

Development Agreement

THIS AGREEMENT (“Agreement”), is made this 15th day of Nov, 2021, by and between [Wishcamper Development Partners, LLC], (“Developer”), and the City of Missoula, a municipal corporation organized and existing under the laws of the State of Montana, 435 Ryman St., Missoula, MT 59802 (“City”).

WHEREAS, the City, in partnership with Missoula County, intends to construct transportation improvements and public utility improvements with a federal BUILD Grant and other local funding sources in the Mullan Road area (the “BUILD Project”);

WHEREAS, the City engaged DJ&A to perform engineering services to design the transportation and other infrastructure to be constructed as part of the BUILD Project, and has spent significant time and money on this design effort, which has largely been completed;

WHEREAS, the Developer owns and intends to subdivide certain real property described as: [West End Farms, Tract 1: 04-2200-07-3-01-09-0000, Tract 6: 04-2199-12-1-01-11-0000] (the “Subdivision”), subject to City regulations;

WHEREAS, the Developer desires to evaluate design changes to the BUILD Project to better align with the proposed Subdivision, which may include changes to the road profile, storm drainage, intersections, and utility stub outs on England Boulevard; and

WHEREAS, the City is amenable to considering and potentially incorporating Developer’s desired design changes, so long as the City does not incur additional design expenses to conduct the evaluation proposed by Developer.

NOW THEREFORE, based on the above recitals, which are a material part of this Agreement, and for other valuable consideration, the sufficiency of which is acknowledged by the parties, the Developer and the City hereby agree as follows:

1. **Feasibility.** The parties agree to evaluate the feasibility and benefits of design changes for both England Boulevard and the Subdivision. The City reserves the right to reject any design changes that compromise the safety, use, or function of England Boulevard or related infrastructure, or have potential to delay or increase the City’s cost to construct the BUILD Project.
2. **Contract Change Order.** The parties agree that changes proposed by the Developer that, after DJ&A’s evaluation, are deemed feasible by the City will be implemented by the BUILD Project through a Contract Change Order (CCO) process. Upon written direction from the City Public Works Director, DJ&A, will prepare plan revisions and necessary documentation for the CCO for review and approval by the City and Developer.
3. **Engineering Costs.** The Developer agrees to pay the DJ&A engineering costs incurred to evaluate the feasibility and prepare plan revisions as an amendment to the current BUILD

Project contract between the County and DJ&A. The parties agree the cost of this work will be billed on a time and materials basis not to exceed \$80,000 without a supplemental agreement. The Developer agrees to deposit \$80,000 with the City prior to start of work. The City agrees to provide accounting for services performed and refund any remaining unused amount. The City shall not be liable for any costs associated with DJ&A's effort to evaluate the feasibility and prepare plan revisions. In the event DJ&A determines that it is likely that the cost for the work anticipated by this Agreement shall exceed \$80,000, DJ&A shall immediately stop work and alert the City and Developer, in order to determine whether the Parties should execute a supplemental agreement.

4. **Construction Costs.** The Developer understands and agrees that any additional construction costs associated with the design changes, as determined by DJ&A in its sole and exclusive discretion, that result from the Contract Change Order process will be the Developer's responsibility.
5. **Risk.** The Developer understands and agrees that the Subdivision is not approved and accepts the risk of future changes to the design as part to the subdivision review and approval process. The City's participation in this Agreement does not constitute approval of the Subdivision or infrastructure that may be required as the result of subdivision conditions required by City Council or other agencies.
6. **Notices.** All notices shall be addressed as follows, or addressed in such other manner as the Party being notified shall have requested by written notice to the other Party. Refusal to accept delivery of notice shall be deemed to be receipt of notice. Any notice in writing required to be given shall be complete when personally delivered, delivered by courier or expedited delivery service such as Federal Express, or when deposited in the United States Mail, first class, certified mail, return receipt requested, postage prepaid, addressed to the other Party at the following addresses:

Developer:

Wishcamper Development Partners, LLC
131 South Higgins Ave Suite P-1
Missoula MT 59802

City:

Office of the Mayor
City of Missoula
435 Ryman Street
Missoula, Montana 59802

With a copy to:

City Engineer
City of Missoula
435 Ryman Street
Missoula, MT 59802

The Parties, by notice given under this section, may designate different addresses to which subsequent notices, certificates or other communications should be sent.

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7. Compliance With Applicable Ordinances. Except as provided in this Section, nothing contained in this Agreement shall be interpreted to authorize or permit Developer to violate any law, ordinance, or regulation relating to building codes, fire codes, building materials, zoning, construction methods, or use. In the event of any conflict between any law, ordinance, or regulation and the terms of this Agreement, the law, ordinance, or regulation shall prevail and Developer shall promptly notify City of the conflict. City shall cooperate with Developer to accommodate the purposes of both this Agreement and such law, ordinance, or regulation.
8. Force Majeure. A Party shall not be held responsible if the fulfillment of the Party's obligations under this Agreement is delayed or prevented by revolutions, wars, acts of enemies, strikes, fires, global pandemics, floods, other natural disasters, acts of God, or without limiting the foregoing, by any other cause not within the control of the Party whose performance is interfered with, and which by the exercise of reasonable diligence, the Party is unable to prevent, whether of the class of causes hereinbefore enumerated or not.
9. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective heirs, personal representatives, successors and assigns. This Agreement will not run with the land and will not be filed with the Missoula County Clerk and Recorder's Office.
10. Additional Provisions.
 1. Modification and Amendment. This Agreement may be amended or modified by written agreement signed by the Parties.
 2. Time. Time is of the essence in this Agreement. Any deadline falling on a Saturday, Sunday, or Montana State or United States legal holiday shall be extended to the next business day.
 3. Binding Effect. This Agreement is binding upon the heirs, successors, and assigns of the Parties.
 4. Default and Remedies. In the event of any breach of this Agreement by a Party, the non-breaching Party shall give the breaching Party written notice describing the breach and thirty (30) days in which to cure. In the event the default is not cured timely, or in the event work required to cure a default is not commenced, the Parties may seek such remedies as are available under law.
 5. Attorneys' Fees. In the event suit is brought for the enforcement of this Agreement or as a result of an alleged default, each Party shall pay their own attorney fees.
 6. Governing Law and Venue. The law governing the interpretation or enforcement of the terms and condition of the Agreement shall be the laws of the State of

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Montana. The venue for any action brought pursuant to this Agreement shall be in the Fourth Judicial District of Montana, unless the issue involves a federal claim, in which case the venue shall be in the District of Montana.

7. Severability. If a part of this Agreement is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Agreement is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.
8. Entire Agreement. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement and supersedes all prior agreements and understandings, both oral and written, between the Parties with respect to the subject matter of this Agreement.
9. Captions. The captions or headings in this Agreement are for convenience only and in no way define, limit or describe the scope of intent of any provisions or Sections of this Agreement.
10. Drafting of Agreement. Both Parties have participated in the drafting of this Agreement and have been represented by their own counsel.
11. Counterparts. This Agreement may be executed and delivered in counterparts, each of which shall be deemed to be a duplicate original hereof, but all of which shall constitute one and the same document. Signatures transmitted electronically shall be treated and accepted as original signatures. The parties agree to communicate regarding this Agreement by electronic means as allowed by the Montana Uniform Electronic Transactions Act, Mont. Code Ann. § 30-18-101, et seq. (2019). After this Agreement is executed, any written document made under this Agreement may be created in original or may be an electronic record; any signature may be in original, or by electronic signature.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals on the day and year in this certificate written below.

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