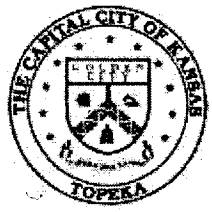


5A



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Council Action Form

Council Chambers
214 SE 8th Street
Topeka, Kansas 66603

February 14, 2011

Back Print

DATE: March 15, 2011 Contract No. 41094
 CONTACT PERSON: Shawn P. Brunts DOCUMENT #: 8317
 SECOND PARTY/SUBJECT: Project Budget, Resolution and Petition PROJECT #: T-151011.00

CATEGORY/SUBCATEGORY 015 Petitions/001 Benefit District

CIP PROJECT: No

ACTION OF COUNCIL: *Close public hearing, approve the petition, project budget* JOURNAL #: 2011

PAGE #: MAR 28 2011
 DOCUMENT DESCRIPTION: *and resolution as amended. Approve the maintenance agreement 3/15/11*

A PUBLIC HEARING for the purpose of hearing any and all comments that may be made as to the advisability of Improvement Project No. T-151011.00, which provides for repairs to an existing pond at Lauren's Bay Villas Subdivision and Lauren's Bay Estates.

(A public hearing to consider the advisability of a proposed improvement district for a pond repair improvement project located in Lauren's Bay Estates.)

A REVISED PETITION, A PROJECT BUDGET in the amount of \$1,358,350 and A RESOLUTION introduced by City Manager Norton N. Bonaparte, Jr., authorizing Drainage Improvement Project No. T-151011.00, which provides for repair to the existing pond at Lauren's Bay Villas Subdivision, and Lauren's Bay Estates, as more specifically described herein. (Council District No. 7)

Voting Requirement: Majority of the Governing Body, including the Mayor.

(Approval would authorize improvements to be made to the pond and dam at Lauren's Bay Subdivision and Lauren's Bay Estates, located west of SW 44th Street and SW Wanamaker Road. This petition project would be funded by general obligation bonds with a total estimated debt service of \$1,998,995 spread over 20 years to be paid 100% by the Improvement District.)

AN AGREEMENT for the maintenance of public improvements at Lauren's Bay Subdivision between the City of Topeka and Lauren's Bay Estates Subdivision Homeowners Association, Inc., and Lauren's Bay Home Owners Association, L.L.C., as a result of Improvement Project No. T-151011.00 and specifically authorizing the City Manager to execute the agreement. (Council District No. 7)

(Approval would provide for an agreement on the maintenance and repair of the public improvements constructed at Lauren's Bay by Improvement Project No. T-151011.00.)

POLICY ISSUE:

N/A

Item #9

AGREEMENT FOR REPAIR AND MAINTENANCE OF
IMPROVEMENTS AT LAUREN'S BAY

CITY OF TOPEKA CONTRACT NO. 41094

THIS AGREEMENT, is made and entered into this 21 day of January, 2011, by and among the City of Topeka, Kansas, a Kansas municipal corporation of Shawnee County, Kansas, hereinafter referred to as the "City," and i) Lauren's Bay Estates Subdivision Homeowners Association, Inc., a Kansas Corporation with its principal offices in Topeka, Kansas; and ii) Lauren's Bay Home Owners Association, L.L.C. a Kansas Limited Liability Corporation with its principal offices in Topeka, Kansas, hereinafter referred to jointly as the "Associations."

WHEREAS, the owners of real property located in the subdivisions of Lauren's Bay, Lauren's Bay Subdivision No. 2, Lauren's Bay Estates, Lauren's Bay Estates No. 2, Lauren's Bay Villas, Lauren's Bay Villas No. 2, Lauren's Bay Villas No. 3, Wanamaker Meadows and Brian's Addition Subdivision No. 3, have petitioned the City for a public improvement project to repair the pond and dam and construct a sidewalk for recreational use around the perimeter of the pond at Lauren's Bay; and

WHEREAS, the parties desire to enter into an agreement as to the responsibilities of each party for the repair and maintenance of the improvements.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein made and other good and valuable considerations, the sufficiency and receipt of which is hereby acknowledged by each party, the parties do hereby mutually agree as follows:

1. DEFINITIONS.

Unless otherwise specified in this Agreement, the following terms as used in this Agreement shall have these meanings or definitions:

a. *Final Completion* shall mean the date on which the public improvement project has been constructed.

b. *Public Improvement Project or Project* shall mean the repair of existing pond at Lauren's Bay Subdivision and Lauren's Bay Estates, including completed Division of Water Resources breaching, dredging silt deposits, repairing or replacing the existing dam, permitting with Division of Water Resources and United States Corps of Engineers, landscaping, perimeter sidewalk, parking facilities, engineering and all other contingencies required for a complete project.

c. *Homeowner's Associations or Associations* shall mean the Lauren's Bay Estates Subdivision Homeowners Association, Inc. and Lauren's Bay Home Owners Association, L.L.C . hereinafter referred to jointly as the "Associations." .

d. *Improvement District* shall mean the property subject to assessment for the costs of the public improvement project as set forth on Exhibit A, attached hereto.

