

**[PROPOSED] DEVELOPMENT AGREEMENT  
BY AND BETWEEN THE CITY OF PORT ORCHARD AND McCORMICK FOR THE  
DEVELOPMENT AND FUNDING OF  
CERTAIN TRANSPORTATION IMPROVEMENTS**

THIS DEVELOPMENT AGREEMENT is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2021, by and between the City of Port Orchard, a non-charter, optional code Washington municipal corporation, hereinafter the “City,” and McCormick Communities, LLC, a limited liability company organized under the laws of the State of Washington, together with McCormick Development Corporation, a Washington Corporation, hereinafter collectively the “Developer” or “McCormick” (together the “Parties”).

In addition, McCormick Land Company, a Washington corporation, hereafter “MLC,” is a Party for purposes of Sections 7, 15 and such other sections as specifically refer to MLC.

The Parties hereby agree as follows:

**RECITALS**

WHEREAS, the Washington State Legislature has authorized the execution of a development agreement between a local government and a person having ownership or control of real property within its jurisdiction (RCW 36.70B.170(1)); and

WHEREAS, a development agreement must set forth the development standards and other provisions that shall apply to, govern, and vest the development, use and mitigation of the development of the real property for the duration specified in the agreement (RCW 36.70B.170(1)); and

WHEREAS, a development agreement must be consistent with the applicable development regulations adopted by a local government planning under chapter 36.70A RCW (RCW 36.70B.170(1)); and

WHEREAS, Port Orchard adopted Chapter 20.26 of the Port Orchard Municipal Code (“POMC”) which establishes the standards and procedures for Development Agreements in Port Orchard; and

WHEREAS, Chapter 20.26 POMC is consistent with State law; and

WHEREAS, the Developer has applied for a Development Agreement under Chapter 20.26 POMC and such Agreement has been processed consistently with the POMC and State law; and

WHEREAS, this Development Agreement by and between the City of Port Orchard and the Developer (hereinafter the “Development Agreement”), relates primarily to the development of property owned by Developer within and near McCormick Woods in the vicinity of Old Clifton Road and Campus Parkway and that is more particularly described on Exhibits A-1, A-2,

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B-1, and B-2 (hereinafter the “McCormick Property”); and

WHEREAS, in 2005 the City’s predecessor in interest entered into a Development Agreement with Developer’s predecessor in interest for the development of certain transportation improvements; and

WHEREAS, since that time, the City annexed the property and in accordance with RCW 36.70B.190 assumed jurisdiction and agreed to be bound by the 2005 Transportation Development Agreement; and

WHEREAS, as part of that 2005 Agreement, the predecessor to the Developer (GEM 1, LLC) constructed some projects and payments for those projects are still on-going and will continue until GEM 1, LLC’s successor is fully reimbursed; and

WHEREAS, since annexing this property, the City’s transportation plans have been updated; and

WHEREAS, the City is in the process of adopting updated transportation impact fees; and

WHEREAS, during this process, an in-depth look at the projects needed to meet the projected development by Developer and others in the City was performed; and

WHEREAS, the updated transportation impact fees are based, in part, on the 2005 Development Agreement with the Developer’s predecessor as well as on the updated project list; and

WHEREAS, the Developer did not acquire from GEM 1, LLC (“GEM 1”), and GEM 1 still retains, the right to reimbursement that accrued under the 2005 Transportation Agreement when GEM 1 constructed the Glenwood Connector Roadway and minor improvements to Feigley Road, the only projects identified in that 2005 agreement that have been constructed; and

WHEREAS, the City has been paying such reimbursement to GEM 1 and its successor since 2008, and nothing in this Agreement changes or is intended to change the City’s obligation to continue paying such reimbursement to GEM 1; and

WHEREAS, GEM 1 assigned its right to reimbursement to the McCormick Land Company in 2016, after which time, the City paid reimbursement to the McCormick Land Company (“MLC”); and

WHEREAS, MLC continues to own property in Port Orchard; and

WHEREAS, MLC has signed this Agreement to confirm that this Agreement will fully replace and supersede the 2005 Transportation Development Agreement (“2005 Transportation DA”); and

WHEREAS, the Developer now seeks to update the 2005 Transportation DA in conjunction with obtaining a permit to build the Campus Parkway Roundabout; and

WHEREAS, the purpose of this Agreement is to carry forward and better define the concurrency evaluation that was part of the 2005 Transportation DA, to carry forward the impact fee reimbursement for MLC, and to establish an impact fee credit system for Developer to recover its costs of building the McCormick Projects described below; and

WHEREAS, apart from concurrency and impact fee credits/reimbursement, this Agreement does not address development standards, vesting, or any other regulation that impacts how the McCormick Property will be developed; and

WHEREAS, the Parties agree that the 2005 Transportation DA, as set forth in the traffic study attached to that 2005 Transportation DA, anticipated the generation of 4,935 PM peak hour trips. Based on the development activity since 2005, some of these “trips” have been absorbed. The parties believe it is advantageous to set forth the remaining capacity that may be utilized in future development phases and have confirmed the concurrency numbers as of the date of this Agreement; and

