

DEVELOPMENT AGREEMENT FOR STORMWATER

THIS DEVELOPMENT AGREEMENT (“Agreement”) is entered into between Kitsap County, a Washington municipal corporation (“the County”), the South Kitsap School District (“the School District”), a Washington municipal corporation, and GEM 1, a Washington limited liability company, as Assignee of McCormick Land Company, Inc. (hereinafter for purposes of this Agreement “GEM 1”).

RECITALS

WHEREAS, GEM 1 is the owner and developer of a parcel of property in south Kitsap County known as the Bailey Creek subbasin, which is a portion of a larger area in the South Kitsap Urban Growth Area known as McCormick North. The Bailey Creek subbasin is located in the general vicinity of Old Clifton Road and Feigley Road, and is shown in the site plan attached as Appendix A; and

WHEREAS, the School District is in the process of acquiring certain property from GEM 1 and such other lands within the Bailey Creek subbasin (the “School Site”) as illustratively shown on Appendix A and described in Appendix B; and

WHEREAS, GEM 1 is in the process of preparing plans for the development of those portions of the Bailey Creek subbasin which it owns (the School Site, described in Appendix B, and the GEM 1 Development, described in Appendix C), and has submitted an application for Master Plan approval under Application No. 0418788 (“Master Plan Application”) for the development of McCormick North Phase II (“McCormick North Phase II”), pursuant to Kitsap County Code Chapter 17.428, which includes the Bailey Creek subbasin; and

WHEREAS, GEM 1 intends to construct a regional stormwater control facility (the “Regional Stormwater Facility”) that will provide stormwater runoff quantity control and stormwater runoff quality treatment for all of the anticipated development in the portions of the Bailey Creek subbasin that belong to GEM 1 and its successors, including the School Site and land to be dedicated by GEM 1 to Kitsap County for Right-of-Way commonly known as relocated Feigley Road, as illustrated in Appendix A; and

WHEREAS, GEM 1 has applied for a Site Development Activity Permit under Application No. 0418785 (“SDAP Application” or “SDAP Permit”) for the construction of the Regional Stormwater Facility as well as construction of the relocation of Feigley Road together with its Master Plan Application for McCormick North Phase II. The construction plans and analysis (“Construction Plans”) for the SDAP Application are required to be prepared and have been prepared pursuant to with Title 12 of the Kitsap County Code by Norman L. Olson II, P.E., a civil engineer licensed in the State of Washington (“Olson”); and

WHEREAS, in accordance with Title 12 of the Kitsap County Code, a technical study of the Regional Stormwater Facility (“Technical Study”) has also been prepared by Olson and was submitted with GEM 1’s SDAP Application. When the Technical Study and the Construction

Plans have received final approval by Kitsap County, it will serve as the basis for the design and construction of the Regional Stormwater Facility; and

WHEREAS, Kitsap County is reviewing GEM 1's SDAP Application for compliance with Title 12 of the Kitsap County Code and all other relevant requirements currently in effect as of the date of application for the SDAP; and

WHEREAS, construction by GEM 1 of a Regional Stormwater Facility for the Bailey Creek subbasin and construction by GEM 1 of the intersection of Old Clifton Road and relocated Feigley Road provides a public benefit to the County in that (i) GEM 1 will bear the expense of relocating Feigley Road, which will provide an improved public transportation system, and (ii) GEM 1 will bear the expense of constructing a Regional Stormwater Facility that will provide stormwater management through a combined stormwater facility for several properties and the public road system in lieu of individual stormwater systems; and

WHEREAS, allowing the School District to utilize the Regional Stormwater Facility as provided herein will make it more economically feasible, and therefore more likely, that the School District will be able to construct needed schools to serve South Kitsap County; and

WHEREAS, the School District and GEM 1 both anticipate that development of their respective properties in the Bailey Creek subbasin will occur over a period of years, and

WHEREAS, the parties wish to have an assurance that if the Regional Stormwater Facility is constructed, it will be usable for the future development of the GEM 1 properties in the Bailey Creek subbasin, including the School Site; and

WHEREAS, RCW 36.70B.170, et. seq., authorizes counties to enter into development agreements with owners of real property to establish, among other things, the "development standards and other provisions that shall apply to and govern and vest the development" as well as a "build-out or vesting period for applicable standards."