2. GOVERNING BODY APPROVAL OF PROJECT.

The obligations and duties under this Agreement shall be subject to and contingent upon the governing body approving a resolution of Authorization and Advisability for the public improvement project.

3. REPRESENTATIONS AND WARRANTIES.

The Associations hereby represent and warrant to the City that the Associations

are Kansas Corporations are duly formed, existing and in good standing under the laws of the State of Kansas, and have all requisite power and authority to enter into and perform this Agreement. The members, officers, managers, agents and representatives of the Associations who have executed and delivered this Agreement and who may execute and deliver any other documents, instruments and agreements or perform any acts or deeds in connection with the transactions contemplated by this Agreement, have been and will remain duly authorized and empowered to do so on behalf of the Associations, and the Associations will be bound thereby.

4. COST OF PUBLIC IMPROVEMENT PROJECT.

It is understood and agreed by both parties that the total cost of the project shall be paid by the owners of the real property located within the improvement district and that the City shall have no obligation to pay for any of the costs of the project.

5. PUBLIC NATURE OF IMPROVEMENT.

It is understood and agreed by the parties that the public improvement project is for the benefit of the public. The parking lot, access sidewalks, and recreational sidewalk around the perimeter of the pond shall be open to public recreational use. Neither the Associations nor its members may obstruct or interfere with the public's use of the parking lot, access sidewalks, or recreational trail.

6. MAINTENANCE.

6.1 Associations Responsibilities.

a. The Associations agree to provide all reasonable and necessary maintenance and repairs for the Public Improvement Project at

their sole expense from and after Final Completion of the Project. All maintenance and repair work will be performed in accordance with all applicable city, state and federal laws, rules and regulations..

b. By way of illustration but not limitation the Associations specifically agree to be responsible for all reasonable and necessary maintenance and repair costs relating to the dam, recreational sidewalks, landscaping and parking lot, including sidewalk repair, removal of snow and ice, mowing of grass between the residents property and the pond, maintenance for any irrigation system including repairs to the system and cost of water, and maintenance and repair of any electrical facilities or service including lighting. Additionally, the Associations will be responsible for all maintenance of the pond and vegetation adjacent to the pond and sidewalks including elimination of animal nuisance and repair of damage caused by such animals to the dam and pond, stabilization of banks, trimming of trees and woody vegetation, and litter control including placement and emptying of trash cans. Further, the Associations will be responsible for paying the costs of the periodic inspections of the dam and any inundation study and any updates or modifications thereto as required by federal or state agencies.

c. The City agrees to mow the dam area and to maintain the spillway outfall area and structures therein. The City shall be responsible for contracting for periodic inspections and inundation study or updates thereto required under Section 5.1b; however, said inspections and

reports shall be paid for by the Associations.

d. The Associations understand and agree that if the Associations fail to make a repair or perform maintenance after the City has provided the Associations with written notice, the City shall have the right to make any necessary repairs or perform such maintenance and the Associations shall be responsible for all costs incurred by the City specifically including, but not limited to, permit fees, design, labor, materials, and supplies.

6.2 Associations Indemnification.

The Associations shall indemnify and hold the City and its authorized representatives harmless from all reasonable costs, liabilities, damages, expenses, suits, judgments and claims of any kind caused by the Associations' negligent performance of or failure to perform obligations under this Agreement.

6.3 Notice.

The City Engineer or his or her representative shall notify the Associations in writing of what reasonable and necessary repairs and maintenance need to be performed on the Project to the extent that the Associations do not routinely perform the same. The Associations shall have at least 90 days following such written notice, to perform the necessary repairs, or else the City may repair the same at its expense and the Associations shall be responsible to the City for the cost of the work. In the event that the Associations fail to pay for said work within 30 days of receipt of the bill. The City may assess the cost of repairs to the Associations property or that of its members.

6.4 Assignment.

The parties agree that the rights and duties under this Agreement may only be assigned with the written consent of all parties.

