

BILL NO. S-15-02-22

SPECIAL ORDINANCE NO. S-_____

AN ORDINANCE approving CONSTRUCTION CONTRACT - UPPER ELY PHASE V SANITARY SEWER FACILITIES, 2014-S-0260 between TWIN EAGLES DEVELOPMENT II, LLC and the City of Fort Wayne, Indiana, in connection with the Board of Public Works.

NOW, THEREFORE, BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF FORT WAYNE, INDIANA:

SECTION 1. That the CONSTRUCTION CONTRACT - UPPER ELY PHASE V SANITARY SEWER FACILITIES, 2014-S-0260 by and between TWIN EAGLES DEVELOPMENT II, LLC and the City of Fort Wayne, Indiana, in connection with the Board of Public Works, is hereby ratified, and affirmed and approved in all respects, respectfully for:

All labor, insurance, material, equipment, tools, power, transportation, miscellaneous equipment, etc., necessary for the construction of an interceptor/regional sewer including approximately 4,502 lineal feet of 18-inch sanitary sewer; approximately 2,262 lineal feet of 10-inch sanitary sewer; and approximately 364 lineal feet of 8-inch sanitary sewer and approximately 23 manholes. Facilities also include the installation of a 180 gpm sanitary sewer lift station and approximately 25 lineal feet of 4-inch force main, along with all necessary appurtenances, clearing and restoration of the construction site:

involving a total cost of NOT TO EXCEED ONE MILLION, TWO HUNDRED THOUSAND AND 00/100 DOLLARS - (\$1,200,000.00). A copy of said Contract is on file with the Office of the City Clerk and made available for public inspection, according to law.

SECTION 2. That this Ordinance shall be in full force and effect
from and after its passage and any and all necessary approval by the Mayor.

Council Member

APPROVED AS TO FORM AND LEGALITY

Carol Helton, City Attorney

**CONTRACT FOR THE CONSTRUCTION AND TRANSFER OF
SANITARY SEWER FACILITIES 2014-S-0260**

**UPPER ELY PHASE V
INVESTOR AGREEMENT ("Project")**

W.O. #75972

This Agreement titled above ("Agreement") is made by and between the City of Fort Wayne, Indiana, an Indiana municipal corporation by and through the Fort Wayne Board of Public Works, hereinafter referred to as "City"), and Twin Eagles Development II, LLC., and Indiana Liability Company (hereinafter referred to as "Investor").

WITNESSETH:

Whereas, growth patterns and development trends indicate that substantial community growth can be anticipated in the northern Coldwater Road area; and

Whereas, for orderly growth to occur, urban services such as sanitary sewer facilities must be present to accommodate that growth; and

Whereas the most logical way from an engineering and fiscal perspective to provide sanitary sewer service to the anticipated growth area would be to extend the City's existing sanitary sewer system a sufficient distance into the area where new land development is anticipated to occur; and

Whereas, Investor agrees to facilitate the construction and then transfer to the City an extension of the sanitary sewer system, and City desires to acquire same under certain terms and conditions hereinafter set forth.

NOW THEREFORE in consideration of the mutual covenants herein contained, it is agreed between the parties as follows:

1. FACILITY CONSTRUCTION AND TRANSFER DATE. Investor hereby agrees to cause to be constructed and transferred to the City of Fort Wayne the following regional interceptor and local sanitary sewer system:
 - a. Installation of approximately 4,502 lineal feet of 18-inch sanitary sewer; approximately 2,262 lineal feet of 10-inch sanitary sewer; and approximately 364 lineal feet of 8-inch sanitary sewer and approximately 23 manholes. Facilities also include the installation of a 180 gpm (gallons per minute) sanitary sewer lift station and approximately 25 lineal feet of 4-inch force main, along with all necessary appurtenances, clearing and restoration of the construction site, hereinafter referred to as the "Sanitary Sewer Facilities." A map showing the Sanitary Sewer Facilities is included in this Agreement as Exhibit A.
 - b. Investor and City agree that the Sanitary Sewer Facilities will be constructed in accordance with the Project Manual with all associated Agreements and Forms, Construction Drawings, and Addenda or Contract Modifications, plans and specifications

Construction Drawings, and Addenda or Contract Modifications, plans and specifications prepared by D.A. Brown Engineering Consultants, Inc., titled "Upper Ely Phase V" which have been approved and initialed by City and Investor ("Contract Documents"). The Sanitary Sewer Facilities construction, testing and all other applicable elements shall meet all requirements described in the Contract Documents for this project in order for the City to accept and take ownership of the Sanitary Sewer Facilities.

