

RESOLUTION NO. 1321

A RESOLUTION APPROVING A DEVELOPMENT AGREEMENT BETWEEN THE CITY OF CANBY AND CANBY EAST ASSOCIATES, LLC FOR THE IMPROVEMENT OF SE 1ST AVENUE BETWEEN HAZEL DELL WAY AND S. WALNUT STREET, AND AUTHORIZING THE CITY ADMINISTRATOR TO SIGN THE DEVELOPMENT AGREEMENT AND OTHER DOCUMENTS AS MAY BE REQUIRED TO COMPLETE THE TERMS OF THE AGREEMENT.

WHEREAS, the CITY OF CANBY, hereinafter referred to as “CITY” a municipal corporation, and Canby East Associates, LLC, herein after referred to as “DEVELOPER” wish to enter into an agreement for the improvement of SE 1st Avenue between Hazel Dell Way and S. Walnut Street, as more particularly described in the Development Agreement and exhibits thereto; and

WHEREAS, the Development Agreement provides for specified improvements to SE 1st Avenue in conformance with City Standards; and

WHEREAS, the Development Agreement provides for the sharing of costs for the project between CITY and DEVELOPER as outlined; and


WHEREAS, the Development Agreement provides for the assignment of specified project responsibilities between CITY and DEVELOPER as outlined; and

WHEREAS, the Canby City Council believes it is in the best interests of the citizens of Canby to enter into such a lease.

NOW, THEREFORE, IT IS HEREBY RESOLVED by the City of Canby Council as follows:

1. Approve the Development Agreement between the City of Canby and Canby East Associates, LLC for the improvement of SE 1st Avenue between Hazel Dell Way and S Walnut Street, as outlined in the Development Agreement.
2. The City Administrator is authorized to sign the Development Agreement and other documents as may be required to complete the terms of the Development Agreement.

Adopted this 15th day of May 2019, by the Canby City Council.



Brian Hodson
Mayor

ATTEST:



Kimberly Scheafer, MMC
City Recorder

DEVELOPMENT AGREEMENT

This Development Agreement (this “**Agreement**”) is entered into effective as of May 15, 2019 by and between The City of Canby (“**City**”), and Canby East Associates, LLC, a Delaware limited liability company (“**Developer**”).

RECITALS

A. City owns that certain real property contiguous to SE 1st Avenue in Canby, Oregon, depicted on Exhibit A attached to this Agreement (the “**Project Property**”).

B. In conjunction with Developer’s improvement of certain real property located in the City of Canby, the City and Developer will perform a joint pavement reconstruction project on the Project Property (the “**Project**”). City and Developer will fund the costs of the Project equally, up to a maximum City contribution of two hundred fifty thousand dollars (\$250,000) (the “**City Contribution**”). Developer shall be solely responsible for project costs in excess of five hundred thousand dollars (\$500,000).

C. City has requested, and Developer has agreed, to design, permit and construct the Project according to the terms and provisions of this Agreement.

AGREEMENT

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

1. Management Services.

Developer agrees to provide planning and construction management services for the Project (collectively, “**Services**”) in compliance with all applicable permits and governmental regulations, including, but not limited to, Oregon Prevailing Wage Laws (ORS-279C.800, et seq.), and within the Budget (as defined below). Developer agrees to use all reasonable efforts to further the interests of the City with respect to the Project. Developer agrees to engage such qualified and capable personnel as may be necessary and appropriate to perform its obligations and carry out its responsibilities hereunder. Developer will issue bi-monthly reports (more frequently if requested by the City) to update the City on the status of the Project and apprise the City on major aspects of the Project. Developer’s Services will include the following:

- 1.1 The creation of a plan (the “**Project Plan**”) that shall provide for the construction of the Project in a first-class manner consistent with the City of Canby standards within the limits of the budget approved by City attached hereto as Exhibit B (the “**Budget**”). The Project Plan shall include, among other things, the following:

