

26

DEVELOPMENT AGREEMENT

Revision #2

(To original Agreement dated 2/28/06)

2009 MAR 31 PM 3 24
RECORDED
WILLIAM J. HURST
CANYON COUNTY RECORDER
[Signature]

2009015525

This Development Agreement ("Agreement") is entered into by and among the City of Middleton, a municipal corporation in the State of Idaho (hereinafter referred to as "City"), West Highlands, LLC (hereinafter referred to as "Owner") and Coleman Homes, LLC (hereafter referred to as "Developer").

RECITALS

WHEREAS, Owner owns certain real property shown on the Vicinity Map in Exhibit A and legally described in Exhibit B ("Project Site"), except for that portion conveyed to Middleton School District #134 of Idaho and legally described in Exhibit C, which exhibits are attached hereto and incorporated herein.

WHEREAS, Developer previously requested annexation, R-3 zoning and preliminary plat approval of the majority of the Project Site (all except the Additional Property, described below) for the development of the West Highlands Ranch subdivision, and the City previously approved that request subject to the terms of the original version of this Agreement, dated 2/28/06.

WHEREAS, Developer has acquired additional real property shown on the Annexation Vicinity Map in Exhibit D and legally described in Exhibit E ("Additional Property") that it desires to develop as part of the West Highlands Ranch subdivision, and Developer has applied to the City for annexation and R-3 zoning of the Additional Property.

WHEREAS, Developer has applied to the City for approval of a revised preliminary plat for the entire Project Site, which plat is included in Exhibit F, attached hereto and incorporated herein.

WHEREAS, Developer has applied to the City for approval of a planned unit development ("PUD") for the purpose of reducing certain dimensional requirements for a portion of the lots within the development.

WHEREAS, the City, pursuant to Section 67-6511A, Idaho Code, has the authority to conditionally zone property and to enter into a development agreement for the purpose of allowing, by agreement, a specific development to proceed in a specific area and for a specific purpose or use which is appropriate in the area, but for which all allowed uses for the requested zoning may not be appropriate pursuant to the Idaho Code and the Middleton City Code.

WHEREAS, upon annexation and zoning of the Additional Property and approval of the revised preliminary plat and PUD for the Project Site, the parties desire to enter into this revised Agreement to incorporate the terms and conditions of such approvals.

RECORDED
TYPE B & A
[Signature]
City of Middleton

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and in consideration of the recitals above, which are incorporated below, the parties agree as follows:

ARTICLE I.

LEGAL AUTHORITY

1.1. This Agreement is made pursuant to and in accordance with the provisions of Idaho Code Section 67-6511A and Middleton City Code, Title 5, Chapter 7.

ARTICLE II.

ZONING ORDINANCE AMENDMENT

2.1. Upon annexing the Additional Property, the City will adopt an ordinance amending the Middleton Zoning Ordinance to zone the Additional Property to R-3. The Ordinance will become effective after its passage, approval and publication and the execution and recordation of this Agreement.

ARTICLE III.

CONDITIONS ON DEVELOPMENT

3.1. Applicant will develop the Project Site subject to the conditions and limitations set forth in this Agreement. Further, Applicant will submit such applications regarding flood plain development permit review, final plat reviews and/or any conditional use permits, if applicable, and any other applicable applications as may be required by the City of Middleton.

3.2. The development shall comply with the Middleton Comprehensive Plan and City Code, as they exist in final form at the time the development applications were approved, except as otherwise provided by Idaho Code or as modified pursuant to this Agreement. The following conditions shall be satisfied:

3.2.1. The development shall include 10% of the gross area that must be set aside for open space and shall conform to MCC 6-3-7(D) and 6-5-3-1(I)(7) as to shape, use and method of calculation.

3.2.2. The development shall be subject to MCC 5-2-4 Table 2 and Notes, with the following exceptions:

3.2.2.1. In lieu of Note #4 the following garage setback restrictions shall be applied and required percentages shall be met within each phase of the development or each cluster of 50 adjacent permitted lots:

A. A minimum of 10 percent of dwelling units shall utilize side entry garages. If 3 car garage, single car garage may be front facing.

B. A minimum of 10 percent of dwelling units shall utilize garages set back a minimum of 10 feet from front living space or porch columns.

C. A minimum of 10 percent of dwelling units shall utilize garages set back a minimum of 5 feet from front living space or porch columns.

D. A minimum of 10 percent of dwelling units shall utilize garages set forward a maximum of 10 feet from front living space or porch columns.

