

October 7, 2013

To: Mayor Bemrich and City Council

From: David Fierke, City Manager

**Subject: Pizza Ranch and Webster County Agreement for Development in
Drainage District Easement**



ACTION: For Vote Monday, October 14, 2013

Brief History

Pizza Ranch is proposing to construct a building on the northwest out lot of Menards (MPR Subdivision Plat, approved by the Council on August 26, 2013). A portion of the lot lies within the Webster County Drainage District No. 1 ditch easement, where direct discharge of additional waters created from development is discouraged, as the culvert downstream of the ditch is reaching its full capacity. Pizza Ranch is proposing to construct a detention pond within Webster County's right-of-way easement of such ditch in order to catch stormwater before it enters into the ditch; therefore, reducing its impact to the ditch. Development within this easement requires an agreement between Pizza Ranch and Webster County to establish parameters for construction of the detention pond and maintenance of the drainage ditch. Establishing such parameters requires acknowledgement from the City, as established in Section 4.3 of the attached agreement.

Section 4.3 declares that if the District performs a permanent realignment or alteration to the ditch and the detention pond becomes inoperable, the District will allow the Developer to remove all detention facilities and direct discharge the stormwater, undetained, into the District's ditch. In allowing this to happen, the County and Pizza Ranch has asked that the City acknowledge such agreement; allowing the Developer to direct discharge stormwater into the County Ditch, without detention, whether or not stormwater detention is required by City Code, ordinance, or other directive in the future.

Analysis of Issue

Future impacts are limited, as reconstruction of the ditch, and culvert downstream would allow for additional stormwaters to be directed into the ditch. Acknowledging Section 4.3 of the above Agreement will allow the Pizza Ranch development to move forward and Site Plan Review to continue.

Budget Impact

Acknowledging to Section 4.3 of the Agreement between Pizza Ranch and Webster County will not entail any City expenditures.

Strategic Plan Impact

Meets strategic plan policies as identified below.

- Policy C.1.1: With the majority of new jobs being created by small business, the expansion of existing small businesses and the start up of new small businesses shall be a critical component of the city's economic development effort.

- Policy D.1.4: Runoff and drainage from development shall be of a quality and quantity as near to natural conditions as possible.
- Policy D.3.8: New development and infill development shall be especially encouraged in locations where a full range of urban services and infrastructure (i.e. schools, fire stations, water and sewer facilities, parks, and roads) is already in place, and where the public sector will not incur the full cost for building new facilities to serve the area.

Existing Plan Impact

This agreement will not negatively impact the existing plans adopted by the City. The agreement will allow development on the site; which as proposed, will compliment the City's existing Site Plan Ordinance, in terms of stormwater management practices.

Subcommittee or Commission Review / Recommendation

N/A

Staff Conclusions / Recommendations

Staff recommends moving forward with acknowledgement of the agreement to allow the Developer to remove all detention facilities and direct discharge the stormwater, undetained, into the District's Ditch in the future, if the District performs a permanent realignment or alteration to the ditch and the detention pond becomes inoperable.

Alternatives

The alternative would be to not proceed with the agreement. This may prevent the project as proposed, from moving forward.

Implementation and Accountability

If the Council approves acknowledgement of the agreement, the proposed development of Pizza Ranch will move forward. Pizza Ranch with the supervision of Webster County will be allowed to construct the detention pond within the Drainage District Ditch Easement. All ditch maintenance will be a responsibility of the County with confidence that Pizza Ranch will adhere to parameters established within the agreement in order to mitigate any impacts to the ditch.

Signed



Carissa Miller
Associate Planner
Department of Business Affairs &
Community Growth

Approved

David R. Fierke
City Manager

AGREEMENT FOR DEVELOPMENT IN DRAINAGE DISTRICT EASEMENT

This Agreement is made this _____ day of _____, 2013 by and between **Webster County, Iowa**, acting by and through its Board of Supervisors as the Trustees of Drainage District No. 1 (hereinafter the “*District*”); and _____, an Iowa limited liability company (hereinafter the “*Developer*”).