7. DEFAULT.

7.1 Associations' Remedies.

In the event of default by the City of its obligations under this Agreement, then the Associations may pursue any remedy at law or in equity

7.2 City's Remedies.

In the event of default by the Associations of their obligations under this Agreement, the City may pursue any remedy it may have under law or in equity

7.3 No Waiver.

The failure of either party to declare this Agreement to be in default or pursue any available remedies by reason of a breach by the other party of its obligations under this Agreement, shall not constitute a waiver or release by the non-defaulting party of its rights and remedies upon any subsequent default by the other party.

8. GENERAL PROVISIONS.

8.1 Additional Acts.

In addition to the acts and deeds recited and contemplated under this Agreement to be performed, executed and/or delivered by the Associations or the City, the Associations and the City hereby agree to cause to be performed, executed and/or delivered at the closing or thereafter, any and all such further acts, deeds and assurances as the City or the Associations, as the case may be,

may reasonably require to consummate the transactions contemplated under this Agreement.

8.2 Applicable Law.

This Agreement shall be governed by and construed under and in accordance with the laws of the State of Kansas.

8.3 Relationship of Parties.

Nothing contained herein shall be construed to hold or to make the City a partner, joint venturer, or associate of the Associations, nor shall either party be deemed the agent of the other, it being expressly understood and agreed that the relationship between the parties hereto is and shall at all times remain contractual as provided by the terms and conditions of this Agreement.

8.4 Entire Agreement.

This Agreement, together with the Plans, any Exhibits or Addenda attached hereto, embodies and constitutes the entire understanding between the parties with respect to the transaction contemplated herein, and all prior or contemporaneous contracts, understandings, representations and statements, oral or written, are merged into this Agreement. Neither this Agreement nor any provisions hereof may be waived, modified, amended, discharged or terminated except by an instrument in writing signed by the party against which the enforcement of such waiver, modification, amendment, discharge or termination is sought and then only to the extent set forth in such instrument.

8.5 Headings.

The headings contained in this Agreement are for reference and

convenience purposes only and shall not in any way affect the meaning or interpretation hereof.

8.6 Interpretation.

Whenever the context hereof shall so require, the singular shall include the plural and vice versa. The terms "include," "includes," "including," and similar terms shall be construed to mean "without limitation." All references to sections, subsections, and Exhibits shall be deemed references to sections, subsections of this Agreement and to Exhibits which are attached hereto and made a part hereof for all purposes.

8.7 Multiple Counterparts.

This Agreement may be executed in a number of identical counterparts. If so executed, each such counterpart is to be deemed an original for all purposes, and all such counterparts shall collectively constitute one (1) contract, but in the making proof of this Agreement it shall not be necessary to produce or account for more than one (1) such counterpart.

8.8 Notice.

Any notice, demand, approval or disapproval, consent or submission for approval or consent permitted or required hereunder (hereinafter, collectively, any "Notice") shall be in writing, and any such Notice shall be sent to the Associations or the City by electronic mail, facsimile, first class mail, registered or certified mail, return receipt requested, postage prepaid, or by Federal Express, UPS or other express delivery service, addressed as follows:

To Associations:

Lauren's Bay Estates Subdivision Homeowners Association, Inc.	Lauren's Bay Home Owners Association, L.L.C.

With copy to: Mike Unrein
Frieden, Unrein, Forbes & Biggs
555 S. Kansas Avenue
Topeka, KS 66603

To City: Public Works Director
City of Topeka
620 SE Madison
Topeka, KS 66607

With copy to: City Clerk
City of Topeka
215 SE 7th Street
Topeka, KS 66603

Or the same may be delivered by messenger at the same address or, if the same is a post office box, the last known address of the addressee. In the event such notice is given or delivered by messenger delivery or electronic mail, the date of actual delivery shall fix the time thereof. If delivered by electronic mail or facsimile, the person giving notice must retain proof of delivery of such electronic facsimile in the form of a log showing delivery. In the event Notice is given or delivered by first class mail, such notice shall be deemed given or delivered three (3) business days after the date on which the sealed envelope containing the Notice is deposited in the United States mail, properly addressed and with proper postage prepaid.

8.9 Parties Bound.

The terms and provisions of this Agreement shall inure to, extend to and be for the benefit of the successors, assigns, and legal representatives of the

respective parties hereto though the foregoing shall not of itself be construed as authorizing any assignment of this Agreement.

8.10 Severability.

If any provision of this Agreement shall, for any reason, be held by a court of competent jurisdiction to violate any applicable law or to be unenforceable, then the invalidity of such specific provision herein shall not be held to invalidate any other provision in this Agreement and the other provisions shall remain in full force and effect.