- (a) Plans, specifications and related documents that fully define the scope of work of the Project, as set forth on attached Exhibit C (the “**Scope of Work**”).
 - (b) An itemized cost breakdown for the Project, including both “hard costs” (construction) and “soft costs” (engineering fees, permits, contingencies, etc.) (collectively, “**Costs**”).
 - (c) A proposed construction schedule, as set forth on attached Exhibit D (the “**Project Schedule**”).
- 1.2 Hire the Project’s general contractor (“**GC**”), who will hire subcontractors based upon three (3) or more competitive bids for each major component of the Project; supervise the GC and other professionals required for construction of the Project; and negotiate the terms of the agreements with the GC and/or other professionals. In order to maximize Project resources and efficiency, Developer and City acknowledge and agree that Developer will hire Perlo Construction as GC for the Project.
 - 1.3 With the assistance of the GC, architect, and engineers, secure all necessary design approvals, building permits and studies required to proceed with the Project.
 - 1.4 Developer will administer all aspects of the construction contracts including review of claims for additional services and change orders. Developer shall advise City if it appears that total construction costs will exceed the Budget, and make recommendations for corrective action.
 - 1.5 Developer shall visit the Project site at intervals appropriate to the stage of construction, and shall perform those management services necessary to complete the Project in conformance with the Project Plans.
 - 1.6 At the end of every pay period, Developer will evaluate and verify the GC’s pay requests, confirm the amounts due the contractor(s) for work done over the period in question, and ensure adequacy of all necessary back up, lien waivers and/or any additional documents as may be required. Developer will provide the City with copies of all invoices and proofs of payment associated with each such pay request. In addition to such GC pay requests, Developer will periodically invoice the City for other Costs, as previously contractually agreed upon, associated with the Project. Within twenty (20) days of receiving Developer’s request therefor, the City will pay to Developer fifty percent (50%) of each payment to be made by Developer for documented expenses; provided that City shall in no event be obligated to pay a total amount in excess of the City Contribution. Developer will make all payments to the GC and other Project professionals and/or vendors.
 - 1.7 Developer shall determine when the Project or a designated portion thereof is substantially complete, and prepare a list of incomplete or unsatisfactory items

("punch list items") and have the contractors prepare a schedule for their completion. In any event, an amount sufficient to have these corrections undertaken shall be withheld from the final payment to the GC until it has fulfilled its obligations.

2. City's Role and Responsibilities. City shall appoint a lead representative who is authorized to act on behalf of and make decisions that bind the City in connection with any matter pertaining to the Project. Developer shall be allowed to rely on all decisions or information received from the lead representative. Specifically, City will coordinate with the Developer regarding the following:

- 2.1 The Budget shall be approved by City prior to commencement of construction.
- 2.2 Provide payments to be disbursed by Developer to the GC, other professionals and/or vendors for costs related to the Project upon receiving payment requests and detailed invoices that have been received from the Developer.
- 2.3 Approve the design of the Project and the Project Plan.
- 2.4 Provide inspections of the work for the Project to City standards in accordance with the Project schedule.
- 2.5 Provide final sign-off and certifications for the Project.

3. Management Fee. For the Services provided by Developer under this Agreement, City shall pay Developer a fee equal to four percent (4%) of the Project Costs (the "**Management Fee**"). The Management Fee shall be included in the Budget.

4. Insurance; Waiver of Subrogation.

- 4.1 Developer's Coverage. Developer has, or has the benefit of, and shall maintain during the term of this Agreement, all of the following insurance, which covers the Developer:

(a) Liability Insurance. (i) Business Automobile Liability Insurance: a combined single limit for bodily injury and property damage per accident of \$2,000,000 covering "any auto"; and mandatory limits for personal injury protection and uninsured motorist coverage. (ii) Commercial General Liability Insurance_(including a contractual liability endorsement): a combined single limit for personal injury and property accident \$2,000,000 per occurrence, \$2,000,000 combined single limit. Such limits can be provided under a single policy or in combination with umbrella liability or other excess policies. All such policies of insurance shall be "occurrence basis." Developer may use blanket policies to satisfy these insurance requirements. The cost of this coverage will be included in the Budget.