WHEREAS, in consideration of the benefits conferred by this new Development Agreement, which reflect the current plans of both the City and the Developer and include confirmation of concurrency, a new project list, and a set impact fee credit calculation, the parties deem it in their best interests and the best interests of the community to repeal and replace the 2005 Transportation DA with this updated agreement; and

WHEREAS, there are two projects identified on both Exhibit A to the 2005 Transportation DA and also on the City’s new TIP. As described in the new TIP, these projects are ID #1.5C, “Old Clifton Rd – Campus Pkwy Intersection and ID #2.08 Old Clifton Rd & McCormick Woods Dr. Intersection Impr”. These two projects are collectively referred to herein as “the McCormick Projects”; and

WHEREAS, the McCormick Projects are eligible for credits under RCW 82.02.060(4); and

WHEREAS, the following events have occurred in the processing of the Developer’s application:

- a) The Developer applied for this Development Agreement on December 4, 2020; and
- b) The Development Agreement is related to and has been consolidated under POMC 20.22.020(2) with the following project permits:

Land Disturbing Activity Permit PW20-031  
Stormwater Drainage Permit PW20-032

- c) The Developer is ready and willing to commence construction on the project known as Old Clifton Rd - Campus Parkway Intersection (a roundabout project) and has applied for a

Land Disturbing Activity permit and Stormwater Drainage Permit to perform this project;

d) The Old Clifton Rd – Campus Parkway Intersection is included in the City’s transportation plan upon which the updated impact fees are based and therefore the Developer may be reimbursed from the impact fees for that project;

e) The City Council held a public hearing on [DATE] regarding this Development Agreement;

f) After a public hearing, by Ordinance No.\_\_\_\_, the City Council authorized the Mayor to sign this Development Agreement with the Developer;

## AGREEMENT

**Section 1. The McCormick Projects.** The two transportation projects described above as “the McCormick Projects” will serve the McCormick Property as well as provide connectivity and capacity for the City. The Campus Parkway Roundabout LDAP Permit #PW20-0031 and SDP Permit PW20-032 as well as the future development of the McCormick Woods Drive Roundabout, which will be permitted at a later date, are both subject to impact fee credit in accordance with this Agreement.

**Section 2. The McCormick Property.** The McCormick Property comprises McCormick North, McCormick West, and McCormick Woods, which are legally described by parcel number in Exhibit A-1 and depicted on A-2, attached hereto and incorporated herein by this reference. The McCormick Projects will serve the McCormick Property and the credits authorized by this Development Agreement are only applicable to lots for which building permits are applied for after the date of this Agreement within the boundaries of the McCormick Property as defined on Exhibit A-1 and as shown on the Map attached hereto as Exhibit A-2.

**Section 3. Definitions.** As used in this Development Agreement, the following terms, phrases and words shall have the meanings and be interpreted as set forth in this Section.

a) “2005 Transportation Development Agreement” or “2005 Transportation DA” means the 2005 Development Agreement for Transportation which was executed between Kitsap County and Gem 1, LLC and dated April 25, 2005 and which was assumed by the City of Port Orchard upon annexation on May 27, 2009.

b) “Adopting Ordinance” means the Ordinance which approves this Development Agreement, as required by RCW 36.70B.200 and Chapter 20.26 POMC.’

c) “Commence construction” as to the McCormick Projects means that the required permit(s) have issued and there are “boots on the ground” at the construction site.

d) “Completion” as to the McCormick Projects means passing final inspection associated with the LDAP/SDP permits and providing the required 2-year warranty and

maintenance bond for the improvement(s).

“CPI-U” means the percentage rate change for the All Urban Consumers Index (CPI-U) (1982-1984=100), not seasonally adjusted, for the Seattle-Tacoma-Bellevue area for that 12 month period from January 1<sup>st</sup> to December 31<sup>st</sup> Indexed as the Annual Average, as is specified by the Bureau of Labor Statistics, United States Department of Labor. Increases based on CPI-U shall take effect on March 1<sup>st</sup> of the following year.

e) “Council” or “City Council” means the duly elected legislative body governing the City of Port Orchard.

f) “Director” means the City’s Community Development Director.

g) “Effective Date” means the effective date of the Adopting Ordinance.

h) “Maximum credit” or “maximum reimbursement” means the maximum amount that is eligible for projects subject to this Agreement, or for past projects done by GEM 1/MLC, for which reimbursement or impact fee credits will be provided by the City to the Developer or MLC.

i) “McCormick Project(s)” or “Project(s)” means the two transportation projects described above which serve both the McCormick Property and the greater community, as specified in Section 1 and as provided for in all associated permits/approvals, and all incorporated exhibits.