3.2.2.2. In lieu of Note #10, the following required minimum lot width percentages shall be met:

A. At least 10 percent of lots shall have a width of less than 70 feet.

B. At least 10 percent of lots shall have a width of 70-79 feet.

C. At least 10 percent of lots shall have a width of 80-89 feet.

D. At least 10 percent of lots shall have a width of 90 feet and greater.

3.2.2.3. The corner lot side setback may be reduced to 20 feet if a 3 car garage is utilized.

3.2.2.4. The rear yard setback may be reduced to 15 feet when applied to open sided covered porches. The 20 foot setback to enclosed living space shall remain. The overall width of the porch which occurs in this additional 5 feet may not be greater than 50% of the entire width of the house.

3.2.2.5. For the lots identified with diagonal hatching on Exhibit G attached hereto and incorporated herein:

A. The minimum lot width shall be 55 feet.

B. The minimum interior lot area shall be 5700 square feet, and the minimum corner lot area shall be 6600 square feet.

C. The minimum interior side setback shall be 5 feet, and the minimum side street setback shall be 15 feet.

3.2.3. In lieu of the definition for "lot width" in MCC 5-1-2, lot width shall be measured at the actual front setback line.

3.3. Developer agrees that failure to construct the proposed development consistent with the Middleton City Code and this Agreement, and any amendments hereto, shall result in a default of this Agreement by Developer.

3.4. Conditions, Guarantee for Completion. All of the conditions set forth herein for a particular final plat shall be complied with or shall be guaranteed for completion by Developer before signature of the final plat, building permit or certificate of occupancy for that plat phase

will be granted. Failure to comply or guarantee completion of the conditions established in the subdivision plat approval conditions and the Middleton City Code as modified by the terms of this Agreement within one year, unless that timeframe is modified by the City Council, shall result in a default of this Agreement by Developer. Developer shall be allowed to guarantee all items except: 1.) street signs, 2.) water improvements, 3.) sewer and 4.) Emergency Vehicle ingress/egress at one hundred and fifty percent (150%) of the estimated cost of completion pursuant to Middleton City Code and the procedures set forth in MCC 6-4-1(D)(1)-(3). The estimated cost shall be provided by Developer and reviewed and approved by the City engineer. Acceptable guarantees shall include but not be limited to irrevocable letter(s) of credit and/or cash deposit(s). In all cases, the guarantee shall be drawn solely in favor of, and payable to, the order of the City, in accord with the regulations contained in the agreement by and between the guarantor and the City.

3.4.1. If the roadways are not paved prior to recording the final plat, the City shall issue up to five (5) building permits per phase; however, certificates of occupancy shall not be issued for any of these buildings until such time as the roadways are completed for that particular phase with asphalt, curb/gutter and sidewalk.

3.5. Commencement of Construction. Developer shall commence construction within two (2) years of the effective date of this Agreement. In the event Developer fails to commence construction within the time periods herein stated, unless modified by the City Council, Developer shall be in default of this Agreement.

3.6. Road connections will be provided to all adjoining developable properties as shown on the revised preliminary plat in Exhibit F.

3.7. A pedestrian route will be constructed through the subdivision to provide for future connections to surrounding schools.

3.8. A solid wood or vinyl fence will be constructed between the Project Site and the existing cemetery prior to occupancy of any homes bordering the cemetery.

3.9. At such time as the City is prepared to install a traffic signal at the intersection of State Highway 44 and Cemetery Road, and so long as such installation will be completed prior to January 1, 2015, Developer shall pay the City \$175,000 to be used toward the cost of that traffic signal within 30 days of a written request from the City. Developer shall execute a guarantee to secure this payment, the form of which shall be approved by the City Attorney.

ARTICLE IV.

IMPACT FEE

4.1. The parties acknowledge this development was principally designed and initially approved before the City began proceedings to propose impact fees. Consequently, Developer's proposals, plus additional requirements imposed by the City, determined the level of improvements needed to mitigate the development's impacts. The parties further acknowledge that Developer relied on the City's initial approval to proceed with final design and construction

of the development and improvements, which construction has, in some instances, commenced and been completed.

4.2. In accordance with the provisions of the Idaho Development Impact Fee Act, Idaho Code Section 67-8201, *et seq*, the parties acknowledge and agree Developer may be entitled to credit for the present value of any construction of system improvements or contribution or dedication of land or money required by a governmental entity from the developer for system improvements of the category for which the development impact fee is being collected, including certain portions of the development's street and park improvements, provided that credit is only available for eligible capital improvements as prescribed in the Act. The parties will calculate the amount of such credit after the adoption of any development impact fees. The parties further acknowledge and agree that, under the Act, Developer is not entitled to credit for improvements that merely provide service to the development itself and are necessary for the use and convenience of the development's residents, including the development's community center and pool.