- c. The parties anticipate that transfer of ownership from Investor to the City shall be completed on or before September 10, 2015. The actual date of the acceptance of the Sanitary Sewer Facilities by the Board of Works shall be designated the "Acceptance Date." The City agrees that it will not unreasonably withhold or delay its acceptance of the Project.
2. ADMINISTRATION, ENGINEERING AND EASEMENTS. City shall facilitate and pay for all Investor related engineering services, if any, that are directly associated with the Sanitary Sewer Facilities described herein. City shall facilitate and pay for all necessary easements to accomplish the construction and installation of the Sanitary Sewer Facilities. Investor shall grant easements on land areas owned by the Investor at no cost. City shall facilitate and pay for City related administration of the Project.
3. COST OF SANITARY SEWER FACILITY CONSTRUCTION. The cost of the Project for the purpose of this Agreement shall be paid by the Investor. The Investor or the Investor's contractors shall furnish and pay for all material, contractual labor, equipment, permits, restoration, fees, charges and or licenses required for construction of the Project ("Construction Costs") and shall hold City harmless from any liability for claims for the Construction Costs. At completion of the Project, Investor or its contractors shall file a Completion Affidavit and a Maintenance Bond with the Board of Works of the City. The Maintenance Bond shall run for a minimum of one year from the date of acceptance of the Project by the City and shall be in the minimum amount of twenty-five (25) percent of the construction, restoration and change orders of the Project.
4. REIMBURSEMENT BY CITY TO INVESTOR. The eligible reimbursement to be paid by the City to the Investor for the purposes of this agreement shall be called the "Balance." It is agreed that reimbursement of costs by the City to the Investor for the Project shall be as follows:
 - a. The total amount of cost eligible for reimbursement from the City shall not exceed \$1.1 million (one million one hundred thousand dollars) hereinafter referred to as the "Reimbursement Cap" and shall be limited to the qualifications listed in this paragraph.
 - i. **Construction Costs.** The eligible construction costs shall be no more than the lowest of at least four (4) competitive bids from qualified, City approved contractors with bid openings witnessed by the City and accompanied by non-collusion statements for the Project.
 1. There will be two (2) construction/bid alternatives for the Project. The Investor and City shall select the awarded bid and construction alternative based on certain and specific cost and serviceable area considerations.
 2. Work Allowance. Allowances for unforeseen construction work as defined in the Contract Documents shall be included as a line item in the

construction bids and shall be no more than \$50,000 (fifty thousand dollars). Payment of these costs shall be approved by the Investor and by the City prior to the work being completed by the contractor. Payment of these costs shall be made by the Investor to the contractor. At the time of completion of the Project, all remaining funds for this Item shall be deducted from the total Project construction cost. Contingency costs, if any, shall be included in the Reimbursement Cap.

