

CITY of NOVI CITY COUNCIL

Agenda Item M
March 23, 2009



SUBJECT: Approval of an Agreement for Completion and Maintenance Improvements for Taft Knolls II (SP 05-34), single-family residential site condominium, in accordance with the requirements of Chapter 26.5

SUBMITTING DEPARTMENT: Community Development - Building 

CITY MANAGER APPROVAL: 

BACKGROUND INFORMATION:

City Council is being asked to consider approval of the Agreement for Completion and Maintenance Improvements for Taft Knolls II (SP 05-34), single-family residential site condominium, pursuant to Chapter 26.5 of City Code. Two units of this 14-unit site condominium have been constructed and are occupied. The bank holding the mortgage on the development, New Liberty Bank, foreclosed on the remaining units on July 29, 2008 and the redemption period ended on January 29, 2009. New Liberty Bank now owns fee title to twelve units and the corresponding percentage of general common elements making them responsible for completion of improvements within the Taft Knolls II development.

Because more than two years has elapsed since the issuance of the initial permit for development, and the site improvements are not complete (per ordinance requirements), New Liberty Bank has requested an extension of time for completion. In addition to entering into the Completion Agreement, Chapter 26.5 requires that New Liberty Bank must 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. Within Taft Knolls II, street trees, site landscaping, site work, including the final course of paving, and traffic control signs remain incomplete. The City must also retain security for any damage done to the City's right-of-way adjacent to the condominium. In this case, New Liberty Bank will be responsible for posting \$79,392.62 in performance guarantees.

The Agreement provides for, among other things, street trees to be installed over an interval of approximately two-years in increments with the issuance of certificates of occupancy. If the 9th certificate of occupancy has not been issued by 2011, the City Council may consider whether the remainder of the street trees should be installed at the time, or whether an additional extension would be reasonable. The remaining site landscaping must be installed prior to the issuance of the final 5 certificates of occupancy but no later than October 1, 2011. Similarly, the final course of asphalt and traffic control signs must be installed prior to the issuance of the final five certificates of occupancy but no later than October 1, 2011. New Liberty will be responsible for maintenance and repair of the road until transfer of control to the homeowners association or dedication and acceptance by the City takes place in accordance with the terms of Chapter 26.5.

RECOMMENDED ACTION: Approval of an Agreement for Completion and Maintenance Improvements for Taft Knolls II (SP 05-34), single-family residential site 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				

March 3, 2009

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Marina Neumaier, Assistant Finance Director
City of Novi
45175 West Ten Mile Road
Novi, MI 48375-3024

**Re: Taft Knolls II - Agreement for Completion and Maintenance of
Improvements Pursuant to Chapter 26.5 of City Code
Our File No. 660078. NOV1**

Dear Ms. Neumaier:

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

As you know, Taft Knolls II is a 14-unit, single-family residential site condominium development. Currently, two units within the condominium have been sold to homeowners. Two homes have been constructed and are occupied. The remainder of the units are undeveloped. The bank holding the mortgage on the development, New Liberty Bank, foreclosed on the remaining twelve units in August, 2008. The redemption period has now expired and New Liberty Bank owns fee title to twelve units and the corresponding percentage of the general common elements. As a result of the foreclosure, New Liberty Bank became the successor to the developer, and thus the "applicant" under the terms of Chapter 26.5. New Liberty Bank is now responsible for completion of improvements within the Taft Knolls II development.

Unlike the Bolingbroke Condominium in which no units had been sold to homeowners and little site work had been initiated, performance guarantees for improvements within Taft Knolls II must remain in place to ensure completion of all site improvements for the use and benefit of the homeowners within the condominium.

Because more than two years has elapsed since the issuance of the initial permit for the development, and the site improvements are not complete, rather than completing a majority of the improvements prior to the construction of additional

homes within the condominium, New Liberty Bank has requested an extension of time for completion. In addition to entering into the Completion Agreement, Chapter 26.5 requires that New Liberty Bank must 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.

A short outline of the pertinent sections of the Agreement is as follows:

Section 1 of the Agreement describes the purpose of the Agreement.

Section 2 provides for the inclusion of specific information relating to the amount and type of performance guarantee provided by the Owner and/or Developer to secure completion of the incomplete site improvements. In this case, New Liberty Bank will be responsible for posting \$79,392.62 in performance guarantees.

Section 3 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.

Within Taft Knolls II, street trees, site landscaping, site work, including the final course of paving, and traffic controls signs remain incomplete. The City must also retain security for any damage done to the City's right-of-way adjacent to the condominium.