(b) Worker's Compensation and Employer's Liability Insurance. Statutory benefits: as required by law; and Employer's liability: limits

of \$1,000,000 bodily injury by accident, \$1,000,000 each employee bodily injury by disease, and a \$1,000,000 policy aggregate limit for bodily injury by disease. The cost of this coverage will be included in the Budget.

(c) Builder's Risk Insurance. Unless otherwise obtained by the City or GC, Developer will acquire and maintain All Risk Completed Value Builder's Risk insurance against all risks of physical loss in such amounts covering the total value of work performed and equipment, supplies and materials. Said builders risk insurance coverage shall be kept in full force and effect at all times until the completion of construction of the Project. Said insurance shall be maintained on an occurrence basis and shall include the interests of the City, Developer, the GC and subcontractors in the Project, as their interests may appear, and shall insure against all perils in an all risk builder's risk form. The cost of this coverage will be included in the Budget.

(d) Project Insurance. Upon the request of the City, the Developer will assist the City in obtaining any insurance for the Project desired by the City. The cost of said insurance shall be borne by the City.

(e) Certificate of Insurance. Within 30 days following the execution of this Agreement, Developer shall provide the City with a certificate of insurance evidencing that Developer has obtained the aforesaid coverages. Such certificate shall provide that the insurance policies will not be materially changed or canceled until at least ten (10) days' prior written notice has been given to the City.

4.2 Waiver of Subrogation. The Developer and the City and all parties claiming under them mutually release and discharge each other from all claims and liabilities arising from or caused by any casualty or hazard covered by the property insurance required to be maintained under this Agreement, or otherwise carried with respect to the Project or in connection with activities conducted on the Project Property, and waive any right of subrogation which might otherwise exist in or accrue to any person on account thereof.

5. Response. Both Parties shall respond promptly to any written request submitted by either Party, and make all necessary decisions called for in such requests as soon as possible following receipt of such request taking into account the subject matter of such request.

6. Defaults. It shall be an event of default hereunder if:

6.1 Either party fails to perform any of its material obligations under this Agreement (except for City's payment of money as provided below), and such failure to perform under this Agreement continues for a period of thirty (30) days after written notice of such failure to the defaulting party from the other party hereto; provided that such thirty (30) day period shall be extended for such time as is necessary to effectively cure such default, if the defaulting party

has commenced the curing of such default within such thirty (30) day period and is diligently pursuing the completion of such cure;

- 6.2 City fails to make any payment required herein and such failure continues for a period of ten (10) days after written notice of such failure from Developer to City;
- 6.3 Developer or City files a petition seeking an order for relief or reorganization or arrangement under the bankruptcy laws of any state or of the United States;
- 6.4 A petition is filed against Developer or City seeking an order for relief under the bankruptcy laws of any state or the United States unless such petition is dismissed within sixty (60) days after filing;
- 6.5 Developer or City makes an assignment for the benefit of its creditors; or
- 6.6 A receiver or trustee is appointed for all or substantially all of Developer's or City's assets.

7. Termination.

- 7.1 In the event a default occurs under the provisions of Section 6 above, the non-defaulting party may terminate this Agreement by written notice to the defaulting party and this Agreement shall terminate upon the date which is ten (10) days after such notice is given.
- 7.2 In the event a termination occurs, Developer shall be paid fees and expenses due it under the terms hereof earned or accrued through the date of termination which shall include any retention being held and the parties shall have all other rights and remedies available under applicable law.