**Section 4. Exhibits.** Exhibits to this Agreement are as follows:

a) **Exhibit A-1** – Parcel numbers of the McCormick Property that are subject to impact fee credit.

b) **Exhibit A-2** – Map depicting the boundaries of the McCormick Property that are subject to the impact fee credit in this Agreement.

c) **Exhibit B-1** – Parcel numbers of the McCormick Property with vested concurrency.

d) **Exhibit B-2** Map depicting the boundaries of the McCormick Property with vested concurrency .

e) **Exhibit C** – Map showing the original boundaries for the 2005 Transportation DA which remains the reimbursement area for MLC

**Section 5. Parties to Development Agreement.** The parties to this Agreement are:

a) The “City” is the City of Port Orchard, 216 Prospect Street, Port Orchard, WA 98366.

b) The “Developer” or “Property Owner” or “McCormick” is a private enterprise which owns the McCormick Property in fee, and whose principal office is located at 12332 NE 115<sup>th</sup> Place, Kirkland, WA.

c) GEM 1, LLC is the prior owner of the property that was subject to the 2005 Transportation DA, and MLC is the successor to GEM for purposes of reimbursement. MLC is located at [REDACTED], WA and is still receiving reimbursement from the City for transportation projects done under the 2005 Transportation DA. These payments will continue in accordance with Section 15 of this Agreement.

**Section 6. Projects are a Private Undertaking.** It is agreed among the parties that the Projects are private improvements for which credits are required pursuant to RCW 82.02.060(4) and that the City has no interest in the improvements until such time as each Project is completed and dedicated to the City.

**Section 7. Term of Agreement.** This Agreement shall commence upon the effective date of the Adopting Ordinance approving this Agreement and shall continue in force for a period of twenty (20) years unless extended or terminated as provided herein, provided that reimbursement to MLC pursuant to Section 15 shall survive expiration until full reimbursement is received by MLC. Following the expiration of the term or extension thereof, or if sooner terminated, this Agreement shall have no force and effect.

**Section 8. Repeal and Replacement of 2005 Transportation DA.** In consideration of the benefits to the Developer provided by the timely construction of the McCormick Projects, the confirmation of concurrency, the agreement on a credit calculation for transportation impact fees which will be charged to the McCormick Property, and the continuation of reimbursement from impact fees to MLC, the Developer, MLC, and the City agree to rescind, and by execution of this Agreement do rescind, the 2005 Transportation Agreement, and replace it with this Development Agreement.

**Section 9. Concurrency.** The Parties agree that City streets affected by development of the McCormick Property have the capacity to serve the McCormick Property in compliance with the City’s concurrency requirements so long as such development does not result in the generation of more than 3,806 PM peak hour trips, which is the number of remaining trips identified in Section 9 of the 2005 Transportation DA reserved for the McCormick Property identified on Exhibits B-1 and B-2. This remaining concurrency provided in the 2005 Transportation DA is being carried forward for the duration of this Agreement as set forth below. These trips are available as of December 15, 2020.

Area	Available PM Peak Trips	Lots/Units for Residential <sup>1</sup>	Map Designation on Ex. C
McCormick North			North
• Village local center	659	(See Note 1)	North

(residential + commercial			
• Single Family Residential	312	315	North
<b>Total McCormick North</b>	<b>971</b>		
McCormick West			West
• Multifamily	415	419	West
• Single Family Residential	1,530	1,545	West
<b>Total McCormick West</b>	<b>1,945</b>		
McCormick Woods	697	640	Wd
McCormick Woods Retail	63	N/A	Wd
McCormick Woods Conference (Golf Facilities)	122	N/A	GC
McCormick Woods legacy lots	8	8	Not depicted
<b>Total McCormick Woods</b>	<b>890</b>		
<b>Grand Total</b>	<b>3,806</b>		

<sup>1</sup> There are 659 PM Peak Trips available within the Village local center. Residential PM Peak Trips will be calculated per unit and commercial PM Peak trips will be calculated by use type and square footage.

The defined areas for the assigned concurrency numbers above are listed by parcel number on Exhibit B-1 and shown (except for the eight legacy lots, which are vacant lots in prior subdivisions) on Exhibit B-2, which Exhibits are attached hereto and incorporated herein by this reference as if set forth in full. Residential development shall be limited by either the PM peak hour trips or the number of units, whichever is more restrictive. Commercial development shall be limited only by the PM peak hour trips. To the extent that McCormick in the future proposes residential or commercial development within the McCormick Property that will generate more than the number of PM peak hour trips shown in the above table, the City will make a new concurrency determination regarding the capacity of its street system at that time.

**Section 10. Project Schedule.** The Developer will commence construction of the two McCormick Projects on the following schedule

- a) Work on the roundabout at the intersection of Old Clifton Road and Campus Parkway (Project ID #1.5C on the City's TIP) (Permits #PW20-031 and PW20-032) shall commence no later than June 30, 2021, and Developer will complete construction in a timely and workmanlike manner. Such work shall be completed no later than September 30, 2022.
- b) Developer will submit a complete set of plans for a roundabout at the intersection of Old Clifton Road and McCormick Woods Drive (Project ID #2.08) no later than June 1, 2023

and will commence construction of said roundabout no later than June 1, 2024, provided that the City has before then acquired the additional land, not owned by Developer, that is needed for this roundabout; and Developer will complete construction in a timely and workmanlike manner. Such work shall be completed no later than September 30, 2025 so long as the City has acquired the land necessary for the roundabout before June 1, 2024. If the City has not acquired the land necessary for the roundabout before June 1, 2024, but does so more than 24 months before expiration of this Agreement, Developer shall construct the roundabout with 24 months of such acquisition.