4.3. Notwithstanding the above, in accordance with Idaho Code Section 67-8215(2), Developer shall not be subject to development impact fees or credits thereof subsequently adopted by the City for portions of the development where construction has commenced and is pursued according to the terms of the permit or development approval.

ARTICLE V.

AFFIDAVIT OF PROPERTY OWNERS

5.1. An affidavit of all owners of the Property agreeing to submit the Property to this Agreement and to the provisions set forth in Idaho Code Section 67-6511A and Middleton City Code shall be provided and is incorporated herein by reference. The School District affidavit is included as Exhibit H, attached hereto and incorporated herein.

ARTICLE VI.

DEFAULT

6.1. In the event Developer, its heirs or assigns or subsequent owners of the Project Site or any other person acquiring an interest in the Project Site fail to faithfully comply with all of the terms and conditions included in this Agreement, this Agreement may be modified or terminated by the Middleton City Council upon compliance with the requirements of Middleton City Code. In the event the City Council determines that this Agreement shall be modified, then either (i) Developer and the City shall agree to amend the terms of this Agreement and Developer shall comply with the amended terms or (ii) the Agreement shall be terminated. All uses of Project Site that are not consistent with R-3 zoning, as modified by this Agreement, shall cease. Nothing herein shall prevent Developer from applying for any nature of use permit consistent with R-3 zoning. A waiver by the City of any default by Developer of any one or more of the covenants or conditions hereof shall apply solely to the breach and breaches waived and shall not bar any other rights or remedies of the City or apply to any subsequent breach of any such or other covenants and conditions.

6.2. Consent to Rezone. Developer, by entering into the Agreement, does hereby agree that in the event there shall be a default in the terms and conditions of this Agreement that this Agreement shall serve as consent to a reversion of the subject property to R-3 zoning as provided in the Idaho Code.

6.3. Remedies. Upon a breach of this Agreement, any of the parties in any court of competent jurisdiction, by action or proceeding at law or in equity, may secure the specific performance of the covenants and agreements herein contained, may be awarded damages for failure of performance of both or may obtain rescission, disconnection and damages for repudiation or material failure of performance, and any other remedy as provided by law. Before any failure of any party to this Agreement to perform its obligations under this Agreement, the party claiming such failure shall notify, in writing, the party alleged to have failed to perform of the alleged failure and shall demand performance. No breach of this Agreement may be found to have occurred if performance has commenced to the satisfaction of the complaining party within thirty (30) days of the receipt of such notice.

ARTICLE VII.

UNENFORCEABLE PROVISIONS

7.1. If any term, provision, commitment or restriction of this Agreement or the application thereof to any party or circumstance shall, to any extent, be held invalid or unenforceable, the remainder of this instrument shall remain in full force and effect.

ARTICLE VIII.

ASSIGNMENT AND TRANSFER

8.1. After its execution, the Agreement shall be recorded in the office of the County Recorder at the expense of Developer. Each commitment and restriction on the development subject to this Agreement shall be a burden on the Project Site, shall be appurtenant to and for the benefit of the Project Site, adjacent property and other residential property near the Project Site and shall run with the land. This Agreement shall be binding on the City and Developer and their respective heirs, administrators, executors, agents, legal representatives, successors and assigns; provided, however, that if all or any portion of the Project Site is divided and each owner of a legal lot shall only be responsible for duties and obligations associated with an owner's parcel and shall not be responsible for duties and obligations or defaults as to their parcels of lots with the Project Site. The new owner of the Project Site or any portion thereof (including, without limitation, any owner who acquires its interest by foreclosure, trustee's sale or otherwise) shall be liable for all commitments and other obligations arising under this Agreement with respect only to such owner's lot or parcel.

ARTICLE IX.

GENERAL MATTERS

9.1. Amendments. Any alteration or change to this Agreement shall be made only after complying with the notice and hearing provisions of Idaho Code Section 67-6509, as required by Middleton City Code, Title 5, and Chapter 7.

9.2. Paragraph Headings. This Agreement shall be constructed according to its fair meaning and as if prepared by both parties hereto. Title and captions are for convenience only and shall not constitute a portion of this Agreement. As used in this Agreement, masculine, feminine or neuter gender and the singular or plural number shall each be deemed to include the others wherever and whenever the context so dictates.