8.11 Time; Entire Agreement.

Time is of the essence of this Agreement. The parties hereto expressly acknowledge and agree that, with regard to the subject matter of this Agreement and the transactions contemplated by this Agreement, there are no oral contracts or understandings between the parties. This Agreement, including the defined terms and all Exhibits, and Addendums, if any, attached hereto: (a) embodies the final and complete contract between the parties; (b) supersedes all prior and contemporaneous negotiations, offers, proposals, contracts, commitments, promises, acts, conduct, course of dealing, representations, statements, assurances and understandings, whether oral or written; and (c) may not be varied or contradicted by evidence of any such prior or contemporaneous matter or by evidence of any subsequent oral contract of the parties hereto.

8.12 Covenant Running with the Land.

This Agreement is a covenant that will run with the land and is binding upon all heirs, assigns, successors and transferees of the Associations and that

this Agreement is to be filed and recorded with the Register of Deeds Office, Shawnee County, Kansas.

8.13 No Relinquishment of Title or Easement.

It is understood by the parties hereto that the permission granted by City herein shall in no way be deemed a relinquishment of title to any land owned by the City and the Associations shall not acquire title or any easement interest by either adverse possession or prescription.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first written above.



ATTEST:
Brenda Younger
Brenda Younger, City Clerk

CITY OF TOPEKA, KANSAS

[Signature]
Norton N. Bonaparte, Jr., City Manager

APPROVED AS TO FORM AND LEGALITY
DATE 2/10/11 BY M Feigh

LAUREN'S BAY ESTATES SUBDIVISION
HOMEOWNERS ASSOCIATION, INC.

Mark J. McGovern
MARK J. MCGOVERN CO-CHAIR
(Print Name and Title)

LAUREN'S BAY HOME OWNERS
ASSOCIATION, L.L.C.

Donald K Ford
Donald K Ford
(Print Name and Title)

ACKNOWLEDGEMENTS

STATE OF KANSAS)
) ss:
SHAWNEE COUNTY)

BE IT REMEMBERED, that on this ____ day of _____, 2011, before me a Notary Public in and for the County and State aforesaid, personally appeared Norton N. Bonaparte, Jr., City Manager and Brenda Younger, City Clerk, to me personally known, being by me duly sworn, did say that they are the officers of the City of Topeka, the Municipality that executed the foregoing instrument, and that the seal affixed to the foregoing instrument is the seal of said Municipality, and that said instrument was signed, sealed and delivered in the name and on behalf of said Municipality and they acknowledge said instrument to be the free and voluntary act and deed of said Municipality.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my notarial seal the day and year last above mentioned.

[Seal]
My Commission Expires:

Notary Public

STATE OF KANSAS)
) ss.
SHAWNEE COUNTY)

On this ____ day of _____, 2011, before me appeared _____, to me personally known, who, being by me duly sworn did say that he is the _____ of Lauren's Bay Estates Subdivision Homeowners Association, Inc., a Kansas corporation, and that said instrument was signed on behalf of said company by authority of its members, and said duly authorized officer acknowledged said instrument to be the free act and deed of said company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]
My Commission Expires:

Notary Public

this Agreement is to be filed and recorded with the Register of Deeds Office,
Shawnee County, Kansas.

8.13 No Relinquishment of Title or Easement.

It is understood by the parties hereto that the permission granted by City
herein shall in no way be deemed a relinquishment of title to any land owned by
the City and the Associations shall not acquire title or any easement interest by
either adverse possession or prescription.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the
day and year first written above.

CITY OF TOPEKA, KANSAS

Norton N. Bonaparte, Jr., City Manager

APPROVED AS TO FORM AND LEGALITY

DATE _____ BY _____

ATTEST:

Brenda Younger, City Clerk

LAUREN'S BAY ESTATES SUBDIVISION
HOMEOWNERS ASSOCIATION, INC.

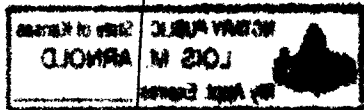
Donald K Ford

Donald K. Ford, President
(Print Name and Title)

LAUREN'S BAY HOME OWNERS
ASSOCIATION, L.L.C.

Mark J. McGovern

Mark J. McGovern CO-CH
(Print Name and Title)



ACKNOWLEDGEMENTS

STATE OF KANSAS)
) ss:
SHAWNEE COUNTY)

BE IT REMEMBERED, that on this _____ day of _____, 2011, before me a Notary Public in and for the County and State aforesaid, personally appeared Norton N. Bonaparte, Jr., City Manager and Brenda Younger, City Clerk, to me personally known, being by me duly sworn, did say that they are the officers of the City of Topeka, the Municipality that executed the foregoing instrument, and that the seal affixed to the foregoing instrument is the seal of said Municipality, and that said instrument was signed, sealed and delivered in the name and on behalf of said Municipality and they acknowledge said instrument to be the free and voluntary act and deed of said Municipality.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my notarial seal the day and year last above mentioned.