**Section 11. Project standards.** Developer will finance, design, and construct these McCormick Projects to comply with City standards, including obtaining all necessary permits. The City will approve the plans before construction begins; and the City will accept responsibility for the operation of the Projects once construction is completed and a two-year warranty and maintenance bond is in place. A Project will be deemed completed when all of the following occurs: 1. The City deems it substantially complete; 2. All punch list items are finished; 3. The City releases the performance bond; 4. The Developer has put a 2-year warranty and maintenance bond in place; 5. The Developer has completed all property dedications; and 6. The Developer has provided the City with a Bill of Sale for the improvements containing the certified construction costs (stamped by licensed engineer) to the City for determination of the maximum credits available under this Agreement. The City will confirm completeness of the Project by issuing a Final Notice of Completeness to the Developer.

**Section 12. Project costs.** The maximum amount of the credit (or reimbursement) for project costs performed under this Agreement shall be limited to no greater than the engineer's estimate contained in the City's transportation impact fee calculation, plus an annual inflator per the CPI-U, or, the actual costs incurred by the Developer, whichever is less. The credits provided under Section 14 below are limited to this maximum credit/reimbursement amount and once the project cost maximum(s) have been achieved through credits or direct reimbursement to Developer, the credits will no longer be available and full impact fees will be due for further development.

**Section 13. Applicable Impact Fees.** The repeal and replacement of the 2005 Transportation DA results in all property owners both within and without the McCormick Property being subject to the City's established city-wide impact fees as these now exist or may be modified in the future by the City Council. This Agreement further confirms that impact fees, permit fees, capital facilities charges, and other similar fees which are adopted by the City as of the Effective Date of this Agreement may be increased by the City from time to time, and made applicable to permits and approvals for the McCormick Property, as long as such fees and charges apply to similar applications and projects elsewhere in the City. All impact fees shall be paid as set forth in the approved permit or approval, or as addressed in chapter 20.182 of the Port Orchard Municipal Code, except as modified by this Agreement. Nothing in this Agreement restricts or prohibits the City from raising its fees, including transportation impact fees, and the Developer agrees to pay the impact fees at the rates that are in effect at the time when payment is due minus any credits applicable according to this Agreement.

**Section 14. Impact Fee Credits.** The City hereby grants the Developer a credit against transportation impact fees for its costs to finance, design, and construct the McCormick Projects.



The credit is available to parcels located in the areas identified and shown on Exhibits A-1 and A-2. The credits will be calculated and applied as follows:

- a) Each parcel or lot that is developed within the McCormick Property credit area (Exhibits A-1 and A-2) will pay the City's adopted impact fees until Developer provides documentation to the City that Developer has expended a minimum of \$50,000 towards the design or construction of one of the McCormick Projects. At the time of this Agreement, the parties believe that Developer has already met this threshold, therefore, once Developer provides the documentation, the City will begin applying the credit described in this Agreement.
- b) Once McCormick provides documentation to the City of such \$50,000 expenditure, the City will grant a credit in the amount of \$1,000 per new home (or per peak pm trip for commercial/multifamily development) against its standard transportation impact fee for each application to develop a lot or parcel within the McCormick Property credit area (Exhibits A-1 and A-2) until such time as the credits granted by the City equal the amount of credit due to Developer under Section 12 above. This credit amount shall be adjusted as follows:
  - i. The \$1,000 credit shall be adjusted annually per the CPI-U, such adjustment to occur on March 1<sup>st</sup> of each year;
  - ii. If the amount outstanding for reimbursement of project costs is less than the credit, then the lesser amount shall be provided as a credit;
  - iii. If the City reimburses the Developer directly with SEPA mitigation funds received from another developer, then that amount shall be deducted dollar for dollar from the amount of project costs outstanding and the credits available will be reduced accordingly.
- c) Upon completion of each Project, Developer shall submit certified project costs to the City for review and acceptance by the City Engineer. Once these costs and executed Bill of Sale are reviewed and accepted by the City Engineer, the maximum credit due to Developer will be established and will equal the amount of the project costs as so certified in accordance with this subsection and Section 12. The City will grant the credits described in Subsection b) above against the transportation impacts fees that would otherwise be due for development of lots and parcels within the McCormick Property credit area as identified and shown on Exhibits A-1 and A-2. Such credits shall be provided until such time as the Developer receives full credit and/or reimbursement for its project costs or this Agreement terminates, whichever occurs first.