3. The final Construction Cost shall be based on bid/unit costs of the lowest bid contractor for the selected alternative and shall be based on work actually completed, material purchased and utilized, installed and that passes all City identified testing standards and requirements identified in the Contract Documents.
 - ii. **Cost Share.** City shall reimburse the Investor the total Construction Cost of the sanitary sewer lift station, including the access drive, the total Construction Cost associated with the 4-inch force main and all Construction Costs for the entire 18-inch sanitary sewer alternative installed as part of this Project per the Contract Documents. City shall pay for any added construction costs for the remaining sanitary sewer facilities associated with for serving additional real estate outside of Investor's project. Investor shall bear the construction cost of the remaining Sewer Facilities.
 - iii. **Engineering Costs.** Unforeseen additional engineering services required to complete the construction of the Project shall be approved, completed and paid for directly by the City and shall not be included in the Reimbursement Cap.
 - b. In the event the Eligible Costs of the Project exceeds the Reimbursement Cap, the Investor may either terminate this agreement by written notice to the City, or submit an addendum to the City increasing the Reimbursement Cap or reducing the scope of work to be completed in connection with the Project. In no case shall the Investor be expected to ultimately pay costs for the Project that exceeds the Reimbursement Cap.
5. **CUMULATIVE FUND FOR BALANCE OF COST OF FACILITY CONSTRUCTION.** City shall establish a cumulative fund entitled, "Upper Ely Phase V Sanitary Sewer" ("Cumulative Fund") from which City will pay the Balance. The Cumulative Fund shall be the primary source of payment to Investor for the Balance. The Cumulative Fund shall be funded in accordance with the Agreement.
 6. **FUNDING OF CUMULATIVE FUND.** The City agrees to deposit in and otherwise fund the Cumulative Fund with revenues from City Utilities sanitary sewer funds in sufficient amounts to cover the reimbursement due to the Investor at such times as required under this Agreement.
 7. **PAYMENT TO INVESTOR BY CITY.** City shall reimburse Investor for the Project according to the following payment schedule until Balance is paid.
 - a. Payment #1 for Construction Costs may include the cost of the purchase and delivery of materials to the site per the Contract Documents. Costs will be reimbursed within 15 business days of receipt of acceptable invoice and supporting documentation.

- b. Progress payments for Construction Costs will be paid in the amount equal to work actually performed and completed per the Contract Documents, less 5% (five percent) and shall be submitted to City by Investor no more than monthly.
 - c. Final Payment of the remaining balance of the Construction Costs and any other amounts due pursuant to this Agreement shall be paid to Investor by City within 30 calendar days of the Acceptance Date.
- 8. TRANSFER OF OWNERSHIP AND MAINTENANCE OF PROJECT. Upon acceptance by City, City shall receive ownership of the Project from Investor and thereafter, said sanitary sewer facilities shall be maintained under the control and supervision of City, provided however, restoration of the disturbed areas shall be the responsibility of Investor during the Maintenance Bond term as identified in Paragraph 3.
- 9. EXTENSION FROM SANITARY SEWER FACILITIES. The City may approve the extension of additional sanitary sewer mains from the Sanitary Sewer Facilities covered in this Agreement without incurring any financial obligations to the Investor under this Agreement.
- 10. COMPLIANCE WITH LAW. All actions associated with and in support of this Agreement will be done in compliance with Federal, State, and Local law.
- 11. INDEMINIFICATION. To the extent permitted by law, the City agrees to indemnify, defend, and hold harmless Investor, its agents, officers, and employees from all claims and suits by reason of injury or death to persons or damage to tangible property, including costs, attorney's fees, and other expenses caused by any negligent act or negligent omission by the City and/or its contractors and/or its subcontractors, if any, arising out of the construction or construction management, except for financial claims as described in Section 3.
- 12. JURISDICTION. It is agreed that this Agreement shall be governed by, construed, and enforced in accordance with the laws of the State of Indiana, and proper venue for any dispute arising under this Agreement shall be in any federal or state court of competent jurisdiction located in Allen County, Indiana.
- 13. MODIFICATION. Any modification of this Contract or additional obligation assumed by either party in connection with this Agreement shall be binding only if evidenced in writing and executed by each party or an authorized representative of each party.
- 14. WAIVER. The failure of either party to this Agreement to insist upon the performance of any of the terms and conditions of this Agreement, or the waiver of any breach of any of the terms and conditions of this Agreement, shall not be construed as thereafter waiving any such terms and conditions, but the same shall continue and remain in full force and effect as if no such forbearance or waiver had occurred.
- 15. SAVINGS CLAUSE. The invalidity of any portion of this Agreement will not and shall not be deemed to affect the validity of any other provision. In the event that any provision of this Agreement is held to be invalid, the parties agree that the remaining provisions shall be deemed

to be in full force and effect as if they had been executed by both parties subsequent to the expungement of the invalid provision; provided, however, that if in the reasonable opinion of City, the Agreement fails of its essential purpose as a result of the severed provision(s), the City shall have the right to terminate the Agreement.