WHEREAS, Developer is constructing a new Pizza Ranch restaurant at 3315 5th Avenue South in Fort Dodge, Iowa (hereinafter the “*Project*”), the grading and drainage plan (“*Plan*”) for which is attached hereto as Exhibit A; and

WHEREAS, as shown on Exhibit A, said Project is adjacent to the easterly right-of-way of the District’s open ditch, and will result in construction activities within the right-of-way easement of the Drainage District No. 1 ditch, including the construction of a detention pond; and

WHEREAS, the District wants to ensure that the construction of the Project and the detention pond do not now or in the future, interfere with or otherwise adversely impact the District’s use of its right-of-way, or the drainage efficiency of the open ditch; and

WHEREAS, the parties acknowledge that this Agreement is being entered into under the authority of Iowa Code §468.186, as the Developer has requested permission to undertake construction activities within the right-of-way easement of the Drainage District No. 1 open ditch; and

WHEREFORE, in consideration of the mutual promises herein, and other good and valuable consideration, the District hereby grants to Developer and its successors and assigns, a limited permanent easement to encroach into the District’s open ditch right-of-way easement, upon and subject to the following terms and conditions.

1. Permitted Construction Within the District Right-of-Way.
 - A. Detention Pond Encroachment. As shown on the Plan attached hereto as Exhibit A, virtually the entire Detention Pond will encroach into the District’s right-of-way for the open ditch. The Board hereby authorizes said encroachment, but subject to the following terms, conditions, and limitations:
 - i.) The detention pond encroachment shall be strictly limited to that area and extent specified in Exhibit A, and any deviations or modifications to same shall require additional Board approval.
 - ii.) The detention pond shall be maintained by the Developer in good condition and proper working order. In the event it is damaged

because of the flows in the ditch, the deterioration of the ditch bank, a clean-out or other maintenance activities by the District, or any other cause, Developer shall be solely responsible to promptly restore same.

- B. Limitation. Except as set forth in A. above, no other encroachments of any kind related to the Project shall be allowed in the District's right-of-way easement, expressly including fencing or landscaping (other than grass).

2. District Representative. During construction and installation of the Project, the District shall have the right to have a licensed engineer (hereinafter the "*District Representative*") on-site for the purpose of observing activities to confirm that said construction conforms to the specifications set forth herein. Such inspector shall be appointed by the District and shall be under the direction and control of the District. All customary and reasonable wages, mileage and expenses incurred by said District Representative in carrying out his duties hereunder shall be paid by the Developer. The District Representative shall have unimpeded access to the Project site.

The Developer shall notify the County Drainage Clerk no less than seven (7) days prior to the commencement of construction activities within the District's right-of-way.

The District Representative shall have the authority, in his reasonable discretion, to suspend construction within the District right-of-way in the event of:

- (i) Material non-compliance by Developer with the provisions of this Agreement; or
- (ii) Imminent risk of damage to the District's facilities at the Project site.

Said authority may be exercised by verbal order at the Project site followed by a telephone call to Developer within six (6) hours. (Phone Number - _____)

3. Obligations of Developer During Construction.

3.1 Obligation to Repair Drainage Facilities. If any portions of the District's drainage facilities are damaged as a result of the Project construction, the Developer shall promptly repair (or cause to be repaired) such damage as directed by the District Representative in his reasonable discretion.

3.2 Compaction, Rutting and Soil Restoration. The Developer shall be responsible to restore all land within the District right-of-way that is disturbed during construction of the Project to its pre-construction condition as near as is practicable. All disturbed areas shall be graded and reseeded.

3.3 Failure to Repair. If the Developer fails on its own to properly repair or restore any portion of the District's facilities or right-of-way that is damaged as a result of the

Project as required hereunder, the District may demand in writing that the Developer repair same within the agreed period; then, unless the Developer and District mutually agree otherwise, the District may make such repairs and invoice the Developer for the reasonable cost of such repairs. Developer shall pay such amount within thirty (30) days of receipt of the invoice, or the District may access said costs per the usual procedure.