The City agrees that these credits are consistent with RCW 82.02.060(4); that they are appropriate in light of the unusual circumstances described in the Recitals above; that they are consistent with the intent of POMC 20.182.080; and that the City Council has legislatively approved this Agreement and exempted these credits for development of the McCormick Projects from the specific provisions of POMC 20.182.080.

**Section 15. McCormick Land Company Reimbursement.** This Agreement reaffirms the City's obligation to reimburse MLC for construction of the Glenwood Connector Roadway and minor improvements to Feigley Road. The maximum reimbursement amounts outstanding for these projects as of August 1, 2020 is \$1,542,239.64. Regardless of any fee credits provided for in this Agreement, the City's reimbursement for such project shall continue at the rate of \$720.80 for each unit of housing constructed or for each PM Peak trip, or fraction thereof, for which an impact fee is assessed in the MLC reimbursement area as depicted on Exhibit C until such time as MLC is fully reimbursed or this Agreement expires, whichever occurs first. This reimbursement amount shall be increased annually by CPI-U (Seattle/Tacoma/Bellevue) for the most recent twelve-month period (January 1<sup>st</sup> to December 31<sup>st</sup>) prior to the date of the adjustment. Such adjustment shall take effect on March 1<sup>st</sup> of each year, commencing on March 1, 2021. Disbursements shall be made annually in January of each year based on the collections from January 1<sup>st</sup> to December 31<sup>st</sup> in the prior year, however in 2021, such payment shall only be from collections from August 1 to December 31, 2020 as payment from collections through July 31, 2020 has already occurred. MLC agrees to the repeal of the 2005 Transportation DA and accepts the continued reimbursement under this new Agreement and agrees to be bound by this new Agreement as shown by its signature to this Agreement. This Section 15 shall survive expiration of this Agreement and shall remain in effect until such time as MLC has been fully reimbursed under the terms of this Agreement for construction of the Glenwood Connector Roadway and minor improvements to Feigley Road.

**Section 16. Dedication of Public Lands.** The Developer shall dedicate the land that it owns that is needed to construct the McCormick Projects prior to final completion of each Project. Neither Project shall be deemed completed until such dedications have occurred. In addition, consistent with Section 9 of the 2005 Transportation DA, to the extent that projects on the City's TIP including Old Clifton Widening and the Feigley Road Roundabout require additional dedications of right-of-way from within the McCormick Property, McCormick will dedicate that portion of the additional right-of-way. Such dedications shall occur within a mutually agreeable timeframe prior to the bid solicitation for the project requiring additional right-of-way.

**Section 17. Default.**

a) Subject to extensions of time by mutual consent in writing, failure or delay by either Party to perform any term or provision of this Agreement shall constitute a default. In the event of alleged default or breach of any terms or conditions of this Agreement, the Party alleging such default or breach shall give the other Party not less than thirty (30) days' notice in writing, specifying the nature of the alleged default and the manner in which said default may be cured. During this thirty (30) day period, the Party charged shall not be considered in default for purposes of termination or institution of legal proceedings.

b) After notice and expiration of the thirty (30) day period, if such default has not been cured or is not being diligently cured in the manner set forth in the notice, the other Party to this Agreement may, at its option, institute legal proceedings pursuant to this Agreement. In addition, the City may decide to file an action to enforce the City's Codes, and to obtain penalties and costs as provided in the Port Orchard Municipal Code for violations of this Development

Agreement and the Code.

**Section 18. Termination.** This Agreement shall terminate upon the expiration of the term identified in Section 7, which expiration date is [INSERT DATE]. Upon termination of this Agreement, the City shall record a notice of such termination in a form satisfactory to the City Attorney that the Agreement has been terminated. In addition, this Agreement shall automatically terminate and be of no further force and effect as to any single-family residence, any other residential dwelling unit or any non-residential building and the lot or parcel upon which such residence or building is located, when it has been approved by the City for occupancy and impact fees have been paid.

**Section 19. Extension and Modification.** Any request for extension or modification, if allowed under the City's code, shall be subject to the provisions contained in Chapter 20.26 POMC.

**Section 20. Effect upon Termination on Developer and MLC.** Termination of this Agreement as to the Developer or as to MLC shall not affect any of the Developer's or MLC's respective obligations to comply with the City Comprehensive Plan and the terms and conditions or any applicable zoning code(s) or subdivision map or other land use entitlements approved with respect to the McCormick Property or the MLC property, or any other conditions specified in the Agreement to continue after the termination of this Agreement or obligations to pay assessments, liens, fees or taxes. Furthermore, if the Agreement expires without the project costs being fully recovered by impact fee credit or mitigation funds, the Developer will no longer be eligible to receive such credits. Provided, however, that Section 15 of this Agreement will survive termination if MLC has not yet been fully reimbursed and this Agreement will only expire as to MLC after both termination and full reimbursement have occurred.