8. Notices. Any notice required or permitted by this Agreement to be given shall be in writing and shall be addressed as set forth below or such other addresses and to such other parties and/or attorneys as either party may designate in writing. Any such notice shall be sent by registered or certified US Mail, postage prepaid, return receipt requested and shall be deemed to have been given on the date of delivery at the address to which such notice is so directed as reflected by such return receipt. The parties agree to use their best efforts to accompany any written notice with actual notice by telephone whenever possible:

To the City: City of Canby
 222 NE 2nd Avenue
 PO Box 930
 Canby, OR 97013

Attn: City Administrator

To Developer: Canby East Associates, LLC
1300 SW 5th Ave, Suite 3050
Portland, OR 97205
Attn: Deniz Arac

9. Force Majeure. For all purposes of this Agreement, the term "Force Majeure" shall mean any failure, prevention, delay or stoppage due to strikes, lockouts, acts of God, inability to obtain labor or material or reasonable substitutes therefor, enemy or hostile government action, civil commotion, failure of a governmental entity to issue governmental permits within a reasonable time period, fire or other casualty and other causes (other than financial) beyond the reasonable control of the party obligated to perform. Neither party shall be responsible for failure, prevention, delay or stoppage in performing any obligations hereunder (other than the payment of money), to the extent such failure or delay results solely from a Force Majeure.
10. Enforceability. The enforceability and validity of this Agreement, in whole or in part, shall not be affected by the unenforceability or invalidity of any particular provision of this Agreement.
11. Entire Agreement. This Agreement, together with other writings signed by the parties expressly stated to be supplementary hereto and together with any instruments to be executed and delivered pursuant to this Agreement, constitutes the entire agreement between the parties and supersedes all prior understandings and writing, and may be changed only by a writing signed by the parties hereto.
12. Applicable Laws. This Agreement shall be construed under the laws of the State of Oregon.
13. Successors and Assigns. All of the provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective permitted successors and assigns.
14. Waiver. Failure of either party at any time to require performance of any provision of this Agreement shall not limit such party's right to enforce such provision, nor shall any waiver of any breach of any provision of this Agreement constitute a waiver of any succeeding breach of such provision or a waiver of such provision itself.
15. Amendment. This Agreement may not be modified or amended except by the written agreement of the parties.
16. Time of Essence. Time is of the essence with respect to the performance of every provision of this Agreement in which time of performance is a factor.
17. Attorney's Fees. In the event a suit, action, arbitration, or other proceeding of any nature whatsoever, including, without limitation, any proceeding under the US Bankruptcy Code, is instituted, or the services of an attorney are retained, to interpret or enforce any provision of this Agreement or with respect to any dispute relating to this Agreement, the

prevailing party shall be entitled to recover from the losing party its reasonable attorneys', in-house counsel, paralegals', accountants', and other experts' fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith. In the event of suit, action, arbitration, or other proceeding, the amount thereof shall be determined by the judge or arbitrator, shall include fees and expenses incurred on any appeal or review, and shall be in addition to all other amounts provided by law.

18. Authority of Parties. City represents and warrants that it has full right and authority to enter into this Agreement and to perform all of City's obligations hereunder. Developer represents and warrants that it has full right and authority to enter into this Agreement and to perform all of Developer's obligations hereunder.

IN WITNESS WHEREOF, the undersigned have executed and delivered this Agreement effective as of the date first set forth above.