AGREEMENT

NOW, THEREFORE, the County, the School District, and GEM 1 agree as follows:

1. **GEM 1 Design and Construction of Regional Stormwater Facility:** GEM 1 has designed and will construct a Regional Stormwater Facility for the portions of the Bailey Creek subbasin that it owns, including the School Site and land to be dedicated to the County for Right-of-Way. Such design and construction shall comply with the standards contained in Title 12 of the Kitsap County Code and such other applicable Kitsap County development regulations in effect at the time that GEM 1 applied for a SDAP Permit for the construction of the Regional Stormwater Facility. The capacity of the Regional Stormwater Facility shall be determined based on the Technical Study prepared by Olson upon approval by the County.

For purposes of this Agreement, “Regional Stormwater Facility” shall mean the stormwater runoff quantity control and stormwater runoff quality treatment facilities and associated conveyance facilities to be constructed pursuant to Site Development Activity Permit Application No. 0418785 located within easements or tracts dedicated to Kitsap County.

2. **County Review and Approval of Regional Stormwater Facility:** The County will review and approve, with conditions as appropriate, the Regional Stormwater Facility if it complies with the standards contained in Title 12 of the Kitsap County Code and all other applicable Kitsap County development regulations in effect at the time GEM 1 submitted its SDAP Application. Approval is further contingent on GEM 1 obtaining Master Plan approval for McCormick North Phase II.
3. **Determination of Capacity of Regional Stormwater Facility – School Site:** As part of the design of the Regional Stormwater Facility, the School District has determined that the following development represents the maximum development for the School Site for stormwater control purposes:
 - 3.1 25 acres of impervious surface;
 - 3.2 13 acres of underdrained or all weather fields; and
21 acres of pervious surface.

These surface areas are assumed in the Technical Study prepared by Olson in determining total capacity of the Regional Stormwater Facility. The School District shall be entitled to use the Regional Stormwater Facility for any development on the School Site; provided, however, to the extent such development exceeds the above surface areas, the School District shall be required to comply with all stormwater regulations in effect at the time of application for a development permit except as otherwise set forth under Section 6.3 below. The development on the School Site must also comply with the Master Plan for McCormick North Phase II and all applicable development regulations in effect at the time an application for development is submitted, excluding the requirements for stormwater runoff quantity control and stormwater runoff quality treatment set forth in Title 12 of the Kitsap County Code.

4. **Determination of Capacity of Regional Stormwater Facility – Roads:** The total capacity of the Regional Stormwater Facility shall include the amount of stormwater runoff from roads and land to be dedicated to the County for Right-of-Way.
5. **Determination of Capacity of Regional Stormwater Facility – GEM 1 Development:** GEM 1 shall be entitled to develop its property in the Bailey Creek subbasin using the Regional Stormwater Facility to the extent that the demand on the Regional Stormwater Facility does not exceed the total capacity of the Facility after deduction of the capacity allocated to the School District pursuant to Section 3 and to roads and dedicated land pursuant to Section 4, above, so long as such development complies with the Master Plan for McCormick North Phase II and all applicable development regulations in effect at the time an application for development is submitted, excluding the requirements for stormwater runoff quantity control and stormwater runoff quality treatment set forth in

Title 12 of the Kitsap County Code. Total capacity includes the development of the School Site identified in Section 3 of this Agreement and the runoff from roads identified in Section 4 of this Agreement.

