Director (w/Enclosures)
- Sheila Weber, Treasurer's Office (w/Enclosures)
- Dave Beschke, Landscape Architect (w/Enclosures)
- Ted Meadows, Spalding DeDecker (w/Enclosures)
- Sarah Marchioni, Building Permit Coordinator (w/Enclosures)
- Sue Troutman, City Clerk's Office (w/Enclosures)
- Mike Huszti and Larry Shew, Meadow Pointe, LL (w/Enclosures)
- Thomas R. Schultz, Esquire (w/Enclosures)

STATE OF MICHIGAN
COUNTY OF OAKLAND
CITY OF NOVI

AVALON POINTE OFFICE CENTER

**AGREEMENT FOR COMPLETION
AND MAINTENANCE OF IMPROVEMENTS**

AGREEMENT, dated _____, 2009 by and between the City of Novi, a Michigan municipal corporation, whose address is 45175 W. Ten Mile Road, Novi, Michigan 48375 ("City"), and Meadow Pointe, LLC, a Michigan limited liability company whose address is 673 Olivia Drive, Milford, Michigan 48381. ("Developer") who represents itself hereby as the owner of the Property and Developer of the Development.

RECITATIONS:

Developer is the owner and developer of the land in the City of Novi, Oakland County, Michigan, described on the attached Exhibit A (the "Property"). The subject land has been approved as a three building office condominium development pursuant to the provisions of the City of Novi Zoning Ordinance, known as Avalon Pointe Office Center (the "Development").

As part of the approval process, Developer has agreed to develop the Property, to complete certain improvements, and to proceed with other undertakings in compliance with applicable City Ordinances. Chapter 26.5 of the City of Novi Code of Ordinances, Section 26.5-5 (b) requires completion of actual construction and installation of all required site improvements within two (2) years after the issuance of the initial permit for any improvements, or within six (6) months after a temporary occupancy permit has been issued for any structure on the property, whichever is shorter or occurs first. The initial permit for the Development was issued on March 8, 2006. Because two (2) years have elapsed since the initial permit, the Developer must either complete the improvements immediately, or request an extension of time. Section 26.5-5 (b) requires that extension of such time periods may only be granted by City Council when such extensions are requested for a period greater than six (6) months for reasons including but not limited to delays resulting from weather conditions and/or delays in securing required approvals/permits from outside regulatory agencies, and unforeseen economic events or conditions

Two of the three buildings within the Development have been completed. Site improvements, including the final course of paving, and site landscaping relating to the third building have not been completed. Though Developer initially sought re-phasing of the site plan to create a second phase to develop the third building separately, Developer has determined not to proceed any further with the re-phasing proposal. Therefore, the site improvements for all three buildings must be completed within two-years from the issuance of the initial permit for the Development.

Developer is requesting an extension with respect to the completion of improvements for a period greater than six months, therefore, Developer must request an extension from City

Council and must provide a written completion agreement, together with a revised performance guarantee, pursuant to Section 26.5-12 of the City of Novi Code of Ordinances.

Consistent with all applicable laws and ordinances, more particularly Chapter 26.5 of the City of Novi Code of Ordinances, to obtain an extension with respect to completion of improvements, the Developer has offered to provide, and the City is willing to accept, certain assurances to the City that such improvements relating to the Development will be properly completed and maintained pursuant to a schedule. Such assurances include providing a performance guarantee in an amount no less than two hundred (200) percent of the cost of the work to be completed, and a schedule, for completion and maintenance of the improvements for the Development.

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. Purpose of Agreement

The City and the Developer enter into this Agreement for the purpose of ensuring that certain improvements for the Development will be completed and maintained pursuant to all approvals granted by the City and all applicable laws and ordinances, and that such completion and maintenance occur on a timely basis, in accordance with a schedule approved by City Council.