9.3. Choice of Law. This Agreement shall be construed in accordance with the laws of the State of Idaho in effect at the time of the execution of this Agreement. Any action brought in connection with this Agreement shall be brought in a court of competent jurisdiction located in Canyon County, Idaho.

9.4. Notices. Any notice which a party may desire to give to another party must be in writing and may be given by personal delivery, by mailing the same by registered or certified mail, return receipt requested postage prepaid, or by Federal Express or other reputable overnight delivery service, to the party to whom the notice is directed at the address of such party set forth below.

Middleton: City Clerk
City of Middleton
P.O. Box 487
Middleton, ID 83644

Owner or Developer: Coleman Homes, LLC
1025 S. Bridgeway Pl. Suite 280
Eagle, ID 83616

or such other address and to such other persons as the parties may hereafter designate in writing to the other parties. Any such notice shall be deemed given upon delivery if by personal delivery, upon deposit in the United States mail if sent by mail pursuant to the foregoing.

9.5. Attorney's Fees and Costs. If either party shall default under this Agreement and said default is cured with the assistance of an attorney for the other party, as a part of curing said default, the reasonable attorneys' fees incurred by the other party shall be reimbursed to the other party upon demand. In the event a suit or action is filed by either party against the other to interpret or enforce this Agreement, the unsuccessful party to such litigation agrees to pay to the prevailing party all costs and expenses, including attorneys' fees incurred therein, including the same with respect to an appeal.

9.6. Effective date. This Agreement shall be effective on the date of the last signature hereto.

9.7. Effect of Agreement. This Agreement shall become valid and binding only upon its approval by the City Council and execution of the Mayor and City Clerk. This Agreement shall be binding upon the parties to it, their respective grantees, successors, assigns or lessees.

[End of Text. Signatures with Acknowledgements and Exhibits to follow.]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.



CITY OF MIDDLETON

By: *Vicki Thurber*
Mayor Vicki Thurber

Date: 3/26/09

Attest:

Ellen Smith CMC
Ellen Smith, City Clerk

WEST HIGHLANDS, LLC

By: *[Signature]*

Date: 3/31/09

COLEMAN HOMES, LLC

By: *[Signature]*

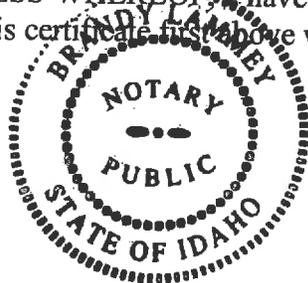
Date: 3/31/09

- Exhibit A: Vicinity Map
- Exhibit B: Legal Description of Project Site
- Exhibit C: Legal Description of School District Property
- Exhibit D: Annexation Vicinity Map
- Exhibit E: Legal Description of Additional Property
- Exhibit F: Revised Preliminary Plat
- Exhibit G: Lot Width Map
- Exhibit H: School District Affidavit

STATE OF IDAHO)
) ss.
County of Canyon)

On this 26 day of March, in the year of 2009, before me, a Notary Public in and for the State of Idaho, personally appeared Vicki Thurber, Mayor of the City of Middleton, known or identified to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he has the authority to execute and executed the same for the purposes therein contained on behalf of the City of Middleton.

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

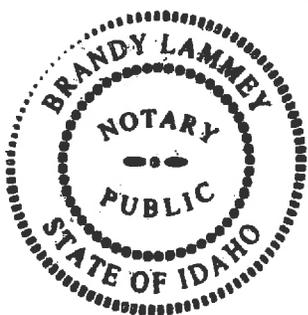


Brandy Lamney
Notary Public for Idaho
Residing at Caldwell, Idaho
My Commission expires 11-3-12

STATE OF IDAHO)
) ss.
County of Canyon)

On this 31 day of March, in the year of 2009, before me, a Notary Public in and for the State of Idaho, personally appeared Thomas Coleman, known or identified to me to be the person whose name is subscribed to the foregoing instrument on behalf of West Highlands, LLC and acknowledged to me that (s)he has the authority to execute and executed the same for the purposes therein contained.