6. **Development Limits:** GEM 1 and the School District shall be permitted to develop their properties in the Bailey Creek subbasin without the construction of additional stormwater runoff retention/detention or water quality control facilities, except as otherwise provided herein, so long as:

- 6.1 The total square footage of development allowed on the School Site shall not exceed the square footages set forth in Section 3, above.

- 6.2 The total development allowed on the GEM 1 property in the Bailey Creek subbasin, not including the School Site, shall not exceed the capacity determined pursuant to Section 5, above.

- 6.3 Both GEM 1 and the School District may utilize techniques for reducing total stormwater runoff as may be allowed by Kitsap County Code, such as the use of pervious surfaces, infiltration systems, or other such methods of reducing total stormwater runoff. In the event such techniques are used, the total development permitted on their respective properties may be increased, provided the demand on the Regional Stormwater Facility shall not exceed the capacity determined pursuant to Sections 3, 4 and 5, above.

7. **Vesting Rules:** This Agreement shall remain in effect and the GEM 1 and School District developments shall be considered to be vested against changes in Title 12 of the Kitsap County Code, as follows:

- 7.1 This Agreement shall remain in effect and GEM 1 shall be considered to be vested against changes to Title 12 of the Kitsap County Code for a period of ten (10) years after the date of Master Plan approval for McCormick North Phase II. This period may be extended for one (1) five-year period in accordance with the procedures and requirements of Kitsap County Code 17.428.110 in effect at the time the extension is requested.

- 7.2 This Agreement shall remain in effect and the School District shall be considered to be vested against changes to Title 12 of the Kitsap County Code for a period of ten (10) years after the date of Master Plan approval for McCormick North Phase II. This period may be extended for two (2) separate five-year periods in accordance with the procedures and requirements of Kitsap County Code 17.428.110 in effect at the time the extension is requested, except that the Hearing Examiner's decision shall be a recommendation to the Board of County Commissioners based on KCC 17.428.110 and the Board of County Commissioners shall make the final decision. In reviewing the School District's application for an extension and the criteria for an extension under KCC 17.428.110: (i) the Hearing Examiner shall liberally construe the factual circumstances which constitute tangible progress; for example, any planning, land use application, or development activity by the School District, including but not limited to internal planning

processes, shall constitute evidence of tangible progress and the failure to pass a bond election shall not conclusively mean tangible progress has not been shown; and (ii) the expiration of the Master Plan approval for McCormick North Phase II at the time of any application for a second five (5) year extension, shall have no relevancy in determining whether to recommend approval of the second five (5) year extension request.

7.3 To the extent that either GEM 1 or the School District does not apply for development or building permits for all or a portion of their respective properties within the time periods, including any extension, set forth in Sections 6.1 and 6.2, the County shall have the authority to require additional stormwater control improvements as may be required by Title 12 of the Kitsap County Code or other applicable regulations in effect at the time of such application.

8. **Ownership, Maintenance and Repair:**

8.1 GEM 1 shall initially own, operate, maintain, and repair as necessary the Regional Stormwater Facility. Prior to the issuance of the SDAP Permit, GEM 1 shall post and maintain a construction bond pursuant to Title 12 of the Kitsap County Code. After construction of the Regional Stormwater Facility has been completed and approved by Kitsap County, GEM 1 shall post a two (2) year maintenance bond pursuant to Title 12, the amount of which shall be ten percent (10%) of the actual construction cost of the Regional Stormwater Facility. The construction cost of the facilities requiring maintenance shall be determined by the project engineer, subject to the approval of the Public Works Director. At the end of the two (2) year period, the County will assume the ownership, operation, maintenance, and repair of the Regional Stormwater Facility provided all of the conditions set forth below are satisfied.