2. Performance Guarantee Posted

Prior to or with the execution of this Agreement, the Developer has provided, or does provide, to the City, performance guarantee in the total amount of \$ 154,840.66 guarantee completion and maintenance of improvements for the Development, as estimated and itemized in Paragraph 3, below. Such performance guarantee funds have been posted in the form of irrevocable Letter of Credit No. S408439 issued by Fifth Third Bank. ("Bank"), to guarantee completion and maintenance of improvements for the Development, as itemized in Paragraph 3, below, for an initial period of one (1) year, and shall provide by its terms that it shall, without further action by any person or entity be continuously renewed and be continuously effective for successive periods of one (1) year subject to termination only by 60 days advanced, written notice by Bank to the City's Assistant Finance Director as follows. As a condition to the termination of the effectiveness of the letter of credit, Bank shall be required to provide to the office of the City's Assistant Finance Director, with 60 days advanced written notice, a statement that the letter of credit shall terminate at the end of the 60 day period. Such notice shall be required regardless of the stated termination date of any other documentation. Prior to the date of termination, the letter of credit shall at all times be effective and payable according to its terms.

3. Items of Improvement and Maintenance

The items of improvements and maintenance included within this Agreement, and the estimated cost of completion and ongoing maintenance, are set forth below:

a. Incomplete Sitework (Paving):	\$ 47,000.00
b. Site Landscape:	\$ 14,190.00
c. Right-of Way	\$ 2,000.00
d. Soil Erosion and Sedimentation Control	\$ 10,897.00
e. Woodland Fence	\$ 3,333.33

Subtotal: \$ 77,420.33
200% Multiplier: x 2
Total Financial Guarantee: \$ 154,840.66

4. Completion and Maintenance of Improvements; Schedule and Requirements

Each of the Improvement Items listed in Paragraph 3, above, shall be completed and maintained by the Developer, at its expense, pursuant to all final approvals granted by the City and all applicable laws and ordinances, according to the following schedule:

- a) Improvement Item 3a contemplates installation of the asphalt wearing course of paving, and the sidewalk within the Development. Improvement Item 3a, above shall be completed prior to the issuance of the final certificate of occupancy within the Development, and in all events, before October 1, 2011. Until such time as the asphalt wearing course is installed, Developer shall be responsible under this Agreement for maintenance and repairs of all internal paved areas. For purposes of this Agreement "maintenance and repairs" of such areas shall mean and include, without limitation, removing of debris and obstacles, repairing pot holes and cracks, adding new materials, providing for proper drainage, constructing all needed structures (e.g., without limitation, lateral support, drainage, etc.), resurfacing and such other action as shall be necessary or expedient to provide structural integrity and substantially continuous, unobstructed and safe vehicular passage to and through the Development, and providing unobstructed drainage as necessary or required.
- b) Improvement Item 3b contemplates and includes the installation of all site landscaping for the Development. Site Landscaping shall be completed prior to the issuance of the final certificate of occupancy within the Development, and in all events on or before October 1, 2011. For two (2) years from the date of completion of the installation of all such landscape plantings installed as part of the Development, Developer shall, under this Agreement, maintain the landscape plantings that were so installed, which maintenance shall include the replacement of any dead, substantially dead, diseased or removed landscape during such one (2) year period.
- c) Improvement Item 3c above contemplates and includes security for restoration for any work proposed within the right-of-way of the arterial system of the City. Improvement Item 3c, above, shall be completed in all

events on or before prior to the issuance of the final certificate of occupancy within the Development, and in all events on or before October 1, 2011.

- d) Improvement Item 3 (d) above, contemplates and includes without limitation: (i) the installation of all required soil erosion and sedimentation controls (which have been installed and inspected); and (ii) completion of repairs and maintenance of the soil erosion and sedimentation controls within and for the Development on an ongoing basis until the site has been stabilized in accordance with the City's Sedimentation Control Ordinance.
- e) Improvement Item 3 (e) above, contemplates and includes without limitation the installation and maintenance of all required woodland protective fencing on an ongoing basis until the site work is complete or the woodlands no longer require protection, whichever occurs first.