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



Brandy Lamney
Notary Public for Idaho
Residing at Caldwell
My Commission expires 11-3-12

STATE OF IDAHO)
) ss.
County of Canyon)

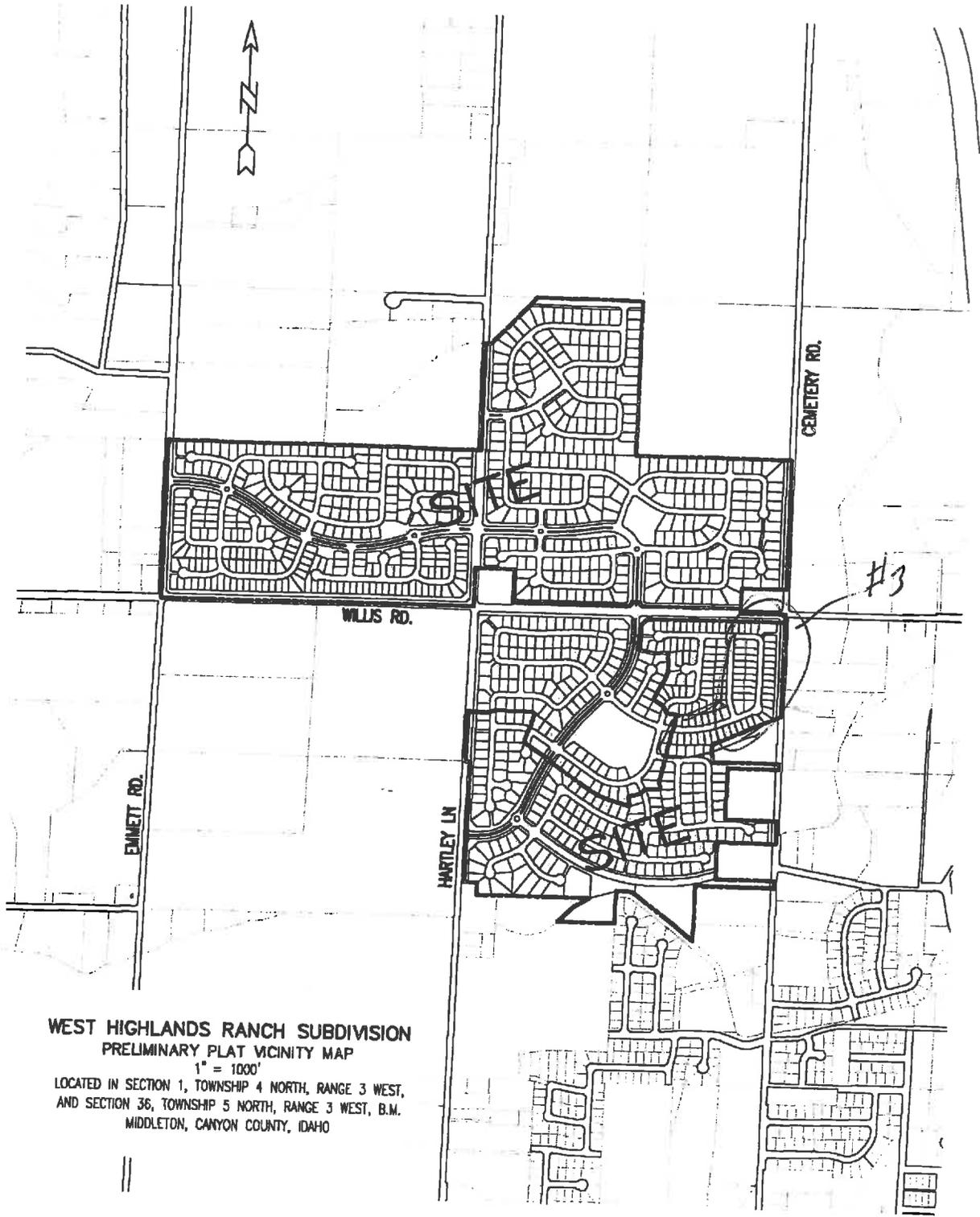
On this 31 day of March, in the year of 2009, before me, a Notary Public in and for the State of Idaho, personally appeared Thomas Coleman, known or identified to me to be the person whose name is subscribed to the foregoing instrument on behalf of Coleman Homes, LLC and acknowledged to me that (s)he has the authority to execute and executed the same for the purposes therein contained.

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



Brandy Lamney
Notary Public for Idaho
Residing at Caldwell, Idaho
My Commission expires 11-3-12

EXHIBIT A
Vicinity Map



WEST HIGHLANDS RANCH SUBDIVISION
PRELIMINARY PLAT VICINITY MAP
1" = 1000'
LOCATED IN SECTION 1, TOWNSHIP 4 NORTH, RANGE 3 WEST,
AND SECTION 36, TOWNSHIP 5 NORTH, RANGE 3 WEST, B.M.
MIDDLETON, CANYON COUNTY, IDAHO