8.1.1 The Regional Stormwater Facility has been inspected and approved by the County and has been in satisfactory operation for at least two years;

8.1.2 Any part of the Regional Stormwater Facility that has been repaired or reconstructed has been approved by the County;

8.1.3 The Regional Stormwater Facility, as designed and constructed, conforms to Title 12 of the Kitsap County Code in effect when the SDAP Permit was submitted;

8.1.4 Any required easements and tracts have been conveyed to the County and have been recorded with the County Auditor;

8.1.5 An operation and maintenance manual, including a maintenance schedule, has been submitted to and accepted by the County;

8.1.6 A complete and accurate set of reproducible mylar as-built drawings has been provided to the County; and

8.1.7 In lieu of the requirement set forth in Kitsap County Code 12.24.030(1) that 80% of the entire parcel served by the Regional Stormwater Facility be constructed prior to the County's acceptance of ownership and maintenance responsibility of the Regional Stormwater Facility, the following shall be conditions imposed on development of the GEM 1 property, including the School Site:

8.1.7(i) For each preliminary plat application submitted by GEM 1 or its successors within McCormick North Phase II, a maintenance bond shall be posted and maintained in the same amount as the ten percent (10%) of the construction cost of the Regional Stormwater Facility as previously determined pursuant to Section 8.1, for the purpose of providing security against the risk of damage to that Facility during construction of plat improvements. This bond shall remain in effect until 80% of the lots within the preliminary plat have been constructed. This bond shall be in addition to the maintenance bond required for any stormwater and road improvements to be constructed as part of the preliminary plat which are not components of the Regional Stormwater Facility.

8.1.7(ii) For each building permit issued to the School District, the School District shall provide a two (2) year financial guarantee in the same amount as the ten (10%) percent of the construction cost of the Regional Stormwater Facility as previously determined pursuant to Section 8.1, for the purpose of providing security against the risk of damage to that Facility during construction of District's improvements. This bond shall be in addition to any security required for stormwater and road improvements to be constructed as part of the District's development which are not components of the Regional Stormwater Facility.

8.2 The School District shall pay Storm and Surface Water Maintenance Fees ("SSWM Fee"), including adjustments, if any, in accordance with the provisions of Chapter 12.40 of the Kitsap County Code in effect at the time the SSWM Fee is required to be paid for continued maintenance of the Regional Stormwater Facility by the County.

9. **Indemnity.** To the fullest extent permitted by law, GEM 1 shall indemnify, defend and hold harmless the County and its elected and appointed officials, officers, employees and agents, from and against all claims arising out of or resulting from (1) the design or construction of the Regional Stormwater Facility to the extent of any claim that the Facility was not designed or constructed in compliance with the requirements of the Kitsap County Surface Water Manual and other applicable rules and regulations, or (2) any negligent maintenance or repairs that were performed by GEM 1 prior to assumption of ownership and maintenance of the Regional Stormwater Facility by Kitsap County. This indemnification obligation shall not extend to claims arising as the result of alleged inadequacies in the Kitsap County Surface Water Manual. Nothing herein shall be construed as either shortening or extending any applicable statute of repose or limitations that may apply to the design, construction or maintenance of the Regional Stormwater Facility. "Claim" means any financial loss, claim, suit, action, damage or expense, including but not limited to attorneys' fees, attributable to injury, sickness, disease or death, or damage to property.