5. City Authority to Complete and/or Maintain.

In the event Developer has failed to complete and/or maintain the improvements itemized in Paragraph 3, above, within the time periods and in the manner specified in this Agreement, and, provided the City has given the Developer 14 days notice of the failure to timely complete and/or maintain and Developer has not completed and/or maintained all of such improvements within said 14 days, the City shall have the authority, but shall not have the legal obligation, to take one or more of the following actions:

- (a) The City may draw the funds from the letter of credit or other securities posted and enter upon the Development through its officials, employees, agents, and/or contractors and complete and/or maintain the improvements, or restore the Property or areas disturbed in the Development. In such event, all costs and expenses incurred shall be paid from the proceeds of the funds drawn on the letter of credit or otherwise obtained from the performance guarantee posted. Any amounts of unused proceeds of the performance guarantee shall be returned to Developer, or otherwise be credited, as the case may be. Developer, and all of Developer's officers, employees, consultants and agents, shall be obligated to act and work in cooperation with the City to bring about completion and/or maintenance of the improvements as contemplated in this Agreement, or restoration, and shall provide the City with all drawings, contracts, documentation, public and private correspondence, agreements and other materials relating to any such improvements, restoration and/or maintenance. Notwithstanding other provisions to the contrary, in the event the City receives a notice of termination from Bank with regard to the letter of credit, or from any other securing party as to performance guarantee posted pursuant to this Agreement, and the improvements and/or maintenance itemized in Paragraph 3, above, have not been completed or fulfilled as required by this Agreement, the City shall be entitled to immediately draw the funds from the letter of credit or other performance guarantee posted, without notice to Developer, and proceed as specified in this paragraph.

(b) The City may, but is not required to, initiate a lawsuit for purposes of enforcing and achieving full compliance with the terms and provisions of this Agreement. In the event that the City is awarded relief in such suit, the Developer shall pay all court costs, expenses and reasonable actual attorney fees incurred by the City in connection with such suit.

(c) The City may, in its discretion, in accordance with the provisions of Chapter 26.5, grant Developer additional time beyond the time periods reference in Paragraph 4, in accordance with the provisions of Chapter 26.5 of the City of Novi Code of Ordinances, which provisions may be amended from time to time.

6. Additional Liability

Developer shall also be liable for any costs and expenses incurred by the City in excess of the amounts posted by the Developer under this Agreement as well as any costs and expenses, including reasonable attorney fees, incurred by the City in any action and/or litigation to enforce or collect such funds and/or to otherwise restore the property and/or secure completion and/or maintenance of the improvements itemized in Paragraph 3, above, pursuant to the terms of this Agreement, in the event the City obtains any relief as a result of such lawsuit. The liability of Developer in such regard, if unpaid after 30 days of a billing sent to Developer at its last known address, may be secured by the City recording a lien on the Property, effective as of the date the City is authorized to proceed with the completion and/or maintenance of improvements, or restoration, as provided in this Agreement, and all such unpaid amounts may be placed on the delinquent tax roll of the City as to the Property, and shall accrue interest and penalties, and shall be collected as, and shall be deemed delinquent real property taxes according to the laws made and provided for the collection of delinquent real property taxes. In the discretion of the City, such costs and expenses may also be collected by suit initiated against the Developer, and in the event the City is awarded relief in such suit, the Developer shall pay all court costs, expenses and reasonable actual attorney fees incurred by the City in connection with such suit.

7. Rebate or reduction of Performance Guarantee

The City shall not release a performance guarantee until (1) all fees that are due to the City have been paid; (2) a maintenance guarantee has been posted, if applicable; (3) inspection of the development site has been performed when required (4) expired permits have been renewed; and (5) the City has determined that the conditions and requirements of the permit/approval otherwise specified in the performance guarantee have been met and final approval of same has been granted.

The City may, after performing a site inspection at the written request of an applicant, rebate or reduce portions of a performance guarantee upon determination by the City, in its sole discretion, that the improvements and/or actions for which that performance guarantee was posted have been satisfactorily completed in accordance with the approved plans, any temporary certificate of occupancy, and all other applicable laws, regulations, and ordinances. At no point shall the amount of the performance guarantees held by the city be less than two hundred (200)

percent of the cost to complete the remaining required improvements on the property. The applicant is responsible for the actual cost of inspections requested pursuant to this section.

8. Binding Effect

This Agreement shall run with the land constituting the property described on Exhibit A and shall be binding upon and inure to the benefit of the City and Developer and to their respective heirs, successors, assigns and transferees.