Section 4 sets forth the time schedule in which the Developer must complete the improvements. For most of 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.

The Completion Agreement provides for street trees to be installed over an interval of approximately two-years in increments with the issuance of certificates of occupancy. If the 9th certificate of occupancy has not been issued by 2011, the City Council may consider whether the remainder of the street trees should be installed at the time, or whether an additional extension would be reasonable.

The remaining site landscaping must be installed prior to the issuance of the final 5 certificates of occupancy but no later than October 1, 2011. City staff is not likely to recommend any additional extension be considered with respect to site

landscaping because it is less likely to be damaged during the construction of homes than street trees since it is not generally on the home sites.

Similarly, the final course of asphalt, and traffic control signs, must be installed prior to the issuance of the final five certificates of occupancy but no later than October 1, 2011. New Liberty Bank will be responsible for maintaining and repairing the road until transfer of control to the homeowner's association or dedication and acceptance by the City in accordance with the terms of Chapter 26.5.

Of course, in the event that New Liberty Bank sells the development to a successor developer, the responsibilities for completion and maintenance will be transferred as well. New Liberty Bank's performance guarantees must stay in place until such time as any successor developer posts replacements.

Section 5 contains the language authorizing 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. Section 5 also permits the City to deny issuance of related building permits and certificates of occupancy until such time as the requirements for completion have been addressed.

Section 6 permits the City to recover any additional expenses incurred in pursuing completion of the required improvements pursuant to the Agreement, including but not limited to attorney's fees and court costs if it becomes necessary to pursue litigation of the Agreement or the issues contained in the agreement.

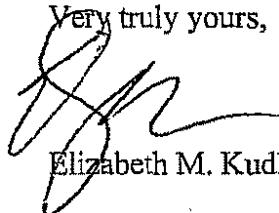
Section 7 provides for the procedure for reduction in the amount of performance guarantees in the event of completion of certain improvements. This provision follows the language contained in Chapter 26.5 with respect to reduction in performance guarantees.

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.

Marina Neumaier, Assistant Finance Director
March 3, 2009
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Should you have any questions or concerns with regard to this matter, please feel free to contact us.

Very truly yours,



Elizabeth M. Kudla

EMK

C: Maryanne Cornelius, City Clerk
Clay Pearson, Assistant City Manager
Rob Hayes, City Engineer
Aaron Staup, Construction Engineering Coordinator
Sheila Weber, Treasurer's Office
Dave Beschke, Landscape Architect
John Freeland, ECT, Inc.
Ted Meadows, Spalding DeDecker
Sarah Marchioni, Building Permit Coordinator
Darren LaLonde, New Liberty Bank
Tamika Bryant, Esquire
Thomas R. Schultz, Esquire

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STATE OF MICHIGAN
COUNTY OF OAKLAND
CITY OF NOVI

TAFT KNOLLS II

**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 New Liberty Bank whose address is 1333 W. Ann Arbor Road, Plymouth, Michigan 48170. ("Owner") who represents itself hereby as the owner of the Property.

R E C I T A T I O N S:

Owner is the successor owner of the land in the City of Novi, Oakland County, Michigan, described on the attached Exhibit A (the "Property"). Owner was mortgagee of the Property and foreclosed on the mortgage receiving title to Units 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, and 14 together with an undivided interest in the common elements of the Taft Knolls II Condominium, Oakland County Condominium Subdivision Plan No. 1879, by Sheriff's Deeds recorded with Oakland County Records on August 5, 2008. The redemption period concludes on January 29, 2009.

The subject land has been approved for a single-family residential site condominium development pursuant to the provisions of the City of Novi Zoning Ordinance, known as Taft Knolls II (the "Development"). The Development contains fourteen (14) single family home sites.

As part of the approval process, the City granted site plan approval and Owner has agreed to develop the Property, and accordingly, to complete certain improvements, and to proceed with certain 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 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 May 21, 2006.

Because two (2) years have elapsed since the initial permit, the Owner has requested 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 reasons other than delay resulting from weather conditions and/or delay in securing required approvals/permits from outside regulatory agencies.