3.4 Preliminary Punchlist. Not less than thirty (30) days before the completion of the Project, the District Representative shall issue a preliminary punch list of items requiring restoration or repair under this Agreement. Developer will proceed with correcting all punch list items upon which the Developer and District agree. If there are items upon which Developer and District disagree, Developer and District shall meet to attempt to reach agreement on all such items. If agreement cannot be reached, Developer shall engage an independent licensed engineer acceptable to District to review the items and this Agreement and determine whether the items in dispute should be part of the punch list. The determination of the independent engineer shall be binding and conclusive on both parties. Developer shall make repairs in accordance with the determination by the independent engineer.

3.5 As-Built Plans. Final “as-built” plans and maps for all final Project installations within the District right-of-way shall be furnished to the Webster County Drainage Clerk within 90 days after the date of Project completion. Said plans shall include a plan and profile and location using civil monument or GPS locations.

4. Continuing Obligations of Developer.

4.1 Recognizing that damage to the District’s drainage facilities caused by the Project may not be discovered or manifest itself until well after completion of the Project’s construction activities, Developer hereby agrees that for a period of two (2) years from and after the date of Completion, they shall be responsible to repair any damage to the facilities of the District that were caused by or arose out of the Project’s construction activities. In the event during said two-year period the District Representative identifies damage to a District facility that he believes is a result of the Project’s construction activities, the District shall notify Developer and City of same. If Developer acknowledges that the damage was the result of the Project’s construction activities, the City and Developer shall remedy same pursuant to the provisions of this Agreement. If the parties cannot agree on the cause or extent of the damage, they shall retain an independent licensed engineer acceptable to both to make a determination of whether the damage was a result of the Project’s construction activities and the scope of repair necessary to remedy same. The determination of the independent engineer shall be conclusive and binding on both parties.

4.2 **THE DEVELOPER SHALL, AT ANY TIME SUBSEQUENT TO THE COMPLETION OF PROJECT AND AT ITS SOLE EXPENSE, RECONSTRUCT OR REPLACE ANY PORTION OF THE PROJECT (INCLUDING ALL OR ANY PORTION OF THE DETENTION POND) LOCATED WITHIN THE DISTRICT’S RIGHT-OF-WAY AS MAY BE NECESSARY AS A RESULT OF MAINTENANCE OPERATIONS BY THE DISTRICT IN CONNECTION WITH THE DITCH; PROVIDED, THE DISTRICT WILL FIRST DISCUSS ANY SUCH PLANS WITH THE**

DEVELOPER IN AN EFFORT TO MINIMIZE ANY IMPACT ON THE PROJECT IMPROVEMENTS. THE DISTRICT FURTHER ACKNOWLEDGES THAT A GOOD FAITH EFFORT WILL BE MADE TO PERFORM SUCH MAINTENANCE OPERATIONS AROUND THE DETENTION POND, TO THE EXTENT REASONABLY PRACTICAL, THAT WILL CAUSE THE LEAST AMOUNT OF IMPACT TO THE DEVELOPER'S DETENTION POND AND ASSOCIATED IMPROVEMENTS. THIS WOULD INCLUDE, BUT NOT BE LIMITED TO, UTILIZING THE PROPERTY ON THE WEST SIDE OF THE DITCH (CURRENTLY OWNED BY THE CITY OF FORT DODGE) AND PORTIONS OF THE COUNTY'S DITCH EASEMENT SOUTH OF THE PROPOSED DETENTION POND FOR CONSTRUCTION OPERATIONS, STAGING, STORAGE OF EQUIPMENT, HAUL ROUTES, AND THE SPREADING OF EXCAVATED SOIL MATERIAL FROM THE DITCH. RECONSTRUCTION OF THE PROJECT IMPROVEMENTS BY THE DEVELOPER SHALL BE MADE IN ACCORDANCE WITH AND APPROVED BY THE DISTRICT OR ITS REPRESENTATIVE, AND THE DEVELOPER AGREES TO COMPLETE SAME WITHIN SIXTY (60) DAYS OF RECEIPT OF A WRITTEN REQUEST FROM THE DISTRICT, (OR SUCH LONGER TIME PERIOD AS THE DISTRICT MAY SPECIFY), WITHOUT COST TO THE DISTRICT. IF THE DEVELOPER IS UNWILLING OR UNABLE TO COMPLY WITHIN THE TIME PERIOD SPECIFIED ABOVE, THE DISTRICT MAY CAUSE THE WORKED TO BE DONE AND THE DEVELOPER WILL PAY THE REASONABLE COST THEREOF UPON RECEIPT OF A STATEMENT OF SUCH COSTS.