10. **Amendments.** Except as otherwise provided in this Section, no change or modification of this Agreement shall be valid unless the same is in writing and is signed by authorized representatives of the County, the School District and GEM 1 (provided the signature of the School District will not be required if the change does not affect in any manner the School Site, development of the School Site, or the rights or obligations of the School District under this Agreement). No purported or alleged waiver of any of the provisions of this Agreement shall be binding or effective unless in writing and signed by the party against whom it is sought to be enforced.
11. **Serious Threat to Public Health and Safety.** Pursuant to RCW 36.70B.170(4), the County reserves the authority to impose new or different regulations to the extent required by a serious threat to public health and safety.
12. **Binding Effect.** This Agreement shall be recorded with the Kitsap County Auditor. The recording date shall be the effective date of this Agreement. The Agreement shall inure to the benefit of and be binding upon the heirs, personal representatives, successors and assigns of the parties hereto and shall benefit the properties described under Appendix B (School Site) and Appendix C (GEM 1 Development), provided that the indemnification obligation of GEM 1 established pursuant to Section 9 of this Agreement shall be binding solely on the corporate successors and assigns of GEM 1 but shall not be binding on the School District, any homeowner's association created by GEM 1 or on purchasers of individual lots in the GEM 1 Development.
13. **Relationship of the Parties.** Notwithstanding any other provision of this Agreement, or any other agreements, contracts, or obligations which may derive herefrom, nothing herein shall be construed to make the County, the School District or GEM 1 partners or joint venturers, or to render any other parties liable for any of the debts or obligations of the other parties, it being the intention of this Agreement merely to create the agreements set forth herein with regard to the Regional Stormwater Facility for the Bailey Creek subbasin.
14. **Applicable Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. Any action with respect to this Development Agreement shall be brought in Kitsap County Superior Court, Port Orchard, Washington.
15. **Multiple Originals.** This Agreement may be executed in multiple copies, each of which shall be deemed an original.
16. **Construction.** The captions throughout this Agreement are for convenience and reference only and the words contained in them shall not be held to expand, modify, amplify or aid in the interpretation, construction or meaning of this Agreement. All parties hereto have been represented by legal counsel and accordingly hereby waive the general rule of construction that an agreement shall be construed against its drafter.

17. **Attorney's Fees.** In the event that any party to this Agreement brings a lawsuit against any other party in order to enforce any provision of this Agreement or to redress any breach thereof, the prevailing party in any such lawsuit shall be entitled to recover its costs and reasonable attorney's fees in addition to any other available remedy.

IN WITNESS WHEREOF, this Agreement was executed by the parties on the dates hereinafter indicated.

DATED this _____ day of _____, 2005.

KITSAP COUNTY BOARD OF COMMISSIONERS

CHRIS ENDRESEN, Chair

ATTEST:

JAN ANGEL, Commissioner

Opal Robertson
Clerk of the Board

PATTY LENT, Commissioner

APPROVED AS TO FORM:

By: _____
Deputy Prosecuting Attorney

Date: _____

SOUTH KITSAP SCHOOL DISTRICT

By:

Dr. Beverly Cheney

Superintendent

Date: _____

STATE OF WASHINGTON)
) ss.
COUNTY OF KITSAP)

I certify that I know of have satisfactory evidence that Dr. Beverly Cheney is the person who appeared before me, and said person acknowledged that she signed this instrument, on oath stated that she was authorized to execute the instrument and acknowledge it as the Superintendent of the South Kitsap School District to be the fee and voluntary act of the School District for the purposes mentioned in the instrument.

SUBSCRIBED AND SWORN to before me this ____ day of _____2005.

NOTARY PUBLIC in and for the State of
Washington, residing at _____.
My appointment expires: _____.

APPROVED AS TO FORM:

By: _____
Mary J. Urback
Attorney for School District

Date: _____

GEM 1, LLC

By: _____

Its: _____

Date: _____

STATE OF WASHINGTON)
) ss.
COUNTY OF KITSAP)

I certify that I know of have satisfactory evidence that _____ is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledge it as the _____ of GEM 1, LLC to be the fee and voluntary act of such party for the purposes mentioned in the instrument.

SUBSCRIBED AND SWORN to before me this _____ day of _____2005.

NOTARY PUBLIC in and for the State of
Washington, residing at _____.
My appointment expires: _____.

APPROVED AS TO FORM:

By: _____
Attorney for GEM 1, LLC

Date: _____

APPENDIX A
ILLUSTRATIVE SITE MAP

APPENDIX B
SCHOOL SITE LEGAL DESCRIPTION

APPENDIX C
GEM 1 DEVELOPMENT LEGAL DESCRIPTION