Because the Owner is requesting an extension with respect to the completion of improvements for reasons other than delay resulting from weather conditions and/or approvals/permits from outside regulatory agencies, Owner 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 Owner 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 Owner enter into this Agreement for the purpose of extending the completion time for certain required improvements, 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 Owner has provided, or does provide, to the City, performance guarantees in the total amount of \$ 79,392.62 to 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 Nos. _____ issued by _____ ("Bank"), to guarantee completion and maintenance of improvements for the Development, as itemized in Paragraph 3, below, for an initial period of two (2) years, and shall provide by its terms that it shall, and shall be renewed by the Owner for successive periods of two (2) years subject to termination 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. Street Trees:	\$ 10,133.33
b. Landscape:	\$ 11,096.31
c. Right-of-Way:	\$ 1,000.00
d. Incomplete Site Work	\$ 14,000.00
e. Traffic Control Signs:	\$ 3,466.67
Subtotal:	<u>\$ 39,696.31</u>
200% Multiplier:	x 2
Total Financial Guarantee:	<u>\$ 79,392.62</u>

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 Owner, 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 and includes the installation of forty-one (41) street trees for the Development. Improvement Item 3a above shall be completed in increments in accordance with the completion of construction of new homes within the Development. In all events, 50% of the improvement items in Paragraph 3a shall be installed prior to the issuance of the 8th certificate of occupancy within the Development. 75% of the improvement items in Paragraphs 3a shall be installed prior to the issuance of the 10th certificate of occupancy within the Development. 100% of the of the improvement items in Paragraphs 3a shall be installed prior to the issuance of the last certificate of occupancy within the Development. Pursuant to the terms of this Paragraph, a partial release of financial guarantee may be made at the time of the issuance of the of each of the 8th and 10th certificates of occupancy within the Development, subject to the City retaining an appropriate amount pursuant to the applicable City Ordinance, to guarantee replacement of any dead, substantially dead, diseased or removed trees during the one (1) year period following installation of the trees. If by October 1, 2011, not more than 8 certificates of occupancy within the development have been issued, City Council may reconsider, in its discretion, the scheduling of the installation of the improvement items set forth in Paragraph 3a so as to require more immediate installation of the improvement items, in its reasonable discretion, to ensure that the homeowners receive the benefit of those improvement items.
- b) Improvement Item 3b contemplates and includes the installation of all site landscaping, not including street trees. Site Landscaping shall be completed prior to the issuance of the final five (5) certificates of occupancy within the Development, and in all events on or before October

1, 2011. For one (1) year from the date of completion of the installation of all such landscape plantings installed as part of the Development, Owner 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 plantings during such one (1) 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 prior to the issuance of the final certificate of occupancy within the Development, and in all events on or before June 1, 2012.
- d) Improvement Item 3d contemplates installation of the asphalt wearing course of paving along interior roads within the Development. Improvement Item 3d, above shall be completed prior to the issuance of the final (5) certificates of occupancy within the Development, and in all events, before October 1, 2011. Until such time as the asphalt wearing course is installed, Owner 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.
- e) Improvement Item 3e contemplates and includes the installation of all traffic control signs within the Development. Traffic control signs shall be installed prior to the issuance of the final five (5) certificates of occupancy within the Development, and in all events on or before October 1, 2011.

5. City Authority to Complete and/or Maintain.

In the event Owner 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 Owner 31 days notice of the failure to timely complete and/or maintain and Owner has not completed and/or maintained all of such improvements within said 31 days, or has not begun such completion or maintenance within said 31 days period if such completion or maintenance cannot be finalized within 31 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 by 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 Owner, or otherwise be credited, as the case may be. Owner, and all of Owner'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 the 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 Owner, 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 Owner shall pay all court costs, expenses and reasonable actual attorney fees incurred by the City in connection with such suit.

(c) City Council may, in its discretion, grant Owner additional time beyond the time periods reference in Paragraph 4.

6. Additional Liability

Owner shall also be liable for any costs and expenses incurred by the City in excess of the amounts posted by the Owner 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 Owner in such regard, if unpaid after 30 days of a billing sent to Owner 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 Owner, and in the event the City is awarded relief in such suit, the Owner 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 Owner and to their respective heirs, successors, assigns and transferees.

9. Owner's Warranty on Ownership

Owner hereby warrants that it is the owner of the Property described on attached Exhibit A has 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 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. Owner has offered and agreed to complete the on-site and off-site improvements, at its cost and expense, as specified in

this Agreement. Owner 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 Owner, all of which improvements and obligations Owner 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 Owner, as authorized under applicable City ordinances and the Home Rule City Act, MCL 117.1, et seq. Furthermore, Owner fully accepts and agrees to the final terms, conditions, requirements, and obligations of this Agreement, and Owner 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 "Owner" shall mean and include the undersigned party designated herein as 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, excluding residential home owners.

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.

"OWNER"

NEW LIBERTY BANK,
a state chartered commercial bank

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: _____