**Section 21. Effects upon Termination on City.** Upon any termination of this Agreement as to the McCormick Property, or any portion thereof, or as to MLC property, the entitlements, conditions of development, limitations on fees and all other terms and conditions of this Agreement shall no longer be vested hereby with respect to the property affected by such termination (provided that vesting of such entitlements, conditions or fees may then be established for such property pursuant to the then existing planning and zoning laws). The City will be under no obligation to provide any additional credits or reimbursement to Developer even if the project costs have not been fully recovered at the time of expiration or termination.

**Section 22. Assignment and Assumption.** The Developer shall have the right to sell, assign or transfer this Agreement with all rights, title and interests therein to any person, firm or corporation at any time during the term of this Agreement with a sale of the underlying property. Developer shall provide the City with written notice of any intent to sell, assign, or transfer all or a portion of the McCormick Property, at least 30 days in advance of such action. A transfer by Developer will not impact the rights of MLC under this Agreement. This requirement for notice, however, does not apply to the sale by Developer of individual residential lots approved by the City for development of houses.

**Section 23. Binding on Successors; Covenants Running with the Land.** The conditions and covenants set forth in this Agreement and incorporated herein by the Exhibits shall run with the land and the benefits and burdens shall bind and inure to the benefit of the Parties. The Developer and every purchaser, assignee or transferee of an interest in the McCormick Property, or any portion thereof, shall be obligated and bound by the terms and conditions of this Agreement, and shall be the beneficiary thereof and a Party thereto, but only with respect to the McCormick Property, or such portion thereof, sold, assigned or transferred to it. Any such purchaser, assignee or transferee shall observe and fully perform all of the duties and obligations of a Developer contained in this Agreement, as such duties and obligations pertain to the portion of the McCormick Property sold, assigned or transferred to it.

**Section 24. Amendment to Agreement; Effect of Agreement on Future Actions.** No waiver, alteration, or modification to any of the provisions of this Agreement shall be binding unless in writing, signed by the duly authorized representatives of the Parties, be consistent with Chapter 20.26 POMC, and, where considered substantive as determined by the Director, follow the same procedures set forth in Chapter 20.26 POMC. However, nothing in this Agreement shall prevent the City Council from making any amendment to its Comprehensive Plan, Zoning Code, Official Zoning Map or development regulations, or to impacts fees that affect the McCormick Property in the same manner as other properties, after the Effective Date of this Agreement.

**Section 25. Releases.**

a) General. Developer may free itself from further obligations relating to the sold, assigned, or transferred property, provided that the buyer, assignee or transferee expressly assumes the obligations under this Agreement as provided herein.

b) Previously collected impact fees. Developer expressly waives and forever releases City from any and all claims it may have with regards to the amount or usage of any transportation impact fees which the City collected from property that was subject to the 2005 Transportation DA prior to the effective date of this Agreement. Developer further agrees that City can utilize these previously collected funds on any project it deems appropriate and is not limited to the projects outlined in the 2005 Transportation DA. These projects include, but are not limited, to the Old Clifton Road/Anderson Hill Road Roundabout (Project 2.07), the Old Clifton Road non-motorized shoulder and pedestrian improvements (Project 1.5A), Old Clifton Widening Design (Project 1.5A), and Bethel Avenue (Project 1.3).

c) Obligations to Kitsap County Extinguished. This Agreement being a complete replacement to the 2005 Transportation DA, neither Party has any obligations to Kitsap County.

**Section 26. Notices.** Notices, demands, correspondence to the City, MLC, and/or Developer (as applicable) shall be sufficiently given if dispatched by pre-paid first-class mail to the addresses of the parties as designated in “Written Notice” Section 38 below. Notice to the City shall be to the attention of both the City Clerk and the City Attorney. Notices to successors-in-interest of the Developer shall be required to be given by the City only for those successors-in-interest who have given the City written notice of their address for such notice. The parties

hereto may, from time to time, advise the other of new addresses for such notices, demands or correspondence.

**Section 27. Reimbursement for Agreement Expenses of the City.** Developer agrees to reimburse the City for actual expenses incurred over and above fees paid by Developer as an applicant incurred by City directly relating to this Agreement, including recording fees, publishing fees and reasonable staff and consultant costs not otherwise included within application fees. This Agreement shall not take effect until the fees provided for in this section, as well as any processing fees owed to the City for the transportation project known as the Campus Parkway Roundabout are paid to the City. Upon payment of all expenses, the Developer may request written acknowledgement of all fees. Such payment of all fees shall be paid, at the latest, within thirty (30) days from the City's presentation of a written statement of charges to the Developer.

**Section 28. Applicable Law, Resolution of Disputes, and Attorneys' Fees.** If any dispute arises between the City and Developer under any of the provisions of this Agreement, jurisdiction of any resulting litigation shall be filed in Kitsap County Superior Court, Kitsap County, Washington or the U.S. District Court for Western Washington. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. The non-prevailing Party in any action brought to enforce this Agreement shall pay the other Parties' expenses and reasonable attorney's fees.

**Section 29. No Third-Party Beneficiaries.** Except as otherwise provided herein, this Agreement shall not create any rights enforceable by any party who is not a Party to this Agreement.