9. Owner's Warranty on Ownership

Developer hereby warrants that it is the owner of the Property described on attached Exhibit A, and that it, and Developer have the full authority to execute this Agreement.

10. Delay in Enforcement

A delay in enforcement of any provision of this Agreement shall not be construed as a waiver or estoppel of the City's right to eventually enforce, or take action to enforce, the terms of this Agreement.

11. Severability

Each covenant, requirement, obligation and provision contained herein shall be considered to be an independent and separate covenant and agreement, and, in the event one or more of the covenants, requirements, obligations or provisions shall for any reason be held to be invalid or unenforceable by a court of competent jurisdiction, all remaining covenants, requirements, obligations and provisions shall nevertheless remain in full force and effect.

12. Lawful Document

Owner, Developer and City agree that this Agreement and its terms, conditions, and requirements are lawful and consistent with the intent and provisions of local ordinances, state and federal law, and the Constitutions of Michigan and the United States of America. Developer has offered and agreed to complete the on-site and off-site improvements, at their cost and expense, as specified in this Agreement. Developer has offered and agreed to complete such improvements, and to proceed with other undertakings and obligations as set forth in this Agreement in order to protect the public health, safety and welfare and provide material advantages and development options for the Developer, all of which improvements and obligations Developer and the City agreed were roughly proportional to the burden imposed and necessary in order to ensure that public services and facilities necessary for or affected by the Development will be capable of accommodating the development on the Property and the increased service and facility loads caused by the Development, to protect the natural environment and conserve natural resources, to ensure compatibility with adjacent uses of land, to promote use of the Property in a socially, environmentally and economically desirable manner, and to achieve other reasonable and legitimate objectives of the City and Developer, as authorized under applicable City ordinances and the Home Rule City Act, MCL 117.1, et seq. Furthermore, Developer fully accepts and agrees to the final terms, conditions, requirements, and

obligations of this Agreement, and Developer shall not be permitted in the future to claim that the effect of this Agreement results in an unreasonable limitation upon use of all or any portion of the Property, or claim that enforcement of this Agreement causes an inverse condemnation or taking of all or any portion of such property. It is further agreed and acknowledged that the terms, condition, obligations, and requirements of this Agreement are clearly and substantially related to the burdens to be created by the development of the Property, and are, without exception, clearly and substantially related to the City's legitimate interests in protecting the public health, safety, and general welfare.

13. Applicable Law

This Agreement shall be interpreted and construed in accordance with Michigan law, and shall be subject to enforcement only in Michigan courts.

14. Current and Future Owners and Developers.

As used in this Agreement, the term "Developer" shall mean and include the undersigned party designated herein as developer and owner of the Property, as well as all future and successor persons and entities that become owners and developers of all or any portion of the Development property in the future until such time as all phases of the Development have been completed and approved.

15. Headings.

The headings contained herein are for the convenience of the parties and are not to be used in construing or interpreting this Agreement.

16. Effective Date.

This Agreement is deemed effective as of the date first written above.

"DEVELOPER"

MEADOW POINTE, LLC,
a Michigan limited liability company

By:
Its:

STATE OF MICHIGAN)
)ss

COUNTY OF OAKLAND)

The foregoing instrument was acknowledges before me this ____ day of _____,
200_, by _____, as the _____ of
_____.

Notary Public
Oakland County, Michigan
My Commission Expires: _____

"CITY":
CITY OF NOVI
a Michigan municipal corporation

BY: _____

BY: _____

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

The foregoing Agreement was acknowledged, signed and sworn to before me on this _____ day
_____, 2009, by _____, Mayor and _____, Clerk of the City of
Novi.

Notary Public
_____ County, Michigan
My Commission Expires: _____

EXHIBIT A

The Avalon Pointe Office Center Condominium, according to the Master Deed recorded in Liber 36353, Pages 533 through 590, inclusive, Oakland County Records, and designated as Oakland County Condominium Subdivision Plan No. 1785, together with rights in common elements and limited common elements, as set forth in the above Master Deed (and amendments thereto) and as described in Act 59 of the Public Acts of 1978, as amended.