[Seal]
My Commission Expires:

Notary Public

STATE OF KANSAS)
) ss.
SHAWNEE COUNTY)

On this 28th day of January, 2011, before me appeared Mark McGivern to me personally known, who, being by me duly sworn did say that he is the Co-Chair of Lauren's Bay Estates Subdivision Homeowners Association, Inc., a Kansas corporation, and that said instrument was signed on behalf of said company by authority of its members, and said duly authorized officer acknowledged said instrument to be the free act and deed of said company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]
My Commission Expires:

Lois M. Arnold
Notary Public

1/14/14



STATE OF KANSAS)
)ss:
COUNTY OF SHAWNEE)

The foregoing instrument was acknowledged before me this 21st day of January, 2011, by Donald K. Ford, President of Lauren's Bay Home Owners Association, L.L.C, a Kansas limited liability company, and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed, acting for and on behalf of said limited liability company in capacity as such officer.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

Carol L. Scheetz
Notary Public

My Appointment Expires: _____



**RESOLUTION OF THE
LAUREN'S BAY ESTATES SUBDIVISION
HOMEOWNERS ASSOCIATION, INC.**

The undersigned, being all the current members of the Lauren's Bay Estates Subdivision Homeowners Association, Inc. (hereinafter HOA) acting accordance with the By-Laws hereby consent to the following actions.

Whereas, the City of Topeka, the Lauren's Bay Homeowners Association, LLC and the HOA have collectively worked towards the creation of a Benefit District the purpose of which is to create a funding mechanism for the Public Improvement Project to repair the pond and dam and construct a sidewalk for recreational use around the perimeter of the pond at Lauren's Bay; and

Whereas, as a condition of implementing the Benefit District, the City of Topeka is requiring that the parties enter into an Agreement For Repair And Maintenance Of Improvements At Lauren's Bay the purpose being to define the rights and responsibilities of the parties to the Agreement regarding the ongoing maintenance of those items constructed and/or repaired through the Benefit District; and


Whereas, the cost of maintaining and repairing the improvements created through the Benefit District shall be allocated between the property owners comprising the Lauren's Bay Homeowners Association, LLC and the HOA and that an Agreement between the Lauren's Bay Homeowners Association, LLC and the HOA has been drafted and is styled Agreement For Repair And Maintenance Of Improvements At Lauren's Bay; and

Whereas, Mark J. McGivern being a Co-Chair of the HOA has reviewed drafts of the above referenced Agreements and has determined that it is in the best interest of the HOA that the HOA become party to said Agreements; and

NOW, THEREFORE BE IT RESOLVED, that Mark J. McGivern in his capacity as Co-Chair is hereby authorized by all members of the HOA to execute the above referenced documents binding the HOA to their contents.

EXECUTED this 31st day of January, 2011.

MCGIVERN REALTY, INC.



JOHN F. MCGIVERN, II, PRESIDENT

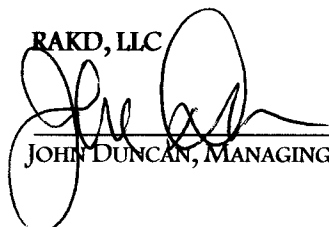
Red 5, LLC

SAM CAMPBELL, MANAGING MEMBER

2641 WANAMAKER, LLC

JAMES KLAUSMAN, MANAGING MEMBER

RAKD, LLC



JOHN DUNCAN, MANAGING MEMBER

**RESOLUTION OF THE
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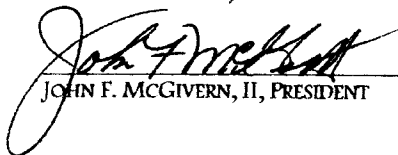
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MCGIVERN REALTY, INC.


JOHN F. MCGIVERN, II, PRESIDENT

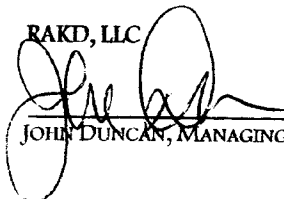
Red 5, LLC


SAM CAMPBELL, MANAGING MEMBER

2641 WANAMAKER, LLC

JAMES KLAUSMAN, MANAGING MEMBER


RAKD, LLC


JOHN DUNCAN, MANAGING MEMBER

LAKEVIEW DEVELOPMENT, LLC

COREFIRST BANK


PERRY MARNEY, MANAGING MEMBER


DARRELL DUGAN, AUTHORIZED REPRESENTATIVE