16. ATTORNEY FEES. In the event that any action is filed in relation to compliance with this Agreement, or any form of alternative dispute resolution is pursued, the unsuccessful party shall pay to the successful party, in addition to all the sums that either party may be called on to pay, a reasonable sum for the successful party's attorneys' fees, court costs, and costs of litigation.
17. HEADINGS. The titles to the paragraphs of this Agreement are solely for the convenience of the parties and shall not be used to explain, modify, simplify, or aid in the interpretation of the provisions of this Agreement.
18. NOTICES. Any notice provided for or concerning this Agreement shall be in writing and shall be deemed sufficiently given when sent by certified or registered mail if sent to the respective address of each party as set forth at the beginning of this Agreement, or at any subsequent address either party may designate to the other in writing.
19. UNFORSEEN PROBLEMS. Neither party to this Agreement shall be liable to the other for any loss, cost or damage arising out of, or resulting from, any failure to perform in accordance with the terms of this Agreement where such failure shall be beyond the reasonable control of such party, which, as employed herein, shall be deemed to mean, but not limited to, acts of God, strikes, lockouts, or other industrial disturbances, wars, whether declared or undeclared, blockages, insurrections, riots, governmental actions, explosions, fire, floods, or any other cause not within the reasonable control of either party.
20. ENTIRE AGREEMENT. This Agreement sets forth the entire agreement and understanding between the parties, and supersedes all prior discussions or agreements (written or oral) between them. Neither party shall be bound by any conditions, definitions, warranties, understandings or representations other than as expressly provided herein, or as duly set forth on or subsequent to the date hereof in writing and signed by a proper and duly authorized officer or representative of the party to be bound thereby.
21. E-VERIFY AFFIDAVIT. Pursuant to Indiana Code 22-5-1.7, Investor agrees and shall enroll in and verify the work eligibility status of all newly hired employees of the Investor through the E-Verify program. E-Verify means the electronic verification of work authorization program of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (P.L. 104-208), Division C, Title IV, s.403(a), as amended, operated by the United States Department of Homeland Security or a successor work authorization program designated by the United States Department of Homeland Security or other federal agency authorized to verify the work authorization status of newly hired employees under the Immigration Reform and Control Act of 1986 (P.L. 99-603). Investor is not required to verify the work eligibility status of all newly hired employees of Investor through the E-verify program if the E-Verify program no longer exists.

22. EFFECTIVE DATE. This Agreement shall effective upon approval by the Common Council of the City of Fort Wayne as required by I.C. 36-9-23-6(b). The City shall notify Investor in writing within two (2) days after Common Council approval is obtained.

IN WITNESS WHEREOF, each party to this Agreement has caused it to be executed at Fort Wayne, Indiana on the date indicated below.

Dated this 11 day of February, 2015.

"CITY"

"INVESTOR"

CITY OF FORT WAYNE, INDIANA
an Indiana municipal corporation and
through the Fort Wayne Board of Pubic

TWIN EAGLES DEVELOPMENT II, LLC

By: _____

Robert P. Kennedy, Chair

By: _____

Jeffery M. Thomas, Member
1020 East DuPont Road
Fort Wayne, Indiana 46825

By: _____

Mike Avila, Member

By: _____

Kumar Menon, Member

Attest: _____

Lyndsey Richards, Clerk

STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

Before me, the undersigned, a Notary Public in and for said County and State, this 10th day of FEBRUARY, 2015, personally appeared Jeffrey M. Thomas, Member Twin Eagles Development II, LLC, who acknowledged the execution of the foregoing instrument for and on behalf of said Investor. Witness my hand and notarial seal.

My Commission Expires:



Tina M Anderson
Notary Public
Printed TINA M ANDERSON
County of Residence ALLEN

STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

Before me, the undersigned, a Notary Public in and for said County and State, this ____ day of _____, 2015, personally appeared Robert P. Kennedy, Mike Avila and Kumar Menon (CITY) who acknowledged the execution of the foregoing instrument for and on behalf of the Board of Public Works of the City of Fort Wayne. Witness my hand and notarial seal.