**Section 30. City's right to breach.** The parties agree that the City may, without incurring any liability, engage in action that would otherwise be a breach if the City makes a determination on the record that the action is necessary to avoid a serious threat to public health and safety, or if the action is required by federal or state law.

**Section 31. Developer's Compliance.** The City's duties under the agreement are expressly conditioned upon the Developer's or Property Owner's substantial compliance with each and every term, condition, provision and/or covenant in this Agreement, including all applicable federal, state, and local laws and regulations and the Developer's/Property Owner's obligations as identified in any approval or project permit for the property identified in this Agreement.

**Section 32. Limitation on City's Liability for Breach.** Any breach of this Agreement by the City shall give right only to damages under state contract law and shall not give rise to any liability under Chapter 64.40 RCW, the Fifth and Fourteenth Amendments to the U.S. Constitution, or similar state constitutional provisions.

**Section 33. Third Party Legal Challenge.** In the event any legal action or special proceeding is commenced by any person or entity other than a Party to challenge this Agreement or any provision herein, the City may elect to tender the defense of such lawsuit or individual claims in the lawsuit to Developer. In such event, Developer shall hold the City harmless from

and defend the City from all costs and expenses incurred in the defense of such lawsuit or individual claims in the lawsuit, including but not limited to, attorneys' fees and expenses of litigation. The Developer shall not settle any lawsuit without the consent of the City. The City shall act in good faith and shall not unreasonably withhold consent to settle.

**Section 34. Specific Performance.** The parties specifically agree that damages are not an adequate remedy for breach of this Agreement, and that the parties are entitled to compel specific performance of all material terms of this Development Agreement by any Party in default hereof.

**Section 35. Recording.** This Agreement shall be recorded against the property with the real property records of the Kitsap County Auditor. During the term of the Agreement, it is binding upon the owners of the property and any successors in interest to such property.

**Section 36. Severability.** If any phrase, provision or section of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, or if any provision of this Agreement is rendered invalid or unenforceable according to the terms of any statute of the State of Washington which became effective after the effective date of the ordinance adopting this Development Agreement, and either Party in good faith determines that such provision or provisions are material to its entering into this Agreement, that Party may elect to terminate this Agreement as to all of its obligations remaining unperformed.

**Section 37. Non-Waiver of Breach.** The failure of a Party to insist upon strict performance of any of the covenants and agreements contained herein, or to exercise any option herein conferred in one or more instances shall not be construed to be a waiver or relinquishment of said covenants, agreements, or options, and the same shall be and remain in full force and effect.

**Section 38. Written Notice.** All written communications regarding enforcement or alleged breach of this Agreement shall be sent to the parties at the addresses listed below, unless notified to the contrary. Unless otherwise specified, any written notice hereunder shall become effective upon the date of both emailing and mailing by registered or certified mail, and shall be deemed sufficiently given if sent to the addressee at the address stated below:

**McCORMICK:**

Eric Campbell  
12332 NE 115<sup>th</sup> Place  
Kirkland, WA 98033  
[eric@mspgroupllc.com](mailto:eric@mspgroupllc.com)

Nick Tosti  
805 Kirkland Avenue, Suite 200  
Kirkland, WA 98033  
[nicktosti@gmail.com](mailto:nicktosti@gmail.com)

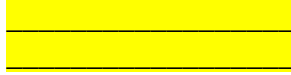
**CITY:**

Mayor  
City of Port Orchard  
216 Prospect Street  
Port Orchard WA 98366  
[rputaansuu@cityofportorchard.us](mailto:rputaansuu@cityofportorchard.us)

Copies shall also be transmitted to the City Clerk and City Attorney at the above address.

**GEM 1, LLC / McCORMICK  
LAND COMPANY**

Doug Skrobot



[dskrobot@gmail.com](mailto:dskrobot@gmail.com)

**Section 39. Time is of the essence.** All time limits set forth herein are of the essence. The Parties agree to perform all obligations under this Agreement with due diligence.

**Section 40. Entire Agreement.** The written provisions and terms of this Agreement, together with the Exhibits attached hereto, shall supersede all prior verbal statements of any officer or other representative of the parties, and such statements shall not be effective or be construed as entering into or forming a part of or altering in any manner whatsoever, this Agreement. The entire agreement between the parties with respect to the subject matter hereunder is contained in this Agreement and exhibits thereto.

IN WITNESS WHEREOF, the parties have executed this Agreement on this \_\_\_\_ day of \_\_\_\_\_, 2021.