SO LONG AS DEVELOPER RECEIVES NOTICE AND INCLUDING A GOOD FAITH EFFORT BY THE COUNTY SET FORTH ABOVE, THE COUNTY SHALL HAVE NO RESPONSIBILITY FOR DAMAGES TO DEVELOPER RESULTING FROM ANY DITCH CONSTRUCTION OR MAINTENANCE ACTIVITIES BY THE DISTRICT.

4.3 Ditch Realignment or Major Ditch Reconstruction: In the event the District performs a permanent realignment of the ditch centerline, alteration in ditch cross section, or any other activity that would render the Developer's detention pond system permanently inoperable or non-functional, given the detention pond design shown in Exhibit A, the District will allow the Developer to remove all detention facilities and direct discharge the stormwater undetained into the District's Ditch. This is to be accomplished through the installation of underground storm sewer piping and structures (or another method approved by the Developer and District at that time) connecting the property's storm sewer system to the Ditch. These improvements are to be completed by District forces as part of the major ditch reconstruction activity, to the approval of the Developer or its representative, and reimbursed to the County by the Developer for the actual cost of construction improvements incurred by the County.

ACKNOWLEDGEMENT OF CITY FOR FUTURE DETENTION VARIANCE

Given the circumstances stated above, the City of Fort Dodge will allow the Developer to direct discharge stormwater into the County Ditch, without detention, whether or not stormwater detention is required by City Code, ordinances, or other directive in the future.

Director of B.A.C.G.– City of Fort Dodge Date

Mayor – City of Fort Dodge Date

4.4 Developer acknowledges the risk it is taking in constructing Project improvements within the District right-of-way, all or part of which may need to be removed and/or relocated at Developer’s expense, in accordance with the conditions set forth above. The Developer agrees and consents to a classification or reclassification, as the case may be, of all its land located within Drainage District No. 1 subsequent to the completion of the Project. All land within the District’s boundary shall be subject to assessment pursuant to said classification.

5. Indemnity. Webster County and its elected and appointed officials, as well as its officers, agents, employees, representatives and contractors shall not be liable or responsible in any manner to the Developer, or to any contractor, subcontractor, materialman, laborer, or any other person or persons whomsoever, for any claims, demands, damages, actions, or causes of action of any kind or character whatsoever which arise out of work on the Project during initial construction or at any time thereafter, and whether within or outside of the District right-of-way; or from the failure by Developer to observe or perform any covenant, condition, obligation or agreement on its part to be observed or performed under this Agreement; or from the failure by the Developer to pay such persons. Developer, further agrees to indemnify, defend, and hold the District, Webster County, and its elected and appointed officials, its officers, engineers, agents, employees representatives and volunteers harmless from all such claims, demands, damages, actions, or causes of action, and all costs, disbursements, and expenses resulting from such claims, including reasonable attorneys' fees to the extent that such claims, demands, damages, actions or causes of action were not caused by the gross negligence of any such indemnified person.

6. Notice. Any notice, demand, or other communication ("Notice") given under this Agreement shall be in writing and given personally or by registered or certified mail (return receipt requested) as set forth below. A courtesy copy of the Notice may be sent by facsimile transmission.

If to the District: Webster County Auditor
Attention: Drainage Clerk
701 Central Avenue
Fort Dodge, Iowa 50501
E-mail: auditor@webstercountya.org
Fax: 515-574-3714

If to the Developer: _____

E-mail: _____
Fax: _____

By notice to the other party, any party may at any time designate a different address or person to which such notice or communication shall be given.