My Commission Expires:

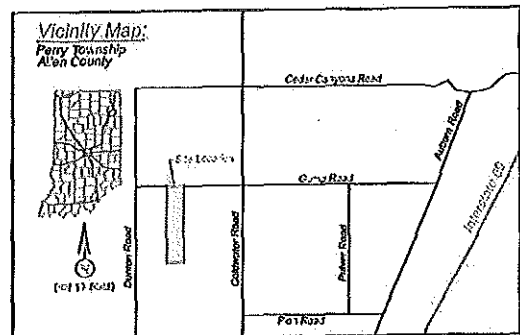
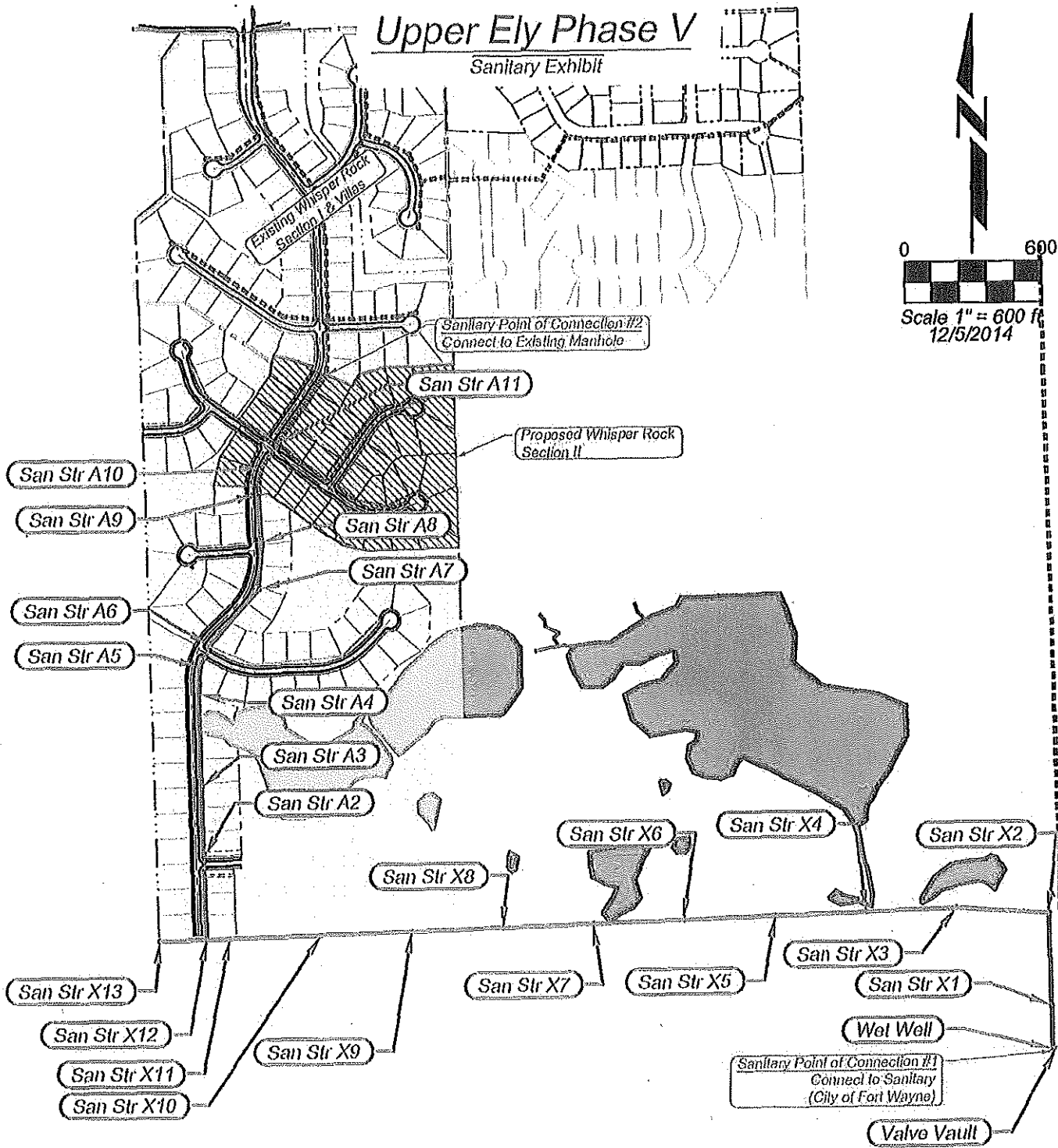
Notary Public
Printed _____
County of Residence _____