**MCCORMICK COMMUNITIES, LLC**

**CITY OF PORT ORCHARD**

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: Mayor

**GEM 1, LLC/McCORMICK LAND  
COMPANY**

By: \_\_\_\_\_  
Its: \_\_\_\_\_

**APPROVED AS TO FORM:**

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Patrick Schneider  
Attorney for McCormick

\_\_\_\_\_  
Jennifer S. Robertson  
Attorney for Port Orchard

**APPROVED AS TO FORM:**

**ATTEST:**

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Duana Kolouskova  
Attorney for GEM 1, LLC/MLC

---

Brandy Rinearson  
Port Orchard City Clerk

DRAFT



**NOTARY BLOCK FOR PORT ORCHARD**

STATE OF WASHINGTON        )  
  ) ss.  
COUNTY OF KITSAP        )

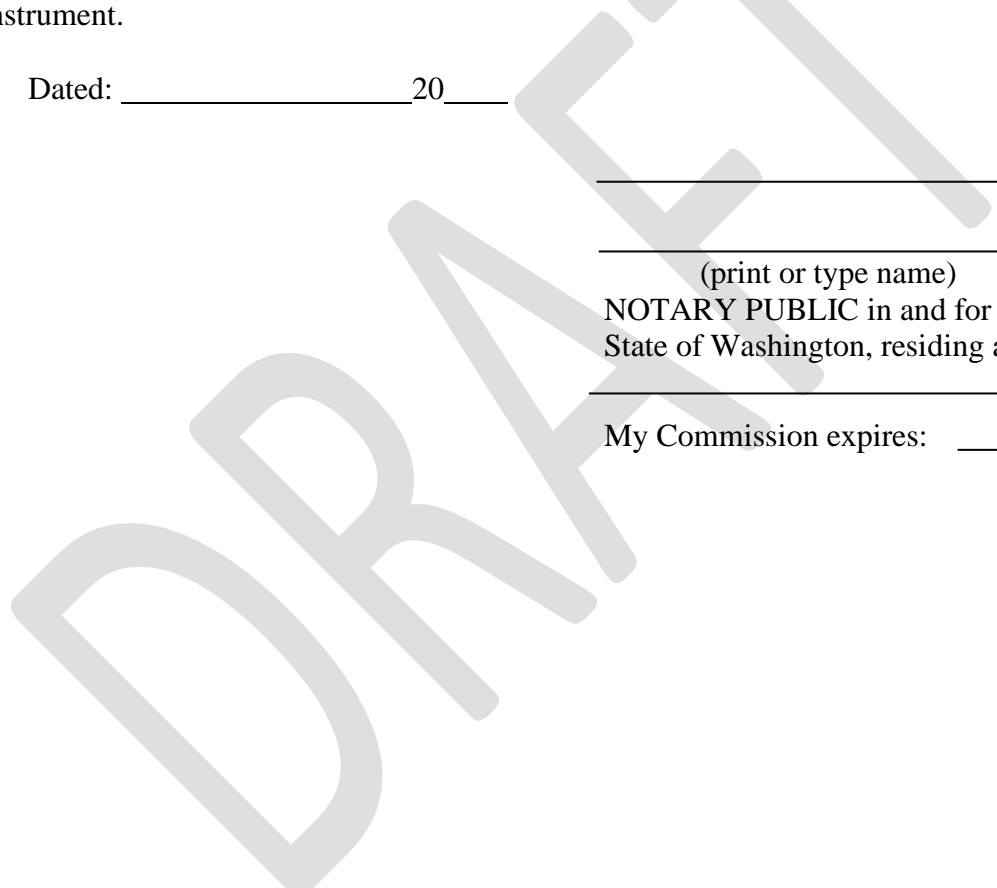
I certify that I know or have satisfactory evidence that Mr. Rob Putaansuu is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the Mayor of Port Orchard to be the free and voluntary act of such Party for the uses and purposes mentioned in the instrument.

Dated: \_\_\_\_\_ 20\_\_\_\_\_

\_\_\_\_\_

(print or type name)  
NOTARY PUBLIC in and for the  
State of Washington, residing at:

\_\_\_\_\_  
My Commission expires: \_\_\_\_\_



**NOTARY BLOCK FOR McCORMICK COMMUNITIES**

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

I certify that I know or have satisfactory evidence that Mr. \_\_\_\_\_ 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 acknowledged it as the \_\_\_\_\_ of McCormick Communities, LLC to be the free and voluntary act of such Party for the uses and purposes mentioned in the instrument.

Dated: \_\_\_\_\_ 20\_\_\_\_

\_\_\_\_\_

(print or type name)  
NOTARY PUBLIC in and for the  
State of Washington, residing at: \_\_\_\_\_

My Commission expires: \_\_\_\_\_

DRAFT

NOTARY BLOCK FOR GEM 1 / McCORMICK LAND COMPANY

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

I certify that I know or have satisfactory evidence that Mr. Doug Skorbut 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 acknowledged it as the \_\_\_\_\_ of GEM 1, LLC/McCormick Land Company to be the free and voluntary act of such Party for the uses and purposes mentioned in the instrument.

Dated: \_\_\_\_\_ 20\_\_

\_\_\_\_\_  
\_\_\_\_\_  
(print or type name)  
NOTARY PUBLIC in and for the  
State of Washington, residing at: \_\_\_\_\_

My Commission expires: \_\_\_\_\_