DEVELOPER:

Canby East Associates, LLC,
a Delaware limited liability company

By: 

Title: VP

CITY:

CITY OF CANBY

By: 

Title: Assistant City Administrator

EXHIBIT A

PROJECT PROPERTY

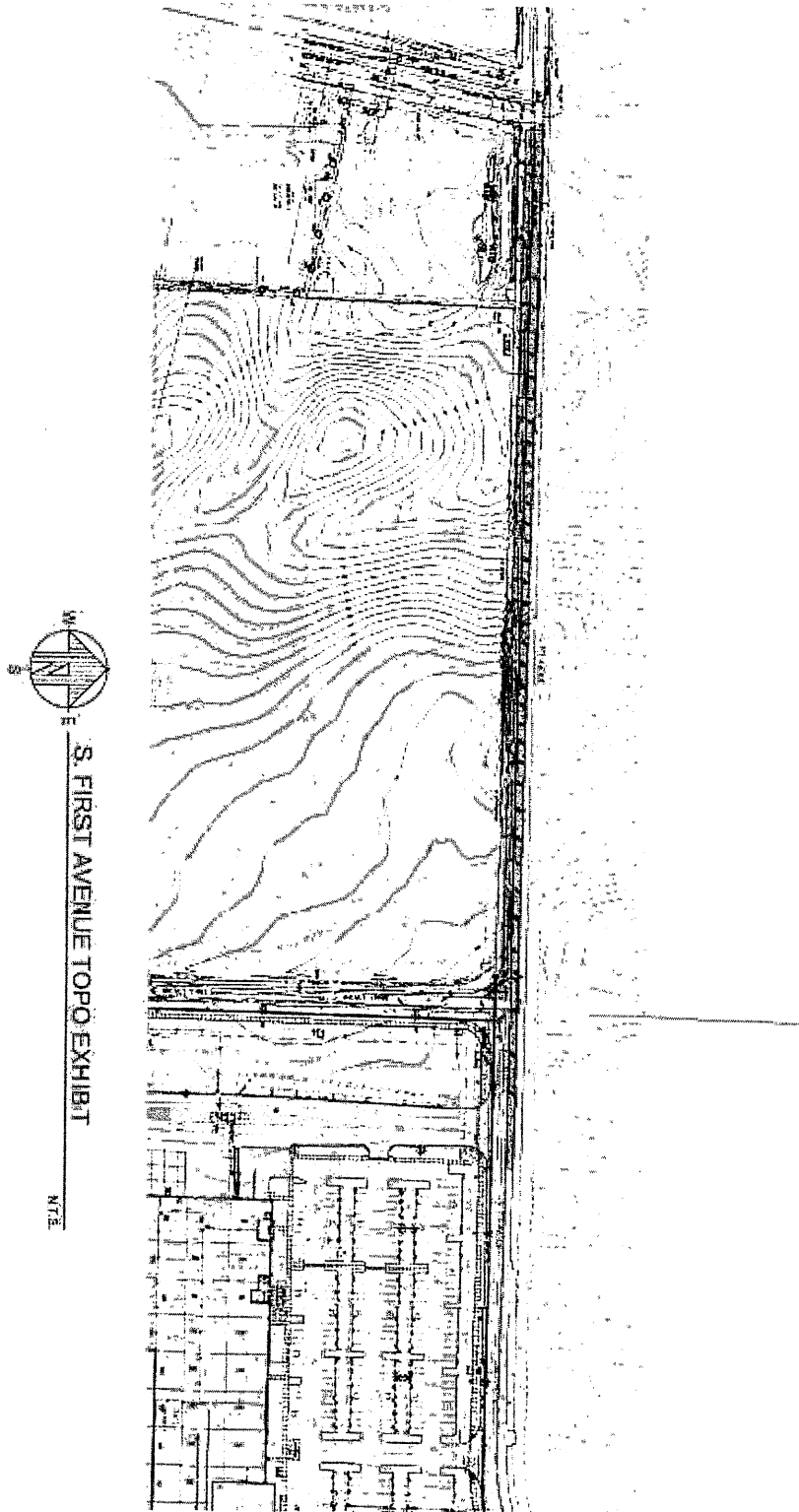


EXHIBIT B

PRELIMINARY BUDGET*

Hard Costs				
Scope of Work	QTY	Unit	Unit Price	Estimate
ROW on 1st Between Walnut and Hazel Dell	25,920	SF	\$ 15.82	\$ 410,000
Mobilization & Traffic Control				included
Grind Asphalt in Place				included
FDR Cement Treating				included
Additional Base Rock Where Needed				included
6" New Asphalt				included
Striping, Signage, Misc. Improvements				included
Utility Relocations				\$ 5,000
Total Hard Cost				\$ 415,000