This instrument prepared by Nancy Townsend for Fort Wayne City Utilities, Fort Wayne, IN 46802.

Exhibit A

Upper Ely Phase V

Sanitary Exhibit



DABEC

D.A. Brown Engineering Consultants
5419 County Road 427, Suite C, Auburn, IN 46706
Phone: (260) 925-2020 Fax: (260) 925-1212
www.dabrownengineering.com

Job No: 1404-03b

DIGEST SHEET

Department: City Utilities, Utility Administration & Development Services

Resolution Number: Board of Works Contract 2014-S-0260

Title of Ordinance: Contract for the Construction and Transfer of Sanitary Sewer Facilities 2014-S-0260, Upper Ely Phase V Sanitary Sewer.

Awarded To: Twin Eagles Development II, LLC

Amount of Contract: (Not To Exceed) \$1.2 million

Number of Bidders: In compliance with State purchasing requirements, the developer is required to obtain competitive bids from at least three qualified contractors; Non Collusion Affidavits must accompany each of the bid submittals.

Description of Project (Be Specific):

This Agreement calls for the construction of approximately 4,502 lineal feet of 18-inch sanitary sewer; approximately 2,262 lineal feet of 10-inch sanitary sewer; and approximately 364 lineal feet of 8-inch sanitary sewer and approximately 23 manholes. Facilities also include the installation of a 180 gpm sanitary sewer lift station and approximately 25 lineal feet of 4-inch force main, along with all necessary appurtenances, clearing and restoration of the construction site. This construction will be completed as part of a residential subdivision being completed by Twin Eagles Development II, LLC.

What Are The Implications If Not Approved:

- The current opportunity to efficiently install the sanitary sewer facilities in the most cost effective manner and to meet development schedules would be missed.

If Prior Approval Is Being Requested, Justify:

Not Applicable.

Additional Comments: This system will provide public sanitary sewer service opportunity to properties, both developed and undeveloped, within a large developing region. The funding source for this project is Sanitary Sewer funds.

Nancy Townsend, 427-2691

Date

Interoffice Memo

Date: February 6, 2015
To: Common Council Members
From: Kumar Menon, Director of City Utilities
RE: Upper Ely Phase V Sanitary Sewer Facilities, 2014-S-0260

On February 10, 2015, the Board of Public Works will process an agreement with Twin Eagles Development II, LLC for the construction of an interceptor/regional sewer including approximately 4,502 lineal feet of 18-inch sanitary sewer; approximately 2,262 lineal feet of 10-inch sanitary sewer; and approximately 364 lineal feet of 8-inch sanitary sewer and approximately 23 manholes. Facilities also include the installation of a 180 gpm sanitary sewer lift station and approximately 25 lineal feet of 4-inch force main, along with all necessary appurtenances, clearing and restoration of the construction site.

This project is located near Coldwater Road and Pion Road and will be designed and constructed to collect and convey wastewater to developing residential subdivisions and the surrounding area. This installation coincides with the construction of the residential subdivision and takes advantage of the economies of completing the overlapping work at the same time. The Board's participation in this project calls for the reimbursement not to exceed \$1.2 million for the construction costs for these improvements; funds for project will come from the Sanitary Sewer Utility.

The Board of Works and City Utilities seeks the Council's concurrence with the Board's action so that we may proceed with this significant system improvement and economic development opportunity.

Please contact Nancy Townsend at 427-2691 or at nancy.townsend@cityoffortwayne.org if you have any questions.

CC: Diane Brown
Molly McCray