7. Default and Remedies.

7.1 Remedies. If Developer fails in any way to perform or observe any covenant, condition, or obligation contained in this Agreement and such failure continues for a period of thirty (30) days after notification of same from the District; Developer agrees that the District may do any, all, or any combination of the following:

- a. Halt all further approvals relating to the Project;
- b. Complete any work required to be done by Developer under this Agreement, including, without limitation, the inspection, repair or replacement of any District drainage facility, or the removal or other remediation of any obstruction thereto caused by Developer's failure to complete any of their obligations under this Agreement, and to assess the cost thereof against the Project real estate in the same manner as a drainage assessment;
- c. Seek injunctive relief;
- d. Suspend any work or improvement relating to the Project by issuing a stop work order; and/or
- e. Take any other action at law or in equity which may be available to the District.

7.2 Failure to Cure Default. If the Developer does not cure the default within the required period (or such longer period as may be necessary if the default may not reasonably be cured within the required period but the cure is pursued with reasonable diligence), then the District may avail itself of any remedy afforded it by law and any of the above cumulative, non-

exclusive remedies. Provided, however, that if Developer fails to comply with any obligation of this Agreement and the District reasonably determines that such failure has caused or is causing an immediate danger to public health and safety, the District may, in its reasonable discretion, immediately and without further notice avail itself of any remedy afforded it by law and any of the above cumulative, non-exclusive remedies.

7.3 No Remedy Exclusive. No remedy herein conferred upon or reserved to the Parties shall be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or now or hereafter existing at law or in equity or by statute. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient.

8. Miscellaneous Provisions.

8.1 Binding Effect. This Agreement shall be binding upon, and inure to the benefit of, the parties and their respective heirs, successors (by merger, consolidation or otherwise), assigns, devisees, administrators, representatives, lessees and agents. The Developer shall be responsible to make certain all of its contractors, subcontractors, agents, employees and representatives comply with all terms of this Agreement.

8.2 Severability. If any provisions of this Agreement are determined to be unenforceable, invalid or excessive, this Agreement can thereafter be modified, to implement the intent of the parties to the maximum extent allowable under law and the remainder of this Agreement shall remain unaffected and in full force and effect.

8.3 Authority. The parties each represent and warrant that they have the respective power and authority, and are duly authorized, to enter into this Agreement on the terms and conditions herein stated, and to execute, deliver and perform their obligations under this Agreement.

8.4 Entire Agreement. This Agreement, together with all Exhibits hereto, constitutes the entire agreement and understanding between the parties with respect to the subject matter of this Agreement. This Agreement shall be deemed to be fully integrated, and not subject to amendment except as may hereafter be agreed to in writing by the parties.

Webster County Drainage District No. 1

Developer

By _____
Robert Singer, Chairman Date
of the Webster County
Board of Supervisors

By _____

(print name and title)

ATTEST: _____
Carol Messerly, Auditor

RESOLUTION NO. _____

**RESOLUTION ACKNOWLEDGING SECTION 4.3 OF AN AGREEMENT
BETWEEN PIZZA RANCH, WEBSTER COUNTY, IA AND THE CITY OF FORT
DODGE, IA**

BE IT ENACTED BY THE CITY COUNCIL OF THE CITY OF FORT DODGE,
IOWA:

SECTION I. PURPOSE.

The purpose of this Agreement is to grant acknowledgement of future detention variance as laid out in the agreement between Pizza Ranch and Webster County.

SECTION II.

The City Council of the City of Fort Dodge, Iowa, hereby makes the following findings:

- (1) That the legally binding agreement will allow Pizza Ranch to remove detention facilities if a permanent realignment or alteration to Drainage District No.1 Ditch is completed, which makes the detention pond inoperable.
- (2) That the City of Fort Dodge acknowledges Section 4.3 of the agreement, in which, in the occurrence of the above scenario, if detention is required by City Code, ordinance or other directive in the future will not be required for the Developer of the site established within such agreement.

SECTION III.

The above acknowledgement, is hereby declared approved.

SECTION VI.

This Resolution shall be in effect after its approval, and publication, as by law provided. Passed and approved by the City Council of the City of Fort Dodge, Iowa, this _____ day of _____, AD, 2013.

Ayes: _____

Nays: _____

Other: _____

CITY OF FORT DODGE

BY: _____

Matt Bemrich, Mayor

ATTEST:

Jeff Nemmerers, City Clerk