Soft Costs	
Design	\$ 40,500
Testing/Inspections/Surveys	\$ 10,000
Permitting	\$ 1,500
CM Fee	\$ 18,680
	\$ 70,680

Total Cost	
Total Hard Cost	\$ 415,000
Total Soft Cost	\$ 70,680
Contingency	\$ 14,320
Total Cost	\$ 500,000

*Budget is subject to change once it has been bid out to three subcontractors.

EXHIBIT C

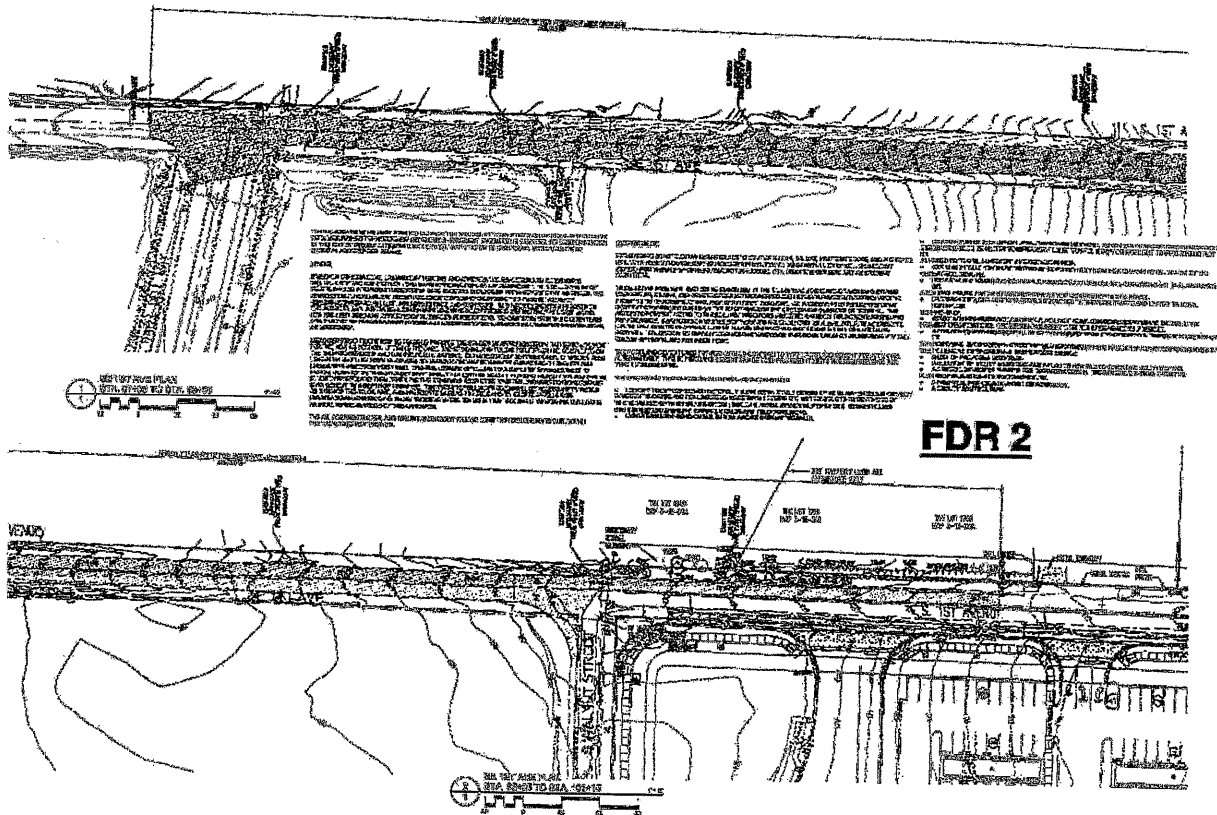
PRELIMINARY SCOPE OF WORK*

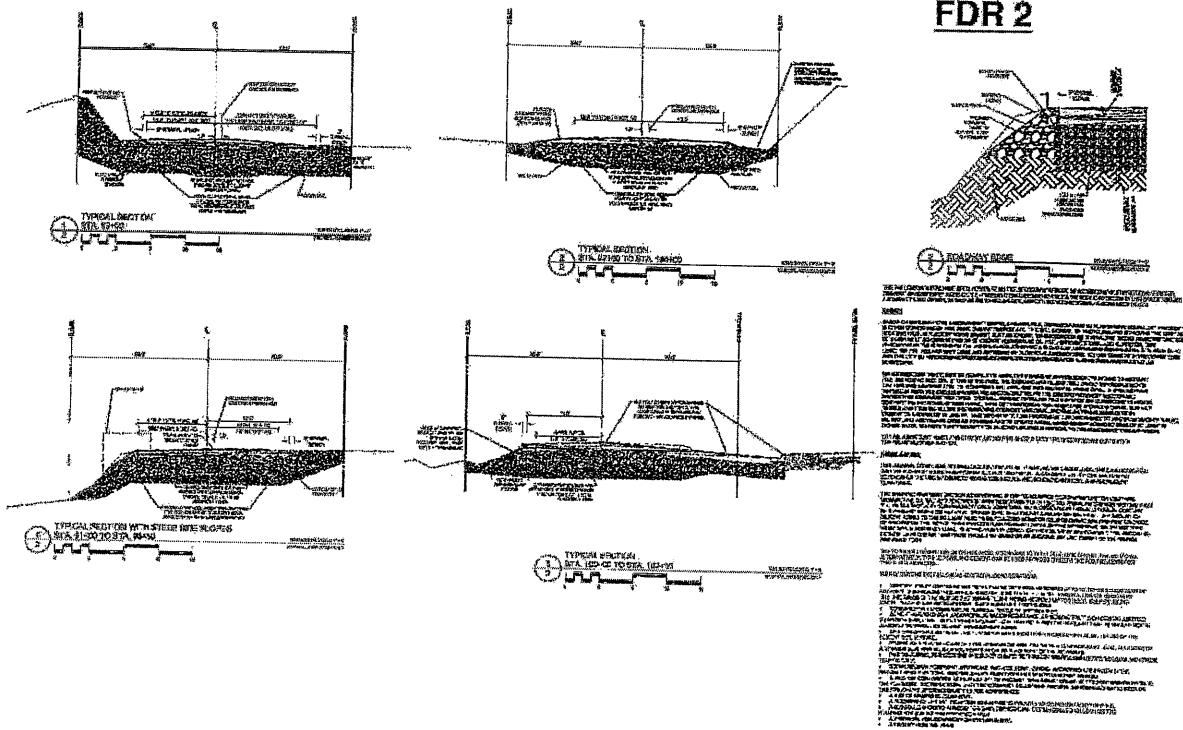
Drawings	Page
1st Ave Preliminary Paving Plan - Double Till FDR 2	1
1st Ave Preliminary Paving Plan - Double Till FDR 2	2

A full depth reclamation of the frontage on SE 1st Ave between Hazell Dell and Walnut.

Includes:

- Grinding of existing asphalt
- Grinding of base to native soils
- Tilling of asphalt and base with a cement amendment
- Compaction of base
- New asphalt & striping





*Drawings are conceptual and will be completed prior to construction

EXHIBIT D

PRELIMINARY PROJECT SCHEDULE*

Tentative Start Date	Duration
August 2019	2 Months

*Construction commencement and duration is subject to change.